

DRAFT
FOR DISCUSSION ONLY

POWERS OF APPOINTMENT ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FIRST YEAR
NASHVILLE, TENNESSEE
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POWERS OF APPOINTMENT ACT

With Prefatory Notes and Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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May 23, 2012

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POWERS OF APPOINTMENT ACT

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POWERS OF APPOINTMENT ACT

REPORTER'S GENERAL PREFATORY NOTE

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

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

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

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

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

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

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

1 **POWERS OF APPOINTMENT ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

Paragraphs (3) and (13) define the donor and the 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.

Paragraph (4) introduces 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 or more of the permissible appointees to the exclusion of the others. A nonexclusionary power is one in which the power holder cannot make an appointment that excludes any permissible appointee, or one or more designated permissible appointees, from a share of the appointive property. An instrument creating a power of appointment is construed as creating an exclusionary power unless the terms of the instrument manifest a contrary intent. See Section 203. And in fact, the typical power of appointment is exclusionary. For example, a power to appoint "to such of my descendants as the 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, an example of a nonexclusionary power would be a power "to appoint to all and every one of my children in such shares and proportions as the powerholder shall select." In this latter case, the 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 301 and 305. Only a power of appointment whose permissible appointees are "defined and limited" can be nonexclusionary. For elaboration of the well-accepted term of art "defined and limited," see Section 204 and the accompanying Comment.

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

An instrument creating a power of appointment is construed as creating a general power unless the terms of the instrument manifest a contrary intent. See Section 203. A power to revoke, amend, or withdraw is a general power of appointment if it is exercisable in favor of the 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 (6) defines the gift-in-default clause. In an instrument creating a power of appointment, the clause that identifies the taker in default is called the gift-in-default clause. A gift-in-default clause is not mandatory but is included in a well-drafted instrument.

Paragraphs (7) and (10) explain the distinction between impermissible and permissible appointees. The permissible appointees (known at common law as the "objects") of a power of appointment may be narrowly defined (for example, "to such of the 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 307.

Paragraph (8) defines the term "instrument" to include the terms of an oral trust. Some jurisdictions authorize oral trusts, as does the Uniform Trust Code. See Uniform Trust Code § 407.

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

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

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

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

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

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

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

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

41 On the authority of the holder of a power of appointment to exercise the power by
42 creating a new power of appointment over the appointive property, see Section 305. If a power
43 holder exercises a power by creating another power, the holder of the first power is the donor of
44 the second power, and the holder of the second power is the appointee of the first power.
45

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

1
2 A power of appointment is presently exercisable if it is exercisable at the time in
3 question. Typically, a presently exercisable power of appointment is exercisable at the time in
4 question during the power holder's life and also at the power holder's death, e.g., by the power
5 holder's will. Thus, a power of appointment that is exercisable "by deed or will" is a presently
6 exercisable power. To take another example, a power of appointment exercisable by the power
7 holder's last unrevoked instrument in writing is a presently exercisable power, because the power
8 holder can make a present exercise irrevocable by explicitly so providing in the instrument
9 exercising the power. See Restatement Third of Property: Wills and Other Donative Transfers §
10 17.4, Comment a.

11
12 A power of appointment is presently exercisable even though, at the time in question, the
13 power holder can only appoint an *interest* that is revocable or subject to a condition. For
14 example, suppose that a trust directs the trustee to pay the income to the power holder for life,
15 then to distribute the principal by representation to the power holder's surviving descendants.
16 The trust further provides that, if the power holder leaves no surviving descendants, the principal
17 is to be distributed "to such individuals as the power holder shall appoint." The power holder has
18 a presently exercisable power of appointment, but the appointive property is a remainder interest
19 that is conditioned on the power holder leaving no surviving descendants.

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

26
27 A power is testamentary if it is not exercisable during the power holder's life but only in
28 the power holder's will or in a nontestamentary instrument that is functionally similar to the
29 power holder's will, such as the power holder's revocable trust that remains revocable until the
30 power holder's death. On the ability of a power holder to exercise a testamentary power of
31 appointment in such a revocable trust, see Section 304 and the accompanying Comment. See also
32 Restatement Third of Property: Wills and Other Donative Transfers § 19.9, Comment b.

33
34 Paragraph (16) defines a taker in default of appointment. A taker in default of
35 appointment (often called the "taker in default") has a property interest that can be transferred to
36 another. If a taker in default transfers the interest to another, the transferee becomes a taker in
37 default.

38
39 Paragraph (17) defines the "terms of an instrument" as the manifestation of the intent of
40 the maker of the instrument regarding the instrument's provisions as expressed in the instrument
41 or as may be established by other evidence that would be admissible in a judicial proceeding.
42 The maker of an instrument creating a power of appointment is the donor. The maker of an
43 instrument exercising a power of appointment is the power holder. This definition is a slightly
44 modified version of the definition of "terms of a trust" in Uniform Trust Code § 103(18).

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

4
5 **SECTION 103. GOVERNING LAW.** Unless the terms of the instrument creating a
6 power of appointment manifest a contrary intent:

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

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

11 **Comment**

12
13 This Section provides default rules for determining the law governing the creation and
14 exercise of, and related matters concerning, a power of appointment. Unless the terms of the
15 instrument creating the power provide otherwise, the actions of the donor (the creation,
16 revocation, or amendment of the power) are governed by the law of the donor's domicile at the
17 relevant time, and actions of the power holder (the exercise, revocation or amendment of
18 exercise, release, or disclaimer of the power) are governed by the law of the power holder's
19 domicile at the relevant time.

20
21 See Restatement Third of Property: Wills and Other Donative Transfers § 19.1, Comment
22 e; Restatement Second of Conflict of Laws § 275, Comment c.

23
24 **SECTION 104. SUPPLEMENTATION BY COMMON LAW AND PRINCIPLES**
25 **OF EQUITY.** The common law of powers of appointment and principles of equity supplement
26 this [act], except to the extent modified by this [act] or other law of this state other than this [act].

27 **Comment**

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

36
37 The statutory text of the act is also supplemented by these Comments, which, like the
38 Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v.*

1 *Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform
2 Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993)
3 (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, Statutory
4 Construction § 52.05 (6th ed. 2000); Jack Davies, Legislative Law and Process in a Nutshell §
5 55-4 (2d ed. 1986).

6
7 The text of and Comment to this Section are based on Uniform Trust Code § 106 and its
8 accompanying Comment.

9
10 **[ARTICLE] 2**

11 **CREATION, REVOCATION, AND AMENDMENT OF POWER OF APPOINTMENT**

12 **SECTION 201. CREATION OF POWER OF APPOINTMENT.**

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

14 (1) the instrument creating the power:

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

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

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

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

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

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

26 **Comment**

27
28 An instrument can only create a power of appointment if the instrument itself is valid.
29 Thus, for example, a *will* creating a power of appointment must be valid under the law—
30 including choice of law—applicable to wills. An *inter vivos trust* creating a power of
31 appointment must be valid under the law—including choice of law—applicable to inter vivos
32 trusts. In part, this requirement of validity means that the instrument must be properly executed

1 to the extent that other law imposes requirements of execution. In addition, the creator of the
2 instrument must have the capacity to execute the instrument and be free from undue influence
3 and other wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and
4 Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue
5 influence and other wrongdoing, see, e.g., Restatement Third of Property §§ 8.3 (Undue
6 Influence, Duress, or Fraud). The ability of an agent or guardian to make a power of appointment
7 on behalf of a principal or ward is determined by other law, such as the Uniform Power of
8 Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

9
10 In addition to being valid, an instrument creating a power of appointment must transfer the
11 appointive property. The creation of a power of appointment requires a transfer. See Restatement
12 Third of Property: Wills and Other Donative Transfers § 18.1 (“A power of appointment is created
13 by a transfer that manifests an intent to create a power of appointment.”). The one exception to this
14 rule is stated in subsection (b): by necessity, the requirement of a transfer does not apply to the
15 creation of a power of appointment by the exercise of a power of appointment. On the ability of a
16 power holder to exercise the power by creating a new power of appointment, see Section 305.

