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A PRIMER ON POWERS

S. Alan Medlin*

INTRODUCTION

Powers of appointment have earned accolades and encomium about the benefits of their use. Professor Leach praised the power of appointment as "... the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out."1 Others have lauded powers of appointment as "... the most important single conveyancing device for the minimizing of death taxes"2 and as the "... most efficient device through which an owner desiring control of the general purposes to which his property shall be devoted may obtain needed flexibility in the disposition of his assets."3

Powers of appointment can also serve to confuse and to complicate. The reports and notes to the New York powers of appointment statutes opine that "[t]he law of powers, as all who have attempted to master it will readily admit, is probably the most intricate labyrinth in all our jurisprudence."4 The historical development of powers law in England illustrates a virtually limitless opportunity for lawyers to invent increasingly complex and convoluted solutions to client problems.5

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3. Comment, supra note 2, at 1289.

4. 3 N.Y. Rev. Stat., Reviser's Notes, 588 (2d ed. 1836); Jones, Consequences of an Ineffective Appointment - Capture, 18 ALA. L. REV. 229, 229 (1966); Comment, supra note 2, at 1289.

5. For a comprehensive study of the early law of powers, see SUGDEN, POWERS (8th ed. 1861). "In reading this book, one sees that Lord Bacon's metaphor truly is no exaggeration: These were men who could spin their brains into cobwebs." J. DUKEMINIER AND S. JOHANSON,
If powers of appointment can be as beneficial and flexible as advertised, then one who employs powers should benefit from a basic understanding of their operation, stripped of the cobwebs and esoterica that are involved with their more sophisticated uses. In other words, the use of powers of appointment can be effective even in relatively basic applications. The purpose of this article is to explain, generally and rudimentarily, the current use and effect of powers of appointment.

I. Historical Development of Powers of Appointment

A common theme of the use of powers of appointment from feudal times has been the exercise of a conveyancer's ingenuity. The power of appointment originated as a means to avoid early common law restrictions on transfers of property. In those early days, real property composed most of the wealth in an estate. Powers of appointment developed around the 13th Century to circumvent the prohibition against the devise of real estate. A landowner wishing to "devise" real estate could convey inter vivos an interest in the property to the feoffee to uses (the trustee), directing the feoffee to convey the land to whomever the landowner appointed by will. The appointment by will transferred the land as part of the inter vivos conveyance rather than as a devise. Equity enforced the appointment. The enactment of the Statute of Uses and the Statute of Wills, TRS. & ESTS. 614 (3rd ed. 1984).

6. In its early stages, the power of appointment was utilized in tandem with the use. The use was the early common law precursor to the modern trust, which also developed as a method of circumventing restraints on property transfers. A. Scott, ABRIDGEMENT OF THE LAW OF TRUSTS §§ 1.2 - 6.1.6 (1960). As early as the 12th Century, "sokemen and villeins" employed the use to convey property despite the prohibition against conveying in their own names. The use differed from a power in that the feoffee to uses held legal title to accomplish the purpose, whereas the holder of a power did not hold legal title as an incident of authority. Stoebuck, Infants' Exercise of Powers of Appointment, 43 DEN. U.L. REV. 255, 256 (1966). Most of the restrictions circumvented through the employment of powers were avoided because of the treatment of the holder's exercise under the relation back theory. See infra notes 65-73 and accompanying text.


8. Statute of Wills, 32 Henry 8, ch.1 (1540); see also Stoebuck, supra note 6, at 256.


Wills diminished some of the need for the use of powers of appointment.11

Other innovative uses of powers of appointment developed. Joint tenants held land for the use of one another to lessen the feudal restraints on ownership; by appending a power of appointment, the joint tenants could delay their decision about who would receive the future use of the property.19 Landowners used powers to convey land without livery of seisin.13 An appointment by will rendered ineffective the Statute of Wills limitation14 that otherwise would have allowed an owner to devise only two-thirds of any land held in knight's service.16 Through the use of powers of appointment, married women and infants could sidestep restraints on their ability to convey.18 A major benefit of the power of appointment was the ability of a property owner to delay choosing the recipient of his largess by giving another the right to determine that recipient.17

Until this century, property owners in the United States had little need for powers of appointment because of a lack of restraints on alienation and the absence of estate, inheritance and death taxes.16 Lawyers employed them infrequently and scholarship was scarce.19 The renewed interest in this country for the use of powers of appointment stems principally from the imposition of transfer taxes on the disposition of property.20 In addition, some state legisla-

11. Statute of Uses, 27 Henry 8, ch.10 (1535); Statute of Wills, 32 Henry 8, ch.1 (1540); Berall, Donahue, Oleyer and Tate, The Legal and Tax Consequences of Powers of Appointment in Connecticut, 50 CONN. B.J. 479, 482-83 (1976). These statutes allowed certain transfers that were theretofore impermissible and unobtainable without the use of powers of appointment. Some need for powers still persisted; see infra notes 12-17 and accompanying text.

12. Powell, Powers of Appointment, 10 BROOKLYN L. REV. 233, 235 (1941). The power to appoint could rest with someone other than the joint tenant. Id.

13. The landowner avoided livery of seisin by transferring in trust as appointed. Stoebuck, supra note 6, at 256 (citing 1 Sugden, Powers 1-4 (1856)).

14. 32 Henry 8, ch.1 (1540); see Berall, Donahue, Oleyer and Tate, supra note 11, at 482-83.

15. 77 Eng. Rep. 279, 280 (K.B. 1599); Stoebuck, supra note 6, at 256.

16. At that time, a married woman could not transfer land by will or by deed without the approval of her husband. Effland, supra note 10, at 585. For a more recent example, see Osgood v. Bliss, 141 Mass. 474, 6 N.E. 527 (1886).

17. Powell, Powers of Appointment in California, 19 HASTINGS L.J. 1281, 1281 (1968). For example, Chief Justice Lord Mansfield used powers of appointment in his will to allow for "... events and contingencies which it is impossible for me to foresee. ..." Id.

18. Kuntz, supra note 9, at 144.


20. See Effland, supra note 10. Although the estate and gift taxation of powers of ap-
tures enacted statutes aimed mainly at clarifying the sometimes inconsistent and ambiguous treatment of powers by the courts. For example, New York, California, Oklahoma, and Wisconsin attempted to simplify and make more uniform the use and effect of powers of appointment.

The two most important factors in the modern development of the law of powers of appointment in this country were the enactment of federal estate tax laws taxing some powers and the publication of the Restatement of the Law of Property. In 1918, the federal estate tax included in the donee's estate for tax purposes property passing pursuant to the exercise of a general power of appointment. Because the tax affected only exercised general powers, a testator could still use powers of appointment to provide flexibility in the disposition of the estate while avoiding adverse tax consequences. In pointment deserves significant consideration, the myriad tax issues are beyond the general focus of this article. For a brief discussion of some estate and gift tax issues, see infra notes 242-51 and accompanying text.

21. Powell, supra note 12, at 236. Legislators in New York, for example, attempted a pervasive coverage dealing with the use of powers of appointment of every type. Whether they succeeded is problematic. One commentator found the New York laws a "... morass ... covered over by bindweed and brambles to trip, trap, scratch, and impale." Rarick and Henry, The Oklahoma Powers of Appointment Act of 1977, 32 Okla. L. Rev. 787, 789 (1979).


23. See Effland, supra note 10, at 583.

24. See Rarick and Henry, supra note 21, at 787-88. Oklahoma's drafters attempted to formulate powers law to allow freedom to adapt to change and to deal with taxes, to effectuate the intent of the creator of the power, to clarify and conform the law without inhibiting judicial discretion, to reflect accurately modern conditions (rather than pay unnecessary homage to early common law rules), and to reserve certain restraints on property ownership to other areas of the law (e.g., taxation and the Rule Against Perpetuities). Id.

25. See Effland, supra note 10, at 583.

26. Kuntz, supra note 9, at 144.

27. RESTATEMENT OF PROPERTY §§ 318-69 (1940) (The American Law Institute prepared the Restatement of Property under the supervision of Professor W. Barton Leach). Powell, supra note 12, at 237. See also Powell, supra note 17, at 1285-86.

28. For the definition of donee, see infra note 39 and accompanying text.

29. For the definition of a general power, see infra notes 50-57 and accompanying text. The federal estate tax became effective in 1916. Before this time, obviously, no need existed for the use of a power of appointment to allow flexibility for estate tax purposes. Kuntz, supra note 9, at 148-49. See infra notes 242-51 and accompanying text.

30. The testator could delay a decision about the ultimate disposition of property by giving the decision to a donee. For the definition of donee, see infra note 39 and accompanying text.

31. Before 1942, the donee's estate would be taxed only if the donee exercised a general power of appointment. See infra notes 242-51 and accompanying text.
1942 and 1951, Congress tightened the estate tax laws governing powers of appointment so that the property subject to a general power of appointment would be includable in the donee's estate even if not exercised.\textsuperscript{32} Consequently, the use of powers of appointment in estate planning became increasingly refined. Most recently, the introduction into estate tax law of the concept of qualified terminable interest property\textsuperscript{34} and the revision of the tax on generation skipping transfers\textsuperscript{35} have fueled interest in the use of powers of appointment in estate planning.

Because of the increased interest in powers of appointment resulting from the imposition of taxes, the first Restatement of Property collected applicable rules and concepts.\textsuperscript{36} Recently, the American Law Institute published an updated version of the Restatement that recognizes changes in the law since the publication of the original.\textsuperscript{37}

II. DEFINITIONS

A power of appointment is the device by which one who is not the owner of a property interest is authorized to select, nominate, or designate recipients of that property interest.\textsuperscript{38} The property owner creating the power of appointment is the donor.\textsuperscript{39} The donee holds

\textsuperscript{32} See infra notes 242-51 and accompanying text.
\textsuperscript{33} See id.
\textsuperscript{34} See id.
\textsuperscript{35} Restatement of Property, supra note 27, §§ 318-69
\textsuperscript{36} Restatement (Second) of Property §§ 11.1-30.2 (1984) (Donative Transfers).
\textsuperscript{37} Id. § 11.1. Powers of appointment have been variously described: A power of appointment is a device by which an individual owning property or having the right to dispose of property reserves for himself or gives to another the power to determine who shall receive interests in the property subject to the power. Restatement of Property, supra note 26, § 318. A power of appointment is the capacity of one person without having necessarily an interest in property to direct the succession of that property interest. Kuntz, supra note 9, at 141. A power of appointment allows a person the discretion to determine who will receive interests in property and to what extent those interests will be received. Casner, Estate Planning - Powers of Appointment, 64 Harv. L. Rev. 185, 185-86 (1950). A power of appointment is a device used in estate planning to postpone the determination of the recipient of an owner's property. French, Exercise of Powers of Appointment: Should Intent to Exercise be Inferred from a General Disposition of Property?, 1979 Duke L.J. 747, 747. A power of appointment is a power created by a property owner in a trust or will that enables another person to name the recipients of the owner's property. Berall, Donahue, Oleyer and Tate, supra note 11, at 482. A power of appointment is "an authority enabling one person to dispose of the interest which is vested in another." Browning v. Blue Grass Hardware Co., 153 Va. 20, 29, 149 S.E. 497, 499 (1929) (quoting Davis v. Kendall, 130 Va. 175, ----, 107 S.E. 751, 759 (1921)).
\textsuperscript{38} Restatement (Second) of Property, supra note 36, § 11.2. "The donor is the person who brings the power of appointment into existence." Id. §11.2(1) The creation of the
the power and possesses the authority to exercise it.\textsuperscript{38} An object is one to whom the donee permissibly may appoint.\textsuperscript{40} An appointee is one to whom the donee actually appoints a property interest.\textsuperscript{41} When creating the power of appointment, the donor may designate someone — known as a taker in default — to take in case the donee fails to appoint the property interest.\textsuperscript{42} The appointive property is that property subject to the power of appointment.\textsuperscript{43}

An example will help make this clear. In her will, Testator (\textit{T}) gives her child (\textit{C}) a power of appointment over a fund of $100,000, to distribute to any of \textit{T}'s grandchildren, but if \textit{C} does not exercise the power, then the American Cancer Society will receive the fund. \textit{T} is the donor of the power of appointment. \textit{C} is the donee. \textit{T}'s power of appointment may be by grant of the power to another or by reservation by the donor. Casner, \textit{supra} note 37, at 186; French, \textit{supra} note 37, at 747; Kuntz, \textit{supra} note 9, at 142. See also Holzbach v. United Virginia Bank, 216 Va. 482, 219 S.E.2d 868 (1975).

39. \textit{Restatement (Second) of Property, supra} note 36, § 11.1. "The donee is the powerholder." \textit{Id. See} Casner, \textit{supra} note 37, at 186, 190-93; French, \textit{supra} note 37, at 747; Kuntz, \textit{supra} note 9, at 142-43. See also Holzbach, 216 Va. 482, 219 S.E.2d 868. The donee may also be known as the holder of the power. Virtually anyone possesses the capacity to serve as a donee. See \textit{Restatement (Second) of Property, supra} note 36, § 18.1. For an interesting discussion of infant capacity, see Stoebuck, \textit{supra} note 6, at 258-68.

