POWER OF APPOINTMENT ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Power of Appointment Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Adverse party" means a person with a substantial beneficial interest in property which would be adversely affected by a power holder's exercise or nonexercise of a power of appointment in favor of the holder, the holder's estate, a creditor of the holder, or a creditor of the holder's estate.

(2) "Appointive property" means the property or property interest subject to a power of appointment.

(3) "Blanket-exercise clause" means a clause in an instrument which exercises a power of appointment and is not a specific-exercise clause. The term includes a clause that:

(A) exercises "any" power of appointment the power holder has;

(B) appoints "any" property over which the holder has a power of appointment; or

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

(4) "Blending clause" means a clause in an instrument which blends appointive property with the power holder's own property in a common disposition.

(5) "Donor" means a person that creates a power of appointment.

(6) "Exclusionary power of appointment" means a power of appointment exercisable in favor of any one of the permissible appointees to the exclusion of the other permissible appointees.

(7) "General power of appointment" means a power of appointment exercisable in favor of the power holder, the holder's estate, a creditor of the holder, or a creditor of the holder's

estate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(22) "Testamentary power of appointment" means a power of appointment exercisable only in a will [or in a nontestamentary instrument that is revocable until, and effective only at, the power holder's death].

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

Comment

Paragraph (1) defines an adverse party—meaning, a party adverse *to the power holder*—as a person who has a substantial beneficial interest in property which would be adversely affected by a power holder's exercise or nonexercise of a power of appointment in favor of the power holder, the power holder's estate, or a creditor of either. See Section 3.

Paragraph (2) defines appointive property as the property or property interest subject to a power of appointment. The effective creation of a power of appointment requires that there be appointive property. See Section 6.

Paragraphs (3), (4), and (19) explain the distinctions among blanket-exercise, blending, and specific-exercise clauses. A specific-exercise clause exercises and specifically refers to the particular power of appointment in question, using language such as the following: "I hereby exercise the power of appointment conferred upon me by my father's will as follows: I appoint [fill in details of appointment]." In contrast, a blanket-exercise clause exercises "any" power of appointment the power holder may have or appoints "any" property over which the power holder may have a power of appointment. The use of specific-exercise clauses is recommended; the use

of blanket-exercise clauses is discouraged. See Section 8 and the accompanying Comment. A blending clause blends appointive property with the power holder's own property in a common disposition. A blending clause can be combined with a specific-exercise clause ("All the residue of my estate, including the property over which I have a power of appointment under my father's will, I devise as follows") or with a blanket-exercise clause ("All the residue of my estate, including any property over which I may have a power of appointment, I devise as follows").

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

Paragraphs (6) and (10) explain the distinction between exclusionary and nonexclusionary powers of appointment. An exclusionary power is one in which the donor has authorized the power holder to appoint to any one of the permissible appointees to the exclusion of the other permissible appointees. The typical power of appointment is exclusionary. For example, a power to appoint "to such of my descendants as the power holder may select" is exclusionary, because the power holder may appoint to any one of the donor's descendants to the exclusion of all the others. In contrast, a nonexclusionary power is one in which the donor has specified that the power holder cannot make an appointment excluding any, or a specified, permissible appointee. An example of a nonexclusionary power would be a power "to appoint to all and every one of my children in such shares and proportions as the powerholder shall select." The power holder is not under a duty to exercise the power; but, if the holder does exercise the power, the appointment must abide by the power's nonexclusionary nature. See Sections 8 and 12. Only a power of appointment whose permissible appointees are "defined and limited" can be nonexclusionary. For elaboration of the well-accepted term of art "defined and limited," see Section 3 and the accompanying Comment.

Paragraphs (7) and (11) explain the distinction between general and nongeneral powers of appointment. A general power of appointment enables the power holder to exercise the power in favor of the power holder, the power holder's estate, or the creditors of either, regardless of whether the power is also exercisable in favor of others. A nongeneral power of appointment cannot be exercised in favor of the power holder, the power holder's estate, or the creditors of either. An instrument creating a power of appointment is construed as creating a general power unless the terms of the instrument manifest a contrary intent. See Section 3. A power to revoke, amend, or withdraw is a general power of appointment if it is exercisable in favor of the power holder, the power holder's estate, or the creditors of either. If the settlor of a trust empowers a trustee or another person to change a power of appointment from a general power into a nongeneral power, or vice versa, the power is either general or nongeneral depending on the scope of the power at any particular time.