17
18 In addition to the aforementioned requirements, an instrument creating a power of
19 appointment must manifest the donor’s intent to create in one or more power holders a power of
20 appointment over appointive property. This manifestation of intent does not require the use of
21 particular words or phrases, but careful drafting should leave no doubt about the transferor’s intent.

22
23 Sometimes the instrument is poorly drafted, raising the question of whether the donor
24 intended to create a power of appointment. In such a case, determining the donor’s intent is a
25 process of construction. On construction generally, see Chapters 10, 11, and 12 of the
26 Restatement Third of Property: Wills and Other Donative Transfers. See also, more specifically,
27 Restatement Third of Property: Wills and Other Donative Transfers § 18.1, Comments b-g,
28 containing many illustrations of language ambiguous about whether a power of appointment was
29 intended and, for each illustration, offering guidance about how to construe the language.

30
31 The creation of a power of appointment requires that there be a donor, a power holder
32 (who may be the same as the donor), and appointive property. There must also be one or more
33 permissible appointees, though these need not be restricted; a power holder can be authorized to
34 appoint to anyone. A donor is not required to designate a taker in default of appointment,
35 although a well-drafted instrument will specify one or more takers in default.

36
37 Subsection (c) states the well-accepted rule that a power of appointment cannot be
38 created in a power holder who is deceased. If the power holder dies before the effective date of
39 an instrument purporting to confer a power of appointment, the power is not created, and an
40 attempted exercise of the power is ineffective. (For example, the effective date of a power of
41 appointment created in a donor’s will is the donor’s death, not when the donor executes the will.
42 The effective date of a power of appointment created in a donor’s inter vivos trust is the date the
43 trust is established, even if the trust is revocable. See Restatement Third of Property: Wills and
44 Other Donative Transfers § 19.11, Comments b and c.) If the power holder is deceased on the
45 relevant date, the power of appointment is not created, and an attempt by the power holder to
46 exercise the power is ineffective.

47
48 Nor is a power of appointment created if all the possible permissible appointees of the

1 power are deceased when the transfer that is intended to create the power becomes legally
2 operative. If all the possible permissible appointees of a power die after the power is created and
3 before the power holder exercises the power, the power terminates.
4

5 A power of appointment is not created if the permissible appointees are so indefinite that it
6 is impossible to identify any person to whom the power holder can appoint. If the description of
7 the permissible appointees is such that one or more persons are identifiable, but it is not possible to
8 determine whether other persons are within the description, the power is validly created, but an
9 appointment can only be made to persons who can be identified as within the description of the
10 permissible appointees.
11

12 Subsection (d) explains that a power of appointment can be conferred on an unborn or
13 unascertained power holder, subject to any applicable rule against perpetuities. This is a postponed
14 power. The power arises on the power holder's birth or ascertainment. The language creating the
15 power as well as other factors such as the power holder's capacity under applicable law determine
16 whether the power is then presently exercisable, postponed, or testamentary.
17

18 The rules of this Section are consistent with, and this Comment draws on, Restatement
19 Third of Property: Wills and Other Donative Transfers §§ 18.1 and 19.9 and the accompanying
20 Commentary.
21

22 **SECTION 202. NONTRANSFERABILITY.** A power holder may not transfer a power
23 of appointment. If a power holder dies without exercising or releasing the power, the power lapses.

24 **Comment**

25

26 A power of appointment is nontransferable. The power holder may not transfer the power
27 to another person. (On the ability of the power holder to exercise the power by conferring on a
28 permissible appointee a new power of appointment over the appointive property, see Section
29 305.) If the power holder dies without exercising or releasing the power, the power lapses. The
30 power does not pass through the power holder's estate to the power holder's successors in
31 interest.
32

33 The ability of an agent or guardian to make, revoke, exercise, or revoke the exercise of a
34 power of appointment on behalf of a principal or ward is determined by other law, such as the
35 Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.
36

37 The rule of this Section is fundamentally consistent with, and this Comment draws on,
38 the Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment b.
39

40 **SECTION 203. PRESUMPTION OF UNLIMITED AUTHORITY; EXCEPTION.**

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

43 (1) the power is:

1 (A) presently exercisable;

2
3 (B) exclusionary; and

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

5 (2) the power is nongeneral if:

6 (A) the power holder is the donor's child;

7 (B) the power is exercisable only at the holder's death; and

8 (C) the permissible appointees of the power are described as the donor's

9 "descendants" or "issue."

10 **Comment**

11
12 In determining which type of power of appointment is created, the general principle of
13 construction, articulated in paragraph (1), is that a power falls into the category giving the holder
14 the maximum discretionary authority except to the extent that the terms of the instrument creating
15 the power restrict the holder's authority. Maximum discretion confers on the power holder the
16 flexibility to alter the donor's disposition in response to changing conditions.

17
18 In accordance with this presumption of unlimited authority, a power is general unless the
19 terms of the creating instrument specify that the power holder cannot exercise the power in favor
20 of the power holder, the power holder's estate, or the creditors of either. A power is presently
21 exercisable unless the terms of the creating instrument specify that the power can only be exercised
22 at some later time or in some document such as a will that only takes effect at some later time. A
23 power is exclusionary unless the terms of the creating instrument specify that a permissible
24 appointee must receive a certain amount or portion of the appointive assets if the power is
25 exercised.

26
27 This general principle of construction applies, unless the terms of the instrument creating
28 the power of appointment provide otherwise. A well-drafted instrument intended to create a
29 nongeneral or testamentary or nonexclusionary power will use clear language to achieve the
30 desired objective. Not all instruments are well-drafted, however. A court may have to construe the
31 terms of the instrument to discern the donor's intent. For principles of construction applicable to
32 the creation of a power of appointment, see Restatement Third of Property: Wills and Other
33 Donative Transfers Chapters 17 and 18, and the accompanying Commentary, containing some
34 examples.

35
36 Paragraph (2) is designed to remedy a recurring drafting mistake. Scriveners sometimes
37 forget that X's "descendants" include X's children. A testamentary power of appointment created
38 in the donor's child to appoint among the donor's "descendants" or "issue" is usually intended to
39 be a nongeneral power.

