Commissioner Primarily Responsible: Stanton

#69 9/12/68

First Supplement to Memorandum 68-77

Subject: Study 69 - Powers of Appointment

A copy of the tentative recommendation on powers of appointment is attached to Memorandum 68-77. We distributed this tentative recommendation for comment and the comments received to date are attached to this supplement.

We analyze the comments in this supplement. Certain minor changes in style and form, for the most part those suggested by Commissioners Sato and Stanton, will be made when we prepare the recommendation for the printer and are not noted in this supplement. Only changes in substance or suggestions involving policy are noted below.

General reaction

The general reaction of the persons submitting comments was that legislation along the lines proposed by the Commission is desirable. The California Bankers Association Committee (Exhibit III) states: "We agree that the project is a good one and will be very helpful; but we feel, contrary to expressions in the material, that powers of appointment are in common usage in trusts in California." Professor Dukeminier (Exhibit II) states: "In general I approve the recommended legislation."

Scope of recommended legislation

Several persons submitting comments suggested revisions in the law of trusts generally or that the scope of the recommended statute be expanded.

Professor Rabin (Exhibit I, pages 1-2) suggests:

> Since the revocable inter vivos trust with power to appoint is frequently used as a will substitute, existing statutory provisions relating to wills should, perhaps, be assimilated to the revocable trust area. The proposed statute has already done this as regards the antilapse statute (see §1389.4). Also prior legislation has extended spousal rights in quasi-community property under a will to revocable trusts. (Probate Code §201.8). It should be considered whether, when a trust serving as a will substitute is involved, (1) an omitted heir or spouse should be protected in the same way that such person is protected in the will context (see Probate Code §§70, 71, 90, 91); (2) rules of construction applicable to wills (Probate Code §100-109) should be extended to such trusts; and (3) restrictions on charitable bequests (Probate Code §§40-43) should be extended to charitable appointments under revocable trusts. In short it should be recognized that a disposition under a power of appointment appended to a revocable trust resembles a testamentary disposition as much as an appointive disposition. See e.g., Katz v. U.S., 382 F.2d 723, 730 (9th Cir. 1967).

The Commission's recommendation basically follows the same general approach as that taken in other recently enacted statutes. We do not have the necessary research studies to provide us with background information on the various matters Professor Rabin suggests we deal with in the statute. The staff recommends that no attempt be made to deal with the problems mentioned in the above quote from Professor Rabin's letter.

Section 1380.2 (page 11)

This section deals with conflicts resulting from changes in the California law over a period of time. Professor Rabin (Exhibit I, page 2) queries whether a similar section should deal with conflicts of law between California and its sister states, e.g., should the law of the donor's or donee's domicile control. However, as indicated in the Initial Comment to the proposed legislation, this title does not codify all of the law relating to powers of appointment. Many matters are left

to judicial decision under the common law. The issue of choice of law is one of these. Because of the difficulty that would be involved in drafting an appropriate choice of law rule or rules, the staff believes that no such attempt should be made in the absence of a careful study of the problem. We recommend against attempting to include choice of law rules in the recommended legislation.

The Comment to Section 1380.2 states that "this section cannot be applied to invalidate a power created prior to the operative date of the title--July 1, 1970." It has been questioned whether the section itself clearly so states. To make this matter clear, an additional sentence could be added to Section 1380.2 to read:

> Nothing in this section makes invalid a power of appointment that was created prior to July 1, 1970, and which was valid under the law in existence at the time it was created.

If this sentence is added to the section, the Comment should be revised to add a sentence reading:

> Note that Section 1380.2 deals only with the "release" or "exercise" of a power or the "assertion of a right" given by this title. Since the section does not deal with "creation" of powers of appointment, 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 existence at the time it was created. Under Section 1380.2, for example, 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.

Section 1381.1 (page 12)

No questions concerning the definitions in this section were raised. However, Professor Rabin (Exhibit I, page 2) suggests that additional definitions be considered:

(1) Should "exercise" be defined. Does the word "exercise" include attempted or ineffective exercises? The answer to Professor Rabin's

question is that in some cases the word "exercise" does include an ineffective exercise but in other cases it does not. The meaning of the word appears to be clear in the context of various sections although we have not examined each section of the bill with this in mind. A revision that might be desirable would be to insert "effectively" before "exercised" in those cases where this addition would be appropriate. We do not, however, recommend this addition. The other statutes do not define this term.

(2) The word "appointment" is not defined, nor is the word "created" or "effective." Professor Rabin asks: "Is a power 'created' by will 'effective' when the will is executed or when the testator-donor dies. The latter, presumably; but it would be useful to the average practitioner to have this set forth in the definitions." None of the other statutes define these terms.

Section 1381.2 (page 13)

Professor Rabin (Exhibit I, page 2) asks: "Should not a statement that a power to revoke is a general power be included?"

Dean Halbach (Exhibit IV) states that the adoption of the tax definition "is a good idea as a general matter, but I have some questions about the desirability of this in several instances." He is concerned about the definition of a "general" power insofar as that definition affects the rule against perpetuities and the rights of creditors. Professor Dukeminier (Exhibit II, page 5) is likewise concerned about the broad definition of "general" power insofar as the rule against perpetuities is concerned. These comments are discussed later under the sections of the proposed legislation that relate to the rule against perpetuities and rights of creditors. The writers did not object to the use of the tax definition generally.

Section 1381.3 (page 15)

The staff suggests that this section be revised to read:

> 1381.3. (a) A power of appointment is "testamentary" if it is exercisable only by a will or can become effective only at the death of the donee .
>
> (b) A power of appointment is "presently exercisable" if it is not testamentary and (i) it was is exercisable from the time of its creation or (ii) if its effective exercise was postponed , ~~but~~ the period of postponement has expired.

The revision of subdivision (a) follows a suggestion by the California Bankers Association Committee (Exhibit III, comment 2). If this change is made we suggest that we add the following to the Comment:

> 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." A power of appointment is one that "can become effective only at the death of the donee" where, for example, a testator gives his wife a power of appointment over such of his property "as may remain undisposed of at her death," such power to be exercised "only by a written instrument, other than a will, on file with the Trustee at the death of my wife." If the creating instrument, for example, contains a condition that "any distribution [in accordance with the exercise of the power of appointment by written instrument (other than a will) delivered to the trustee during the donee's lifetime] shall be made after the donee's death," then the power of appointment is "testamentary" since it "can become effective only at the death of the donee."

See Exhibit V for samples of forms used by banks to create the "testamentary" powers of appointment that do not involve use of a will. The recommended revision recognizes that there is no difference in substance between this type of power of appointment and a power of appointment that can be exercised only by a will.

The first sentence of the revised Comment makes a clarification suggested by Professor Rabin (Exhibit I, page 2), but does not involve revision of the statute itself as he suggested. The statute appears to be clear but we have added the first sentence merely because Professor Rabin expressed concern that it might not be clear.

