

10/9/68

Memorandum 68-99

Subject: Study 69 - Powers of Appointment

Attached are two copies of a revised tentative recommendation relating to powers of appointment. It incorporates the changes made at the last meeting and other revisions suggested by Commissioners who turned in edited copies of the previous recommendation. In addition, it includes some nonsubstantive staff revisions. We must approve this recommendation for printing at the October meeting if we are to submit it to the 1969 Legislature. Accordingly, please mark your suggested editorial revisions on one copy and return it to the staff at the October meeting.

The following are the matters noted for your attention.

Section 1380.2

The second sentence was added to this section at the request of the Commission. The first two paragraphs of the Comment were also completely revised to include language adopted at the September meeting.

Section 1381.3

This section was tabulated and the Comment was completely redrafted to make clear the distinctions between "testamentary," "presently exercisable" and "postponed" powers. Two examples of commonly used postponed powers were included to illustrate and satisfy a problem raised by the Bankers Legislative Committee.

Section 1384.1

Subdivision (b) was added to this section at the direction of the Commission at the last meeting. The second paragraph of the Comment was also added to explain subdivision (b).

Section 1385.1

This section was revised to combine former Section 1383.1 and Section 1385.1. Subdivision (a)(formerly Section 1383.1) is simply adopted without change. Subdivision (b)(formerly subdivision (a) of Section 1385.1) is revised in accordance with the decisions of the Commission at the last meeting, to require compliance by the donee in all cases with limitations specified in the creating instrument as to the manner, time, and conditions of the exercise of a power of appointment. The sole exception to this rule is set forth in subdivision (c) (formerly subdivision (b) of Section 1385.1) which permits a power stated to be exercisable by an inter vivos instrument to also be exercisable by will.

Section 1385.3

Subdivision (b) of Section 1385.3 was revised so that when a person whose consent is required becomes incapable of consenting, the consent on behalf of such person may be given by his guardian or conservator. The change was made to avoid a possible tax trap that might occur if a power is converted into a general power by simply dispensing with the consent of a person becoming legally incompetent.

Section 1386.2

Section 1386.2 was revised to reflect the Commission's decision that a residuary clause should exercise a general power of appointment unless the creating instrument requires a specific reference to either the power or the creating instrument or the donee manifests an intent not to so exercise the power. The Comment, of course, was redrafted in accordance with this change.

Section 1387.1

At the Commission's direction, this section was revised to include the limiting introductory clause "Unless the creating instrument clearly manifests a contrary intent." The staff was, however, also directed to check this inclusion against the Restatement rule. It was discovered that the Restatement does not include such a limitation, and the Comments to Section 356 and 357 of the Restatement point out that such limitations are both inconsistent with the nature of a general power (i.e., that it is equivalent to outright ownership) and are generally avoidable by the subterfuge of appointment to the donee's estate (or the donee himself) and thence appointed subject to conditions, lawful restraints, in trust, and so on. The staff recommends therefore that the section be restored to its original form by striking the introductory clause.

Section 1387.2

The first paragraph of the Comment to Section 1387.2 was revised and expanded to discuss the exercise of a special power by the creation of a special power in a permissible appointee. Special mention was made of the fact that a special power is not the equivalent of outright ownership and that the creation of a special power will not therefore satisfy a minimum share under an imperative power.

Section 1388.2

Subdivision (c) of Section 1388.2 was revised in accordance with the decisions of the Commission at the last meeting. Two minor changes were, however, made in the language adopted. In paragraph (1) of subdivision (c), the phrase "if such person cannot with due diligence

be found within the state" was substituted for "if the circumstances are such that personal service of process could not be made on such person." The substitution simply makes explicit the test intended here. In subparagraph (ii) of paragraph (3) the phrase "or has a place of business" was deleted. As explained in the Comment, this provision would have required a check in each county in the state to determine whether a release had been delivered to the county recorder since it is always possible that the donee may have had a place of business in any county in the state.

Left unresolved is the problem generally of proving delivery after the donee's death and specifically the proof of diligent efforts by the donee to find the person to whom he was to have delivered his release. One possibility is to provide for an affidavit by the donee concerning his efforts. The affidavit could perhaps be recorded and be deemed presumptive evidence of diligent search in the event a contest subsequently occurs. The last paragraph of the Comment to this Section (page 43) was added to explain the revision of this subdivision.

