#L-200 1/3/81

Memorandum 81-3

Subject: Study L-200 - Powers of Appointment

In 1969, a comprehensive power of appointment statute was enacted upon recommendation of the Law Revision Commission. The Commission has assumed the responsibility to make a continuing review of statutes enacted upon its recommendation and to recommend any needed changes. However, this topic was dropped from our agenda after a few years because we had no indication that any changes were needed.

In 1979, this topic was restored to our calendar of topics because Assemblyman McAlister had received suggestions for revision of the powers of appointment statute and desired that these suggestions be reviewed by the Commission. He requested that we prepare a recommendation to the 1981 Legislature if possible. We have received additional suggestions since the topic was restored to our agenda.

The staff approached the suggested revisions with a critical attitude. The 1969 statute has been viewed as an outstanding drafting job, and we were inclined to recommend to the Commission only those revisions that we believed were clearly desirable improvements in the statute. Nevertheless, we have concluded that almost all of the suggested revisions should be made.

A staff draft of a recommendation is attached and contains background and a discussion of the changes that the recommendation would make in existing law.

We distributed an initial version of the recommendation and a revised version to Professors James L. Blawie, Jesse Dukeminier, Susan F. French, Jerry A. Kasner, and Richard Powell. We have made revisions in preparing the attached staff draft as a result of the comments we received from these professors on earlier versions of the draft. Attached as Exhibits 1 and 2 are letters from Professors Dukeminier and French commenting on earlier versions of the staff draft. Professor Blawie sent numerous letters (not attached) suggesting various technical revisions.

I believe that there is general support for the recommendation in its present form with two exceptions:

(1) Professor Powell questions whether the existing California law which prohibits release of a power of appointment not presently exercisable should be changed. The other persons commenting on the staff draft approved this change. Since there is no limitation on the right to disclaim a power of appointment not presently exercisable, the staff recommends the substitution of language taken from the New York statute for the present California prohibition against release of a power not presently exercisable. See the attached draft for more discussion.

(2) Professor Blawie questions whether a transitional provision should be included in the proposed draft. He would prefer to give the changes retroactive effect to the extent possible and to leave the question of the extent of retroactive application to the courts. The staff believes that a transitional provision is desirable since it will make the law clear and avoid litigation. Professor French recommended that transitional provisions be included.

You should read the attached draft with care to determine the changes that would be made and whether they are desirable. Also, since we would like to approve this recommendation at the January meeting for printing, please mark any suggested editorial changes on the draft and return it to us at the meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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December 1, 1980

Mr. John H. DeMoully
Secretary, California Law Revision Commn.
4000 Middlefield Road, Room D-2
Palo Alto, CA 94305

Dear Mr. DeMoully:

Thank you for sending me your staff draft relating to revision of the powers of appointment statute. I have the following comments on the draft.

Amendment of Civil Code § 1386.2 (exercise of power by residuary clause). I approve of this amendment which provides that a residuary clause or general disposition of property does not exercise a power unless the donor intends otherwise. This amendment will bring California in line with the majority of states. Several states which long followed the rule that a residuary clause did exercise a general power have recently changed to the majority rule. See, e.g., Mass. Gen. Laws Ann. c. 191, § 1A (5) (1969, Supp. 1979); Ohio Rev. Code Ann. § 2107.521 (1974); Md. Est. & Trusts Code Ann. § 4-407 (1974). It is particularly significant that Massachusetts has changed to the majority rule, for that state had probably more litigation on this issue than any other state and the recent change was proposed by the very active estate planning section of the Massachusetts Bar. It was the opinion of the Bar that a blind or unintended exercise of a power of appointment by a residuary clause has more undesirable than desirable effects.

Amendment of Civil Code § 1388.2 (release of discretionary power). Having suggested this amendment, naturally I support it. I have played with the present language of the last sentence of § 1388.2(b) in class for several years, and have come up with several possible interpretations of it, none of which I am certain of. I find little help in the Official Comment. The Official Comment explains, "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." This is completely

mysterious. If A, donee of a power, releases the power except to appoint to B, it makes no sense to say A has exercised the power. A does not have to appoint to B; the property can pass in default of appointment. So, in whose favor has the power been exercised by the release? Neither B nor the takers in default have any certainty of getting the property. The most obvious interpretation of the last sentence of § 1388.2(b) would say that there was a present exercise of the power only when the remainder had indefeasibly vested, when the donee had lost discretion--but such an interpretation is not supported by the quoted sentence from the Official Comment.

The Official Comment goes on to say, "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 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." (Emphasis added) First, the example is far-fetched because it will be highly unusual to find a power so limited. Second, here again we find this notion that a release which forbids appointment to "all but one child" is an exercise. There seems to be some idea that if the effect of the release is that the donee can only choose between one appointee and the takers in default, the power is exercised. I can't follow this. Suppose the donee releases the power except to appoint to A or B, or except to appoint to A, B, or C, or except to A, B, C, D, and E. Is this tantamount to exercise? Is any narrowing of the class of objects or only "excessive" narrowing tantamount to exercise? Is releasing a general power except to appoint to the donee's issue (converting the general power into a special power) tantamount to exercise?

This last sentence of § 1388.2(b) only serves to make any release of a power of appointment--to avoid unfavorable tax consequences or for marriage dissolution settlements--a risky business. Your proposed language is very clear and eliminates the uncertainty in the present language.

On page 4 of your Memorandum 80-95, you have quoted at length from the Comment to the 1978 amendment which is not involved here, and may only serve to confuse the reader since the Comment is directed to another issue than the one before us.

Amendment of Civil Code § 1388.3 (release by guardian). This seems like a good idea, even though I can't think of many circumstances when release of a power by a minor donee would be appropriate.

Amendment of Civil Code § 1389.3 (reversion to donor). I do not approve of the language in this amendment which eliminates the words "reverts to the donor" and substitutes the words "the owner of the appointive property holds the property free of the power." Your comment says this change is made "to substitute more technically accurate language for the phrase 'reverts to the donor' formerly contained in the subdivision" and goes on to repeat the exploded theory that the donor owns the property subject to condition subsequent or executory limitation.

