

## MEMORANDUM

TO: Committee on Scope and Program

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RE: Proposed Uniform Act on Powers of Appointment: Background and Issues

This memorandum provides background information regarding the request for the appointment of a drafting committee to prepare a uniform act on powers of appointment. The memorandum also identifies the major issues a drafting committee will want to address.

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## BACKGROUND

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.” *Powers of Appointment*, 24 A.B.A. J. 807 (1938). The power of appointment is a core device in modern estate planning practice. Powers of appointment are routinely included in trusts for tax reasons and to add flexibility to the property arrangement. For background on powers of appointment, see T. GALLANIS & L. WAGGONER, *ESTATES, FUTURE INTERESTS, AND POWERS OF APPOINTMENT* (West Nutshell Series, 4th ed. 2010).

Only a minority of states have enacted power-of-appointment legislation. The legislation in California and New York is the most detailed. See Cal. Prob. Code, div. 2, pt. 14; N.Y. Est. Pow. & Tr. L. ch. 17-B, art. 10. Statutes in Michigan, Minnesota, and Wisconsin cover some topics in power-of-appointment law. See Mich. Comp. Laws §556.111 et seq.; Minn. Stat. §502.62 et seq.; Wisc. Stat. §702.01 et seq. In addition, there are statutes in Colorado, Connecticut, Iowa, Mississippi, New Hampshire, Texas, Virginia, and Washington that primarily or exclusively focus on the release of powers of appointment. See Colo. Rev. Stat. §15-2-102 et seq.; Conn. Gen. Stat. §45a-568 et seq.; Iowa Code §559.1 et seq.; Miss. Code §91-15-1 et seq.; N.H. Rev. Stat. § 566:1-a et seq.; Tex. Prop. Code §181.001 et seq.; Va. Code §55-278 et seq.; Rev. Code Wash. §11.95.020 et seq.

Pennsylvania is currently considering power-of-appointment legislation. Report of the Advisory Committee on Decedent’s Estates Laws, Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes (June 2010), pp. 51-60, available at: [http://jsg.legis.state.pa.us/resources/documents/ftp/documents/DEL Report June 2010.pdf](http://jsg.legis.state.pa.us/resources/documents/ftp/documents/DEL%20Report%20June%202010.pdf).

For most jurisdictions, the law governing powers of appointment is primarily or exclusively case law – and some jurisdictions have little or no case law on point.

The provisions of the Restatement Third of Property on powers of appointment were approved by the membership of the American Law Institute in May 2006. These provisions are detailed and comprehensive, and could readily form a basis for the development of a uniform act.

This memorandum identifies the major issues in drafting a uniform act on powers of appointment and provides the relevant language from the Restatement Third of Property and other uniform acts, such as the Uniform Probate Code.

Attached as an appendix is the full-text of the chapters on powers of appointment in the Restatement Third of Property, including detailed Reporter's Notes including the text of relevant state statutes. Also attached as an appendix is the proposed power-of-appointment legislation in Pennsylvania.

## **ISSUES FOR THE DRAFTING COMMITTEE**

### **I. DEFINITIONS AND TERMINOLOGY**

A uniform act would need to define a “power of appointment.” In addition, powers of appointment are described using a special terminology. Among the terms requiring definition are the terms for the *parties* to a power of appointment (donor, donee, permissible appointee, appointee, and taker in default of appointment), for the *property* subject to a power of appointment (the appointive property), and for the *categories* of powers of appointment (e.g., general, nongeneral, presently exercisable, testamentary, postponed, exclusionary, and nonexclusionary).

#### **A. Power of appointment**

*Restatement Third of Property §17.1:* A power of appointment is a power that enables the donee of the power, acting in a nonfiduciary capacity, to designate recipients of beneficial ownership interests in the appointive property.

*Restatement Third of Property §17.1 Cmt. e:* In modern law, as reflected in this Restatement and in the Restatement Third of Trusts, a power to revoke or amend a trust or a power to withdraw principal from a trust is recognized as a power of appointment over the principal of the trust, whether the power is reserved by the transferor or conferred on another. ...

