STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND A STUDY

relating to

Powers of Appointment

October 1968

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

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NOTE

This pamphlet begins on page 301. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 9 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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STATE OF CALIFORNIA RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION
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October 21, 1968

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to make a study relating to powers of appointment.

The Commission herewith submits its recommendation and a study relating to this subject. The study was prepared by Professor Richard R. Powell of the University of California, Hastings College of the Law. Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Respectfully submitted,

SHO SATO
Chairman

CONTENTS

CONTENTS—Continued

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Powers of Appointment

BACKGROUND

Powers of appointment have been aptly described as one of the most useful and versatile devices available in estate planning. A power of appointment is a power conferred by the owner of property (the "donor") upon another person (the "donee") to designate the persons ("appointees") who will receive the property at some time in the future. Although such powers can be created as to legal (or "non-trust") interests in property, the present day use of powers is normally incident to inter vivos or testamentary trusts. In the typical situation, the creator of the trust transfers property in trust for the benefit of a designated person during his lifetime with a provision that, upon the death of the life beneficiary, the remaining property shall be distributed in accordance with an "appointment" made by the life beneficiary or, occasionally, by the trustee or another person.

The most common use of powers today is in connection with the so-called marital deduction trust. Under this arrangement, the husband leaves his wife a sufficient portion of his estate to obtain full benefit of the marital deduction. She is given a life interest in such portion together with an unrestricted power to appoint the remainder, with a further provision in case she does not exercise the power. The transfer takes advantage of the marital deduction and yet, where the power of appointment may be exercised only by will, insures that the property will be kept intact during the wife's lifetime. If, on the other hand, the husband does not want to permit the wife to appoint the property to herself or her estate, he may give her a life estate with a power to appoint among only a small group of persons such as their children. In this case, the transfer is not eligible for the marital deduction but the so-called "second tax" is avoided; the property is not subject to an estate tax at the wife's death. At the same time, the husband has been able to direct the future disposition of the property; it must be kept intact during the wife's lifetime and, at her death, her right to dispose of the property is restricted to the appointees designated by the husband. The latter device may also be used to avoid the "second tax" when the special power is given to someone other than the donor's wife. Where, for example, the donor gives a special power of appointment to his son or daughter, he achieves substantial tax savings in the donee's estate and control over the ultimate distribution of the appointive property.

Apart from their usefulness in minimizing death taxes, powers make possible a disposition reaching into the future but with a flexibility that can be achieved in no other way. When a husband leaves his property in trust for the benefit of his wife during her lifetime and, upon her death, to such of his children and in such proportions as his wife may appoint, he makes it possible for the ultimate distribution to be made in accordance with changes that occur between the time of his death and the time of his wife's death. He has limited the benefits of his property to the objects of his bounty, but he has also permitted future distributions of principal and income to take account of changes in the needs of beneficiaries which he could not possibly have foreseen. Births, deaths, financial successes and failures, varying capacities of individuals, and fluctuations in income and property values can all be taken into account at the time of appointment. Moreover, the limitations imposed by the donor on the manner of exercising the power and the persons to whom appointments can be made give him substantial control of the property after he has transferred it. He can make the power exercisable during the lifetime of the donee (a power that is "presently exercisable" or one that is "postponed" until a stated event during the lifetime of the donee), or he can make the power exercisable only by will ("testamentary power"). He may permit the donee to appoint only among a specified group of persons, such as his children ("special power"), or he may create a broad power permitting the donee to appoint without limitation as to permissible appointees or to a group that includes the donee, her estate, her creditors, or creditors of her estate ("general power").

Despite the many advantages of powers of appointment, uncertainties exist as to their validity and interpretation under California law. It was not until 1935 that an appellate court held that the common law of powers obtains in this state.[1] This decision was helpful in assuring lawyers that powers of appointment are valid devices and are governed by the evolving law declared in judicial decisions. Nevertheless, the law of powers remains uncertain for want of a sufficient body of authoritative case law to resolve the significant issues. The uncertainty as to the nontax consequences of powers may cause some estate planners to be hesitant in using powers and may make it necessary for lawyers and judges to investigate large numbers of cases, often from other jurisdictions, before drafting an instrument with a power or deciding a question in litigation.

RECOMMENDATIONS

The Commission recommends the enactment of a statute stating the more important rules governing powers of appointment and providing that the common law rules relating to powers of appointment are applicable unless modified by statute. New York, Minnesota, Wisconsin, and Michigan have recently enacted similar statutes. The enactment of such a statute in California would be of significant value in clarifying the

[1] Estate of Sloan, 7 Cal. App.2d 319, 46 P.2d 1007 (1935).

In 1872, California adopted, as part of the Civil Code, an elaborate statute relating to powers of appointment. The complexity of that statute and certain ill-considered provisions that it contained, in addition to the general unfamiliarity with powers of appointment prevalent at that time, caused the Legislature, in 1874, to repeal the entire statute.

law of powers and creating confidence in their use. Although the statute generally should follow common law rules, a few significant departures from the common law rule or existing California law are recommended:

1. Distinction between "general" and "special" powers. "General" and "special" powers should be defined so as to conform generally to the definitions of "general" and "limited" powers found in the state inheritance tax law and the definition of "general power" in the federal estate tax law. This approach would accord with the general professional usage of the terms and would base the distinction upon the equivalency of ownership in the donee of the general power, rather than upon the number of permissible appointees. This distinction, however cast, is important primarily in regard to the rights of creditors and the rule against perpetuities.

2. Exercise of general power of appointment by residuary clause in donee's will. Under existing law, a residuary clause in a will exercises a general power of appointment unless the will indicates a contrary intent or lacks a specific reference to the power required by the donor. See *Estate of Carter*, 47 Cal. 2d 200, 302 P. 2d 301 (1956).

In *Estate of Carter*, the Supreme Court interpreted Probate Code Section 125 to require a holding that a residuary clause in a will, which did not mention the testator-donee's general testamentary power, exercised the power despite evidence *apart from the will* that the donee did not intend to exercise the power. The *Carter* rule may result in the passing of the appointive property to residuary legatees where the donee intended the property to pass to the takers in default. In addition, the donee of a power may, through the unintended exercise of the power, cause disadvantageous tax consequences for his estate. See CALIFORNIA WILL DRAFTING, Hopkins, *Introductory and Concluding Clauses*, § 7.11 (Cal. Cont. Ed. Bar 1965). The *Carter* rule should be changed to permit the admission of evidence apart from the will that the donee did not intend to exercise a general power of appointment by the residuary clause in his will.

3. Preference for exclusive powers of appointment. Where a power is created in a donee to appoint to a class such as his children, the question arises as to whether the power is an "exclusive" power (one which permits the donee to appoint all of the property to one of his children) or a "nonexclusive" power (one which requires the donee to appoint some of the property to each of the children). In most jurisdictions, the common law preference was for exclusive powers. In *Estate of Sloan*, 7 Cal. App. 2d 319, 46 P. 2d 1007 (1935), however, the Court of Appeal held that in California the preference is for nonexclusive powers. Therefore, a California donee must appoint to each of the permissible objects under a special power of appointment unless the donor has manifested a contrary intention in the creating instrument. This holding encourages litigation to determine the amount which must be appointed to each permissible object of a power and restricts the flexibility of powers, which is one of their principal advantages. See CALIFORNIA WILL DRAFTING, *Powers of Appointment*, § 13.4 (Cal. Cont. Ed. Bar 1965). Therefore, the Commission recommends that the California rule be changed to embody the preference for exclusive powers unless the donor mani-

fests a contrary intention by providing a minimum or maximum amount for each permissible appointee.

4. Rights of creditors of donee. One of the most unsatisfactory aspects of the common law of powers of appointment is the rule governing the rights of creditors of the donee. Under the common law doctrine of "equitable assets," creditors of the donee can reach the appointive assets only when a general testamentary power of appointment has been exercised in favor of a creditor or volunteer (RESTATEMENT OF PROPERTY § 329) or when an inter vivos exercise of a power results in a fraud on creditors (RESTATEMENT OF PROPERTY § 330). Property covered by an unexercised power of appointment is not subject to the claims of creditors. RESTATEMENT OF PROPERTY § 327. These rules apparently constitute present California law. *Cf. Estate of Masson,* 142 Cal. App.2d 510, 298 P.2d 619 (1956).

The common law rule is not logical. Where the power to appoint is both general and presently exercisable, the donee has the equivalent of full ownership as to the appointive assets. His creditors should be able to reach property that their debtor can appropriate for his own benefit. This is equally true where the property is covered by a general testamentary power which has become presently exercisable by the death of the donee. In such case, the appointive assets were subject to the complete power of disposition by the debtor-donee and upon his death should be treated the same as the other assets of the decedent. The rights of creditors should not be dependent upon the exercise of the power. The mere existence of the power should be the essential operative fact.

Accordingly, the Commission recommends that, to the extent that the donee's other property is not adequate to satisfy the claims of the creditors, the creditors of the donee may be permitted to reach property subject to a presently exercisable general power, or subject to a general testamentary power after the donee has died, to the same extent as if the property were owned by the donee.[2] The recommended rule is consistent with the rule adopted by modern legislation in other states [3] and the rules that treat such property as owned by the donee for the purposes of death taxes [4] and bankruptcy.[5]

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[2] If the property has been appointed by an inter vivos instrument, the property should be subject to creditors' claims if, had it been the donee's own property, the property could have been reached by the creditors under the rules relating to fraudulent conveyances. See RESTATEMENT OF PROPERTY § 330.

[3] See MICH. STAT. ANN. § 26.155 (113) (Supp. 1967); MINN. STAT. ANN. § 502.70 (Supp. 1967); N. Y. ESTATES, POWERS & TRUSTS LAW § 10-7.2 (1967); WIS. STAT. ANN. § 232.17 (Supp. 1967).

[4] Section 2041 of the Internal Revenue Code requires that property subject to a general power of appointment be included in the donee's gross estate for estate tax purposes. Similarly, California Revenue and Taxation Code Section 13696 provides that a taxable inheritance from the donee occurs whenever a person takes property either by the exercise or the nonexercise of a general power.

[5] The Federal Bankruptcy Act includes in a bankrupt's assets all property subject to his appointment under a general power of appointment that is presently exercisable at the moment of bankruptcy. 11 U.S.C. § 110(a)(3).

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by the enactment of the following measures:

I

An act to add Title 7 (commencing with Section 1380.1) to Part 4 of Division 2 of, and to repeal Section 1060 of, the Civil Code, and to amend Sections 125 and 126 of the Probate Code, relating to powers of appointment.

The people of the State of California do enact as follows:

TITLE 7. POWERS OF APPOINTMENT

SECTION 1. Title 7 (commencing with Section 1380.1) is added to Part 4 of Division 2 of the Civil Code, to read:

TITLE 7. POWERS OF APPOINTMENT

Comment. This title does not codify all of the law relating to powers of appointment. Its provisions deal with the problems most likely to arise and afford positive statutory rules to govern these problems. Many minor matters are not covered by this title or other statutes; these are left to court decision under the common law which remains in effect. See Section 1380.1 and the Comment to that section. Other states that have recently enacted legislation dealing with powers of appointment have taken the same approach. See MICH. STAT. ANN. § 26.155 (119) (Supp. 1967); MINN. STAT. ANN. § 502.62 (1945); N. Y. ESTATES, POWERS & TRUSTS LAW § 10-1.1 (1967); WIS. STAT. ANN. § 232.19 (Supp. 1967).

CHAPTER 1. GENERAL PROVISIONS

Section 1380.1. Common law applies unless modified by statute

1380.1. Except to the extent that the common law rules governing powers of appointment are modified by statute, the common law as to powers of appointment is the law of this state.

Comment. Section 1380.1 codifies the holding in *Estate of Sloan*, 7 Cal. App.2d 319, 46 P.2d 1007 (1935), that the common law of powers of appointment is in effect in California unless modified by statute. See also *Estate of Elston*, 32 Cal. App.2d 652, 90 P.2d 608 (1939); *Estate of Davis*, 13 Cal. App.2d 64, 56 P.2d 584 (1936). As used in this section, the "common law" does not refer to the common law as it existed in 1850 when the predecessor of Civil Code Section 22.2 was enacted; rather, the reference is to the contemporary and evolving rules of decisions developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions. See, *e.g.*, *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 Pac. 425 (1920).

Section 1380.2. Law applicable to powers created prior to July 1, 1970

1380.2. If the law existing at the time of the creation of a power of appointment and the law existing at the time of the release or exercise of the power or at the time of the assertion of a right given by this title differ, the law existing at the time of the release, exercise, or assertion of a right controls. Nothing in this section makes invalid a power of appointment created prior to July 1, 1970, that was valid under the law in existence at the time it was created.

Comment. Section 1380.2 makes this title applicable where a release is executed, a power is exercised, or a right is asserted after the operative date of this title (July 1, 1970), regardless of when the power was created. However, Section 1380.2 deals only with the "release" or "exercise" of a power or the "assertion of a right" given by this title. The section does not deal with "creation" of powers of appointment, and nothing in the section makes invalid a power of appointment created prior to July 1, 1970, where such power was valid under the law in effect at the time it was created.

Under Section 1380.2, the rights of creditors after July 1, 1970, with respect to a power of appointment—whether created before or after July 1, 1970—are controlled by Sections 1390.1–1390.4. Likewise, after July 1, 1970, such matters as the exercise of a power of appointment are governed by this title—even though the power of appointment was created prior to July 1, 1970.