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

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

Paragraphs (13) and (18) contain the definitions of "person" and "record." These are standard definitions approved by the Uniform Law Commission.

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

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

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

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

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

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

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

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

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

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

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

On the authority of the power holder to exercise the power by creating a new power of appointment over the appointive property, see Section 12. If a power holder exercises a power by creating another power, the holder of the first power is the donor of the second power, and the holder of the second power is the appointee of the first power.

Paragraph (20) defines a taker in default of appointment. A taker in default of appointment (often called the "taker in default") has a property interest that can be transferred to

another. If a taker in default transfers the interest to another, the transferee becomes a taker in default.

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

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

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

SECTION 3. PRESUMPTION OF UNLIMITED AUTHORITY; EXCEPTION.

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

(1) general;

(2) presently exercisable; and

(3) exclusionary.

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

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

Comment

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

In accordance with this presumption of unlimited authority, a power is general unless the terms of the creating instrument specify that the power holder cannot exercise the power in favor

of the power holder, the power holder's estate, or the creditors of either. A power is presently exercisable unless the terms of the creating instrument specify that the power can only be exercised at some later time or in some document such as a will that only takes effect at some later time. A power is exclusionary unless the terms of the creating instrument specify that a permissible appointee must receive a certain amount or portion of the appointive assets if the power is exercised.

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

Subsection (b) states a well-accepted exception to the presumption of unlimited authority. If a power of appointment can be exercised only with the joinder of an adverse party, the power is not a general power. An adverse party, as defined in Section 2(1), is an individual who has a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power in favor of the power holder, the power holder's estate, or the creditors of either. Consider the following examples.

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

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

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

If the permissible appointees are not defined and limited, the power is exclusionary irrespective of the donor's intent. A power exercisable, for example, in favor of "such person or

persons other than the power holder, the power holder's estate, the creditors of the power holder, and the creditors of the power holder's estate" is an exclusionary power. An attempt by the donor to require the power holder to appoint at least $X to each permissible appointee of the power is ineffective, because the permissible appointees of the power are so numerous that it would be administratively impossible to carry out the donor's expressed intent. The donor's expressed restriction is disregarded, and the power holder may exclude any one or more of the permissible appointees in exercising the power.

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

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

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

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

SECTION 4. NONTRANSFERABILITY. A power holder may not transfer a power of appointment. If a holder dies without exercising or releasing the power, the power lapses.

Comment

A power of appointment is nontransferable. The power holder may not transfer the power to another person. (On the ability of the power holder to exercise the power by conferring on an appointee a *new* power of appointment over the appointive property, see Section 12.) If the power holder dies without exercising or releasing the power, the power lapses. The power does not pass through the power holder's estate to the power holder's successors in interest.

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

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

SECTION 5. SUPPLEMENTATION OF ACT BY COMMON LAW AND PRINCIPLES OF EQUITY. The common law of powers of appointment and principles of equity supplement this [act], except to the extent modified by this [act] or other statute of this state.

Comment

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

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

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

SECTION 6. CREATION OF POWER OF APPOINTMENT.

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

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

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

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

(c) Subject to any applicable rule against perpetuities, a power of appointment may be created in an unborn or unascertained power holder.

Comment

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

If the instrument is valid, the terms of the instrument must also manifest the donor's intent to create in one or more power holders a power of appointment over appointive property. This manifestation of intent does not require the use of particular words or phrases, but careful drafting should leave no doubt about the transferor's intent.

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

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

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

relevant date, the power of appointment is not created, and an attempt by the power holder to exercise the power is ineffective.

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

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

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

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

SECTION 7. POWER TO REVOKE OR AMEND. A donor may revoke or amend a power of appointment only to the extent that:

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

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

Comment

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

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

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

If the same individual is both the donor and the holder of a power of appointment, the donor in his or her capacity as power holder can indirectly revoke or amend the power by a partial or total release of the power. See Section 22. After the power has been irrevocably exercised, however, the donor as donor is in no different position in regard to revoking or amending the exercise of the power than the donor would be if the donor and power holder were different individuals.