1 Typically, permissible appointees who are defined and limited are described in class-gift terms: a
2 single-generation class such as “children,” “grandchildren,” “brothers and sisters,” or “nieces and
3 nephews,” or a multiple-generation class such as “issue” or “descendants” or “heirs.” Permissible
4 appointees need not be described in class-gift terms to be defined and limited, however. The
5 permissible appointees are also defined and limited if one or more permissible appointees are
6 designated by name or otherwise individually identified.
7

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

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

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

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

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

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

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

4 **Comment**

5

6 The donor of a power of appointment has the authority to revoke or amend the power

7 only to the extent that the instrument creating the power is revocable by the donor or the donor

8 reserves a power of revocation or amendment in the instrument creating the power.

9

10 For example, the donor's power to revoke or amend a will or a revocable inter vivos trust

11 carries with it the authority to revoke or amend any power of appointment created in the will or

12 trust. However, to the extent that an exercise of the power removes appointive property from a

13 trust, the donor's authority to revoke or amend the power is eliminated, unless the donor

14 expressly reserved authority to revoke or amend any transfer from the trust after the transfer is

15 completed.

16

17 If an irrevocable inter vivos trust confers a presently exercisable power on someone who

18 is not the settlor of the trust (the settlor being the donor of the power), the donor lacks authority

19 to revoke or amend the power, except to the extent that the donor reserved the authority to do so.

20 If the donor did reserve the authority to revoke or amend the power, that authority is only

21 effective until the power holder irrevocably exercises the power.

22

23 If the same individual is both the donor and the holder of a power of appointment, the

24 donor in his or her capacity as power holder can indirectly revoke or amend the power by a

25 partial or total release of the power. See Section 402. After the power has been irrevocably

26 exercised, however, the donor as donor is in no different position in regard to revoking or

27 amending the exercise of the power than the donor would be if the donor and power holder were

28 different individuals.

29

30 The ability of an agent or guardian to revoke or amend a power of appointment on behalf

31 of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or

32 the Uniform Guardianship and Protective Proceedings Act.

33

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

35 Third of Property: Wills and Other Donative Transfers § 18.2 and the accompanying

36 Commentary.

37

38 **[ARTICLE] 3**

39 **EXERCISE OF POWER OF APPOINTMENT**

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

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

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

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

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

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

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

7 **Comment**

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

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

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

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

40 Not recommended is a blanket-exercise clause, which purports to exercise "any power of

1 appointment” the power holder may have, using language such as the following: “I hereby
2 exercise any power of appointment I may have as follows: I appoint [fill in details of
3 appointment].” Although a blanket-exercise clause does manifest an intent to exercise any power
4 of appointment the power holder may have, such a clause raises the often-litigated question of
5 whether it satisfies the requirement of specific reference imposed by the donor in the instrument
6 creating the power.
7

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

16 This act aims to eliminate any significance attached to the use of a blending clause. A
17 blending clause has traditionally been regarded as significant in the application of the doctrines
18 of “selective allocation” and “capture.” This act eliminates the significance of such a clause
19 under those doctrines. See Sections 308 (selective allocation) and 309 (capture). The use of a
20 blending clause is more likely to be the product of the forms used by the power holder’s lawyer
21 than a deliberate decision by the power holder to facilitate the application of the doctrines of
22 selective allocation or capture.
23

24 If the power holder decides not to exercise a specific power or any power that the power
25 holder might have, it is important to consider whether to depend on mere silence to produce a
26 nonexercise or to take definitive action to assure a nonexercise. Definitive action can take the
27 form of a release during life (see Section 402) or a nonexercise clause in the power holder’s will
28 or other relevant instrument. A nonexercise clause can take the form of a specific-nonexercise
29 clause (for example, “I hereby do not exercise the power of appointment conferred on me by my
30 father’s trust”) or the form of a blanket-nonexercise clause (for example, “I hereby do not
31 exercise any power of appointment I may have”).
32

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

42 Paragraph (3) provides that the exercise is only valid to the extent that the exercise is
43 permissible. On permissible and impermissible exercise, see Sections 305 to 307.
44

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

1 **SECTION 302. INTENT TO EXERCISE: DETERMINING INTENT FROM**
2 **RESIDUARY CLAUSE.**

3 (a) In this section:

4 (1) “residuary clause” does not include a residuary clause containing a blanket-
5 exercise clause or a specific-exercise clause; and

6 (2) “will” includes a codicil and a testamentary instrument that merely revokes or
7 revises another will.

8 (b) A residuary clause in a power holder’s will, or a comparable clause in the holder’s
9 revocable trust, manifests the holder’s intent to exercise the power only if:

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

12 (2) the power is a general power;

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

14 (4) the holder did not release the power.

15 **Comment**

16
17 This Section addresses a question arising under Section 301(2)(A)—namely, whether the
18 power holder’s intent to exercise a power of appointment is manifested by a garden-variety
19 residuary clause, such as “All the residue of my estate, I devise to ...” or “All of my estate, I
20 devise to” This Section does not address the effect of a residuary clause that contains a
21 blanket exercise or a specific exercise of a power of appointment. On blanket-exercise and
22 specific-exercise clauses, see the Comment to Section 301.

23
24 The rule of this Section is that a garden-variety residuary clause manifests an intent to
25 exercise a power of appointment only if (1) the terms of the instrument containing the residuary
26 clause do not manifest a contrary intent, (2) the power in question is a general power, (3) there is
27 no gift-in-default clause or it is ineffective, and (4) the power holder did not release the power.

28 In a well-planned estate, a power of appointment, whether general or nongeneral, is
29 accompanied by a gift in default. In a less carefully planned estate, on the other hand, there may
30 be no gift-in-default clause. Or, if there is such a clause, the clause may be wholly or partly
31 ineffective. To the extent that the donor did not provide for takers in default or the gift-in-default
32 clause is ineffective, it is more efficient to attribute to the power holder the intent to exercise a
33 general power in favor of the power holder’s residuary devisees. The principal benefit of

1 attributing to the power holder the intent to exercise a general power is that it allows the property
2 to pass under the power holder's will instead of as part of the donor's estate. Because the donor's
3 death would normally have occurred before the power holder died, some of the donor's
4 successors might themselves have predeceased the power holder. It is more efficient to avoid
5 tracing the interest through multiple estates to determine who are the present successors.
6 Moreover, to the extent that the donor did not provide for takers in default, it is also more in
7 accord with the donor's probable intent for the power holder's residuary clause to be treated as
8 exercising the power.

9
10 A gift-in-default clause can be ineffective or partially ineffective for a variety of reasons.
11 The clause might cover only part of the appointive property. The clause might be invalid because
12 it violates a rule against perpetuities or some other rule, or it might be ineffective because it
13 conditioned the interest of the takers in default on an uncertain event that did not happen, the
14 most common of which is an unsatisfied condition of survival.

15
16 Under no circumstance does a residuary clause manifest an intent to exercise a
17 *nongeneral* power. A residuary clause disposes of the power holder's own property, and a
18 *nongeneral* power is not an ownership-equivalent power.

19
20 The rule of this Section is consistent with, and this Comment draws on, Restatement
21 Third of Property: Wills and Other Donative Transfers § 19.4 and the accompanying
22 Commentary.

23
24 **SECTION 303. INTENT TO EXERCISE: AFTER-ACQUIRED POWER.** Unless
25 the terms of the instrument exercising a power of appointment manifest a contrary intent:

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

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

30 **Comment**

31
32 Nothing in the law prevents a power holder from exercising a power of appointment in an
33 instrument executed before acquiring the power. The only question is one of construction:
34 whether the power holder intended to exercise the after-acquired power. (The term "after-
35 acquired power" in this Section refers to a power acquired on or before the power holder's death.
36 A power of appointment cannot be conferred on a deceased power holder. See Section 201.)