#### **B. Donor**

*Restatement Third of Property §17.2(a):* The person who created or reserved the power of appointment is called the “donor” (“creator”). Before creating the power, the donor was either the

owner of the appointive property or the donee of a power of appointment with respect to the appointive property.

### **C. Donee**

*Restatement Third of Property §17.2(b)*: The person on whom the power of appointment was conferred or in whom the power was reserved is called the “donee” (“power holder”). If the power was reserved by the donor in himself or herself, the donor is also the donee, and the term “Donor–Donee” is sometimes used to refer to this situation.

### **D. Permissible appointee**

*Restatement Third of Property §17.2(c)*: The persons to whom an appointment is authorized are called the “permissible appointees” (“objects”).

### **E. Impermissible appointee**

*Restatement Third of Property §17.2(d)*: Anyone who is not a permissible appointee is called an impermissible appointee (“nonobject”).

### **F. Appointee**

*Restatement Third of Property §17.2(e)*: A person to whom an appointment has been made is called an “appointee.”

### **G. Taker in default of appointment**

*Restatement Third of Property §17.2(f)*: A person who takes the appointive property to the extent that the power is not effectively exercised is called a “taker in default of appointment” (“taker-in-default”).

### **H. Appointive property**

*Restatement Third of Property §17.2(g)*: The property or property interest that is subject to a power of appointment is called the “appointive property.”

### **I. General power**

*Restatement Third of Property §17.3(a)*: A power of appointment is general to the extent that the power is exercisable in favor of the donee, the donee’s estate, or the creditors of either, regardless of whether the power is also exercisable in favor of others.

## **J. Nongeneral power**

*Restatement Third of Property §17.3(b):* A power of appointment that is not general is a nongeneral power.

## **K. Power presently exercisable**

*Restatement Third of Property §17.4(a):* A power of appointment is presently exercisable if it is exercisable by the donee at the time in question, regardless of whether it is also exercisable by will.

## **L. Testamentary power**

*Restatement Third of Property §17.4(b):* A power of appointment is testamentary if it is exercisable only in the donee's will.

## **M. Postponed power**

*Restatement Third of Property §17.4(c):* A power of appointment is postponed if it is not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period of time. A postponed power becomes presently exercisable upon the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period of time.

## **N. Exclusionary power**

*Restatement Third of Property §17.5:* An exclusionary power is one in which the donor has authorized the donee to appoint to any one or more of the permissible appointees, to the exclusion of the others.

## **O. Nonexclusionary power**

*Restatement Third of Property §17.5:* A nonexclusionary power is one in which the donor has specified that the donee cannot make an appointment that excludes any permissible appointee or one or more designated permissible appointees from a share of the appointive property.

## **II. PRESUMPTIONS**

A well-drafted instrument creating a power of appointment is clear about whether the power is general or nongeneral, presently exercisable or testamentary, exclusionary or nonexclusionary. Not all instruments are well-drafted, however. A uniform act should establish rules of construction that operate as rebuttable presumptions.

### **A. Presumption of maximum discretionary authority**

*Restatement Third of Property, Introductory Note to Chapter 17, Part B:* In determining which type of power is created, the general principle of construction is that a power falls into the category giving the donee the maximum discretionary authority except to the extent that the language creating the power specifically restricts the donee's authority. Thus, for example, a power is general unless the language specifies that the donee cannot exercise the power for his or her own benefit or for his or her creditors. A power is presently exercisable unless the language specifies that the power can only be exercised at some later time or in some document such as a will that only takes effect at some later time. A power is exclusionary unless the language specifies that a permissible appointee must receive a certain amount or portion of the appointive assets if the power is exercised.

### **B. Presumption of general power**

*Restatement Third of Property §17.3 Cmt. a:* Language creating a power of appointment is construed as creating a general power unless the language expressly prohibits exercise in favor of the donee, the donee's estate, and the creditors of either.

