

DRAFT
FOR DISCUSSION ONLY

POWERS OF APPOINTMENT ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For the March 23-24, 2012,
Meeting of the Drafting Committee

With Prefatory Notes and Comments

Copyright ©2012
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

February 21, 2012

DRAFTING COMMITTEE ON POWERS OF APPOINTMENT ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

TURNEY P. BERRY, 500 W. Jefferson St., Suite 2800, Louisville, KY 40202, *Chair*

DAVID J. CLARK, 353 Bel Marin Keys Blvd., Suite 1, Novato, CA 94949

E. EDWIN ECK, II, University of Montana School of Law, Maurice and Eddy, Missoula, MT 59812

DAVID M. ENGLISH, University of Missouri-Columbia School of Law, 203 Hulston Hall, Columbia, MO 65211

STANLEY C. KENT, 90 S. Cascade Ave., Suite 1210, Colorado Springs, CO 80903

ROBERT H. SITKOFF, Harvard Law School, 1575 Massachusetts Ave., Cambridge, MA 02138

SUZANNE BROWN WALSH, P.O. Box 271820, West Hartford, CT 06127

KAREN ROBERTS WASHINGTON, 2214 Main St., Dallas, TX 75201

STEVE WILBORN, 306 Tower Dr., Shelbyville, KY 40065

THOMAS P. GALLANIS, University of Iowa, Boyd Law Bldg., Iowa City, IA 52242, *Reporter*

EX OFFICIO

MICHAEL HOUGHTON, P.O. Box 1347, 1201 N. Market St., 18th Floor, Wilmington, DE 19899, *President*

BRIAN K. FLOWERS, 1350 Pennsylvania Ave. NW, Suite 300, Washington, DC 20004, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

AMY MORRIS HESS, University of Tennessee College of Law, 1505 W. Cumberland Ave., Knoxville, TN 37996-0001, *ABA Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

POWERS OF APPOINTMENT ACT

TABLE OF CONTENTS

REPORTER’S GENERAL PREFATORY NOTE.....1

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE2
SECTION 102. DEFINITIONS.....2
SECTION 103. PRESUMPTION OF UNLIMITED AUTHORITY; EXCEPTION.....8
SECTION 104. NONTRANSFERABILITY.....11
SECTION 105. SUPPLEMENTATION OF ACT BY COMMON LAW AND PRINCIPLES OF EQUITY.....11

[ARTICLE] 2

CREATION, REVOCATION, AND AMENDMENT OF POWER OF APPOINTMENT

SECTION 201. CREATION OF POWER OF APPOINTMENT12
SECTION 202. POWER TO REVOKE OR AMEND13

[ARTICLE] 3

EXERCISE OF POWER OF APPOINTMENT

SECTION 301. REQUISITES FOR EXERCISE OF POWER OF APPOINTMENT14
SECTION 302. INTENT TO EXERCISE: DETERMINING INTENT FROM RESIDUARY CLAUSE.....17
SECTION 303. INTENT TO EXERCISE: AFTER-ACQUIRED POWER.....18
SECTION 304. MEANING OF SPECIFIC-REFERENCE REQUIREMENT.....19
SECTION 305. PERMISSIBLE APPOINTMENT21
SECTION 306. APPOINTMENT TO DECEASED APPOINTEE OR TO PERMISSIBLE APPOINTEE’S DESCENDANT23
SECTION 307. IMPERMISSIBLE APPOINTMENT24
SECTION 308. SELECTIVE ALLOCATION DOCTRINE25
SECTION 309. CAPTURE DOCTRINE: DISPOSITION OF INEFFECTIVELY APPOINTED PROPERTY UNDER GENERAL POWER.....26
SECTION 310. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED GENERAL POWER28
SECTION 311. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED NONGENERAL POWER29
SECTION 312. DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL APPOINTMENT TO TAKER IN DEFAULT31
SECTION 313. APPOINTMENT TO TAKER IN DEFAULT31
SECTION 314. POWER HOLDER’S AUTHORITY TO REVOKE OR AMEND EXERCISE32

[ARTICLE] 4

RELEASE OR DISCLAIMER

SECTION 401. AUTHORITY TO RELEASE	33
SECTION 402. METHOD OF RELEASE.....	34
SECTION 403. REVOCATION OR AMENDMENT OF RELEASE	35
SECTION 404. DISCLAIMER	35

[ARTICLE] 5

CONTRACT TO APPOINT OR NOT TO APPOINT

SECTION 501. POWER TO CONTRACT: PRESENTLY EXERCISABLE POWER OF APPOINTMENT	36
SECTION 502. POWER TO CONTRACT: POWER OF APPOINTMENT NOT PRESENTLY EXERCISABLE	37
SECTION 503. REMEDY FOR BREACH OF CONTRACT TO APPOINT OR NOT TO APPOINT.....	38

[ARTICLE] 6

RIGHTS OF POWER HOLDER’S CREDITORS IN APPOINTIVE PROPERTY

SECTION 601. GENERAL POWER CREATED BY POWER HOLDER.....	38
SECTION 602. GENERAL POWER NOT CREATED BY POWER HOLDER.....	40
SECTION 603. NONGENERAL POWER	41

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	42
SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT	42
SECTION 703. REPEALS	43
SECTION 704. EFFECTIVE DATE.....	43

POWERS OF APPOINTMENT ACT

REPORTER'S GENERAL PREFATORY NOTE

This draft has been prepared for review by the drafting committee at its March 23-24, 2012, meeting in Seattle.

The drafting committee for the Power of Appointment Act held its first committee meeting in Washington D.C. on September 23-24, 2011. This draft incorporates revisions suggested by members of the drafting committee at that meeting. 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, meeting of the Uniform Law Commission's Committee on Style.

This draft is divided into seven articles. Article 1 contains general provisions. Article 2 concerns the creation, revocation, and amendment of a power of appointment. Article 3 addresses the exercise of a power of appointment. Article 4 concerns the release or disclaimer of a power of appointment. Article 5 contains provisions on contracts to appoint, or not to appoint, a power of appointment. Article 6 concerns the rights of the power holder's creditors in appointive property. Article 7 contains miscellaneous provisions. The Committee on Style expressed the view that the act should not be divided into articles. For the review of the drafting committee, a PDF of the act in such a format accompanies this draft.

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 (7) “General power of appointment” means a power of appointment exercisable in favor
2 of the power holder, the holder’s estate, a creditor of the holder, or a creditor of the holder’s
3 estate.

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

5 (9) “Impermissible appointee” means a person that is not a permissible appointee.

6 (10) “Nonexclusionary power of appointment” means a power of appointment that is not
7 an exclusionary power of appointment.

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

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

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

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

18 (15) “Power of appointment” means a power that enables a power holder acting in a
19 nonfiduciary capacity to designate a recipient of an ownership interest in or another power of
20 appointment over the appointive property.

21 (16) “Power holder” means an individual in whom a donor creates a power of
22 appointment.

23 (17) “Presently exercisable power of appointment” means a power of appointment
24 exercisable by the power holder at the time in question.

1 (18) “Record” means information that is inscribed on a tangible medium or that is stored
2 in an electronic or other medium and is retrievable in perceivable form.

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

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

8 (21) “Terms of an instrument” means the manifestation of the intent of the maker of the
9 instrument regarding the instrument’s provisions as expressed in the instrument or as may be
10 established by other evidence that would be admissible in a judicial proceeding.

11 (22) “Testamentary power of appointment” means a power of appointment exercisable
12 only in a will [or in a nontestamentary instrument that is revocable until, and effective only at,
13 the power holder’s death].

14 (23) “Will” includes codicil and any testamentary instrument that merely appoints an
15 executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits
16 the right of an individual or class to succeed to property of the decedent passing by intestate
17 succession.

18 **Comment**

19
20 Paragraph (1) defines an adverse party—meaning, a party adverse *to the power holder*—
21 as a person who has a substantial beneficial interest in property which would be adversely
22 affected by a power holder’s exercise or nonexercise of a power of appointment in favor of the
23 power holder, the power holder’s estate, or a creditor of either. See Section 103.

24
25 Paragraph (2) defines appointive property as the property or property interest subject to a
26 power of appointment. The effective creation of a power of appointment requires that there be
27 appointive property. See Section 201.

