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Memorandum 68-49

Subject: Study 69 - Powers of Appointment

Attached to this Memorandum is a tentative recommendation on powers of appointment. At this meeting, the Commission should consider the entire draft with a view toward circulating the recommendation for comment after the meeting. We plan to go through the tentative recommendation section by section. The Commission should pay particular attention to the undecided policy questions involved in Sections 1380.2, 1387.4, 1391.1, and 1392.1.

Drafting revisions. The entire statute has been reorganized. Every section has been renumbered and redrafted for clarity and consistency. Changes in form that were directed by the Commission have been made. Such changes are not noted in this Memorandum; only changes of substance and policy considerations are discussed.

Section 1380.2. This section has been revised to provide an exception that a trust creating a power which becomes effective prior to the effective date of the act does not become irrevocable as a result of Sections 1380.2 and 1390.1. In addition, the Commission should consider other changes to be made in the present California law to determine whether any other exceptions are warranted. The major changes in the law are outlined in Exhibit I (pink).

Section 1381.1. This section is new. It defines terms that are used throughout the tentative recommendation. All of the definitions except the definition for "creating instrument" are taken from the Restatement. In place of the term "objects of a power" used in the Restatement, the term "permissible appointees" is used. The latter term seems more consistent with the term "appointee" used throughout

the recommendation. In addition, it includes the concept that persons may be excluded as possible appointees by the creating instrument.

In place of the term "property covered by a power" used by the Restatement is substituted "appointive property." The latter designation is used in N.Y. E.P.T.L. Section 10-2.2(d). The definition of "creating instrument" is taken from Michigan Section 26.155(102)(1).

Sections 1382.1 and 1382.2. These sections have been revised to delete the subdivision requiring that the donee be capable of holding the interest in property to which the power relates. The consultant has informed the staff that his subdivision (c) did not preclude the creation of a power in an unborn child because the limitation becomes effective only when the child is born. At that time, the child is capable of holding the property. However, the subdivision was ambiguous and does not appear to be necessary. The subdivision is in the New York statute but was not adopted in Michigan, Minnesota, or Wisconsin.

Section 1387.4. This section has been left unchanged in substance pending the Commission decision on the policy question involved. This section provides the penalty for the attempt to appoint the property to a person who is not a permissible appointee. The Commission is faced with a choice between three alternatives:

(1) Any appointment that is intended to benefit a nonobject of the power to any extent may be declared invalid in its entirety. Such a provision would serve as the most effective deterrent to attempted appointments to benefit an impermissible appointee. In addition, such a rule would prevent an appointee who has been a party to the attempted appointment from making any profit on the transaction.

(2) The appointment may be declared to be invalid only to the extent that the transaction was motivated by the improper purpose. In such a case, the intent of the donee is carried out to the extent that a separable acceptable motive can be found. Since the donor would presumably rather have had the assets pass to one of the permissible appointees than to the takers in default, this approach tends also to carry out his intent. This is the alternative recommended by the staff and the one codified in Section 1387.4.

(3) The appointment can be considered valid except to the extent that the money actually went to the impermissible appointee. In this situation, the donor's intent to benefit the primary objects of the power (the permissible appointees) is carried out, but there is no deterrent to such transactions. In addition, the donor's intent is not truly carried out because he intends that the donee choose the more deserving or needing of the permissible appointees. When the donee is motivated by the desire to benefit one who is not a permissible object, the fact that part of the assets pass to a permissible appointee does not necessarily mean that the donee has considered all of the permissible appointees and decided that this one is the most deserving.

Section 1388.2. The last sentence in subdivision (b) has been revised to provide that a release of a power is not permissible if it results in the present exercise of a power that is not presently exercisable. The revised sentence precludes the premature exercise of a postponed power by using a release as well as the inter vivos exercise of a testamentary power by the use of a release.

Section 1389.2. Subdivision (a) of this section has been redrafted to include a partial appointment of an imperative power where

the donee never appoints the rest of the property. The staff recommends that the same rule be adopted with respect to this problem as exists for advancements under Probate Code Sections 1050-1054. A similar rule exists under Restatement Section 368 for a taker in default who has already received a partial appointment. Thus, under this section, where the donee of an imperative power partly exercises the power and then dies without appointing the remainder, a partial appointee can share equally in the unappointed assets unless the creating instrument or the donee, in writing, has manifested a contrary intent.

Section 1391.1. This section deals with the permissible period under the rule against perpetuities. It has been redrafted to clearly provide the rule where there is a postponed power. Under the wording of the section, the permissible period for all general powers, except a testamentary general power, is computed from the time of exercise. This is in accord with the common law rule and is based on the premise that the donee of a postponed general power has substantial ownership at some time during his lifetime and can then appoint readily to himself.

There are two alternatives. First, the English courts have abandoned the distinction between postponed powers and testamentary powers and now hold that the permissible period for all general powers starts at the time of exercise. This decision is based on the premise that the donee of a general testamentary power has complete control of the assets for all purposes at the time of death, and theoretically cuts off any control by the donor. In other words, the English courts find a sufficient break in control between the lifetime of the donee and his subsequent appointment to start the period again at the time of exercise.

Second, the testamentary general power and the postponed general power may be treated alike by applying the rule against perpetuities to them at the time of the creation of the power. This apparently is the consultant's view. Under this alternative, the fact that there is a time during which the donee cannot exercise the power would be sufficient to compute the period from the time of creation.