### **C. Presumption of presently exercisable power**

[see above, item II.A]

### **D. Presumption of exclusionary power**

*Restatement Third of Property §17.5:* A power is exclusionary, unless the terms of the power provide that an appointment must benefit each permissible appointee or one or more designated permissible appointees.

## **III. TRANSFERABILITY?**

A uniform act should address the question whether the donee of a power of appointment can transfer the power to another.

*Restatement Third of Property §17.1 Cmt. b:* The donee of a power of appointment cannot transfer the power to another. If the donee dies without exercising the power, the power lapses (expires). The power does not pass through the donee's estate to the donee's successors in interest.

Note, however, that the donee can exercise the power to create another power in another donee. If a donee exercises a power in this way, the donee of the first power is the *donor* of the second power, and the donee of the second power is an appointee of the first power. See Restatement Third of Property §§17.2 Cmt. c, 19.13, 19.14.

#### **IV. INVALID POWERS**

A uniform act should address the circumstances under which a power of appointment is invalid.

Under the Restatement Third of Property, a power of appointment is invalid if (1) the permissible appointees are not ascertainable, or (2) the power violates the Rule Against Perpetuities.

A power of appointment is invalid if the permissible appointees are not ascertainable—in other words, the permissible appointees are so indefinite that it is impossible to identify any person to whom the donee can appoint.

*Restatement Third of Property, §18.1 Cmt. i:* A power of appointment is invalid if the permissible appointees are so indefinite that it is impossible to identify any person to whom the donee can appoint. If the description of the permissible appointees is such that one or more persons are identifiable, but it is not possible to determine whether other persons are within the description, the power is validly created, but an appointment can only be made to persons who can be identified as within the description of the permissible appointees.

Powers of appointment are subject to the Rule Against Perpetuities. A power that violates the Rule is invalid and cannot be validly exercised.

#### **V. CREATION, REVOCATION, AND AMENDMENT OF POWER**

A uniform act should address the method(s) of creating a power of appointment and the extent to which the donor can revoke or amend the power.

##### **A. How created**

*Restatement Third of Property §18.1:* A power of appointment is created by a transfer that manifests an intent to create a power of appointment.

##### **B. Donor's authority to revoke or amend power**

*Restatement Third of Property §18.2:* The donor of a power of appointment lacks the authority to revoke or amend the power, except to the extent that the donor reserved a power of revocation or amendment when creating the power.

#### **VI. EXERCISE OF POWER**

A uniform act must address nine core issues concerning the exercise of a power of appointment: (1) the requisite capacity of the donee (including freedom from undue influence



and wrongdoing); (2) the sufficiency of the manifestation of the donee's intent to exercise the power; (3) the donee's compliance with formalities imposed by law or by the donor; (4) the effectiveness of the exercise; (5) the scope of permissible appointments; (6) the effect of an impermissible or partially impermissible appointment; (7) the allocation of owned and appointive assets if the donee exercises the power in a document that also transfers assets owned by the donee; (8) the disposition of unappointed property; and (9) the effect of an appointment to a taker in default.

### **A. Capacity of donee; freedom from wrongdoing**

*Restatement Third of Property §19.8:* (a) In order for an attempted exercise of a power of appointment to be effective, the donee must have capacity to exercise the power. The donee has capacity to exercise the power if the donee has capacity to make a similar transfer of owned property. (b) In order for an attempted exercise of a power of appointment to be effective, the donee must be free from undue influence and other wrongdoing.

*Restatement Third of Property §8.1:* ... (b) If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.

(c) If the donative transfer is in the form of an irrevocable gift, the donor must have the mental capacity necessary to make or revoke a will and must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor.

### **B. General requisites**

*Restatement Third of Property §19.1:* A power of appointment is exercised to the extent that: (1) the donee manifests an intent to exercise the power in an otherwise effective document; (2) the donee's expression of an intent to appoint satisfies the formal requirements of exercise imposed by the donor and by applicable law; and (3) the donee's appointment constitutes a permissible exercise of the power.