Section 1389.2

Subdivision (a) and the first paragraph of the Comment to Section 1389.2 (pages 45 and 46) have been substantially revised in an attempt to resolve the problems of distribution arising where a donee dies having partially exercised an imperative power. The staff checked the Restatement and the statutes of the other states and found that they did not cover this situation and provided only for the situation where the donee fails completely to exercise an imperative power. In this situation, the Restatement, the other states, and our tentative recommendation all provide for equal distribution among the permissible

appointees. Where there has been a partial appointment under an imperative power, the staff feels that this demonstration of the donee's intent should be honored where possible by giving effect to the partial appointment and then dividing the property not appointed equally among all the permissible appointees. Where this equal division fails to satisfy a minimum distribution requirement set by the donor, the appointees who have received a partial appointment will have to refund a pro rata portion of their share in an amount sufficient to fulfill the minimum distribution. Examples illustrating this solution to the problem are included in the Comment on page 46.

Section 1389.3

This is a section that disturbed Professor Rabin and perhaps remains unsatisfactory. Throughout this recommendation a general power of appointment is treated as being the substantial equivalent of outright ownership. Nevertheless, here we hedge this principle with potentially restrictive rules of "capture." It would seem that unless either the creating instrument or the instrument of appointment manifests a contrary intent in all cases where the donee of a general power makes an ineffective appointment, he sufficiently manifests an intent to exercise control over the property, and the property ineffectively appointed should pass to the donee or his estate rather than revert to the donor or the donor's estate for distribution. It should be noted that by definition the power is a general power and the appointive property will therefore be included in the donee's estate for tax purposes and the problem we are concerned with here is simply that of distribution.

The rule suggested above could be adopted by revising Section 1389.3 to read:

1389.3. (a) Except as provided in subdivision (b), when the donee of a discretionary power of appointment fails to appoint the property or releases the entire power, the appointive property passes to the person or persons named by the donor as takers in default or, if there are none, reverts to the donor.

(b) Unless either the creating instrument or the instrument of appointment manifests a contrary intent, when the donee of a general power of appointment makes an ineffective appointment, in whole or in part, the appointive property not effectively appointed, passes to the donee or his estate.

If the revision above is adopted the Comment to this section would, of course, also be redrafted.

Section 1390.3

In accordance with the decision at the last meeting, this section has been redrafted to require other assets of the donee to be resorted to by creditors before the appointive property is reached. No attempt, however, has been made to exclude the two basic kinds of powers excepted under the tax law. These are: (1) a power exercisable only with the consent of an adverse party or the creator and (2) a power exercisable subject to an ascertainable standard. In both these situations, the donee may lack the substantial equivalent of full ownership, but Section 1390.3 makes the appointive property available to creditors.

Section 1391.1

This section and the Comment thereto has been revised in accordance with the decisions made at the last meeting.

Section 1392.1

The Commission at the last meeting directed the staff to redraft this section to provide in essence that an exercise of a power of appointment be revocable until title to the appointive property has passed or until the property has become distributable.

This was done and the section and Comment implementing this directive is attached hereto as Exhibit 1.

However, in checking back into the Restatement and the statutes of the other states, it was learned that the rule presently provided in Section 1392.1 is universal. The principle behind the rule is that a transfer of property should be irrevocable unless the power to revoke is expressly reserved. As applied to the exercise of a power of appointment, it seems to be assumed that "exercise" means "effective exercise." For example, a donee's will exercising a power of appointment is not effective until the donee's death. Similarly an exercise to take effect at death is revocable until death. The Comment to Section 1392.1 was completely revised to reflect this analysis and the staff feels that this will be adequate without changing the Section.

Respectfully submitted,

Jack Horton
Junior Counsel

EXHIBIT I

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

(b) Unless made expressly irrevocable by the creating instrument or the instrument of exercise, an exercise of a power of appointment is revocable so long as the title to the appointive property has not passed or the appointive property has become distributable pursuant to such appointment.

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

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

Under subdivision (b), an exercise of a power of appointment is revocable so long as title to the appointive property has not passed of the appointive property has not become distributable, unless the creating instrument or instrument of exercise provides otherwise. This subdivision embodies a policy that the donee should be permitted to

modify or revoke an exercise of the power so long as the appointive assets have not been affectively transferred.