Section 1392.1 (former Section 752.71). Section 1392.1 has been redrafted to correlate it with Civil Code Section 2280, which provides that a trust is revocable unless expressly made irrevocable. Under subdivision (b) of the draft, that rule is changed with regard to a trust to the extent that it includes a power of appointment. Although there is some feeling that the rule on powers should be consistent with Section 2280, the consultant believes that that rule should not be extended to powers. He made the following comment to the staff:

> I sincerely hope that it is not desired to extend the rule of Civil Code, Section 2280, to powers of appointment. Insofar as that Section has made a Trust revocable automatically, it constitutes a snare for the unwary and incurs the great, frequently unescapable, tax loads. The California statutory rule as to Trusts operates, I believe, in only the state of California, Oklahoma and Texas. It seems to me highly undesirable to extend the scope of this unfortunate minority rule to another area of the law.

If the Commission accepts the consultant's argument with regard to the revocability of powers, it must decide what to do with a trust that includes a power. If the trust is revocable but the power is irrevocable, that would mean that a settlor could terminate the trust but could not deprive the donee of the power to ultimately distribute the property. This inconsistency is highly undesirable. Therefore, the staff recommends that the statute provide that a trust subject to a power of appointment be irrevocable insofar as that property is concerned.

Respectfully submitted,

Gordon E. McClintock
Junior Counsel

Memorandum 68-49

EXHIBIT I

Major changes in California powers of appointment law and application of retroactivity provision

1. Definition of general and special powers (§ 1381.2): The tentative recommendation adopts a definition of general and special powers different from the Restatement and in accord with modern tax terminology. This change should create no problem if applied retroactively because a power exercisable in favor of the donee or his estate is presently considered a general power.

2. Formalities in exercising power (§ 1385.1): The changes in this section are not of concern with respect to retroactivity. Although a formality imposed by the donor may no longer be required, its absence will not affect the integrity of the exercise. In addition, by allowing a donee to exercise a power despite a requirement of too few formalities, the recommendation makes the power good despite a mistake by the donor.

3. Specific reference to the power (§ 1385.2): The requirement of a specific reference to the power where the creating instrument provides that it is necessary merely implements the donor's intent by forcing the donee to comply with his directions.

4. Exercise of power by residuary clause (§§ 1386.2 and 1386.3): Although these sections change the rule in Estate of Carter by imposing limits on when a residuary clause may exercise a power, they do not affect the donor or his intent. Obviously, the donor does not contemplate the fact that the donee may leave a will containing no reference to the power which also contains a residuary clause. In most cases, this change will better effectuate both the donor's and donee's intent by allowing the property to pass to the takers in default.

5. Permissible appointments under special power (§ 1387.2): This section may or may not change California law. (Under the Restatement, a donee can exercise a special power by creating another power of appointment only in certain situations.) If it does change California law, it is of concern only to the donee. If the donor was concerned with such things, he would have provided limitations in the creating instrument.

6. Preference for exclusive powers (§ 1387.3): This change may affect the intent of some donors. However, the practice is for the creating instrument to specify whether an exclusive or nonexclusive power is created. In most other cases, the present California preference for nonexclusive powers does not effectuate the donor's intent and is a windfall for permissible appointees that the donee meant to exclude.

7. Capture (§ 1389.3): There is no law in California on this problem. The adoption of the retroactivity provision will not frustrate the donor's intent with regard to capture because he has given the donee a general power of appointment which could have been taken over by the donee for his own use in any event.

8. Spendthrift trusts (§ 1390.1): Section 1388.1 provides that the donor cannot modify the rights of creditors to the appointive property. The creditors are given a right to the property only if it is subject to a general power of appointment that is presently exercisable. If the donor gives the donee the income for life, plus a testamentary general power of appointment, he may subject the income to a spendthrift provision. Until the donee dies, the assets cannot be reached, and the donor has effectively protected the donee's income interest from the creditors. Once the donee has died, the creditors can reach the property,

but since it was a general power and the donee could have appointed the property to his estate, the fact that the creditors can reach the property should not be considered to frustrate the donor's intent. By giving the donee a general power, the donor has indicated his lack of interest in where the property goes after the donee dies. Certainly, the creditors of such a donee should have the first chance at the appointive property.

9. Rights of creditors (§ 1390.3): Under prior law, a general power had to be exercised to allow the creditors to reach the assets. Under our recommendation, if the donee has a presently exercisable general power of appointment, the creditors of the donee can reach the property. Applying this rule retroactively will not frustrate the donor's intent and will remove from the donee the power to withhold assets from his creditors. The donor's intent is not frustrated because, by allowing the donee to appoint to himself during his lifetime, he must have contemplated that the donee might exercise the power during his life and spend the money. The placing of the equivalence of ownership in the donee should effectively erase any consideration of the donor of a presently exercisable general power with respect to the rights of creditors.

10. Revocability (§ 1392.1): This section will change the present California law. As a practical matter, lawyers do not rely on Section 2280 to make a trust revocable but include specific language in the trust instrument. Do-it-yourself draftsmen probably do not have Section 2280 in mind when they draft a trust instrument and usually think they are giving the property away altogether. However, it seems that there might be a constitutional objection to a provision making a trust irrevocable when it had been revocable. Therefore, the staff recommends that an exception for the revocability of the creating instrument be contained in the retroactivity provision.

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TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

POWERS OF APPOINTMENT

Powers of appointment have been aptly described as one of the most useful and versatile devices available in estate planning. At the same time, under appropriate statutory or decision law rules, the use of such powers does not conflict with social policy respecting creditor's rights, perpetuities, restraints on alienation, and other matters.