### **C. Intent to exercise**

#### **1. Determining the donee's intent to exercise**

*Restatement Third of Property §19.1(1):* A[n exercise of a] power of appointment ... [is effective only if] the donee manifests an intent to exercise the power in an otherwise effective document.

*Restatement Third of Property §19.2:* Whether or not the donee has manifested an intent to exercise a power of appointment is a question of construction.

## **2. Recommended method: specific-exercise clause**

*Restatement Third of Property §19.2 Cmt. c:* The recommended method for exercising a power of appointment is by a specific-exercise clause, using language such as the following: “I hereby exercise the power of appointment conferred upon me by [my mother’s will of [date]] as follows: I appoint [fill in details of appointment].”

## **3. Contrast: blanket-exercise clause**

Contrast a specific-reference clause with a blanket-exercise clause:

*Restatement Third of Property §19.2 Cmt. d:* A blanket-exercise clause purpose to exercise “any power of appointment” the donee may have ....

## **4. Disposition of appointive property**

*Restatement Third of Property §19.3:* A purported disposition by the donee of property over which the donee has a power of appointment manifests an intent to exercise the donee’s power over that property.

## **5. Donee’s residuary clause**

*Restatement Third of Property §19.4:* A general residuary clause in the donee’s will does not manifest an intent to exercise any of the donee’s power(s) of appointment, unless the power in question is a general power and the donor did not provide for takers in default or the gift-in-default clause is ineffective.

*Uniform Probate Code §2-608:* In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will, or a will making general disposition of all of the testator’s property, expresses an intention to exercise a power of appointment held by the testator only if (i) the power is a general power and the creating instrument does not contain a gift if the power is not exercised or (ii) the testator’s will manifests an intention to include the property subject to the power.

## **6. Other circumstances indicating intent to exercise**

*Restatement Third of Property §19.5:* A disposition manifests an intent to exercise a power of appointment if the disposition, read with reference to the property that the donee owned

and other relevant evidence of intent, indicates that the donee understood that he or she was disposing of property covered by the power.

## **7. Testamentary exercise of after-acquired powers**

*Restatement Third of Property §19.6:* Unless the language or circumstances indicate that the donee had a different intention, a blanket-exercise clause in the donee's will extends to powers acquired after executing the will.

## **8. Donee's authority to revoke or amend exercise**

*Restatement Third of Property §19.7:* The donee of a power of appointment lacks the authority to revoke or amend an exercise of the power, except to the extent that the donee reserved a power of revocation or amendment when exercising the power, and the terms of the power do not prohibit the reservation.

### **D. Effectiveness of donee's attempted exercise**

#### **1. Formal requirements of an appointment; substantial compliance**

*Restatement Third of Property §19.9:* In order for an attempted exercise of a power of appointment to be effective, the document purporting to exercise the power must be executed in compliance with (i) the formalities required by law for the transfer by the donee of owned property of a similar type and (ii), except as provided in §19.10, any additional formalities required by the donor.

*Restatement Third of Property §19.10:* Substantial compliance with formal requirements of an appointment imposed by the donor, including a requirement that the instrument of exercise make reference or specific reference to the power, is sufficient if (i) the evidence establishes that the donee knew of and intended to exercise the power, and (ii) the donee's manner of attempted exercise did not impair the donor's purpose in imposing the requirement.

*Restatement Third of Property §19.10 Cmt. d:* ... A more difficult question is whether a blanket-exercise clause ... satisfies a specific-reference requirement. If it could be shown that the donee had knowledge of an intended to exercise the power, the blanket-exercise clause would be sufficient to exercise the power, unless it could be shown that the donor's intention was not merely to prevent an inadvertent exercise of the power but to prevent any exercise of the power, intentional or inadvertent. The possibility of applying §12.1 [on reformation] to reform the donee's attempted appointment to insert the required specific reference should also be explored.

*Uniform Probate Code §2-704:* If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference to the power or its source, it is presumed that the donor's intention, in

requiring that the donee exercise the power by making reference to the particular power or the creating instrument, was to prevent an inadvertent exercise of the power.