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

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

SECTION 8. REQUISITES FOR EXERCISE OF POWER OF APPOINTMENT.

A power of appointment is exercised only if:

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

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

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

(B) subject to Section 11, satisfy the requirements of exercise, if any, imposed by the donor; and

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

Comment

Paragraph (1) states the fundamental principle that an instrument can only exercise a power of appointment if the instrument itself is valid. Thus, for example, a *will* exercising a power of appointment must be valid under the law—including choice of law—applicable to wills. An *inter vivos trust* exercising a power of appointment must be valid under the law—including choice of law—applicable to inter vivos trusts. In part, this means that the instrument must be properly executed to the extent that other law imposes requirements of execution. In addition, the creator of the must have the capacity to execute the instrument and be free from undue influence and other wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue influence and other wrongdoing, see, e.g., Restatement Third of Property §§

8.3 (Undue Influence, Duress, or Fraud). The ability of an agent to exercise a power of appointment on behalf of a principal is determined by other law, such as the Uniform Power of Attorney Act.

Paragraph (2) requires the terms of the instrument exercising the power of appointment to manifest the power holder's intent to exercise the power of appointment. Whether a power holder has manifested an intent to exercise a power of appointment is a question of construction. See generally Restatement Third of Property: Wills and Other Donative Transfers § 19.2. For example, a power holder's disposition of appointive property may manifest an intent to exercise the power even though the power holder does not refer to the power. See Restatement Third of Property: Wills and Other Donative Transfers § 19.3. Paragraph (2) also requires that the terms of the instrument exercising the power must, subject to Section 11, satisfy the requirements of exercise, if any, imposed by the donor.

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

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

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

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

This act aims to eliminate any significance attached to the use of a blending clause. A blending clause has traditionally been regarded as significant in the application of the doctrines of "selective allocation" and "capture." This act eliminates the significance of such a clause under those doctrines. See Sections 15 (selective allocation) and 16 (capture). The use of a blending clause is more likely to be the product of the forms used by the power holder's lawyer than a deliberate decision by the power holder to facilitate the application of the doctrines of selective allocation or capture.

If the power holder decides not to exercise a specific power or any power that the power

holder might have, it is important to consider whether to depend on mere silence to produce a nonexercise or to take definitive action to assure a nonexercise. Definitive action can take the form of a release during life (see Section 22) or a nonexercise clause in the power holder's will or other relevant instrument. A nonexercise clause can take the form of a specific-nonexercise clause (for example, "I hereby do not exercise the power of appointment conferred on me by my father's trust") or the form of a blanket-nonexercise clause (for example, "I hereby do not exercise any power of appointment I may have").

In certain circumstances, different consequences depend on the power holder's choice. Under Section 9, a residuary clause in the power holder's will is treated as manifesting an intent to exercise a general power in certain limited circumstances if the power holder silently failed to exercise the power, but not if the power holder released the power or refrained in a record from exercising it. Under Section 17, unappointed property passes to the power holder's estate in certain limited circumstances if the power holder silently failed to exercise a general power, but passes to the donor or to the donor's successors in interest if the power holder released the power or refrained in a record from exercising it.

Paragraph (3) requires the appointment to constitute a permissible exercise of the power. On permissible and impermissible exercise, see Sections 12 to 14.

The law of the power holder's domicile governs whether the power holder has effectively exercised a power of appointment, unless the terms of the instrument creating the power manifest a different intent. See Restatement Second of Conflict of Laws § 275, Comment c.

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

SECTION 9. INTENT TO EXERCISE: DETERMINING INTENT FROM RESIDUARY CLAUSE.

(a) In this section, "residuary clause" means a residuary clause purporting to dispose only of the power holder's own property.

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

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

(2) the power is a general power;

(3) there is no taker in default of appointment or the gift-in-default clause is

ineffective; and

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

Comment

This Section addresses a question arising under Section 8(2)(A)—namely, whether the power holder's intent to exercise a power of appointment is manifested by a residuary clause purporting to dispose only of the power holder's own estate, such as "All the residue of my estate, I devise to . . ." or "All of my estate, I devise to . . . ." This Section does not address the effect of a residuary clause that contains a blanket exercise or a specific exercise of a power of appointment. On blanket-exercise and specific-exercise clauses, see the Comment to Section 8.