Note This change is not now included in staff draft

Although the original conception of a donee of a power--even a general power--was that the donee is an agent of the donor, to a very considerable extent modern law recognizes the donee of a general power as the owner of the property. See 5 American Law of Property § 23.44 (A. J. Casner ed. 1952); Berger, The General Power of Appointment as an Interest in Property, 40 Neb. L. Rev. 104 (1960). Under the federal tax laws, the donee of a general power of appointment is treated as owner for income, estate, and gift tax purposes. California Civil Code § 1390.3, departing from the old common law theory, subjects property subject to a general power to the claims of creditors of the donee--thus treating the donee as owner. Under the federal bankruptcy act (11 U.S.C. A. § 110(a)), a general power presently exercisable passes to the donee's trustee in bankruptcy, and the trustee can exercise it to pay donee's creditors. Under the common-law Rule against Perpetuities, codified in California Civil Code § 1391.1(a), the donee of a general power presently exercisable is treated as the owner of the property; the perpetuities period begins to run from the date of appointment, the same as with any owner of a fee simple making a transfer. Under California Civil Code § 1387.1 the donee of a general power can appoint in further trust, create new powers and generally appoint in any way the donee pleases. In light of all this, how can it be said that the donor, rather than the donee, is owner?

Of course there are some instances when the donee of a general power is not treated as owner--principally for purposes of claims of pretermitted heirs or a spouse seeking to reach the property under an elective share statute. But the truth of the matter is that the situations are too various and complicated to characterize either the donor or the donee of a general power as owner of the property. In most situations the donee looks more like the "owner," in some the donor looks more like an "owner."

It does not help analysis to characterize either the donor or the donee as owner of the property, and the California powers of appointment statute has been very carefully drafted to avoid such characterization. You will not find

in this legislation, nor in New York's statute from which our statute was taken, any mention of the donor as an owner. This was a deliberate omission. It has taken many years to wean lawyers and judges away from mindless repetition of the original common law theory, which was more misleading than illuminating, and it would be a great mistake now to characterize the donor of the power as the owner of the property. It is regressive and may lead to mischievous unintended results.

Amendment of Civil Code § 1389.4 and addition of § 1389.5 (lapse provisions). I approve of these changes except that I would delete from the proposed language of § 1389.4 the words "and the appointee is related by consanguinity to either the donor or the donee." I realize that you are incorporating a feature of the California lapse statute, Probate Code § 92, but this feature has always appeared to me to be unsound. Suppose the donee appoints to his spouse, who has issue by a previous marriage. Under the limitation you propose such issue (the stepchildren of the donee) cannot take. With divorce and remarriage as a not unusual circumstance in modern life, spouses often become step-parents and have great affection for their step-children. In addition, if the donee appoints to a brother or sister or nephew or niece of the donee's spouse, under your proposed limitation the appointee's issue would not take. In many cases, particularly in long marriages, a spouse will become very close to the other spouse's relatives and would want the issue to take.

I do not see why the issue of the appointee should not take in every case of a lapsed appointment as that result accords with what I infer is the intent of the average donee. I would not move this objectionable feature of the out-of-date California lapse statute into a modern, revised powers of appointment statute. You should eliminate it from the lapse statute instead.

Amendment and addition to Civil Code § 1390. I approve this clarification. It seems like a good idea.

Sincerely,

Jesse Dukeminier

Jesse Dukeminier
Professor of Law

JD:bd

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December 19, 1980

John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John,

Thank you very much for giving me the opportunity to comment on the proposed revisions to the Powers of Appointment Act. I am very pleased that the Commission has taken up this subject again and that the staff report has accepted the recommendations I made. I have reviewed the staff recommendations, and have the following comments and suggestions on implementation.

Exercise: I agree entirely with the substance of the change, but would much prefer scrapping the language of the current section in favor of the language of the Uniform Probate Code. I think this can be done without sacrificing the linguistic integrity of section 1386, and would provide substantial advantages. Most important, adoption of the UPC language would make the California statute the same as that of several other states. As I pointed out in my article, uniformity of the rule on exercise would be highly desirable. In addition, a simpler statement of the rule is possible using the UPC language. I would suggest the following language:

Sec. 1386.2 [Exercise by Residuary Clause]

"A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless there is some other indication of intention to include the property subject to the power."

I would suggest that the comment might be changed to read:

"Comment. Sec. 1386.2 is amended to adopt the substance of Sec. 2-610 of the Uniform Probate Code. Before this amendment, Sec. 1386.2 provided that a general power of appointment was exercised by a residuary clause or other general language of the donee's will purporting to dispose of property of the kind covered by the power unless the creating instrument otherwise required or the donee manifested an intent not to exercise the power. Under the amended section, a power of appointment is not exercised unless there is some manifestation of intent to exercise the power. A general residuary clause or disposition of all of the testator's property, alone, is not such a manifestation of intent.

"This change is made in recognition of the need for a uniform rule on this question, and in recognition of the fact that donees today may frequently intend that assets subject to a power pass to the takers in default, particularly assets held in a marital deduction trust. See Comment to Section 2-610

of the UPC; French, Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred From a General Disposition of Property? 1979 Duke L.J. 747.

"Under Section 1386.2, a general disposition of property in the donee's will may exercise a power of appointment if there is some other indication of intention to include the appointive assets in the disposition made. Such other indication of intent to exercise the power may be found in the will or in other evidence apart from the will. Section 1386.1 (b) and (c) illustrate types of evidence that indicate an intention to exercise a power of appointment. See also Probate Code Sec. 105. An exercise of a power of appointment may be found if a preponderance of the evidence indicates that the donee intended to exercise the power. See Bank of New York v. Black, 26 N.J. 276, 286-87, 139 A.2d 393, 398 (1958). Probate Code Sections 125 and 126 expressly except Section 1386.2."

I have deviated from the explanation given in the comment to UPC 2-610 in that the real problem under the marital deduction trust is not that we frustrate donor intent, but that we frustrate the intent of the donee. To obtain the benefit of the marital deduction, the donor must give the donee the power, and the donee has a perfect right to exercise the power. However, given the situation, the donee may well not wish to exercise the power, and we should not establish a rule which forces a donee to state the negative: that the donee does not wish to exercise the power. By doing so, we run the risk of frustrating the intent of donees who did not think to mention the power. I have also mentioned uniformity because I do think it an important goal. I eliminated the reference to section 1385.2 because I find it confusing. I do not think it very likely that anyone would think that the "unless" clause of sec. 1386.2 creates an exception to sec. 1385.2.

Release: I agree with Prof. Dukeminier's comments about Sec. 1388.2 and 1388.3. The existing language is very confusing because it is not at all clear just when the result of a release would be "present" exercise of a power. I have always assumed that this was aimed at a release of the power to appoint to all but a particular individual coupled with making the power imperative--if such can be done by the donee without having the transaction characterized as a contract rather than a release. This whole question is of course, tied up with the question whether the donee should have the power to contract to exercise a power. I am inclined to believe that donees should have the power to make binding contracts to exercise powers as part of marriage dissolution settlements, at least for the benefit of children, and perhaps for spouses as well, but am doubtful about the utility of going beyond this where the donee is not also the creator of the power. In any event, I support your suggested changes to these sections.