Provisions similar to Section 1380.2 exist in other states. See MICH. STAT. ANN. § 26.155 (122) (Supp. 1967); WIS. STAT. ANN. § 232.21 (Supp. 1967).

CHAPTER 2. DEFINITIONS; CLASSIFICATION OF POWERS OF APPOINTMENT

Section 1381.1. Definitions

1381.1. As used in this title:

(a) "Donor" means the person who creates or reserves a power of appointment.

(b) "Donee" means the person to whom a power of appointment is given or in whose favor a power is reserved.

(c) "Appointee" means the person in whose favor a power of appointment is exercised.

(d) "Permissible appointee" means a person in whose favor a power of appointment can be exercised.

(e) "Appointive property" means the property or interest in property which is the subject of the power of appointment.

(f) "Creating instrument" means the deed, will, trust agreement, or other writing or document that created or reserved the power of appointment.

Comment. Section 1381.1 defines terms that are used throughout the title. Subdivisions (a), (b), and (c) are substantially the same as *Restatement of Property* Section 319(1), (2), and (4). Subdivisions (d) and (e) adopt terms different from the *Restatement of Property* but

are substantially the same in meaning as Section 319(3) and (6). Subdivision (f) is similar to Michigan Statutes Annotated Section 26.155 (102) (g) (Supp. 1967).

Section 1381.2. "General" and "special" powers of appointment

1381.2. (a) A power of appointment is "general" only to the extent that it is exercisable in favor of the donee, his estate, his creditors, or creditors of his estate, whether or not it is exercisable in favor of others.

(b) A power to consume, invade, or appropriate property for the benefit of a person or persons in discharge of the donee's obligation of support which is limited by an ascertainable standard relating to their health, education, support, or maintenance is not a general power of appointment.

(c) A power exercisable by the donee only in conjunction with a person having a substantial interest in the appointive property which is adverse to the exercise of the power in favor of the donee, his estate, his creditors, and creditors of his estate is not a general power.

(d) All powers of appointment which are not "general" are "special."

(e) A power of appointment may be general as to some appointive property or an interest in or a specific portion of appointive property and be special as to other appointive property.

Comment. Subdivisions (a), (c), and (d) of Section 1381.2 are based on the distinction between "general" and "limited" powers in the California inheritance tax law and the distinction between "general" powers and all other powers in the federal estate tax law. See CAL. REV. & TAX. CODE § 13692; INT. REV. CODE of 1954, § 2041(b)(1). Although this title generally codifies the common law, Section 1381.2 departs from the common law distinction stated in *Restatement of Property,* Section 320. Instead, it adopts the prevailing professional usage which is in accord with the definitions contained in the federal and state death tax laws. Section 1381.2 is similar to provisions adopted in other states. See MICH. STAT. ANN. § 26.155(102)(h), (i) (Supp. 1967); N. Y. ESTATES, POWERS & TRUSTS LAW § 10-3.2(b), (c) (1967); WIS. STAT. ANN. § 232.01(4), (5) (Supp. 1967).

A power of appointment is "general" *only to the extent* that it is exercisable in favor of the donee, his estate, his creditors, or creditors of his estate. Thus, for example, *A* places property in trust, and gives *B* a power to consume the income from the trust in such amounts as are necessary to support *B* in accordance with his accustomed manner of living whenever *B*'s annual income from all other sources is less than $15,000. *B*'s power is limited to consumption of the income from the trust; in no event can he (or his creditors under Section 1390.3) reach the principal of the trust. Moreover, *B*'s power is limited by one of a variety of commonly used ascertainable standards and is therefore under Section 1381.2 a "general" power only to the extent that that standard is satisfied. Finally, *B*'s power is subject to the condition that

his annual income from all other sources must be less than $15,000, and is not, therefore, presently exercisable until that condition is met.

A power is general so long as it can be exercised in favor of any *one* of the following: the donee, his estate, his creditors, or the creditors of his estate. To be classified as general, the power does not have to give the donee a choice among all of this group; it is sufficient if the power enables him to appoint to any one of them. However, a power that is not otherwise considered to be a general power is not classified as general merely because a particular permissible appointee may, in fact, be a creditor of the donee or his estate. A similar rule obtains under the federal estate tax and gift tax regulations. Treas. Reg. §§ 20.2041-1(c), 25.2514-1(c) (1968). Moreover, the mere fact that the donee has a power to appoint for the benefit of persons in discharge of his obligation of support does not make the power a general one if it is limited by an ascertainable standard relating to their support. See subdivision (b). This exception is not found in the tax law definition.

Subdivision (c) sets forth the "adverse party" exception contained in both the federal and state tax laws.

A special power generally is one that permits the donee to appoint to a class that does not include himself, his estate, his creditors, or the creditors of his estate. If the class among whom the donee may appoint includes only specified persons but also includes himself, his estate, his creditors, or the creditors of his estate, the power to that extent is general rather than special.

Subdivision (e) is included to make clear that a power of appointment may be general as to part of the appointive property and special as to the rest. Thus, where *A* devises property to *B* for life and at *B*'s death to be distributed, one-half to any person *B* by will directs, and one-half to *C*, *D*, or *E* as *B* by will directs, *B* has a general testamentary power as to one-half the property and a special testamentary power as to the remaining one-half.

Section 1381.3. "Testamentary" and "presently exercisable" powers of appointment

1381.3. (a) A power of appointment is "testamentary" if it is exercisable only by a will.

(b) A power of appointment is "presently exercisable" at the time in question to the extent that an irrevocable appointment can be made.

Comment. Section 1381.3 differentiates among powers of appointment by focusing upon the time at which the power may be effectively exercised. It defines "testamentary" and "presently exercisable" powers. Note that a power of appointment that can be exercised by inter vivos instrument as well as by will is not one that can be exercised "only by a will" and hence is not a testamentary power.

A power may be neither "testamentary" nor "presently exercisable." A power is not "presently exercisable" if it is "postponed." A power is "postponed" if: (1) The creating instrument provides that the power *may be exercised* only after a specified act or event occurs or condition is met (for example, that the donee reach the age of 25), and such act or event has not occurred or the condition has not been

met; or (2) the creating instrument provides that *an exercise of the power is revocable* until a specified act or event occurs or condition is met, and such act or event has not occurred or the condition has not been met. An example of a power that is "postponed" is: The creating instrument provides that a wife's power of appointment over certain property held in trust by a bank is exercisable "only by a written instrument other than a will on file with the trustee at the death of my wife" and, to insure that the wife retains unlimited discretion throughout her lifetime, the creating instrument further provides that any instrument of appointment shall be revocable during the donee's lifetime. Although the wife has filed a written instrument with the trustee designating the appointees, she is still alive. When the term "power not presently exercisable" is used in this title, it includes both testamentary powers and powers that are otherwise postponed.

Section 1381.4. "Imperative" and "discretionary" powers of appointment

1381.4. A power of appointment is "imperative" when the creating instrument manifests an intent that the permissible appointees be benefited even if the donee fails to exercise the power. An imperative power can exist even though the donee has the privilege of selecting some and excluding others of the designated permissible appointees. All other powers of appointment are "discretionary." The donee of a discretionary power is privileged to exercise, or not to exercise, the power as he chooses.

Comment. Section 1381.4 defines "discretionary" and "imperative" powers. A power of appointment is either imperative or discretionary. If a power is imperative, the donee must exercise it or the court will divide the appointive property among the potential appointees. See Section 1389.2. The duty to make an appointment is normally considered unenforceable during the life of the donee. See RESTATEMENT OF PROPERTY § 320, special note at 1830 (1940). A discretionary power, on the other hand, may be exercised or not exercised as the donee chooses. Nonexercise will result in the property's passing to the takers in default or returning to the donor's estate. See Section 1389.3.

Section 1381.4 does not state what constitutes a manifestation of intent that "the permissible appointees be benefited even if the donee fails to exercise the power." The common law rules that determine when such an intent has been manifested apply. See Section 1380.1 and the Comment thereto. See also *O'Neil v. Ross*, 98 Cal. App. 306, 277 Pac. 123 (1929) (discussion of "mandatory" powers but no holding concerning them).

Section 1381.4 is similar to New York Estates, Powers and Trusts Law Section 10-3.4 (1967).

CHAPTER 3. CREATION OF POWERS OF APPOINTMENT

Section 1382.1. Donor's capacity

1382.1. A power of appointment can be created only by a donor having the capacity to transfer the interest in property to which the power relates.

Comment. Section 1382.1 codifies existing law. See *Swart v. Security-First Nat'l Bank*, 48 Cal. App.2d 824, 120 P.2d 697 (1942). See also CODE CIV. PROC. §§ 1971, 1972 (creation of power relating to real property).

CHAPTER 4. EXERCISE OF POWERS OF APPOINTMENT

Article 1. Donee's Capacity

Section 1384.1. Donee's capacity

1384.1. (a) A power of appointment can be exercised only by a donee having the capacity to transfer the interest in property to which the power relates.

(b) Unless the creating instrument otherwise provides, a donee who is a minor may exercise a power of appointment only if:

(1) He is over the age of 18 years and exercises the power of appointment by a will; or

(2) He is deemed under Section 25 to be an adult person for the purpose of entering into any engagement or transaction respecting property or his estate.

Comment. Under Section 1384.1, the normal rules for determining capacity govern the capacity of the donee to exercise a power of appointment. See *Swart v. Security First Nat'l Bank*, 48 Cal. App.2d 824, 120 P.2d 697 (1942). Subdivision (a) states the common law rule embodied in Section 345 of the *Restatement of Property* and is substantially the same as Michigan Statutes Annotated Section 26.155(105)(1) (Supp. 1967) and Wisconsin Statutes Annotated Section 232.05(1) (Supp. 1967).

Subdivision (b) states a requirement applicable to a donee who is a minor. This requirement is in addition to the general requirement stated in subdivision (a) (*e.g.*, donee not judicially determined to be of unsound mind) which a minor donee also must satisfy. Subdivision (b) adopts the same rules that determine whether a minor can make a valid will (Probate Code Section 21) or can enter into a transaction respecting property or his estate that cannot be disaffirmed (Civil Code Section 25).

Article 2. Scope of Donee's Authority

Section 1385.1. Scope of donee's authority generally

1385.1. (a) Except as otherwise provided in this title, if the creating instrument specifies requirements as to the manner, time, and conditions of the exercise of a power of appointment, the power can be exercised only by complying with those requirements.

(b) Unless expressly prohibited by the creating instrument, a power stated to be exercisable by an inter vivos instrument is also exercisable by a written will.

Comment. Subdivision (a) of Section 1385.1 codifies the common law rule embodied in Section 346 of the *Restatement of Property*. See also RESTATEMENT OF PROPERTY § 324 (1940).

Subdivision (b) states an exception to the rule codified in subdivision (a). This exception is not found in the common law, but a similar ex-

ception is contained in Michigan Statutes Annotated Section 26.155(105)(2) (Supp. 1967), Minnesota Statutes Annotated Section 502.64(1945), and New York Estates, Powers and Trusts Law Section 10-6.2(a)(3)(1967). Often a directive in the creating instrument that a power be exercised by an inter vivos instrument places an inadvertent and overlooked limitation on the exercise of the power. If and when such a prescription is encountered, it is reasonable to say that, "All the purposes of substance which the donor could have had in mind are accomplished by a will of the donee." See RESTATEMENT OF PROPERTY § 347, comment *b* (1940). However, if the donor expressly prohibits the testamentary exercise of the power, his clear intent should be enforced. For example, if the creating instrument requires exercise of the power "only by an instrument other than a will," subdivision (b) is not applicable. See also CODE CIV. PROC. §§ 1971, 1972 (power relating to real property).

Section 1385.2. Requirement of specific reference to power

1385.2. If the creating instrument expressly directs that a power of appointment be exercised by an instrument which makes a specific reference to the power or to the instrument that created the power, the power can be exercised only by an instrument containing the required reference.

Comment. Section 1385.2 permits a donor to require an express reference to the power to assure a conscious exercise by the donee. In such a case, the specific reference to the power is a condition to its exercise. This condition precludes the use of form wills with "blanket" clauses exercising all powers of appointment owned by the testator. The use of blanket clauses may result in passing property without knowledge of the tax consequences and may cause appointment to unintended beneficiaries. The section embodies the rule set out in Michigan Statutes Annotated Section 26.155(104)(Supp. 1967) and Wisconsin Statutes Annotated Section 232.03(1)(Supp. 1967).

Section 1385.3. Power requiring consent of donor or other person

1385.3. (a) If the creating instrument requires the consent of the donor or other person to exercise a power of appointment, the power can only be exercised when the required consent is contained in the instrument of exercise or in a separate written instrument, signed in each case by the person or persons whose consents are required.

(b) Unless expressly prohibited by the creating instrument:

(1) If any person whose consent is required dies, the power may be exercised by the donee without the consent of such person.

(2) If any person whose consent is required becomes legally incapable of consenting, his guardian or conservator may consent on his behalf to an exercise of the power.

(3) A consent may be given before or after the exercise of the power by the donee.