37
38 If the instrument of exercise specifically identifies the power that the holder is exercising,
39 the exercise clause unambiguously expresses an intent to exercise that power, whether the power
40 is an after-acquired power or not. A blanket-exercise clause, however, raises a question of
41 construction.

Paragraph (1) states the general rule of this Section. 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.

Paragraph (2) states an exception to the general rule of paragraph (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 black-letter of this Section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.6 and the accompanying Commentary.

SECTION 304. SUBSTANTIAL COMPLIANCE WITH FORMAL DONOR-IMPOSED REQUIREMENT. A power holder’s substantial compliance with a formal requirement of an appointment imposed by the donor, including a requirement that the instrument of exercise make reference or specific reference to the power of appointment, is sufficient if:

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

Comment

This Section adopts a substantial-compliance rule for donor-imposed formal requirements. This Section only applies to formal requirements imposed *by the donor*. It does not

1 apply to formal requirements imposed by law, such as the requirement that a will must be signed
2 and attested. The Section also does not apply to *substantive* requirements imposed by the donor,
3 for example a requirement that the power holder attain a certain age before the power is
4 exercisable.

5
6 Whenever the donor imposes formal requirements with respect to the instrument of
7 appointment that exceed the requirements imposed by law, the donor's purpose in imposing the
8 additional requirements is relevant to whether the power holder's attempted exercise satisfies the
9 rule of this Section. To the extent that the power holder's failure to comply with the additional
10 requirements will not impair the accomplishment of a material purpose of the donor, the power
11 holder's attempted appointment in a manner that substantially complies with a donor-imposed
12 requirement does not fail for lack of compliance with that requirement.

13
14 For example, a donor's formal requirement that the power of appointment is exercisable
15 "by will" may be satisfied by the power holder's attempted exercise in a nontestamentary
16 instrument that is functionally similar to a will, such as the power holder's revocable trust that
17 remains revocable until the power holder's death. See Restatement Third of Property: Wills and
18 Other Donative Transfers § 19.9, Comment b ("Because a revocable trust operates in substance
19 as a will, a power of appointment exercisable "by will" can be exercised in a revocable-trust
20 document, as long as the revocable trust remained revocable at the [power holder]'s death.").

21
22 A formal requirement commonly imposed by the donor is that, in order to be effective,
23 the power holder's attempted exercise must make specific reference to the power. Specific-
24 reference clauses were a pre-1942 invention designed to prevent an inadvertent exercise of a
25 general power. The federal estate tax law then provided that the value of property subject to a
26 general power was included in the power holder's gross estate if the general power was
27 exercised. The idea of requiring specific reference was designed to thwart unintended exercise
28 and, hence, unnecessary estate taxation.

29
30 The federal estate tax law has changed. An inadvertent exercise of a general power
31 created after October 21, 1942, no longer has adverse estate tax consequences.

32
33 Nevertheless, donors continue to impose specific-reference requirements. Because the
34 original purpose of the specific-reference requirement was to prevent an inadvertent exercise of
35 the power, it seems reasonable to presume that that this is still the donor's purpose in doing so.
36 Consequently, a specific-reference requirement still overrides any applicable state law that
37 presumes that an ordinary residuary clause was intended to exercise a general power. Put
38 differently: An ordinary residuary clause may manifest the power holder's *intent to exercise*
39 (under Section 301(2)(A) but does not satisfy the *requirements of exercise* if the donor imposed a
40 specific-reference requirement (this Section and Section 301(2)(B)).

41
42 A more difficult question is whether a *blanket-exercise clause* satisfies a specific-
43 reference requirement. If it could be shown that the power holder had knowledge of and intended
44 to exercise the power, the blanket-exercise clause would be sufficient to exercise the power,
45 unless it could be shown that the donor's intent was not merely to prevent an inadvertent exercise
46 of the power but instead that the donor had a material purpose in insisting on the specific-
47 reference requirement. In such a case, the possibility of applying Uniform Probate Code § 2-805
48 or Restatement Third of Property: Wills and Other Donative Transfers § 12.1 to reform the

1 power holder's attempted appointment to insert the required specific reference should be
2 explored.

3
4 This rule of this Section is consistent with, but an elaboration of, Uniform Probate Code §
5 2-704: "If a governing instrument creating a power of appointment expressly requires that the
6 power be exercised by a reference, an express reference, or a specific reference, to the power or
7 its source, it is presumed that the donor's intent, in requiring that the [power holder] exercise the
8 power by making reference to the particular power or to the creating instrument, was to prevent
9 an inadvertent exercise of the power."

10
11 The rule of this Section is consistent with, and this Comment draws on, Restatement
12 Third of Property: Wills and Other Donative Transfers § 19.10 and the accompanying
13 Commentary.

14 15 **SECTION 305. PERMISSIBLE APPOINTMENT.**

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

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

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

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

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

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

29 **Comment**

30
31 When a donor creates a general power under which an appointment can be made outright
32 to the power holder or the power holder's estate, the necessary implication is that the power
33 holder may accomplish by an appointment to others whatever the power holder could accomplish
34 by first appointing to himself and then disposing of the property, including a disposition in trust

1 or in the creation of a further power of appointment.

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

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

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

22
23 As stated in subsection (b), however, a general power to appoint only to the power
24 holder’s creditors or the creditors of the power holder’s estate permits an appointment only to
25 those creditors.

26
27 Except to the extent that the terms of the instrument creating the power manifest a
28 contrary intent, the holder of a nongeneral power has the same breadth of discretion in
29 appointment to permissible appointees that the power holder has in the disposition of the power
30 holder’s owned property to permissible appointees of the power.

31
32 Thus, unless the terms of the instrument creating the power manifest a contrary intent, the
33 holder of a nongeneral power has the authority to exercise the power by an appointment in trust.
34 In order to manifest a contrary intent, the terms of the instrument creating the power must
35 specifically prohibit an appointment in trust. So, for example, a power to appoint “to” the power
36 holder’s descendants includes the authority to appoint in trust for the benefit of one or more of
37 those descendants.

38
39 Similarly, unless the terms of the instrument creating the power manifest a contrary
40 intent, the holder of a nongeneral power has the authority to exercise the power by creating a
41 general or nongeneral power in a permissible appointee. The rationale for this rule is a
42 straightforward application of the maxim that the greater includes the lesser. A holder of a
43 nongeneral power may appoint outright to a permissible appointee, so the holder may instead
44 create in a permissible appointee a general power or a nongeneral power. If the holder does the
45 latter—creates a new nongeneral power in a permissible appointee—the permissible appointees
46 of the second power may be broader than the permissible appointees of the first power. For
47 example, the holder of a nongeneral power to appoint among the donor’s “descendants” may
48 exercise the power by creating a nongeneral power in the donor’s child to appoint to anyone in

1 the world except the donor's child, the estate of the donor's child, or the creditors of either. Of
2 course, these are default rules that apply unless the donor manifests a contrary intent. But in
3 order to manifest a contrary intent, the terms of the instrument creating the power must prohibit
4 the creation of new powers. Language merely conferring the power of appointment on the power
5 holder does not suffice.