Ineffective Appointments: Passage of property in default. I agree with Prof. Dukeminier on sec. 1389.3. The section in its present form does not seem to present any problems even if it is not strictly accurate. If the property is held in trust, describing what happens on failure to make an effective appointment as a "reversion" seems quite reasonable. In any event, I can't quite picture a problem that the current language would create, so I would be inclined to leave it as is.

Ineffective Appointments: Capture Doctrine. Although the changes suggested for section 1389.3 (b) and (c) are not substantive, they have called my attention to these two subsections which attempt to (or do) restate the common law doctrine of capture. I find this restatement too mechanistic, and have always preferred looking at the question as one of the donee's intent to make an implied alternative appointment. My objections to the sections as written are that an appointment to a trustee calls for application of the capture doctrine automatically while an appointment to anyone else does not. I really cannot see that the donee is that much more likely to have intended to have the property pass under his or her estate when the appointment is on a trust that fails than when the appointment is outright and fails. I would prefer a rule similar to that which we suggest about exercise: a positive manifestation of intent is required to exercise a power initially and to make an alternative exercise in favor of the donee's estate. Simply making the first exercise does not answer the question whether the donee intended the alternate appointment if the first one failed, whether the first was to a trustee or not.

As with determining the question of initial exercise, I think extrinsic evidence should be admissible. This appears to be precluded under both subsections (b) and (c). In addition, I have always had trouble with the phrase "intent to assume control . . . for all purposes." What does all mean? The donee may well not have intended to make the property available to creditors, or for administration in his or her estate, and yet this should not necessarily prevent us from concluding that the donee would have preferred that the property pass under his or her residuary clause rather than passing in default of appointment. A revised statement of this doctrine that I would be happier with would read something like:

Sec. 1389.3 [Implied Alternative Appointment]

(b) When the donee of a general power of appointment makes an ineffective appointment, an implied alternative appointment to the donee's estate may be found if the donee has manifested an intent that the appointive property be disposed of as property of the donee rather than as in default of appointment.

Comment. Subsections (b) and (c) have been amended to eliminate the distinction formerly made between appointments upon a trust which fails and other ineffective appointments. It has also been amended to eliminate the requirement that evidence of intent to "capture" the appointive assets be contained in the ~~appointing assets~~ instrument of appointment. This change is consistent with the position taken on admissibility of evidence extrinsic to the appointing instrument in Section 1386.1. Otherwise the Section 1389.3 is intended to adopt the substance of the common law doctrine of capture, or implied alternative appointment to the donee's estate. See Simes, Law of Future Interests Sec. 69 (2d ed. 1966).

If the staff wishes to consider a revision of this sort, some additional attention might be given to this suggestion itself, and if it is accepted, to the comment. It may be that the comment should contain some illustrations or discussion of the kind of situation that might indicate intent--like the blending clause.

Ineffective Appointments: Lapse. Although the language of the staff recommendation is that I suggested in my article, I think Prof. Dukeminier is right--the limitation to relatives probably should be eliminated entirely. I would accept his suggestion. In addition, I would suggest eliminating the requirement that a contrary intent appear in the appointing instrument. I think this creates the same problem that I found in the old exercise by residuary clause statutes, exemplified in this state by Estate of Carter, 47 Cal. 2d 200, 302 P.2d 301 (1956). See the comment to existing sec. 1386.2. The problem could perhaps be handled by recasting subsection (b) to speak of the intent of the donor or the donee, rather than the instruments, or by eliminating subsection (b) and introducing (a) with something like: "in the absence of a manifestation of an intent by the donor or by the donee that some other disposition of the appointive property be made, ..." This makes quite a jaw-breaker of a sentence, so breaking it up a bit would probably be better.

Creditor Definition: I agree that this section seems like a good idea.

Again, thank you for the opportunity to comment on these proposed recommendations. I hope that my absence from the state did not unduly delay you. If you have any questions, or would like me to work over any of the language of my suggestions, please give me a call.

Yours very truly,

Susan F. French

Susan F. French
Professor of Law

cc. Prof. Jesse Dukeminier

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

STAFF DRAFT

RECOMMENDATION

Relating to

REVISION OF THE POWERS OF APPOINTMENT STATUTE

December 1980

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

December 15, 1980

To: The Honorable Edmund G. Brown Jr.
Governor of California and
The Legislature of California

The present California statute governing powers of appointment was enacted in 1969 upon recommendation of the Law Revision Commission. See Recommendation and a Study Relating to Powers of Appointment, 9 Cal. L. Revision Comm'n Reports 301 (1969). See also Background Statement Concerning Reasons for Amendment of Statute Relating to Powers of Appointment, 14 Cal. L. Revision Comm'n Reports 257 (1978).

The Commission has received a number of suggestions for revision of the powers of appointment statute. This recommendation is the result of a study of these suggestions and is submitted pursuant to Resolution Chapter 19 of the Statutes of 1979.

The Commission wishes to acknowledge the assistance of Professors James L. Blawie, Jesse Dukeminier, Susan F. French, Jerry A. Kasner, and Richard Powell. They submitted suggestions for revision of the statute and assisted the Commission in the preparation of this recommendation.

Respectfully submitted,

Beatrice P. Lawson
Chairperson

STAFF DRAFT

RECOMMENDATION

relating to

REVISION OF THE POWERS OF APPOINTMENT STATUTE

BACKGROUND[1]

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. A power of appointment is frequently included in an inter vivos or testamentary trust. In the typical situation, the creator of the trust transfers property in trust for the benefit of a designated person during that person's lifetime with a provision that, upon the death of the life beneficiary, the remaining property shall be distributed in accordance with an "appointment" made by the life beneficiary or, occasionally, by the trustee or another person.

Use of a power of appointment makes possible a disposition reaching into the future but with a flexibility that can be achieved in no other way. When a husband leaves his property in trust for the benefit of his wife during her lifetime and, upon her death, to such of their 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

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1. This portion of this recommendation is drawn from the prior Commission recommendation that led to the enactment of the present California statute on powers of appointment. See Recommendation and a Study Relating to Powers of Appointment, 9 Cal. L. Revision Comm'n Reports 301, 307-08 (1969).

income to take account of changes in the needs of beneficiaries which he could not possibly have foreseen. Births, deaths, financial successes and failures, varying capacities of individuals, and fluctuations in income and property values can all be taken into account at the time of appointment. Moreover, the limitations imposed by the donor on the manner of exercising the power and the persons to whom appointments can be made give him substantial control of the property after he has transferred the power. 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 their children ("special power"), or he may create a broad power permitting the donee to appoint without limitation as to permissible appointees or to a group that includes the donee, her estate, her creditors, or creditors of her estate ("general power").