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

October 8, 1968

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

POWERS OF APPOINTMENT

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

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE

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

[Letter of Transmittal on Letterhead]

October 21, 1968

To His Excellency, Ronald Reagan
Governor of California and
The Legislature of California

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

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

Respectfully submitted,

Sho Sato
Chairman

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TENTATIVE
RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION
relating to

POWERS OF APPOINTMENT

BACKGROUND

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

The most common use of powers today is in connection with the so-called "marital deduction trust." Under this arrangement, the husband leaves his wife a sufficient portion of his estate to obtain full benefit of the marital deduction. She is given a life interest in such portion together with an unrestricted power to appoint the remainder,

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

Apart from their usefulness in minimizing death taxes, powers make possible a flexibility of disposition that can be achieved in no other way. When a husband leaves his property in trust for the benefit of his wife during her lifetime and, upon her death, to such of his children and in such proportions as his wife may appoint, he makes it possible for the ultimate distribution to be made in accordance with changes that occur between the time of his death and the time of his wife's death. He has

limited the benefits of his property to the objects of his bounty, but he has also permitted future distributions of principal and income to take account of changes in the needs of beneficiaries which he could not possibly have foreseen. Births, deaths, financial successes and failures, varying capacities of individuals, and fluctuations in income and property values can all be taken into account. Moreover, the limitations imposed by the donor on the manner of exercising the power and the persons to whom appointments can be made give him control of the property after he has transferred it. He can make the power exercisable during the lifetime of the donee (a power that is "presently exercisable" or one that is "postponed" until a stated event during the lifetime of the donee), or he can make the power exercisable only by will ("testamentary power"). He may permit the donee to appoint only among a specified group of persons, such as his children ("special power"), or he may create a broad power permitting the donee to appoint to herself, her estate, or her creditors ("general power").

Despite the many advantages of powers of appointment, uncertainties exist as to their validity and interpretation under California law. It was not until 1935 that an appellate court held that the common law of powers obtains in this state. This decision was helpful in assuring lawyers

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

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

that powers of appointment are valid devices and are governed by the evolving law declared in judicial decisions. Nevertheless, the law of powers remains in a state of arrested development for want of a sufficient body of authoritative case law to resolve the significant issues. The uncertainty as to the non-tax consequences of powers may have caused some estate planners to be hesitant in using powers and has sometimes made it necessary for lawyers and judges to investigate large numbers of cases, often from other jurisdictions, before drafting an instrument with a power or deciding a question in litigation.

RECOMMENDATIONS

The Commission recommends that California adopt a statute stating the more important rules governing powers of appointment and providing that the common law rules relating to powers of appointment are applicable unless modified by statute. New York, Minnesota, Wisconsin, and Michigan have recently enacted similar statutes. The enactment of such a statute in California would be of significant value in clarifying the law of powers and creating confidence in their use. Although the statute generally should follow common law rules, a few significant departures from the common law rule or existing California law are recommended:

1. Distinction between "general" and "special" powers. "General" and "special" powers should be defined so as to conform to the definitions of "general" and "limited" powers found in the state inheritance tax law and the definition of "general power" in the Federal estate

tax law. This approach would accord with the general professional usage of the terms and would base the distinction upon the equivalency of ownership in the donee of the general power, rather than upon the number of permissible appointees. This distinction, however cast, is important primarily in regard to the rights of creditors and the rule against perpetuities.

2. Exercise of general power of appointment by residuary clause in donee's will. In Estate of Carter, 47 Cal.2d 200, 302 P.2d 301 (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. Under the Carter rule, the donee of a power may, through the unintended exercise of the power, cause disadvantageous--and possibly disastrous--tax consequences for his estate. See California Will Drafting § 7.11 (Cal. Cont. Ed. Bar 1965). The rule may also result in the passing of the appointive property to residuary legatees where the donee intended the property to pass to the takers in default.

The Carter rule should be changed to permit evidence apart from the will that the donee did not intend to exercise a general power of appointment. But, a residuary clause should exercise a general power of appointment unless the will lacks a specific reference to the power required by the donor or the donee has manifested his intent--in his will or otherwise--not to exercise the power.

3. Preference for exclusive powers of appointment. Where a power is created in a donee to appoint to a class such as his children, the question arises as to whether the power is an exclusive power, which permits the donee to appoint all of the property to one of his children, or a non-exclusive power, under which he must appoint some of the property to each of the children. At the common law, the preference was for exclusive powers. In Estate of Sloan, supra, however, the Court of Appeal held that in California the preference is for non-exclusive powers. Therefore, a California donee must appoint to each of the permissible objects under a special power of appointment unless the donor has manifested a contrary intention in the creating instrument. This holding encourages litigation to determine the amount which must be appointed to each permissible object of a power and restricts the flexibility of powers, which is one of their principal advantages. See California Will Drafting § 13.4 (Cal. Cont. Ed. Bar 1965). 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 donee. One of the most unsatisfactory aspects of the common law of powers of appointment is the rule governing the rights of creditors of the donee. Under the common law doctrine of "equitable assets," creditors of the donee can reach the appointive assets only when a general testamentary power of appointment has been exercised in favor of a creditor or volunteer (Restatement of Property § 329) or when an inter vivos exercise of a power results in a fraud on creditors (Restatement of Property § 330). Property covered by an unexercised power of appointment is not subject to the claims of creditors. Restatement of Property § 327. These rules apparently constitute present California law. See Estate of Masson, 142 Cal. App.2d 510, 298 P.2d 619 (1956).