40. \textit{Restatement (Second) of Property, supra} note 36, § 11.2. "The objects are the persons to whom an appointment can be made." \textit{Id.} §11.2(4). See also Casner, \textit{supra} note 37, at 186; Kuntz, \textit{supra} note 9, at 142. For a discussion of impermissible appointments, see \textit{infra} notes 200-02 and accompanying text.

41. \textit{Restatement (Second) of Property, supra} note 36, § 11.2. "The appointees are the persons to whom an appointment has been made." \textit{Id.} §11.2(4). See also Holzbach, 216 Va. 482, 219 S.E.2d 868; Kuntz, \textit{supra} note 9, at 142.

42. \textit{Restatement (Second) of Property, supra} note 36, § 11.2. "The takers in default of appointment are the persons whose interests in property are subject to a power of appointment and who take the property to the extent the power is not effectively exercised." \textit{Id.} §11.2(5). See also Kuntz, \textit{supra} note 9, at 142. Property law treats a taker in default as owning a property interest subject to an executory limitation (\textit{i.e.}, divestment upon the appointment by the donee to one other than a taker in default). \textit{Restatement (Second) of Property, supra} note 36, § 11.2 comment c and § 24.4 comment a.

In certain situations, the takers in default may not receive the appointive assets upon the failure of the donee to appoint. See \textit{infra} notes 154-82 and accompanying text. In other situations, the donor may not designate expressly takers in default, yet a court may infer the intent of the donor to name recipients in the event of a failure to exercise or of an ineffective exercise. \textit{Restatement (Second) of Property, supra} note 36, § 24.2 provides for the implication of takers in default when the objects of a special power are a defined limited class, unless the donor indicates otherwise. For the definition of a special power, see \textit{infra} notes 58-64 and accompanying text. Some courts have found implied takers in default when the donee possesses an imperative power. \textit{In re Smythe's Estate}, 132 Cal. App.2d, 343, 282 P.2d 141 (1955). For a discussion of imperative powers, see \textit{infra} notes 74-89 and accompanying text.

43. Kuntz, \textit{supra} note 9, at 142. \textit{Restatement (Second) of Property, supra} note 36, § 11.3 describes appointive assets as those subject to a power of appointment and appointive interests as the "... sum of interests that a power of appointment creates in appointive assets."
grandchildren are the objects. The American Cancer Society is the
taker in default. If $C$ exercises the power and gives the money to
grandchildren $GC_1$, $GC_2$ and $GC_3$, they are appointees.44 If $C$
decides not to appoint or if the attempt fails, the American Cancer
Society receives the money.

A major feature of the power of appointment is that the donee
typically enjoys the ultimate discretion — either to exercise the
power within the framework provided by the donor or to do noth-
ing.46 Thus, the donee may decide whether to complete the transfer
of title from the donor to the appointee, but does not have to act.48
For example, the power of a trustee to determine beneficial shares of
income and principal may be discretionary, in which case the trustee
has a power of appointment.47 A testator may direct a testamentary
trustee to distribute the income and the principal of the trust to the
testator's children in whatever amounts and proportions the trustee
may determine. The trustee has a power of appointment over the
income and the principal, and possesses the discretion not to appoint,
i.e., to do nothing.48

III. TYPES OF POWERS

A. Classification by Object

Powers of appointment fall into different categories. One
method of classification depends on the permissible appointees. The
common types of powers in this category are general powers of ap-
pointment and special powers of appointment. Some courts also dis-
cuss such varieties as powers in trust, collateral powers, powers in
gross, and powers appendant.49

44. If $C$ gives the money to any of the grandchildren, they are appointees. For a discus-
sion of the exclusivity of a power of appointment, see infra notes 195-98 and accompanying
text.
45. See infra notes 74-89 and accompanying text.
46. If a donee fails to exercise a power, several possibilities arise as to who will receive
the property interest. See supra note 42, infra notes 154-82 and accompanying text.
47. Casner, supra note 37, at 187.
48. Id. See also Restatement (Second) of Property, supra note 36, § 14.2 comment
d, illustration 6 (trustee has the discretion to do nothing). Determining whether the trustee
has discretion can sometimes be difficult. For an example of the confusion that can arise in certain
situations where the trustee apparently has some type of power (and to illustrate the vestiges
of the complicated English common law treatment of powers), see Grubb, Powers, Trusts and
Classes of Objects, 1982 The Conveyancer & Prop. Law. 432 (discussion of such catego-
ries as mere powers, collateral powers and intermediate powers); see also infra note 140.
49. Morgan v. Commissioner, 309 U.S. 78, 60 S. Ct. 424 (1940); Greenway v. White,
196 Ky. 745, 246 S.W. 137 (1922); Gold, The Classification of Some Powers of Appointment,
1. General Powers.—The authorities differ on the appropriate definition of a general power of appointment. Various descriptions include a power where the donee can appoint: to anyone he chooses; in favor of such person or persons, including himself, as he pleases; to himself or to his estate; in favor of any person, including himself (if exercisable during lifetime) or his estate (if exercisable at death). The Internal Revenue Code defines a general power as one that can be exercised by the holder of the power in favor of himself, his estate, his creditors, or the creditors of his estate. Probably because of the overwhelming impact of tax law on the development of the use of powers of appointment in this century, the Restatement (Second) of Property updates the definition of a general power to dovetail with the Internal Revenue Code. The uniting thread among all the definitions of a general power is that the ability of the donee to appoint to himself is tantamount to ownership of the appointive property.

40 MICH. L. REV. 337, 338 (1942); Jones, supra note 4, at 232. The special power of appointment may also be referred to as a limited power of appointment, a non-general power of appointment, and a particular power of appointment. Greenway 196 Ky. at 746, 246 S.W. at 138 (limited and particular power of appointment); Massey v. Guaranty Trust Co., 142 Neb. 237, 5 N.W.2d 279 (1942) (limited and particular power of appointment); Clinton County Nat'l Bank v. First Nat'l Bank of Cincinnati, 62 Ohio St. 2d 90, 403 N.E.2d 968 (1980) (limited power of appointment); Restatement (Second) of Property, supra note 36, § 11.4 (non-general power of appointment). For a discussion of the so-called hybrid power, see Note, Powers of Appointment, 21 WILLAMETTE L. REV. 813, 827 (1985) (authored by Kevin G. Clarkson) [hereinafter Note, Powers of Appointment]. See also infra notes 74-95 and accompanying text.


51. Jones, supra note 4, at 232.

52. Id.; Kuntz, supra note 9, at 142.

53. Restatement of Property, supra note 27, § 320.


55. See supra notes 26-34 and accompanying text.

56. Restatement (Second) of Property, supra note 36, § 11.4.

57. "A power of appointment is general if it is exercisable in favor of any one or more of the following: the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate." Id. The First Restatement described a general power as one in which the donee could appoint to himself or to his estate. Restatement of Property, supra note 27, § 320. See also Rowe v. Rowe, 219 Or. 599, 347 P.2d 968 (1959).

Unless otherwise indicated, this article will use the definition of a general power of appointment found in the Code and Restatement (Second) of Property.
2. Special Powers.—Similarly, differences arise as to the definition of a special power of appointment. The *Restatement of Property* classified a power as special if the donee could exercise the power: “(a) . . . in favor of persons, not including the donee, who constitute a group not unreasonably large, and (b) the donor does not manifest an intent to create or reserve the power primarily for the benefit of the donee.”

Some have defined the special power as limiting appointees to an ascertainable group or to anyone other than the donee. Others find special those powers that are not general. The latter definition reflects the policy of the Internal Revenue Code and the *Restatement (Second) of Property*. The premise of the *Restatement (Second) of Property* is that the donee of a special power may not exercise the power for the donee's benefit.

Historically, the power of appointment has depended considerably on its being treated as transferring the appointive property to the appointee from the donor of the power, rather than from the donee. Thus, the law generally treats a power of appointment as an agency: upon exercise of the power, the property passes from the donor and not the donee. Upon creating a power of appointment, the donor essentially has made a transfer without naming a recipient of title to the property. By exercising the power, the donee serves as an amanuensis, naming the recipient and thus filling in the blank left by the donor. Stated from a different perspective, the recipient takes from


62. The Internal Revenue Code does not define a special power of appointment but treats general powers differently for tax purposes. See *infra* notes 242-51 and accompanying text.

63. *Restatement (Second) of Property*, supra note 36, § 11.4(2). Unless otherwise indicated, this article will use the *Restatement (Second) of Property* definition.

64. Although, of course, the donee of a special power may well benefit, albeit indirectly, from possession of the power. For example, a parent with the authority to appoint property among her children may hold an incentive enhancing the probability that the children will treat her appropriately.

65. Stobuck, *supra* note 6, at 257.

the donor and not from the donee.\textsuperscript{67}

As it evolved, the law of powers has invariably applied this relation back theory to special powers of appointment.\textsuperscript{68} The application has not been nearly as consistent for general powers of appointment.\textsuperscript{69} For many purposes, courts and legislatures have determined the relation back theory inappropriate for general powers, instead considering the interest of the donee in the appointive property as tantamount to ownership.\textsuperscript{70} In other situations, however, the relation back theory has applied to defeat the interest of creditors,\textsuperscript{71} children,\textsuperscript{72} and surviving spouses\textsuperscript{73} of the donee of the general power.

3. Powers in Trust.—Equity will not exercise a power of appointment not exercised by the donee. Thus, a donee has ultimate discretion: exercise the power or not exercise the power.\textsuperscript{74} When a fiduciary has no discretion but is required to distribute property, however, he does not have a true power of appointment because he lacks the discretionary element.\textsuperscript{75} If a fiduciary\textsuperscript{76} must select someone to receive an interest in property, he does not hold a power of appointment but rather what the courts and commentators have denominated a power in trust or an imperative power.\textsuperscript{77} Despite the inclusion of the word “power” in the expressions “power in trust” and “imperative power,” most authorities have strictly applied the rules appropriate to trusts in determining the validity and adminis-

\textsuperscript{67} Id.; Kuntz, supra note 9, at 143.
\textsuperscript{68} See Kuntz, supra note 9, at 143.
\textsuperscript{69} Id.; see, e.g., the treatment of capture, infra notes 155-70 and accompanying text.
\textsuperscript{70} Donees are virtual owners for certain applications of the Rule Against Perpetuities, for appointments that create new trusts and new powers of appointment, and for tax purposes. See infra notes 183, 227-28, 234-35, 242-51 and accompanying text; see also Kuntz, supra note 9, at 143.
\textsuperscript{71} The creditors of the donee generally may reach the appointive property of the donee if exercised, but not if the power remains unexercised. Clapp v. Ingraham, 126 Mass. 200 (1879); Kuntz, supra note 9, at 143. For a discussion of the rights of creditors of the donee, see infra notes 202-09 and accompanying text.
\textsuperscript{72} Kuntz, supra note 9, at 143.
\textsuperscript{73} Id.; see infra notes 210-13 and accompanying text.
\textsuperscript{74} Gray, Powers in Trust and Gifts Implied in Default of Appointment, 25 Harv. L. Rev. 1, 3-5 (1911).
\textsuperscript{75} The fiduciary lacks the discretionary element because he cannot decide to do nothing. Note that all powers are in a sense fiduciary, since the donee cannot exercise the power in a manner that would contravene the authority imparted by the donor. Gray, supra note 74, at 3.
\textsuperscript{76} The fiduciary required to select is often serving as a trustee.
\textsuperscript{77} In re Estate of Smythe v. Pacific Home, 132 Cal. App. 2d 343, 382 P.2d 141 (1955); Gray, supra note 74, at 1. Gray indicated that a better description would be a trust in the form of a power. Gray supra note 74, at 2.
tration of these dispositions. The power in trust or imperative power does not qualify as a true power of appointment; in a true power, the donee cannot be forced to exercise.78

A typical example of the difficulty occasioned by powers in trust arises when a testator devises her estate to her trustee, requiring him to dispose of the property among the testator's friends as the trustee shall determine.79 A court would not find that the trustee holds a power of appointment since he does not retain the discretion not to act.80 Since the devise does not create a power of appointment, the court would determine the validity of the devise using trust law. A private trust must benefit definite beneficiaries (who can enforce the trust): the designation of friends fails to ascertain definite beneficiaries and proves fatal to the attempt to create a valid trust.81 A
charitable trust typically must benefit indefinite beneficiaries while serving a charitable purpose. The testator's devise would fail as a charitable trust since it seems to serve no charitable purpose.\(^2\)

To save the gift, proponents of the will would advocate the treatment of the disposition as a power of appointment, which would not fail because of indefinite objects. At best, the argument might convince the court to describe the disposition as effecting a power in trust, but the victory would be Pyrrhic, as the devise would fail. It cannot be a power of appointment because the trustee (the putative donee) must act.\(^8\) The court would use trust rules, rather than power of appointment rules, to determine validity. It cannot be a private trust because no definite beneficiary exists. It fails as a charitable trust because it serves no charitable purpose.