28
29 Paragraphs (3), (4), and (19) explain the distinctions among blanket-exercise, blending,
30 and specific-exercise clauses. A specific-exercise clause exercises and specifically refers to the

1 particular power of appointment in question, using language such as the following: “I hereby
2 exercise the power of appointment conferred upon me by my father’s will as follows: I appoint
3 [fill in details of appointment].” In contrast, a blanket-exercise clause exercises “any” power of
4 appointment the power holder may have or appoints “any” property over which the power holder
5 may have a power of appointment. The use of specific-exercise clauses is recommended; the use
6 of blanket-exercise clauses is discouraged. See Section 301 and the accompanying Comment. A
7 blending clause blends appointive property with the power holder’s own property in a common
8 disposition. A blending clause can be combined with a specific-exercise clause (“All the residue
9 of my estate, including the property over which I have a power of appointment under my father’s
10 will, I devise as follows”) or with a blanket-exercise clause (“All the residue of my estate,
11 including any property over which I may have a power of appointment, I devise as follows”).
12

13 Paragraphs (5) and (16) define the donor and the power holder. The donor is the person
14 who created or reserved the power of appointment. The power holder is the individual on whom
15 the power of appointment was conferred or in whom the power was reserved. (The traditional
16 term for power holder is “donee.” See Restatement of Property § 319 (1940); Restatement
17 Second of Property: Donative Transfers § 11.2 (1986); Restatement Third of Property: Wills and
18 Other Donative Transfers § 17.2 (2011). A majority of the drafting committee decided instead to
19 use the term “power holder.”) In the case of a reserved power, the same individual is both the
20 donor and the power holder. If a power holder exercises the power by creating another power of
21 appointment, the holder of the first power is the donor of the second power, and the holder of the
22 second power is an appointee of the first power.
23

24 Paragraphs (6) and (10) explain the distinction between exclusionary and
25 nonexclusionary powers of appointment. An exclusionary power is one in which the donor has
26 authorized the power holder to appoint to any one of the permissible appointees to the exclusion
27 of the other permissible appointees. The typical power of appointment is exclusionary. For
28 example, a power to appoint “to such of my descendants as the power holder may select” is
29 exclusionary, because the power holder may appoint to any one of the donor’s descendants to the
30 exclusion of all the others. In contrast, a nonexclusionary power is one in which the donor has
31 specified that the power holder cannot make an appointment excluding any, or a specified,
32 permissible appointee. An example of a nonexclusionary power would be a power “to appoint to
33 all and every one of my children in such shares and proportions as the powerholder shall select.”
34 The power holder is not under a duty to exercise the power; but, if the holder does exercise the
35 power, the appointment must abide by the power’s nonexclusionary nature. See Sections 301 and
36 305. Only a power of appointment whose permissible appointees are “defined and limited” can
37 be nonexclusionary. For elaboration of the well-accepted term of art “defined and limited,” see
38 Section 103 and the accompanying Comment.
39

40 Paragraphs (7) and (11) explain the distinction between general and nongeneral powers of
41 appointment. A general power of appointment enables the power holder to exercise the power in
42 favor of the power holder, the power holder’s estate, or the creditors of either, regardless of
43 whether the power is also exercisable in favor of others. A nongeneral power of appointment
44 cannot be exercised in favor of the power holder, the power holder’s estate, or the creditors of
45 either. An instrument creating a power of appointment is construed as creating a general power
46 unless the terms of the instrument manifest a contrary intent. See Section 103. A power to
47 revoke, amend, or withdraw is a general power of appointment if it is exercisable in favor of the

1 power holder, the power holder’s estate, or the creditors of either. If the settlor of a trust
2 empowers a trustee or another person to change a power of appointment from a general power
3 into a nongeneral power, or vice versa, the power is either general or nongeneral depending on
4 the scope of the power at any particular time.
5

6 Paragraph (8) defines the gift-in-default clause. In an instrument creating a power of
7 appointment, the clause that identifies the taker in default is called the gift-in-default clause. A
8 gift-in-default clause is not mandatory but is included in a well-drafted instrument.
9

10 Paragraphs (9) and (12) explain the distinction between impermissible and permissible
11 appointees. The permissible appointees of a power of appointment may be narrowly defined (for
12 example, “to such of the power holder’s descendants as the power holder may select”), broadly
13 defined (for example, “to such persons as the power holder may select, except the power holder,
14 the power holder’s estate, the power holder’s creditors, or the creditors of the power holder’s
15 estate”), or unlimited (for example, “to such persons as the power holder may select”). A
16 permissible appointee of a power of appointment does not have a property interest that he or she
17 can transfer to another in order to make the transferee a permissible appointee of the power.
18 Were it otherwise, a permissible appointee could transform an impermissible appointee into a
19 permissible appointee, exceeding the intended scope of the power and thereby violating the
20 donor’s intent. An appointment cannot benefit an impermissible appointee. See Section 307.
21

22 Paragraphs (13) and (18) contain the definitions of “person” and “record.” These are
23 standard definitions approved by the Uniform Law Commission.
24

25 Paragraphs (14), (17), and (22) explain the distinctions among presently exercisable,
26 postponed, and testamentary powers of appointment.
27

28 A power of appointment is presently exercisable if it is exercisable at the time in
29 question, whether or not it is also exercisable by will. Typically, a presently exercisable power of
30 appointment is exercisable at the time in question during the power holder’s life and also
31 exercisable by the power holder’s will. Thus, a power of appointment that is exercisable “by
32 deed or will” is a presently exercisable power. To take another example, a power of appointment
33 exercisable by the power holder’s last unrevoked instrument in writing is a presently exercisable
34 power, because the power holder can make a present exercise irrevocable by explicitly so
35 providing in the instrument exercising the power. See Restatement Third of Property: Wills and
36 Other Donative Transfers § 17.4, Comment a.
37

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

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

6
7 A power is testamentary if it is exercisable only in the power holder's will [or in a
8 nontestamentary instrument that is functionally the same as the power holder's will, meaning an
9 instrument that is revocable until, and effective only at, the power holder's death]. The language
10 in brackets was suggested by the Joint Editorial Board for Uniform Trust and Estate Acts at its
11 December 2-3, 2011, meeting in New Orleans.

12
13 Paragraph (15) defines a power of appointment. A power of appointment is a power
14 enabling the power holder to designate recipients of ownership interests in or powers of
15 appointment over the appointive property.

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

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

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

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

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

1 On the authority of the power holder to exercise the power by creating a new power of
2 appointment over the appointive property, see Section 305. If a power holder exercises a power
3 by creating another power, the holder of the first power is the donor of the second power, and the
4 holder of the second power is the appointee of the first power.
5

6 Paragraph (20) defines a taker in default of appointment. A taker in default of
7 appointment (often called the “taker in default”) has a property interest that can be transferred to
8 another. If a taker in default transfers the interest to another, the transferee becomes a taker in
9 default.
10

11 Paragraph (21) defines the “terms of an instrument” as the manifestation of the intent of
12 the maker of the instrument regarding the instrument’s provisions as expressed in the instrument
13 or as may be established by other evidence that would be admissible in a judicial proceeding.
14 The maker of an instrument creating a power of appointment is the donor. The maker of an
15 instrument exercising a power of appointment is the power holder. This definition is a slightly
16 modified version of the definition of “terms of a trust” in Section 103(18) of the Uniform Trust
17 Code.
18

19 Paragraph (23) defines a will. This definition is taken directly from Section 1-201(57) of
20 the Uniform Probate Code.
21

22 The definitions in this Section are substantially consistent with, and this Comment draws
23 on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.1 to 17.5 and the
24 accompanying Commentary.
25

26 **SECTION 103. PRESUMPTION OF UNLIMITED AUTHORITY; EXCEPTION.**

27 (a) Unless the terms of the instrument creating a power of appointment provide
28 otherwise, and except as otherwise provided in subsections (b) and (c), the power is:

29 (1) general;

30 (2) presently exercisable; and

31 (3) exclusionary.

32 (b) If a power holder may exercise a power of appointment only jointly with an adverse
33 party, the power is nongeneral.

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

Comment

1
2
3 In determining which type of power of appointment is created, the general principle of
4 construction, codified in subsection (a), is that a power falls into the category giving the holder the
5 maximum discretionary authority except to the extent that the terms of the instrument creating the
6 power restrict the holder's authority. Maximum discretion confers on the power holder the
7 flexibility to alter the donor's disposition in response to changing conditions.
8

9 In accordance with this presumption of unlimited authority, a power is general unless the
10 terms of the creating instrument specify that the power holder cannot exercise the power in favor
11 of the power holder, the power holder's estate, or the creditors of either. A power is presently
12 exercisable unless the terms of the creating instrument specify that the power can only be exercised
13 at some later time or in some document such as a will that only takes effect at some later time. A
14 power is exclusionary unless the terms of the creating instrument specify that a permissible
15 appointee must receive a certain amount or portion of the appointive assets if the power is
16 exercised.
17

18 This general principle of construction applies, unless the terms of the instrument creating
19 the power of appointment provide otherwise. A well-drafted instrument intended to create a
20 nongeneral or testamentary or nonexclusionary power will use clear language to achieve the
21 desired objective. Not all instruments are well-drafted, however. A court may have to construe the
22 terms of the instrument to discern the donor's intent. For principles of construction applicable to
23 the creation of a power of appointment, see Restatement Third of Property: Wills and Other
24 Donative Transfers Chapters 17 and 18, and the accompanying Commentary, containing some
25 examples. By way of an additional example, a testamentary power of appointment created in the
26 donor's child to appoint among the donor's "descendants" is likely intended to be a nongeneral
27 power.
28

29 Subsection (b) states a well-accepted exception to the presumption of unlimited authority.
30 If a power of appointment can be exercised only with the joinder of an adverse party, the power is
31 not a general power. An adverse party, as defined in Section 102(1), is an individual who has a
32 substantial beneficial interest in the trust or other property arrangement that would be adversely
33 affected by the exercise or nonexercise of the power in favor of the power holder, the power
34 holder's estate, or the creditors of either. Consider the following examples.
35

36 *Example 1.* D transferred property in trust, directing the trustee "to pay the income to D's
37 son S for life, remainder in corpus to such person or persons as S, with the joinder of X, shall
38 appoint; in default of appointment, remainder to X." S's power is not a general power because X is
39 an adverse party.
40

41 *Example 2.* Same facts as Example 1, except that S's power is exercisable with the joinder
42 of Y rather than with the joinder of X. Y has no property interest that could be adversely affected
43 by the exercise of the power. Because Y is not an adverse party, S's power is general.
44