## **2. Death of donee before power created**

*Restatement Third of Property §19.11*: If the donee dies before the effective date of a document purporting to confer on the donee a power of appointment, the power is not created, and any attempted exercise of the power is ineffective.

## **3. Appointment to deceased appointee; application of antilapse statute**

*Restatement Third of Property §19.12*: (a) An appointment to a deceased appointee is ineffective, but an antilapse statute may apply to pass the appointed property to the deceased appointee's descendants or other substitute takers. (b) An antilapse statute that does not expressly address an appointment to a deceased appointee should nevertheless have its purpose and policy applied to an appointment to a deceased appointee (i) as if the appointed property were owned by either the donor or the donee, and (ii) so that the substituted takers are treated as permissible appointees of the power. ...

*Uniform Probate Code §2-603(a)(6)*: "Devisee" includes ... (iii) an appointee under a power of appointment exercised by the testator's will.

## **4. Appointment to descendants of permissible appointee**

*Restatement Third of Property §19.12(c)*: The donee of a nongeneral power is authorized to appoint to the descendants of a deceased permissible appointee, whether or not the permissible appointee's descendants are included within the description of the permissible appointees, but not if the deceased permissible appointee died before the execution of the creating instrument. This subsection does not apply if the donor specifically prohibited an appointment to the descendants of a deceased permissible appointee.

*Restatement Third of Property §19.12 Cmt. e*: Although the deceased appointee must be in a class of protected relatives (see Comment *d*), the substitute takers provided by the antilapse statute (typically the descendants of the deceased appointee) are treated as permissible appointees even if the description of permissible appointees provided by the donor does not expressly cover them. This rule corresponds to the rule applying antilapse statutes to class gifts. Antilapse statutes substitute the descendants of deceased class members, even if the class member's descendants are not members of the class.

*Uniform Probate Code §2-603(b)(5)*: Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be

substituted for the appointee under this section, whether or not the descendant is an object of the power.

## **E. Permissible appointments**

### **1. General power**

*Restatement Third of Property §19.13:* (a) The donee of a general power that permits appointment to the donee or to the donee's estate is authorized to make any appointment, including one in trust and one that creates a power of appointment in another, that the donee could make by appointing to the donee or to the donee's estate and then disposing of the appointive assets as owned property. (b) The donee of a general power that permits appointment only to the donee's creditors or to the creditors of the donee's estate is restricted to appointing to those creditors.

### **2. Nongeneral power**

*Restatement Third of Property §19.14:* Except to the extent that the donor has manifested a contrary intention, the donee of a nongeneral power is authorized to make an appointment, including one in trust and one that creates a power of appointment in another, that solely benefits permissible appointees of the power.

*Restatement Third of Property §19.14 Cmt. g:* Except to the extent that the donor has manifested a contrary intention, the donee of a nongeneral power has the authority to exercise the power by creating a general power in a permissible appointee, or by creating a nongeneral power in any person to appoint to a permissible appointee of the original nongeneral power.

An appointment that creates a general power in a permissible appointee of the original nongeneral power is permissible, unless the donor has manifested an intent otherwise. If the donee can appoint outright to a permissible appointee, it follows that the donee can create a general power in a permissible appointee to appoint by deed, because such an exercise is, in substance, the equivalent of appointing outright. If the general power created in the permissible appointee is to appoint by will, even though the permissible appointee does not have, in substance, the equivalent of ownership, the permissible appointee is close to having the equivalent of ownership, especially in a case in which the permissible appointee is given a life interest in the appointive assets. In such a case, the donee-permissible appointee can appoint to any person, including himself or herself, whether or not the appointees are permissible appointees of the original nongeneral power.