The first *Restatement of Trusts* and the majority of American courts would arrive at the same result.\(^8^4\) The second *Restatement of Trusts*, taking a minority position, would give the trustee of an imperative power an authority akin to that of a donee of a power of appointment.\(^8^5\) In the example, if the trustee wants to exercise his authority and appoint among the "friends," he properly may do so. If he does not wish to appoint, the disposition fails and the trustee must reconvey the property to the testator's estate.\(^8^6\)

Certain imperative power situations arise when the grantor disposes of property to a trustee to provide for the saying of masses, the upkeep of cemeteries, or for the care of specific pets.\(^8^7\) Normally, these trusts would fail for want of a definite beneficiary or for violating the Rule Against Perpetuities. Furthermore, if the testator requires the trustee to act, as in the above example, leaving the trustee no discretion not to act, the disposition would not create a valid power of appointment. In these limited situations, however, many courts authorize the trustee to act if he wishes, similar to the *Re-

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82. See *Restatement (Second) of Trusts* § 368 (1959). Some courts, perhaps overly concerned by the rule in *Moric*, have denied validity to trusts with apparently charitable purposes. See, e.g., Tilden v. Green, 130 N.Y. 29, 28 N.E. 880 (1891); see also Fratcher, *supra* note 79, at 449.

83. See *supra* notes 45-48 and accompanying text.


86. A resulting trust arises when an attempt to create a trust fails. See *Scott*, *supra* note 6, § 404.

87. See *In re* Searight's Estate, 87 Ohio App. 417, 95 N.E.2d 779 (1950).

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statement (Second) of Trusts treatment of all imperative powers. Commentators often refer to these specific instances as "honorary trusts." 80

4. Other Types.—The cases discuss several other categories of powers, emanating generally from the English decisions, but without any significant impact in the United States. 80 A donee with discretion over the appointment of property independent of any beneficial interest possesses a collateral power. 91 If the donee also has a beneficial interest in the property subject to the power, he holds a power in gross. 92 With the power in gross, the donee's discretion lies with some interest other than the interest in which he enjoys beneficial ownership. 93 English law also recognized the power appurtenant, 94 which in essence allowed the donor to appoint the donor's own property. 96

B. Classification by Time of Appointment

Another method of classification of powers of appointment depends on when the donee may exercise the power. Of course, the donor's intent determines the permissible time of exercise. A power is presently exercisable if the donee may appoint during her lifetime. 95 A testamentary power is exercisable only by the donee's will and, consequently, takes effect at the donee's death. 97 Typically, a

89. See Searight's Estate, 87 Ohio App. 2d at 418, 95 N.E.2d at 780.
90. American courts appear satisfied with only the general and special powers categories. Lyon v. Alexander, 304 Pa. 288, 156 A. 84 (1931); Casner, supra note 78, § 23.12; Grubb, supra note 48, at 432.
91. Also known as a power simply collateral or a power purely collateral. Casner, supra note 78, § 23.12 at 493-94.
92. Id.
94. Also known as the power appurtenant. Casner, supra note 78, § 23.13; Casner, supra note 37, at 186; see also supra notes 65-73 and accompanying text.
95. Also known as the power appurtenant. Casner, supra note 78, § 23.13; Casner, supra note 37, at 186.
96. The American courts have been reluctant to accept this designation: giving an owner the "additional" right to "appoint" her property seems superfluous. Browning v. Blue Grass Hardware Co., 153 Va. 20, 149 S.E. 497 (1929); Casner, supra note 78 § 23.13; RESTATEMENT OF PROPERTY, supra note 27, § 325; Stoebuck, supra note 6, at 200.
presently exercisable power is also exercisable by the donee's will, unless the donor has indicated a contrary intention.98 A testamentary power is presumably not exercisable during the donee's lifetime, since courts tend to find that the donor intended the donee to have until the moment before death to ascertain whether and how to appoint the property.99

IV. CREATION OF POWERS OF APPOINTMENT

A donor may create a power of appointment orally or by written instrument. The written instrument may be a deed or a will.100 Whether the donor intends to create a power of appointment does not depend on the use of any magic words or talisman101 but rather on the donor's intent as ascertained by competent evidence.102 The donor's intent may be expressed or implied.103 As long as the intent of the donor can be determined and the method of creation falls within a recognized manner of conveyance, the power will be effective.104

One common example of the creation of a power of appointment without the express use of that term occurs when a grantor creates a so-called power to consume or power to dispose of property.105 The

S.E.2d 23. See Powell, supra note 12, at 238; Restatement (Second) of Property, supra note 36, § 11.5.
98. Hutchinson v. Farmer, 190 Md. 411, 58 A.2d 638 (1948); Weston, 264 N.C. 432, 142 S.E.2d 23.
100. Berall, Donahue, Oleyer and Tate, supra note 11, at 483. Caveat: the Statute of Frauds, especially for real property.
101. in re Estate of Jackson, 57 Misc.2d 896, 293 N.Y.S.2d 982 (Sur. Ct. 1968); Restatement (Second) of Property, supra note 36, § 12.1.
102. Berall, Donahue, Oleyer and Tate, supra note 11, at 483; Restatement (Second) of Property, supra note 36, § 12.1.
103. Restatement (Second) of Property, supra note 36, § 12.1 comment f. The following example illustrates a power impliedly created: Testator transfers Blackacre to his husband for life and if he dies intestate to her daughter. Her husband has by implication a general testamentary power of appointment.
104. Berall, Donahue, Oleyer and Tate, supra note 11, at 483; Restatement (Second) of Property, supra note 36, § 12.1. A well drafted dispositive instrument leaves no doubt that the donor intended to create a power of appointment. For an example of the problems a court can have when trying to determine from an ambiguous instrument whether the donor intended to create a power of appointment, see Bredin v. Wilmington Trust Co., 42 Del. Ch. 563, 216 A.2d 685 (1965). Caveat: merely precatory language contained in the grant. See Marx v. Rice, 1 N.J. 574, 65 A.2d 48 (1949).
105. Old Ladies Home Ass'n v. Platt, 252 Miss. 260, 172 So.2d 770 (1965); Johnson v.
grantor gives to the recipient the right to invade principal or to use property. Because the recipient has the right to use the property for her own benefit or for the benefit of her creditors, she holds a general power of appointment. Frequently, the power to consume will be coupled with a life estate.

One variation of the use of the power to consume arises when the grantor gives the recipient a life estate coupled with a right to consume the principal during her lifetime and to direct by her will the disposition of whatever principal remains at her death. Thus, the donee may have two successive powers of appointment. In this case, the donee has a life estate, a power to consume (a general presently exercisable power of appointment) and a testamentary power of appointment over any remaining principal. Numerous questions have arisen in attempting to decipher the donor’s intent when authorizing a power to consume, or a power to consume coupled with a life estate. Many of the construction problems result from inartful

Waldrop, 256 S.C. 372, 182 S.E.2d 730 (1971); see Effland, supra note 10, at 593.
107. See I.R.C. § 2041(b)(1); see also supra note 54 and accompanying text.
108. Old Ladies Home Ass’n, 252 Miss. 260, 172 So.2d 770; Abbott v. Wagner, 108 Neb. 359, 188 N.W. 113 (1922). Of course, a life tenant, without more of an interest, is authorized only to use the property for life without waste or to use the income from the principal. Id.
109. Thus, the donee may have two successive powers of appointment. The testamentary power may be general or special, depending on whether the donor intended the donee’s estate (or its creditors) as objects. See, e.g., Rogers v. Rogers, 221 S.C. 360, 70 S.E.2d 637 (1952).
110. For example, are there any limitations on the ability of the donee to invade the property? See, e.g., Lehner v. Estate of Lehner, 219 Kan. 100, 547 P.2d 365 (1976).
111. For example, did the donor intend to grant a fee simple or a life estate coupled with a power to consume? The difference, of course, is that if a fee simple is granted, the property passes through the feeholder’s estate at death. If the donor authorized merely a life estate coupled with a power to consume, the unused property would pass to the donor’s successors or, if the power to consume was coupled additionally with a testamentary power, to the appointees if exercised or to any takers in default if not exercised. See infra notes 154-82 and accompanying text.

Determining whether the donor intended a fee simple or a life estate coupled with a power causes problems for the courts, which can take either of two views. Some courts first would apply a rule of law (the so-called repugnancy rule) that prohibits the reduction by subsequent language of a fee simple estate clearly given in earlier language of a grant. See Sterner v. Nelson, 210 Neb. 358, 314 N.W.2d 263 (1982). The apparently better-reasoned rule first would determine the intent of the donor and then would look to see if the resulting grant violates a rule of law; if the donor intended to grant less than a fee simple, then the repugnancy rule should not be applicable. See Rogers, 221 S.C. 360, 70 S.E.2d 637; Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950) (Vanderbilt, C.J., dissenting). See also Frederick v. Frederick, 355 Mass. 662, 247 N.E.2d 361 (1969); Greffet v. Willman, 114 Mo. 106, 21 S.W. 459 (1893); In re Segal’s Estate, 107 N.H. 120, 218 A.2d 53 (1966); Estate of Curtis, 452 Pa. 527, 307 A.2d 251 (1973); Johnson v. Waldrop, 256 S.C. 372, 182 S.E.2d 730 (1971); Comment,
drafting.112

V. EXERCISE OF POWERS OF APPOINTMENT

A. Express Exercise

As with many other aspects of the interpretation of powers of appointment, whether the donee effectively exercises the power depends on a determination of the intent of the donor and of the donee.113 If the donor designated a method of exercise upon creation of the power, the donee must comply with that designation.114 If, how-


112. See Effland, supra note 10, at 593. Another construction problem may arise with the power to dispose: Did the grantor intend for the grantee to have (1) a power to consume, (2) merely a power to sell without consumption of the proceeds (therefore held in "trust"), or (3) a power to sell coupled with a limited right of consumption? Id.


Analogous to the discussion of an express or an implicit appointment is the question of whether the donee may appoint while retaining a right to revoke the appointment. The courts usually have held that the donee may appoint with a retained right of revocation only by expressly reserving the right to revoke. The English treated the appointment with revocation as a partial appointment. Failure to reserve a right to revoke constituted an exhaustion of all power of the donee. This was the so-called "one-exercise rule." Of course, the donee can retain a right to revoke only if the exercise is inter vivos (although, in a sense, the appointment of a power by will is always revocable - because wills are always revocable - until the donee's death). The donee can retain a right to revoke only if not prohibited by the donor: intent is the controlling factor. See Comment, Powers of Appointment in California: Revocability of an Appointment, 8 CAL. W.L. REV. 439, 442-49 (1972) (authored by Roger W. Krauel and Francesca Mecia Krauel); see also RESTATEMENT (SECOND) OF PROPERTY, supra note 36, §15.2.

Other factors may influence the effectiveness of an attempted exercise: the capacity of the donee, possible formal requirements of the instrument of exercise, an attempt to exercise the power before its creation (typically when the donee attempts to exercise a power created by the donor's will but before the death of the donor), and appointments to nonobjects or predeceased objects. For an excellent discussion, see French, Application of Antilapse Statutes to Appointments Made by Will, 53 WASH. L. REV. 405, 409 (1978); see also RESTATEMENT (SECOND) OF PROPERTY, supra note 36, §§ 18.1-.5. Other instances in which an attempted exercise may fail occur when an attempted exercise results in a violation of the Rule Against Perpetuities or when the appointee is not allowed to take the property (e.g., witness to a will under a purging statute). See Amerige v. Attorney General, 324 Mass. 648, 88 N.E.2d 126 (1949); In re Vander Byl, 1 Ch. 216 (1931); Jones, supra note 4, at 256. When the exercise is ineffective (as when the donee fails to exercise), several possibilities arise with respect to the transfer of the appointive property. See infra notes 155-83 and accompanying text.

114. Lisner v. Chicago Title & Trust Co., 582 F.2d 1092 (7th Cir. 1978); Union Trust Co. v. Sheldon, 84 Conn. 494, 80 A. 758 (1911); O'Brien v. Flint, 74 Conn. 502, 51 A. 547 (1902); Old Colony Trust Co. v. Richardson, 297 Mass. 147, 7 N.E.2d 432 (1937); Massey v. Guaranty Trust Co., 142 Neb. 237, 5 N.W.2d 279 (1942). See supra notes 96-99 and accompanying text. For a discussion of the English view that a trustee with a mere power should
ever, the donor did not designate a particular method of exercise, the donee may exercise the power in any manner.\textsuperscript{115} In either case, after determination of the donor's intent about the method of exercise, the donee's intent must be scrutinized to determine whether the donee intended to exercise.\textsuperscript{116} Unless required by the donor, written evidence of the donee's intent is unnecessary, but rather the donee's conduct and declarations may indicate the exercise.\textsuperscript{117} Thus, if the intent to exercise is expressed clearly by the donee, and the method of exercise complies with any requirements imposed by the donor, finding an effective exercise poses little problem. When, however, the intent to exercise is not clear or the method does not comply with the donor's condition, finding an effective exercise becomes more problematic.