45 Subsection (c) also states a well-accepted rule. Only a power of appointment whose
46 permissible appointees are defined and limited can be nonexclusionary. "Defined and limited" in
47 this context is a well-accepted term of art. For elaboration and examples, see Restatement Third of

1 Property: Wills and Other Donative Transfers § 17.5, Comment c. In general, permissible
2 appointees are “defined and limited” if they are defined and limited to a reasonable number.
3 Typically, permissible appointees who are defined and limited are described in class-gift terms: a
4 single-generation class such as “children,” “grandchildren,” “brothers and sisters,” or “nieces and
5 nephews,” or a multiple-generation class such as “issue” or “descendants” or “heirs.” Permissible
6 appointees need not be described in class-gift terms to be defined and limited, however. The
7 permissible appointees are also defined and limited if one or more permissible appointees are
8 designated by name or otherwise individually identified.
9

10 If the permissible appointees are not defined and limited, the power is exclusionary
11 irrespective of the donor’s intent. A power exercisable, for example, in favor of “such person or
12 persons other than the power holder, the power holder’s estate, the creditors of the power holder,
13 and the creditors of the power holder’s estate” is an exclusionary power. An attempt by the donor
14 to require the power holder to appoint at least \$X to each permissible appointee of the power is
15 ineffective, because the permissible appointees of the power are so numerous that it would be
16 administratively impossible to carry out the donor’s expressed intent. The donor’s expressed
17 restriction is disregarded, and the power holder may exclude any one or more of the permissible
18 appointees in exercising the power.
19

20 In contrast, a power to appoint only to the power holder’s creditors or to the creditors of the
21 power holder’s estate is a power in favor of a defined and limited class. Such a power could be
22 nonexclusionary if, for example, the terms of the instrument creating the power provided that the
23 power is a power to appoint “to such of the power holder’s estate creditors as the power holder
24 shall by will appoint, but if the power holder exercises the power, the power holder must appoint
25 \$X to a designated estate creditor or must appoint in full satisfaction of the power holder’s debt to
26 a designated estate creditor.”
27

28 If a power is determined to be nonexclusionary because its terms provide that an
29 appointment must benefit each permissible appointee, it is to be inferred that the donor intends to
30 require an appointment to confer a reasonable benefit upon each permissible appointee. An
31 appointment under which a permissible appointee receives nothing, or only a nominal sum,
32 violates this requirement and is forbidden. This doctrine is known as the doctrine forbidding
33 illusory appointments. For elaboration, see Restatement Third of Property: Wills and Other
34 Donative Transfers § 17.5, Comment j.
35

36 The terms of the instrument creating a power of appointment sometimes provide that no
37 appointee shall receive any share in default of appointment unless the appointee consents to
38 allow the amount of the appointment to be taken into account in calculating the fund to be
39 distributed in default of appointment. This “hotchpot” language is used to minimize unintended
40 inequalities of distribution among permissible appointees. Such a clause does not make the
41 power nonexclusionary, because the terms do not prevent the power holder from making an
42 appointment that excludes a permissible appointee.
43

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

1 Restatement Third of Property: Wills and Other Donative Transfers. See also, more specifically,
2 Restatement Third of Property: Wills and Other Donative Transfers § 18.1, Comments b-g,
3 containing many illustrations of language ambiguous about whether a power of appointment was
4 intended and, for each illustration, offering guidance about how to construe the language.
5

6 The creation of a power of appointment requires that there be a donor, a power holder
7 (who may be the same as the donor), and appointive property. There must also be one or more
8 permissible appointees, though these need not be restricted; a power holder can be authorized to
9 appoint to anyone. A donor is not required to designate a taker in default of appointment,
10 although a well-drafted instrument will specify one or more takers in default.
11

12 Subsection (b) states the well-accepted rule that a power of appointment cannot be
13 created in a power holder who is deceased. If the power holder dies before the effective date of
14 an instrument purporting to confer a power of appointment, the power is not created, and an
15 attempted exercise of the power is ineffective. (For example, the effective date of a power of
16 appointment created in a donor's will is the donor's death, not when the donor executes the will.
17 The effective date of a power of appointment created in a donor's inter vivos trust is the date the
18 trust is established, even if the trust is revocable. See Restatement Third of Property: Wills and
19 Other Donative Transfers § 19.11, Comments b and c.) If the power holder is deceased on the
20 relevant date, the power of appointment is not created, and an attempt by the power holder to
21 exercise the power is ineffective.
22

23 Nor is a power of appointment created if all the possible permissible appointees of the
24 power are deceased when the transfer that is intended to create the power becomes legally
25 operative. If all the possible permissible appointees of a power die after the power is created and
26 before the power holder exercises the power, the power terminates.
27

28 A power of appointment is not created if the permissible appointees are so indefinite that it
29 is impossible to identify any person to whom the power holder can appoint. If the description of
30 the permissible appointees is such that one or more persons are identifiable, but it is not possible to
31 determine whether other persons are within the description, the power is validly created, but an
32 appointment can only be made to persons who can be identified as within the description of the
33 permissible appointees.
34

35 Subsection (c) explains that a power of appointment can be conferred on an unborn or
36 unascertained power holder, subject to any applicable rule against perpetuities. This is a postponed
37 power. The power arises on the power holder's birth or ascertainment. The language creating the
38 power as well as other factors such as the power holder's capacity under applicable law determine
39 whether the power is then presently exercisable, postponed, or testamentary.
40

41 The rules of this Section are consistent with, and this Comment draws on, Restatement
42 Third of Property: Wills and Other Donative Transfers §§ 18.1 and 19.9 and the accompanying
43 Commentary.
44

45 **SECTION 202. POWER TO REVOKE OR AMEND.** A donor may revoke or amend
46 a power of appointment only to the extent that:

- 1 (1) the instrument creating the power is revocable by the donor; or
2 (2) the donor reserves a power of revocation or amendment in the instrument creating the
3 power of appointment.

4 **Comment**

5
6 The donor of a power of appointment has the authority to revoke or amend the power
7 only to the extent that the instrument creating the power is revocable by the donor or the donor
8 reserves a power of revocation or amendment in the instrument creating the power.
9

10 For example, the donor's power to revoke or amend a will or a revocable inter vivos trust
11 carries with it the authority to revoke or amend any power of appointment created in the will or
12 trust. However, to the extent that an exercise of the power removes appointive property from a
13 trust, the donor's authority to revoke or amend the power is eliminated, unless the donor
14 expressly reserved authority to revoke or amend any transfer from the trust after the transfer is
15 completed.
16

17 If an irrevocable inter vivos trust confers a presently exercisable power on someone who
18 is not the settlor of the trust (the settlor being the donor of the power), the donor lacks authority
19 to revoke or amend the power, except to the extent that the donor reserved the authority to do so.
20 If the donor did reserve the authority to revoke or amend the power, that authority is only
21 effective until the power holder irrevocably exercises the power.
22

23 If the same individual is both the donor and the holder of a power of appointment, the
24 donor in his or her capacity as power holder can indirectly revoke or amend the power by a
25 partial or total release of the power. See Section 401. After the power has been irrevocably
26 exercised, however, the donor as donor is in no different position in regard to revoking or
27 amending the exercise of the power than the donor would be if the donor and power holder were
28 different individuals.
29

30 The ability of an agent to revoke or amend a power of appointment on behalf of a
31 principal is determined by other law, such as the Uniform Power of Attorney Act.
32

33 The rule of this Section is consistent with, and this Comment draws on, Restatement
34 Third of Property: Wills and Other Donative Transfers § 18.2 and the accompanying
35 Commentary.
36

37 **[ARTICLE] 3**

38 **EXERCISE OF POWER OF APPOINTMENT**

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

40 **APPOINTMENT.** A power of appointment is exercised only if:

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

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

3 (A) manifest the power holder’s intent to exercise the power; and

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

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

7 **Comment**

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

21
22 Paragraph (2) requires the terms of the instrument exercising the power of appointment to
23 manifest the power holder’s intent to exercise the power of appointment. Whether a power
24 holder has manifested an intent to exercise a power of appointment is a question of construction.
25 See generally Restatement Third of Property: Wills and Other Donative Transfers § 19.2. For
26 example, a power holder’s disposition of appointive property may manifest an intent to exercise
27 the power even though the power holder does not refer to the power. See Restatement Third of
28 Property: Wills and Other Donative Transfers § 19.3. Paragraph (2) also requires that the terms
29 of the instrument exercising the power must, subject to Section 304, satisfy the requirements of
30 exercise, if any, imposed by the donor.

31
32 Language expressing an intent to exercise a power is clearest if it makes a specific
33 reference to the creating instrument and exercises the power in unequivocal terms and with
34 careful attention to the requirements of exercise, if any, imposed by the donor.

35
36 The recommended method for exercising a power of appointment is by a specific-
37 exercise clause, using language such as the following: “I hereby exercise the power of
38 appointment conferred upon me by [my father’s will] as follows: I appoint [fill in details of
39 appointment].”