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

Accordingly, the Commission recommends that, to the extent that the donee's own property is not adequate to satisfy the claims of the creditors, the creditors of the donee may be permitted to reach property.

subject to a presently exercisable general power, or subject to a general testamentary power after the donee has died, to the same extent as if the property were owned by the donee.² The recommended rule is consistent with the rule adopted by modern legislation in other states³ and the rules that treat such property as owned by the donee for the purposes of death taxes⁴ and bankruptcy.⁵

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2. If the property has been appointed by an inter vivos instrument, the property should be subject to creditors' claims if, had it been the donee's own property, the property could have been reached by the creditors under the rules relating to fraudulent conveyances. See Restatement of Property § 330.
 3. See Mich. Stat. Ann. § 26.155 (113)(Supp. 1967); Minn. Stat. Ann. § 502.70 (Supp. 1967); N.Y. Estates, Powers and Trusts Law § 10-7.2 (1967); Wis. Stat. Ann. § 232.17 (Supp. 1967).
 4. Section 2041 of the Internal Revenue Code requires that property subject to a general power of appointment be included in the donee's gross estate for estate tax purposes. Similarly, the California Revenue and Taxation Code Section 13696 provides that a taxable inheritance from the donee occurs whenever a person takes property either by the exercise or the nonexercise of a general power.
 5. The Federal Bankruptcy Act includes in a bankrupt's assets all property subject to his appointment under a general power of appointment that is presently exercisable at the moment of bankruptcy. 11 U.S.C. § 110(a)(3).

PROPOSED LEGISLATION

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

I

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

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

TITLE 7. POWERS OF APPOINTMENT

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

TITLE 7. POWERS OF APPOINTMENT

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

CHAPTER 1. GENERAL PROVISIONS

Section 1380.1. Common law applies unless modified by statute

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

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

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

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

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

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

Provisions similar to Section 1380.2 exist in other states. See Mich. Stat. Ann. § 26.155(122)(Supp. 1967); Wis. Stat. Ann. § 232.21 (Supp. 1967).

CHAPTER 2. DEFINITIONS; CLASSIFICATION OF POWERS
OF APPOINTMENT

Section 1381.1. Definitions

1381.1. As used in this title:

- (a) "Donor" means the person who creates or reserves a power of appointment.
- (b) "Donee" means the person to whom a power of appointment is given or in whose favor a power is reserved.
- (c) "Appointee" means the person in whose favor a power of appointment is exercised.
- (d) "Permissible appointee" means a person in whose favor a power of appointment can be exercised.
- (e) "Appointive property" means the property or interest in property which is the subject of the power of appointment.
- (f) "Creating instrument" means the deed, will, trust agreement, or other writing or document that created or reserved the power of appointment.

Comment. Section 1381.1 defines terms that are used throughout the title. Subdivisions (a), (b), and (c) are substantially the same as Restatement of Property Section 319(1), (2), and (4). Subdivisions (d) and (e) adopt terms different from the Restatement of Property but are substantially the same in meaning as Section 319(3) and (6). Subdivision (f) is similar to Michigan Statutes Annotated Section 26.155(102)(g)(Supp. 1967).

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

1381.2. (a) A power of appointment is "general" 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 be 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 of 1954 § 2041(b)(1). Although this title generally codifies the common law, Section 1381.2 departs from the common law distinction stated in Restatement of Property, Section 320. Instead, it adopts the prevailing professional usage which is in accord with the definitions contained in the federal and state death tax laws. Section 1381.2 is similar to provisions adopted in other states. See Mich. Stat. Ann. § 26.155(102)(h), (i) (Supp. 1967); N.Y. Estates, Powers and **Trusts 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. Omission of the exceptions follows the example of Michigan, New York, and Wisconsin.

The language in subdivision (a) of Section 1381.2 is similar to that used in the Internal Revenue Code to define 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. 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(c), 25.2514-1(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.

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

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

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

(b) A power of appointment is "presently exercisable" if it is not testamentary and:

(1) It is effectively exercisable from the time of its creation; or

(2) If its effective exercise was postponed, the period of postponement has expired.