Comment. Section 1385.3 reflects a policy similar to that embodied in California Civil Code Section 860, Michigan Statutes Annotated Section

26.155(105)(4)(Supp. 1967), Minnesota Statutes Annotated Section 502.68 (1945), New York Estates, Powers and Trusts Law Section 10-6.4 (1967), and Wisconsin Statutes Annotated Section 232.05(3) (Supp. 1967).

It is important to note that additional formalities may be necessary to entitle the instrument of exercise and the consent to be recorded. For example, under Government Code Section 27287, a consent apparently must be acknowledged to entitle it to be recorded.

Section 1385.4. Power created in favor of two or more donees

1385.4. A power of appointment created in favor of two or more donees can only be exercised when all of the donees unite in its exercise. If one or more of the donees dies, becomes legally incapable of exercising the power, or releases the power, the power may be exercised by the others, unless expressly prohibited by the creating instrument.

Comment. Section 1385.4 reflects the same policy as Civil Code Section 860. It embodies the rule stated in Michigan Statutes Annotated Section 26.155(105)(5)(Supp. 1967), Minnesota Statutes Annotated Section 502.67 (1945), New York Estates, Powers and Trusts Law Section 10-6.7 (1967), and Wisconsin Statutes Annotated Section 232.05(4) (Supp. 1967).

Section 1385.5. Power of court to remedy defective exercise

1385.5. Nothing in this chapter affects the power of a court of competent jurisdiction to remedy a defective exercise of an imperative power of appointment.

Comment. Section 1385.5 is included to make clear that this chapter does not limit the power of a court under Section 1389.2. The same provision is included in the introductory clause of New York Estates, Powers and Trusts Law Section 10-6.2 (1967).

Article 3. Donee's Required Intent

Section 1386.1. Manifestation of intent to exercise

1386.1. (a) The exercise of a power of appointment requires a manifestation of the donee's intent to exercise the power.

(b) Such a manifestation exists where:

(1) The donee declares, in substance, that he exercises the specific power or all powers that he has.

(2) The donee purports to transfer an interest in the appointive property which he would have no power to transfer except by virtue of the power.

(3) The donee makes a disposition which, when considered with reference to the property he owned and the circumstances existing at the time of the disposition, manifests his understanding that he was disposing of the appointive property.

(c) The listing in subdivision (b) is illustrative, not exclusive.

Comment. Section 1386.1 states existing California law and the common law generally. See *Childs v. Gross*, 41 Cal. App.2d 680, 107 P.2d 424 (1940); *Reed v. Hollister*, 44 Cal. App. 533, 186 Pac. 819 (1919); RESTATEMENT OF PROPERTY §§ 342–343 (1940).

Subdivision (b) gives examples of when the donee has sufficiently manifested his intent under Section 1386.1 to exercise the power. The listing is not exclusive and is similar to New York Estates, Powers and Trusts Law Section 10-6.1(a) (1), (2), (3) (1967). See also MICH. STAT. ANN. § 26.155(104) (Supp. 1967).

Section 1386.2. Exercise by residuary clause or other general language

1386.2. A general power of appointment exercisable at the death of the donee is exercised by a residuary clause or other general language in the donee's will purporting to dispose of the property of the kind covered by the power unless:

(a) The creating instrument requires that the donee make a specific reference to the power or to the instrument that created the power; or

(b) The donee manifests an intent, either expressly or by necessary inference, not to so exercise the power.

Comment. Section 1386.2 creates an exception to Section 1386.1. Under Section 1386.2, despite the absence of a manifestation of intent by the donee to exercise the power, a residuary clause exercises a general power under the circumstances stated. A residuary clause does not exercise a power when the creating instrument requires that the donee make a specific reference to the power or when the donee manifests an intent not to exercise the power.

Section 1386.2 modifies the rule stated in Probate Code Section 125. In *Estate of Carter*, 47 Cal.2d 200, 302 P.2d 301 (1956), the Supreme Court interpreted that section to require a holding that a residuary clause, which did not mention a general testamentary power with gifts in default, exercised the power despite the donee's specific intent not to exercise the power. See also *Childs v. Gross*, 41 Cal. App.2d 680, 107 P.2d 424 (1940) (construing Probate Code Section 125 to apply to both land and personalty). Under Section 1386.2, the donee's intent not to exercise the power may be manifested, either expressly or by necessary inference, by the terms of his will or, contrary to *Estate of Carter*, by evidence apart from the will. Section 1386.2 thus eliminates the trap for the unwary that defeated the donee's clearly provable intent in *Estate of Carter*.

Section 1386.3. Will executed before power created

1386.3. If a power of appointment existing at the donee's death, but created after the execution of his will, is exercised by the will, the appointment is effective unless:

(a) The creating instrument manifests an intent that the power may not be exercised by a will previously executed; or

(b) The will manifests an intent not to exercise a power subsequently acquired.

Comment. Section 1386.3 codifies the rule of *California Trust Co. v. Ott*, 59 Cal. App.2d 715, 140 P.2d 79 (1943). It also states the rule con-

tained in Section 344 of the *Restatement of Property*. Section 1386.3 requires that the power of appointment be one "existing at the donee's death." Thus, where the donor executes a will creating a power exercisable by will and the donee executes a will purporting to exercise that power and thereafter the donee dies and later the donor dies without having changed his will, the attempted exercise by the donee is ineffective because the power of appointment was not one "existing at the donee's death" since the donor could have revoked or changed his will at any time before his death.

Article 4. Types of Appointments

Section 1387.1. General power

1387.1. (a) The donee of a general power of appointment may make an appointment:

(1) Of all of the appointive property at one time, or several partial appointments at different times, where the power is exercisable inter vivos.

(2) Of present or future interests or both.

(3) Subject to conditions or charges.

(4) Subject to otherwise lawful restraints on the alienation of the appointed interest.

(5) In trust.

(6) Creating a new power of appointment.

(b) The listing in subdivision (a) is illustrative, not exclusive.

Comment. Section 1387.1 embodies the common law rules found in Sections 356 and 357 of the *Restatement of Property*. It makes clear that, under a general power to appoint, the donee has the same freedom of disposition that he has with respect to assets owned by him. The types mentioned in subdivision (a) are the ones about which question has most often arisen.

Section 1387.2. Special power

1387.2. Subject to the limitations imposed by the creating instrument, the donee of a special power may make any of the types of appointment permissible for the donee of a general power under Section 1387.1.

Comment. Section 1387.2 embodies the rules stated in Sections 358 and 359 of the *Restatement of Property* except that Section 1387.2 authorizes the donee of a special power to exercise the power by creating a special power of appointment in a permissible appointee. Under Section 359 of the *Restatement of Property*, the donee could only exercise the power by creating a new special power under certain circumstances. Since the donee can appoint outright to one of the permissible appointees of the special power, it would be undesirable to refuse to allow him to give such a person a special power to appoint. See 3 POWELL, REAL PROPERTY ¶ 398 at nn.28–30 (1967). A special power is not, of course, the substantial equivalent of outright ownership and

the creation of a special power in a permissible appointee may fail therefore to constitute a valid exercise of an imperative power. For example, where each of the permissible appointees under an imperative power is to receive not less than 10 percent of the appointive property, the creation of a special power in a permissible appointee would not satisfy this 10-percent requirement.

The donee of a special power of appointment may not have the same freedom as to types of appointments that the donee of a general power has; other rules of law may limit his ability to appoint in a particular manner. For example, although the donee of a special power may create a new power or appoint a future interest under Section 1387.2, the appointment may be subject to a different method of computing the applicable period under the rule against perpetuities than under a general power. See Section 1391.1. In addition, the common law rules against fraud on a special power by appointing to persons who are not permissible appointees are not affected by this section. See *Matter of Carroll*, 153 Misc. 649, 275 N.Y.S. 911, *modified*, 247 App. Div. 11, 286 N.Y.S. 307, *rev'd*, 274 N.Y. 288, 8 N.E.2d 864 (1937).

Section 1387.3. Exclusive and nonexclusive powers

1387.3. (a) Except as provided in subdivision (b), the donee of any special power of appointment may appoint the whole or any part of the appointive property to any one or more of the permissible appointees and exclude others.

(b) If the donor specifies either a minimum or maximum share or amount to be appointed to one or more of the permissible appointees, the exercise of the power must conform to such specification.

Comment. Section 1387.3 deals with the problem of whether the donee of a special power can appoint all of the property to one appointee and exclude others or must appoint some of the property to each of the permissible appointees. For example, if the donee is given power "to appoint to his children," there is a question whether he must give each child a share or whether he can appoint all of the assets to one child. If the donee may appoint to one or more of the permissible appointees and exclude others, the power is "exclusive." If the donee must appoint a minimum share or amount specified in the creating instrument to each member of the class of permissible appointees, the power is "nonexclusive." Section 1387.3 provides, in effect, that all powers are construed to be exclusive except to the extent that the donor has specified a minimum or maximum amount. It embodies the constructional preference for exclusive powers contained in Section 360 of the *Restatement of Property*.

Section 1387.3 changes California law as developed in *Estate of Sloan*, 7 Cal. App.2d 319, 46 P.2d 1007 (1935), which is contrary to many common law decisions. See 69 A.L.R.2d 1285 (1960). A similar provision has been adopted in other states. MICH. STAT. ANN. § 26.155(107) (Supp. 1967); N.Y. ESTATES, POWERS & TRUSTS LAW § 10-5.1 (1967); WIS. STAT. ANN. § 232.07 (Supp. 1967).

Article 5. Contracts to Appoint; Releases

Section 1388.1. Contracts to appoint

1388.1. (a) The donee of a power of appointment that is presently exercisable, whether general or special, can contract to make an appointment to the same extent that he could make an effective appointment.

(b) The donee of a power of appointment cannot contract to make an appointment while the power of appointment is not presently exercisable. If a promise to make an appointment under such a power is not performed, the promisee cannot obtain either specific performance or damages, but he is not prevented from obtaining restitution of the value given by him for the promise.

Comment. Section 1388.1 specifies rules governing the validity of a contract to make an appointment.

Subdivision (a). A contract by a donee to make an appointment in the future which he could have made at the time the contract was executed does not conflict with any rule of the law of powers. The objection to such promises under a testamentary power—that if the promise is given full effect, the donee is accomplishing by contract what he is forbidden to accomplish by appointment—is inapplicable to a power of appointment that is presently exercisable. Subdivision (a) states the common law rule. See RESTATEMENT OF PROPERTY § 339 (1940). It is substantially the same as Michigan Statutes Annotated Section 26.155(110)(1)(Supp. 1967) and New York Estates, Powers and Trusts Law Section 10-5.2 (1967).

Section 1388.1 is not intended to deal with the question of the extent to which an appointment is invalid when the donee of a special power appoints, either directly or indirectly to a person who is not a permissible appointee. This problem—fraud on special power—is left to the common law. See *Matter of Carroll,* 153 Misc. 649, 275 N.Y.S. 911, *modified,* 247 App. Div. 11, 286 N.Y.S. 307, *rev'd,* 274 N.Y. 288, 8 N.E.2d 864 (1937).

Subdivision (b). By giving a testamentary or postponed power to the donee, the donor expresses his desire that the donee's discretion be retained until the donee's death or such other time as is stipulated. To allow the donee to contract to appoint under such a power would permit the donor's intent to be defeated. The rule stated in subdivision (b) applies to all promises that are, in substance, promises to appoint. This would include, for example, a promise not to revoke an existing will which makes an appointment in favor of the promisee. The rule with respect to releases of testamentary and postponed powers is similar. See Section 1388.2. Subdivision (b) states the common law rule. See RESTATEMENT OF PROPERTY § 340 (1940). *Cf. Briggs v. Briggs,* 122 Cal. App.2d 766, 265 P.2d 587 (1954); *Childs v. Gross,* 41 Cal. App.2d 680, 107 P.2d 424 (1940).

Subdivision (b) also provides that the promisee can obtain neither specific performance nor damages for the breach of a promise to appoint although the donee is not prevented from obtaining restitution of value given for the promise to appoint. Restitution generally will be available

unless precluded by other factors. This is the common law rule. RESTATEMENT OF PROPERTY § 340 (1940).

Section 1388.2. Release of power of appointment

1388.2. (a) Unless the creating instrument otherwise provides, any general or special power of appointment that is a discretionary power, whether testamentary or otherwise, may be released, either with or without consideration, by written instrument signed by the donee and delivered as provided in subdivision (c).

(b) Any releasable power may be released with respect to the whole or any part of the appointive property and may also be released in such manner as to reduce or limit the permissible appointees. No partial release of a power shall be deemed to make imperative the remaining power that was not imperative before such release unless the instrument of release expressly so provides. No release of a power is permissible when the result of the release is the present exercise of a power that is not presently exercisable.

(c) A release shall be delivered as provided in this subdivision:

(1) If the creating instrument specifies a person to whom a release is to be delivered, the release shall be delivered to that person but delivery need not be made as provided in this paragraph if such person cannot with due diligence be found.

(2) In any case where the property to which the power relates is held by a trustee, the release shall be delivered to such trustee.

(3) In a case not covered by paragraph (1) or (2), the release may be delivered to any of the following:

(i) Any person, other than the donee, who could be adversely affected by the exercise of the power.

(ii) The county recorder of the county in which the donee resides or in which the deed, will, or other instrument creating the power is filed.

(d) This section does not impair the validity of any release made prior to July 1, 1970.

Comment. Section 1388.2 is similar in substance to former Civil Code Section 1060 (repealed).