An appointment that creates a nongeneral power in another to appoint to permissible appointees, no one of whom is an impermissible appointee of the original power, in effect delegates to another person the final selection of the persons to take under an exercise of the donee's power. In the absence of a contrary manifestation of intent by the donor (see Comment g), the inference is that the donor did not intend to do more than to restrict appointments to the permissible appointees of the original power. Accordingly, the donee or another whom the donee

chooses may make the final selection of the permissible appointees. In such a case, the donee-permissible appointee can only appoint to permissible appointees of the original nongeneral power, excluding himself or herself. The donee-permissible appointee cannot appoint to himself or herself, because the donee-permissible appointee has been given a nongeneral power.

*Restatement Third of Property §19.14 Cmt. h:* The donor has imposed confidence in the donee to select which permissible appointees of the power to benefit by an appointment. Unless the donor manifests a contrary intent (see Comment *i*), the donee is authorized to grant the selection power to any other person.

## **F. Impermissible appointments**

### **1. Appointment to impermissible appointee**

*Restatement Third of Property §19.15:* An appointment that benefits an impermissible appointee is ineffective.

### **2. Appointment to permissible appointee for benefit of impermissible appointee**

*Restatement Third of Property §19.16:* An appointment to a permissible appointee is ineffective to the extent that it was (i) conditioned on the permissible appointee-appointee conferring a benefit on an impermissible appointee, (ii) subject to a charge in favor of an impermissible appointee, (iii) upon a trust for the benefit of an impermissible appointee, (iv) in consideration of a benefit conferred upon or promised to an impermissible appointee, (v) primarily for the benefit of the permissible appointee's impermissible appointee creditor, or (vi) motivated in any other way to be for the benefit of an impermissible appointee.

### **3. Liability of fiduciary who transfers property pursuant to ineffective appointment**

*Restatement Third of Property §19.17:* (a) A fiduciary who transfers property pursuant to a direct appointment to an impermissible appointee commits a breach of trust. (b) A fiduciary who transfers property pursuant to an appointment to a permissible appointee commits no breach of trust, unless the fiduciary knows or has reason to know that the appointment was in violation of the donee's scope of authority under § 19.16.

### **4. Purchaser for value without notice**

*Restatement Third of Property §19.18:* If an appointee of an ineffective appointment transfers the appointive assets to a purchaser for value, the purchaser is protected from liability, unless the purchaser knows or has reason to know that the appointment was in violation of the donee's scope of authority.

## **G. Consequences of ineffective or partially ineffective appointments**

### **1. Effect of partially ineffective appointment on otherwise effective portion of appointment**

*Restatement Third of Property §19.20:* If part of an appointment is ineffective and another part, if standing alone, would be effective, the effective part is given effect, except to the extent that the donee's scheme of disposition is more closely approximated by concluding that some or all of the otherwise effective part should be treated as ineffective.

### **2. Disposition of ineffectively appointed property**

#### **a. Basic rule**

The basic rule is that if the donee of a power of appointment makes an ineffective or partially ineffective exercise, the ineffectively appointed property passes under the donor's gift-in-default clause. If there is no gift-in-default clause, or to the extent the gift-in-default clause is ineffective, what happens to the appointive property depends on whether the power is general or nongeneral.

#### **b. Gift-in-default clause wholly or partially ineffective**

##### **i. General power**

*Restatement Third of Property §19.21:* ... (b) To the extent that the gift-in-default clause is ineffective, the ineffectively appointed property passes to the donee or to the donee's estate rather than under a reversionary interest to the donor or to the donor's transferees or successors in interest.

##### **ii. Nongeneral power**

*Restatement Third of Property §19.23:* ... (b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes under an implied gift in default to the permissible appointees of the power (including those who are substituted for permissible appointees under an antilapse statute) living when the power lapses, if:

- (1) the permissible appointees are a defined and limited class and
- (2) the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the donee elects to appoint it to them.

## **H. Allocation of owned and appointive assets**

*Restatement Third of Property §19.19:* If the donee of a power of appointment exercises the power in a document that also disposes of owned property, the owned and appointive property are deemed to be allocated in the manner that best carries out the donee's intent.

### **I. Effect of appointment to taker in default**

#### **1. Appointment to taker in default**

*Restatement Third of Property §19.25:* To the extent that an appointee would have taken the appointed property as a taker in default of appointment had the appointment not been made, the appointee takes under the gift in default of appointment and not under the appointment.