1 Not recommended is a blanket-exercise clause, which purports to exercise “any power of
2 appointment” the power holder may have, using language such as the following: “I hereby
3 exercise any power of appointment I may have as follows: I appoint [fill in details of
4 appointment].” Although a blanket-exercise clause does manifest an intent to exercise any power
5 of appointment the power holder may have, such a clause raises the often-litigated question of
6 whether it satisfies the requirement of specific reference imposed by the donor in the instrument
7 creating the power.
8

9 A blending clause purports to blend the appointive property with the power holder’s own
10 property in a common disposition. The exercise portion of a blending clause can take the form of
11 a specific exercise or, more commonly, a blanket exercise. For example, a clause providing “All
12 the residue of my estate, including the property over which I have a power of appointment under
13 my mother’s will, I devise as follows” is a blending clause with a specific exercise. A clause
14 providing “All the residue of my estate, including any property over which I may have a power
15 of appointment, I devise as follows” is a blending clause with a blanket exercise.
16

17 This act aims to eliminate any significance attached to the use of a blending clause. A
18 blending clause has traditionally been regarded as significant in the application of the doctrines
19 of “selective allocation” and “capture.” This act eliminates the significance of such a clause
20 under those doctrines. See Sections 309 (selective allocation) and 310 (capture). The use of a
21 blending clause is more likely to be the product of the forms used by the power holder’s lawyer
22 than a deliberate decision by the power holder to facilitate the application of the doctrines of
23 selective allocation or capture.
24

25 If the power holder decides not to exercise a specific power or any power that the power
26 holder might have, it is important to consider whether to depend on mere silence to produce a
27 nonexercise or to take definitive action to assure a nonexercise. Definitive action can take the
28 form of a release during life (see Section 401) or a nonexercise clause in the power holder’s will
29 or other relevant instrument. A nonexercise clause can take the form of a specific-nonexercise
30 clause (for example, “I hereby do not exercise the power of appointment conferred on me by my
31 father’s trust”) or the form of a blanket-nonexercise clause (for example, “I hereby do not
32 exercise any power of appointment I may have”).
33

34 In certain circumstances, different consequences depend on the power holder’s choice.
35 Under Section 302, a residuary clause in the power holder’s will is treated as manifesting an
36 intent to exercise a general power in certain limited circumstances if the power holder silently
37 failed to exercise the power, but not if the power holder released the power or refrained in a
38 record from exercising it. Under Section 310, unappointed property passes to the power holder’s
39 estate in certain limited circumstances if the power holder silently failed to exercise a general
40 power, but passes to the donor or to the donor’s successors in interest if the power holder
41 released the power or refrained in a record from exercising it.
42

43 Paragraph (3) requires the appointment to constitute a permissible exercise of the power.
44 On permissible and impermissible exercise, see Sections 305 to 307.
45

46 The law of the power holder’s domicile governs whether the power holder has effectively
47 exercised a power of appointment, unless the terms of the instrument creating the power manifest

1 a different intent. See Restatement Second of Conflict of Laws § 275, Comment c.

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 §§ 19.1, 19.8, and 19.9 and the
5 accompanying Commentary.

6
7 **SECTION 302. INTENT TO EXERCISE: DETERMINING INTENT FROM**
8 **RESIDUARY CLAUSE.**

9 (a) In this section, “residuary clause” means a residuary clause purporting to dispose only
10 of the power holder’s own property.

11 (b) A residuary clause manifests a power holder’s intent to exercise a power of
12 appointment only if:

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

15 (2) the power is a general power;

16 (3) there is no taker in default of appointment or the gift-in-default clause is
17 ineffective; and

18 (4) the holder did not release or refrain in a record from exercising the power.

19 **Comment**

20
21 This Section addresses a question arising under Section 301(2)(A)—namely, whether the
22 power holder’s intent to exercise a power of appointment is manifested by a residuary clause
23 purporting to dispose only of the power holder’s own estate, such as “All the residue of my
24 estate, I devise to . . .” or “All of my estate, I devise to . . .” This Section does not address the
25 effect of a residuary clause that contains a blanket exercise or a specific exercise of a power of
26 appointment. On blanket-exercise and specific-exercise clauses, see the Comment to Section
27 301.

28
29 The rule of this Section is that a residuary clause purporting to dispose only of the power
30 holder’s own estate manifests an intent to exercise a power of appointment only if (1) the terms
31 of the instrument containing the residuary clause do not manifest a contrary intent, (2) the power
32 in question is a general power, (3) the donor did not provide for takers in default or the gift-in-
33 default clause is ineffective, and (4) the power holder did not release or refrain in a record from
34 exercising the power.

1 The rule stated in this Section applies to a residuary clause that disposes *only* of the
2 power holder's own estate. This is a garden-variety residuary clause. In contrast, a residuary
3 clause that disposes of all property that is *subject to disposition* by the power holder is a blanket-
4 exercise clause. See Section 102(3).

5
6 In a well-planned estate, a power of appointment, whether general or nongeneral, is
7 accompanied by a gift in default. In a less carefully planned estate, on the other hand, there may
8 be no gift-in-default clause. Or, if there is such a clause, the clause may be wholly or partly
9 ineffective. To the extent that the donor did not provide for takers in default or the gift-in-default
10 clause is ineffective, it is more efficient to attribute to the power holder the intent to exercise a
11 general power in favor of the power holder's residuary devisees. The principal benefit of
12 attributing to the power holder the intent to exercise a general power is that it allows the property
13 to pass under the power holder's will instead of as part of the donor's estate. Because the donor's
14 death would normally have occurred before the power holder died, some of the donor's
15 successors might themselves have predeceased the power holder. It is more efficient to avoid
16 tracing the interest through multiple estates to determine who are the present successors.
17 Moreover, to the extent that the donor did not provide for takers in default, it is also more in
18 accord with the donor's probable intent for the power holder's residuary clause to be treated as
19 exercising the power.

20
21 A gift-in-default clause can be ineffective or partially ineffective for a variety of reasons.
22 The clause might cover only part of the appointive property. The clause might be invalid because
23 it violates a rule against perpetuities or some other rule, or it might be ineffective because it
24 conditioned the interest of the takers in default on an uncertain event that did not happen, the
25 most common of which is an unsatisfied condition of survival.

26
27 Under no circumstance does a residuary clause manifest an intent to exercise a
28 *nongeneral* power. A residuary clause disposes of the power holder's own property, and a
29 *nongeneral* power is not an ownership-equivalent power.

30
31 The rule of this Section is consistent with, and this Comment draws on, Restatement
32 Third of Property: Wills and Other Donative Transfers § 19.4 and the accompanying
33 Commentary.

34
35 **SECTION 303. INTENT TO EXERCISE: AFTER-ACQUIRED POWER.** Unless
36 the terms of the instrument exercising a power of appointment manifest a contrary intent:

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

39 (2) if the holder is also the donor of the power, the clause does not extend to a power
40 acquired by the holder after executing the instrument containing the clause, unless:

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

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

2 **Comment**

3
4 Nothing in the law prevents a power holder from exercising a power of appointment in an
5 instrument executed before acquiring the power. The only question is one of construction:
6 whether the power holder intended to exercise the after-acquired power. (The term “after-
7 acquired power” in this Section refers to a power acquired on or before the power holder’s death.
8 A power of appointment cannot be conferred on a deceased power holder. See Section 201.)
9

10 If the instrument of exercise specifically identifies the power that the holder is exercising,
11 the exercise clause unambiguously expresses an intent to exercise that power, whether the power
12 is an after-acquired power or not. A blanket-exercise clause, however, raises a question of
13 construction.
14

15 The rule of subparagraph (1) is that, unless the terms of the instrument indicate that the
16 power holder had a different intent, a blanket-exercise clause extends to a power of appointment
17 acquired after the power holder executed the instrument containing the blanket-exercise clause.
18 General references to then-present circumstances, such as “all the powers I have” or similar
19 expressions, are not a sufficient indication of an intent to exclude an after-acquired power. In
20 contrast, more precise language, such as “all powers I have at the date of execution of this will,”
21 does indicate an intent to exclude an after-acquired power.
22

23 It is important to remember that even if the terms of the instrument manifest an intent to
24 exercise an after-acquired power, the intent may be ineffective, for example if the terms of the
25 *donor’s* instrument creating the power manifest an intent to preclude such an exercise. In the
26 absence of an indication to the contrary, however, it is inferred that the time of the execution of
27 the power holder’s exercising instrument is immaterial to the donor. Even if the donor declares
28 that the property shall pass to such persons as the power holder “shall” or “may” appoint, these
29 terms do not suffice to indicate an intent to exclude exercise by an instrument previously
30 executed, because these words may be construed to refer to the time when the exercising
31 document becomes effective.
32

33 Subparagraph (2) states an exception to the general rule of subparagraph (1). If the power
34 holder is also the donor, a blanket-exercise clause in a preexisting instrument is rebuttably
35 presumed *not* to manifest an intent to exercise a power later reserved in another donative
36 transfer, unless the donor/power holder did not provide for a taker in default of appointment or
37 the gift-in-default clause is ineffective.
38

39 The rules of this Section are consistent with, and this Comment draws on, Restatement
40 Third of Property: Wills and Other Donative Transfers § 19.6 and the accompanying
41 Commentary.
42

43 **SECTION 304. MEANING OF SPECIFIC-REFERENCE REQUIREMENT.**

44 Unless the terms of the instrument creating a power of appointment manifest a contrary intent,

1 the donor’s intent in requiring that the power be exercised by a reference, an express reference,
2 or a specific reference to the power or its source is to prevent an inadvertent exercise of the
3 power.

4 **Comment**

5
6 Whenever the donor imposes formal requirements with respect to the instrument of
7 appointment that exceed the requirements imposed by law, the donor’s purpose in imposing the
8 additional requirements is relevant to whether the power holder’s attempted exercise is
9 sufficient.