The last sentence of subdivision (b) is new. California has taken the position that a power created to be exercisable only by will cannot be exercised by inter vivos act. *Briggs v. Briggs*, 122 Cal. App.2d 766, 265 P.2d 587 (1954); *Childs v. Gross*, 41 Cal. App.2d 680, 107 P.2d 424 (1940). The last sentence of subdivision (b) prevents this rule from being nullified by the use of a release. Otherwise, a release as to all persons except a designated person would permit the donee, in effect, to exercise by inter vivos act a power which the creator of the power intended to remain unexercised until the donee's death.

The last sentence of subdivision (b) also precludes the premature exercise of a postponed power by the use of a release. If, for example, the creating instrument provides that the donee shall appoint only after

all his children reach 21 years of age, the donee cannot release the power as to all but one child before that time because, in effect, he would be exercising the power prior to the time designated by the donor. Thus, the added sentence precludes the use of a release to defeat the donor's intention as to the time of exercise of a power of appointment. Compare Section 1388.1(b) (contract to appoint).

Subdivision (c) is based on a portion of former Civil Code Section 1060 but differs from Section 1060 in several respects. First, it provides certain priorities for delivery of the release; Section 1060 did not. Second, the provision of Section 1060 relating to recording as constructive notice has been omitted because that provision was inconsistent with the recording provisions relating to real property and the general principles of constructive notice. The constructive notice provision of Section 1060 made it extremely difficult or impossible for a purchaser from an apparent appointee to protect himself from a release unknown to him. Third, the portion of Section 1060 permitting delivery to the county recorder of the county in which the donee "has a place of business" has been omitted; this provision required a check in each county in the state to determine whether a release had been delivered to the county recorder since it is always possible that the donee may have had a place of business in any county in the state.

It should be noted that subdivision (c) deals with "delivery" of the release. Nothing in the subdivision precludes the recording of a release delivered in accordance with paragraph (1), (2), or (3)(i) of subdivision (c). See CIVIL CODE §§ 1213–1215.

CHAPTER 5. EFFECT OF FAILURE TO MAKE EFFECTIVE APPOINTMENT

Section 1389.1. Unauthorized appointments void as to excess only

1389.1. An exercise of a power of appointment is not void solely because it is more extensive than authorized by the power but is valid to the extent that such exercise was permissible under the terms of the power.

Comment. Section 1389.1 makes clear that, when a power is exercised partly in favor of an unauthorized person, the exercise is valid to the extent that it is permissible under the terms of the power. However, if a fraud on a special power is involved, the appointment is not permissible under the terms of the power and the disposition of the property should be determined by common law principles. See *Matter of Carroll,* 153 Misc. 649, 275 N.Y.S. 911, *modified,* 247 App. Div. 11, 286 N.Y.S. 307, *rev'd,* 274 N.Y. 288, 8 N.E.2d 864 (1937).

Section 1389.1 also covers other types of nonpermissible exercises of the power. For example, if the donor of a power specifies that the donee is to appoint 20 percent or less of the corpus of a trust to each of six permissible appointees and the donee appoints 25 percent to one of the permissible appointees, Section 1389.1 permits the appointee to receive 20 percent of the assets. Thus, an appointment of an excess amount will not invalidate the appointment, but will instead be deemed to be an appointment of the maximum amount.

Section 1389.1 is based on the rule found in New York Estates, Powers and Trusts Law Section 10-6.6(1) (1967).

Section 1389.2. Nonexercise or improper exercise of an imperative power

1389.2. (a) Unless the creating instrument or the donee, in writing, manifests a contrary intent, where the donee dies without having exercised an imperative power of appointment either wholly or in part, the persons designated as permissible appointees shall take equally of the property not already appointed. Where the creating instrument establishes a minimum distribution requirement which is not satisfied by an equal division of the property not already appointed, the appointees who have received a partial appointment shall be required to return a pro rata portion of the property they would otherwise be entitled to receive in an amount sufficient to meet such a minimum distribution requirement.

(b) Where an imperative power of appointment has been exercised defectively, either wholly or in part, its proper execution may be adjudged in favor of the person or persons intended to be benefited by the defective exercise.

(c) Where an imperative power of appointment has been so created as to confer on a person a right to have the power exercised in his favor, its proper exercise can be compelled in favor of such person, his assigns, his creditors, or his guardian or conservator.

Comment. Section 1389.2 states the consequences flowing from the imperative character of a power of appointment. Under subdivision (a), if an imperative power of appointment is created and the donee of the power dies without exercising it, the appointive assets go equally to the permissible objects of the power. Where there has been a partial appointment, unless the creating instrument or the donee has manifested a contrary intent, the assets already appointed are not thrown into a hotchpot and are considered only to the extent necessary to satisfy a requirement set by the donor that each of the permissible appointees receive a certain minimum amount. The following illustrates these rules. The donor of a power specifies that the donee is to appoint at least 25 percent of the corpus of a trust to each of three permissible appointees (*A*, *B*, and *C*). (1) Donee appoints 10 percent to *A*, but fails to appoint the remainder. *B* and *C* each take 30 percent and *A* takes 40 percent (30 plus 10). (2) Donee appoints 40 percent to *A*, but fails to appoint the remainder. Since 60 divided by 3 equals 20, the donee failed to satisfy the minimum distribution requirement set by the donor. *A* therefore must "return" a portion of the property he receives. The appointive property will be distributed 25 percent (20 plus 5) each to *B* and *C* and 50 percent (40 plus 20 minus 10) to *A*. (3) Donee appoints 60 percent to *A*, 40 percent to *B*. This again fails to satisfy the minimum distribution requirement. To obtain the 25 percent required, *A* and *B* must "return" on a pro rata basis and distribution is made accordingly—45 percent (60 minus 15) to *A*, 30 percent (40 minus 10) to *B* and 25 percent to *C*. The arithmetic can become quite complex but the principle remains the same. Unless the creating instrument or the donee, in writing, manifests a contrary intent, a partial appointment is to be treated as reflecting an intended preference. The requirement of a

writing by the donee is consistent with Probate Code Sections 1050–1054 concerning advancements.

Under subdivision (b), if the donee exercises the power defectively (*e.g.*, without proper formalities), the court may allow the intended appointment to pass the assets to the person whom the donee attempted to benefit. A similar rule obtains in California concerning the defective exercise of a power of attorney. *Gerdes v. Moody,* 41 Cal. 335 (1871).

Under subdivision (c), if the power creates a right in the permissible appointee to compel the exercise of the power (*e.g.*, where the donee must appoint to his children within ten years of the creation of the power and at the end of ten years he has only one child), that person may compel exercise of the power by the donee. In addition, the assigns or creditors of the appointee who possesses the right to compel exercise may also compel its exercise.

Section 1389.3. Effect of failure to make effective appointment

1389.3. (a) Except as provided in subdivisions (b) and (c), when the donee of a discretionary power of appointment fails to appoint the property, releases the entire power, or makes an ineffective appointment, in whole or in part, the appointive property not effectively appointed passes to the person or persons named by the donor as takers in default or, if there are none, reverts to the donor.

(b) Unless either the creating instrument or the instrument of appointment manifests a contrary intent, when the donee of a general power of appointment appoints to a trustee upon a trust which fails, there is a resulting trust in favor of the donee or his estate.

(c) Unless the creating instrument manifests a contrary intent, when the donee of a general power of appointment makes an ineffective appointment other than to a trustee upon a trust which fails, the appointive property passes to the donee or his estate if the instrument of appointment manifests an intent to assume control of the appointive property for all purposes and not only for the limited purpose of giving effect to the expressed appointment.

Comment. Section 1389.3 states the rules determining to whom property passes that has not been effectively appointed.

Subdivision (a). Subdivision (a) states the accepted common law rule. See RESTATEMENT OF PROPERTY § 365(1) (1940). It also accords with the established rule in California. *Estate of Baird,* 120 Cal. App.2d 219, 260 P.2d 1052 (1953); *Estate of Baird,* 135 Cal. App.2d 333, 287 P.2d 365 (1955) (later decision in same case on different point). Under Section 1389.3, the property passes directly from the donor to the ultimate takers.

Subdivision (b). Subdivision (b) embodies the rule of "capture" set forth in Section 365(2), (3), of the *Restatement of Property.* Where the donee of a general power of appointment appoints to a trustee upon a trust which fails, the intent, if any, manifested in the creating instrument or in the instrument of appointment as to the disposition of the appointive property under such circumstances prevails. Absent such a

manifestation of intent, there is a resulting trust in favor of the donee or his estate. If the creating instrument or instrument of appointment indicates an intent that there not be a resulting trust but does not manifest an intent as to the disposition of the property under the circumstances, the property will pass to the takers in default or, if there are none, to the donor or his estate under subdivision (a). Only England, Illinois, and Massachusetts have considered the problem, and all have adopted the substance of the rule of subdivision (b). See 3 POWELL, REAL PROPERTY ¶ 400 at n.3 (1967).

Subdivision (c). When the donee of a general power of appointment makes an ineffective appointment other than to a trustee upon a trust which fails, the intent, if any, manifested in the creating instrument as to the disposition of the appointive property under such circumstances prevails. Absent a manifestation of contrary intent in the creating instrument, the appointive property passes to the donee or his estate if the instrument of appointment "manifests an intent to assume control of the appointive property for all purposes"; otherwise, the appointive property passes to the takers in default or, if there are none, reverts to the donor or his estate under subdivision (a). Only England, Illinois, Maryland, and Massachusetts have considered this problem, and all have adopted the rule of subdivision (c). See 3 POWELL, REAL PROPERTY ¶ 400 at nn.6–11 (1967).

The intent of the donee to assume control of the assets "for all purposes" is most commonly manifested by provisions in the instrument of appointment which blend the property owned by the donee with the property subject to the power. Thus, where the donee's will provides that, "I devise and appoint all property that I own at my death or over which I then have a power of appointment to *A*," the blending of the owned and appointive assets shows an intent of the donee to treat the appointive assets as his own. Thus, if *A* predeceases the donee and the antilapse statute (Section 1389.4) does not dispose of the property, the appointive assets will pass into the donee's estate to be distributed to his statutory heirs or next of kin. See RESTATEMENT OF PROPERTY § 365, comment *d*, at 2025 (1940).

Section 1389.4. Death of appointee before effective date of appointment

1389.4. If an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective, the appointment is to be effectuated, if possible, by applying the provisions of Section 92 of the Probate Code as though the appointive property were the property of the donee except that the property shall pass only to persons who are permissible appointees.

Comment. Section 1389.4 embodies the theory of Sections 349 and 350 of the *Restatement of Property*. It is broadened to cover special powers by employing the language used by Michigan Statutes Annotated Section 26.155(120) (Supp. 1967). Section 1389.4 is necessary because Probate Code Section 92 does not specifically deal with lapse of a testamentary appointment. Section 1389.4 is not intended to cover the attempt to appoint property inter vivos to a predeceased appointee, but does

apply to an instrument other than a will effective only at the death of the donee. Such an instrument is for all practical purposes identical to a will and is accorded the same effect.

CHAPTER 6. RIGHTS OF CREDITORS

Section 1390.1. Donor cannot modify rights of creditors

1390.1. The donor of a power of appointment cannot nullify or alter the rights given creditors of the donee by Sections 1390.3 and 1390.4 by any language in the instrument creating the power.

Comment. Section 1390.1 deals with a question that has not been considered by the California appellate courts. It is patterned after a provision adopted in New York. See N.Y. ESTATES, POWERS & TRUSTS LAW § 10-4.1(4) (1967). The section prevents instruments utilizing Treasury Regulations Section 20.2056(b)-5(f)(7) (which allows a marital deduction despite a spendthrift clause in the instrument creating the power) from nullifying the rights given creditors under Sections 1390.3 and 1390.4.

Section 1390.2. Special power

1390.2. Property covered by a special power of appointment is not subject to the claims of creditors of the donee or of his estate or to the expenses of the administration of his estate.

Comment. Section 1390.2 codifies the common law rule that bars creditors from reaching the property covered by a special power of appointment. See RESTATEMENT OF PROPERTY § 326 (1940). The section is the same in substance as New York Estates, Powers and Trusts Law Section 10-7.1 (1967).

Section 1390.3. General power

1390.3. (a) To the extent that the property owned by the donee is inadequate to satisfy the claims of his creditors, property subject to a general power of appointment that is presently exercisable is subject to such claims to the same extent that it would be subject to such claims if the property were owned by the donee.

(b) Upon the death of the donee, to the extent that his estate is inadequate to satisfy the claims of creditors of the estate and the expenses of administration of the estate, property subject to a general testamentary power of appointment or to a general power of appointment that was presently exercisable at the time of his death is subject to such claims and expenses to the same extent that it would be subject to the claims and expenses if the property had been owned by the donee.

(c) This section applies whether or not the power of appointment has been exercised.

Comment. Section 1390.3 states the rule with respect to the availability of property subject to a general power of appointment to satisfy

the debts of the donee. It is intended to make appointive property available to satisfy creditors' claims when the donee has the equivalent of full ownership of the property. See Comment to Section 1381.2.