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

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

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

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

Under no circumstance does a residuary clause manifest an intent to exercise a *non*general power. A residuary clause disposes of the power holder's own property, and a

nongeneral power is not an ownership-equivalent power.

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

SECTION 10. INTENT TO EXERCISE: AFTER-ACQUIRED POWER. Unless the terms of the instrument exercising a power of appointment manifest a contrary intent:

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

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

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

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

Comment

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

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

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

It is important to remember that even if the terms of the instrument manifest an intent to exercise an after-acquired power, the intent may be ineffective, for example if the terms of the *donor's* instrument creating the power manifest an intent to preclude such an exercise. In the absence of an indication to the contrary, however, it is inferred that the time of the execution of the power holder's exercising instrument is immaterial to the donor. Even if the donor declares

that the property shall pass to such persons as the power holder "shall" or "may" appoint, these terms do not suffice to indicate an intent to exclude exercise by an instrument previously executed, because these words may be construed to refer to the time when the exercising document becomes effective.

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

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

SECTION 11. MEANING OF SPECIFIC-REFERENCE REQUIREMENT. Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the donor's intent in requiring that the power be exercised by a reference, an express reference, or a specific reference to the power or its source is to prevent an inadvertent exercise of the power.

Comment

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

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

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

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

Consequently, a specific-reference requirement still overrides any applicable state law that presumes that an ordinary residuary clause was intended to exercise a general power. Put

differently: An ordinary residuary clause may manifest the power holder's *intent to exercise* (under Section 8(2)(A)) but does not satisfy the *requirements of exercise* if the donor imposed a specific-reference requirement (this Section and Section 8(2)(B)).

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

The black letter of this Section is drawn from the black letter of Uniform Probate Code § 2-704: "If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intent, in requiring that the holder exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power."

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

SECTION 12. PERMISSIBLE APPOINTMENT.

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

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

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

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

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

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

Comment

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

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

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

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

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

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

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

Similarly, unless the terms of the instrument creating the power manifest a contrary

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

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

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

SECTION 13. APPOINTMENT TO DECEASED APPOINTEE OR TO PERMISSIBLE APPOINTEE'S DESCENDANT.

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

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

. **Comment**

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

However, an antilapse statute may apply to trigger the substitution of the deceased

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

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

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

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

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

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

SECTION 14. IMPERMISSIBLE APPOINTMENT.

(a) Except as otherwise provided in Section 13, an exercise of a power of appointment in favor of an impermissible appointee is ineffective.

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

Comment

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

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

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

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

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

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

SECTION 15. SELECTIVE ALLOCATION DOCTRINE. If a power holder exercises a power of appointment in an instrument that also disposes of owned property, the owned and appointive property must be allocated in the permissible manner that best carries out the holder's intent.

Comment

The rule of this Section is commonly known as the doctrine of selective allocation. This

doctrine applies if the power holder uses the same instrument to exercise a power of appointment and to dispose of property that the power holder owns. For purposes of this Section, the power holder's will, any codicils to the power holder's will, and any revocable trust created by the power holder that did not become irrevocable before the power holder's death are treated as the same instrument.

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

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

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

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

On the distinction between "selective allocation" (a rule of construction based on the assumed intent of the power holder) and the process sometimes known as "marshaling" (an outgrowth of general equitable principles), see the Restatement Second of Property: Donative Transfers, especially the Introductory Note to Chapter 22.

SECTION 16. CAPTURE DOCTRINE: DISPOSITION OF INEFFECTIVELY APPOINTED PROPERTY UNDER GENERAL POWER.

(a) In this section, "general power of appointment" does not include a power of revocation, amendment, or withdrawal.

(b) If a power holder of a general power of appointment makes an ineffective appointment:

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

(2) if there is no gift-in-default clause or it is ineffective, the ineffectively

appointed property passes to the power holder if living or, if the holder is not living, to the holder's estate.

Comment

The rule of this Section applies when the holder of a general power makes an ineffective appointment. The rule of this Section does not apply when the holder of a general power fails to exercise the power, releases the power, or refrains in a record from exercising the power. (On such fact-patterns, see instead Section 18.)