Section 1381.4 (page 16)

Dean Halbach (Exhibit IV, page 3) makes the following comment:

> On page 16, Section 1381.4 defines an "imperative" power as one which exists when the creating instrument manifests an intent to benefit permissible appointees even if the donee fails to exercise the power. I wonder if it is desirable to leave no guidance for the court in determining when such an intent is manifested in the instrument. For example, is it now clear that there is sufficient manifestation of such intent whever the permissible appointees are described in terms of a reasonably definite or ascertainable class (e.g., "children" or "descendants") and no takers in default of appointment are specified. Under present law this would be sufficient.

There is merit to this comment. However, the staff suggests that the following be added to the Comment to Section 1381.4 in lieu of making any revision of the section:

> 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 will continue to apply. See Section 1380.1 and the Comment thereto.

Section 1382.2 (page 18)

The California Bankers Association Committee (Exhibit III) comments:

> We wonder whether this provision applies to a declaration of trust by a Trustee. In such a situation, the property is transferred to the Trustee by a separate instrument and the Trustee declares that he is holding the property in trust for specified purposes. The declaration is not an instrument sufficient to transfer the interest in property so we believe that 1382.2 should be extended to cover this situation.

This comment points out that Section 1382.2 does not cover the situation referred to in the comment. What about a case where the donor "reserves" a power. In this connection, it should be noted that Michigan has enacted the following provisions dealing with this problem:

155. (1) A power may be created by any creating instrument which is executed in the manner required by law for that instrument.

(2) The donor of a power must be a person capable of transferring the interest in property to which the power relates and having a transferable interest in such property.

Subdivision (2) of the Michigan statute is similar to Section 1382.1. Subdivision (1) differs significantly from our Section 1382.2 and is a better provision. See the definition of "creating instrument" in Section 1381.1(f). The New York statute is similar to the Michigan statute:

10-4.1. (a) The donor of a power of appointment:

* * * * *

(2) Must have created or reserved the power by a written instrument executed by him in the manner provided by law.

Our provision may be based in part on the Minnesota provision which reads:

502.63. A donor may create a power of appointment only by an instrument executed with the same formalities as one which would pass title to the property covered by the power.

This provision, however, is significantly different from the one included in our tentative recommendation and is not as good as the Michigan and New York provisions (which are later statutes than the Minnesota statute).

Section 1384.1 (page 20)

The California Bankers Association Committee comments:

We are concerned how this provision will apply to minors who do have the capacity to transfer an interest in property even though it is voidable.

It would seem that a power of appointment would rarely be given to a minor, but the comment quoted above raises the question whether the statute needs clarification or perhaps the Comment should be supplemented.

It should be noted that persons under the age of 18 years lack testamentary capacity (Probate Code Sections 20, 21). Similarly, a person under the age of 18 may not make a contract relating to real property, or any interest therein, or relating to any personal property

not in his immediate possession or control" (Civil Code Section 33). And of course, generally speaking, contracts of a minor over the age of 18 are subject to disaffirmance by either the minor or his estate upon restoration of the consideration received (Civil Code Section 35). The contracts of a minor over 18 who has contracted a lawful marriage are valid "the same as if he were 21 years of age." There would certainly appear to be a substantial conflict between the thrust of those sections and Section 1392.1 which makes the exercise of a power of appointment irrevocable. With respect to an exercise of a power by a person under 18, the exercise would perhaps be considered totally ineffective or void because of a total lack of capacity (although query whether the appointive assets would be considered to be within the donee's "immediate possession or control" and the transfer or exercise, therefore, only voidable. When the minor is over age 18, a testamentary disposition would presumably be given effect. However, an inter vivos exercise would, it seems, be subject to disaffirmance under Section 35, but not under Section 1392.1.

Section 1384.1 is substantially the same as the statutes in Michigan and Wisconsin. New York merely provides that the donor of a power of appointment must "manifest his intention to confer the power on a person capable of holding the appointive property." Minnesota deals with the problem expressly:

> 502.66. Any donee, except a minor, who would be capable of conveying the property covered by the power may exercise a power of appointment.

If no revision is made in the statute, the reference to the Minnesota statute should be deleted from the Comment.

Consideration should be given to whether this conflict is merely one of those areas that will be left to judicial resolution or whether the problem should be resolved in the statute. Since the staff is unable to predict with any certainty what the result would be in the absence of a provision in the statute, we suggest that the statute be clarified by making the existing section subdivision (a) of the section and adding the following subdivision to Section 1384.1:

> (b) 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 to be an adult person for the purpose of entering into any engagement or transaction respecting property or his estate under Civil Code Section 25.

Section 1385.1 (page 21)

Professor Rabin (Exhibit II, page 2) suggests that the phrase "Except as provided in Section 1385.2," be inserted at the beginning of subdivision (d). We consider this addition unnecessary. Section 1385.2 obviously is an exception to subdivision (d); otherwise there would be no purpose in including it in the statute.

This section, by use of the word "instrument" throughout, impliedly excludes the oral exercise of a power of appointment. If intended, this exclusion perhaps should be made more explicit in the Comment. If not intended, the language of the section should be amended, perhaps by substituting "in a manner" for "by an instrument."

With respect to subdivision (b), the Bankers Legislative Committee states:

> With regard to 1385.1(b), we would question the rationale of allowing exercise by a written will where the instrument states that the power is to be exercisable by an inter vivos instrument.

> This could hold up the distribution of property subject to a power to takers in default where the Trustee has not received an inter vivos instrument. The Trustee would have to wait until it is certain that the power was not exercised by will. If the donor of a power wants it to be exercised either by an inter vivos instrument or by a will, it would be easy enough to so state.

This comment presents a matter that is purely a weighing of the relative advantages and disadvantages.

The Bankers Legislative Committee states "We do not understand 1385.1(d)." Subdivision (d) does not define "additional" formalities, but there are requirements that may be expressed in "the creating instrument as to the manner, time, and conditions of the exercise of the power," that should be considered mere or "additional formalities" and which can, therefore, be disregarded under subdivision (d). A requirement of subscription by three witnesses would be such a requirement. Whether or not a specific requirement is a "formality" or a vital requirement to be given effect is left entirely to judicial decision. This approach may be unavoidable, but the comment of the Committee indicates perhaps that clarification of the purpose and intent of the subdivision is needed. Perhaps page 23, which contains the Comment to subdivision (d), was inadvertently omitted on the copies we distributed for comment. To further clarify the meaning of subdivison (d) the staff suggests that the following sentence be added at the end of the Comment on page 23:

> Such a formality would be, for example, a requirement that the execution of the instrument exercising the power be witnessed by three subscribing witnesses.

Section 1385.2 (page 24)

Professor Rabin (Exhibit I, page 3) suggests that the following sentence be added at the end of this section:

> An attempted exercise by reference to "all powers," or by a similar phrase does not constitute a specific reference.

We do not consider this addition necessary. We think the language of the section is clear and the Comment states the substance of the proposed addition to the statute. The comparable provision of the Michigan statute reads:

> except that if the creating instrument explicitly directs that no instrument shall be effective to exercise the power unless it contains a reference to the specific power, an instrument that lacks such reference does not validly exercise the power.