Subdivision (a) provides that the creditors of a donee possessing a power of appointment that is both general and presently exercisable can reach the appointive property for the satisfaction of their claims. However, these creditors must first exhaust the remainder of the donee's assets before resorting to the appointive property. See *Estate of Masson*, 142 Cal. App.2d 510, 298 P.2d 619 (1956). Subject to this limitation, appointive property is treated just as the donee's owned property. Thus, where the property has been appointed by an inter vivos instrument, the property is liable if, had it been the donee's owned property, the transfer would have been subject to the rules relating to fradulent conveyances. See RESTATEMENT OF PROPERTY § 330 (1940).

Subdivision (b) provides that the same rule applies to property which is covered by a general testamentary power (or the equivalent) which has, in effect, become presently exercisable because of the death of the donee. In such case, the appointive assets have come under the power of disposition by the debtor-donee and hence are treated the same as other assets of the decedent.

Subdivision (c) provides that the rights of creditors are not dependent upon the exercise of the power. Unlike the common law rule, which requires the exercise of the power, the mere existence of the power is the operative fact essential to the right of creditors. In addition, it does not matter what the interest of the donee is in the property; the property available to creditors can be either a present or a future interest.

Section 1390.4. General power created by donor in favor of himself

1390.4. Property subject to an unexercised general power of appointment created by the donor in favor of himself, whether or not presently exercisable, is subject to the claims of creditors of the donor or of his estate and to the expenses of the administration of his estate.

Comment. Section 1390.4 provides that, when the donor of a general power of appointment is also its donee, creditors of the donor-donee can reach the appointive property even though it is in terms exercisable only at a future date (as, for example, by will of the donor-donee). Section 1390.4 codifies the common law rule. See RESTATEMENT OF PROPERTY § 328 (1940).

CHAPTER 7. RULE AGAINST PERPETUITIES

Section 1391.1. Time at which permissible period begins

1391.1. The permissible period under the applicable rule against perpetuities with respect to interests sought to be created by an exercise of a power of appointment begins:

(a) In the case of an instrument exercising a general power of appointment presently exercisable by the donee alone, on the date the appointment becomes effective.

(b) In all other situations, at the time of the creation of the power.

Comment. Section 1391.1 states the substance of the common law rule as embodied in Sections 391 and 392 of the *Restatement of Property.* It is substantially the same as New York Estates, Powers and Trusts Law Section 10-8.1(a)(1967) and Michigan Statutes Annotated Section 26.155(114)(Supp. 1967).

Subdivision (a) is limited to a case where the power of appointment is presently exercisable by *only one* person. Subdivision (b), rather than subdivision (a), applies to a general power held by two or more persons. This distinction between general powers held by one person and general powers held by two or more persons is consistent with the rule in most other states. See generally *In Re Churston Settled Estates,* [1954] 1 Ch. 334; Crane, *Consent Powers and Joint Powers,* 18 CONVEY. (n.s.) 565 (1954). It should be noted that, insofar as an interest sought to be created by an exercise of a power of appointment is concerned, the rule stated in Section 1391.1 prevails over the rule stated in Civil Code Section 715.8: Where the power of appointment is presently exercisable by more than one person or requires the consent of a third person, the permissible period under the applicable rule against perpetuities begins at the time of the creation of the power, despite the fact that theoretically there are persons in being who could convey fee simple title.

Section 1391.2. Facts to be considered

1391.2. When the permissible period under the applicable rule against perpetuities begins at the time of the creation of a power of appointment with respect to interests sought to be created by an exercise of the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account in determining the validity of interests created by the instrument exercising the power.

Comment. Section 1391.2 modifies the "all contingencies" approach under the rule against perpetuities by excluding from consideration those contingencies that have been eliminated by events occurring between the creation and the exercise of the power. Suppose, for example, that *A* devises $100,000 to a trustee, *B; B* is to pay the income to *A*'s children *C* and *D* for life. Thereafter, the corpus of each half is to be distributed as appointed by *C* and *D,* respectively, among the lineal descendants of *A* (excluding *C* and *D*). *C* has children, *E* and *F,* both conceived prior to the creation of the power, and has never had another child. On his death, *C* appoints by will to his children for life and, after the death of the survivor, among his lineal descendants per capita. Viewed from the time of the creation of the original power by *A,* the rule against perpetuities has been violated; the limitation might run for more than the lives in being, plus 21 years, because *C* might have additional children. However, the limitation is completely effective under Section 1391.2 because the children of *C* were all conceived prior to the creation of the power and will serve as lives in being for the operation of the rule. If, on the other hand, *E* had been born after the creation of the power, the limitation would have been invalid because it exceeds the permissible period in any event.

This is the accepted rule of the common law. See RESTATEMENT OF PROPERTY § 392(a)(1944). It is also the established rule in California. See *Estate of Bird*, 225 Cal. App.2d 196, 37 Cal. Rptr. 288 (1964). Section 1391.2 is substantially the same as New York Estates, Powers and Trusts Law Section 10-8.3 (1967) and Michigan Statutes Annotated Section 26.155(117)(Supp. 1967).

CHAPTER 8. REVOCABILITY OF CREATION, EXERCISE, OR RELEASE OF POWER OF APPOINTMENT

Section 1392.1. Revocability of creation, exercise, or release of power of appointment

1392.1. (a) Unless the power to revoke is reserved in the instrument creating the power or exists pursuant to Section 2280, the creation of a power of appointment is irrevocable.

(b) Unless made expressly irrevocable by the creating instrument or the instrument of exercise, an exercise of a power of appointment is revocable if the power to revoke exists pursuant to Section 2280 or so long as the interest to the appointive property, whether present or future, has not been transferred or become distributable pursuant to such appointment.

(c) Unless the power to revoke is reserved in the instrument releasing the power, a release of a power of appointment is irrevocable.

Comment. Under subdivision (a) of Section 1392.1, the creation of a power of appointment is irrevocable unless the power to revoke is reserved in the instrument creating the power or unless the power is created in connection with a trust made revocable under Civil Code Section 2280. In the latter case, to avoid conflict between this section and Section 2280, a power of appointment is revocable to the same extent that the trust in connection with which it is created is revocable.

Under subdivision (b), an exercise of a power of appointment is revocable so long as the interest to the appointive property has not been transferred or become distributable, unless the creating instrument or instrument of exercise provides otherwise. This subdivision embodies a policy that the donee should be permitted to modify or revoke an exercise of the power so long as the appointive assets have not been effectively transferred. A donee may exercise his power of appointment by creating a trust for the benefit of permissible appointees. To avoid conflict with Section 2280, subdivision (b) permits the donee to revoke such an exercise, even though there has been an effective transfer, if the power to revoke exists pursuant to Section 2280.

Under subdivision (c), the release of a power of appointment is irrevocable, unless the power to revoke is reserved in the instrument of release. The procedure necessary to effect a release is provided in Section 1388.2.

CONFORMING AMENDMENTS AND REPEALS

Civil Code Section 1060 (repealed)

SEC. 2. Section 1060 of the Civil Code is repealed.

~~1060. 1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the donee and delivered as hereinafter provided unless the instrument creating the power provides otherwise.~~

~~2. A power which is releasable may be released with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such powers would otherwise be exercisable. No release of a power shall be deemed to make imperative a power which was not imperative prior to such release, unless the instrument of release expressly so provides.~~

~~3. Such release may be delivered to any of the following:~~

~~(a) Any person specified for such purpose in the instrument creating the power.~~

~~(b) Any trustee of the property to which the power relates.~~

~~(c) Any person, other than the donee, who could be adversely affected by an exercise of the power.~~

~~(d) The county recorder of the county in which the donee resides, or has a place of business, or in which the deed, will or other instrument creating the power is filed, and from the time of filing the same for record, notice is imparted to all persons of the contents thereof.~~

~~4. All releases heretofore made which substantially comply with the foregoing requirements are hereby validated. The enactment of this section shall not impair, nor be construed to impair, the validity of any release heretofore made.~~

Comment. Section 1060 is superseded by Section 1388.2.

Probate Code Section 125 (amended)

SEC. 3. Section 125 of the Probate Code is amended to read:

125. *Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment,* ~~A~~ *a* devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death ~~, including property embraced in a power to devise~~ .

Comment. The amendment to Section 125 makes clear that Section 125 does not operate with respect to powers of appointment. A provision in a will devising or bequeathing all of the testator's real or personal property operates with respect to powers only to the extent provided in Civil Code Sections 1386.1 and 1386.2.

Probate Code Section 126 (amended)

SEC. 4. Section 126 of the Probate Code is amended to read:

126. *Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment,* ~~A~~ *a* devise of the residue of the testator's real property, or a bequest of the residue of the testator's personal property, passes all of the real or personal property, as the case may be, which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will.

Comment. The amendment to Section 126 makes clear that Section 126 does not operate with respect to powers of appointment. A provision in a will devising the residue of the testator's real property or bequeathing the residue of the testator's personal property operates with respect to powers only to the extent provided in Civil Code Sections 1386.1 and 1386.2.

SEVERABILITY CLAUSE

SEC. 5. If any provision of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Comment. Section 1380.2 of this act provides for the application of this act to the exercise, release, and assertion of rights under a power of appointment created prior to the effective date of this act. It is possible —but not likely—that this provision will be held unconstitutional. Section 5 is therefore included to preserve the remainder of the act in the event that a particular provision is held invalid or its application to a particular situation is held invalid.

OPERATIVE DATE

SEC. 6. This act shall become operative on July 1, 1970.

Comment. To permit time for attorneys to become familiar with the provisions of this act, the operative date is deferred until July 1, 1970.

II

An act to amend Section 860 of the Civil Code, relating to powers.

The people of the State of California do enact as follows:

Section 860 (amended)

SECTION 1. Section 860 of the Civil Code is amended to read:

860. Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, *is legally incapable of exercising the power, or releases the power,* the power may be executed by the ~~survivor or survivors~~ *others*, unless otherwise prescribed by the terms of the power.

Comment. Section 860 has been amended to conform it to Civil Code Section 1385.4. *Cf.* Civil Code Section 1385.3.

RESEARCH STUDY
POWERS OF APPOINTMENT IN CALIFORNIA

By RICHARD R. B. POWELL*

Introduction

POWERS of appointment were used with great frequency in England during the 17th and 18th centuries.[1] Chief Justice Lord Mansfield died in 1793. In his will he thus explained why he had employed powers of appointment in his dispositions:

> Those who are nearest and dearest to me best know how to manage and improve, and ultimately in their turn, to divide and subdivide, the good things of this world which I commit to their care, *according to events and contingencies which it is impossible for me to foresee,* or trace through all the many labyrinths of time and chance.[2]

The flexibility of dispositions, and their moulding in the light of circumstances, which occur decades after the disposer has died, is still the most powerful argument for a free use of powers of appointment.[3]

West of the Atlantic there was a great hiatus of time between the English resort to powers, and the kindling interest in powers recently to be observed. This is easily understood. In the early decades of a new economy substantial accumulations of wealth are slow to grow. It is also true that American conveyancers lacked both the finesse and the technical training common among their English brethren. In consequence the decisions of American courts concerning powers of appointment were extremely few in number down to 1900.[4]

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This article was prepared to provide the California Law Revision Commission with background information for its study of this subject. The opinions, conclusions, and recommendations contained in the article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

[1] E. SUGDEN, A PRACTICAL TREATISE OF POWERS (7th ed. 1845), originally published in 1823, contains 1234 pages of exposition as to their creation and characteristics.

[2] Quoted in *Per Stirpes vs. Powers of Appointment*, in THE BANK OF CALIFORNIA, ESTATE PLANNING STUDIES 1 (Fall 1966).

[3] The Bank of California, in the Fall of 1966, devoted an eight-page bulletin (cited in note 2 *supra*) to the "enormous possibilities of the power." The Chemical Bank New York Trust Co. devoted the whole of their monthly bulletin, TAXES AND ESTATES, for January 1968, to *Flexibility Through Powers of Appointment.*

[4] Morffew v. San Francisco & S.R.R.R., 107 Cal. 587, 40 P. 810 (1895), contains the only judicial reference to powers of appointment which this writer has been able to find in California reports down to 1900.

So long as Californians with large accumulations of wealth were rare, and so long as gift and death taxes were absent, or low in percentage, a failure to use powers of appointment was of little practical importance. Both of these facts have been changing rapidly in recent decades. This state now counts among its citizens a very large number of wealthy individuals; and both gift and death taxes, both state and federal, have long since ceased to be "low in percentage." Future dispositions of large fortunes require full awareness of any available device which gives added flexibility and of any available device which can minimize the tax-bite. Powers of appointment serve both of these ends.[5] Lawyers whose work includes the drafting of wills or trusts have a responsibility to their clients to assure that the dispositions made will have the maximum in flexibility and the minimum of tax-loss, consistent with the desires of the client and with safety.

California lawyers have been most hesitant in using powers of appointment. This attitude was wholly understandable, and wholly justified, while it remained uncertain whether the law of California permitted powers of appointment. That uncertainty was eliminated by 1935.[6] The hesitance has, however, continued with only a slight abatement, from 1935 down to date. This presents the problem to which this study is devoted.