6
7 And finally, unless the terms of the donor's instrument creating the power manifest a
8 contrary intent, the holder of a nongeneral power may exercise the power by creating a new
9 nongeneral power in *any* individual to appoint to some or all of the permissible appointees of the
10 original nongeneral power. In order to manifest a contrary intent, the terms of the instrument
11 creating the power must prohibit the creation of such powers. Language merely conferring the
12 power of appointment on the power holder does not suffice.

13
14 With one exception, the rules of this Section are consistent with, and this Comment draws
15 on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.13 and 19.14 and
16 the accompanying Commentary. The exception is that the Restatement does not allow a holder of
17 a nongeneral power to create a new nongeneral power in a permissible appointee if the
18 permissible appointees of the new power are broader than the permissible appointees of the
19 original power. See Restatement Third of Property: Wills and Other Donative Transfers § 19.14
20 and id., Comment g(3).

21
22 **SECTION 306. APPOINTMENT TO DECEASED APPOINTEE OR**
23 **PERMISSIBLE APPOINTEE'S DESCENDANT.**

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

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

30 **Comment**

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

34
35 However, an antilapse statute may apply to trigger the substitution of the deceased
36 appointee's descendants (or other substitute takers), unless the terms of the instrument creating
37 or exercising the power of appointment manifest a contrary intent. Antilapse statutes typically
38 provide, as a default rule of construction, that devises to certain relatives who predecease the
39 testator pass instead to specified substitute takers, usually the descendants of the predeceased

1 devisee who survive the testator. See generally Restatement Third of Property: Wills and Other
2 Donative Transfers § 5.5.

3
4 When an antilapse statute does not expressly address whether it applies to the exercise of
5 a power of appointment, a court should construe it to apply to such an exercise. See Restatement
6 Third of Property: Wills and Other Donative Transfers § 5.5, Comment *l*. The rationale
7 underlying antilapse statutes, that of presumptively attributing to the testator the intent to
8 substitute the descendants of a predeceased devisee, applies equally to the exercise of a power of
9 appointment.

10
11 The substitute takers provided by an antilapse statute (typically the descendants of the
12 deceased appointee) are treated as permissible appointees even if the description of permissible
13 appointees provided by the donor does not expressly cover them. This rule corresponds to the
14 rule applying antilapse statutes to class gifts. Antilapse statutes substitute the descendants of
15 deceased class members, even if the class member's descendants are not members of the class.
16 See Restatement Third of Property: Wills and Other Donative Transfers § 19.12, Comment *e*.

17
18 The donor of a power, general or nongeneral, can prohibit the application of an antilapse
19 statute to the power holder's appointment and, in the case of a nongeneral power, can prohibit an
20 appointment to the descendants of a deceased permissible appointee, but must manifest an intent
21 to do so in the terms of the instrument creating the power of appointment. A traditional gift-in-
22 default clause does not manifest a contrary intent in either case, unless the clause provides that it
23 is to take effect instead of the descendants of a deceased permissible appointee.

24
25 Subsection (b) provides that the descendants of a deceased permissible appointee are
26 treated as permissible appointees of a nongeneral power of appointment. This rule is a logical
27 extension of the application of antilapse statutes to appointments. If an antilapse statute can
28 substitute the descendants of a deceased appointee, the power holder should be allowed to
29 appoint in favor of, or to create a new power of appointment in, one or more descendants of a
30 deceased permissible appointee.

31
32 The rule of this Section is consistent with, and this Comment draws on, Restatement
33 Third of Property: Wills and Other Donative Transfers § 19.12 and the accompanying
34 Commentary.

35 36 **SECTION 307. IMPERMISSIBLE APPOINTMENT.**

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

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

41 **Comment**

42
43 The rules of this Section apply only to the extent the power holder attempts to confer a

1 beneficial interest in the appointive property on an impermissible appointee.

2
3 The rules of this Section do not apply to an appointment of a *nonbeneficial* interest—for
4 example, the appointment of legal title to a trustee—if the beneficial interest is held by
5 permissible appointees.

6
7 Nor do the rules of this Section prohibit beneficial appointment to an impermissible
8 appointee if the intent to benefit the impermissible appointee is not the power holder's but rather
9 is the intent of a permissible appointee in whose favor the holder has decided to exercise the
10 power. In other words, if the power holder makes a decision to exercise the power in favor of a
11 permissible appointee, the permissible appointee may request the power holder to transfer the
12 appointive assets directly to an impermissible appointee. The appointment directly to the
13 impermissible appointee in this situation is effective, being treated for all purposes as an
14 appointment first to the permissible appointee followed by a transfer by the permissible
15 appointee to the impermissible appointee.

16
17 The donor of a power of appointment sets the range of permissible appointees by
18 designating the permissible appointees of the power. The rule of this Section is concerned with
19 attempts by the power holder to exceed that authority. Such an attempt is called a fraud on the
20 power and is ineffective. The term "fraud on the power" is a well-accepted term of art. See
21 Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16.

22
23 Among the most common devices employed to commit a fraud on the power are: an
24 appointment conditioned on the appointee conferring a benefit on an impermissible appointee; an
25 appointment subject to a charge in favor of an impermissible appointee; an appointment upon a
26 trust for the benefit of an impermissible appointee; an appointment in consideration of a benefit
27 to an impermissible appointee; and an appointment primarily for the benefit of the permissible
28 appointee's creditor if the creditor is an impermissible appointee. Each of these appointments is
29 impermissible and ineffective.

30
31 The rules of this Section are consistent with, and this Comment draws on, Restatement
32 Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16 and the
33 accompanying Commentary.

34
35 **SECTION 308. SELECTIVE ALLOCATION DOCTRINE.** If a power holder
36 exercises a power of appointment in a disposition that also disposes of owned property, the
37 owned and appointive property must be allocated in the permissible manner that best carries out
38 the holder's intent.

39 **Comment**

40
41 The rule of this Section is commonly known as the doctrine of selective allocation. This
42 doctrine applies if the power holder uses the same instrument to exercise a power of appointment
43 and to dispose of property that the power holder owns. For purposes of this Section, the power
44 holder's will, any codicils to the power holder's will, and any revocable trust created by the

1 power holder that did not become irrevocable before the power holder's death are treated as the
2 same instrument.

3
4 The doctrine of selective allocation provides that the owned and appointive property shall
5 be allocated in the permissible manner that best carries out the power holder's intent.

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

10
11 The result of applying selective allocation is always one that the power holder could have
12 provided for in specific language, and one that the power holder most probably would have
13 provided for had he or she been aware of the difficulties inherent in the dispositive scheme. By
14 the rule of selective allocation, courts undertake to prevent the dispositive plan from being
15 frustrated by the ineptness of the power holder or the power holder's lawyer. For an early case
16 adopting selective allocation, see *Roe v. Tranmer*, 2 Wils. 75, 95 Eng. Rep. 694 (1757).

17
18 The rule of this Section is consistent with, and this Comment draws on, Restatement
19 Third of Property: Wills and Other Donative Transfers § 19.19 and the accompanying
20 Commentary, containing a full discussion of the doctrine of selective allocation.