10
11 A formal requirement commonly imposed by the donor is that, in order to be effective,
12 the power holder’s attempted exercise must make specific reference to the power. Specific-
13 reference clauses were a pre-1942 invention designed to prevent an inadvertent exercise of a
14 general power. The federal estate tax law then provided that the value of property subject to a
15 general power was included in the power holder’s gross estate if the general power was
16 exercised. The idea of requiring specific reference was designed to thwart unintended exercise
17 and, hence, unnecessary estate taxation.

18
19 The federal estate tax law has changed. An inadvertent exercise of a general power
20 created after October 21, 1942, no longer has adverse estate tax consequences.

21
22 Nevertheless, donors continue to impose specific-reference requirements. Because the
23 original purpose of the specific-reference requirement was to prevent an inadvertent exercise of
24 the power, it is reasonable to presume that that this is still the donor’s purpose in doing so. This
25 Section sets forth that presumption.

26
27 Consequently, a specific-reference requirement still overrides any applicable state law
28 that presumes that an ordinary residuary clause was intended to exercise a general power. Put
29 differently: An ordinary residuary clause may manifest the power holder’s *intent to exercise*
30 (under Section 301(2)(A)) but does not satisfy the *requirements of exercise* if the donor imposed
31 a specific-reference requirement (this Section and Section 301(2)(B)).

32
33 A more difficult question is whether a *blanket-exercise clause* satisfies a specific-
34 reference requirement. If it could be shown that the power holder had knowledge of and intended
35 to exercise the power, the blanket-exercise clause would be sufficient to exercise the power,
36 unless it could be shown that the donor’s intent was not merely to prevent an inadvertent exercise
37 of the power but instead that the donor had a material purpose in insisting on the specific-
38 reference requirement. In such a case, the possibility of applying Uniform Probate Code § 2-805
39 or Restatement Third of Property: Wills and Other Donative Transfers § 12.1 to reform the
40 power holder’s attempted appointment to insert the required specific reference should be
41 explored.

42
43 The black letter of this Section is drawn from the black letter of Uniform Probate Code §
44 2-704: “If a governing instrument creating a power of appointment expressly requires that the

1 power be exercised by a reference, an express reference, or a specific reference, to the power or
2 its source, it is presumed that the donor's intent, in requiring that the holder exercise the power
3 by making reference to the particular power or to the creating instrument, was to prevent an
4 inadvertent exercise of the power.”
5

6 The rule of this Section is consistent with, and this Comment draws on, Restatement
7 Third of Property: Wills and Other Donative Transfers § 19.10 and the accompanying
8 Commentary.
9

10 **SECTION 305. PERMISSIBLE APPOINTMENT.**

11 (a) A power holder of a general power of appointment that permits appointment to the
12 holder or the holder’s estate may make an appointment in any form, including an appointment in
13 trust or creating a new power of appointment, that the holder could make of the holder’s own
14 property.

15 (b) A power holder of a general power of appointment that permits appointment only to a
16 creditor of the holder or of the holder’s estate is restricted to appointing to that creditor.

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

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

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

22 (3) create a nongeneral power in an impermissible appointee to appoint to one or
23 more of the permissible appointees of the original nongeneral power.

24 **Comment**

25
26 When a donor creates a general power under which an appointment can be made outright
27 to the power holder or the power holder’s estate, the necessary implication is that the power
28 holder may accomplish by an appointment to others whatever the power holder could accomplish
29 by first appointing to himself and then disposing of the property, including a disposition in trust
30 or in the creation of a further power of appointment.
31

32 A general power to appoint only to the power holder (even though it says “and to no one
33 else”) does not prevent the power holder from exercising the power in favor of others. There is

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

7
8 Similarly, a general power to appoint to the power holder may purport to allow only one
9 exercise of the power, but such a restriction is ineffective and does not prevent multiple partial
10 exercises of the power. To take another example, a general power to appoint to the power holder
11 or to the power holder's estate may purport to restrict appointment to outright interests not in
12 trust, but such a restriction is ineffective and does not prevent an appointment in trust.

13
14 An additional example will drive home the point. A general power to appoint to the
15 power holder or to the power holder's estate may purport to forbid the power holder from
16 imposing conditions on the enjoyment of the property by the appointee. Such a restriction is
17 ineffective and does not prevent an appointment subject to such conditions.

18
19 As stated in subsection (b), however, a general power to appoint only to the power
20 holder's creditors or the creditors of the power holder's estate permits an appointment only to
21 those creditors.

22
23 Except to the extent that the terms of the instrument creating the power manifest a
24 contrary intent, the holder of a nongeneral power has the same breadth of discretion in
25 appointment to permissible appointees that the power holder has in the disposition of the power
26 holder's owned property to permissible appointees of the power.

27
28 Thus, unless the terms of the instrument creating the power manifest a contrary intent, the
29 holder of a nongeneral power has the authority to exercise the power by an appointment in trust.
30 In order to manifest a contrary intent, the terms of the instrument creating the power must
31 prohibit an appointment in trust. Language merely authorizing the power holder to make an
32 outright appointment does not suffice.

33
34 Similarly, unless the terms of the instrument creating the power manifest a contrary
35 intent, the holder of a nongeneral power has the authority to exercise the power by creating a
36 general or nongeneral power in a permissible appointee. (In order to manifest a contrary intent,
37 the terms of the instrument creating the power must prohibit the creation of new powers.
38 Language merely conferring the power of appointment on the power holder does not suffice.) If
39 the power holder creates a new *nongeneral* power in a permissible appointee of the original
40 power, the permissible appointees of the second power may be broader than the permissible
41 appointees of the first power. For example, the holder of a nongeneral power to appoint among
42 the donor's "descendants" may exercise the power by creating a nongeneral power in the donor's
43 child to appoint to anyone in the world except the donor's child, the estate of the donor's child,
44 or the creditors of either.

45
46 And finally, unless the terms of the donor's instrument creating the power manifest a
47 contrary intent, the holder of a nongeneral power may exercise the power by creating a new

1 nongeneral power in *any* individual to appoint to some or all of the permissible appointees of the
2 original nongeneral power. In order to manifest a contrary intent, the terms of the instrument
3 creating the power must prohibit the creation of such powers. Language merely conferring the
4 power of appointment on the power holder does not suffice.
5

6 With one exception, the rules of this Section are consistent with, and this Comment draws
7 on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.13 and 19.14 and
8 the accompanying Commentary. The exception is that the Restatement applies the rule in
9 subsection (c)(3)—on a nongeneral power created in an *impermissible* appointee—to a
10 nongeneral power created in a permissible appointee. See Restatement Third of Property: Wills
11 and Other Donative Transfers § 19.14 and *id.*, Comment g(3).
12

13 **SECTION 306. APPOINTMENT TO DECEASED APPOINTEE OR TO**
14 **PERMISSIBLE APPOINTEE’S DESCENDANT.**

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

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

21 **Comment**

22 Just as property cannot be transferred to an individual who is deceased (see Restatement
23 Third of Property: Wills and Other Donative Transfers § 1.2), a power of appointment cannot be
24 effectively exercised in favor of a deceased appointee.
25

26 However, an antilapse statute may apply to trigger the substitution of the deceased
27 appointee’s descendants (or other substitute takers), unless the terms of the instrument creating
28 or exercising the power of appointment manifest a contrary intent. Antilapse statutes typically
29 provide, as a default rule of construction, that devises to certain relatives who predecease the
30 testator pass instead to specified substitute takers, usually the descendants of the predeceased
31 devisee who survive the testator. See generally Restatement Third of Property: Wills and Other
32 Donative Transfers § 5.5.
33

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

1 appointment.

2
3 The substitute takers provided by an antilapse statute (typically the descendants of the
4 deceased appointee) are treated as permissible appointees even if the description of permissible
5 appointees provided by the donor does not expressly cover them. This rule corresponds to the
6 rule applying antilapse statutes to class gifts. Antilapse statutes substitute the descendants of
7 deceased class members, even if the class member's descendants are not members of the class.
8 See Restatement Third of Property: Wills and Other Donative Transfers § 19.12, Comment e.

9
10 The donor of a power, general or nongeneral, can prohibit the application of an antilapse
11 statute to the power holder's appointment and, in the case of a nongeneral power, can prohibit an
12 appointment to the descendants of a deceased permissible appointee, but must manifest an intent
13 to do so in the terms of the instrument creating the power of appointment. A traditional gift-in-
14 default clause does not manifest a contrary intent in either case, unless the clause provides that it
15 is to take effect instead of the descendants of a deceased permissible appointee.

16
17 Subsection (b) provides that the descendants of a deceased permissible appointee are
18 treated as permissible appointees of a nongeneral power of appointment. This rule is a logical
19 extension of the application of antilapse statutes to appointments. If an antilapse statute can
20 substitute the descendants of a deceased appointee, the power holder should be allowed to make
21 a direct appointment to one or more descendants of a deceased permissible appointee.

22
23 The rule of this Section is consistent with, and this Comment draws on, Restatement
24 Third of Property: Wills and Other Donative Transfers § 19.12 and the accompanying
25 Commentary.

26 **SECTION 307. IMPERMISSIBLE APPOINTMENT.**

27
28 (a) Except as otherwise provided in Section 306, an exercise of a power of appointment
29 in favor of an impermissible appointee is ineffective.

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

32 **Comment**

33
34 The rules of this Section apply only to the extent the power holder attempts to confer a
35 beneficial interest in the appointive property on an impermissible appointee.