It is, perhaps, useful to begin with an exposition of the positions heretofore taken by the courts of California as to the law governing powers of appointment;[7] to continue with an exposition of the statutory ingredient in the California law as to powers of appointment;[8] to present the reasons urging the enactment of a statute, fairly inclusive in scope, setting forth the "California common law" on powers of appointment;[9] to follow these three general presentations, with a detailed consideration of the specific rules which will work best with respect to the rights of creditors of the donee of a general power,[10]

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[5] The tax-saving factor works thus: suppose that *A* has $500,000 of assets at his death; that *A* wills these assets to *B* as trustee to pay the income to *A's* widow *C* for life; thereafter to pay the income in equal shares to *A's* children, *D*, *E* and *F*, for their several lives; then, on the death of each child, to distribute the corpus of each child's share to such relatives of the life tenant child by blood or marriage as the life tenant child shall appoint by will. There is no escaping the federal estate tax or the California inheritance tax which becomes payable on *A*'s death; *but* the nongeneral character of the power of appointment conferred on *D*, *E* and *F excludes* the appointive assets, from their respective estates. *One generation is thus skipped* for federal tax purposes; and like results can be obtained under the California inheritance tax as to all powers of appointment created since 1935.

[6] See text accompanying notes 14-27 *infra*.

[7] See text accompanying notes 15-56 *infra*.

[8] See text accompanying notes 58-75 *infra*.

[9] See text accompanying notes 76-81 *infra*.

[10] See text accompanying notes 82-90 *infra*.

and in favoring exclusive or nonexclusive powers.[11] These last two points deal with matters in which wisdom may well dictate a modernization of the ancient common law. Lastly it is vital to present a tentative form of statute which is designed to accomplish the desired ends.[12] Those concerned with the clarity and serviceability of our current law can then make such suggestions as are dictated by their experiences, to the end that the statute finally presented to the legislature for enactment can be the best that can be evolved to meet the current needs of this great state.

Positions Heretofore Taken by the Courts of California, as to Powers of Appointment

The early statute of 1850, adopting, in general, the common law was incorporated into the Political Code as section 4468,[13] and is now present, with no change of substance in California Civil Code section 22.2.[14] This statute has been claimed to establish in California the common law as to powers of appointment for the period of 1850-1872. If it did, the law so established was a "paper law," because there are no decisions or other records which indicate that anyone sought to create a power of appointment in California prior to 1872. It is, nevertheless, indisputable that the statute of 1850 furnished the commonly accepted background for the controversy as to the consequences of California legislation in 1872 and 1874.

The pervasive influence of the New York Field Code on the California statutes of 1872 needs no discussion at this time. As a part of that influence, California adopted a statute containing 62 sections concerning powers of appointment,[15] modeled on the New York Revised Statutes of 1830. The complexity of these provisions, plus a complete lack of any awareness of the possibilities of powers, caused California to do in 2 years what New York required 135 years to accomplish. In 1874, as a part of its "cleanup of the 'excesses of

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[11] See text accompanying notes 91-96 *infra.*

[12] See Appendix A.

[13] Cal. Stats. 1850, ch. 95, at 219.

[14] CAL. CIV. CODE § 22.2 states:

"The common law of England, so far as it is not repugnant [to] or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

This section was added by Cal. Stats. 1951, ch. 655, § 1, at 1833, and was derived from Cal. Pol. Code § 4468, Cal. Stats. 1850, ch. 95, at 219 (repealed 1951).

To any having historical interests, see 1 Cal. 588-604 (1850), which contains the *Report of the Senate Judiciary Comm.*, dated February 27, 1850, narrating the struggle in the legal profession as to whether California should have the "common law" or the "civil law." This report resulted in Cal. Pol. Code § 4468, Cal. Stats. 1850, ch. 95, at 219 (repealed 1951).

[15] Cal. Civ. Code of 1872, §§ 878-940 (repealed 1874).

1872,' " the California Legislature repealed the entire group of 62 sections.[16]

This 1874 repeal of the statute of 1872 raised a very basic question. Did the adoption of the New York statutory system of powers, in 1872, followed by the complete repeal of these provisions in 1874, leave California with its prior common law as to powers, or leave California with no law whatever permitting and regulating powers of appointment?

Estate of Fair,[17] in 1901, by a 4-to-3 decision took the position that the 1874 repeal left California with none of its common law on powers. During the next 34 years California courts manifested great hesitance in accepting the common law on this topic. In *Estate of Dunphy*[18] the supreme court sidestepped the basic question in 1905. By finding that remainders created in named persons were vested, and that the claimed powers to appoint had never been exercised, the case was decided without any decision on the lawfulness in California of powers. There was, however, a dictum that powers of appointment were permissible; and this dictum was in the opinion written by Justice McFarland who had been one of the four judges finding powers in trust nonexistent in *Estate of Fair*,[19] 4 years before. In *Gray v. Union Trust Co.*,[20] the desired termination of a trust was refused in 1915 by finding the created remainders vested, whether the attempted divesting power of appointment was good or bad. Again there was a dictum,[21] that a reserved power of appointment was "probably valid." In *Estate of Murphy*[22] the supreme court, in 1920, happily announced that the same result would flow from *either* finding no valid power of appointment to have been created, *or* finding an effective exercise of a validly created power. Thus again the basic question was left unanswered. In *Estate of McCurdy*,[23] in 1925, the death of the named donee before the death of the testator-donor relieved the supreme court from the necessity of passing on the permissibility, in California, of powers of appointment. The court said:

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[16] Cal. Stats. 1873-1874, ch. 612, § 123, at 223. This statute was approved April 30, 1874, and became effective July 1, 1874.

A similar result in New York was reached by ch. 864, §§ 1-2, [1964] N.Y. Laws 2322, effective June 1, 1965 (drawn by the writer of this article).

[17] 132 Cal. 523, 537, 64 P. 1000 (1901). The dissent by Temple, J., concurred in by Harrison, J., and Beatty, C.J., later became accepted California law. See text accompanying notes 28-29 *infra*.

[18] 147 Cal. 95, 81 P. 315 (1905).

[19] See note 17 *supra*.

[20] 171 Cal. 637, 154 P. 306 (1915).

[21] *Id.* at 642, 154 P. at 309: "There is in this trust a power of appointment or nomination reserved to the trustor." This statement was in no way necessary to the decision.

[22] 182 Cal. 740, 190 P. 46 (1920).

[23] 197 Cal. 276, 240 P. 498 (1925).

> We are not concerned with the question whether or not powers of appointment are valid in this state, since the repeal by the legislature in 1874 of the title in the Civil Code relating to powers . . . .[24]

As long as the supreme court of the state avoided an outright overruling of the 4-to-3 decision in *Estate of Fair*,[25] informed lawyers were wise not to subject their clients to possible litigation by inserting powers of appointment in dispositive instruments. This continued to be the discouraging situation until 1935.[26]

Estate of Sloan,[27] in 1935, adopted the position argued by the three dissenters in *Estate of Fair*;[28] decided that the 1874 statute did not abrogate "the common law of powers"; and declared:

> *the whole question is solved whenever it is determined what the common law rule is.*[29]

Unfortunately, the acceptance, for California, of the "common law" as to powers, did not settle all of the problems facing lawyers in this field. *What is the common law on powers of appointment*? Some learned in the history of the law remember the preface to the Proposed Civil Code (at iii), written by the Commissioners on October 2, 1871. This preface reads:

> Our Act adopting the Common Law of England (Stats. 1850, 219) is as follows: "The Common Law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." The Courts hold that this Act does not mean Common Law of England, but of the United States—"American Common Law;" the Common Law of England, as *modified* by the respective States. There are as many authoritative modifications as there are States in the Union. Rules upon the same subject differ much in different States. When they so differ, or when they need modifications to suit our conditions, the Court, not the Legislature, establishes the law.

The potential babel of the 50, possibly discordant, voices has caused the lawyers of California to continue hesitant in using powers of appointment. This same problem, *i.e.* what is the common law on powers of appointment, engaged the efforts of those of us working on the

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[24] *Id.* at 286, 240 P. at 502.

[25] See note 17 *supra*.

[26] A careful search has revealed only one opinion prior to 1935, basing its result on the effective exercise of a general testamentary power. This is the lower appellate court opinion of Reed v. Hollister, 44 Cal. App. 533, 186 P. 819 (1919).

[27] 7 Cal. App. 2d 319, 46 P.2d 1007 (1935).

[28] See note 17 *supra*.

[29] 7 Cal. App. 2d at 332, 46 P.2d at 1013 (emphasis added). This statement is, of course, subject to the qualification that the common law of powers prevails in California, *except as it has been modified by statute*. As to these statutory modifications, see text accompanying notes 61-75 *infra*.

Reiterating the controlling force of the common law on powers in California (since 1935), see Estate of Elston, 32 Cal. App. 2d 652, 90 P.2d 608 (1939); Estate of Huntington, 10 Misc. 2d 932, 170 N.Y.S.2d 452 (Sur. Ct. 1957) (New York case resting its decision on California law).

Restatement of Property, during the 5 years between 1935 and 1940. Professor W. Barton Leach of Harvard became the Special Reporter for the topic Powers of Appointment. With the advice and counsel of the judges, practitioners and law professors[30] of the country, a chapter 25 of the *Restatement of Property* containing 51 sections, and occupying 237 printed pages, was published in 1940. Herein, for the first time in American jurisprudence, could be found the harmonizing of discordant voices in the nonstatutory law of powers, with a considered choice as between conflicting rules. It never was intended to be accepted in toto, and without inquiry, as the law of California or of any other state. It merely provides the embodiment of 1940 wisdom of a group of specialists, which the courts of any state are free to follow or to modify. It does, however, indicate the diversities of the commonly litigated problems raised when powers of appointment are commonly employed.

A careful combing of the California reports reveals not only the seven cases above discussed, which culminated in the acceptance of the common law of powers as the California law,[31] but some 13 other cases[32] dealing with specific problems in the law of powers, and an additional group of cases furnishing analogies possibly applicable to powers.[33] The 13 specific holdings cover (a) the validity of a discretionary power to fix the shares of five takers;[34] (b) the validity of a special power presently exercisable, and the taxability under the California inheritance law of the appointive assets separately from an outright gift made to the donee;[35] (c) the sufficiency of circumstantial evidence to prove the exercise of a general testamentary power as to bank stock, plus the more important holding that an inter vivos agreement made by the donee cannot be effective to exercise a testamentary power;[36] (d) the ease of creating a power by combining the inferences based on separate facts;[37] (e) the lawfulness of the exercise of a general testamentary power created inter vivos in *1930*, by

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[30] Dean Orrin K. McMurray of Berkeley was then a member of the Institute's Council. The group doing the research, and working on its accurate expression, included two persons, then and now distinguished Professors of Property Law at Harvard, namely A. James Casner and W. Barton Leach, plus four who are presently on the Faculty of Hastings College of the Law, namely, Everett Fraser (emeritus), J. Warren Madden, Richard R. Powell and Lewis M. Simes.

[31] See text accompanying notes 18, 19, 21, 23, 24, 27, 28 *supra*.

[32] See text accompanying notes 34-46 *infra*.

[33] See text accompanying notes 50-57 *infra*.

[34] Estate of Davis, 13 Cal. App. 2d 64, 56 P.2d 584 (1936).

[35] Estate of Elston, 32 Cal. App. 2d 652, 90 P.2d 608 (1939).

[36] Childs v. Cross, 41 Cal. App. 2d 680, 107 P.2d 424 (1940). This case applies the rule embodied in RESTATEMENT OF PROPERTY § 340 (1940) [hereinafter cited as RESTATEMENT].

[37] Security-First Nat'l Bank v. Ogilvie, 47 Cal. App. 2d 787, 119 P.2d 25 (1941). This is the rule embodied in RESTATEMENT § 323.

a will executed in *1929*;[38] (f) the inclusion of the appointive assets in the gross estate of a donee of a general power presently exercisable, for the purposes of the federal estate tax when the power was exercised in 1932;[39] (g) the existence of "fraud on the power" which caused the exercise to fail when the donee of a special power attempted to divert some of the appointive assets to a person outside the permissible group of appointees;[40] (h) the ability of a donee-testator to prevent the proration of the federal estate tax, under the exception embodied in California Probate Code section 970;[41] (i) the taking of the appointive assets by the takers in default named by the donor of the power to whatever extent the donee fails effectively to exercise his power;[42] (j) the nonexercisability of a testamentary power by an inter vivos *act*;[43] (k) the fact that an equitable life interest under a trust plus a special testamentary power to appoint is not the equivalent of ownership;[44] (l) the ease of creating a power by combining the inferences based on separate facts;[45] (m) the determination of the validity, under the Rule Against Perpetuities, of the exercise of a general *testamentary* power by applying the permissible period from the *creation* of the power, but taking into account the circumstances which exist when the power is exercised.[46]

In assessing the 20 California decisions thus far discussed, three conclusions are justified. In the first place, the California cases thus far decided cover only a very small fraction of the problems dealt with by the common law as exemplified in the 237 printed pages of chapter 25 of the *Restatement of Property*. In the second place, on

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[38] California Trust Co. v. Ott, 59 Cal. App. 2d 715, 140 P.2d 79 (1943). This is the rule embodied in RESTATEMENT § 344.

[39] Henderson v. Rogan, 159 F.2d 855 (9th Cir. 1947). This result would presently occur under the current provisions of INT. REV. CODE OF 1954, § 2041(a).

[40] Horne v. Title Ins. & Trust Co., 79 F. Supp. 91 (S.D. Cal. 1948). This is the rule embodied in RESTATEMENT § 353.

[41] Estate of Parker, 98 Cal. App. 2d 393, 220 P.2d 580 (1950).