21
22 On the distinction between "selective allocation" (a rule of construction based on the
23 assumed intent of the power holder) and the process sometimes known as "marshaling" (an
24 outgrowth of general equitable principles), see the Restatement Second of Property: Donative
25 Transfers, especially the Introductory Note to Chapter 22.

26
27 **SECTION 309. CAPTURE DOCTRINE: DISPOSITION OF INEFFECTIVELY**
28 **APPOINTED PROPERTY UNDER GENERAL POWER.** If a power holder of a general
29 power of appointment other than a power to revoke, amend, or withdraw property from a trust
30 makes an ineffective appointment:

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

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

35 **Comment**

36
37 The rule of this Section applies when the holder of a general power makes an ineffective
38 appointment. The rule of this Section does not apply when the holder of a general power fails to
39 exercise or releases the power. (On such fact-patterns, see instead Section 310.)

1
2 Nor does the rule of this Section apply to an ineffective exercise of a power of
3 revocation, amendment, or withdrawal—in each case, a power pertaining to a trust. To the extent
4 that the holder of one of these types of powers makes an ineffective appointment, the
5 ineffectively appointed property remains in the trust.
6

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

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

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

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

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

43 **SECTION 310. DISPOSITION OF UNAPPOINTED PROPERTY UNDER**
44 **RELEASED OR UNEXERCISED GENERAL POWER.** If a power holder releases or fails
45 to exercise a general power of appointment other than a power to revoke, amend, or withdraw

1 property from a trust:

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

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

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

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

9 **Comment**

10
11 The rules of this Section apply to unappointed property under a general power of
12 appointment. The rules do *not* apply to unappointed property under a power of revocation,
13 amendment, or withdrawal—powers pertaining to a trust. If the power holder releases or dies
14 without exercising a power of revocation or amendment, the power to revoke expires and, unless
15 someone else continues to have a power of revocation or amendment, the trust becomes
16 irrevocable and unamendable. If the power holder releases or dies without exercising a power to
17 withdraw principal of a trust, the principal that the power holder could have withdrawn, but did
18 not, remains part of the trust.

19 The rationale for the rules of this Section is as follows. The gift-in-default clause controls
20 the disposition of unappointed property to the extent that the clause is effective. To the extent
21 that the gift-in-default clause is nonexistent or ineffective, the disposition of the unappointed
22 property depends on whether the power holder merely failed to exercise the power or whether
23 the power holder released the power. If the power holder merely failed to exercise the power, the
24 unappointed property passes to the power holder or to the power holder's estate. The rationale is
25 the same as when the power holder makes an ineffective appointment. If, however, the power
26 holder released the power, the power holder has affirmatively chosen to reject the opportunity to
27 gain ownership of the property, hence the unappointed property passes under a reversionary
28 interest to the donor or to the donor's transferee or successor in interest.

29
30 These rules are illustrated by the following examples.

31
32 *Example 1.* D transfers property to T in trust, directing T to pay the income to S (D's son)
33 for life, with a general testamentary power in S to appoint the principal of the trust, and in default
34 of appointment the principal is to be distributed "to S's descendants who survive S, by
35 representation, and if none, to X charity." S dies leaving a will that does not exercise the power.
36 The principal passes under the gift-in-default clause to S's descendants who survive S, by
37 representation.

38
39 *Example 2.* Same facts as Example 1, except that D's gift-in-default clause covered only
40 half of the principal, and S died intestate. Half of the principal passes under the gift-in-default

1 clause. The other half of the principal passes to S's estate for distribution to S's intestate heirs.

2
3 *Example 3.* Same facts as Example 2, except that S released the power before dying
4 intestate. Half of the principal passes under the gift-in-default clause. The other half of the
5 principal passes to D or to D's transferee or successor in interest.
6

7 The rules of this Section are consistent with, and this Comment draws on, Restatement
8 Third of Property: Wills and Other Donative Transfers § 19.22 and the accompanying
9 Commentary.
10

11 **SECTION 311. DISPOSITION OF UNAPPOINTED PROPERTY UNDER**

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

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

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

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

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

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

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

22 **Comment**

23
24 To the extent that the holder of a nongeneral power releases or fails to exercise the
25 power, thus causing the power to lapse, the gift-in-default clause controls the disposition of the
26 unappointed property to the extent that the gift-in-default clause is effective.
27

28 To the extent that the gift-in-default clause is nonexistent or ineffective, the unappointed
29 property passes to the permissible appointees of the power (including those who are substituted
30 for permissible appointees under an antilapse statute), if the permissible appointees are "defined
31 and limited" (on the meaning of this term of art, see the Comment to Section 204) and the donor
32 has not manifested an intent that the permissible appointees shall receive the appointive property
33 only so far as the power holder elects to appoint it to them. This rule of construction is based on
34 the assumption that the donor intends the permissible appointees of the power to have the benefit
35 of the property. The donor focused on transmitting the appointive property to the permissible
36 appointees through an appointment, but if the power holder fails to carry out this particular
37 method of transfer, the donor's underlying intent to pass the appointive property to the defined

1 and limited class of permissible appointees should be carried out. Subparagraph (2)(A)
2 effectuates the donor's underlying intent by implying a gift in default of appointment to the
3 defined and limited class of permissible appointees.

4
5 If the defined and limited class of permissible appointees is a multigenerational class,
6 such as "descendants," "issue," "heirs," or "relatives," the default rule of construction is that they
7 take by representation. See Restatement Third of Property: Wills and Other Donative Transfers §
8 14.3, Comment b. If the defined and limited class is a single-generation class, the default rule of
9 construction is that the eligible class members take equally. See Restatement Third of Property:
10 Wills and Other Donative Transfers § 14.2.

11
12 No implied gift in default of appointment to the permissible appointees arises if the
13 permissible appointees are identified in such broad and inclusive terms that they are not defined
14 and limited. In such an event, the donor has no underlying intent to pass the appointive property
15 to such permissible appointees. Similarly, if the donor manifests an intent that the defined and
16 limited class of permissible appointees is to receive the appointive property only by appointment,
17 the donor's manifestation of intent eliminates any implied gift in default to the permissible
18 appointees. Subparagraph (2)(B) responds to these possibilities by providing for a reversionary
19 interest to the donor or the donor's transferee or successor in interest.

20
21 The rules are illustrated by the following examples.

22
23 *Example 1.* D died, leaving a will devising property to T in trust. T is directed to pay the
24 income to S (D's son) for life, and then to pay the principal "to such of S's descendants who
25 survive S as S may appoint by will." D's will contains no gift-in-default clause. S dies without
26 exercising the nongeneral power. The permissible appointees of the power constitute a defined
27 and limited class. Accordingly, the principal of the trust passes at S's death to S's descendants
28 who survive S, by representation.

29
30 *Example 2.* Same facts as Example 1, except that the permissible appointees of S's power
31 of appointment are "such one or more persons, other than S, S's estate, S's creditors, or creditors
32 of S's estate." The permissible appointees do not constitute a defined and limited class.
33 Accordingly, the principal of the trust passes, at S's death, under a reversionary interest to D or
34 D's transferee or successor in interest.

35
36 The rules of this Section are consistent with, and this Comment draws on, Restatement
37 Third of Property: Wills and Other Donative Transfers § 19.23 and the accompanying
38 Commentary.