A power of appointment, of course, is simply 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 "nontrust") interests in property, today powers are almost always incident to inter vivos or testamentary trusts. In the typical situation, the creator of the trust transfers legal title to a trustee. The trustee is directed to pay the income from the trust to one or more beneficiaries during their lifetime. Then, upon the death of those beneficiaries, the property passes in accordance with the "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 together with an unrestricted power to appoint the remainder, with a further provision in case the wife 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, in effect, retained substantial control over 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.

Apart from their usefulness in minimizing death taxes, powers make possible a flexibility of disposition that can be achieved in no other way. Thus, 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 the changes that have occurred during her lifetime. In short, 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 that the donor 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. Moreover, the donor has broad control over the manner of exercising the power and over the scope of persons to whom appointments can be made. Thus, he can make the power exercisable during the lifetime of the donee ("presently exercisable power") 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 to himself, his estate, or his creditors ("general power").

Thus, it can be seen that in California--as in any state with large accumulations of personal wealth--any obstacles to the effective use of powers of appointment is unfortunate. Despite their advantages, it appears that California lawyers have been hesitant to use powers because of uncertainties as to the applicable law. It was not until 1935 that an appellate court in California had occasion to declare that the common

law of powers obtains in this state.[1] This decision was helpful in assuring donors and their counsel that powers of appointment are available devices and are governed by the evolving law declared in judicial decisions. Nevertheless, the law of powers in this state remains in a state of arrested development for want of a sufficient case law to resolve the significant issues. Moreover, this uncertainty as to the non-tax consequences of powers has caused legal draftsmen not to use them and has made it necessary for lawyers and judges to investigate large numbers of cases, usually from other jurisdictions, before using a power or deciding a question in litigation.

Recent statutes enacted in New York, Minnesota, Wisconsin, and Michigan have codified frequently litigated common law rules, and have provided that the common law is to control as to other questions. The Commission believes that adoption of such a statute in California would be of significant value in clarifying the law of powers and restoring confidence in their use. In general, the provisions adopted should follow common law rules. However, a few significant departures from the common law rule or existing California law are recommended:

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1. Estate of Sloan, 7 Cal. App.2d 319, 47 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, cause the Legislature, in 1874, to repeal the entire statute.

1. Distinction between "general" and "special powers." "General" and "special" powers should be defined so as to conform 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 by general residuary clause. In Estate of Carter, 47 Cal.2d 200, 302 P.2d 201 (1956), 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 the clearly provable intent of the donee not to exercise the power. This rule should be changed. The statute should provide that, if the holder of the power does not expressly exercise it, the property passes to those persons designated to take in default of appointment and, if no such persons are designated, that the property passes under the residuary clause only if the circumstances indicate that such was the intent of the donee. This will eliminate the uncertainty caused by finding the exercise of a power by implication and will prevent the donee from inadvertently creating disadvantageous tax consequences in his estate. See California Will Drafting § 13.12 (Cal. Cont. Ed. Bar 1965).

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 whether he can appoint all of the property to one of

his children or must he appoint some of the property to each of them. At the common law, the preference was for exclusive powers. An exclusive power is one under which the donee may appoint to one or more appointees to the exclusion of others. However, in Estate of Sloan, supra, the California Court of Appeal held that in California the preference is for nonexclusive powers. In other words, in California a 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 constructional preference results in litigation to determine the amount which must be appointed to each permissible object of the power. Furthermore, since one of the principal reasons for using powers of appointment is their flexibility, this construction severely hampers their effectiveness. See California Will Drafting § 13.4 (Cal. Cont. Ed. Bar 1965). It is advisable for powers to be exclusive whenever possible. Therefore, the Commission recommends that the California rule be changed to embody the common law preference for exclusive powers unless the donor manifests a contrary intention by providing a minimum or maximum amount for each permissible appointee.

4. Rights of creditors of the donee. One of the most unsatisfactory aspects of the common law of powers is the rule that governs 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 power of appointment had been exercised in favor of a creditor or volunteer. Since the donee of a general power of appointment has the equivalent of the ownership of the assets (because he can appoint to himself), the ability of creditors to reach the assets should depend on the existence rather than the exercise of the general power.

Section 2041 of the Internal Revenue Code requires that 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 occurs whenever a person takes either by the exercise or the nonexercise of a general power. Thus, on death, both the Federal and California statutes treat a general power as the equivalent of full ownership. In addition, the Federal Bankruptcy Act has taken this position as to all general powers of the bankrupt which are presently exercisable at the moment of bankruptcy. U.S.C.A., Tit. 11, § 110(a)(3). If this is true with regard to taxes and bankruptcy, it should also be true with respect to any other creditor of the donee of a general power. Accordingly, the Commission recommends that the California rule be changed so that the creditors of the donee can reach the assets under any presently exercisable general power or under a general testamentary power where the donee has died.

PROPOSED LEGISLATION

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

An act to add Title 7 to Part 4 of Division 2 (commencing with Section 1380.1 and to repeal Section 1060, of the Civil 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. They have codified the important common law principles and have left minor problems to court determination. See Mich. Stat. Ann. §§ 26.155(101)-26.155(122) (Supp. 1967); Minn. Stat. Ann. §§ 502.62-502.78 (Supp. 1967); N.Y. Estates, Powers and Trust Law §§ 10-1.1 to 10-9.2 (1967); Wis. Stat. Ann. §§ 232.01-232.21 (Supp. 1967).

CHAPTER 1. GENERAL PROVISIONS

Section 1380.1. Common law applies in absence of statute

1380.1. Except to the extent that rules governing powers of appointment are provided 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 as to matters not covered 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 heretofore created

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 embodied in this title differ, the law existing at the time of the release, exercise, or assertion of a right controls, except that the revocability of the creating instrument is determined as of the time it became effective.