The donor often may require the donee to make reference to the power of appointment upon exercise.\textsuperscript{118} An increasing number of states impose this condition by statute for a donee attempting a tesa...
tamentary exercise of the power.\textsuperscript{119} For example, Uniform Probate Code section 2-610 provides that a general devise or residuary clause does not exercise a power "... unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power."\textsuperscript{120}

B. \textit{Implied Exercise}

A donee may exercise by implication a power of appointment.\textsuperscript{121} A discussion of an implied exercise presumes that the donee did not express clearly her intent to exercise any power she may hold.\textsuperscript{122} The implication may result in one of several ways. One method of exercise by implication may result from the donee's reference to the power of appointment. For example, her will may refer to "that power of appointment given me by Jane Donor in her will dated July 1, 1982." Despite a lack of an expression of intent to exercise that power, the will impliedly may do so merely by reference to the power.\textsuperscript{123} The implication also may result from a reference to the appointive property itself. For instance, the donee's will might leave all real property, including Blackacre, to her devisees. If Blackacre is appointive property, a court may well find that the donee intended to exercise a power of appointment over Blackacre even though the will lacks a direct expression of that intent.\textsuperscript{124} Or the implication may

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\textsuperscript{119} Dewey, \textit{Is There a Simple Will? Or Drafting of a Testamentary Power of Appointment Without Specific Reference to Source of the Power: Opportunity for Malpractice?}, 4 DET. C.L. REV. 1533, 1535 (1983) (provides examples of state statutes and referring to \textit{Uniform Probate Code} § 2-610, 8 U.L.A. 150 (1988)). The Uniform Probate Code provision is a response to those decisions and statutes holding that a general devise (or a residuary devise) impliedly exercised any power of appointment held by the donee. See infra notes 127-36 and accompanying text.

\textsuperscript{120} \textit{Uniform Probate Code} § 2-610, 8 U.L.A. 150 (1988).

\textsuperscript{121} The donee's ability to exercise by implication remains subject to any limitations imposed by the donor. Holzbach, 216 Va. 482, 219 S.E.2d 868. See, e.g., supra notes 96-99 and accompanying text.

\textsuperscript{122} For example, the donee might exercise expressly by stating in her will: I hereby exercise the power of appointment granted to me under Item VII of my mother's will. For sample language expressly exercising a power, see \textit{Wilkins, Drafting Wills and Trust Agreements: A Systems Approach} (3rd ed. 1985). Of course, problems of proof exist any time a court must determine the unexpressed intent of a testator.

\textsuperscript{123} Blagge v. Miles, 3 F. Cas. 559 (C.C.D. Mass. 1841) (No. 1,479); Carlisle v. Delaware Trust Co., 34 Del. Ch. 133, 99 A.2d 764 (1953); Hopkins v. Fauble, 47 Ill. App. 2d 263, 197 N.E.2d 725 (1964); Foster v. Grey, 96 Ill. App. 38 (1900); Hollister v. Hollister, 85 Or. 316, 166 P. 940 (1917).

\textsuperscript{124} The court assumes the donee must have intended to exercise the power, knowing that otherwise she could not have effectuated affirmatively a transfer of Blackacre to her devisees. Blagge, 3 F. Cas. 559; Carlisle, 34 Del. Ch. 133, 99 A.2d 764; Hopkins, 47 Ill. App. 2d
stem from a disposition of property that would be ineffective without exercise of the power of appointment. For example, the donee's will may leave a gift of cash totalling $150,000. The donee's estate may include only $50,000, but if she also holds a power of appointment over a fund of $100,000, a court could infer an intent to exercise the power to fulfill the devise.126

Perhaps the most common example of an implied exercise occurs when a testator makes a general or residuary devise without mentioning expressly any intent to appoint property subject to a power. Because the donee of a power differs from an owner of property,126 the earlier English common law decisions determined that a general disposition of property without reference to a power of appointment failed to exercise that power.127 The majority of American decisions agreed,128 although some, distinguishing general powers as being tantamount to ownership, applied the rule only to special powers.129

In response to the refusal of a majority of common law courts to recognize an implicit act probably intended by the testator,130 a number of states enacted statutes expressly providing for the exercise of powers of appointment merely by the inclusion of a general or

263, 197 N.E.2d 725; Foster, 96 Ill. App. 38; Hollister, 85 Or. 316, 166 P. 940.

125. See Re Beesty's Will Trusts, 3 All E.R. 82 (1964); Blagge, 3 F.Cas. 559; Carlisle, 34 Del. Ch. 133, 99 A.2d 764; Illinois State Trust Co. v. So. Illinois Nat'l Bank, 29 Ill. App. 3d 1, 329 N.E.2d 805 (1975); Hopkins, 47 Ill. App. 2d 263, 197 N.E.2d 725; Foster, 96 Ill. App. 38; Hollister, 85 Or. 316, 166 P. 940. The English courts have recognized one other type of "implicit" exercise: The informal exercise, achieved despite the invalidity for other purposes of the exercising instrument (i.e., the will or deed). Comment, supra note 113, at 448.

126. See e.g., Jones v. Curry, 36 Eng. Rep. 300 (M.R. 1818); Effland, supra note 10, at 596; supra notes 65-73 and accompanying text.

127. French, supra note 37, at 751. For a thorough discussion of case development, see id. at 755.


129. Clinton City Nat'l Bank & Trust Co. v. First Nat'l Bank of Cincinnati, 62 Ohio St.2d 90, 403 N.E.2d 968 (1980). See Blagge, 3 F.Cas 959; Amory v. Meredith, 89 Mass. (7 Allen) 397 (1863). The first Restatement acknowledge the possibility that a donee could have intended to appoint property subject to a power along with property owned outright by the donee. RESTATEMENT OF PROPERTY, supra note 27, § 343; see Note, Powers of Appointment, supra note 49, at 833. Cf. RESTATEMENT (SECOND) OF PROPERTY, supra note 36, § 17.3 (without additional evidence of intent, disposition of all of donee's property not an exercise). See French, supra note 37, at 752 for a discussion of the admissibility of extrinsic evidence.

residuary disposition in the will. Some states, however, enacted legislation confirming the majority common law rule and others reversed previously enacted statutes presuming exercise; the increased bandwagon effect against presumed exercise stemmed from tightening tax treatment of powers of appointment and from the suggested language of the Uniform Probate Code. Today, most states follow the majority rule and do not infer an intent to exercise from a residuary clause. The unwary estate planner should beware of a couple of traps. First, in states following the minority rule, a client not wishing to devise the appointive property must do more than merely remain silent. Second, states differ in their treatment of implicit exercise by a general or residuary devise; therefore, the careful estate planner should consider and discuss with clients the possibility of different treatment in the event the law of another state should apply to the construction of the will.

C. Contracts to Exercise

Whether a contract to exercise is enforceable depends on the categorization of the power of appointment. The courts have drawn a

131. French, supra note 37, at 752, 768-73 (giving examples of state statutes); When Does a Will Effectively Exercise a Power of Appointment?, 104 TRS. & Ests. 814 (1965); Halbach, The Use of Powers of Appointment in Estate Planning, 45 IOWA L. REV. 691, 711 (1960). Of course, the will provisions could expressly overcome the constructional statute. In re Deane's Will, 4 N.Y.2d 326, 21151 N.E. 2d 184, 175 N.Y.S.2d (1958). The applicable English statute (Wills Act, 1837, s.27) exercised general powers:

A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will.


132. See infra note 242.

133. Dewey, supra note 119, at 118; French, supra note 37, at 752, 792-93. See supra note 121 and accompanying text.

134. French, supra note 37, at 753-54; see Restatement (Second) of Property, supra note 36, § 17.3 Reporter’s notes 1, 3. See also Mastin v. Merchants Nat’l Bank of Mobile, 278 Ala. 261, 177 So. 2d 817 (1965); Northern Trust Co. v. House, 3 Ill. App. 2d 10, 120 N.E.2d 234 (1954).

135. See supra note 252 and accompanying text.
distinction between testamentary powers and presently exercisable (inter vivos) powers. If the donee may exercise only by will, a contract to exercise is not enforceable. The policy behind this result stems from the presumed intent of the donor: by giving the donee a power exercisable only by will, the donor must have meant for the donee to be able to wait until the moment before the donee’s death before finally deciding whether and how to exercise the power of appointment. A contract to exercise (entered into during the lifetime of the donee), if enforceable, would contradict the donor’s intent by eliminating effectively the ability of the donee to change his mind during the time period after contracting and before death. The party contracting with the donee may seek restitution rather than specific performance or damages.

A donee of a presently exercisable power may enter into an enforceable contract to exercise as long as the exercise would not confer a benefit upon someone who is not an object. Since the donee has the authority to exercise currently, the recognition of a contract to exercise does not violate the intent of the donor.

D. Release

Unless prohibited by the donor, a donee may release a power of appointment at any time. By releasing a power, the donee in effect

136. O’Hara v. O’Hara, 185 Md. 321, 44 A.2d 813 (1945); Farmers’ Loan & Trust Co. v. Mortimer, 219 N.Y. 290, 114 N.E. 389 (1916). For similar treatment of a “presently exercisable” power of appointment which is not yet presently exercisable because of a condition precedent, see Lisner v. Chicago Title & Trust Co., 582 F.2d 1092 (7th Cir. 1978). See also Restatement (Second) of Property, supra note 36, § 16.2.


138. See In re Crampton’s Estate, 45 Misc. 2d 895, 258 N.Y.S.2d 35 (Sur. Ct. 1965); In re Coffrini’s Estate, 45 Misc. 2d 205, 256 N.Y.S.2d 524 (Sur. Ct. 1964); Restatement (Second) of Property, supra note 36, § 16.1. The exercise of a power to benefit a nonobject constitutes a “fraud on the power” and is invalid. See infra notes 200-01 and accompanying text.


In deciding whether a donee may release a power, the English cases refer to the numerous categories of English law. Donees may release powers appendant, Savile v. Blacket, 24 Eng. Rep. 610 (Ch. 1721), powers in gross, Smith v. Death, 56 Eng. Rep. 937 (Ch. 1820), and powers simply collateral, see In re Wills’ Trust Deeds, 1 Ch. 219 (1964). Donees may not release imperative powers. See Brown v. Higgs, 32 Eng. Rep. 473 (1803). Note the discussion
decides before the time limit for exercise that he will never exercise the power. Upon release of a power of appointment, the appointive property passes as though the donee failed effectively to exercise the power. The ability to release applies to testamentary and presently exercisable powers, to general and special powers, and to complete and partial releases.

Tax law provided a major impetus for the release of powers. Before 1942, the Internal Revenue Code did not subject to taxation in the estate of the donee any appointive property of an unexercised general power. By amendment to the Code in 1942, Congress expanded the scope of the taxman's reach to include in the donee's estate appointive property of unexercised general powers. The amended, more comprehensive provision did allow a transition period during which the donee could partially release a general power of appointment, transforming it into a special power not subject to tax-

in Hawkins, supra note 93, at 79 of Re Wills' Trust Deeds, Ch. 219 (1964), adding the beneficial and vicarious powers designations to the plethora of English categories referred to supra notes 48, 90-95 and accompanying text.

Some commentators have noted that to permit a release of a testamentary power would allow the donee to remove the flexibility (at least as to time of exercise) intended by the donor. See Jones, supra note 4, at 237; see also supra notes 137-39 and accompanying text.

The careful drafter would include express provisions for or against exercise to ensure compliance with the donor's intent.

140. See infra notes 154-82 and accompanying text.

141. Halbach, supra note 132, at 712.


The Restatement originally took the position that the donee could not release a testamentary special power. Restatement of Property, supra note 27, § 335. But cf. Restatement (Second) of Property, supra note 36, § 14.2. A nonobject, however, cannot benefit from the release of a special power. See Restatement (Second) of Property, supra note 36, § 14.3 comment d; see also, infra notes 200-01 and accompanying text.

143. Halbach, supra note 131, at 712. If a donee of a general power releases partially to prohibit an exercise to himself (or to his creditors, his estate, or the creditors of his estate), he pares down the general power to a special power. At one time, changes in the tax treatment of powers of appointment prompted an outbreak of partial releases. See, infra notes 145-48 and accompanying text.