This may be a better statement than Section 1385.2.

The comparable Wisconsin provision reads:

> 232.03. (1) If the donor has explicitly directed that no instrument shall be effective to exercise the power unless the instrument contains a reference to the specific power, in order to exercise effectively such a power the donee's instrument must contain a specific reference to the power or the creating instrument and expressly manifest an intention to exercise the power or transfer the property covered by the power.

Section 1385.3 (page 25)

The second sentence of this section should be made subdivision (b) and the last sentence should be subdivision (c).

Consideration should be given to adding "Unless otherwise restricted by the creating instrument," at the beginning of the last sentence.

The Bankers Legislative Committee comments:

> We believe that the phrase . . . "or becomes legally incapable of consenting" should be deleted, otherwise the incompetency of the donor, or a person having a substantial adverse interest

could cause a tax trap under Internal Revenue Code Section 2041(b)(1)(C). Civil Code Section 860 only covers the death situation.

The suggested "tax trap" is that a power may become a "general power" for tax purposes upon the incompetency of the donor or the person having a substantial adverse interest whose consent is required. The suggested alternative of the Bankers, however, apparently prevents the exercise of the power where a person whose consent is required becomes legally incapacitated. Some choice must be made between these conflicting considerations, and the staff believes that the choice reflected in the section is sound.

Section 1386.2 (page 29)

Professor Rabin (Exhibit I, page 3) suggests a technical change: Insert "only" before "if" in the fourth line of the section. This appears to be a desirable change.

The Bankers Legislative Committee specifically approves the policy of this section and, in substance, questions whether the section goes far enough in changing existing law:

> We believe the change to avoid inadvertent exercise of the powers is an excellent one. However, it might be noted that, in the rare situation where a power is exercised by a residuary clause under 1386.2, and the power is a pre-1941 power, it would subject the property to U.S.Estate taxation. However, this has to be balanced against the disadvantage of a reversion.

Professor Rabin (Exhibit I), on the other hand, believes that the section goes too far in changing existing law. He states:

> A fundamental change which I urge would alter paragraph (a) to read as follows: "(a) The creating instrument does not require that the donee make a specific reference to the power; and . . . ." This would basically merely modify Probate Code §125, whereas §1386.2(a) as now proposed radically changes it. I have previously written on this matter as follows:
>
> > "To start, we may ask, "Why should not the donee attempt to exercise all powers which he may possess at the time of his death?" The testator-donee ordinarily wishes to benefit his legatees to the maximum extent of his ability. He wants to pass any property which he can to his legatees. A failure to dispose of unknown or after-acquired appointive property is as unnatural as a failure to dispose of unknown or after-acquired owned property. Unless there are disadvantages to disposing of unknown appointive property which outweigh the donee's natural desire to benefit his legatees, the donee should attempt to exercise unknown powers." (51 Corn. L.Q. 2 (1965))
>
> As far as non-tax factors are concerned I believe that a rule which makes the residuary clause exercise all powers (in the absence of an expressed contrary intent by either the donor or the donee) will more often promote a just disposition than the contrary rule. Suppose, for example, that H creates a trust for W for life remainder as she shall appoint by will, and in default of appointment to her issue by right of representation. Twenty

years later W dies, leaving two sons and a daughter. Her will neglects to manifest any intention concerning the power. Her residuary clause gives all of her property to her needy daughter, and makes no provision for her sons, who already have ample wealth. Under section 1386.2 as now written the three children would share equally in the appointive assets. Yet the donor wanted such an "equal" disposition only as a backstop. He wanted to prefer that child who his wife preferred and it seems most likely that if W had considered her power of appointment she would have exercised it in favor of the daughter. Yet proposed §1386.2 requires the opposite result. I strongly believe that the example given above is typical; and that cases in which a more just disposition will occur under §1386.2 as now written are comparatively rare.

As far as tax factors are concerned (mentioned at page 5 of the introduction) these have been given undue importance. Serious tax disadvantages may result from a thoughtless or inadvertent exercise only (1) when the power was created before October 22, 1942, and (2) it was a general power, and (3) the donor was not also the donee. See generally Rabin, op. cit. supra, at page 3. If, considering the above, the tax danger is still considered serious, the present form of section 1386.2 could be used to apply to all general powers created before October 22, 1942, and my proposed statute could be applied to all other powers.

Professor Rabin's suggested revision might be more acceptable if the word "will" were deleted from subdivision (b) so that the donee's actual intent, as in Estate of Carter, not to exercise the power could be shown, even though there is nothing in his will one way or the other.

The Commission has given considerable thought to this change. It meets the approval of the Bankers Legislative Committee but not Professor Rabin. The question is strictly one of policy.

Section 1386.3 (page 31)

Professor Rabin (Exhibit I) presents the following case:

Suppose the donor executes a will creating a power exercisable by will in the donee and the donee executes a will purporting to exercise that power. Thereafter the donee dies and a few years later the donor dies without having changed his will. Section 1386.3 seems to say that the appointment by the donee is ineffective. This position is debatable as a matter of policy, but in any event the section should be clarified.

The staff believes that the section does not purport to cover the situation presented by Professor Rabin since the will creating the power would be revocable until the donor's death and the power of appointment should not therefore be considered to be "existing at the donee's death." The requirement that the power be one "existing at the donee's death" would necessarily imply that the purported exercise in Rabin's case would be ineffective. To avoid any doubt in the result, we suggest that the following sentence be added to the Comment:

> 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," because the donor could have revoked his will at any time before his death.

Sections 1387.1 and 1387.2 (pages 32-33)

Professor Rabin comments:

> Sometimes the creator of a power of appointment states that the donee can appoint "the fee," or "the principal," or "the corpus." These sections should make clear that such words ordinarily do not impose any restrictions on the donee. Perhaps section 1387.1 could read as follows:
>
> (a) In the absence of a clearly manifested contrary intent of the donor, the donee of a general power of appointment may make:
>
> * * * * *
>
> (c) The fact that the creating instrument gives the donee the power to appoint "the fee," "the principal," "the corpus" or uses similar expressions does not alone indicate a clearly manifested contrary intent.

The introductory clause of subdivision (a), if any change is to be made, should probably read: "Unless the creating instrument clearly manifests a contrary intent,". The addition of such an introductory clause seems

desirable. The addition of subdivision (c) may be a desirable clarification if the introductory clause is added to subdivision (a).

The introductory clause of Section 1387.2 should be revised to read: "Subject to the limitations imposed by the creating instrument,".

Section 1388.2 (page 38)

This section, based on Civil Code Section 1060, obviously has not been given careful consideration. We merely substantially reenacted the existing law. The comments received indicate that subdivision (c) of the section should be revised.

The Bankers Legsialtive Committee states: "We believe that if the instrument exercising the power is to be delivered to the Trustee, the release should also be required to be delivered to the Trustee. This would require a change in 1388.2(c)."