The most common use of powers today is in connection with the so-called marital deduction trust. Under this arrangement, the husband, for example, 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[2] 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

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2. A life estate coupled with a general power of appointment--testamentary or presently exercisable--will qualify for the marital deduction. I.R.C. § 2056(b)(5); Rusoff, Powers of Appointment and Estate Planning, 10 J. Fam. L. 443, 456-57 (1971).

marital deduction but 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. Ownership of the special power of appointment does not subject the appointive property to taxation in the donee's estate.[3] Prior to the enactment of the Tax Reform Act of 1976,[4] a special power of appointment was frequently used in connection with generation-skipping to avoid the so-called "second tax."[5] The impact of the generation-skipping tax of the Tax Reform Act of 1976[6] on the use of special powers of appointment has not yet been determined.[7]

A power of appointment also may be used to accomplish other objectives. One common use of the power in modern times is to give the surviving spouse some degree of control over the conduct of the children after the death of the other spouse. For instance, the Commission is advised[8] that a common provision in wills drafted by neighborhood law offices gives the surviving spouse a life estate in the dwelling house and gives the children the remainder, subject to a general power in the surviving spouse to appoint or consume as the surviving spouse sees fit.

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3. I.R.C. § 2041(b)(1).

4. Pub. L. No. 94-455, 90 Stat. 1520 (1976).

5. A. Casner, I Estate Planning 717 (3d ed. 1961); Coleman, The Special Power of Appointment in Estate Planning, 109 Tr. & Est. 920 (1970).

6. I.R.C. §§ 2601-2622.

7. "Powers of appointment will continue to be used in marital deduction trusts; and it seems likely that they will increasingly be used in other kinds of trusts, as a result of the enactment of the generation-skipping tax in the Tax Reform Act of 1976." French, Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property? 1979 Duke L.J. 747, 802 n.276.

8. Letter from Professor James L. Blawie to John H. DeMoully (Dec. 1, 1980) (on file in office of California Law Revision Commission).

This provides the surviving spouse with protection against unexpected illness and debts, permits the property to pass to the children if they give care and attention to the surviving spouse, and permits the surviving spouse to exercise the power to cut off some or all of the children if so inclined. Such a provision is included in a will on the belief that, with this provision, the children will be solicitous of the surviving spouse, and without it, the surviving spouse will be neglected by the children.

RECOMMENDATIONS

Exercise of Power of Appointment by Residuary Clause or Other General Disposition in Donee's Will

Under existing law,[9] a residuary clause or other general disposition language in the donee's will exercises a general power of appointment unless a contrary intent appears. The Uniform Probate Code provides the opposite rule. Under the Uniform Probate Code, a general residuary clause or other general disposition in a will does not exercise a power of appointment unless there is an indication of intention to include the property subject to the power under the will.[10] The existing California rule has been criticized by legal scholars,[11] and a number of states that formerly followed the rule have abandoned it.[12]

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9. Civil Code § 1386.2.

10. Uniform Probate Code § 2-610.

11. See French, Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property? 1979 Duke L.J. 747. Professor Jesse Dukeminier of U.C.L.A. Law School has also suggested that the existing California rule should be changed. Letter from Jesse Dukeminier to John H. DeMoully (Feb. 19, 1980) (on file in office of California Law Revision Commission).

12. French, Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property? 1979 Duke L.J. 747, 792. "Since 1965 nineteen states have enacted statutes that address the question whether a general disposition or residuary clause in the donee's will exercises a power of appointment. All of these statutes, except those of New York and California, adopt the basic premise of the common law, that a general disposition or residuary clause, without more, does not exercise a power." Id. (footnotes omitted.)

The Commission recommends that the substance of the Uniform Probate Code provision be substituted for the existing California rule. Adopting the Uniform Probate Code rule--that a general disposition or residuary clause, without more, does not exercise a power--will make California law consistent with that of the majority of other states.[13] There is a need for uniformity among the various states.[14] But a more important reason for changing the existing California rule is that it may operate to upset a carefully drafted estate plan. Professor French sumarizes the problem created by the existing rule:[15]

> Since 1948, the year the marital deduction was enacted, estate plans of married people have commonly included a marital deduction trust. This kind of trust, designed to secure the marital deduction without transferring property outright to the

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13. See French, Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property? 1979 Duke L.J. 747, 753-54 (survey of law in the 50 states).

14. "The variety and complexity of the rules applied by the various states, when combined with the likelihood that the donee's attorney will not correctly anticipate which state's law will be applied, have created a situation that inevitably breeds litigation, frustrates expectations of beneficiaries, and provides ample opportunity for legal malpractice. The costs imposed by the variety of state rules clearly outweigh any possible advantages derived from their diversity. Given the mobility of today's population, the increasing emphasis on reducing the transaction costs in transmitting property at death, and the increasing use of powers of appointment, a better approach must be found. The only satisfactory solution will be a single rule that gives maximum opportunity to carry out the actual intent of the donee, applied uniformly throughout the United States. A uniform act would be ideal." French, Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property? 1979 Duke L.J. 747, 802 (footnotes omitted). The drafters of the Uniform Probate Code generally avoided any provisions relating to powers of appointment. However, the Uniform Probate Code section was included because "there is a great need for uniformity on the subject of exercise by a will purporting to dispose of all of the donee's property, whether by a standard residuary clause or a general recital of property passing under the will." See Comment to Section 2-610 of the Uniform Probate Code.

15. French, Exercise of Powers of Appointment: Should Intent to Exercise be Inferred From a General Disposition of Property? 1979 Duke L.J. 747, 791 (footnotes omitted).

surviving spouse, gives the surviving spouse a life estate and a general testamentary power of appointment over the remainder. The primary purpose of creating the power is to qualify the property for the marital deduction, not to provide the surviving spouse with the power to dispose of the property by her will. In such estate plans the donor intends that the clause in default of appointment control devolution of the property, and that the donee will refrain from exercising the power. Statutes providing that the residuary clause or other general disposition in the donee's will exercises a power can wreak havoc on these estate plans.[16]

Release of Power of Appointment

Release of power of appointment not presently exercisable. A donor may give the donee a testamentary or postponed power. For example, the creating instrument may permit the power to be exercised only by the will of the donee or may provide that the donee may appoint only after all of their living children reach 21 years of age. By giving the testamentary or postponed power to the donee, the donor expresses the 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 a testamentary or postponed power would permit the donor's intent to be defeated. Accordingly, the existing statute includes an express provision that the donee of a power of appointment cannot contract to make an appointment while the power of appointment is not presently exercisable and makes unenforceable a promise to make such an appointment.[17]

Consistent with the provision relating to contracts to appoint, the existing statute also provides that 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."[18] This rule preventing release of a

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16. It should be noted, however, that the creating instrument can avoid this problem by an express requirement that the instrument of appointment make a specific reference to the power or to the instrument that created the power. See Civil Code § 1385.2.