Comment. Section 1380.2 makes this title applicable where a release is executed, a power is exercised, or a right is asserted after the effective date of this title, regardless of when the power was created. This section applies not only to powers but also to the rules of lapse and the rule against perpetuities as applied to powers. However, this section cannot be applied to invalidate a power created prior to the effective date of the title. Similar provisions exist in other states. See Mich. Stat. Ann. § 26.155(122)(1968); Wis. Stat. Ann. § 232.21 (Supp. 1967).

An exception is included which makes the revocability of the creating instrument determinable as of the time it became effective. Section 1390.1 makes a trust subject to a power irrevocable unless expressly declared revocable. This departs from existing law under Civil Code Section 2280, which states that a trust is revocable unless expressly made irrevocable. Thus, the exception is included to prevent a holding that Section 1380.2 is unconstitutional because it deprives a donor of his property without due process of law.

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 to whom the donee is given the power to appoint.

(e) "Appointive property" means the 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 (5). Subdivisions (d) and (e) adopt different terms from the Restatement of Property but are substantially the same as Section 319(3) and (6). Subdivision (f) is similar to Michigan Annotated Statutes Section 26.155(102)(1) (Supp. 1968).

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

1381.2. (a) A power of appointment is "general" 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. All other powers of appointment are "special."

(b) A power of appointment may be general as to some appointive property or a specific portion of appointive property, and special as to other appointive property.

Comment. Subdivision (a) of Section 1381.2 is 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 § 2041(b)(1). Although this title generally follows the prevailing modern terminology, Section 1381.2 departs from the common law distinction stated in Restatement of Property, Section 320. Instead, it adopts the general 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. 1968); N.Y. Estates, Powers and Trust Law § 10-3.2(b), (c)(1967); Wis. Stat. Ann. § 232.01(4)(5) (Supp. 1967).

The exceptions contained in the tax law definitions are omitted because those exceptions are significant only in connection with tax problems. Omission of the exceptions follows the example of New York, Wisconsin, and Michigan.

The language of the first clause of subdivision (a) of Section 1381.2 has the same meaning as the comparable language of the Internal Revenue Code that defines a general power for purposes of the federal

estate tax law. The 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; otherwise no testamentary power could be general since the testator cannot appoint to himself by his will. However, a power that is not otherwise considered to be a general power should not be 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(3)(c), 25.2514-1(3)(c)(1958).

A special power 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 is general rather than special.

There are several situations in which the classification of a power as general or special may not be possible by reference to Section 1381.2. Both joint powers (those created in two or more donees), and consent powers (powers exercisable only with the consent of another person), are hybrid powers which must be classified according to the terms of the power and the particular problem involved. See Crane, Consent Powers and Joint Powers, 18 Convey. (n.s.) 565-575 (Eng. 1954). Although in most cases such powers should be classified as special powers, in some cases the joint power or consent power may actually

create in a donee the equivalent of ownership of the property. In those situations, the power should be considered general. In each such case, the court must look at the requirements for exercise and the particular problem involved (i.e., rule against perpetuities or rights of creditors) to determine whether the rules applicable to special powers or the rules applicable to general powers should apply.

Subdivision (b) is included to make it 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 F 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" if it is not testamentary and its exercise is not otherwise postponed beyond the time in question by the terms of the creating instrument.

Comment. Section 1381.3 differentiates among powers of appointment by focusing upon the time at which the power may be exercised. It defines "testamentary" and "presently exercisable" powers. However, a power may be neither testamentary nor presently exercisable. When a power cannot be exercised until the occurrence of some event other than the death of the donee, the power is "otherwise postponed" within the terms of subdivision (b). A power is postponed when, for example, it is a power to appoint among the children of A by an instrument executed after the youngest child reaches the age of twenty-five. When the condition occurs, the power becomes presently exercisable. Thus, when the term "power not presently exercisable" is used in this title, it includes both testamentary powers and powers that are otherwise postponed.

Section 1381.3 follows the common law embodied in the Restatement of Property, Section 321. For comparable sections in other recently enacted statutes, see Mich. Stat. Ann. § 26.155(102)(1)(Supp. 1968) (defining a power of appointment that is "presently exercisable"); N.Y. Estates, Powers and Trust Law § 10-3.3 (1967).

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, rather than any takers in default, 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 must be one or the other. If a power is imperative, the donor must exercise it or the court will divide the assets among the potential appointees rather than among any default takers. See Section 1387.2. 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 1387.3.

Section 1381.4 is similar to New York Estates, Powers and Trust Law Section 10-3.4 (1967). The Restatement of Property does not define or use these terms in discussing the distribution of property on the failure of the donee to exercise the power. See Restatement of Property

§§ 320 (special note at 1830) and 367 (statutory note at 2033)(1940). See also O'Neil v. Ross, 98 Cal. App. 306, 277 Pac. 123 (1927)(discussion of "mandatory" powers but no holding concerning them).

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 capable of transferring the interest in property to which the power relates.

Comment. Section 1382.1 requires that the donor of a power of appointment have the capacity to transfer the assets subject to the power. It codifies existing California law. See Swart v. Security-First Nat'l Bank, 48 Cal. App.2d 824, 120 P.2d 697 (1942).

Section 1382.2. Creating instrument

1382.2. A power of appointment can be created only by an instrument sufficient to transfer the title to the property to which the power relates.