36
37 The rules of this Section do not apply to an appointment of a *nonbeneficial* interest—for
38 example, the appointment of legal title to a trustee—if the beneficial interest is held by
39 permissible appointees.

40
41 Nor do the rules of this Section prohibit beneficial appointment to an impermissible
42 appointee if the intent to benefit the impermissible appointee is not the power holder's but rather

1 is the intent of a permissible appointee in whose favor the holder has decided to exercise the
2 power. In other words, if the power holder makes a decision to exercise the power in favor of a
3 permissible appointee, the permissible appointee may request the power holder to transfer the
4 appointive assets directly to an impermissible appointee. The appointment directly to the
5 impermissible appointee in this situation is effective, being treated for all purposes as an
6 appointment first to the permissible appointee followed by a transfer by the permissible
7 appointee to the impermissible appointee.

8
9 The donor of a power of appointment sets the range of permissible appointees by
10 designating the permissible appointees of the power. The rule of this Section is concerned with
11 attempts by the power holder to exceed that authority. Such an attempt is called a fraud on the
12 power and is ineffective. The term “fraud on the power” is a well-accepted term of art. See
13 Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16.

14
15 Among the most common devices employed to commit a fraud on the power are: an
16 appointment conditioned on the appointee conferring a benefit on an impermissible appointee; an
17 appointment subject to a charge in favor of an impermissible appointee; an appointment upon a
18 trust for the benefit of an impermissible appointee; an appointment in consideration of a benefit
19 to an impermissible appointee; and an appointment primarily for the benefit of the permissible
20 appointee’s creditor if the creditor is an impermissible appointee. Each of these appointments is
21 impermissible and ineffective.

22
23 The rules of this Section are consistent with, and this Comment draws on, Restatement
24 Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16 and the
25 accompanying Commentary.

26
27 **SECTION 308. SELECTIVE ALLOCATION DOCTRINE.** If a power holder
28 exercises a power of appointment in an instrument that also disposes of owned property, the
29 owned and appointive property must be allocated in the permissible manner that best carries out
30 the holder’s intent.

31 **Comment**

32
33 The rule of this Section is commonly known as the doctrine of selective allocation. This
34 doctrine applies if the power holder uses the same instrument to exercise a power of appointment
35 and to dispose of property that the power holder owns. For purposes of this Section, the power
36 holder’s will, any codicils to the power holder’s will, and any revocable trust created by the
37 power holder that did not become irrevocable before the power holder’s death are treated as the
38 same instrument.

39
40 The doctrine of selective allocation provides that the owned and appointive property shall
41 be allocated in the permissible manner that best carries out the power holder’s intent.

1 exercise the power, releases the power, or refrains in a record from exercising the power. (On
2 such fact-patterns, see instead Section 311.)
3

4 Nor does the rule of this Section apply to an ineffective exercise of a power of
5 revocation, amendment, or withdrawal—in each case, a power pertaining to a trust. To the extent
6 that the holder of one of these types of powers makes an ineffective appointment, the
7 ineffectively appointed property remains in the trust.
8

9 The rule of this Section is a modern variation of the so-called “capture doctrine” adopted
10 by a small body of case law and followed in Restatement Second of Property: Donative
11 Transfers § 23.2. Under that doctrine, the ineffectively appointed property passed to the power
12 holder or the power holder’s estate, but only if the ineffective appointment manifested an intent
13 to assume control of the appointive property “for all purposes” and not merely for the limited
14 purpose of giving effect to the attempted appointment. If the ineffective appointment manifested
15 such an intent, the ineffective appointment was treated as an implied alternative appointment to
16 the power holder or the power holder’s estate, and thus took effect even if the donor provided for
17 takers in default and one or more of the takers in default were otherwise entitled to take.
18

19 The capture doctrine was developed at a time when the donor’s gift-in-default clause was
20 considered an afterthought, inserted just in case the power holder failed to exercise the power.
21 Today, the donor’s gift-in-default clause is typically carefully drafted and intended to take effect,
22 unless circumstances change that would cause the power holder to exercise the power.
23 Consequently, if the power holder exercises the power effectively, the exercise divests the
24 interest of the takers in default. But if the power holder makes an ineffective appointment, the
25 power holder’s intent regarding the disposition of the ineffectively appointed property is
26 problematic.
27

28 Whether or not the ineffective appointment manifested an intent to assume control of the
29 appointive property “for all purposes” often depended on nothing more than whether the
30 ineffective appointment was contained in a blending clause. The use of a blending clause rather
31 than a direct-exercise clause, however, is typically the product of the drafting lawyer’s forms
32 rather than a deliberate choice of the power holder.
33

34 The rule of this Section alters the traditional capture doctrine in two ways: (1) the gift-in-
35 default clause takes precedence over any implied alternative appointment to the power holder or
36 the power holder’s estate deduced from the use of a blending clause or otherwise; and (2) the
37 ineffectively appointed property passes to the power holder or the power holder’s estate only if
38 there is no gift-in-default clause or the gift-in-default clause is ineffective. Nothing turns on
39 whether the power holder used a blending clause or somehow otherwise manifested an intent to
40 assume control of the appointive property “for all purposes.”
41

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

1 the power or refrained in a record from exercising it, the power holder has affirmatively chosen
2 to reject the opportunity to gain ownership of the property, hence the unappointed property
3 passes under a reversionary interest to the donor or to the donor's successors in interest.

4
5 These rules are illustrated by the following examples.

6
7 *Example 1.* D transferred property to T in trust, directing T to pay the income to S (D's
8 son) for life, with a general testamentary power in S to appoint the principal of the trust, and "in
9 default of appointment, to S's descendants who survive S, by representation, and if none, to X
10 charity." S dies leaving a will that does not exercise the power. The principal passes under the
11 gift-in-default clause to S's descendants who survive S, by representation.

12
13 *Example 2.* Same facts as Example 1, except that D's gift-in-default clause covered only
14 half of the principal and S died intestate. Half of the principal passes under the gift-in-default
15 clause to S's descendants who survive S, by representation. The other half of the principal passes
16 to S's intestate heirs.

17
18 *Example 3.* Same facts as Example 2, except that S released the power before dying
19 intestate. Half of the principal passes under the gift-in-default clause to S's descendants who
20 survive S, by representation. The other half of the principal passes to D if D is then living or, if D
21 is not then living, to D's then living successors in interest.

22
23 *Example 4.* Same facts as Example 2, except that, before dying intestate, S executed a
24 record in which S refrained from exercising the power. The result is the same as in Example 3.

25
26 The rules of this Section are consistent with, and this Comment draws on, Restatement
27 Third of Property: Wills and Other Donative Transfers § 19.22 and the accompanying
28 Commentary.

29
30 **SECTION 311. DISPOSITION OF UNAPPOINTED PROPERTY UNDER**

31 **RELEASED OR UNEXERCISED NONGENERAL POWER.** If a power holder releases or
32 fails to exercise a nongeneral power of appointment:

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

34 (2) if there is no gift-in-default clause or it is ineffective, the unappointed property passes

35 to:

36 (A) the permissible appointees, if:

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

38 (ii) the terms of the instrument creating the power of appointment do not

1 manifest a contrary intent; or

2 (B) if there is no taker [produced by the application of][under] subparagraph (A),
3 the donor if the donor is living or, if the donor is not living, the donor's living successors in
4 interest.

5 **Comment**

6
7 To the extent that the holder of a nongeneral power releases or fails to exercise the
8 power, thus causing the power to lapse, the gift-in-default clause controls the disposition of the
9 unappointed property to the extent that the gift-in-default clause is effective.

10
11 To the extent that the gift-in-default clause is nonexistent or ineffective, the unappointed
12 property passes to the permissible appointees of the power (including those who are substituted
13 for permissible appointees under an antilapse statute), if the permissible appointees are "defined
14 and limited" (on the meaning of this term of art, see the Comment to Section 103) and the donor
15 has not manifested an intent that the permissible appointees shall receive the appointive property
16 only so far as the power holder elects to appoint it to them. This rule of construction is based on
17 the assumption that the donor intends the permissible appointees of the power to have the benefit
18 of the property. The donor focused on transmitting the appointive property to the permissible
19 appointees through an appointment, but if the power holder fails to carry out this particular
20 method of transfer, the donor's underlying intent to pass the appointive property to the defined
21 and limited class of permissible appointees should be carried out. Subparagraph (2)(A)
22 effectuates the donor's underlying intent by implying a gift in default of appointment to the
23 defined and limited class of permissible appointees.

24
25 If the defined and limited class of permissible appointees is a multigenerational class,
26 such as "descendants," "issue," "heirs," or "relatives," the default rule of construction is that they
27 take by representation. See Restatement Third of Property: Wills and Other Donative Transfers §
28 14.3, Comment b. If the defined and limited class is a single-generation class, the default rule of
29 construction is that the eligible class members take equally. See Restatement Third of Property:
30 Wills and Other Donative Transfers § 14.2.