17. Civil Code § 1388.1.

18. Civil Code § 1388.2(b).

testamentary or postponed power is designed to prevent the donor's intent 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 an inter vivos act a power which the creator of the power intended to remain unexercised until the donee's death"[19] or until the time specified in the creating instrument when the power becomes exercisable.

The absolute prohibition against release of a power of appointment not presently exercisable should be contrasted with the existing rule on disclaimer of a power of appointment. Existing Probate Code provisions permit the donee to make a disclaimer of a power of appointment, whether or not presently exercisable.[20] By exercising the right of disclaimer, the donee may be able to avoid undesired tax consequences.[21] But the right of disclaimer exists only for a limited time.[22] If the disclaimer is not made within the time prescribed, the donee may under some circumstances avoid undesired tax consequences if the donee is permitted to release the testamentary or postponed power. There are other circumstances where it may be necessary to release a testamentary or postponed power. For example, in connection with a marriage dissolution settlement agreement, a spouse may be willing to waive support for the children if the other spouse releases a testamentary or postponed power of appointment to assure that the appointive property will vest in the children.

In recognition that there are circumstances when a release should be permitted, the Commission recommends that Civil Code Section 1388.2 be amended to eliminate the absolute prohibition on release of a power that is not presently exercisable and to substitute a provision--taken

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19. Comment to Civil Code § 1388.2.

20. See Prob. Code §§ 190(a)(8), 190.1.

21. See Kasner, Disclaimers as an Estate Planning Tool: Are the Proposed Regulations Contrary to Congressional Intent and the Expectations of Practitioners and Their Clients? 1980 CEB Est. Plan R. 21.

22. See Prob. Code § 190.3.

from the New York statute[23]--that no release of a power that is not presently exercisable is permissible "where the donor designated persons or a class to take in default of the donee's exercise of the power unless the release serves to benefit all those so designated as provided by the donor." This new provision prevents the donee under the guise of a release from benefiting certain of the takers in default at the expense of the others.

The effect of this change on the three basic kinds of testamentary powers can be summarized as follows:

(1) The imperative power. 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.[24] If the power is imperative, the donee must exercise it or the court will divide the appointive property among the potential appointees.[25] An imperative power may not be released.[26]

(2) The special power. A power is classified as a "special" power where the donor establishes specific persons or a class among whom the donee is to appoint.[27] Ordinarily, the donee is given discretion to appoint to one, all, or some of the class, and there is a gift over in case of default, the class commonly being those to whom the donee could have appointed. Under the amendment recommended by the Commission, this power could be released even though not presently exercisable, but the

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23. The New York statute permits a release of a power of appointment which is not presently exercisable, but a 1977 amendment (1977 N.Y. Laws ch. 341, § 1) added the provision to assure that the release will benefit all the takers in default as provided by the donor.

24. Civil Code § 1381.4.

25. See Civil Code §§ 1381.4, 1389.2.

26. See Civil Code § 1388.2.

27. See Civil Code § 1381.2. A power is general, not special, if the donee can appoint to the donee, creditors of the donee, the donee's estate, or creditors of the donee's estate.

release is permitted only if it serves to benefit all those designated as takers in default as provided by the donor.

(3) The general power. The donee of a "general" power ordinarily may appoint to anyone the donee chooses,[28] and a default class may be specified in case the power is not effectively exercised. Under the amendment recommended by the Commission, this power could be released even though not presently exercisable, but the release is permitted where a default class is specified only if the release serves to benefit all those designated as takers in default as provided by the donor.

This summary of the effect of the proposed amendment demonstrates that the amendment will give needed flexibility to the release provision of the existing statute and, at the same time, will prevent the abuses possible if there were no limit on a release of a power not presently exercisable. The proposed limit on release of a power not presently exercisable diminishes the donee's power to bargain for his own advantage and limits the donee's ability to use the power to place undue pressure on one or more of the takers in default.

Release of power of appointment of minor donee. Under existing law, a minor donee may not exercise a power of appointment during minority unless the creating instrument otherwise provides.[29] Yet, to avoid unfavorable tax consequences, it may be desirable to disclaim or release a power of appointment of a minor donee. Existing law permits the guardian of the estate of a minor donee to disclaim any interest (including a power of appointment) which would otherwise be succeeded to by a minor.[30] Since the right of disclaimer exists for only a limited time,[31] it may sometimes be necessary to release a power where the disclaimer was not made within the time allowed. But there is no provision in existing law for the release of the minor donee's power of appointment.

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28. See Civil Code § 1381.2.

29. Civil Code § 1384.1(b).

30. Prob. Code §§ 190(a)(8), 190.2.

31. Prob. Code § 190.3.

The Commission recommends that a provision be added to the powers of appointment statute to authorize the guardian of the estate of a minor donee to release a power of appointment in whole or in part. The recommended procedure is comparable to that provided in the new guardianship-conservatorship statute for obtaining a court order authorizing or requiring the conservator of the estate to exercise or release a power of appointment for a conservatee donee.[32] The recommended provision authorizes the court to order that the power be released in whole or in part. It does not authorize the court to order that the power be exercised on behalf of the minor; the minor can exercise it when the minor reaches majority.

Ineffective Appointments: Capture Doctrine

Under the existing statute,[33] the general rule is that when the donee of a discretionary power of appointment fails to make an effective appointment, the appointive property not effectively appointed passes to the takers in default or, if there are none, reverts to the donor. This general rule is subject to two statutory exceptions that apply the doctrine of capture in favor of the donee or the donee's estate when the donee of a general power of appointment makes an ineffective appointment:

(1) If the donee appoints to a trustee upon a trust which fails, there is a resulting trust in favor of the donee or the donee's estate.[34]

(2) In other cases, the appointive property passes to the donee or the donee's estate "if the instrument of appointment manifests an intent to assume control of the appointive property for all purposes and not for the limited purpose of giving effect to the expressed appointment.[35]

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32. Prob. Code §§ 2580-2586.

33. Civil Code § 1389.3.

34. This rule does not apply if either the creating instrument or the instrument of appointment manifests a contrary intent. Civil Code § 1389.3(b).