Comment. Section 1382.2 requires that the creating instrument be executed with the formalities required to pass title to the appointive property. It states existing California law. See Estate of Kuttler, 160 Cal. App.2d 332, 325 P.2d 624 (1958). It does not change the rule stated in Security-First Nat'l Bank v. Ogilvie, 47 Cal. App.2d 787, 119 P.2d 25 (1941), that a power of appointment can be inferred from circumstances despite the fact that the creating instrument does not specifically mention a power.

CHAPTER 4. EXERCISE OF POWERS OF APPOINTMENT

Article 1. Scope of Donee's Authority Generally

Section 1383.1. Scope of donee's authority generally

1383.1. Except to the extent that the creating instrument manifests an intent to impose limitations, the authority of the donee to determine appointees and to select the time and manner of making appointments is unlimited.

Comment. Section 1383.1 embodies the common law rule stated in Restatement of Property, Section 324, and is substantially the same as New York Estates, Powers and Trust Law Section 10-5.1 (1967).

Article 2. Donee's Capacity

Section 1384.1. Donee's capacity

1384.1. A power of appointment can be exercised only by a donee capable of transferring the interest in property to which the power relates.

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). The subdivision states the common law rule embodied in the Restatement of Property, Section 345, and is substantially the same as Michigan Statutes Annotated Section 26.155(105)(1) (Supp. 1968), Minnesota Statutes Annotated Section 502.66 (1947), and Wisconsin Statutes Annotated Section 232.05(1)(Supp. 1967).

Article 3. Formalities Required

Section 1385.1. Requirements for instrument exercising power

1385.1. (a) Except as otherwise provided in this title, a power of appointment can be exercised only by an instrument that is sufficient to transfer the title to the property to which the power relates and which complies with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise of the power.

(b) A power stated to be exercisable only by deed is also exercisable by a written will.

(c) A power stated to be exercisable by an instrument not sufficient in law to pass the appointive assets is valid, but can be exercised only by an instrument conforming to the requirements of subdivision (a).

(d) A power stated to be exercisable only by the observance of additional formalities can be exercised by an instrument conforming to the requirements of subdivision (a) without the observance of the additional formalities.

Comment. Section 1385.1 specifies the requirements for an instrument exercising a power of appointment.

Subdivision (a). Subdivision (a) states two requirements for the exercise of a power of appointment. First, the instrument purporting to exercise the power of appointment must conform to the formalities required to transfer the appointive property. This requirement is similar to Wisconsin Statutes Section 232.05(2)(Supp. 1967).

Second, the exercise of the power must comply with the requirements of the creating instrument as to the manner, time, and conditions for exercise. This codifies the common law rule embodied in the Restatement of Property, Section 346. However, three exceptions not found in the common law are made to this rule in subdivisions (b), (c), and (d).

Subdivision (b). Subdivision (b) provides that a power of appointment exercisable only by deed is also exercisable by will. This exception is also contained in Michigan Statutes Annotated Section 26.155(105)(2)(Supp. 1968), Minnesota Statutes Annotated Section 502.64 (1947), and New York Estates, Powers and Trust Law Section 10-6.2(3)(1967). It is based on the premise that few donors intend to dictate that a power of appointment be exercised only by an inter vivos instrument. 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." Restatement of Property § 347 (comment b)(1940).

Subdivision (c). Subdivision (c) requires the donee to follow normal formalities in exercising a power of appointment even if the creating instrument dispenses with the requirement. Thus, if the creating instrument prescribes that the donee may exercise the power by mailing a letter to John Smith, such an exercise may not conform to the legal requirements for passing title to the property. If it does not conform to the legal requirements, the power is nevertheless valid, and the donee may exercise the power by an instrument that does comply. In such a case, only the donor's directions are invalid; the power is not invalidated by the designation of a legally insufficient means of exercising the power. This paragraph is substantially

the same as Michigan Statutes Annotated Section 26.155(105)(3)(Supp. 1968) and New York Estates, Powers and Trust Law Section 10-6.2(a)(1) (1967). See Restatement of Property § 346 (comment g)(1940)(accord).

Subdivision (d). Subdivision (d) adopts the same policy as Minnesota Statutes Section 502.65(1947) and New York Estates, Powers and Trust Law Section 10-6.2(a)(2)(1967). It is more liberal than the common law rule embodied in the Restatement of Property, Section 346. It provides that, where the donor prescribes greater formalities for the donee's exercise of the power of appointment than those normally imposed by law, the power may nevertheless be exercised by an instrument legally sufficient to transfer the appointive assets. The paragraph is designed to facilitate the exercise of a power of appointment without unnecessary formalities and avoids a possible trap that would exist if the formalities normally imposed by law were observed but the additional formality prescribed by the donor was inadvertently omitted.

Section 1385.2. Requirement of specific reference to power

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

Comment. Section 1385.2 permits a donor to require an express reference to the power to assure a deliberated 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. 1968) and Wisconsin Statutes Annotated Section 232.03(1)(1967). As to the effect of this section on prior California law, see the Comment to Section 1386.1.

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; but if any person whose consent is required dies or becomes legally incapable of consenting, the power may be exercised by the donee without the consent of such person unless the creating instrument explicitly forbids.

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

(c) To entitle the instrument exercising the power to be recorded, the signature of any person consenting must be acknowledged, and if the consent is given in a separate instrument, that instrument must be attached to the instrument exercising the power.

Comment. Subdivision (a) of Section 1385.3 reflects the same policy as Civil Code Section 860. It embodies the rule stated in Michigan Statutes Annotated Section 26.155(105)(4)(Supp. 1968), Minnesota Statutes Annotated Section 502.68 (1947), New York Estates, Powers and Trust Law Section 10-6.4 (1967), and Wisconsin Statutes Annotated Section 232.05(3)(Supp. 1967). Subdivision (b) merely makes it clear that the consent may precede or follow exercise of the power. Subdivision (c) is included to warn the unwary donee that

the lack of an acknowledgement of the consent may make the instrument of exercise unrecordable. It states existing California law. See Government Code Section 27287.