#### **2. Partial appointment to taker in default**

*Restatement Third of Property §19.24:* If the donee of a power of appointment makes a valid partial appointment to a taker in default, the taker in default-appointee also takes his or her full share of any unappointed property as taker in default, unless the donor or the donee manifests a contrary intent.

## **VII. RELEASE OR DISCLAIMER OF POWER**

A uniform act should address the effect of a decision by the donee to release or disclaim the power.

### **A. Release**

#### **1. General power**

*Restatement Third of Property §20.1:* The donee of a general power of appointment can release the power, in whole or in part, except to the extent that the donor effectively manifested an intent that the power not be releasable. A release is irrevocable unless the donee expressly reserved a power to revoke or amend the release.

*Restatement Third of Property §20.1 Cmt. c:* If the donee created the general power, so that the donee is also the donor, the donor-donee cannot effectively impose a restraint on release. A self-imposed restraint on release resembles a self-imposed restraint on alienation, which is ineffective when the settlor of an inter vivos trust attempts to impose a spendthrift restraint on the settlor's beneficial interests in the trust. See Restatement Third, Trusts §58.

*Restatement Third of Property §19.22:* (a) To the extent that the donee of a general power to appoint a future interest ... completely releases the power ..., the gift-in-default clause controls



the disposition of the unappointed property to the extent that the gift-in-default clause is effective. (b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes to the donee or to the donee's estate if the donee merely failed to exercise the power, but if the donee released the power or expressly refrained from exercising the power, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.

## **2. Nongeneral power**

*Restatement Third of Property §20.2:* The donee of a nongeneral power of appointment can release the power, in whole or in part, except to the extent that the donor effectively manifested an intent that the power not be releasable. A release is irrevocable unless the donee expressly reserved a power to revoke or amend the release.

*Restatement Third of Property §19.23:* (a) To the extent that the donee of a nongeneral power to appoint a future interest ... completely releases the power ..., the gift-in-default clause controls the disposition of unappointed property to the extent that the gift-in-default clause is effective. (b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes under an implied gift in default to the permissible appointees of the power (including those who are substituted for permissible appointees under an antilapse statute) living when the power lapses, if: (1) the permissible appointees are a defined and limited class and (2) the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the donee elects to appoint it to them. (c) If subsection (b) is inapplicable, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.

## **3. Methods of releasing a releasable power**

*Restatement Third of Property §20.3:* The donee of a releasable power can release the power, in whole or in part, by:

- (1) delivering a writing declaring the extent to which the power is released to a person who could be adversely affected by an exercise of the power.
- (2) joining with some or all of the takers in default in making an otherwise effective transfer of an interest in the property that is subject to the power; the power is released to the extent that a subsequent exercise of the power would defeat the interest transferred.
- (3) contracting with a person who could be adversely affected by an exercise of the power not to exercise the power; the power is released to the extent that a subsequent exercise of the power would violate the terms of the contract.
- (4) communicating in any other appropriate manner an intent to release the power; the power is released to the extent that a subsequent exercise of the power would be contrary to manifested intent.
- (5) utilizing any method authorized by the donor or by applicable statute.

## **B. Disclaimer**

*Restatement Third of Property §20.4:* A person who would otherwise be a donee of a power of appointment can, by a disclaimer, avoid acquiring the power or any part of it.

## **VIII. FAILURE OR REFUSAL TO EXERCISE**

A uniform act should address the effect of the donee's failure or refusal to exercise the power.

### **A. Basic rule**

The basic rule is that if the donee of a power of appointment fails or declines to exercise the power, the appointive property passes under the donor's gift-in-default clause. If there is no gift-in-default clause, or to the extent the gift-in-default clause is ineffective, what happens to the appointive property depends on whether the power is general or nongeneral.