Professor Rabin comments on subdivision (c) as follows:

> This subdivision is based on the existing subdivision 3 of Civil Code §1060. The wide variety of places of possible delivery of the release makes it difficult for a purchaser from an apparent appointee, to protect himself from a release unknown to him. Subpart (4) of subdivision (c) aggravates the problem by requiring such persons to check the recorder's office of possibly three counties. In addition, should the donee change his residence or place of business the recorder's office at his old residence or place of business would have to be checked. Perhaps the statute should provide for filing only as provided in (1) or (2) ordinarily, with the alternate places being permitted only if no person is specified, or there is no trust.

We suggest that subdivision (c) be revised to read:

> (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 the circumstances are such that personal service of process could not be made on such person.

(2) In cases where delivery is not governed by paragraph (1) and where the property to which the power relates is held by a trustee, the release shall be delivered to such trustee.

(3) In cases not covered by paragraph (1) or (2), 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 has a place of business, or in which the deed, will, or other instrument creating the power is filed.

Note that, among other changes, we have eliminated the constructive notice. The Comment should be revised to add:

> The provision of former Civil Code Section 1060 relating to recording as constructive notice has been omitted because the 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.

Dean Halbach (Exhibit IV, page 3) suggests that attention be directed to the release of powers by a fiduciary, a deficiency in Civil Code Section 1060 and a problem not dealt with by the tentative recommendation. The staff does not fully understand the suggestion. It appears to be a problem that merits attention but would require a significant amount of research.

Section 1389.2 (page 41)

Rabin (Exhibit I, page 5) suggests that "confers on its donee a right of selection" is superfluous. We agree.

Section 1389.3 (page 43)

Rabin (Exhibit I, page 5) suggests that subdivision (a) be amended to read "(a) . . . , or makes an ineffective appointment, in whole or in part,". This appears to be a desirable revision.

Rabin further suggests:

> Subdivision (b) and the phrase "other to a trustee upon a trust" in subdivision (c) should be omitted entirely. There is no reason (other than some ill thought out precedent in states other than California) why appointments in trust should be "captured" but similar appointments not in trust should not.

Note that the distinction between (b) and (c) is in part a matter of burden of proof. Under (b) the donee gets the property unless a contrary intent is manifested. Under (c) the donee gets the property if an intent to assume control of the property for all purposes is shown. There is some merit to Professor Rabin's suggestion.

Section 1389.4 (page 46)

The Bankers Legislative Committee (Exhibit III, point 9) suggests that Section 1389.4 be revised to conform to the change they propose in subdivision (a) of Section 1381.3 so that it covers both by will and by an instrument other than a will which becomes effective at death. This suggestion presents a question of policy as to how far the anti-lapse statute should be extended.

Section 1390.3 (page 49)

The Bankers Legislative Committee (Exhibit III) has two concerns with Section 1390.3:

> We have two concerns with 1390.3(a)--
>
> (1) We do not believe property subject to a general power of appointment even though it is presently exercisable should be liable for expenses of administration of the donee's probate estate.
>
> (2) The property should only have secondary liability for the claims of creditors of the donee, in accordance with the Restatement of Property Rule, Section 329.
>
> In the typical A-B trust, where the surviving spouse has a general power of appointment over Trust "A", it is common for the surviving spouse not to exercise the power so that, upon

the death of the surviving spouse, Trust "A" passes into Trust "B", the residuary or "by-passing" trust, while property held by the surviving spouse will pass to others. We agree that creditors should be protected but that we should not cause property to pass to others than those intended.

The rationale of the existing section is that property subject to a general power of appointment is indistinguishable for all practical purposes from property "owned" by the donee and therefore should be treated identically.

Dean Halbach is also concerned that the broad definition of a general power, based on the tax law definition (Section 1381.2), exposes property subject to a power of appointment to claims of creditors of the donee in situations where this may not be desirable:

> I suppose the most fundamental question I would raise concerning the entire recommendation has to do with the way in which and the purposes for which the property law definition of general power of appointment has now been totally equated with the tax definition. Essentially, I have no doubt that this is a good idea as a general matter, but I have some question about the desirability of this in several instances. I think they should at least be considered. I am sure that Dick Powell has thought about these things extensively, and I have not had an opportunity to discuss this aspect of these problems with him. Nevertheless, I think I would come to different conclusions than he has and suggest that the Law Revision Commission give some special attention to these matters. It strikes me as doubtful that every power which falls within the rather broad definition of a general power should expose the subject matter to the claims of all of the donee's creditors . . . . Let me use an example, which might also serve to suggest some of the problems of uncertainty contained in the definition of general powers of appointment, as well as some of the problems resulting from this classification. Assume that the donor has created a power of appointment under which the life beneficiary of a trust can appoint principal to his ex-wife or to any of his children. Assume also that his right to so appoint is not restricted so as to preclude the appointed assets from being used to discharge his alimony or support obligations to these persons. This power would be classified for tax purposes as a general power of appointment according to the Federal Estate Tax Regulations. Should the principal of the trust estate therefore be subject to the claims of all creditors of the life beneficiary? If

> so, should there be no priority (reflecting a respect for the intentions of the donor) given to the needs of the divorced spouse and children? Many variations of this factual situation could be given, and some would be far less appealing than others as cases in which one might want not to allow some creditors to reach the assets.

A special provision could be added to Section 1390.3 to except the case described by Dean Halbach from the claims of creditors of the donee. Perhaps a better solution, however, is to adopt the priority suggestion of the Bankers Legislative Committee.

Dean Halbach continues:

> Further questions relating to classification of powers that I would like to bring to your attention are the following. The comment (bottom p. 13) indicates that the exceptions contained in the tax law definition of general powers are omitted as being insignificant in connection with non-tax problems. This seems to mean that the ascertainable standard power under which a person can invade a trust for his own health, education, support and maintenance (non-taxable) would constitute a general power of appointment over the entire subject matter of the trust. If this is so, as would seem to be the case when this exception in the tax law is excluded from our legislation, such a limited "general" power would at least arguably be sufficient . . . to expose the entire trust estate to the claims of the donee's creditors . . . . One might think initially that it was appropriate to permit creditors to reach such property, but then one should consider what this means in terms of the donee's opportunity to subvert the objectives of the trust by deliberately incurring obligations for his own benefit extending beyond the benefits the support which the creator of the trust had sought to provide.

Obviously, there is no easy solution to the rights of creditors problems. Here again, the staff believes that the priority system suggested by the Bankers Legislative Committee probably is the best solution if the Commission wishes to depart from the statute as now drafted.

Section 1391.1 (page 52)

Professor Dukeminier (Exhibit II) demonstrates rather concisely an existing defect in the California statutes regarding the rule

against perpetuities (Civil Code Section 715.8) and the perpetuation of this defect in the draft statute on powers of appointment. (In a separate memorandum suggesting a new topic for study, the staff proposes that the Commission request authority to study the rule against perpetuities generally so that the defect which Professor Dukeminier points out can be eliminated from our law.) Dean Halbach (Exhibit IV) also is greatly concerned that Section 1391.1 (rule against perpetuities) is defective.