As often happens, the interest of the Internal Revenue Service spurred the interest of the taxpayers, precipitating a flurry of partial releases.\textsuperscript{147}

The recognition of the ability of a donee to release a testamentary power\textsuperscript{148} juxtaposed with the refusal to enforce a contract for exercise of a testamentary power creates an apparent contradiction in the law of powers. In many instances, a donee can achieve through release a result not allowed by contract. The same person may benefit from the release as from the contract if enforceable.\textsuperscript{149}

Some courts even allow invalid contracts to exercise testamentary powers to be recast as valid releases if the donee's intent and the results in both situations seem consistent.\textsuperscript{150} Blanket allowance of releases of testamentary powers and blanket prohibitions of contracts to exercise seem to serve cross-purposes. Rather than paying lip service to general rules, a court could achieve more consistent results by basing a determination in either case on the donor's intent: if the donor's purpose in creating a testamentary power of appointment was to allow the donee to make his decision until the moment of death, then the court should find that the donor prohibited a release\textsuperscript{151} as well as a contract to exercise.\textsuperscript{152}

For example, Donor creates a testamentary power of appointment in Donee, providing that Donee may exercise the power in favor of Donee's "wife or issue," with Donee's children as takers in default. Donee obtains a divorce. As part of the property settlement, Donee agrees to exercise his power of appointment in favor of their children. Donee remarries and dies. His will exercises the power in favor of his new wife. A claim by Donee's children that Donee contracted to exercise the power in their favor would fail, since an exer-

\textsuperscript{146} I.R.C. § 2041 (1954); Minot, 45 T.C. 578. Some states enacted enabling legislation. See Comment, supra note 2, at 1295.

\textsuperscript{147} See infra notes 243-52 and accompanying text.

\textsuperscript{148} Unless prohibited by the donee. See supra note 140 and accompanying text.

\textsuperscript{149} See generally, Comment, supra note 2, at 1295-96. As to whether a donee can benefit from the release of a power by contracting not to appoint, see Restatement (Second) of Property, supra note 36, § 14.3(3) and comment d.


\textsuperscript{151} Rather than the intent of the donee, as in the recast cases. See supra note 151 and accompanying text.

\textsuperscript{152} A donor effectively can prohibit a release of a power. See supra note 140 and accompanying text.

\textsuperscript{153} Comment, supra note 2, at 1296.
cise before death would have been contrary to Donor's intent. The children would therefore argue that the property settlement instead operated as a release of the power which, once released, could not be exercised by Donee's will. They would claim the property as takers in default. A court may rule in favor of the children, since both the attempted contract to exercise and the release seem to indicate Donee's intent to benefit the children, and since the property passes to the children in either case. The court, however, preferably should examine further the intent of Donor. If Donor did not want Donee to make an irrevocable decision before his death, then Donor may have opposed a release as well as a contract to exercise. If so, the court should uphold the testamentary exercise.

E. Ineffective Exercise and Failure to Exercise

The donee may decide not to exercise her power of appointment;154 or the donee may attempt to exercise the power of appointment, but for some reason the attempted exercise is ineffective.155 The recipient of the appointive property must be determined in either case. If the donee fails to exercise (or releases) the power of appointment, the donor-designated takers in default generally will receive the property subject to that power.156 If the donor failed to select any taker in default, the property belongs to the donor (or the donor's successors).157 If the donee attempts an exercise that is ren-

154. See supra notes 45-48 and accompanying text. This article will refer to a donee's decision not to exercise as a failure to exercise.

155. See, e.g., Lavender v. Wilkins, 237 Ga. 510, 228 S.E.2d 888 (1976). If a defect is substantive, the court may not apply equitable principles to exercise the power. See Breit v. Yeaton, 101 Ill. 242 (1882); cf. In re McNeill's Estate, 463 A.2d 782 (Me. 1983) (equitable exception if attempted exercise approximates manner of appointment prescribed by donor and appointee is the material object of donee's affection; citing RESTATEMENT (SECOND) OF PROPERTY, supra note 36, § 18.3). Although some commentators distinguish between a "defective" exercise (lacking the formal requisites for validity, whether imposed by law or by the donor) and an "ineffective" exercise (an exercise complying with any requisite formalities, but nevertheless failing to transfer the appointive assets to the appointee), the distinction achieves no difference in result. See, e.g., MacBryde v. Burnett, 45 F. Supp. 451 (D. Md. 1942); Oke v. Heath, 27 Eng. Rep. 940 (Ch. 1748). For reasons that an attempted exercise may fail, see supra note 114 and accompanying text.

This article will use the term ineffective to cover any attempted exercise that for some reason is unsuccessful.

156. See Jones, supra note 4, at 250.

157. Bradford v. Andrew, 308 Ill. 458, 139 N.E. 922 (1923); Harrison v. Battle, 21 N.C. (1 Dev. & Bat. Eq.) 213 (1835). The concept is similar to that of a resulting trust, which arises when a settlor attempts to create a trust but for some reason fails. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS, § 404.1 (1960).

Some courts may find that the donor designated implicit takers in default, especially when
dered ineffective, a court may give the property to the takers in default or, if none, to the donor (or the donor's successors). Alternatively, the court may determine that the donee effectively captured the property through the attempted exercise and give the property to the successors of the donee.

Capture may result when the donee of a general power of appointment ineffectively attempts to appoint property but in so doing exercises enough control over the appointive assets to render them her own. Since holding a general power of appointment is tantamount to ownership, courts often allow the donee effectively to appoint the property to herself without the subservience to formality sometimes found in other areas of property law. In the situation where a donee attempts but for some reason fails to exercise a

a trustee is also the donee, when the donor creates a power in trust, or when objects are a defined limited class (the implied gift theory). See, e.g., McGaughey's Adm'r v. Henry, 54 Ky. (15 B. Mon. 383) 307 (1854); First-Mechanics Nat'l Bank of Trenton v. First-Mechanics Nat'l Bank of Trenton, 137 N.J. Eq. 106, 43 A.2d 674 (1945); Salusbury v. Denton, 69 Eng. Rep. 1219 (V.C. 1857); Efland, supra note 10, at 604; Down v. Worrall, 1 Myl. & K. 561 (1833); Gray, supra note 74, at 8-10, 19-20, 26; Restatement (Second) of Property, supra note 36, § 24.2.

An exercise may fail partially. If the taker in default, successor to the donor, or successor to the donee also received property pursuant to the appointment, that recipient could wind up with a greater portion of the appointive assets than the donor intended. For example, Donor creates a power of appointment in Donee to appoint to any of Donor's issue; Donor names Donor's three children (C1, C2 and C3) to take equally in default of appointment. Donee appoints one-half of the property to C1 and the other half to Donor's brother. The attempted appointment to Donor's brother fails (not an object) and the three takers in default share equally that half of the property. Thus, C1 ultimately receives two-thirds of the property: the one-half appointed to C1 plus one-sixth as taker in default.

The careful drafter can avoid this problem by inserting a hotchpot clause in the instrument creating the power of appointment, requiring the recipient in that situation to add back to the estate for accounting purposes any property received from the appointment, thus creating an augmented estate. See Cruse v. McKee, 39 Tenn. (2 Head) 1 (1858). Cf. Deveux v. Barnwell, 1 S.C. Eq. (1 Des.) 497 (1796). See also Equitable Trust v. Foulke, 28 Del. Ch. 238, 40 A.2d 713 (1945); Coleman, supra note 1, at 922; Leach, supra note 1, at 810; Restatement (Second) of Property, supra note 36, § 24.3.

158. See Jones, supra note 4, at 247-50; Restatement (Second) of Property, supra note 36, §§ 23.1 -. 2. See also Efland, supra note 10, at 605. Cf. Restatement of Property, supra note 27, § 362 (addressing whether ineffectiveness of part of the appointment causes the rest to fail).

159. See infra notes 161-66 and accompanying text.

160. See Bradford v. Andrew, 308 Ill. 458, 139 N.E. 922 (1923); Old Colony Trust Co. v. Allen, 307 Mass. 40, 29 N.E.2d 310 (1940); Hammond v. Hammond, 234 Mass. 554, 125 N.E. 686 (1920); Jones, supra note 4, at 230. Of course, this rule is subject to variation in individual cases. See Jones, supra note 4, at 261-63, 276; Restatement (Second) of Property, supra note 36, § 23.2 and comment d.

161. See supra notes 50-57 and accompanying text.

162. See supra notes 121-35 and accompanying text.
power, a court may determine that the attempted exercise itself was a sufficient indication of the donee's appropriation of the property to her own use. In other words, by appointing the property to herself first and then giving the property to a recipient, the donee of a general power of appointment could achieve the same dispositive result as when she simply appoints to the appointee. By interpreting the donee's intent to appropriate, courts applying the capture doctrine use the fiction of the "two-step" disposition, finding that the first step — the appointment to the donee — remains valid even though the second step — the gift to the recipient — fails.

Because the doctrine of capture rests upon the foundation of the general power of appointment being tantamount to ownership, it should not apply to special powers. According to the relation back theory, the donee of a special power of appointment enjoys only the right to fill in the blanks in the grant left by the donor and may not permissibly appoint to herself or for her benefit. Consequently, courts should not find that the donee of a special power appoints through a two-step process (appropriation then gift) as with the general power. Without the fiction of the two-step process, the rationale for applying capture to special powers fails.

Since the typical capture situation involves an attempted testamentary exercise, the treatment by the donee of her own property en masse with the appointive property serves as one indicator of the intent to appropriate to her estate. The donee in effect blends the appointive property with her own. If the attempted appointment proves ineffective, the blending indicates the donee's desire to treat the appointive property as her own, thereby passing the appointive property along with the rest of the donee's probate assets.

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163. See supra note 116 and accompanying text.
164. The donee, however, may not achieve the same collateral result. For the rights of creditors and surviving spouses, treatment of an exercise to the donee may differ from that of an exercise to another. See Jones, supra note 4, at 238-43; supra notes 203-214 and accompanying text.
165. 3 R. Powell, Powell On Real Property ¶ 400 (1952); Jones, supra note 4, at 234.
166. See supra note 64 and accompanying text.
167. Jones, supra note 4, at 231-34.
168. Old Colony Trust Co. v. Allen, 307 Mass. 40, 29 N.E.2d 310 (1940); In re Marten, 1 Ch. 314 (1902); Brickenden v. Williams, 7 L.R. Eq. 310 (L.R. 1869); Jones, supra note 4, at 264-66.
169. Compare the states that by case law or statute imply exercise if the donee's will contains a general or residuary devise. See supra notes 126-35 and accompanying text. Similar to the effect of blending on an otherwise ineffective exercise, these states presume a blending by the donee through the use of a general or residuary devise. The results differ technically.
1. Application of Anti-lapse Provisions.—Appointment to a predeceased object\textsuperscript{170} may result in an ineffective exercise.\textsuperscript{171} The application of an anti-lapse statute, however, may save the appointment. An anti-lapse statute provides a rule of construction, presuming what the testator would have done if he had known the named beneficiary would predecease him. The devise intended for the predeceased beneficiary will pass to the beneficiary’s successors if two conditions are satisfied: (1) the predeceased beneficiary was within the statutorily requisite degree of relationship to the testator, and (2) the testator is survived by successors of the predeceased beneficiary who are allowed to represent that beneficiary.\textsuperscript{172} Of course, the testator can overcome (or avoid) the operation of the statute as a rule of construction by indicating a contrary intent.\textsuperscript{173}

Anti-lapse statutes may apply to ineffective exercises of powers of appointment in two situations.\textsuperscript{174} First, if the donee of a general power of appointment appoints to a predeceased beneficiary, the anti-lapse statute should apply as it would to the donee’s own property.\textsuperscript{175} Since holding a general power of appointment is tantamount

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\textsuperscript{170} One who dies before appointment. See supra note 114 and accompanying text.

\textsuperscript{171} Restatement (Second) of Property, supra note 36, § 18.5.

\textsuperscript{172} See Uniform Probate Code § 2-605, 8 U.L.A. 145 (1988). Usually, only issue of the predeceased beneficiary are allowed to represent their predeceased ancestor. Statutes differ on the requisite degree of relationship to satisfy the first condition. Some states require the beneficiary to be kindred of the testator (see, e.g., VT. STAT. ANN. tit. 14, § 558 (1974)); some require that only certain heirs may represent the predeceased beneficiary (see, e.g., Mich. Comp. Laws Ann. § 700.134 (West 1980)).

\textsuperscript{173} See Uniform Probate Code § 21-7-470 (Law. Coop. 1976) (repealed effective July 1, 1987)). For a list of state laws and their requirements, see Restatement (Second) of Property, supra note 36, § 18.6 Statutory Note.

\textsuperscript{174} Stated differently, the expression of intent renders the statute inapplicable, because it is necessary only as a device to aid in construing the testator’s intent if not express.

\textsuperscript{175} Although most states have anti-lapse statutes, the majority are silent about their application to powers of appointment. French, supra note 114, at 408.