39
40 **SECTION 312. DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL**
41 **APPOINTMENT TO TAKER IN DEFAULT.** Unless the terms of the instrument creating or
42 exercising a power of appointment manifest a contrary intent, if the power holder makes a valid
43 partial appointment to a taker in default of appointment, the taker in default of appointment may
44 share fully in unappointed property.

1 **Comment**

2
3 If the holder of a power of appointment makes a valid partial appointment to a taker in
4 default, leaving some property unappointed, there is a question about whether that taker-in-
5 default may also fully share in the unappointed property. In the first instance, the intent of the
6 *donor* controls. In the absence of any indication of the donor's intent, it is assumed that the donor
7 intends that the taker can take in both capacities. This rule presupposes that the donor
8 contemplated that the taker in default who is an appointee could receive more of the appointive
9 assets than a taker in default who is not an appointee. The donor can defeat this rule by
10 manifesting a contrary intent in the instrument creating the power of appointment, thereby
11 restricting the power holder's freedom to benefit an appointee who is also a taker in default in
12 both capacities. If the donor has not so manifested a contrary intent, the *power holder* is free to
13 exercise the power in favor of a taker in default who is a permissible appointee. Unless the power
14 holder manifests a contrary intent in the terms of the instrument exercising the power, it is
15 assumed that the power holder does not intend to affect in any way the disposition of any
16 unappointed property.

17
18 The rule of this Section is consistent with, and this Comment draws on, Restatement
19 Third of Property: Wills and Other Donative Transfers § 19.24 and the accompanying
20 Commentary.

21
22 **SECTION 313. APPOINTMENT TO TAKER IN DEFAULT.** If a power holder
23 makes an appointment to a taker in default of appointment and the appointee would have taken
24 the property under the gift-in-default clause had the property not been appointed, the power of
25 appointment is deemed not to have been exercised, and the appointee takes under the clause.

26 **Comment**

27
28 This Section articulates the rule that, to the extent that an appointee would have taken
29 appointed property as a taker in default, the appointee takes under the gift-in-default clause
30 rather than under the appointment.

31
32 Takers in default have future interests that may be defeated by an exercise of the power
33 of appointment. To whatever extent the power holder purports to appoint an interest already held
34 in default of appointment, the power holder does not exercise the power to alter the donor's
35 disposition but merely declares an intent not to alter it. To the extent, however, that the appointed
36 property *is different from* (e.g., is a lesser estate) or *exceeds the total of* the property the
37 appointee would receive as a taker in default, the property passes under the appointment.

38
39 Usually it makes no difference whether the appointee takes as appointee or as taker in
40 default. The principal difference arises in jurisdictions that follow the rule that the estate
41 creditors of the holder of a general testamentary power that was conferred on the holder by
42 another have no claim on the appointive property unless the holder has exercised the power.
43 Although this act does not follow that rule regarding creditors' rights (see Section 502), some
44 jurisdictions do.

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

SECTION 314. 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.

1 **[ARTICLE] 4**

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

3 **SECTION 401. DISCLAIMER.**

4 (a) In this section, “appointee” means a person to which a power holder makes an
5 appointment of appointive property.

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

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

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

11 **Comment**

12
13 A prospective power holder cannot be compelled to accept the power of appointment, just
14 as the prospective donee of a gift cannot be compelled to accept the gift.

15
16 A disclaimer is to be contrasted with a release. A release occurs after the power holder
17 accepts the power. A disclaimer prevents acquisition of the power, and consequently a power
18 holder who has accepted a power can no longer disclaim.

19
20 Disclaimer statutes frequently specify the time within which a disclaimer must be made.
21 The Uniform Disclaimer of Property Interests Act (1999) (UDPIA) does not specify a time limit,
22 but allows a disclaimer until a disclaimer is barred (see UDPIA § 13).

23
24 Disclaimer statutes customarily specify the methods for filing a disclaimer. UDPIA § 12
25 provides that the statutory methods must be followed. In the absence of such a requirement,
26 statutory formalities for making a disclaimer of a power are not construed as exclusive, and any
27 manifestation of the power holder’s intent not to accept the power may also suffice.

28
29 A partial disclaimer of a power of appointment leaves the power holder possessed of the
30 part of the power not disclaimed.

31
32 Just as an individual who would otherwise be a holder of a power of appointment can
33 avoid acquiring the power by disclaiming it, a person who otherwise would be a permissible
34 appointee, appointee, or taker in default of appointment can avoid acquiring that status by
35 disclaiming it.

36
37 The ability of an agent or guardian to disclaim on behalf of a principal or ward is
38 determined by other law, such as the Uniform Power of Attorney Act or the Uniform

Guardianship and Protective Proceedings Act.

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

SECTION 402. 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 prevent the release.

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 an effective 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 or guardian to release a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

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

SECTION 403. METHOD OF RELEASE.

(a) In this section, "record" means information that is inscribed on a tangible medium or

1 that is stored in an electronic or other medium and is retrievable in perceivable form.

2 (b) A power holder of a releasable power of appointment may release the power in whole
3 or in part:

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

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

9 **Comment**

10
11 A power holder may release the power of appointment by substantial compliance with the
12 method specified in the terms of the instrument creating the power or any other method
13 manifesting clear and convincing evidence of the power holder's intent. Only if the method
14 specified in the terms of the creating instrument is made exclusive is use of the other methods
15 prohibited. Even then, a failure to comply with a technical requirement, such as required
16 notarization, may be excused as long as compliance with the method specified in the terms of the
17 creating instrument is otherwise substantial.

18
19 Examples of methods manifesting clear and convincing evidence of the power holder's
20 intent to release include: (1) delivering an instrument declaring the extent to which the power is
21 released to an individual who could be adversely affected by an exercise of the power; (2)
22 joining with some or all of the takers in default in making an otherwise effective transfer of an
23 interest in the appointive property, in which case the power is released to the extent that a
24 subsequent exercise of the power would defeat the interest transferred; (3) contracting with an
25 individual who could be adversely affected by an exercise of the power not to exercise the
26 power, in which case the power is released to the extent that a subsequent exercise of the power
27 would violate the terms of the contract; and (4) communicating in a record an intent to release
28 the power, in which case the power is released to the extent that a subsequent exercise of the
29 power would be contrary to manifested intent.

30
31 The text of this Section is based on Uniform Trust Code § 602(c). The rule of this Section
32 is fundamentally consistent with, and this Comment draws on, Restatement Third of Property:
33 Wills and Other Donative Transfers § 20.3 and the accompanying Commentary.

34
35 **SECTION 404. REVOCATION OR AMENDMENT OF RELEASE.** A power
36 holder may revoke or amend a release of a power of appointment only to the extent that:

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

(2) the holder reserves a power of revocation or amendment in the instrument of 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 405. POWER TO CONTRACT: PRESENTLY EXERCISABLE

POWER OF APPOINTMENT. A power holder of a presently exercisable power of appointment may contract:

(1) not to exercise the power; or

(2) to exercise the power if the contract when made 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 305(a). In contrast, a presently exercisable nongeneral power, or a general power presently exercisable only in favor of one or more of the creditors of the power holder or the power holder's estate, does have impermissible appointees. See Section 305(b)-(c).