35. This rule does not apply if the creating instrument manifests a contrary intent.

There are two problems created by the provisions of the existing statute that state the "capture" doctrine. First, the appointment to a trustee calls for the application of the capture doctrine automatically while an appointment to anyone else does not. This distinction is based on a doubtful assumption that the donee intends to have property pass to his or her estate when the appointment is on a trust that fails but does not when the appointment is outright and fails. The Commission recommends that the existing rules stating the capture doctrine be replaced by a uniform provision that "an implied alternative appointment to the donee's estate may be found if the donee has manifested an intent that the appointive property be disposed of as property of the donee rather than as in default of appointment." This standard would require a manifestation of intent to make an alternative appointment to the donee's estate and would apply whether the ineffective appointment is made to a trustee or another.[36]

The second problem with the existing statutory provision is that it limits the evidence of intent to "capture" the appointive assets to the instrument of appointment. This limitation is unduly restrictive and may operate to defeat an intent that can be clearly established by extrinsic evidence. Accordingly, the Commission recommends that the requirement that the evidence of intent be contained in the instrument of appointment be eliminated. This change is consistent with the rule that permits use of extrinsic evidence to find an intent to exercise a power of appointment.[37]

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36. The proposed standard will eliminate a troublesome problem in determining the meaning of the phrase "intent to assume control . . . for all purposes" (emphasis added) in subdivision (c) of Civil Code Section 1389.3. The donee may not intend to make the property available to creditors, or for administration in his or her estate, but this lack of intent to assume control of the appointive property for "all" purposes should not necessarily prevent a determination that the donee would have preferred that the property pass under his or her residuary clause rather than passing in default of appointment.

37. Civil Code § 1386.1. See also discussion supra concerning the exercise of a power of appointment by a residuary clause or other general disposition in the donee's will.

Antilapse Provisions

A provision of the existing powers of appointment statute prevents the lapse of an appointment to a "kindred" of the donee but does not prevent the lapse of an appointment to someone unrelated to the donee.[38] To apply the antilapse statute to prevent the lapse of appointments to kindred of the donee while refusing to apply it to prevent the lapse of appointments to anyone else is more likely to defeat the donee's intent than to carry it out. For example, a spouse of the donee is not the donee's kindred within the meaning of the antilapse statute.[39] Hence, a testamentary appointment to the donee's spouse will lapse if the spouse dies before the donee. Thus, there is a likelihood that the donee's children will receive no share of the appointive property.[40]

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38. See Civil Code § 1389.4. Civil Code Section 1389.4 requires the appointment to be effectuated, if possible, by applying the provisions of Section 92 of the Probate Code (the antilapse statute) "as though the appointive property were the property of the donee." Section 92 of the Probate Code provides that when the estate is devised or bequeathed to any "kindred" of the testator and the devisee or legatee dies before the testator, the estate goes to lineal descendants of the devisee or legatee who survive the testator. It has been said that the effect of this provision is to prevent lapse of a testamentary appointment to relatives of the donee of the power, but not to prevent lapse of a testamentary appointment to relatives of the donor. French, Application of Antilapse Statutes to Appointments Made by Will, 53 Wash. L. Rev. 405, 432 (1978).

39. As used in Section 92 of the Probate Code, the term "kindred" means a blood relative. 7 B. Witkin, Summary of California Law Wills and Probate § 226, at 5737 (8th ed. 1974); cf. In re Estate of Sowash, 62 Cal. App. 512, 217 P. 123 (1923) (construing term "relation" in earlier antilapse statute to exclude testator's spouse); Estate of Goulart, 222 Cal. App.2d 808, 819-24, 35 Cal. Rptr. 465 (1963) ("kindred" normally means biological relative).

40. If an appointment lapses, the appointive property will pass under an express or implied provision in the creating instrument which is to be effective in default of appointment, by the residuary clause of the donor's will, or by intestacy from the donor. French, Application of Antilapse Statutes to Appointments Made by Will, 53 Wash. L. Rev. 405, 407 n.9 (1978).

Similarly, a testamentary appointment to a brother, sister, nephew, or niece of the donee's spouse will lapse if any such appointee dies before the donee; the children of any such deceased appointee will likely receive no share of the appointive property. Such a result is probably inconsistent with the donee's intent, particularly where the donee has been married for a long time and has had an opportunity to develop close relationships with the spouse's relatives.

Accordingly, the Commission recommends that existing antilapse provisions relating to power of appointment be revised to provide that, when a testamentary appointment is made to a person who was alive at the time the creating instrument was executed but who dies before the donee, the appointive property passes to the appointee's issue (if any) who survive the donee. This rule would not apply if the creating instrument or the instrument of appointment manifests a contrary intent.

A related problem is whether the donee may appoint to the issue of a permissible appointee under a special power of appointment even though the permissible appointees as designated in the creating instrument do not include such issue.[41] Suppose the donor creates a special power of appointment that permits the donee to appoint to John, Mary, and George, the three children of the donor. After the creating instrument is executed but before the power of appointment is exercised, George dies leaving a child. George having died, can the donee appoint any of the appointive property to the child of George? The Commission recommends that a new provision be added to the powers of appointment statute to make clear that where a permissible appointee under a special power of appointment dies before the power is exercised, the class of permissible appointees is expanded to include the issue of the deceased permissible appointee. This rule is likely to be what the donor would have wanted had the donor considered the possibility that one of the permissible appointees would die (leaving issue) before the power was exercised. The rule would not apply if the creating instrument provides otherwise.

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41. For a discussion of this problem, see French, Application of Antilapse Statutes to Appointments Made by Will, 53 Wash. L. Rev. 405, 428-31 (1978).

Recordation

Under existing law, provision is made for the recording of a disclaimer of a power of appointment that affects real property. The disclaimer shall be acknowledged and proved, and may be certified and recorded, in like manner and with like effect as grants of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof apply to the disclaimer with like effect. The validity of the recorded disclaimer is not affected by the failure to file the disclaimer as otherwise required by statute with the superior court in which the estate is being administered or with the trustee or with the person creating the interest; and, if the disclaimer is so filed, the effect of recording is not affected by the date of the filing.[42]

The provision governing the recording of a release of a power of appointment affecting real property is inconsistent with the provision governing disclaimers. Where the creating instrument has been previously recorded or where the creating instrument is a will and the order or decree of distribution has been previously recorded, the existing statute provides that no power of appointment affecting real property shall be terminated as to the appointive property until the release has been recorded.[43] This provision appears to require recording of the release in order to make an effective release.

The Commission recommends that the provision governing releases be revised to make it consistent with the provision governing recording of disclaimers.

Technical and Clarifying Changes

The Commission also recommends that revisions be made in the existing statute to make clear that, where a creditor of the donee has a right to reach property subject to a power of appointment, this right

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42. Prob. Code § 190.4.

43. Civil Code § 1388.2(d).

extends to a person to whom the donee owes an obligation to support to the extent of that obligation. A few other technical revisions are made in the recommended legislation. These revisions are explained in more detail in the Comments that accompany the relevant sections of the recommended legislation.