\textsuperscript{176} English cases have justified this result in situations where the appointment was attempted as part of a general or residuary devise, based on the English statute providing that a general or residuary devise exercises a general power of appointment (see supra note 131 and accompanying text). American courts, therefore, conceivably could justify not applying anti-lapse statutes (assuming the statutes are silent about application to powers; see supra notes 131-34 and accompanying text) if the state does not follow the “implicit exercise by general or residuary devise” rule. A better view would base the decision on the nature of a general power: that it is tantamount to ownership. See Thompson v. Pew, 214 Mass. 520, 102 N.E. 122 (1913); Grubb’s Estate, 36 Pa. D. & C. 1 (1939); French, supra note 114, at 418.
to ownership, the court can treat the attempted exercise as if the donee appropriated the property to his estate, capturing the assets for his own use.\textsuperscript{176}

More problematic is the second situation, in which the donee exercises a special power of appointment in favor of a predeceased appointee. Here, a court must recognize the distinction between a general power, virtually equivalent to ownership, and a special power, subject to the relation back theory. If the concern with special powers is with the intent of the donor,\textsuperscript{177} it is questionable that an anti-lapse statute should apply to presume the intent of the donee.\textsuperscript{178} Nevertheless, if the concern is also for the intent of the donee with respect to the exercise of the power,\textsuperscript{179} the presumption of the anti-lapse statute could apply here also. If the donee of the special power had known the appointee would predecease him, he would have filled in the donor's blank by appointing to the issue of the predeceased appointee.\textsuperscript{180} Of course, the latter observation should apply only if the representatives under the anti-lapse statute are permissible appointees under the donor's power;\textsuperscript{181} the cases are rare.\textsuperscript{182}

19; \textit{Restatement (Second) of Property}, supra note 36, §§ 18.6, 23.2 comment c.

\textsuperscript{176} See e.g., \textit{In re Goodman}, 155 N.Y.S.2d 424 (Sup. Ct. 1956). \textit{See also supra} note 154-69 and accompanying text. This application pleases some commentators who think this most closely follows the donee's intent. \textit{See, e.g.}, Jones, \textit{supra} note 4, at 282. Actually, the donee's intent is missing: if the donee had considered the possibility of a devisee failing to survive him, he probably would have provided for an alternative disposition. More appropriately, then, the application of anti-lapse to ineffective appointments is justified by presuming what the donee would have intended had he considered the unforeseen eventuality.

\textsuperscript{177} \textit{See supra} note 65-73 and accompanying text.

\textsuperscript{178} Most cases apply the anti-lapse statute based on the relationship of the predeceased appointee to the donee. A couple of cases deal with the situation where the appointee is related to the donor but not the donee. In Dow v. Atwood, 260 A.2d 437 (Me. 1969), the donee attempted an appointment to the brother of her husband. In Rowland's Estate, 17 Pa. D. & C. 477 (1932), the donee attempted an appointment to the nephew of her husband. Both decisions invalidated the attempted appointments because the putative appointees were not within the protected class of relationship to the donee under the applicable anti-lapse statute. The courts did not discuss the possibility of saving the appointment because of the relationship of the putative appointees to the donor. \textit{See French, supra} note 114, at 425-28, 432; \textit{Restatement (Second) of Property}, \textit{supra} note 36, § 18.6.

\textsuperscript{179} \textit{See supra} note 116 and accompanying text.


\textsuperscript{181} French, \textit{supra} note 113, at 421-24, 426-29.

\textsuperscript{182} \textit{Id}. at 421-24. A few states have enacted statutes on point. \textit{Id}. at 424. For a statutory proposal, see \textit{id}. at 437-39.
E. Special Questions with Special Powers

Because general powers of appointment are considered tantamount to ownership for many purposes and special powers, under the relation back theory, are considered as treating the donee as an agent of the donor, some problems inapplicable to general powers arise if the donee of a special power attempts to appoint in trust or to create a new power of appointment. Courts recognize that in any event the donee of a general power can accomplish the desired result in two steps: First by appointing to the donee and then by creating a grant of what is now the donee's own property. The courts and commentators take a refreshingly sensible substance over form view in those situations, allowing the appointment in one step because the same result could be accomplished easily in two. Because the donee of a special power is not treated as the owner of the appointive property, questions arise about the validity of certain aspects of their appointment.

1. Appointment in Trust.—Some courts have allowed the donee of a special power of appointment to appoint the property in trust rather than outright to the appointees. Obviously, the beneficiaries of the trust must be objects of the special power. Others have ruled that to allow an appointment in trust would circumvent the intention of the donor, for the donor would have provided for the

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183. "A donee of a general power under which an appointment can be made outright to the donee or outright to the donee's estate is permitted to make any appointment directly that could be made indirectly by appointing to the donee or the donee's estate and then disposing of the appointive assets as owned property." Restatement (Second) of Property, supra note 36, § 19.1. For attempts to appoint in trust, see Massey v. Guaranty Trust Co., 142 Neb. 237, 5 N.W.2d 279 (1942). Cf. Equitable Trust Co. v. James, 29 Del. Ch. 166, 47 A.2d 303 (1946). For attempts to create further powers, see Garfield v. State Street Trust Co., 320 Mass. 646, 70 N.E.2d 705 (1947); Mays v. Beech, 114 Tenn. 544, 86 S.W. 713 (1905). Cf. Boston Safe Deposit & Trust Co. v. Prindle, 290 Mass. 577, 195 N.E. 793 (1935). See supra notes 155-70 and accompanying text.

184. For a checklist, albeit somewhat dated, for drafting suggestions to avoid problems with powers of appointment, including some of the problems peculiar to special powers, see Kuntz, supra note 9, at 154.


186. Foulke, 28 Del. Ch. 238, 40 A.2d 713; Morrison, 9 N.J. Super. 552, 75 A.2d 916; Restatement (Second) of Property, supra note 36, § 19.3.
creation of a trust by the donee if intended. The rationale of the well-reasoned cases, whichever the result, stems from an examination of the donor's intent.

2. Appointment by Further Appointment.—Perhaps even less certain is the ability of the donee of the special power of appointment to exercise the power by creating another power of appointment. The concern here is less with the quality of the title — as with an appointment in trust — as with the delegation of the power by the "old" donee to the "new" donee. In essence, the old donee is saying she does not want to decide whether and how to exercise her discretion; by creating a new power she passes the decision along to the new donee. Stated simply, the old donee delegates the discretion to the new donee.

Some cases have allowed the donee, absent the indication of a contrary intent by the donor, to create a new or further power of appointment in or among the original class of objects, but not in or among those who are not original objects. The Restatement (Second) would allow either the creation of a general power in an object of the original power or the creation of a special power in any person to appoint to or among the original objects. In either case, obvi-

188. McCoyd, supra note 185, at 273.
189. The term "old" refers to the donee of the original power of appointment; the term "new" refers to the donee of the power created by the donee of the original power.

Compare the refusal to enforce contracts to exercise testamentary powers because the donor intends for the donee to be able to wait until the moment before death before making a decision (see supra note 137 and accompanying text). In that situation, enforcing a contract to exercise would allow the donee to exercise too early. Those refusing to allow a donee to delegate the exercise of a special power by creating a new power would argue that the donee (at least vicariously) could otherwise exercise too late. In both cases, the concern focuses on the donor's intent about the time of exercise.

190. Re Morris's Settlement Trusts, 2 All E.R. 528 (1951); Hughes, supra note 132, at 38.


192. RESTATEMENT (SECOND) OF PROPERTY, supra note 36, § 19.4. See Hooper v. Hooper, 203 Mass. 50, 89 N.E. 161 (1909); Hood v. Haden, 82 Va. 588 (1886); Coleman, supra note 1, at 922-23; McCoyd, supra note 186, at 273. The result of either type appointment allows the first donee to delegate the appointment to the second donee; the practice would not result in a benefit to one not an object of the first power of appointment.
ously, nonobjects cannot be directly benefited. Again, the donor's intent should be paramount.

3. Exclusivity.—An exclusive power allows the donee to appoint, if at all, to one or some of the objects to the exclusion of the others. A nonexclusive power requires the donee to appoint to each of the objects. Generally, a power of appointment is exclusive unless the donor expresses a contrary intention. If the power is nonexclusive, a donee who appoints a nominal amount to one or some of the objects takes the risk that such an appointment is illusory and in contravention of the donor's direction. A court could require that a fair, minimum share be given to each object. Not surprisingly, the donor's intent again controls. The use of words such as "to each," "among," and "between" may indicate an intent to create a nonexclusive power.

Caveat: the possible adverse tax consequences (the notorious Delaware tax trap) resulting from the creation of a general power of appointment through the appointment by the donee of a special power. Stated simply, the Delaware tax trap evolved from the failure of the Internal Revenue Code to tax in the donee's estate for estate and gift purposes property appointed through a special power. Congress placed no limit on this exclusion, assuming that the Rule Against Perpetuities as applied in the various states would limit the ability of the continuing exercise and creation of special powers. See infra notes 214-41 and accompanying text. Delaware, however, computed the rule period from the date of exercise of the special power, rather than from the time of the original creation of the power by the donor, effectively allowing the continuation of the appointment and creation of special powers ad infinitum. To prevent a Delaware tax loophole, Congress amended the Internal Revenue Code to include in the donee's estate appointive property subject to a special power to the extent the donee exercises the special power to create another power that is measured for rule purposes from the date of exercise. I.R.C. §§ 2041(a)(3), 2514(d). Even in states following the majority Rule Against Perpetuities treatment, exercise of a special power to create a general power subjects the donee of the special power to the Delaware tax trap. For an excellent discussion of the trap, and its possible beneficial effect on the operation of the generation-skipping transfer tax, see Blattmachr and Pennell, Adventures in Generation-Skipping or Growing to Love the "Delaware Tax Trap," 68 J. Tax'n 242 (1988). See also Halbach, supra note 132, at 708-09; Leach, supra note 1, at 809.

193. Although in the latter case, the nonobject donee may receive an indirect benefit. See supra note 64.

194. Good drafting expresses the donor's intent. See Leach, supra note 1, at 810.

195. Harlan v. Citizens Nat'l Bank of Danville, 251 S.W.2d 284 (Ky. 1952); Moore v. Emery, 137 Me. 259, 18 A.2d 781 (1941); Kuntz, supra note 9, at 152.


198. See e.g., Kemp v. Kemp, 31 Eng. Rep. 891 (Ch. 1801); Hatchett v. Hatchett, 103 Ala. 556, 16 So. 550 (1894); Harlan v. Citizen's Nat'l Bank of Danville, 251 S.W.2d 284 (Ky.
4. Invalid Exercise and Fraud on the Power.—An exercise of a special power of appointment in contravention of the donor's directions is invalid. The donee cannot benefit anyone except an object. Nor can the exercise of the power render a result inconsistent with the parameters set by the donor.\footnote{199} Similarly, the donee cannot exercise a power apparently in favor of a permissible object with the intent of benefiting a nonobject. Such an exercise is known as a fraud on the power and is also void.\footnote{200}

For example, Donor creates a power of appointment, providing that Donee may exercise the power in favor of any of Donor's children. Donee wants to appoint to Donor's brother, but realizes that such an appointment would be void. Therefore, Donee appoints to Donor's son after the son agrees to transfer half of the appointive property to Donor's brother. The attempted appointment constitutes a fraud on the power. In this example, the court could choose to invalidate the entire appointment or only the portion of the appointment intended to benefit the nonobject.\footnote{201}

VI. RIGHTS OF CREDITORS OF THE DONEE

Although the rights of creditors in the area of property law often have been uncertain,\footnote{202} the treatment of the donee's creditors has been checkered and perhaps occasionally illogical. Most courts have determined the rights of creditors depending on the type of power the donee holds. Usually, the cases deal with claims against

\footnote{1952; Barret's Ex'r v. Barret, 166 Ky. 411, 179 S.W. 396 (1915); Jones v. Mackie, 49 Pa. D. & C. 459 (1943); Note, Powers of Appointment, supra note 49, at 826. Compare the use of such words as "such" and "any." See, e.g., Harlan, 251 S.W.2d 284; In re Kohler's Estate, 463 Pa. 150, 344 A.2d 469 (1975). Of course, the careful drafter will indicate clearly the intent of the donor. See Leach, supra note 1, at 809; Restatement (Second) of Property, supra note 36, §§ 21.1 - .2.}

\footnote{199. See Cloutte v. Storey, 1 Ch. 18 (1911); Old Colony Trust Co. v. Richardson, 297 Mass. 147, 7 N.E.2d 432 (1937); Daniel v. Brown, 156 Va. 563, 159 S.E. 209 (1931); Restatement (Second) of Property, supra note 36, § 20.1. Cf. In re Estate of Session, 217 Or. 340, 341 P.2d 512 (1959).}

\footnote{200. The donee of a special power may attempt to appoint to a permissible object with an agreement to receive a kickback. Or the donee may attempt to appoint to a permissible object with the understanding that the appointee will transfer some of the appointed assets to a nonobject. See Beatson v. Bowers, 174 Ind. 601, 91 N.E. 922 (1910); In re Carroll's Will, 274 N.Y. 288, 8 N.E.2d 864 (1937); Holt v. Hogan, 58 N.C. (5 Jones Eq.) 78 (1859); Gold, supra note 49, at 342; Powell, supra note 12, at 252; Restatement (Second) of Property, supra note 36, § 20.2.}

\footnote{201. In re Carroll's Will, 274 N.Y. 288, 8 N.E.2d 864 (1937); Cruse v. McKee, 39 Tenn. (2 Head) 1 (1858); Restatement (Second) of Property, supra note 36, § 20.2.}

\footnote{202. For example, the rights of creditors in the property of trusts created by the debtor. See State St. Bank & Trust Co. v. Reiser, 7 Mass. App. Ct. 633, 389 N.E.2d 768 (1979).}
the estate of the donee.\textsuperscript{203}

Absent a statute to the contrary, most courts would protect the rights of creditors of the estate of a donee of a general power of appointment if two conditions are satisfied. The donee must exercise the power gratuitously and the estate of the donee otherwise must be unable to pay the claim.\textsuperscript{204} The majority rule protects the estate if the general power is not exercised.\textsuperscript{205} The difference in treatment of an unexercised general power represents a deviation from the usual theory that the donee of a general power is essentially the owner, since all he must do to appropriate the property is appoint to himself.\textsuperscript{206} Some states have enacted statutory provisions governing cred-

\textsuperscript{203} Creditors will pursue the appointive assets when the property in the decedent's estate is otherwise insufficient to pay the donee's debts.