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 excercised when all of the donees unite in its exercise; but 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 the creating instrument explicitly forbids.

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. 1968), Minnesota Statutes Annotated Section 502.67 (1947), New York Estates, Powers and Trust 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 not affected

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

Comment. Section 1385.5 is included to make it 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 Trust Law Section 10-6.2 (1967).

Article 4. Donee's Required Intent

Section 1386.1. Manifestation of intent to exercise

1386.1. The exercise of a power of appointment requires a manifestation of the donee's intent to exercise the power. Such a manifestation exists when the instrument of appointment purports to transfer an interest in the appointive property which the donee would have no power to transfer except by virtue of the power, including, but not limited to, the following situations:

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

(b) The donee's deed, will, or other instrument sufficiently identifies appointive property and purports to transfer it.

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

Comment. Section 1386.1 is accepted common law. See Restatement of Property §§ 342-343 (1940). It also states existing California law. See Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940); Reed v. Hollister, 44 Cal. App. 533, 187 Pac. 167 (1919). The initial language of Section 1386.1 states that the donee must manifest his intent to exercise the power. Following that language is a general test for determining whether or not the donee has manifested his intent. If the donee is attempting to transfer property covered

by the power, he has manifested his intent. Michigan has enacted a similar provision. See Mich. Stat. Ann. § 26.155(104)(Supp. 1968).

Subdivisions (a), (b), and (c), are examples of when the donee has sufficiently manifested his intent under Section 1386.1 to exercise the power. The listing is not exclusive. The list is similar to New York Estates, Powers and Trust Law Section 10-6.1(1), (2), (3)(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 when:

(a) The creating instrument does not provide for a gift in default and does not require that the donee make a specific reference to the power; and

(b) The donee includes in his will a residuary clause or other general language purporting to dispose of all of the donee's property of the kind covered by the power; and

(c) The donee's will does not manifest an intent, either expressly or by necessary inference, not to exercise the power.

Comment.

Section 1386.2 changes the rule developed by decisions interpreting Probate Code Section 125. In Estate of Carter, 47 Cal.2d 200, 302 P.2d 201 (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). It represents a substantial return to the common law rule. Under the subdivision, a residuary clause exercises the power only under the circumstances stated. The section does not apply where the creating instrument makes a gift in default, or where the creating instrument requires that the donee make a specific reference to the power, or where the will manifests an intent not to exercise the power. Section

1386.2 will eliminate the trap for the unwary that defeated the donee's clearly provable intent in Estate of Carter, supra. It embodies the rule of Wisconsin Statutes Annotated Section 232.03(2)(Supp. 1967).

Section 1386.3. Limitation on exercise of power by residuary clause or other general language

1386.3. A devise or bequest of all of the testator's real or personal property within Probate Code Section 125 or a devise or bequest of the residue of the testator's real or personal property within Probate Code Section 126 exercises the power only under the circumstances stated in subdivision (c) of Section 1386.1 and Section 1386.2.

Comment. Section 1386.3 is included to make it clear that Probate Code Sections 125 and 126 do not operate with respect to powers of appointment except under the circumstances stated in Sections 1386.1 (c) and 1386.2.

Section 1386.4. Will executed before power created

1386.4. 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 1386.4 codifies the rule of California Trust Co. v. Ott, 59 Cal. App.2d 715, 140 P.2d 79 (1943). It also states the rule contained in the Restatement of Property, Section 344.

Article 5. Types of Appointments

Section 1387.1 General power

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

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

(2) An appointment of present or future interests or both.

(3) An appointment subject to conditions or charges.

(4) An appointment subject to otherwise lawful restraints on the alienation of the appointed interest.

(5) An appointment in trust.

(6) An appointment 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 Restatement of Property, Sections 356 and 357. It makes it 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. In addition, it indicates that there are other types of appointments that can be made effectively. 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 terms of a special power of appointment, 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 if all of the persons benefited by the appointments are permissible appointees.

Comment. Section 1387.2 embodies the rules stated in Restatement of Property Sections 358 and 359 except that it authorizes the donee of a special power to exercise the power by creating a general power of appointment in a permissible appointee. Under Restatement of Property Section 359, the donee could only appoint the power by creating a new power under certain circumstances. Since the donee can appoint outright to one of the permissible appointees of the special power, it is irrational to refuse to allow him to give such a person a general power to appoint. See 3 Powell, Real Property ¶ 398 at n.76 (1967). As under a general power, there are types of appointments which can be made other than those listed in Section 1387.1.

There may be differences in the ability to appoint in a particular manner because of other rules of law. 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. As a result, the donee of a special power of appointment may not have the same freedom as to types of appointment as the donee of a general power.

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 assets to any one or more of the permissible appointees and exclude others.

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

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 common law constructional preference for exclusive powers as embodied in the Restatement of Property, Section 360.

Section 1387.3 changes California law as developed in Estate of Sloan, 7 Cal. App.2d 319, 47 P.2d 1007 (1935), which is contrary to many common law decisions. See 69 A.L.R. 1285 (1960). A similar provision has been adopted in other states. Mich. Stat. Ann. § 26.155(107)(Supp. 1968); N.Y. Estates, Powers and Trust Law § 10-5.1 (1967); Wis. Stat. Ann. § 232.07 (Supp. 1967).