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

40 The rules are illustrated by the following examples.

41
42 *Example 1.* D died, leaving a will devising property to T in trust. T is directed to pay the
43 income to S (D's son) for life, and then to pay the principal "to such of S's descendants who

1 survive S as S may appoint by will.” D’s will contains no gift-in-default clause. S dies without
2 exercising the nongeneral power. The permissible appointees of the power constitute a defined
3 and limited class. Accordingly, the corpus of the trust passes at S’s death to S’s descendants who
4 survive S, by representation.
5

6 *Example 2.* Same facts as Example 1, except that the permissible appointees of S’s power
7 of appointment are “such one or more persons, other than S, S’s estate, S’s creditors, or creditors
8 of S’s estate.” The permissible appointees do not constitute a defined and limited class.
9 Accordingly, the corpus of the trust passes at S’s death to D if D is then living or, if D is not then
10 living, to D’s then living successors in interest.
11

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

16 **SECTION 312. DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL**

17 **APPOINTMENT TO TAKER IN DEFAULT.** Unless the terms of the instrument creating or
18 exercising a power of appointment manifest a contrary intent, if the power holder makes a valid
19 partial appointment to a taker in default of appointment, the taker in default of appointment
20 remains entitled to a full share of unappointed property.

21 **Comment**
22

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

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

42 **SECTION 313. APPOINTMENT TO TAKER IN DEFAULT.** If a power holder

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

4 **Comment**

5
6 This Section articulates the rule that, to the extent that an appointee would have taken
7 appointed property as a taker in default, the appointee takes under the gift-in-default clause
8 rather than under the appointment.
9

10 Takers in default have future interests that may be defeated by an exercise of the power
11 of appointment. To whatever extent the power holder purports to appoint an interest already held
12 in default of appointment, the power holder does not exercise the power to alter the donor's
13 disposition but merely declares an intent not to alter it. To the extent, however, that the appointed
14 property *is different from* (e.g., is a lesser estate) or *exceeds the total of* the property the
15 appointee would receive as a taker in default, the property passes under the appointment.
16

17 Usually it makes no difference whether the appointee takes as appointee or as taker in
18 default. The principal difference arises in jurisdictions that follow the rule that the estate
19 creditors of the holder of a general testamentary power that was conferred on the holder by
20 another have no claim on the appointive property unless the holder has exercised the power.
21 Although this act does not follow that rule regarding creditor's rights (see Section 602), some
22 jurisdictions do.
23

24 The rule of this Section is consistent with, and this Comment draws on, Restatement
25 Third of Property: Wills and Other Donative Transfers § 19.25 and the accompanying
26 Commentary.
27

28 **SECTION 314. POWER HOLDER'S AUTHORITY TO REVOKE OR AMEND**

29 **EXERCISE.** A power holder may revoke or amend an exercise of a power of appointment only
30 to the extent that:

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

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

1 **Comment**

2
3 This Section recognizes that the holder of a power of appointment lacks the authority to
4 revoke or amend an exercise of the power, except to the extent that (1) the holder 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 holder of a power of appointment who exercises the power is like any other transferor
10 of property in regard to authority to revoke or amend the transfer. Hence, unless the power
11 holder (or the donor) in some appropriate manner manifests an intent that an appointment is
12 revocable or amendable, the appointment is irrevocable.
13

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

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

21 **[ARTICLE] 4**

22 **RELEASE OR DISCLAIMER**

23 **SECTION 401. AUTHORITY TO RELEASE.** A power holder may release a power
24 of appointment, in whole or in part, except to the extent that the terms of the instrument creating
25 the power provide that the power is not releasable.

26 **Comment**

27
28 The holder of a power of appointment, whether general or nongeneral, presently
29 exercisable or testamentary, has the authority to release the power in whole or in part, in the
30 absence of a valid restriction on release imposed by the donor. A partial release is a release that
31 narrows the freedom of choice otherwise available to the power holder but does not eliminate the
32 power. A partial release may relate either to the manner of exercising the power or to the persons
33 in whose favor the power may be exercised.
34

35 If the power holder did not create the power, so that the power holder and donor are
36 different individuals, the donor can effectively impose a restraint on release, but the donor must
37 manifest an intent in the terms of the creating instrument to impose such a restraint.
38

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

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

6
7 The ability of an agent to release a power of appointment on behalf of a principal is
8 determined by other law, such as the Uniform Power of Attorney Act.

9
10 The rule of this Section is consistent with, and this Comment draws on, Restatement
11 Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying
12 Commentary.

13
14 **SECTION 402. METHOD OF RELEASE.** A power holder of a releasable power of
15 appointment may release the power in whole or in part:

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

18 (2) if the terms of the instrument creating the power do not provide a method or the
19 method provided in the terms of the instrument is not expressly made exclusive, by any record
20 manifesting clear and convincing evidence of the holder's intent.

21 **Comment**

22
23 A power holder may release the power of appointment by substantial compliance with the
24 method specified in the terms of the instrument creating the power or any other method
25 manifesting clear and convincing evidence of the power holder's intent. Only if the method
26 specified in the terms of the creating instrument is made exclusive is use of the other methods
27 prohibited. Even then, a failure to comply with a technical requirement, such as required
28 notarization, may be excused as long as compliance with the method specified in the terms of the
29 creating instrument is otherwise substantial.

30
31 Examples of methods manifesting clear and convincing evidence of the power holder's
32 intent to release include: (1) delivering an instrument declaring the extent to which the power is
33 released to an individual who could be adversely affected by an exercise of the power; (2)
34 joining with some or all of the takers in default in making an otherwise effective transfer of an
35 interest in the appointive property, in which case the power is released to the extent that a
36 subsequent exercise of the power would defeat the interest transferred; (3) contracting with an
37 individual who could be adversely affected by an exercise of the power not to exercise the
38 power, in which case the power is released to the extent that a subsequent exercise of the power
39 would violate the terms of the contract; and (4) communicating in a record an intent to release

1 the power, in which case the power is released to the extent that a subsequent exercise of the
2 power would be contrary to manifested intent.

3
4 The text of this Section is based on Uniform Trust Code § 602(c). The rule of this Section
5 is fundamentally consistent with, and this Comment draws on, Restatement Third of Property:
6 Wills and Other Donative Transfers § 20.3 and the accompanying Commentary.

7
8 **SECTION 403. REVOCATION OR AMENDMENT OF RELEASE.** A power
9 holder may revoke or amend a release of a power of appointment only to the extent that:

10 (1) the instrument executing the release is revocable by the holder; or

11 (2) the holder reserves a power of revocation or amendment in the instrument executing
12 the release.

13 **Comment**

14 A release is typically irrevocable. If a power holder wishes to retain the power to revoke
15 or amend the release, the power holder should so indicate in the instrument executing the release.

16
17 The ability of an agent to revoke or amend the release of a power of appointment on
18 behalf of a principal is determined by other law, such as the Uniform Power of Attorney Act.

19
20 The rule of this Section is consistent with, and this Comment draws on, Restatement
21 Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying
22 Commentary.

23
24 **SECTION 404. DISCLAIMER.** As provided by [cite state law on disclaimer or the
25 Uniform Disclaimer of Property Interests Act]:

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

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

29 **Comment**

30
31 A prospective power holder cannot be compelled to accept the power of appointment, just
32 as the prospective donee of a gift cannot be compelled to accept the gift.

33
34 A disclaimer is to be contrasted with a release. A release occurs after the power holder
35 accepts the power. A disclaimer prevents acquisition of the power, and consequently a power
36 holder who has accepted a power can no longer disclaim.

1
2 Disclaimer statutes frequently specify the time within which a disclaimer must be made.
3 The Uniform Disclaimer of Property Interests Act (1999) (UDPIA) does not specify a time limit,
4 but allows a disclaimer until a disclaimer is barred (see UDPIA § 13).
5

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

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

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

19 The ability of an agent to disclaim on behalf of a principal is determined by other law,
20 such as the Uniform Power of Attorney Act.
21

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

26 [ARTICLE] 5

27 CONTRACT TO APPOINT OR NOT TO APPOINT

28 SECTION 501. POWER TO CONTRACT: PRESENTLY EXERCISABLE

29 **POWER OF APPOINTMENT.** A power holder of a presently exercisable power of
30 appointment may contract to make, or not to make, an appointment only if the contract does not
31 confer a benefit on an impermissible appointee.

32 Comment

33 A holder of a presently exercisable power may contract to make, or not to make, an
34 appointment if the contract does not confer a benefit on an impermissible appointee. The
35 rationale is that the power is presently exercisable, so the power holder can presently enter into a
36 contract concerning the appointment.
37

38 The contract may not confer a benefit on an impermissible appointee. Recall that a
39 general power presently exercisable in favor of the power holder or the power holder's estate has
40 no impermissible appointees. See Section 305(a). In contrast, a presently exercisable nongeneral

1 power, or a general power presently exercisable only in favor of one or more of the creditors of
2 the power holder or the power holder's estate, does have impermissible appointees. See Section
3 305(b)-(c).

4
5 A contract *not* to appoint assures that the appointive property will pass to the taker in
6 default. A contract to appoint to a taker in default, if enforceable, has the same effect as a
7 contract not to appoint.

8
9 The ability of an agent to contract on behalf of a principal is determined by other law,
10 such as the Uniform Power of Attorney 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 § 21.1 and the accompanying
14 Commentary.

15
16 **SECTION 502. POWER TO CONTRACT: POWER OF APPOINTMENT NOT**
17 **PRESENTLY EXERCISABLE.** A power holder of a power of appointment that is not a
18 presently exercisable power may contract to make, or not to make, an appointment only if:

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

20 (2) the holder:

21 (A) is also the donor of the power; and

22 (B) has reserved the power in a revocable inter vivos trust.

23 **Comment**

24
25 Except in the case of a power reserved by the donor in a revocable inter vivos trust, a
26 contract to exercise, or not to exercise, a power of appointment that is not presently exercisable is
27 unenforceable, because the holder of such a power does not have the authority to make a current
28 appointment. If the power holder was also the donor of the power and created the power in a
29 revocable inter vivos trust, however, a contract to appoint is enforceable, because the donor-
30 power holder could have revoked the trust and recaptured ownership of the trust assets or could
31 have amended the trust to change the power onto one that is presently exercisable.