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

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

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

SECTION 406. POWER TO CONTRACT: POWER OF APPOINTMENT NOT

PRESENTLY EXERCISABLE. A power holder of a power of appointment that is not a presently exercisable power may contract to exercise or not exercise the power only if the holder:

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

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

Comment

Except in the case of a power reserved by the donor in a revocable inter vivos trust, a contract to exercise, or not to exercise, a power of appointment that is not presently exercisable is unenforceable, because the 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 or guardian to contract on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

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

SECTION 407. 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

1 enforceable contract to appoint, or not to appoint, is limited to damages payable out of the
2 appointive property or, if appropriate, specific performance. The power holder's owned assets
3 are not available to satisfy a judgment for damages. For elaboration and discussion, see
4 Restatement Third of Property: Wills and Other Donative Transfers §§ 21.1 and 21.2, and
5 especially id., § 21.1, Comments c and d.
6

7 **[ARTICLE] 5**

8 **RIGHTS OF POWER HOLDER'S CREDITORS IN APPOINTIVE PROPERTY**

9 **SECTION 501. GENERAL POWER CREATED BY POWER HOLDER.**

10 (a) In this section, "power of appointment created by the power holder" includes a power
11 of appointment created in a transfer by another person to the extent that the power holder
12 contributed value to the transfer.

13 (b) Subject to subsections (c) and (d), and notwithstanding the presence of a spendthrift
14 provision or whether the claim arose before or after the creation of the power of appointment,
15 appointive property subject to a general power of appointment created by the power holder is
16 subject to a claim of a creditor of:

17 (1) the holder, to the same extent as if the holder owned the appointive property,
18 if the power is presently exercisable; and

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

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

26 (d) A creditor of a power holder or the holder's estate may reach appointive property
27 subject to a general power of appointment created by the holder to the extent provided in [cite

1 state law on fraudulent transfers or the Uniform Fraudulent Transfers Act].

2 **Comment**

3
4 Subsection (b) states the basic rules of this Section. If an individual retains a presently
5 exercisable general power of appointment over property the individual owned, public policy does
6 not allow this formal change in the control of the property to put the property beyond the reach
7 of the donor/power holder's creditors. Thus, appointive property subject to a presently
8 exercisable general power of appointment created by the power holder is subject to a claim of—
9 and is reachable by—a creditor of the power holder to the same extent as if the power holder
10 owned the appointive property. If the power holder retains a general power of appointment
11 exercisable at death, the appointive property is subject to a claim of—and is reachable by—a
12 creditor of the donor/power holder's estate to the extent the estate is insufficient, subject to the
13 decedent's right to direct the source from which liabilities are paid. For the same rules in the
14 context of a retained power to revoke a revocable trust, see Uniform Trust Code § 505(a).

15
16 The application of these rules is not affected by the presence of a spendthrift provision
17 nor by whether the claim arose before or after the creation of the power of appointment. See
18 Restatement Third of Property: Wills and Other Donative Transfers § 22.2, Comment a.

19
20 Subsection (a) enables the rule of subsection (b) to apply even if the general power was
21 not created in a transfer made by the power holder. The rule will apply to the extent the holder
22 contributed value to the transfer. See Restatement Third of Property: Wills and Other Donative
23 Transfers § 22.2, Comment d. Consider the following examples, drawn from the Restatement:

24
25 *Example 1.* D purchases Blackacre from A. Pursuant to D's request, A transfers Blackacre
26 "to D for life, then to such person as D may by will appoint." The rule of subsection (b) applies to
27 D's general testamentary power, though in form A created the power.

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

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

40
41 Subsection (c) states an important exception. An irrevocable exercise of the general
42 power by the donor/power holder in favor of someone other than the holder or the holder's estate
43 eliminates the applicability of the rule of subsection (b) to the extent of the appointive assets
44 appointed by the exercise of the power. The rule relating to fraudulent transfers (subsection (d)),
45 however, remains applicable to the exercise of the power.

46 With one exception, the provisions 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. The exception is that this Section provides that creditors may pursue claims against the estate only to the extent the estate is insufficient and subject to the decedent's right to direct the source from which liabilities are paid. These provisions are designed to be consistent with Uniform Trust Code § 505(a).

SECTION 502. GENERAL POWER NOT CREATED BY POWER HOLDER.

(a) In this section, "ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, [on the effective date of this [act]][as amended].

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

(1) the holder, to the extent the holder's property is insufficient, if the power is presently exercisable; and

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

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

Comment

Subsection (b) reaffirms 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 holder's property is insufficient. Furthermore, upon the power holder's death, property subject to a general power of appointment exercisable by the power holder at death (e.g., in the holder's will) is subject to creditors' claims against the holder's estate to the extent that the estate is insufficient. In each case, whether the power holder has or has not purported to exercise the power is immaterial.

1 Subsection (c) states an important exception. If the power is subject to an ascertainable
2 standard, the power is treated for purposes this article as a nongeneral power, and the rights of
3 the power holder's creditors in the appointive property are governed by Sections 504(a) and (b).
4

5 **SECTION 503. POWER TO WITHDRAW.**

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

9 (b) On the lapse, release, or waiver of a power to withdraw property from a trust, the
10 power is treated as a presently exercisable general power of appointment only to the extent the
11 value of the property affected by the lapse, release, or waiver exceeds the greater of the amount
12 specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986 or Section
13 2503(b) of the Internal Revenue Code of 1986, [on the effective date of this [act]][as amended].

14 **Comment**

15
16 Subsection (a) treats a power of withdrawal as the equivalent of a presently exercisable
17 general power of appointment, because the two are ownership-equivalent powers. Upon the
18 lapse, release, or waiver of the power of withdrawal, subsection (b) follows the lead of Uniform
19 Trust Code § 505(b)(2) in creating an exception for property subject to a Crummey or five and
20 five power: the holder of the power of withdrawal is treated as a power holder of a presently
21 exercisable general power of appointment only to the extent that the value of the property
22 affected by the lapse, release, or waiver exceeds the greater of the amount specified in Internal
23 Revenue Code §§ 2041(b)(2) or 2514(e) [greater of 5% or \$5,000] or § 2503(b) [\$13,000 in
24 2011].
25

26 **SECTION 504. NONGENERAL POWER.**

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

30 (b) Appointive property subject to a nongeneral power of appointment is subject to a
31 claim of a creditor of the power holder or the holder's estate to the extent that the holder owned
32 the property and, reserving the nongeneral power, transferred the property in violation of [cite

1 state statute on fraudulent transfers or the Uniform Fraudulent Transfers Act].

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

4 **Comment**

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

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

17
18 Subsection (c) also addresses an important exception, arising when the initial gift in
19 default of appointment is to the power holder or the power holder's estate. In such a case, the
20 power of appointment, though in form a nongeneral power, is in substance a general power, and
21 the rights of the power holder's creditors in the appointive property are governed by Sections
22 501 and 502.

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

27 **[ARTICLE] 6**

28 **MISCELLANEOUS PROVISIONS**

29
30 **SECTION 601. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
31 applying and construing this uniform act, consideration must be given to the need to promote
32 uniformity of the law with respect to its subject matter among states that enact it.

33 **SECTION 602. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**
34 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
35 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
36 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or

1 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
2 U.S.C. Section 7003(b).

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

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