Section 1387.4. Attempt to benefit nonobject of special power

1387.4. If the donee of a special power of appointment exercises his power in favor of a permissible appointee with intent to benefit, either directly or indirectly, a person who is not a permissible appointee, the exercise of the power is ineffective to the extent it was motivated by the purpose to benefit the person who is not a permissible appointee.

Comment. Section 1387.4 is a limitation on the rule stated in Section 1387.3. Attempts by the donee of a special power to frustrate the desire of the donor that the appointive assets be devoted exclusively to the class of appointees designated by the donor are invalidated by Section 1387.4. Where the entire transaction was motivated by the desire to benefit a person who is not a permissible appointee, the entire appointment is invalid even though some appointive property went to a permissible appointee, and the property will pass under Section 1389.2 or 1389.3. However, where the person who is not a permissible appointee is benefited by only part of the appointive property and part of the transaction was motivated by an honest desire to benefit permissible appointees, that part of the appointment which was not tainted passes to the permissible appointees despite the attempt to benefit the nonpermissible appointee. That part of the transaction intended to benefit the nonpermissible appointee is void.

This appect of the common law is treated extensively in Restatement of Property, Sections 352 to 355. Section 1387.4 follows the decision in Horne v. Title Ins. & Trust Co., 79 F. Supp. 91 (S.D. Cal. 1948), which applied California law and Restatement Section 353.

The leading case on the problem is 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).

Article 6. Contracts to Appoint; Releases

Section 1388.1. Contract to appoint

1388.1.(a) The donee of a power to appoint that is presently exercisable, whether general or special, can contract to make an appointment if the contract does not confer a benefit upon a person who is not a permissible appointee under the power.

(b) The donee of a power of appointment that is not presently exercisable cannot contract to make an appointment.

Comment. Subdivision (a) of Section 1388.1 provides that the donee of a presently exercisable general or special power may contract to appoint the assets to a permissible appointee. 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. The subdivision 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. 1968) and New York Estates, Powers and Trust Law Section 10-5.2 (1967).

Subdivision (b) provides that the donee of a testamentary power or other power not presently exercisable cannot contract to make an appointment. 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). Under the common law, the promisee can obtain neither specific performance nor damages for the breach of a promise to appoint, although restitution of value given is available unless precluded by other factors. Restatement of Property § 340 (1940).

Section 1388.2. Release of power of appointment

1388.2. (a) Unless the creating instrument otherwise provides, any discretionary power of appointment 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 property subject to the 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 power might be exercised. No release of a power shall be deemed to make imperative a 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 may be delivered to any of the following:

(1) Any person specified for such purpose in the creating instrument.

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

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

(4) 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 release for record, notice is imparted to all persons of the contents thereof.

(d) This section does not impair the validity of any release heretofore made.

Comment. Section 1388.2 is the same in substance as 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 language added to subdivision (b) will prevent 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 added language also will preclude 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 last sentence of subdivision (b) 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).

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. Except as provided in Section 1387.4, interests created by such an exercise are valid insofar as they are permissible under the terms of the power.

Comment. Section 1389.1 makes it clear that, whenever a power is exercised partly in favor of an unauthorized person, the exercise is valid to the extent that permissible appointees are benefited unless limiting factors are present under Section 1387.4. In addition, Section 1389.1 covers other 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 Trust Law Section 10-6.6(1)(1967). No comparable rule is found in the Restatement of Property. However, Sections 352 to 355 of the Restatement do provide that an appointment intended to benefit a person who is not a permissible appointee of the power is invalid only to the extent that the appointment was motivated by the improper purpose. Under such a rule, if the exercise of the power also was motivated by the purpose to benefit permissible appointees, they would take the share appointed to them.

Section 1389.2. Nonexercise or improper exercise of an imperative power

1389.2. (a) Where an imperative power of appointment confers on its donee a right of selection, and the donee dies without having exercised the power, either wholly or in part, the persons designated as permissible appointees shall take equally; except that an appointee who has received a partial appointment does not for that reason receive less of the property passing because of the nonexercise of the power unless the creating instrument or the donee, in a writing, manifests a contrary intent.

(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 purportedly 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 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, the assets already appointed are not thrown into a hotchpot, unless the creating instrument or the donee has manifested a contrary intent. 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 purported 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 donee 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, the appointive assets pass to the person or persons named by the donor as takers in default or, if there are none, revert to the donor.

(b) 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 unless either the creating instrument or the instrument of appointment manifests an inconsistent intent.

(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 appointive property passes to the donee or his estate if the instrument of appointment manifests an intent to assume control of the appointive assets for all purposes and not only for the limited purpose of giving effect to the expressed appointment unless the creating instrument manifests a contrary intent.

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

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. This rule has the desirable effect of reducing taxes, fiduciary fees, and lawyer's fees in the estate of the donee.

Subdivision (b). Subdivision (b) embodies the rule of "capture" as set forth in Restatement of Property, Section 365(2), (3). Subdivision (b) provides that, if a donee appoints the property to a trustee on a trust that fails, there is a resulting trust in favor of the donee or his estate. If the donee manifests a contrary intent in the instrument exercising the power, or if the donor has manifested a contrary intent in the creating instrument, the property will pass to 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 rule of subdivision (b). See 3 Powell, Real Property ¶ 400 at n.5 (1967).

Subdivision (c). Subdivision (c) provides that, if the donee of the property makes an ineffective appointment and he has manifested an intent to take over the assets for all purposes, the property passes to the donee or his estate unless the donee has manifested a contrary intent in the instrument exercising the power. Only England, Illinois, Maryland, and Massachusetts have considered this problem, and all have adopted the rule of subdivision (b). See 3 Powell, Real Property ¶ 400 at nn.6-9 (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 anti-lapse statute 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) (1940).