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

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

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

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

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

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

SECTION 17. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED GENERAL POWER.

(a) In this section, "general power of appointment" does not include a power of revocation, amendment, or withdrawal.

(b) If a power holder releases or fails to exercise a general power of appointment:

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

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

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

(B) if the holder released or refrained in a record from exercising the power, the unappointed property passes to the donor if the donor is living or, if the donor is not living, the donor's living successors in interest.

Comment

The rules of this Section apply to unappointed property under a general power of appointment. The rules do *not* apply to unappointed property under a power of revocation, amendment, or withdrawal—powers pertaining to a trust. If the power holder releases or dies without exercising a power of revocation or amendment, the power to revoke expires and, unless someone else continues to have a power of revocation or amendment, the trust becomes irrevocable and unamendable. If the power holder releases or dies without exercising a power to withdraw principal of a trust, the principal that the power holder could have withdrawn, but did not, remains part of the trust.

The rationale for the rules of this Section is as follows. The gift-in-default clause controls the disposition of unappointed property to the extent that the clause is effective. To the extent that the gift-in-default clause is nonexistent or ineffective, the disposition of the unappointed property depends on whether the power holder merely failed to exercise the power or whether

the power holder released the power or refrained from exercising it by, for example, using a nonexercise clause. If the power holder merely failed to exercise the power, the unappointed property passes to the power holder or to the power holder's estate. The rationale is the same as when the power holder makes an ineffective appointment. If, however, the power holder released the power or refrained in a record from exercising it, the power holder has affirmatively chosen to reject the opportunity to gain ownership of the property, hence the unappointed property passes under a reversionary interest to the donor or to the donor's successors in interest.

These rules are illustrated by the following examples.

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

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

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

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

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

SECTION 18. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED NONGENERAL POWER. If a power holder releases or fails to exercise a nongeneral power of appointment:

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

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

(A) the permissible appointees, if:

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

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

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

Comment

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

To the extent that the gift-in-default clause is nonexistent or ineffective, the unappointed property passes to the permissible appointees of the power (including those who are substituted for permissible appointees under an antilapse statute), if the permissible appointees are "defined and limited" (on the meaning of this term of art, see the Comment to Section 3) and the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the power holder elects to appoint it to them. This rule of construction is based on the assumption that the donor intends the permissible appointees of the power to have the benefit of the property. The donor focused on transmitting the appointive property to the permissible appointees through an appointment, but if the power holder fails to carry out this particular method of transfer, the donor's underlying intent to pass the appointive property to the defined and limited class of permissible appointees should be carried out. Subparagraph (2)(A) effectuates the donor's underlying intent by implying a gift in default of appointment to the defined and limited class of permissible appointees.

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

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

The rules are illustrated by the following examples.

Example 1. D died, leaving a will devising property to T in trust. T is directed to pay the

income to S (D's son) for life, and then to pay the principal "to such of S's descendants who survive S as S may appoint by will." D's will contains no gift-in-default clause. S dies without exercising the nongeneral power. The permissible appointees of the power constitute a defined and limited class. Accordingly, the corpus of the trust passes at S's death to S's descendants who survive S, by representation.

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

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

SECTION 19. DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL APPOINTMENT TO TAKER IN DEFAULT. Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the power holder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment remains entitled to a full share of unappointed property.

Comment

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

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

SECTION 20. APPOINTMENT TO TAKER IN DEFAULT. If a power holder

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

Comment

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

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

Usually it makes no difference whether the appointee takes as appointee or as taker in default. The principal difference arises in jurisdictions that follow the rule that the estate creditors of the holder of a general testamentary power that was conferred on the holder by another have no claim on the appointive property unless the holder has exercised the power. Although this act does not follow that rule regarding creditor's rights (see Section 30), some jurisdictions do.

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

SECTION 21. POWER HOLDER'S AUTHORITY TO REVOKE OR AMEND EXERCISE. A power holder may revoke or amend an exercise of a power of appointment only to the extent that:

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

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

Comment

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

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

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

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

SECTION 22. AUTHORITY TO RELEASE. A power holder may release a power of appointment, in whole or in part, except to the extent that the terms of the instrument creating the power provide that the power is not releasable.