A number of cases allowing creditors to reach the appointive assets rely on the equitable assets theory of fraudulent conveyance. The equitable assets theory, perhaps first appearing in Lassells v. Cornwalliss, 23 Eng. Rep. 898 (Ch. 1704), finds that equity regards the appointive property as an asset of the donee subject to the claims of creditors to the extent the donee's estate is otherwise insufficient. See also Lord Townshend v. Windham, 28 Eng. Rep. 1 (Ch. 1750). The English common law theory applied to gratuitous inter vivos and testamentary appointments. If an exercise of the donee's own property would be voidable under the applicable fraudulent conveyance law, then the courts would treat the appointment similarly. See Jackson v. Franklin, 179 Ga. 840, 177 S.E. 731 (1934); Clapp v. Ingraham, 126 Mass. 200 (1879); Note, \textit{Creditors' Ability to Reach Assets}, supra at 371; \textit{RESTATEMENT (SECOND) OF PROPERTY}, supra note 36, § 13.5; cf. Commonwealth v. Duffield, 12 Pa. 277 (1849).


The courts would protect the rights of creditors if a donor were also the donee of the power or if a settlor of a trust retained lifetime benefits along with a general testamentary power over the remainder. See Nolan v. Nolan, 218 Pa. 135, 67 A. 52 (1907); \textit{RESTATEMENT OF PROPERTY}, supra note 27, § 328.

\textsuperscript{206} See supra notes 161-64 and accompanying text. Some commentators have explained the schismatic treatment of creditors' rights in property subject to general powers as a battle between those who desire equity (the donee should pay debts if he has the ability) and those who recognize the difference between powers of appointment and ownership (the relation
itors' rights against donees of general powers.\(^{207}\)

Courts will not allow creditors of a donee to reach property subject to a special power, regardless of whether the donee exercises the power.\(^{208}\) Under the relation back theory, the donee of a special power, by appointing, merely fills in the blanks in the original grant left by the donor.\(^{209}\) The appointive property passes from the donor back concept that the donor, not the donee, transfers to the appointee; see \textit{supra} notes 65-73 and accompanying text). Compare \textit{Clapp}, 126 Mass. 200, and \textit{Johnson v. Cushing}, 15 N.H. 298 (1844), \textit{with} \textit{Dant v. Fidelity & Columbia Trust Co.}, 302 Ky. 54, 193 S.W.2d 399 (1946). \textit{See Note, Powers of Appointment, supra note 49, at 828.}

The latter view does not take into account the reluctance of modern courts to apply the relation back theory to general powers; rather, the courts see the donee as essentially the owner of the appointive assets (see \textit{supra} note 70 and accompanying text). Reliance on the equity theory, however, fails to explain the difference in treatment of exercised and unexercised general powers. In equity, the donee who does not intend to exercise a general power should be no less obligated to appoint the property to creditors than the donee who will exercise a general power. And if the donee with knowledge of creditors (and the majority rule) knows that the decision to exercise will affect whether the creditors prevail or the appointment assets will pass free from their claims (most probably to the takers in default or to the donor's successors; see \textit{supra} notes 154-59 and accompanying text), and exercises, or not, accordingly, then that donee appears to possess another aspect of control that seems to emulate ownership.

The rights of the appointees versus the creditors should also affect an equitable determination. \textit{See Johnson v. Shriver}, 121 Colo. 397, 216 P.2d 653 (1950); \textit{In re Hagen's Estate}, 85 Pa. Super. 123 (1925), \textit{aff'd} 285 Pa. 326, 132 A. 175 (1926). If a donee does appoint, then the appointees could argue that the donee did not benefit from the exercise; any equitable contention that a debtor who receives the benefits of property ought to pay creditors thus loses its vitality.

Some English cases use a different theory: That the donee "charged" the assets with payment of the debt. \textit{See}, \textit{e.g.}, \textit{Willoughby-Osborne v. Holyoake}, 22 Ch. D. 238 (1882).

Thus, whichever way the argument turns, no reasonable rationale appears to support the differing treatment for exercised and unexercised general powers. Since modern courts tend to treat donees of general powers of appointment as virtual owners for many purposes, the better rule, for the sake of consistency, would seem to require similar treatment of exercised and unexercised general powers. (For an interesting discussion of reasons why the general power should not be subject to creditors' claims, regardless of exercise, see \textit{Gold, supra} note 49, at 366-69.)

\(^{207}\) \textit{Note, Powers of Appointment, supra} note 49, at 840-41 (giving examples of state statutes); \textit{Note, supra} note 204, at 367-68, 374-87. For a discussion of the applicable English statute (Administration of Estates Act, 1925, s.32(1)), see Hughes, \textit{supra} note 131, at 32. For a discussion of the applicable New York statute, see Powell, \textit{supra} note 12, at 241-44; \textit{Note, Powers of Appointment and Creditors Rights}, 21 ALB. L. REV. 216, 216-20 (1957); \textit{Comment, supra} note 2, at 1289. \textit{Restatement (Second) of Property, supra} note 36, §13.2 allows creditors to attach assets subject to an unexercised general power only as allowed by statute.


\(^{209}\) \textit{See supra} notes 65-73 and accompanying text.
to the appointees. Because the donee has no ownership interest in the appointive assets and cannot benefit directly from exercise of the power, the creditors have no justifiable claim to an interest.

VII. RIGHTS OF SURVIVING SPOUSE OF DONEE

The surviving spouse of a donee is not entitled to enforce an elective or forced share, dower, or other similar spousal protection right against the appointive property, whether general or specific, and regardless of exercise.210 This result is predicated upon the common law relation back theory211 and applies to general powers of appointment even though courts have been disposed to treat the donee of a general power as a virtual owner.212 A number of states have enacted statutes dealing with the problem, but many do not allow the surviving spouse to reach the appointive assets.213

VIII. THE RULE AGAINST PERPETUITIES

Afficionados of the common law Rule Against Perpetuities214 should be delighted with its application to powers of appointment: the Rule gets two chances to measure the time periods involved with the use of powers of appointment.215 First, the power itself must not violate the time period set by the Rule. Then, if the power qualifies under the first test, the appointment must not overreach the time

210. Fiske v. Fiske, 173 Mass. 413, 53 N.E. 916 (1899); In re Rogers’ Will, 250 A.D. 26, 293 N.Y.S. 626 (2nd Dep’t 1937); Mahoney, Elective Share Statutes: The Right to Elect Against Property Subject to a General Power of Appointment in the Decedent, 55 NOTRE DAME LAWYER 99, 102-05 (1979). See RESTATEMENT (SECOND) OF PROPERTY, supra note 36, § 13.7, which allows the spouse to take if the donor is also the donee and the power is exercisable by the donee alone. But cf. RESTATEMENT OF PROPERTY, supra note 27, § 332. The cases are less clear where the donee is also the settlor and life beneficiary of a revocable inter vivos trust. Halbach, supra note 131, at 700. See Harlan Nat’l Bank v. Brown, 317 S.W.2d 903 (Ky. 1952) for an interesting case where, even when blended, the assets were protected from the elective share.

211. Fiske, 173 Mass. at 418, 53 N.E. at 918. For an attack of the relation back theory with respect to spousal protection, see Mahoney, supra note 210, at 105-12.

212. See supra note 70 and accompanying text. If the argument for the donee’s creditors prevails, it should be applied even more forcefully here, considering the additional public policy argument involved with spousal protection. See Mahoney, supra note 210, at 99.

213. The Uniform Probate Code allows the spouse to reach the assets only if the donor retained a power, thus subjecting it to the augmented share. UNIFORM PROBATE CODE § 2-201, 8 U.L.A. 74 (1988). Many elective share statutes do not address the issue. Note, Powers of Appointment, supra note 49, at 843-45.

214. No interest is good unless it must vest, if at all, not later than 21 years (plus gestation periods) after some life in being at the creation of the interest. J.GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942).

To avoid violating the Rule, the power of appointment must satisfy both tests.\textsuperscript{217}

\textbf{A. Validity of the Power}

Testing for the first condition requires separating powers of appointment into two groups: special powers (both presently exercisable and testamentary) and general testamentary powers constitute one group while general presently exercisable powers compose the second.\textsuperscript{218} The test differs for each group.

1. Special Powers and General Testamentary Powers.—Special powers and general testamentary powers violate the Rule if the donee may exercise the power beyond the rule period.\textsuperscript{219} As is typical with the application of the Rule Against Perpetuities, the concern is not with whether the donee actually exercises the power in time but whether, measuring from the date of the creation of the power,\textsuperscript{220} the donee hypothetically could exercise the power beyond the Rule period. The hypothesis should be based on the facts known at the date of the creation of the power. If any of the possibilities conjectured could result in the donee exercising the appointment after the Rule period, the power fails the first test.\textsuperscript{221}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{216} Hughes, \textit{supra} note 131, at 27-28.
\item \textsuperscript{217} Jones, \textit{The Rule Against Perpetuities and Powers of Appointment: An Old Controversy Revived}, \textit{54 IoWa L. Rev.} 456, 458-59 (1968). Some commentators have described a third test when a power is subject to a condition precedent that may cause the exercise outside the Rule period. Berger, \textit{The Rule Against Perpetuities as It Relates to Powers of Appointment}, \textit{41 Neb. L. Rev.} 583, 587 (1962). Because this test really deals with the issue of the validity of the power itself, this article will consider this test as included within the first.
\item \textsuperscript{218} Casner, \textit{supra} note 37, at 199; Gold, \textit{supra} note 49, at 358. Apparently, the rationalization for not treating the general testamentary power as virtual ownership is that the donee cannot appoint to “himself.” Gold, \textit{supra} note 49, at 372; cf. \textit{supra} note 70 and accompanying text.
\item \textsuperscript{219} Davenport v. Davenport Found., 36 Cal.2d 67, 222 P.2d 11 (1950); Burlington County Trust Co. v. Di Castelcicala, 2 N.J. 214, 66 A.2d 164 (1949); Camden Safe Deposit & Trust Co. v. Scott, 121 N.J. Eq. 366, 189 A. 653 (1937); \textit{In re De Sommery} 2 Ch. 622 (1912); Casner, \textit{supra} note 37, at 199; Gold, \textit{supra} note 49, at 371; Jones, \textit{supra} note 217, at 458.
\item \textsuperscript{220} See Leach, \textit{supra} note 215, at 652-53; \textit{In re Bird’s Estate}, 225 Cal. App. 2d 196, 37 Cal. Rep. 288 (1964); Gold, \textit{supra} note 49, at 371-72. Cf. Industrial Nat’l Bank of Rhode Island v. Barrett, 101 R.I. 89, 220 A.2d 517 (1966); Miller v. Douglas, 192 Wis. 486, 213 N.W. 320 (1927). Generally, the date of creation is the time when the donor’s creating instrument becomes irrevocable. For a will, the time of irrevocability is the donor’s death; for inter vivos transfers, when the donor cannot rescind the gift.
\item \textsuperscript{221} Hence, the so-called “what might happen” rule. At common law, even the most farfetched hypotheses were acceptable. The “what might happen” rule consequently spawned such outrageous rule violators as the fertile octogenarian, the precocious toddler, and the unborn widow. \textit{See, e.g.}, Leach, \textit{supra} note 216, at 638-46.
\end{enumerate}
\end{footnotesize}
Assume, for example, \( O \) devises Blackacre to \( A \) for life, then to \( A \)'s children for their lives, then among \( A \)'s grandchildren as the surviving child of \( A \) shall appoint. \( A \) survives \( O \). \( A \)'s surviving child has a special power of appointment.\(^2\) At least one hypothetical situation can be devised in which exercise is possible after the permissible time period.\(^2\) The child of \( A \) who will survive his siblings could be born after \( O \)'s death. One born\(^2\) after the effective date of the creating instrument cannot be a life in being or a measuring life for Rule Against Perpetuities purposes. The surviving child could exercise the power more than twenty-one years after the death of the last to die of his siblings.\(^2\) Thus, the exercise would occur outside of the rule period. The power violates the Rule Against Perpetuities.\(^2\)

2. General Presently Exercisable Powers.—A presently exercisable general power of appointment must pass a different version of the first test. The power does not violate the Rule Against Perpetuities if the donee must acquire the power during the rule period.\(^2\) The test does not apply to the possible time of the exercise. The Rule Against Perpetuities treats the donee of a general testamentary

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\(^2\) Because that child cannot appoint to himself, his creditors, his estate or the creditors of his estate. See supra notes 58-64 and accompanying text. Presumably, the special power is presently exercisable, since the example indicates no intent on the part of the donor to limit the time of exercise to the death of the donee. See supra notes 96-99 and accompanying text. The same test applies whether the special power is presently exercisable or testamentary. See supra note 219 and accompanying text.