RECOMMENDED LEGISLATION

An act to amend Sections 1388.2, 1389.3, 1389.4, and 1390.1 of, to add Sections 1386.2, 1388.3, 1389.5, and 1390.5 to, and to repeal Section 1386.2 of, the Civil Code, relating to powers of appointment.

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

28836

§ 1386.2 (repealed). Exercise by residuary clause or general disposition in donee's will

SECTION 1. Section 1386.2 of the Civil Code is repealed.

~~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 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 is superseded by new Section 1386.2.

3263

§ 1386.2 (added). Exercise by residuary clause or general disposition in donee's will

SEC. 2. Section 1386.2 is added to the Civil Code, to read:

1386.2. A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise

a power of appointment held by the testator unless there is some other indication of the intention to include the property subject to the power.

Comment. Section 1386.2, which adopts the substance of Section 2-610 of the Uniform Probate Code, supersedes former Section 1386.2. Former Section 1386.2 provided that a general power of appointment was exercised by a residuary clause or other general language of the donee's will purporting to dispose of property of the kind covered by the power unless the creating instrument otherwise required or the donee manifested an intent not to exercise the power. Under new Section 1386.2, a power of appointment is not exercised unless there is some manifestation of intent to exercise the power. A general residuary clause or disposition of all of the testator's property, alone, is not such a manifestation of intent.

The change made by the repeal of the former section and enactment of the new section recognizes the need for a uniform rule on the question and the fact that donees today may frequently intend that assets subject to a power pass to the takers in default, particularly assets held in a marital deduction trust. See Comment to Section 2-610 of the Uniform Probate Code; French, Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred From A General Disposition of Property? 1979 Duke L.J. 747.

Under Section 1386.2, a general disposition of property in the donee's will may exercise a power of appointment if there is some other indication of intent to include the appointive assets in the disposition made. Such other indication of intent to exercise the power may be found in the will or in other evidence apart from the will. Section 1386.1 sets forth a non-exclusive listing of types of evidence that indicate an intent to exercise a power of appointment. See also Section 105. An exercise of a power of appointment may be found if a preponderance of the evidence indicates that the donee intended to exercise the power. See Bank of New York v. Black, 26 N.J. 276, 286-87, 139 A.2d 393, 398 (1958). Section 1386.2 does not apply where the donor has conditioned the exercise of the power on a specific reference to the power or to the instrument that created the power or has specified a specific method of exercise of the power. See Sections 1385.1, 1385.2.

35098

§ 1388.2 (amended). Release of discretionary power

SEC. 3. Section 1388.2 of the Civil Code is amended to read:

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 that is not presently exercisable is permissible ~~when the result of the release is the present exercise of a power that is not presently exercisable~~ where the donor designated persons or a class to take in default of the donee's exercise of the power unless the release serves to benefit all those so designated as provided by the donor .

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

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

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

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

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

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

~~(d) No power of appointment affecting real property, where the creating instrument has been previously recorded or where the creating instrument was a will and the order or decree of distribution has been previously recorded, shall be terminated, in whole or in part, as to such appointive real property by the execution of a release of such power until such release is recorded in the office of the county recorder of the county in which such appointive real property is located.~~

(d) A release of a power of appointment which affects real property or obligations secured by real property shall be acknowledged and proved,

and may be certified and recorded, in like manner and with like effect as grants of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof shall apply to such release with like effect, without regard to the date when the release was delivered, if at all, pursuant to subdivision (c). Failure to deliver pursuant to subdivision (c) a release which is recorded pursuant to this subdivision shall not affect the validity of any transaction with respect to such real property or obligation secured thereby, and the general laws of this state on recording and its effect shall govern any such transaction.

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

Comment. Subdivision (b) of Section 1388.2 is amended to impose the requirement that, where the donor designated persons or a class to take in default of the donee's exercise of the power, a release of a power that is not presently exercisable must serve to benefit all those so designated as provided by the donor. This new requirement is substituted for the deleted portion of the last sentence of subdivision (b) which provided that no release of a power was permissible when the result of the release was the present exercise of a power that was not presently exercisable. The deleted language might have been interpreted to prevent the release of a testamentary power and served as a trap that might upset a release made for tax reasons or in a marriage dissolution settlement. The substituted language is taken from New York Estate, Powers & Trusts Law § 10-5.3(b), added in 1977, and is necessary to ensure that the release of a power not presently exercisable does not defeat the donor's intent by benefiting some but not all of the takers in default.

Subdivision (d) of Section 1388.2 is amended to substitute language drawn from Probate Code Section 190.4 (disclaimer of power of appointment affecting real property) for the former language. This substitution avoids the possible construction of the former language that the release was not effective to terminate the power of appointment unless recorded. At the same time, the new language makes clear that a subsequent purchaser or encumbrancer, in good faith and for a valuable consideration, who first records is protected. See Civil Code § 1214. The unrecorded instrument is valid as between the parties thereto and those who have notice thereof if the instrument is otherwise effective. See Civil Code § 1217.

§ 1388.3 (added). Release by guardian on behalf of minor donee

SEC. 4. Section 1388.3 is added to the Civil Code, to read:

1388.3 (a) A release on behalf of a minor donee shall be made by the guardian of the estate of the minor pursuant to an order of the court obtained under this section.

(b) The guardian or other interested person may file a petition with the court in which the guardianship of the estate proceeding is pending for an order of the court authorizing or requiring the guardian to release the ward's powers as a donee of a power of appointment in whole or in part.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 of the Probate Code to all of the following (other than the petitioner or persons joining in the petition):

(1) The persons required to be given notice under Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 of the Probate Code.

(2) The donor of the power if alive.

(3) The trustee if the property to which the power relates is held by a trustee.

(4) Such other persons as the court may order.

(c) After hearing, the court, in its discretion, may make an order authorizing or requiring the guardian to release on behalf of the ward any general or special power of appointment as permitted under Section 1388.2 if the court determines, taking into consideration all the relevant circumstances, that the ward as a prudent person would make the release of the power of appointment if the ward had the capacity to do so.

(d) Nothing in this section imposes any duty on the guardian to file any petition under this section, and the guardian is not liable for failure to file a petition under this section.