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

A power may be neither "testamentary" nor "presently exercisable." A power is not "presently exercisable" if it is "postponed." A power is "postponed" if: (1) The creating instrument provides that the power may be exercised only after a specified act or event occurs or condition is met (for example, that the donee reach the age of 25), and such act or event has not occurred or the condition has not been met; or (2) the creating instrument provides that an exercise of the power is effective, (for example, the appointive property is distributable pursuant to an exercise of the power) only after a specified act or event occurs or condition is met, and such act or event has not occurred or the condition has not been met. Examples of a power that is

"postponed" are: (1) The creating instrument provides that a wife's power of appointment over certain property held in trust by a bank is exercisable "only by a written instrument other than a will on file with the trustee at the death of my wife" and, although the wife has filed a written instrument with the trustee designating the appointees, she is still alive. (2) The appointive property is held in trust by a bank, the creating instrument provides that "any distribution of the appointive property in accordance with an exercise of the power of appointment by written instrument delivered to the trustee during the donee's lifetime shall be made after the donee's death," and, although the donee has delivered a written instrument to the trustee designating the appointees, the donee is still alive. When the term "power not presently exercisable" is used in this title, it includes both testamentary powers and powers that are otherwise postponed.

Section 1381.3 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. 1967) (defining a power of appointment that is "presently exercisable"); N.Y. Estates, Powers and Trusts 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 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 either imperative or discretionary. If a power is imperative, the donee must exercise it or the court will divide the appointive property among the potential appointees. See Section 1389.2. The duty to make an appointment is normally considered unenforceable during the life of the donee. See Restatement of Property § 320, special note at 1830 (1940). A discretionary power, on the other hand, may be exercised or not exercised as the donee chooses. Nonexercise will result in the property's passing to the takers in default or returning to the donor's estate. See Section 1389.3.

Section 1381.4 does not state what constitutes a manifestation of intent that "the permissible appointees be benefited even if the donee fails to exercise the power." The common law rules that determine when such an intent has been manifested apply. See Section 1380.1 and the Comment thereto.

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Section 1381.4 is similar to New York Estates, Powers and Trusts 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, 367, statutory note at 2033 (1940). See also O'Neil v. Ross, 98 Cal. App. 306, 277 Pac. 123 (1929)(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 having the capacity to transfer the interest in property to which the power relates.

Comment. Section 1382.1 codifies existing law. See Swart v. Security-First Nat'l Bank, 48 Cal. App.2d 824, 120 P.2d 697 (1942).

CHAPTER 4. EXERCISE OF THE POWERS OF APPOINTMENT

Article 1. Donee's Capacity

Section 1384.1. Donee's capacity

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

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

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

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

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

Subdivision (b) states a requirement applicable to a donee who is a minor. This requirement is in addition to the general requirement stated in subdivision (a) (e.g., donee not judicially determined to be of unsound mind) which a minor donee also must

satisfy. Subdivision (b) adopts the same rules that determine whether a minor can make a valid will (Probate Code Section 21) or can enter into a transaction respecting property or his estate that cannot be disaffirmed (Civil Code Section 25).

Article 2. Scope of Donee's Authority; Formalities Required

Section 1385.1. Scope of donee's authority generally

1385.1. (a) 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.

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

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

Comment. Subdivision (a) of Section 1385.1 codifies the common law rule stated in Section 324 of the Restatement of Property and is substantially the same as New York Estate, Powers and Trusts Law Section 10-5.1 (1967).

Under subdivision (b) of Section 1385.1, 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 Section 346 of the Restatement of Property. However, one exception not found in the common law is made to this rule in subdivision (c).

Subdivision (c) provides that a power of appointment stated to be exercisable by an inter vivos instrument is also exercisable

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

Section 1385.2. Requirement of specific reference to power

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

Comment. Section 1385.2 permits a donor to require an express reference to the power to assure a 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. 1967) and Wisconsin Statutes Annotated Section 232.03(1)(Supp. 1967).

Section 1385.3. Power requiring consent of donor or other person

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

(b) Unless the creating instrument otherwise prescribes:

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

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

(c) Unless expressly prohibited by the creating instrument, a consent may be given before or after the exercise of the power by the donee.

Comment. Subdivisions (a) and (b) of Section 1385.3 reflect a policy similar to that embodied in Civil Code Section 860, Michigan Statutes Annotated Section 26.155(105)(4)(Supp. 1967), Minnesota Statutes Annotated Section 502.68 (1945), New York Estates, Powers and Trusts Law Section 10-6.4 (1967), and Wisconsin Statutes Annotated Section 232.05(3)(Supp. 1967). Subdivision (c) merely makes clear that the consent may precede or follow exercise of the power.

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

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

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

Comment. Section 1385.4 reflects the same policy as Civil Code Section 860. It embodies the rule stated in Michigan Statutes Annotated Section 26.155(105)(5)(Supp. 1967), Minnesota Statutes Annotated Section 502.67(1947), New York Estates, Powers and Trusts Law Section 10-6.7 (1967), and Wisconsin Statutes Annotated Section 232.05(4)(Supp. 1967).