[42] Estate of Baird, 120 Cal. App. 2d 219, 260 P.2d 1052 (1953); 135 Cal. App. 2d 333, 287 P.2d 365 (1955).

This is a small part of the rule embodied in RESTATEMENT § 365. It has the practical merit of decreasing the costs of settling the donee's estate.

[43] Briggs v. Briggs, 122 Cal. App. 2d 766, 265 P.2d 587 (1954). This is the rule embodied in RESTATEMENT § 346(a).

[44] Estate of Smythe, 132 Cal. App. 2d 343, 282 P.2d 141 (1955).

[45] Estate of Kuttler, 160 Cal. App. 2d 332, 325 P.2d 624 (1958). This is the rule embodied in RESTATEMENT § 323.

[46] Estate of Bird, 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964). This is the rule embodied in RESTATEMENT § 392. It represents the growth of the common law which began with Minot v. Paine, 230 Mass. 214, 120 N.E. 167 (1918), and has since been accepted as sound common law in the Fourth Circuit and in Delaware, Georgia, Kentucky, Massachusetts, Missouri, New Jersey and Pennsylvania. The authorities are collected in 5 R. POWELL, REAL PROPERTY, ¶ 788 (1962) [hereinafter cited as POWELL].

the points decided there is almost complete[47] concurrence of the common law of California, as expounded by its courts, and of the common law of the United States, as set forth in the *Restatement of Property*. In the third place, *Estate of Sloan*,[48] which, in 1935, rendered California the great service of establishing for this state the common law on powers of appointment, also rendered this state a great disservice in adopting the then already obsolete rule of the old common law, namely a constructional preference for nonexclusive powers.[49] Herein, lies the danger of California's present position. On any litigation concerning powers, lawyers and judges have to retrace the long and arduous paths of research followed in the preparation of the *Restatement of Property*. This takes time of lawyers, and that means it requires large expenditures of clients' funds. It also takes much time of our judges. All this could be at least minimized by the enactment of a statute declaring the "California common law of powers."

The possibly useful analogies based on California cases *not* involving powers of appointment establish (a) equity's willingness to correct a defective exercise of a trustee's power to mortgage;[50] or (b) of a power of attorney;[51] (c) the nondelegability of a discretionary power to sell;[52] a judicial astuteness in making constructions which effect a giver's purposes;[53] (d) the ending of a power to convey conferred on two persons, when one of the two has died;[54] (e) a suggestion that an attempted exercise of a power of appointment in favor of the takers in default is a nullity;[55] (f) the inability to have a power to amend the terms of a trust exercised after the person having such power becomes incompetent;[56] and (g) the inability of one trustee to exercise a power which was conferred on this one plus another.[57]

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[47] See text accompanying note 49 *infra* for the one area of divergence.

[48] 7 Cal. App. 2d 319, 47 P.2d 1007. This case is discussed in the text accompanying note 27 *supra*.

[49] In this case a special testamentary power to appoint to the donee's heirs was held invalidly exercised because the donee appointed to one maternal aunt, who along with two paternal aunts were heirs of the donee at his death. The constructional preference for nonexclusive powers had been declared by English cases of 1853 and 1854, and by early decisions of Minnesota, New Jersey, Virginia and West Virginia, and had been embalmed in *Ruling Case Law* and *Corpus Juris*. The constructional preference for allowing the donee full discretion to give, as he chooses, to one or more of the permissible appointees (now embodied in RESTATEMENT § 360 and based on numerous recent cases collected in 3 POWELL ¶ 398 nn.44-47) was, unfortunately, rejected.

[50] Beatty v. Clark, 20 Cal. 11 (1862).

[51] Gerdes v. Moody, 41 Cal. 335 (1871).

[52] Saunders v. Webber, 39 Cal. 287 (1870).

[53] Elmer v. Gray, 73 Cal. 283, 14 P. 862 (1887).

[54] Burnett v. Piercy, 149 Cal. 178, 86 P. 603 (1906).

[55] Estate of Murphy, 182 Cal. 740, 190 P. 46 (1920).

[56] Swart v. Security-First Nat'l Bank, 48 Cal. App. 2d 824, 120 P.2d 697 (1942).

[57] Briggs v. Briggs, 122 Cal. App. 2d 766, 265 P.2d 587 (1954).

Statutory Ingredient in the Law of California on Powers of Appointment

Any general acceptance of the "common law" on a topic, is subject to an exception covering the statutory deviations therefrom.

The statutory ingredients in the California law on powers concern (a) the releasability of powers;[58] (b) the exercise of a power by a general disposition in the donee-decedent's will;[59] and (c) the taxation of the appointive assets under both the federal estate tax[60] and the California inheritance tax.[61]

The provisions of California Civil Code section 1060, making powers of appointment broadly releasable, were the fortunate product of a nationwide situation. The Internal Revenue Act of 1942[62] had changed the federal rule as to the taxing of appointive assets in the gross estate of the donee. If the permissible appointees were restricted to categories of persons listed in the statute, the appointive assets were excluded. Many persons in the country had powers of appointment not sufficiently restricted to gain the benefit of the 1942 legislation. There was a prevalent desire to curtail the broadness of their powers so as to save taxes. The American law as to the releasability of powers, especially as to a partial release which would diminish the categories of permissible appointees, was in a high state of uncertainty. In the year 1943, and shortly thereafter, a large number of American states met this problem by enacting a statute on releasability. California Civil Code section 1060 was enacted[63] as a

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58 See text accompanying notes 61-63 *infra.*

59 See text accompanying notes 65-70 *infra.*

60 State legislation cannot change the federal tax statutes.

61 See text accompanying notes 71-75 *infra.*

62 Ch. 619, § 403, 56 Stat. 942-44.

63 Cal. Stats. 1945, ch. 318, § 1, at 777. The text of CAL. CIV. CODE § 1060 is as follows:

"1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the donee and delivered as hereinafter provided unless the instrument creating the power provides otherwise.

"2. A power which is releasable may be released with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such powers would otherwise be exercisable. No release of a power shall be deemed to make imperative a power which was not imperative prior to such release, unless the instrument of release expressly so provides.

"3. Such release may be delivered to any of the following:

"(a) Any person specified for such purpose in the instrument creating the power.

"(b) Any trustee of the property to which the power relates.

"(c) Any person, other than the donee, who could be adversely affected by an exercise of the power.

"(d) The county recorder of the county in which the donee resides,

part of this movement. It is a soundly conceived and useful statute. If, however, a general statute on powers of appointment is to be enacted there are two particulars in which the statute can be improved. One involves only a matter of words. The present statute excludes from releasability any "power in trust which is imperative." The idea of this exclusion is sound. No change of substance would be made if the words "in trust" were omitted. If a power is "imperative" it is necessarily "in trust." A twice saying of the same thing is not good statutory drafting. The second matter is more substantial. California has correctly taken the position that a power created, in terms, so as to be exercisable only by will, cannot be effectively exercised by inter vivos conduct by the donee.[64] The provisions of California Civil Code section 1060, as they presently exist, permit this rule of California (and of the common law) to be nullified. Suppose that *A* creates a trust for the benefit of his wife *B* for life and also confers on *B* a general testamentary power of appointment. *B* (under present section 1060) can release this power as to all persons except *X*, and can expressly specify in the release that her residual power shall be imperative. *B* has, by inter vivos act fully exercised the power, which the creator of the power intended to remain unexercised until *B*'s death. This possibility of using the statute to nullify the donor's intent would be prevented if there were added at the end of the second paragraph of section 1060 (see its text in note 63) the phrase, "nor shall any release of a power be permissible when the effect of the release is an inter vivos exercise of a solely testamentary power." With the two suggested changes, one purely semantic, the other precautionary, California Civil Code section 1060 deserves to be retained as an integral part of any proposed new statute on this topic.

California Probate Code section 125,[65] dates back to the California Statutes of 1850.[66] It was probably borrowed from the similar pro-

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or has a place of business, or in which the deed, will or other instrument creating the power is filed, and from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

"4. All releases heretofore made which substantially comply with the foregoing requirements are hereby validated. The enactment of this section shall not impair, nor be construed to impair, the validity of any release heretofore made."

[64] Childs v. Gross, 41 Cal. App. 2d 680, 107 P.2d 424 (1940); Briggs v. Briggs, 122 Cal. App. 2d 766, 265 P.2d 587 (1954). This is also sound common law. See RESTATEMENT § 346(a).

[65] Its text is as follows:

"A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death, including property embraced in a power to devise."

[66] CAL. PROB. CODE § 125 was enacted by Cal. Stats. 1931, ch. 281, § 125,

vision inserted in the New York Revised Statutes of 1830, and still retained in New York.[67] When the donee of a power, by his will, has made a gift of the residue of his estate, or otherwise has manifested an intent to pass all of his property, *but has failed to mention his power or the property subject thereto*, the common law inference was that he had failed to exercise the power.[68] Thus the rule of California Probate Code section 125 is the exact opposite of the common law rule. Some states have a statute applying the rule of Probate Code section 125 only to general powers. The California statute led to a complete frustration of the clearly provable intent of the donee in *Estate of Carter* in 1956.[69] The present statute provides an undesirable pitfall for the unwary. Wisconsin, faced with the same problem in 1965, greatly qualified its prior acceptance of the New York-California provision by restricting the rule to general powers where no gift in default is found.[70] In any general reworking of the California law on powers, it is strongly urged that we either return wholly to the common law rule, or eliminate the "trap" quality of Probate Code section 125 in the manner done in 1965 by Wisconsin.

With respect to taxation the provisions of the federal estate tax are not subject to modification by state legislation. There is, nevertheless, one provision of the Internal Revenue Code of 1954 which deserves careful thought. By section 2041(b)(1) of that Code, a general power is defined as a power which is "exercisable in favor of the decedent, his estate, his creditors or creditors of his estate," with certain stated exceptions. This definition has been borrowed, without its tax exceptions, in the recent statutory revisions of New York,[71] Wisconsin[72] and Michigan.[73] It was also borrowed with the exceptions included for tax purposes in the California Revenue and Taxation Code section 13692 enacted in 1965.

For purposes of definition in a general statute on powers of appointment would it not be wise to use the same concept of a "gen-

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at 594, and was based on Cal. Civ. Code §§ 1330-31, Cal. Stats. 1850, ch. 72, § 22, at 179 (repealed 1874).

[67] N.Y. ESTATES, POWERS & TRUSTS LAW § 10-6.1(a)(4) (McKinney 1967).

[68] 3 POWELL ¶ 397 n.18 cites cases so holding from the Fifth Circuit and from Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Maryland, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Carolina and Texas.

This is the rule embodied in RESTATEMENT § 343. *See also* collection of cases in Annot., 16 A.L.R.3d 911 (1967).

[69] 47 Cal. 2d 200, 302 P.2d 301, *noted in* 95 TRUSTS & ESTATES 1168 (1956).

[70] WIS. STAT. § 232.03(1)(2) (1965). *See generally* Effland, *Powers of Appointment—The New Wisconsin Law*, 1967 WIS. L. REV. 583, 589.

[71] N.Y. ESTATE, POWERS & TRUST LAW § 10-3.2(b) (McKinney 1967).

[72] WIS. STAT. § 232.01(4) (1965).

[73] MICH. STAT. § 26.155(102)(h) (Supp. 1967).

eral power" as is now used in the federal estate tax, in the California inheritance tax and in the recently revised statutes of New York, Wisconsin and Michigan? These states borrowed the wording of Internal Revenue Code of 1954, section 2041(b)(1), without the exceptions needed for tax purposes in the federal estate and in the California inheritance tax statutes. A like simplification of form would serve well in California.

The treatment of appointive assets under the California inheritance tax has differed in five periods spanning the time from 1905 to the present.[74] This segment of the state's tax system was reviewed with care, prior to the enactment[75] of the present form of the statute in 1965. No reconsideration of this aspect of the California law on powers of appointment is desirable at this time.

This survey of the statutory ingredient in the law of California on powers of appointment has shown that California Civil Code section 1060 (on releasability) is generally good, but needs minor changes; that Probate Code section 125 (silent exercise of a power) deserves either elimination or substantial curtailment; that the Internal Revenue Code of 1954, in defining the term "general power" uses language which could profitably be incorporated in a general statute on powers; and that the California inheritance tax, completely revised in 1965, deserves to be left alone. The quantum of statutory departures from the common law is not substantial.

The Need in California for a Fairly Inclusive Statute

California is now in the position which, within the past 4 years, has been met and handled in the states of New York (1964), Wisconsin (1965) and Michigan (1967). In each of these states it has been declared that it has the common law of powers, except as modified by statute.[76] These declarations are the exact equivalent of the

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[74] Estate of Newton, 35 Cal. 2d 830, 831, 221 P.2d 952, 952-53 (1950), traced the treatments in the first four of these five periods.

[75] Cal. Stats. 1965, ch. 1070, § 6, at 2716-19. These provisions constitute CAL. REV. & TAX. CODE §§ 13691-701.

[76] The writer of this article drafted N.Y. Real Property Laws § 130, ch. 864, § 1, [1964] N.Y. Laws 2322, as follows:

"*The common law of powers*, both as embodied in sections of this article, and as to topics left uncovered by the sections of this article, is *established* as the law of this state, except as specifically modified by provisions in the sections of this article." (emphasis added). This, with verbal changes which are no improvement, is now N.Y. ESTATES, POWERS & TRUSTS LAW § 10-1.1 (McKinney Supp. 1967).