Comment

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

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

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

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

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

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

SECTION 23. METHOD OF RELEASE. A power holder of a releasable power of appointment may release the power in whole or in part:

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

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

Comment

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

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

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

SECTION 24. REVOCATION OR AMENDMENT OF RELEASE. A power holder may revoke or amend a release of a power of appointment only to the extent that:

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

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

Comment

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

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

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

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

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

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

Comment

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

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

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

Disclaimer statutes customarily specify the methods for filing a disclaimer. UDPIA § 12 provides that the statutory methods must be followed. In the absence of such a requirement,

statutory formalities for making a disclaimer of a power are not construed as exclusive, and any manifestation of the power holder's intent not to accept the power may also suffice.

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

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

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

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

SECTION 26. POWER TO CONTRACT: PRESENTLY EXERCISABLE POWER OF APPOINTMENT. A power holder of a presently exercisable power of appointment may contract to make, or not to make, an appointment only if the contract does not confer a benefit on an impermissible appointee.

Comment

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

The contract may not confer a benefit on an impermissible appointee. Recall that a general power presently exercisable in favor of the power holder or the power holder's estate has no impermissible appointees. See Section 12(a). In contrast, a presently exercisable nongeneral power, or a general power presently exercisable only in favor of one or more of the creditors of the power holder or the power holder's estate, does have impermissible appointees. See Section 12(b)-(c).

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

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

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

SECTION 27. POWER TO CONTRACT: POWER OF APPOINTMENT NOT PRESENTLY EXERCISABLE. A power holder of a power of appointment that is not a presently exercisable power may contract to make, or not to make, an appointment only if:

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

(2) the holder:

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

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

Comment

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

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

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

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

SECTION 28. REMEDY FOR BREACH OF CONTRACT TO APPOINT OR NOT TO APPOINT. The remedy for a power holder's breach of an enforceable contract to appoint or not to appoint is limited to damages payable out of the appointive property or, if appropriate, specific performance of the contract.

Comment

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

SECTION 29. CREDITOR'S CLAIM: GENERAL POWER CREATED BY POWER HOLDER.

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

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

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

Comment

Subsection (a) states the basic rule of this Section: If an individual retains a general power of appointment over the property the individual owned, public policy does not allow this formal change in the control of the property to put the property beyond the reach of the donor/power holder's creditors. Thus, appointive property subject to a general power of appointment created by the power holder is subject to a claim of—and is currently reachable

by—a creditor of the power holder or the power holder's estate to the extent that the power holder's property is insufficient to satisfy that claim. The application of this rule is not affected by the presence of a spendthrift provision (see Restatement Third of Property: Wills and Other Donative Transfers § 22.2, Comment a) nor by whether the claim arose before or after the creation of the power of appointment.

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

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

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

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

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

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

SECTION 30. CREDITOR'S CLAIM: GENERAL POWER NOT CREATED BY POWER HOLDER.

(a) In this section, "general power of appointment" does not include a postponed power of appointment.

(b) Appointive property subject to a presently exercisable general power of appointment

created by an individual other than the power holder is subject to a claim of a creditor of the holder or the holder's estate to the extent that the holder's property is insufficient to satisfy that claim.

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

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

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

Comment

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

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

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

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

SECTION 31. CREDITOR'S CLAIM: NONGENERAL POWER.

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

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

(c) If the gift in default of appointment is to the power holder or the holder's estate, a nongeneral power of appointment is treated for purposes of this [article] as a general power, and creditor rights in the appointive property are governed by Sections 29 and 30.

Comment

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

Subsection (b) addresses an important exception: the fraudulent transfer. A fraudulent transfer arises if the power holder formerly owned the appointive property covered by the nongeneral power and transferred the property in fraud of creditors, reserving the nongeneral

power. In such a case, the creditors can reach the appointive property under the rules relating to fraudulent transfers.

Subsection (c) also addresses an important exception, arising when the gift in default of appointment is to the power holder or the power holder's estate. In such a case, the power of appointment, though in form a nongeneral power, is in substance a general power, and the rights of the power holder's creditors are governed by Sections 29 and 30.

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

SECTION 32. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 33. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 34. REPEALS. The following are repealed: ….

SECTION 35. EFFECTIVE DATE. This [act] takes effect ....