\(^2\) Although generally the hypothetical must be based on the facts in existence at the time of creation of the power, the result in this example is the same regardless of whether \( A \) had children alive at \( O \)'s death. Under “what might happen,” \( A \) can always have another child (as long as \( A \) lives).

\(^2\) Assuming that child was not \textit{en ventre sa mere} at the effective date of the grant creating the power.

\(^2\) Or more precisely for Rule Against Perpetuities purposes: twenty-one years after the death of the last to die of those qualifying as measuring lives.

\(^2\) Special powers “held” by unborn children are always capable of being exercised outside the rule window and consequently will always violate the rule. Leach, supra note 215, at 652.

The trustee of a discretionary trust may have a special power of appointment that can violate the rule. In some cases, treating the trustee's discretion as a series of annual powers may save the trust, at least partially, from invalidity. See Gray, \textit{The Rule Against Perpetuities} § 410 (4th ed. 1942). Compare a mandatory duty imposed on the trustee, creating an imperative power or a power in trust. See supra notes 74-88 and accompanying text.

\(^2\) Casner, supra note 37, at 198-99; Gold, supra note 49, at 372; Halbach, supra note 131, at 704. This is another example of the treatment of a general power of appointment as being tantamount to ownership. See supra note 70 and accompanying text. Cf. supra notes 203-214 and accompanying text.
power of appointment as it would an owner of the property.\textsuperscript{228}

B. \textit{Validity of Appointed Interests}

If the power of appointment passes the first test, then the second applies. As with the first, the second test differs depending on the type of power. Once again, special powers and general testamentary powers constitute one group and general powers the other.\textsuperscript{229}

1. Special Powers and General Testamentary Powers.—Because the relation back theory unquestionably applies to special powers (and because general testamentary powers are treated as special powers for Rule purposes), the donor’s original grant is recast after the donee has exercised the power. In other words, the Rule requires filling in the blanks of the donor’s original grant with the donee’s exercise, and then measuring that original grant for compliance with the time limit. The measurement stems from the effective date of the original grant and proceeds as would a typical Rule Against Perpetuities calculation with one exception: the so-called “second-look doctrine” allows consideration of facts that exist on the date of the original grant (as with the usual Rule application) and of facts that exist as of the time of appointment.\textsuperscript{230} This exception tempers somewhat the sometimes draconian rigidity of the “what might happen” rule and in a sense enables a “wait and see” approach.\textsuperscript{231} Using these facts, the Rule requires the formulation of hypotheses to conjecture if any possible occurrence would violate the Rule period. If one does, the appointment fails to pass muster.

\textsuperscript{228} Gold, supra note 49, at 372.

\textsuperscript{229} The rationale for this distinction between general testamentary and presently exercisable powers precipitated a notorious debate between the “father” of the Rule Against Perpetuities, John Chipman Gray, and his protege, Albert M. Kales. See Gray, \textit{General Testamentary Powers and the Rule Against Perpetuities}, 26 \textit{Harv. L. Rev.} 720 (1913); Kales, \textit{General Powers and the Rule Against Perpetuities}, 26 \textit{Harv. L. Rev.} 64 (1912); see also Berger, supra note 212, at 589-91; Jones, supra note 217, at 461-65.


\textsuperscript{231} \textit{See} Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952); Casner, \textit{supra} note 37, at 207; Jones, \textit{supra} note 218, at 457. \textit{See also infra} notes 236-41 and accompanying text. The “wait and see” approach allows the use of events as they actually occur to factor into the Rule determination, thus deviating from the strict “what might happen” rule that considers only facts existing on the date of the grant. Some modern courts and legislatures have adopted the wait and see approach. Wait and see reformers differ about the length of the wait. \textit{See} Waggoner, \textit{The Uniform Statutory Rule Against Perpetuities}, 21 \textit{Real Prop. Prob. & Tr. J.} 569 (1986).
For example, O devises Blackacre to A for life, then as A appoints by will. A, by will, appoints to A's children for their lives, remainder to A's grandchildren. Since A has now filled in the blanks, O's original grant is recast as: O devises to A for life, then to A's children for their lives, remainder to A's grandchildren. Normally, this grant as recast would violate the Rule Against Perpetuities since A possibly could have a child born after O's death who could have A's grandchild more than twenty-one years after the death of the last to die of A and A's other children. Using the second look doctrine, however, the gift passes perpetuities muster if A has no children after O's death. The second look doctrine allows consideration of events that occur up to the time of exercise.

2. General Presently Exercisable Powers.—As with the first test, a presently exercisable general power of appointment must pass a different version of the validity of appointment test. The Rule Against Perpetuities measures the appointment of a general presently exercisable power of appointment as if the donee were the owner of the property. The test does not require a recasting of the donor's original grant or measurement from that time, but rather from the time of the donee's appointment as if the donee were granting his own property.

C. Statutory Rule Against Perpetuities

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has recommended the Uniform Statutory Rule Against Perpetuities (USRAP). USRAP provides a statutory rule that encompasses several facets of prior Rule Against Perpetuities common law. The statutory rule would still recognize the common law Rule Against Perpetuities as a first step in determining whether an interest vests in time. If the interest passes common law muster,
then it also satisfies the statutory rule. If, however, the interest fails the traditional common law rule, a second chance becomes appropriate. USRAP provides for a wait and see approach for the second test, discarding measuring lives plus twenty-one years as an applicable time standard and instead imposing a fixed year time period. An interest that does not vest within the fixed year wait and see period fails the second test. At the time an interest fails both the first and second tests, the statute directs the court to provide a third opportunity (one not likely to result in an invalid interest). The court must reform the disposition so that it will vest within the fixed year period.

The statutory rule applies expressly to powers of appointment. Generally, the common law separation into categories (special powers and general testamentary powers in one, general presently exercisable powers in the other) continues. The treatment of powers of appointment under the first test of USRAP, of course, should remain the same as under the common law since that rule applies. The second or third steps of the statutory rule can operate to save a power of appointment otherwise invalid under the common law.

IX. TAX IMPLICATIONS OF POWERS OF APPOINTMENT

The Internal Revenue Code includes appointive assets in the do-


238. The rule is flexible: if the interest vests before the expiration of the fixed year wait and see period, then it satisfies the rule at that time. Similarly, if it becomes apparent before the expiration of the wait and see period that the interest will not be certain to vest (or certain not to vest), the interest fails the rule at that time. See Waggoner, supra note 232, at 595; S.C. CODE ANN. § 27-6-40 (Law. Coop. Supp. 1988).

239. See S.C. CODE ANN. § 27-6-40 (Law. Coop. Supp. 1988). Note the differing effective date provisions depending on when the power was created with relation to the enactment of the statutory provisions.

240. USRAP contains a special provision for general powers not presently exercisable because of a condition precedent (including events other than the death of the donee). See Waggoner, supra note 231, at 591. See also S.C. CODE ANN. § 27-6-20 (Law. Coop. Supp. 1988).

241. See supra notes 218-37 and accompanying text.

242. Certain aspects of the taxation of powers of appointment can become extremely involved. The general treatment, however, focuses on the includability of the appointive property in the donee's estate for estate tax purposes. Because the increasing subjection of powers of appointment to taxation by Congress has affected their use, an overview of the history and current treatment of powers should be appropriate. For the purposes of this article, the overview is extremely general and simplistic. Planners concerned about tax aspects of the use of powers of appointment should study the tax effects in detail. For concerns about attorney
nee's estate to the extent the donee has a general power of appointment. The Code considers a power of appointment general if the donee has the authority to exercise the power in favor of himself, his creditors, his estate, or the creditors of his estate. If the power meets the definition, the inclusion rules apply regardless of the denomination by the donor of the interest given to the donee. A power to consume can qualify as a general power of appointment. If, however, the donor limits the ability of the donee to benefit himself according to an ascertainable standard, the power is not

malpractice for failing to plan properly for tax considerations of powers of appointment, see Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976).

Before 1982, to qualify for the marital deduction, a decedent must have devised to a surviving spouse, at a minimum, the equivalent of a life estate and a general power of appointment. See Note, Life Estate With Power of Appointment: An Exception to the Terminable Interest Rule, 17 CASE W. RES. 863, 864 (1966) (authored by Wallace W. Walker, Jr.). The appointive property would not be taxable in the estate of the first spouse to die, but would be includable and taxable in the estate of the survivor. I.R.C. § 2056(b)(5) (1982). Effective for 1982, however, Congress amended the tax code to allow the equivalent of a mere life estate to qualify for marital deduction treatment, recognizing the concept of qualified terminable interest, or "QTIP," property. I.R.C. § 2056(b)(7). At that time, the fervor of the estate planner to utilize powers of appointment for tax purposes should have diminished (although the use of powers still had some appeal; see, e.g., Estate of Alexander v. Commissioner, 82 T.C. 34 (1984)). In 1986, with the restructuring of the tax on generation-skipping transfers, a generation-skipping tax can apply to a "life tenant," perhaps resulting in a more onerous tax result than inclusion of the property in the "life tenant's" estate. Using powers of appointment may once again produce ameliorative tax results. See Blattmachr and Pennell, supra note 193.

243. For estate and gift tax purposes.
244. The gift tax applies similarly. I.R.C. §§ 2041, 2514.
245. I.R.C. § 2041(b)(1). Whether a power to appoint to "any person" qualifies as a general power depends on local law: if the state would allow the donee properly to appoint to himself, then the power is general. See, e.g., Estate of Pierpont v. Commissioner, 21 T.C.M. (CCH) 1515 (1962), aff'd, 336 F.2d 277 (4th Cir. 1964), cert. denied, 380 U.S. 908 (1965).
247. Id. See supra notes 106-14 and accompanying text.
248. The safe harbor for an ascertainable standard of invasion is the "HEMS" test: health, education, maintenance, and support. I.R.C. § 20.2041(1)(c)(2). Courts use state law to determine whether invasion powers not within the safe harbor constitute general powers. For examples of standards not within the safe harbor, compare Effie Kells Jones Estate v. Commissioner, 73-1 U.S.T.C. CCH ¶ 12,924 (3rd Cir. 1975) (not limited by an ascertainable standard and therefore a general power) with Estate of Sowell v. Commissioner, 708 F.2d 1564 (10th Cir. 1983); Brantingham v. U.S., 631 F.2d 542 (7th Cir. 1980); Barritt v. Tomlinson, 129 F.Supp. 642 (S.D. Fla. 1955) (limited by ascertainable standards and therefore not general powers). Some states have enacted statutes that in certain situations limit the ability of the donee to appoint to himself or for his benefit. See S.C. CODE ANN. § 62-7-603 (Law Coop. Supp. 1988). Another statutory exception to the general rule is the so-called "5 and 5" power, which allows a trust beneficiary to withdraw annually no more than the greater of $5,000 or 5% of the value of the trust assets without being considered the donee of a general power. I.R.C. §§ 2041(b)(2), 2514(e).

The holder of the power to invade also may be considered the owner for income tax pur-
Historically, the tax noose has tightened continually on the use of powers. The Revenue Act of 1916, the first federal law imposing a "pure" estate tax, did not include a provision dealing with powers of appointment. \(^{249}\) Congress corrected its omission in the Revenue Act of 1918, although a power created after the Act but before 1942 was taxable only if general and exercised. \(^{250}\) After 1942, the tax laws included as taxable in the donee's estate appointive property subject to a general power of appointment, regardless of exercise. \(^{251}\)

**X. CHOICE OF LAW**

Since treatment of various aspects of powers of appointment vary from state to state, the choice of law could be outcome determinative. The general questions involve the appropriate state law to determine the validity and construction of the power of appointment and the validity and construction of the exercise. Many cases and a number of statutes consider whether the law of the donor's domicile, the donee's domicile, or some other state should control. \(^{252}\) The choice of law rules are not necessarily consistent. Consequently, the careful drafter will consider choice of law possibilities.

**XI. CONCLUSION**

For centuries, conveyancers have utilized the power of appointment for a myriad of reasons, ranging from the simple and the practical to the ingenious and the complex. From the first use in avoidance of restrictions on transfers to the most recent application in the
amelioration of the impact of estate, gift, and generation-skipping transfer taxes, interest in the power of appointment as a dispositive device historically has oscillated. At any time, however, the employment of powers has necessitated the ability to think creatively. Those wishing to innovate should first understand the elementary. Even a basic application of the power of appointment can render a beneficial result. The opportunity for more imaginative uses of powers of appointment, emanating from an understanding of the fundamental, remains as limitless as the lawyer's desire to solve the problems of a client.