To eliminate the problem outlined by Dukeminier and Halbach, the staff suggests that Section 1391.1 be redrafted as follows:

> 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 only one person, on the date the appointment becomes effective.
>
> (b) In all other situations, at the time of the creation of the power.

We suggest that the Comment include the substance of the following which we have adapted from Professor Dukeminier's letter:

> 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. E.g., In Re Morgan's Trust, 118 N.Y.S.2d 556 (1953). See also Re Churston Settled Estates, [1954] Ch. 334; Crane, Consent Powers and Joint Powers, 18 Conv. (N.S.) 565 (1954). 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 in cases where the power of appointment is presently exercisable by more than one person.

This revision takes care of the serious problem identified by the commentators. If you have concern about the revision of Section 1391.1, we urge you to study Exhibits II and IV before the meeting.

It is recognized that Civil Code Section 715.8 will remain inconsistent in principle with revised Section 1391.1. However, the staff suggests in another memorandum that we request authority to make a study that undoubtedly would result in a recommendation that Section 715.8 be repealed.

Section 1392.1 (page 55)

The Bankers Legislative Committee (Exhibit III, comment 11) states:

> We believe that the trust rule under Civil Code Section 2280 should apply to Section 1392.1 so that the donee of a power exercisable by a written instrument other than a will which becomes effective at death could change the instrument from time to time unless expressly made irrevocable.

Section 1392.1 reflects the policy espoused by the consultant and is consistent with the statutes recently enacted in other states. However, only a few states have a rule similar to Civil Code Section 2280. The matter has been discussed at prior meetings but further discussion may be desirable.

Respectfully submitted,

John H. DeMoully
Executive Secretary

First Supp.
Memorandum 68-77

EXHIBIT I

UNIVERSITY OF CALIFORNIA, DAVIS

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SCHOOL OF LAW DAVIS, CALIFORNIA 95616

June 21, 1968

John H. DeMoully, Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Dear John:

I have received the Commission's Tentative Recommendation relating to Powers of Appointment. In one week I go abroad; on my return in August I am afraid that the Committee's Recommendations might be somewhat lost in the backlog of accumulated matters. I therefore submit the following somewhat hurried comments now. Since they are somewhat hurried I would undoubtedly revise or abandon some of them on further thought, and they by no means cover all of the proposed sections. Also I do not have the research study prepared by Professor Powell (although I do have the "Supplementary material to research study by Professor Powell"), nor do I have page 23 of the Tentative Recommendations, which was omitted from my copy inadvertently. If you could send these two materials I would greatly appreciate it, and they might cause me to modify some of my comments, which follow.

* * *

I. In General

Since the revocable inter vivos trust with power to appoint is frequently used as a will substitute, existing statutory provisions relating to wills should, perhaps, be assimilated to the revocable trust area. The proposed statute has already done this as regards the anti-lapse statute (see §1389.4). Also prior legislation has extended spousal rights in quasi-community property under a will to revocable trusts. (Probate Code §201.8). It should be considered whether, when a trust serving as a will substitute is involved, (1) an omitted heir or spouse should be protected in the same way that such person is protected in the will context (see Probate Code §§70, 71, 90, 91); (2) rules of construction applicable to wills (Probate Code §100-109) should be extended to such trusts; and (3) restrictions on charitable bequests (Probate Code §§40-43) should be extended to charitable appointments under revocable

trusts. In short it should be recognized that a disposition under a power of appointment appended to a revocable trust resembles a testamentary disposition as much as an appointive disposition. See e.g., Katz v. U.S., 382 F.2d 723, 730 (9th Cir. 1967).

II. Specific Sections

Section 1380.2

This section deals w[illegible] problems arising from changes of law due to "time." It (or a separat[illegible]ection) should deal with changes of law due to "space," or conflict of laws. For example, should the law of the donor's or donee's domicile control? What of the law of the situs of the trust?

Section 1381.1

Perhaps the definitions should include "exercise." Does the word "exercise" include attempted or ineffective exercises? The word "appointment" is not defined, nor is the word "created," or "effective." Is a power "created" by will "effective" when the will is executed or when the testator-donor dies. The latter, presumably; but it would be useful to the average practitioner to have this set forth in the definitions.

Section 1381.2

Should not a statement that a power to revoke is a general power be included?

Section 1381.3

I have doubts about the Restatement terminology adopted here. Under this terminology a power exercisable by deed or will, is not "testamentary" because it is not exercisable only by will. If I am correct that this is confusing it is serious since almost all powers exercisable by deed are also exercisable by will. See Section 1383.1 and 1385.1(b).

Perhaps a better terminology would be one which referred to powers exercisable (1) by deed (2) by will or (3) by deed or will. As a sub-[illegible]lass of powers exercisable by deed one could distinguish between "presently exercisable" and "not presently exercisable" powers.

Section 1385.1

Page 23 of my copy is missing. I would like the opportunity to comment on this section after receiving page 23 (and also Professor Powell's research

study). I will hazard, however, one preliminary observation. The apparent effect of section 1385.1(d) is limited by section 1385.2. Therefore perhaps section 1385.1(d) should commence as follows: "Except as provided in section 1385.2, ... "

Section 1385.2

The comments indicated that the intent of the section is to prevent a "blanket" clause exercising "all powers" from being effective when there is a specific reference requirement. The scant authority indicates that the statute may not accomplish its purpose. See Rabin, Blind Exercises of Powers of Appointment, 51 Corn. L.Q. 1, 17-20 (1965). A sentence added to the end of section 1385.2, such as the following, would solve the problem. "An attempted exercise by reference to "all powers," or by a similar phrase shall not constitute a specific reference."

Section 1386.2

If the fundamental philosophy of this section is to be kept I would recommend, as a stylistic change, the insertion of the word "only" so that the section reads " . . . covered by the power only if: . . . . "

A fundamental change which I urge would alter paragraph (a) to read as follows: "(a) The creating instrument does not require that the donee make a specific reference to the power; and . . . ." This would basically merely modify Probate Code §125, whereas §1386.2(a) as now proposed radically changes it. I have previously written on this matter as follows:

> "To start, we may ask, "Why should not the donee attempt to exercise all powers which he may possess at the time of his death?" The testator-donee ordinarily wishes to benefit his legatees to the maximum extent of his ability. He wants to pass any property which he can to his legatees. A failure to dispose of unknown or after-acquired appointive property is as unnatural as a failure to dispose of unknown or after-acquired owned property. Unless there are disadvantages to disposing of unknown appointive property which outweigh the donee's natural desire to benefit his legatees, the donee should attempt to exercise unknown powers."
> (51 Corn. L.Q. 2 (1965))

As far as non-tax factors are concerned I believe that a rule which makes the residuary clause exercise all powers (in the absence of an expressed contrary intent by either the donor or the donee) will more often promote a just disposition than the contrary rule. Suppose, for example,

that H creates a trust for W for life remainder as she shall appoint by will, and in default of appointment to her issue by right of representation. Twenty years later W dies, leaving two sons and a daughter. Her will neglects to manifest any intention concerning the power. Her residuary clause gives all of her property to her needy daughter, and makes no provision for her sons, who already have ample wealth. Under section 1386.2 as now written the three children would share equally in the appointive assets. Yet the donor wanted such an "equal" disposition only as a backstop. He wanted to prefer that child who his wife preferred and it seems most likely that if W had considered her power of appointment she would have exercised it in favor of the daughter. Yet proposed §1386.2 requires the opposite result. I strongly believe that the example given above is typical; and that cases in which a more just disposition will occur under §1386.2 as now written are comparatively rare.