WIS. STAT. § 232.19 (1965) states:

"As to all matters within the scope of those sections of ch. 232 (Stat. 1963) which have been repealed, and not within this chapter or any other applicable statute, *the common law is to govern.*" (emphasis added).

MICH. STAT. § 26.155(119) (Supp. 1967) states:

1935 California decision in *Estate of Sloan*.[77]

When the writer was working on the New York problem in 1963, the Temporary Commission on Estates, in a letter dated April 5, 1963, directed the writer

> not merely to restore the common law (with deviations) but to spell out as far as feasible what the common law is.

The wisdom of this direction is evidenced by the following of its dictates in the legislation of New York in 1964; in the New York Estates, Powers and Trust Law, effective September 1, 1967; in the Wisconsin legislation of 1965 and in the Michigan legislation of 1967. There is no need to include in the statute a coverage of all the points possibly litigable concerning powers of appointment. The bar and the courts will be greatly helped, and the public interest will be served, by a statute which does spell out the "common law of California," on the core points as to which litigation can fairly be anticipated. This will eliminate the need for expensive research into the decisions of England and of our sister states as to the content of the common law on powers. At present the *Restatement of Property* can be regarded as probably a fair presentation of the common law, but a careful lawyer will feel compelled to dig out the decisions and to weigh their conflicting ideas. So also will the careful judge. A declaratory statute will greatly minimize this wasteful process for both the bar and the bench.

In the proposal which the writer submitted in 1967 to the California Law Revision Commission[78] there are 32 sections. *Two* of these embody the modifications in California Civil Code section 1060 (section 12) and in Probate Code section 125 (section 17), hereinbefore discussed; *one* (section 1) embodies the general acceptance of the common law of powers, required by *Estate of Sloan*;[79] 23 (sections 2-8, 13-16, 19-30) are declaratory of the common law, including some points heretofore passed on by the courts of this state; *two* (sections 31 and 32) concern the applicable law and severability; *three* (sections 9-11) deal with the rights of creditors of a donee;[80] and *one*

"As to all matters not within this act or any other applicable statute, *the common law is to govern.*" (emphasis added).

These three recent statutes are discussed (as to New York) in Powell, *The New Powers of Appointment Act*, 103 TRUSTS & ESTATES 807 (1964); Comment, *Powers of Appointment—The New York Revision*, 65 COLUM. L. REV. 1289 (1965); (as to Wisconsin) Effland, *Powers of Appointment—The New Wisconsin Law*, 1967 WIS. L. REV. 583; (as to Michigan) BROWDER, FIRST ANNUAL REPORT, STUDY OF MICHIGAN STATUTES ON POWERS OF APPOINTMENT 50-81 (1967).

[77] 7 Cal. App. 2d 319, 46 P.2d 1007 (discussed in text accompanying notes 27-29 *supra*).

[78] This proposal is Appendix A to this article.

[79] See text accompanying notes 27-29 *supra*.

[80] See text accompanying notes 82-90 *infra*.

(section 18) substitutes the modern constructional preference for exclusive powers for the anachronistic rule on this point applied in *Estate of Sloan*.[81] The remainder of this article consists of the reasons for the four provisions last above mentioned.

Rights of Creditors of the Donee of a General Power

Historically, and traditionally, the appointee took directly from the donor and not from the donee. Chief Justice Gibson, in a Pennsylvania case of 1849, expressed this historical view thus:

> There is such flagrant injustice in applying the bounty of a testator to the benefit of those for whom it was not intended [the creditors of the donee], that the mind revolts from it. An appointee derives title immediately from the donor of the power, by the instrument in which it was created; and consequently not under but paramount to the appointor, by whom it was executed: by reason of which it is impossible to conceive that the appointor's creditors have an equity. A man who is employed to manage the conduit-pipe of another's munificence, is authorized by a general power of disposal to turn the stream of it to any person or point within the compass of his discretion; and his creditors have no right in justice or reason to control him performing his function because it was not assigned to him as their trustee. It is the bounty of the testator, and not the property of his steward, that is to be dispensed.[82]

Despite the historical accuracy of Gibson's position, realities prevailed over theory. The English chancellors developed what came to be known as the "doctrine of equitable assets." This is reputed to have been an effort "to foster credit" in a society where creditors had much influence. Under this doctrine, if a debtor was the donee of a general power, and *he exercised it in favor of a volunteer*, his creditors could reach the appointive assets, in priority to his appointees, provided the debtor lacked other assets to pay the creditor.[83] This doctrine is embodied in the *Restatement of Property* as sound common law doctrine.[84] This is the doctrine which Mr. Justice Traynor used as the basis for an analogy in 1940.[85] It was an adequate, but not a necessary basis for the 1956 decision in *Estate of Masson*.[86]

The doctrine of equitable assets was an improvement on the law which existed before it, but it did not go far enough. The donee of a general power, before its exercise, has substantially the equivalent of full ownership. The Internal Revenue Code, since 1942, has required that a donee having a general power to appoint include the appointive assets in his gross estate.[87] The California Revenue and Taxation

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81 See text accompanying notes 27-29 *supra* and notes 91-96 *infra*.

82 Commonwealth v. Duffield, 12 Pa. 277, 279-80 (1849).

83 3 POWELL ¶ 389.

84 RESTATEMENT §§ 329, 330.

85 Estate of Kalt, 16 Cal. 2d 807, 108 P.2d 401 (1940).

86 142 Cal. App. 2d 510, 298 P.2d 619 (1956).

87 Revenue Act of 1942, § 811(f), 56 Stat. 942 (now INT. REV. CODE OF 1954, § 2041).

Code was amended in 1965, so that a taxable inheritance occurs whenever a person takes either by the exercise or the nonexercise of a general power.[88] Thus, on death, both the federal and California statutes treat a general power as the equivalent of full ownership. If this is true as to taxes, why should it not also be true as to creditors? The Federal Bankruptcy Act has taken this position as to all general powers of the bankrupt presently exercisable at the moment of bankruptcy.[89] The statutes enacted in Minnesota (1943), in New York (1964), in Wisconsin (1965), and in Michigan (1967), have extended this same rule to all creditors of the donee of a general power.[90]

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[88] CAL. REV. & TAX. CODE § 13696.

[89] 11 U.S.C. § 110(a)(3) (1964) (originally enacted 1938). *See also* RESTATEMENT § 331.

[90] Ch. 322, § 10 [1943] Minn. Laws 440, *as amended*, Ch. 206, § 1 [1947] Minn. Laws (now MINN. STAT. § 502.70 (Supp. 1967)) provides:

"When a donee is authorized either to appoint to himself or to appoint to his estate all or part of the property covered by a power of appointment, a creditor of the donee, during the life of the donee, may subject to his claim all property which the donee could then appoint to himself and, after the death of the donee, may subject to his claim all property which the donee could at his death have appointed to his estate, but only to the extent that other property available for the payment of his claim is insufficient for such payment. When a donee has exercised such a power by deed, the rules relating to fraudulent conveyances shall apply as if the property transferred to the appointee had been owned by the donee. When a donee has exercised such a power by will in favor of a taker without value or in favor of a creditor, a creditor of the donee or a creditor of his estate may subject such property to the payment of his claim, but only to the extent that other property available for the payment of the claim is insufficient for such payment."

Ch. 864, § 139 [1964] N.Y. Laws 1568, enacted the provision which now appears in N.Y. ESTATE, POWERS & TRUSTS LAW § 10-7.2 (McKinney 1967). In an earlier section (§ 10-3.2(b)) this statute used the language of INT. REV. CODE OF 1954, § 2041(b), defining a general power as one exercisable wholly in favor of the donee, his estate, his creditors or creditors of his estate. It then provides:

"Property covered by a general power of appointment which is presently exercisable or of a postponed power which has become exercisable, is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself or by some other person, or whether the donee has or has not purported to exercise the power."

It will be noted that this statute is somewhat more favorable to creditors than the Minnesota statute.

WIS. STAT. §§ 232.01(4), 232.17 (Supp. 1967) uses the Internal Revenue Code definition of a general power (§ 232.01(4)) and then provides (§ 232.17) a still broader ability of creditors to reach the appointive assets:

"232.17 Rights of Creditors of the donee.

"(1) General Policy. If the donee has either a general power or an unclassified power which is unlimited as to permissible appointees except for exclusion of the donee, his estate, his creditors and the creditors of his estate, or a substantially similar exclusion, any interest which the donee has power to appoint or has appointed is to be treated as property of the donee for purposes of satisfying claims of his creditors, as provided in this section.

"(2) During lifetime of the donee. If the donee has an unexercised power of the kinds specified in sub. (1), and he can presently exercise such

The proposed statute for California, in sections 9-11, brings the state abreast of modern realities, as has heretofore been done in four sister states.

Exclusive vs. Nonexclusive Powers

There is one problem on which the California decision, purportedly based on the court's understanding of the common law, deviates so markedly from today's general understanding of the common law, that this proposed statute should provide a remedy. This problem concerns only special powers. *Estate of Sloan*[91] held that where, by will, a father provided that if his son died before reaching the age of 30, the property should go to the heirs of the son as the son's will directed; the son could not lawfully exercise the power by giving all the assets to one maternal aunt, to the exclusion of two paternal aunts, all three being "heirs" of the son at his death. This embodies

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a power, any creditor of the donee may by appropriate proceedings reach any interest which the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. Such an interest is to be treated as property of the donee within ch. 273. If the donee has exercised such a power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances he could reach property which the donee has owned and transferred.

"(3) At death of the donee. If the donee has at the time of his death a power of the kinds specified in sub. (1), whether or not he exercises the power, any creditor of the donee may reach any interest which the donee could have appointed or has appointed, to the extent that the claim of the creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient."

MICH. STAT. § 26.155(113) (Supp. 1967) provides:

"Sec. 113. (1) If the donee has a general power of appointment, any interest which the donee has power to appoint or has appointed is to be treated as property of the donee for the purposes of satisfying claims of his creditors, as provided in this section.

"(2) If the donee has an unexercised general power of appointment and he can presently exercise such a power, any creditor of the donee may by appropriate proceedings reach any interest which the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. If the donee has exercised the power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances he could reach property which the donee has owned and transferred.

"(3) If the donee has at the time of his death a general power of appointment, whether or not he exercises the power, the executor or other legal representative of the donee may reach on behalf of creditors any interest which the donee could have appointed to the extent that the claim of any creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

"(4) Under a general assignment by the donee for the benefit of his creditors, the assignee may exercise any right which a creditor of the donee would have under subsection (2)."

[91] 7 Cal. App. 2d 319, 46 P.2d 1007 (1935) (discussed in text accompanying notes 27-29 *supra*).

a constructional preference for the nonexclusionary power. It may, perhaps, once have been good common law. The now long accepted common law view is the direct opposite. *Restatement of Property* section 360 is entitled "Whether a Power is Exclusive or Non-Exclusive." Its text is as follows:

> The donee of a special power may, by an otherwise effective appointment, exclude one or more objects of the power from distribution of the property covered thereby unless the donor manifests a contrary intent.

It will be noted that this reverses the constructional preference stated in *Estate of Sloan*, and creates a constructional preference in favor of the donee's full liberty of choice among the permissible appointees. If the donor wishes, he can, by appropriate additional language, lessen the donee's full liberty of choice. The many authorities on this problem are cited and discussed in *Powell on Real Property* paragraph 398.[92] This same constructional preference for "exclusive" powers is embodied in the recently drafted statutes of New York,[93] Wisconsin,[94] and Michigan.[95]

It is recommended that the proposed new statute include a section bringing the California law into conformity with the modern understanding of the common law on this point.[96]

Conclusion

The enactment of the proposed new statute on powers of appointment:

(1) Will eliminate slight difficulties in present California Civil Code section 1060;

(2) Will greatly lessen the bad features of California Probate Code section 125;

(3) Will substitute the modern constructional preference for exclusive powers for the mistaken view of *Estate of Sloan* on this point;

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[92] 3 POWELL ¶ 398, at 378.49 states: "A special power can be either 'exclusive' or 'nonexclusive.' This means that the donee, under the authority conferred upon him by the donor, may be authorized either to give the appointive assets wholly to one or more of the objects, excluding others of the objects (in which case the power is said to be 'exclusive') or to give the appointive assets in shares to be determined by the donee, but to some extent giving something to every one of the permissible appointees (in which case the power is said to be 'nonexclusive'). The constructional preference is for the finding of exclusive powers [citing decisions from Kentucky, Maine, New Jersey, New York and Pennsylvania]."

[93] N.Y. ESTATES, POWERS & TRUSTS LAW § 10-6.5 (McKinney 1967).

[94] WIS. STAT. § 232.07 (1965).

[95] MICH. STAT. § 26.155(107) (Supp. 1967).

[96] See Appendix A, at § 18.

(4) Will conform the treatment of creditors of the donee of a general power to widely accepted modern views;

(5) Will spell out the content of the common law of powers on many points, some of which have already been accepted in California decisions; and will confirm the position accepted in California since 1935 that the common law of powers is the available reservoir on points not covered in statutes.

[As published in the *Hastings Law Journal*, this article included an appendix containing the author's proposed statute; this appendix is not reprinted here because the statute recommended by the Commission is set out as a part of the Commission's recommendation.]

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