Comment. Section 1388.3 is a new provision that provides a procedure for the release of a general or special power of a minor donee. The extent to which a general or special power of a minor donee may be

released is determined by Section 1388.2. Although former law contained no provision for release of the power of a minor donee, the guardian of the estate of a minor donee could make a disclaimer of an interest (including a power of appointment) which would otherwise be succeeded to by a minor. Prob. Code § 190.2. The court in which a conservatorship proceeding is pending has authority to make an order authorizing or requiring the conservator on behalf of the conservatee to exercise or release the conservatee's powers as donee of a power of appointment. See Prob. Code §§ 2580-2586. Section 1388.3 gives the court in which the guardianship proceeding is pending authority to make an order authorizing or requiring the guardian to release the ward's powers as donee of a power of appointment, but the court is not authorized to order an exercise of the power of appointment. Section 1384.1 provides that a minor donee may not exercise a power of appointment during minority unless the creating instrument otherwise provides. The court may make an order authorizing or requiring the guardian to release the power of appointment only if the court determines, taking into consideration all the relevant circumstances, that the ward as a prudent person would release the power if the ward had the capacity to do so. For example, to avoid unfavorable tax consequences, it may be desirable that the power of appointment be disclaimed or released in whole or in part.

9449

§ 1389.3 (amended). Discretionary powers

SEC. 5. Section 1389.3 is amended to read:

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

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

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

(b) When the donee of a general power of appointment makes an ineffective appointment, an implied alternative appointment to the donee's estate may be found if the donee has manifested an intent that the appointive property be disposed of as property of the donee rather than as in default of appointment.

Comment. Section 1389.3 is amended to substitute a new subdivision (b) for former subdivisions (b) and (c). The new subdivision provides a uniform rule as to the application of the doctrine of capture in cases where the donee of a general power of appointment makes an ineffective appointment. The distinction formerly made between appointments upon a trust which fails and other ineffective appointments has not been continued. The amendment to Section 1389.3 also eliminates the requirement that evidence of intent to "capture" the appointive assets be contained in the instrument of appointment. This change is consistent with the rules found in other sections on admissibility of evidence extrinsic to the instrument of appointment. See Sections 1386.1-1386.3. Otherwise, Section 1389.3 is intended to adopt the substance of the common law doctrine of capture or implied alternative appointment to the donee's estate. See Simes, Law of Future Interests § 69 (2d ed. 1966).

10355

§ 1389.4 (amended). Appointment to previously deceased appointee by will or instrument effective at death of donee

SEC. 6. Section 1389.4 of the Civil Code is amended to read:

1389.4. (a) ~~If~~ Except as provided in subdivision (b), if an appointment made by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective ~~, the appointment is to be effectuated , if possible, by applying the provisions of Section 92 of the Probate Code as though the appointive property were the property of the donee~~ and the appointee leaves issue surviving the donee, the surviving issue of such appointee shall take the appointed property, per stirpes and not per capita, in the same manner as the appointee would have taken had the appointee survived the donee except that the property shall pass only to persons who are the permissible appointees , including those permitted under Section 1389.5 .

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

Comment. Section 1389.4 is amended to permit issue of an appointee to take the appointed property where an appointee dies before the appointment becomes effective and leaves issue surviving the donee, whether or not the issue is related to the donee. Prior to this amendment, the section apparently permitted only issue of an appointee related to the donee to take the appointed property where the appointee dies before the appointment becomes effective. See French, Application of Antilapse Statutes to Appointments Made by Will, 53 Wash. L. Rev. 405, 432 (1978).

Section 1389.4 provides a more liberal antilapse provision than the general antilapse provision of Section 92, because Section 1389.4 does not require that the issue of the predeceased appointee be related either to the donor or donee. Section 1389.4 permits the children of the spouse of the donee to take if the spouse of the donee is the appointee and dies before the appointment becomes effective. Likewise, an appointment to a brother or sister or nephew or niece of the donee's spouse will not lapse. A person may not take under Section 1389.4 unless the person is a permissible appointee.

This section applies only in the absence of a manifestation of a contrary intent by the donor or donee. It is designed to fill the gap if there is no discernible intent of the donor or donee as to the desired disposition of the property when an intended taker dies before the effective date of the disposition.

2185

§ 1389.5 (added). Appointment to issue of permissible appointee of special power

SEC. 7. Section 1389.5 is added to the Civil Code, to read:

1389.5. Unless the creating instrument expressly otherwise provides, if a permissible appointee dies before the exercise of a special power of appointment, the donee has the power to appoint to the issue of the deceased permissible appointee, whether or not such issue was included within the description of the permissible appointees, if the deceased permissible appointee was alive at the time of the execution of the creating instrument or was born thereafter. This section applies whether the special power of appointment is exercisable by inter vivos instrument, by will, or otherwise.

Comment. Section 1389.5 permits an appointment under a special power to the issue of the predeceased object of the power. A special power of appointment is usually designed to permit flexibility in the ultimate disposition of the property by permitting the donee to take into account changing family circumstances. Permitting the donee to select not only among the primary class members but also among the issue of those who are deceased is necessary to permit effectuation of the donor's purpose. Section 1389.5 applies the principle of the antilapse statute to this situation without regard to whether the substitute

takers are included within the permissible appointees. See generally French, Application of Antilapse Statutes to Appointments Made by Will, 53 Wash. L. Rev. 405 (1978).

This section applies only in the absence of a manifestation of contrary intent by the donor in the creating instrument. The section is designed to fill the gap if there is no discernible intent of the donor as to the desired disposition of the property when an object of the power dies before the time of the exercise of the power.

3260

§ 1390.1 (amended). Authority of donor to alter rights of creditors of the donee

SEC. 8. Section 1390.1 of the Civil Code is amended to read:

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, and 1390.5 by any language in the instrument creating the power.

Comment. Section 1390.1 is amended to reflect the addition of Section 1390.5. The addition of the reference to Section 1390.5 will protect the rights of support of dependents from being avoided by language in the creating instrument.

3138

§ 1390.5 (added). Persons entitled to support considered creditors of donor

SEC. 9. Section 1390.5 is added to the Civil Code, to read:

1390.5. For the purposes of Sections 1390.3 and 1390.4, a person to whom the donee owes an obligation of support shall be considered a creditor of the donee to the extent that a legal obligation exists for the donee to provide such support.

Comment. Section 1390.5 is added to make clear that the obligation of the donee to support persons to whom the donee owes an obligation of support can be enforced against (1) property subject to a general power of appointment that is presently exercisable (Section 1390.3), and (2) property subject to an unexercised general power of appointment created by the donor in favor of himself, whether or not presently exercisable (Section 1390.4).

Transitional provision

SEC. 10. (a) Sections 1386.2, 1389.3, and 1389.4 of the Civil Code as amended by this act apply to any case where the donee dies on or after the operative date of this act.

(b) The amendment of Section 1388.2 of the Civil Code made by this act applies to any release made on or after the operative date of this act, but does not impair the validity of any release made prior to that date.

(c) Section 1389.5 which is added to the Civil Code by this act applies to any case where the power of appointment is exercised on or after the operative date of this act, but does not affect the validity of any exercise of a power of appointment made prior to that date.

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Operative date

SEC. 11. This act shall become operative on July 1, 1982.