As far as tax factors are concerned (mentioned at page 5 of the introduction) these have been given undue importance. Serious tax disadvantages may result from a thoughtless or inadvertent exercise only (1) when the power was created before October 22, 1942, and (2) it was a general power, and (3) the donor was not also the donee. See generally Rabin, op. cit. supra, at page 3. If, considering the above, the tax danger is still considered serious, the present form of section 1386.2 could be used to apply to all general powers created before October 22, 1942, and my proposed statute could be applied to all other powers.

Section 1386.3

Suppose the donor executes a will creating a power exercisable by will in the donee and the donee executes a will purporting to exercise that power. Thereafter the donee dies and a few years later the donor dies without having changed his will. Section 1386.3 seems to say that the appointment by the donee is ineffective. This position is debatable as a matter of policy, but in any event the section should be clarified.

Sections 1387.1 and 1387.2

Sometimes the creator of a power of appointment states that the donee can appoint "the fee," or "the principal," or "the corpus." These sections should make clear that such words ordinarily do not impose any restrictions on the donee. Perhaps section 1387.1 could read as follows:

(a) In the absence of a clearly manifested contrary intent of the donor, the donee of a general power of appointment may make:

. . . .

(c) The fact that the creating instrument gives the donee the power to appoint "the fee," "the principal," "the corpus" or uses similar expressions does not alone indicate a clearly manifested contrary intent.

Section 1388.2, subd.(c)

This subdivision is based on the existing subdivision 3 of Civil Code §1060. The wide variety of places of possible delivery of the release makes it difficult for a purchaser from an apparent appointee, to protect himself from a release unknown to him. Subpart (4) of subdivision (c) aggravates the problem by requiring such persons to check the recorder's office of possibly three counties. In addition, should the donee change his residence or place of business the recorder's office at his old residence or place of business would have to be checked. Perhaps the statute should provide for filing only as provided in (1) or (2) ordinarily, with the alternate places being permitted only if no person is specified, or there is no trust.

Section 1389.2

Is the phrase "confers on its donee a right of selection" superfluous?

On page 42, the next to the last line the word "donee" should probably be "appointee."

Section 1389.3

Subdivision (a) could be amended as follows: "(a) . . . , or makes an ineffective appointment, in whole or in part, ..."

Subdivision (b) and the phrase "other to a trustee upon a trust" in subdivision (c) should be omitted entirely. There is no reason (other than some ill thought out precedent in states other than California) why appointments in trust should be "captured" but similar appointments not in trust should not.

* * *

I apologize for this long letter, but once I got started I found it difficult to stop.

Very sincerely,

Edward H. Rabin
Professor of Law

EHR:rf

First Supp.
Memorandum 68-77

EXHIBIT II

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

July 26, 1968

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMoully:

I have received the tentative recommendation of the California Law Revision Commission relating to Powers of Appointment. In general I approve of the recommended legislation. However, the recommended legislation is, in my judgment, seriously defective in the section relating to the Rule against Perpetuities and should be revised.

The proposed legislation and the comments thereto make no reference to California Civil Code § 715.8, enacted in 1963, which provides an alternative test of when an interest is vested for purposes of the Rule against Perpetuities. Under Civil Code § 715.8 it is possible to create a private trust of indefinite, possibly perpetual, duration, which is free of estate taxation throughout its duration. This can be done by creating successive general powers of appointment presently exercisable by two or more persons with adverse interests. See Dukeminier, Perpetuities Revision in California: Perpetual Trusts Permitted, 55

Calif. L. Rev. 678 (1967). Several persons have noted that Civil Code § 715.8 may violate Article 20, § 9 of the California Constitution prohibiting perpetuities. Your proposed legislation appears also to permit a trust of indefinite duration and may be open to the same constitutional objection. In any case the policy of permitting trusts of indefinite duration is one your commission should examine carefully before recommending this legislation. If you conclude such trusts are undesirable your legislation needs revision.

In order to show the problems, and defects in, the proposed legislation it is necessary to set forth here California Civil Code § 715.8 and two sections of your proposed legislation.

California Civil Code § 715.8:

> An interest in real or personal property, legal or equitable, is vested [for purposes of the Rule against Perpetuities] if and when there is a person in being who could convey or there are persons in being, irrespective of the nature of their respective interests, who together could convey a fee simple title thereto.

Proposed 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) . . . .

Proposed 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.

California Civil Code § 715.8 provides that an interest in property is vested, and exempt from the Rule against Perpetuities, if a fee simple title to the property in which the interest is held can be conveyed. No one can predict with assurance what powers to convey a fee will come within Civil Code § 715.8. Courts may hold that a trustee's power to sell the trust property is a power to convey. Or they may hold that a special power of appointment is a power to convey under Civil Code § 715.8 and that by inserting a special power in the trustee to terminate the trust and distribute the corpus to the beneficiaries the trust is exempt from the Rule. Yet regardless of whether a trustee's power of sale or a special power of appointment qualifies as a power to convey under Civil Code § 715.8, a general power of appointment presently exercisable is such a power to convey. Civil Code § 715.8 says this power can be in "persons in being"; therefore it can be held by more than one person. Civil Code § 715.8 says a power to convey qualifies if held by one or more persons "irrespective of the nature of their respective interests." Hence a general power presently exercisable by two persons with substantial adverse interests qualifies. Thus it is now possible in California to have a trust of indefinite duration which will

avoid estate and gift taxes throughout its duration. Here is an example:

> T bequeaths a fund in trust to the Bank of America, to pay the income to his issue per stirpes from time to time living. Whenever there is no issue of T alive, the Bank of America is directed to convey the trust property to Stanford University. T gives the adult income beneficiaries who are sui juris and Stanford University, all acting jointly,[1] the power to appoint the trust property to whomever they see fit. The trust is exempt from the Rule against Perpetuities under Civil Code § 715.8 because a fee simple title to the trust property can be conveyed through exercise of the general power.

Note that this trust is free of estate and gift taxation throughout its existence because the general power in T's issue is held with Stanford University, which has a substantial adverse interest in the property. Estate Tax Regulations § 20.2041-3(c)(2). Under tax law a power held with an adverse party is not a general power of appointment.