### **B. Gift-in-default clause wholly or partially ineffective**

#### **1. General power**

[ *Restatement Third of Property §19.22:* ... (b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes to the donee or to the donee's estate if the donee merely failed to exercise the power, but if the donee released the power or expressly refrained from exercising the power, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.

#### **2. Nongeneral power**

*Restatement Third of Property §19.23:* ... (b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes under an implied gift in default to the permissible appointees of the power (including those who are substituted for permissible appointees under an antilapse statute) living when the power lapses, if: (1) the permissible appointees are a defined and limited class and (2) the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the donee elects to appoint it to them. (c) If subsection (b) is inapplicable, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.

## **IX. CONTRACT TO APPOINT**

A uniform act should address the enforceability of a contract to appoint made by the donee.

### **A. Presently exercisable power**

*Restatement Third of Property §21.1:* (a) If the donee of a presently exercisable general power of appointment contracts to make an appointment, the contract is enforceable. (b) If the donee of a presently exercisable nongeneral power of appointment contracts to make an appointment, the contract is enforceable, unless the contract or the promised appointment confers a benefit upon an impermissible appointee.

### **B. Power not presently exercisable**

*Restatement Third of Property §21.2:* If the donee of a power of appointment that is not presently exercisable purports to contract to make an appointment:

(1) the contract is enforceable if the donee was also the donor of the power and created the power in a revocable inter vivos trust.

(2) except as provided in paragraph (1), the contract is not enforceable. Though the promisee cannot obtain damages or the specific property if the promise is not performed, the promisee is entitled to restitution of value that the promisee gave in exchange for the promise.

## **X. RIGHTS OF DONEE’S CREDITORS IN APPOINTIVE ASSETS**

A uniform act should address whether, under what circumstances, and to what extent the creditors of the donee have rights in the appointive assets.

### **A. Reserved power created in fraud of creditors**

*Restatement Third of Property §22.1 Cmt. b:* If the donee formerly owned the appointive assets covered by a nongeneral power and transferred them in fraud of the donee’s creditors, reserving the nongeneral power, the creditors can reach the appointive assets under the rules relating to fraudulent transfers.

*Uniform Fraudulent Transfer Act §4(a):* A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business

or transaction; or (ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

#### **B. General power created by donee**

*Restatement Third of Property §22.2:* Property subject to a general power of appointment that was created by the donee is subject to the payment of the claims of the donee's creditors to the same extent that it would be subject to those claims if the property were owned by the donee.

#### **C. General power created by someone other than donee**

*Restatement Third of Property §22.3:* (a) To the extent that the property owned by the donee is insufficient to satisfy the claims of the donee's creditors, property subject to a presently exercisable general power of appointment that was created by someone other than the donee is subject to those claims to the same extent that it would be subject to those claims if the property were owned by the donee. (b) Upon the death of the donee, to the extent that the donee's estate is insufficient to satisfy the claims of creditors of the donee's estate, property subject to a general power of appointment that was created by someone other than the donee and that was presently exercisable at the time of or immediately preceding the donee's death is subject to those claims and expenses to the same extent that it would be subject to those claims and expenses if the property had been owned by the donee.

#### **D. Nongeneral power**

*Restatement Third of Property §22.1:* Property subject to a nongeneral power of appointment is exempt from claims of the donee's creditors and from liability for expenses of administering the donee's estate.

### **XI. ELECTIVE-SHARE RIGHTS OF DONEE'S SURVIVING SPOUSE**

A uniform act should address whether, in what circumstances, and to what extent the donee's surviving spouse has elective-share rights in the appointive assets

*Restatement Third of Property §23.1:* For the purpose of determining the elective-share rights of the donee's surviving spouse, property is treated as owned by the donee at death to the extent that the property is subject to:

- (1) a presently exercisable general power of appointment exercisable by the donee immediately before death; or
- (2) a general testamentary power of appointment exercisable by the donee if the donee was also the donor of the power.

*Uniform Probate Code §2-205*: The value of the augmented estate includes ...: (1) ... (A) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. ...

(2) Property transferred in any of the following forms by the decedent during marriage: ... (B) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. ...