Section 1389.4. Death of appointee before effective date of exercise

1389.4. If an attempted exercise of a power of appointment by will 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 Probate Code Section 92 as though the appointive assets were the property of the donee except that in no case shall property pass to a person who is not a permissible appointee under a special power.

Comment. Section 1389.4 embodies the theory of the Restatement of Property, Sections 349 and 350. It is broadened to cover special powers by employing the language used by Michigan Statutes Annotated Section 26.155(120)(Supp. 1968). 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.

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 and Trust 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 of this chapter.

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 Trust Law Section 10-7.1 (1967).

Section 1390.3. Presently exercisable general power

1390.3. Property subject to a general power of appointment that is, or has become, presently exercisable is subject to the claims of creditors of the donee or of his estate and to the expenses of the administration of his estate to the same extent that it would be subject to such claims if the property were owned by him. It is immaterial that the power originally was exercisable only by will. It is also immaterial that the power has not been exercised.

Comment. Section 1390.3 states the rule with respect to the availability of property subject to a general power to satisfy the debts of the 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 could reach the appointive assets only when a general testamentary power of appointment had been exercised in favor of a creditor or volunteer (Restatement of Property § 329) or when an inter vivos exercise of a power resulted in a fraud on creditors (Restatement of Property § 330). Property covered by an unexercised power of appointment could not be subjected to claims. Restatement of Property § 327 (1940). These rules apparently constitute present California law. See Estate of Masson, 142 Cal. App.2d 510, 298 P.2d 619 (1956).

The common law rule is not logical. The rights of creditors should depend upon the existence of the power, rather than upon its exercise.

Modern legislation confirms the desirability of permitting creditors of a donee to reach any appointive assets which the donee can appropriate to himself for the satisfaction of their claims. See Mich. Stat. Ann. § 26.155(113)(Supp. 1968); Minn. Stat. Ann. § 502.70 (Supp. 1967); N. Y. Estates, Powers and Trust Law § 10-7.2 (1967); Wis. Stat. Ann. § 232.17(1) (Supp. 1967).

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 to his own uses. 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 have come under the complete power of disposition by the debtor donee and hence are treated the same as the other assets of the decedent. The rights of creditors are not dependent upon the exercise of the power. Unlike the common law rule, 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.

If the property has been appointed by an inter vivos instrument, the property is liable to the same extent that the donee's owned property would be liable. Thus, it will be liable if, had it been the donee's owned property, the transfer could have been subjected to the rules relating to fraudulent conveyances. See Restatement of Property § 330 (1940).

Section 1390.4. General power not presently exercisable

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. Under Section 1390.4, creditors of the donee of a general power of appointment, which is in terms exercisable only at a future date (as, for example, by will of the donee), can reach the appointive assets prior to the arrival of the stipulated future date if the donee of the power was also its donor. 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 begins:

(a) In the case of an instrument exercising a general power of appointment other than a general testamentary power, 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 common law rule as embodied in Restatement of Property, Sections 391 and 392. It is substantially the same as New York Estates, Powers and Trust Law Section 10-8.1(a)(1967) and Michigan Statutes Annotated Section 26.155(114)(Supp. 1968). It follows the widely accepted American rule with respect to general testamentary powers. The English rule and the rule in some states is to the contrary. See 5 Powell, Real Property ¶ 788 (1962). Under subdivision (a), the rule against perpetuities does not apply to a presently exercisable general power of appointment, whether or not postponed, until an appointment is made. Under subdivision (b), the permissible period is applied to all other powers as of the time of their creation.

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 adopts the "wait and see rule" for ascertaining whether the period of the rule against perpetuities has been violated by a limitation created on the exercise of an otherwise valid special power of appointment or general testamentary power of appointment. 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 descendents of A (excluding C and D). C has children, E and F, both conceived prior to the death of A 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 descendents 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 twenty-one years, because C might have additional children. However, the limitation is completely effective under 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 death of A, 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) (1940); Minot v. Paine, 230 Mass. 514, 120 N.E. 167 (1918). 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 Trust Law Section 10-8.3 (1967) and Michigan Statutes Annotated Section 26.155(117)(Supp. 1968).

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) The creation, exercise, or release of a power of appointment is irrevocable unless the power to revoke is reserved in the instrument creating, exercising, or releasing the power.

(b) Notwithstanding Section 2280, when property transferred in trust is made subject to a power of appointment, the trust is irrevocable insofar as that property is concerned.

Comment. Section 1392.1 embodies the common law as stated in the Restatement of Property, Section 366. It is substantively the same as Michigan Statutes Section 26.155(109)(1968) and is similar to New York Estates, Powers and Trust Law Section 10-9.1(a), (b)(1967) and Wisconsin Statutes Annotated Section 232.11 (Supp. 1967).

Subdivision (b) is included to make it clear that Civil Code Section 2280, which declares that a trust is revocable unless expressly made irrevocable, does not apply to a trust insofar as the property is subject to a power of appointment. Thus, if the entire trust assets are subject to appointment, the trust is irrevocable unless the settlor retains the power to revoke it in the creating instrument. If, however, property is given to A and B for life, with one half the remainder to be distributed as A appoints by will and the other half to go to B's children, one-half of the trust is irrevocable (the part over which A has a power of appointment), and one-half is revocable.

Severability Clause

Sec. 2. 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 2 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.

Section 1060 (repealed)

Sec. 3. 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.

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 subdivision (a) of Section 1385.3 and Section 1385.4.