I find nothing in your proposed legislation which changes this result. In fact it appears from Proposed Section 1391.1 that a trust of indefinite duration exempt from the Rule against Perpetuities is permissible under your proposed legislation. Section 1391.1 provides that, "In the case of an instrument exercising a general power of appointment other than a general testamentary power . . . [the Rule begins] on the date the appointment becomes effective." In the comment below appears this line: "Under subdivision (a), the rule against perpetuities does not

1. Your Proposed Section 1385.4 provides that joint powers can be exercised only when all consent.

apply to a presently exercisable general power of appointment, whether or not postponed, until an appointment is made." This section makes no distinction between (1) general powers presently exercisable by one person and (2) general powers presently exercisable by several persons either with or without adverse interests. When the section refers to "a general power" does it not refer to all types of general powers? I realize the section deals with the exercise, not the creation, of general powers. It can, and ordinarily will, be inferred from this section, however, that a general power that is treated as absolute ownership for purposes of testing its exercise is to be treated as absolute ownership for purposes of testing its creation. I do not see how a distinction, valid in policy, can be drawn between creation and exercise of general powers. They either equal absolute ownership or they don't.

In the comment to Proposed Section 1381.2, which defines a general power, it is stated: "The exceptions [respecting powers held jointly and with adverse parties] 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." This comment mystifies me. In the first place, California perpetuities law differs from the law of New York, Wisconsin, and Michigan. In most states only a general power presently exercisable by one person exempts the property from the Rule against Perpetuities.

In that situation the property is not regarded as being tied up; it is like money in a savings account. In these states a general power presently exercisable by more than one person does not satisfy the policy of the Rule and is treated like a special power under the Rule. In Re Morgan's Trust, 118 N.Y.S.2d 556 (1953). See also Re Churston Settled Estates, [1954] Ch. 334; Crane, Consent Powers and Joint Powers, 18 Conv. (N.S.) 565 (1954). In California, however, since Civil Code § 715.8 was enacted, general powers held by more than one person may satisfy the Rule. In the second place, the distinction between general powers held by one person and general powers held by two or more persons is surely significant under the Rule against Perpetuities. This comment ignores two very important policy questions which your commission should explore. They are:

(1) Does a general power of appointment presently exercisable by two or more persons satisfy the policy against perpetuities? Under orthodox perpetuities law the answer is No. Under California Civil Code § 715.8 the answer is Yes. In my judgment the answer ought to be No. While property may be theoretically marketable if it can be transferred with the consent of ten persons, it is not likely that the ten persons will all agree, particularly if some of them hold income interests and others hold remainders. As a practical matter property held subject to a general power of appointment exercisable jointly by nine life tenants and one remainderman is not marketable. Your proposed

legislation does not expressly cover this question, but by not distinguishing between singly held powers and jointly held powers it appears that they are to be treated alike as satisfying the policy underlying the Rule.

(2) Does a general power of appointment presently exercisable by two or more persons who have interests adverse to each other satisfy the policy against perpetuities? Under orthodox perpetuities law the answer is No. Under Civil Code § 715.8 the answer appears to be Yes. By not distinguishing between powers held with non-adverse parties and powers held with adverse parties the proposed legislation indicates a Yes answer is assumed.

In my judgment both of the above policy questions should be answered No. Moreover, there is another matter involved here besides perpetuities policy; it is tax avoidance. If many trusts of indefinite duration avoiding estate taxation throughout their duration are set up, it seems clear that the Commissioner of Internal Revenue will not sit idly by. Congress closed an estate tax loophole in Delaware caused by a unique powers doctrine (Internal Revenue Code § 2041 (a) (3), applicable in, and causing trouble in, all states). Congress can be expected to move to close any tax loophole in California which would permit trusts avoiding estate taxation possibly forever.

The best solution to the problem, in my judgment, requires two actions: (1) repeal California Civil Code § 715.8; (2) expressly state in your legislation that only general powers

presently exercisable by one person are equivalent to absolute ownership under the Rule. One action without the other would not do the job. If only Civil Code § 715.8 is repealed, it may still be inferred from Proposed Section 1391.1 (a) that general powers presently exercisable by two or more persons are to be treated as singly held general powers. If your legislation is amended to treat jointly held general powers as special powers under the Rule, and § 715.8 is not repealed, there is an apparent inconsistency in the statutes.

Sincerely,

Jesse Dukeminier, Jr.

Jesse Dukeminier, Jr.
Professor of Law

JJD:mmj

UNIVERSITY OF CALIFORNIA, BERKELEY

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SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

September 6, 1968

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

I am writing to send you some last minute comments I have concerning the tentative recommendation relating to powers of appointment, about which you wrote me on June 11. My comments will be relatively few, as I had an opportunity to discuss a number of aspects of the recommendation with Sho Sato at an earlier stage, and I note that some of our conversations seem to be reflected in some of the present recommendations.

First, a minor detail. Footnote 3 on page 8 refers to Section 2141 of the Internal Revenue Code and I assume the reference intended is to Section 2041.

I suppose the most fundamental question I would raise concerning the entire recommendation has to do with the way in which and the purposes for which the property law definition of general power of appointment has now been totally equated with the tax definition. Essentially, I have no doubt that this is a good idea as a general matter, but I have some question about the desirability of this in several instances. I think they should at least be considered. I am sure that Dick Powell has thought about these things extensively, and I have not had an opportunity to discuss this aspect of these problems with him. Nevertheless, I think I would come to different conclusions than he has and suggest that the Law Revision Commission give some special attention to these matters. It strikes me as doubtful that every power which falls within the rather broad definition of a general power should expose the subject matter to the claims of all of the donees creditors (see page 49) or should entitle the power to the benefits of a new perpetuities period at the date of exercise, rather than relating back to the date of the power's creation (see page 52). Let me use an example, which might also serve to suggest some of the problems of uncertainty contained in the definition of general powers of appointment, as well as some

of the problems resulting from this classification. Assume that the donor has created a power of appointment under which the life beneficiary of a trust can appoint principal to his ex-wife or to any of his children. Assume also that his right to so appoint is not restricted so as to preclude the appointed assets from being used to discharge his alimony or support obligations to these persons. This power would be classified for tax purposes as a general power of appointment according to the Federal Estate Tax Regulations. Should the principal of the trust estate therefore be subject to the claims of all creditors of the life beneficiary? If so, should there be no priority (reflecting a respect for the intentions of the donor) given to the needs of the divorced spouse and children? Many variations of this factual situation could be given, and some would be far less appealing than others as cases in which one might want not to allow some creditors to reach the assets. In the same factual situation, should we allow a new perpetuities period for appointed interests merely because the power was one under which the donee could appoint any of his issue or his spouse, as is frequently provided in what have generally been considered special powers of appointment but which now might be classified as general because of the absence of any express or implied restriction against use of the assets to discharge a support obligation? The degree of benefit we may think sufficient to justify taxation of appointive assets to the donee might be considerably less than that which we are prepared to treat as tantamount to outright ownership for purposes of the rule against perpetuities. In the example I have just given, the title and use of the property is effectively tied up during the donee's lifetime and is not at all similar to the case where a donee has an unrestricted general power of appointment.