Section 1385.5. Power of court to remedy defective exercise not affected

1385.5. Nothing in this chapter affects the power of a court of competent jurisdiction 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 Trusts Law Section 10-6.2 (1967).

Article 3. Donee's Required Intent

Section 1386.1. Manifestation of intent to exercise

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

(b) Such a manifestation exists where:

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

(2) The donee, in an instrument, sufficiently identifies appointive property and purports to transfer it.

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

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

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

Comment. Section 1386.1 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 general requirement imposed by Section 1386.1 is that the donee must manifest an intent to exercise the power.

Paragraphs (1), (2), (3), and (4) of subdivision (b) give examples of when the donee has sufficiently manifested his intent under Section

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1386.1 to exercise the power. The listing is not exclusive. The list is similar to New York Estates, Powers and Trusts Law Section 10-6.1(a) (1), (2), (3)(1967). See also Mich. Stat. Ann. § 26.155(104)(Supp. 1967).

Section 1386.2. Exercise by residuary clause or other general language

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

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

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

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

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

necessary inference, by the terms of his will or, contrary to Estate of Carter, by evidence apart from the will. Section 1386.2 thus eliminates the trap for the unwary that defeated the donee's clearly provable intent in Estate of Carter.

Section 1386.3. Will executed before power created

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

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

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

Comment. Section 1386.3 codifies the rule of California Trust Co. v. Ott, 59 Cal. App.2d 715, 140 P.2d 79 (1943). It also states the rule contained in Section 344 of the Restatement of Property. Section 1386.3 requires that the power of appointment be one "existing at the donee's death." Thus, where the donor executes a will creating a power exercisable by will and the donee executes a will purporting to exercise that power and thereafter the donee dies and later the donor dies without having changed his will, the attempted exercise by the donee is ineffective because the power of appointment was not one "existing at the donee's death," since the donor could have revoked or changed his will at any time before his death.

Article 4. Types of Appointments

Section 1387.1 General power

1387.1. (a) Unless the creating instrument clearly manifests a contrary intent, 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 Sections 356 and 357 of the Restatement of Property. It makes clear that, under a general power to appoint, the donee has the same freedom of disposition that he has with respect to assets owned by him. The types mentioned in subdivision (a) are the ones about which question has most often arisen.

Section 1387.2. Special power

1387.2. Subject to the limitations imposed by the creating instrument, the donee of a special power may make any of the types of appointment permissible for the donee of a general power under Section 1387.1 to the extent that the persons benefited by the appointments are permissible appointees.

Comment. Section 1387.2 embodies the rules stated in Sections 358 and 359 of the Restatement of Property except that Section 1387.2 authorizes the donee of a special power to exercise the power by creating a special power of appointment in a permissible appointee. Under Section 359 of the Restatement of Property, the donee could only exercise the power by creating a new special power under certain circumstances. Since the donee can appoint outright to one of the permissible appointees of the special power, it would be undesirable to refuse to allow him to give such a person a special power to appoint. See 3 Powell, Real Property ¶ 398 at nn. 28-30 (1967). A special power is not, of course, the equivalent of outright ownership and the creation of a special power in a permissible appointee may fail therefore to constitute a valid exercise of an imperative power. For example, where each of the permissible appointees under an imperative power is to receive not less than 10 percent of the appointive property, the creation of a special power in a permissible appointee would not satisfy this 10-percent requirement.

The donee of a special power of appointment may not have the same freedom as to types of appointment that the donee of a general power has; other rules of law may limit his ability to appoint in a

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

Section 1387.3. Exclusive and nonexclusive powers

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

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

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

Section 1387.3 changes California law as developed in Estate of Sloan, 7 Cal. App.2d 319, 46 P.2d 1007 (1935), which is contrary to many common law decisions. See 69 A.L.R.2d 1285 (1960). A similar provision

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has been adopted in other states. Mich. Stat. Ann. § 26.155(107)(Supp. 1967); N. Y. Estates, Powers and Trusts Law § 10-5.1 (1967); Wis. Stat. Ann. § 232.07 (Supp. 1967).

Article 5. Contracts to Appoint; Releases

Section 1388.1. Contracts to appoint

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

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

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

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

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

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

Subdivision (b) also provides that the promisee can obtain neither specific performance nor damages for the breach of a promise to appoint although the donee is not prevented from obtaining restitution of value given for the promise to appoint. Restitution generally will be available unless precluded by other factors. This is the common law rule. Restatement of Property § 340 (1940).