32
33 In all other cases, the donor of a power not presently exercisable has manifested an intent
34 that the selection of the appointees and the determination of the interests they are to receive are
35 to be made in the light of the circumstances that exist on the date that the power becomes
36 exercisable. Were a contract to be enforceable, the donor's intent would be defeated.

37
38 The ability of an agent to contract on behalf of a principal is determined by other law,
39 such as the Uniform Power of Attorney Act.

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

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

3
4 **SECTION 503. REMEDY FOR BREACH OF CONTRACT TO APPOINT OR NOT TO**
5 **APPOINT.** The remedy for a power holder’s breach of an enforceable contract to appoint or not
6 to appoint is limited to damages payable out of the appointive property or, if appropriate, specific
7 performance of the contract.

8 **Comment**

9 This Section sets forth a rule on remedy. The remedy for a power holder’s breach of an
10 enforceable contract to appoint, or not to appoint, is limited to damages payable out of the
11 appointive property or, if appropriate, specific performance. The power holder’s owned assets
12 are not available to satisfy a judgment for damages. For elaboration and discussion, see
13 Restatement Third of Property: Wills and Other Donative Transfers §§ 21.1 and 21.2, and
14 especially id., § 21.1, Comments c and d.

15
16 **[ARTICLE] 6**

17 **RIGHTS OF POWER HOLDER’S CREDITORS IN APPOINTIVE PROPERTY**

18 **SECTION 601. GENERAL POWER CREATED BY POWER HOLDER.**

19 (a) Subject to subsections (b) and (c), appointive property subject to a general power of
20 appointment created by the power holder is subject to a claim of a creditor of the holder or the
21 holder’s estate to the extent that the holder’s property is insufficient to satisfy that claim,
22 notwithstanding the presence of a spendthrift provision or when the claim arose. In this
23 subsection, a power of appointment created by the power holder includes a power of
24 appointment created in a transfer by another individual to the extent that the holder contributed
25 value to the transfer.

26 (b) Subject to subsection (c), appointive property subject to a general power of
27 appointment created by the power holder is not subject to a claim of a creditor of the holder or
28 the holder’s estate to the extent that the holder irrevocably appointed the property in favor of a
29 person other than the holder or the holder’s estate.

1 (c) A creditor of a power holder or the holder’s estate may reach appointive property
2 subject to a general power of appointment created by the holder to the extent provided in [cite
3 state law on fraudulent transfers or the Uniform Fraudulent Transfers Act].

4 **Comment**

5
6 Subsection (a) states the basic rule of this Section: If an individual retains a general
7 power of appointment over the property the individual owned, public policy does not allow this
8 formal change in the control of the property to put the property beyond the reach of the
9 donor/power holder’s creditors. Thus, appointive property subject to a general power of
10 appointment created by the power holder is subject to a claim of—and is currently reachable
11 by—a creditor of the power holder or the power holder’s estate to the extent that the power
12 holder’s property is insufficient to satisfy that claim. The application of this rule is not affected
13 by the presence of a spendthrift provision (see Restatement Third of Property: Wills and Other
14 Donative Transfers § 22.2, Comment a) nor by whether the claim arose before or after the
15 creation of the power of appointment.

16
17 The rule of subsection (a) can apply even if the general power was not created in a
18 transfer made by the power holder. It is sufficient if the power holder paid the purchase price for
19 the transfer, for example, or otherwise contributed value to the transfer. See Restatement Third
20 of Property: Wills and Other Donative Transfers § 22.2, Comment d. Consider the following
21 examples, drawn from the Restatement:

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

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

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

38
39 Subsection (b) states an important exception. An irrevocable exercise of the general
40 power by the transferor/power holder in favor of someone other than the power holder or the
41 power holder’s estate eliminates the applicability of the rule of subsection (a) to the extent of the
42 appointive assets appointed by the exercise of the power. The rules relating to fraudulent
43 transfers (subsection (c)), however, are applicable to the exercise of the power.

1 The rules of this Section are consistent with, and this Comment draws on, Restatement
2 Third of Property: Wills and Other Donative Transfers § 22.2 and the accompanying
3 Commentary.
4

5 **SECTION 602. GENERAL POWER NOT CREATED BY POWER HOLDER.**

6 (a) In this section, “general power of appointment” does not include a postponed power
7 of appointment.

8 (b) Appointive property subject to a presently exercisable general power of appointment
9 created by an individual other than the power holder is subject to a claim of a creditor of the
10 holder or the holder’s estate to the extent that the holder’s property is insufficient to satisfy that
11 claim.

12 (c) On a power holder’s death, appointive property subject to a testamentary general
13 power of appointment created by an individual other than the holder is subject to a claim of a
14 creditor of the holder’s estate to the extent that the holder’s property is insufficient to satisfy that
15 claim.

16 (d) The holder of a power of withdrawal is treated, during the period the power of
17 withdrawal may be exercised, in the same manner as the power holder of a presently exercisable
18 general power of appointment to the extent of the property subject to the power of withdrawal.

19 (e) On the lapse, release, or waiver of a power of withdrawal, the holder of the power is
20 treated as the power holder of a presently exercisable general power of appointment only to the
21 extent the value of the property affected by the lapse, release, or waiver exceeds the greater of
22 the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986 or
23 Section 2503(b) of the Internal Revenue Code of 1986, [on the effective date of this [act]][as
24 amended].

1
2
3 **Comment**

4 Subsections (b) and (c) reaffirm the fundamental principle that a presently exercisable
5 general power of appointment is an ownership-equivalent power. Consequently, subsection (b)
6 provides that property subject to a presently exercisable general power of appointment is subject
7 to the claims of the power holder's creditors, to the extent that the property owned by the power
8 holder is insufficient to satisfy those claims. Furthermore, upon the power holder's death,
9 subsection (c) provides that property subject to a general power of appointment that was
10 exercisable by the power holder's will is subject to creditors' claims to the extent that the power
11 holder's estate is insufficient. In each case, whether the power holder has or has not purported to
12 exercise the power is immaterial.

13 Subsection (a) reflects an important exception. A general power of appointment is not
14 subject to the rules of this Section if it is a postponed power. See Restatement Third of Property:
15 Wills and Other Donative Transfers §22.3, Comment b.

16 Subsection (d) treats a power of withdrawal as the equivalent of a presently exercisable
17 general power of appointment, because the two are ownership-equivalent powers. Upon the
18 lapse, release, or waiver of the power of withdrawal, subsection (e) follows the lead of Uniform
19 Trust Code § 505(b)(2) in creating an exception for property subject to a Crummey or five and
20 five power: the holder of the power of withdrawal is treated as a power holder of a presently
21 exercisable general power of appointment only to the extent that the value of the property
22 affected by the lapse, release, or waiver exceeds the greater of the amount specified in Internal
23 Revenue Code §§ 2041(b)(2) or 2514(e) [greater of 5% or \$5,000] or § 2503(b) [\$13,000 in
24 2011].
25

26
27 The rules of subsections (a) through (c) are consistent with, and this Comment draws on,
28 Restatement Third of Property: Wills and Other Donative Transfers § 22.3 and the
29 accompanying Commentary. The black letter of subsections (d) and (e) are based on the black
30 letter of Uniform Trust Code § 505(b)(1) and (b)(2).
31

32 **SECTION 603. NONGENERAL POWER.**

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

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

1 (c) If the gift in default of appointment is to the power holder or the holder's estate, a
2 nongeneral power of appointment is treated for purposes of this [article] as a general power, and
3 creditor rights in the appointive property are governed by Sections 601 and 602.

4 **Comment**

5
6 Subsection (a) states the general rule: Appointive property subject to a nongeneral power
7 of appointment is exempt from a claim of a creditor of the power holder or the power holder's
8 estate. The rationale for this general rule is that a nongeneral power of appointment is not an
9 ownership-equivalent power, so generally the power holder's creditors have no claim to the
10 appointive assets, irrespective of whether or not the power holder exercises the power.

11
12 Subsection (b) addresses an important exception: the fraudulent transfer. A fraudulent
13 transfer arises if the power holder formerly owned the appointive property covered by the
14 nongeneral power and transferred the property in fraud of creditors, reserving the nongeneral
15 power. In such a case, the creditors can reach the appointive property under the rules relating to
16 fraudulent transfers.

17
18 Subsection (c) also addresses an important exception, arising when the gift in default of
19 appointment is to the power holder or the power holder's estate. In such a case, the power of
20 appointment, though in form a nongeneral power, is in substance a general power, and the rights
21 of the power holder's creditors are governed by Sections 601 and 602.

22
23 The rules of this Section are consistent with, and this Comment draws on, Restatement
24 Third of Property: Wills and Other Donative Transfers § 22.1 and the accompanying
25 Commentary.

26 **[ARTICLE] 7**

27 **MISCELLANEOUS PROVISIONS**

28
29 **SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
30 applying and construing this uniform act, consideration must be given to the need to promote
31 uniformity of the law with respect to its subject matter among states that enact it.

32 **SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
33 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
34 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
35 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or

1 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15

2 U.S.C. Section 7003(b).

3 **SECTION 703. REPEALS.** The following are repealed:

4 **SECTION 704. EFFECTIVE DATE.** This [act] takes effect