Further questions relating to classification of powers that I would like to bring to your attention are the following. The comment (bottom p. 13) indicates that the exceptions contained in the tax law definition of general powers are omitted as being insignificant in connection with non-tax problems. This seems to mean that the ascertainable standard power under which a person can invade a trust for his own health, education, support and maintenance (non-taxable) would constitute a general power of appointment over the entire subject matter of the trust. If this is so, as would seem to be the case when this exception in the tax law is excluded from our legislation, such a limited "general" power would at least arguably be sufficient (a) to expose the entire trust estate to the claims of the donee's creditors and (b) to suspend the running of the perpetuity period until his death. One might think initially that it was appropriate to permit creditors to reach such property, but then one should consider what this means in terms of the donee's opportunity to subvert the objectives of the trust by deliberately incurring obligations for his own benefit extending beyond the benefits the support which the creator of the trust had sought to provide.

Further, on the matter of these definitional problems and their consequences, it seems to me that some attention should be given to the problem of joint powers of appointment. Again, the perpetuities problem is troublesome to me. Should we treat as absolute ownership for these purposes a power that is bene-

ficial to the donor or his estate but which must be exercised with the consent of a trustee or some other person? Does such a power satisfy the policy underlying the rule against perpetuities?

On page 16, Section 1381.4 defines an "imperative" power as one which exists when the creating instrument manifests an intent to benefit permissible appointees even if the donee fails to exercise the power. I wonder if it is desirable to leave no guidance for the court in determining when such an intent is manifested in the instrument. For example, is it now clear that there is sufficient manifestation of such intent whenever the permissible appointees are described in terms of a reasonably definite or ascertainable class (e.g., "children" or "descendants") and no takers in default of appointment are specified. Under present law this would be sufficient.

Section 1388.2 (page 38) replaces Civil Code Section 1060, which deals with the release of powers of appointment. I wonder if it would not be desirable to have any statute dealing with releases of powers of appointment also deal in some fashion with release of powers held in a fiduciary capacity. Since the widespread adoption of statutes like our Section 1060, this deficiency has been rather frequently pointed out. Some important aspects of what we refer to as "post mortem estate planning" depend on timely release or partial release by a fiduciary, who otherwise wishes to accept his appointment, of powers which have been improperly planned or drafted so as to result either in a general power of appointment for tax purposes or in a power which will impair intended qualification of a gift for the marital or charitable deduction. Here it might be worth making clear that a person can accept his fiduciary position and yet renounce a power given him in a fiduciary capacity, possibily if and to the extent it is consented to by the person or persons whose beneficial interest would thereby be diminished.

I hope these comments may be of some value to you. If you have questions about any of my comments, I would be glad to try to answer them. I just thought the Commission might want to consider some of these questions at this time, even though I realize that some members may have thought of them already and certainly that Professor Powell has thought them through thoroughly in reaching his own conclusions. You have certainly been fortunate to have him available to work on this project.

Sincerely,

Edward C. Halbach, Jr.

Edward C. Halbach, Jr.
Dean

POWERS EXERCISABLE BY WRITTEN INSTRUMENT OTHER THAN A WILL WHERE THE TRANSFER OF THE PROPERTY SUBJECT TO THE POWER IS DELAYED UNTIL THE DEATH OF THE DONEE.

Excerpts from BANK OF AMERICA - "Suggested Provisions For Wills and Trusts, Third Edition - 1960"

Page 76 - Paragraph (4) --

"Upon the death of my wife, Margaret Brown, if she shall survive me, after first paying any inheritance, estate or other death taxes that may by reason of my wife's death be due upon or in connection with her share of the trust estate or any portion thereof and which the Trustee may be required to pay, the Trustee shall distribute and deliver all of the remaining balance of her share of the trust estate, including any income from such share that may then be accrued or undistributed by the Trustee, to such person or persons, including the estate of my wife if she shall so provide, and in such amounts or proportions as my wife may designate and appoint in the last unrevoked written instrument other than a Will executed by her and on file with the Trustee at the time of her death. This general power of appointment granted to my wife with respect to such remaining balance of her share of the trust estate if she survives me may be so exercised by her alone and at any time after my death, and any exercise of such power may subsequently be revoked or modified by a written instrument other than a Will executed by her and filed with the Trustee as hereinabove provided . . . . . "

'age 28 - Alternative Paragraph (e): Limited power of appointment to wife --

"It is suggested that provision be made for the exercise of a power of appointment by a written instrument other than a Will executed by the donee of the power and filed with the trustee (as indicated in the above Alternative Paragraph (e)), rather than for it to be exercised by the Will of the donee of the power. The former method of exercising a power of appointment is just as flexible as the Will method, since such written instrument may at any time be modified or revoked by the donee of the power during his lifetime; and it has the advantage that, in some cases at least, the Will of the donee of the power may not be established by probate proceedings, for the reason that he leaves no estate requiring administration. Further, under Probate Code Secs. 125 and 126 it appears that a devise or bequest of all the testator's property, or of the residue of his estate, has the effect of exercising any power of appointment by Will which he may have, even though the Will makes no specific reference to exercising such power; hence, it is easily possible for the testator to exercise such power by his Will without realizing that he is doing so. If in a particular case, however, the testator desires that the power of appointment be exercised by the donee's "last Will duly admitted to probate," instead of by a written instrument other than a Will executed by the donee and filed with the trustee, then appropriate changes will have to be made in the above Alternative Paragraph (e)."

cerpts from SECURITY FIRST NATIONAL BANK -

"Forms of Wills and Trusts - Seventh Edition,
Third Printing, 1967"

"There is hereby conferred upon my wife, if she shall survive me, the er of appointment over the whole or any part of Trust "B" which may remain disposed of at her death, including accrued and undistributed income thereof. trust estate may be appointed outright or in trust and may be made subject the further exercise of powers of appointment, within limits, dating from my ath, prescribed by the laws relating to perpetuities. The power shall be ercised only by written instrument, other than a Will, on file with the Trust- in its trust department where this trust is being administered at the death my wife. It may be exercised from time to time and each appointment may be evoked or modified in the same manner in which it is exercised. The power may e exercised in favor of any person or persons." (emphasis added)

Excerpt from SOUTHERN CALIFORNIA FIRST NATIONAL BANK -- Sample Form,

"Will of JOHN SMITH"

Second Alternative - under (a) Provisions of Trust "A", (where wife is to have a general power of appointment effective at her death) --

"Anything herein to the contrary notwithstanding, if my wife survives me, then she shall have the absolute power exercisable only by a written instrument other than a Will delivered to the Trustee during her lifetime to appoint any of the principal and any undistributed net income of Trust "A" in favor of her estate or any person; provided, however, that any distribution in accordance with the exercise of said power shall be made after my wife's death."

Similar language is recommended by WELLS FARGO BANK -- in their "Wills and Trust Provisions, 1957 Edition, Page 57."