Section 1388.2. Release of power of appointment

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

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

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

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

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

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

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

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

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

The last sentence of subdivision (b) is new. California has taken the position that a power created to be exercisable only by will cannot be exercised by inter vivos act. Briggs v. Briggs, 122 Cal. App.2d 766, 265 P.2d 587 (1954); Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940). The last sentence of subdivision (b) 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 last sentence of subdivision (b) 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 added sentence precludes the use of a release to defeat the donor's intention as to the time of exercise of a power of appointment. Compare Section 1388.1(b)(contract to appoint).

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

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

CHAPTER 5. EFFECT OF FAILURE TO MAKE

EFFECTIVE APPOINTMENT

Section 1389.1. Unauthorized appointments void as to excess only

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

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

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

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

Section 1389.2. Nonexercise or improper exercise of an imperative power

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

(b) Where an imperative power of appointment has been exercised defectively, either wholly or in part, its proper execution may be adjudged in favor of the person or persons 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 of appointment is created and the donee of the power dies without exercising it, the

appointive assets go equally to the permissible objects of the power. Where there has been a partial appointment, unless the creating instrument or the donee has manifested a contrary intent, the assets already appointed are not thrown into a hotchpot and are considered only to the extent necessary to satisfy a requirement set by the donor that each of the permissible appointees receive a certain minimum amount. The following illustrates these rules. The donor of a power specifies that the donee is to appoint at least 25 percent of the corpus of a trust to each of three permissible appointees (A, B, and C). (1) Donee appoints 10 percent to A, but fails to appoint the remainder. B and C each take 30 percent and A takes 40 percent (30 plus 10). (2) Donee appoints 40 percent to A, but fails to appoint the remainder. Since 60 divided by 3 equals 20, the donee failed to satisfy the minimum distribution requirement set by the donor. A therefore must "refund" a portion of the property he receives. The appointive property will be distributed 25 percent (20 plus 5) each to B and C and 50 percent (40 plus 20 minus 10) to A. (3) Donee appoints 60 percent to A, 40 percent to B. This again fails to satisfy the minimum distribution requirement. To obtain the 25 percent required, A and B must "refund" on a pro rata basis and distribution is made accordingly--45 percent (60 minus 15) to A, 30 percent (40 minus 10) to B and 25 percent to C. The arithmetic can become quite complex but the principle remains the same. Unless the creating instrument or the donee, in writing, manifests a contrary intent, a partial appointment is to be treated as reflecting an intended preference. The requirement of a writing by the donee is consistent with Probate Code Sections 1050-1054 concerning advancements.

Under subdivision (b), if the donee exercises the power defectively (e.g., without proper formalities), the court may allow the 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 appointee who possesses the right to compel exercise may also compel its exercise.

Section 1389.3. Effect of failure to make effective appointment

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

(b) 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 a contrary intent.

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

Comment. Section 1389.3 states the rules determining to whom property 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 Section 365(2), (3), of the Restatement of Property. Where the donee of a general power of appointment appoints to a trustee upon a trust which fails, the intent, if any, manifested in the creating instrument or in the instrument of appointment as to the disposition of the appointive property under such circumstances prevails. Absent such a manifestation of intent, there is a resulting trust in favor of the donee or his estate. If the creating instrument or instrument of appointment indicates an intent that there not be a resulting trust but does not manifest an intent as to the disposition of the property under the circumstances, the property will pass to the takers in default or, if there are none, to the donor of his estate under subdivision (a). Only England, Illinois, and Massachusetts have considered the problem, and all have adopted the substance of the rule of subdivision (b). See 3 Powell, Real Property ¶ 400 at n.3 (1967).

Subdivision (c). When the donee of a general power of appointment makes an ineffective appointment other than to a trustee upon a trust which fails, the intent, if any, manifested in the creating instrument as to the disposition of the appointive property under such circumstances prevails. Absent a manifestation of contrary intent in the creating instrument, the appointive property passes to the donee or his estate if the instrument of appointment "manifests an intent to assume

control of the appointive property for all purposes"; otherwise, the appointive property passes to the takers in default or, if there are none, reverts to the donor or his estate under subdivision (a). Only England, Illinois, Maryland, and Massachusetts have considered this problem, and all have adopted the rule of subdivision (c). See 3 Powell, Real Property ¶ 400 at nn.6-8 (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, at 2025 (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 or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective, the appointment is to be effectuated, if possible, by applying the provisions of Probate Code Section 92 as though the appointive property 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 Sections 349 and 350 of the Restatement of Property. It is broadened to cover special powers by employing the language used by Michigan Statutes Annotated Section 26.155(120)(Supp. 1967). Section 1389.4 is necessary because Probate Code Section 92 does not specifically deal with lapse of a testamentary appointment. Section 1389.4 is not intended to cover the attempt to appoint property inter vivos to a predeceased appointee, but does apply to an instrument other than a will effective only at the death of the donee. Such an instrument is for all practical purposes identical to a will and is accorded the same effect.

CHAPTER 6. RIGHTS OF CREDITORS

Section 1390.1. Donor cannot modify rights of creditors

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

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

Section 1390.2. Special power

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

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

Section 1390.3. General power

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

(b) Upon the death of the donee, subdivision (a) applies to:

(1) A general testamentary power of appointment.

(2) A general power of appointment the exercise of which can take effect only upon the death of the donee.

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

Comment. Section 1390.3 states the rule with respect to the availability of property subject to a general power of appointment to satisfy the debts of the donee. It is intended to make appointive property available to satisfy creditors' claims when the donee has the equivalent of full ownership of the property.

Subdivision (a) provides that the creditors of a donee possessing a power of appointment that is both general and presently exercisable can reach the appointive property for the satisfaction of their claims. However, these creditors must first exhaust the remainder of the donee's assets before resorting to the appointive property. Subject to this

limitation, 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 would 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).

Subdivision (b) provides that the same rule applies to property which is covered by a general testamentary power (or the equivalent) which has, in effect, become presently exercisable because of the death of the donee. In such case, the appointive assets have come under the power of disposition by the debtor donee and hence are treated the same as other assets of the decedent. Paragraph (2) of subdivision (b) is not strictly necessary since the power of appointment there described becomes "presently exercisable" upon the death of the donee. Nevertheless, to make this clear, the paragraph has been included in subdivision (b).

Subdivision (c) provides that 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.

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

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

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

CHAPTER 7. RULE AGAINST PERPETUITIES

Section 1391.1. Time at which permissible period begins

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

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

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

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

Subdivision (a) is limited to a case where the power of appointment is presently exercisable by only one person. Subdivision (b), rather than subdivision (a), applies to a general power held by two or more persons. This distinction between general powers held by one person and general powers held by two or more persons is consistent with the rule in most other states. 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). It should be noted that, insofar as an interest sought to be created by an exercise of a power of appointment is concerned, the

§ 1391.1

rule stated in Section 1391.1 prevails over the rule stated in Civil Code Section 715.8. That is, where the power of appointment is presently exercisable by more than one person or requires the consent of a third person, the permissible period under the applicable rule against perpetuities begins at the time of the creation of the power, despite the fact that theoretically there are persons in being who could convey fee simple title.

Section 1391.2. Facts to be considered

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

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

§ 1391.2

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

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

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

1392.1. The creation, exercise, or release of a power of appointment is irrevocable unless the power to revoke exists pursuant to Civil Code Section 2280 or is reserved in the instrument creating, exercising, or releasing the power.

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) (Supp. 1967) and is similar to New York Estates, Powers and Trusts Law Section 10-9.1(a), (b)(1967) and Wisconsin Statutes Annotated Section 232.11 (Supp. 1967). It recognizes, however, that Civil Code Section 2280, which declares that a trust is revocable unless expressly made irrevocable, may apply to the creation or exercise of a power of appointment. For example, a donee may exercise his power of appointment by creating a trust for the benefit of certain permissible appointees. In the absence of an express provision, under Civil Code Section 2280 the trust is revocable and, if the trust is revoked, Section 1392.1 provides that the exercise of the power by creating the trust also is revoked. Similarly, in connection with a trust, a donor may create a power to appoint certain trust assets. To the extent that the power has not been effectively exercised, if the trust is revoked pursuant to Civil Code Section 2280, Section 1392.1 provides that the power of appointment created also is revoked.

§ 1392.1

The term "exercise" used in Section 1392.1 refers to an effective exercise. For example, a testamentary exercise becomes effective only at the death of the donee; until that time, the donee-testator may, of course, revoke his will or modify any provisions in it relating to the exercise of a power. The effective exercise of a power may be similarly postponed in various other situations. See the Comment to Section 1381.3. Under Section 1392.1, it is only an effective exercise that is irrevocable unless otherwise provided.

Civil Code Section 1060 (repealed)

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

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

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

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

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

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

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

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

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

Comment. Section 1060 is superseded by Section 1388.2.

Probate Code Section 125 (amended)

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

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

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

Probate Code Section 126 (amended)

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

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

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

SEVERABILITY CLAUSE

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

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

OPERATIVE DATE

Operative date

Sec. 6. This act becomes operative on July 1, 1970.

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

II

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

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

Section 860 (amended)

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

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

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