

Memorandum 91-9

Subject: Study L-3002 - Relocation of Powers of Appointment from Civil Code to Probate Code

Several times in the past the Commission has discussed the desirability of relocating the power of appointment statutes from the Civil Code to the Probate Code. The Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section supported moving the power of appointment statutes to the Probate Code in a letter dated March 6, 1990, which was distributed at the March 1990 Commission meeting. However, the Commission did not make a decision on the matter at that time.

In order to facilitate discussion, the staff has prepared an initial draft of the power of appointment statute as it might be added to the Probate Code. The staff proposes to place this statute with other relatively self-contained, miscellaneous statutes in Division 2 of the Probate Code. This division includes statutes such as those relating to simultaneous death (§§ 220-234), disclaimers (§§ 260-295), fiduciaries' wartime substitution law (§§ 350-388), litigation involving decedents (§§ 550-555), etc. There is sufficient room, and the new statute would have 3-digit section numbers instead of 5-digit decimalized numbers which were needed to squeeze 35 sections into the Civil Code.

In brief, this statute should be moved to the Probate Code because powers of appointment are estate planning tools, and are frequently created by or exercised by wills or trusts. The existing statute in the Civil Code makes several references to other statutes, all of them in the Probate Code. See, e.g., Civil Code §§ 1388.3 (reference to Prob. Code § 1460 *et seq.*), 1389.2 (reference to guardianships and conservatorships), 1389.4 (reference to Prob. Code § 240), 1392.1 (reference to Prob. Code § 15400). There is no particular logic for locating powers of appointment where they now are, in Part 4 (Acquisition of Property) of Division 2 (Property) of the Civil Code, except that powers do relate to property. But then, so does almost all

probate and trust law. Powers of appointment are currently between "common interest developments" and "water rights."

At one time, the various statutes now included in the Probate Code were in the Civil Code. Beginning with the 1931 Probate Code, continuing through the removal of the trust statutes from the Civil Code in 1986, and gifts in view of impending death proposed to be removed in 1991, the process of grouping provisions logically related to estate planning and traditional probate jurisdiction has continued.

The relocation of powers of appointment would provide the opportunity to update the sections in light of later enactments, to make sure terminology is consistent, and to update and combine the Comments. We also anticipate that some substantive revisions may be suggested by experts in the field, when the opportunity to review the statute is presented. At the same time, we are not aware of any need for major revisions, and do not anticipate the need to spend very much time on this project.

A few issues have arisen in the process of preparing the restated power of appointment statute set out in the attached draft. Questions that arose are discussed in notes following the section concerned. See, e.g., Note following draft Section 641 and UPC § 2-608 (1990), attached as Exhibit 1. The Comments to the sections in the draft statute have been revised to eliminate obsolete material, such as where a section has been amended. But for the most part, the draft statute continues the existing law without change.

If the Commission decides to proceed with this matter, when time permits, the staff would make a brief survey of developments in the law during the last 20 years to see if there is any new refinement the Commission might want to consider for adoption. We would also add special operative date provisions where relevant. See, e.g., Civil Code § 1386.2 (1981 amendment applicable to cases where donee died after June 30, 1982).

Respectfully submitted,

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UPC § 2-608 (1990)

SECTION 2-608. EXERCISE OF POWER OF APPOINTMENT. In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will, or a will making general disposition of all of the testator's property, expresses an intention to exercise a power of appointment held by the testator only if (i) the power is a general power and the creating instrument does not contain a gift if the power is not exercised or (ii) the testator's will manifests an intention to include the property subject to the power.

COMMENT

General Residuary Clause. As revised, this section provides that a general residuary clause (such as "All the rest, residue, and remainder of my estate, I devise to") in the testator's will or a will making general disposition of all of the testator's property (such as "All of my estate, I devise to") expresses an intent to exercise a power of appointment held by the donee of the power only if one or the other of two circumstances or sets of circumstances are satisfied. One such circumstance (whether the power is general or nongeneral) is if the testator's will manifests an intention to include the property subject to the power. A simple example of a residuary clause that manifests such an intention is a so-called "blending" or "blanket-exercise" clause, such as "All the rest, residue, and remainder of my estate, including any property over which I have a power of appointment, I devise to"

The other circumstance that expresses an intent to exercise a power by a general residuary clause or a will making general disposition of all of the testator's property is that the power is a general power and the instrument that created the power does not contain a gift over in the event the power is not exercised (a "gift in default"). In well planned estates, a general power of appointment will be accompanied by a gift in default. The gift-in-default clause is ordinarily expected to take effect; it is not merely an after-thought just in case the power is not exercised. The power is not expected to be exercised, and in

fact is often conferred mainly to gain a tax benefit -- the federal estate-tax marital deduction under section 2056(b)(5) of the Internal Revenue Code or, now, inclusion of the property in the gross estate of a younger-generation beneficiary under section 2041 of the Internal Revenue Code, in order to avoid the possibly higher rates imposed by the new federal generation-skipping tax. See Blattmachr & Pennell, "Adventures in Generation Skipping, Or How We Learned to Love the 'Delaware Tax Trap,'" 24 Real Prop. Prob. & Tr. J. 75 (1989). A general power should not be exercised in such a case without a clear expression of an intent to appoint.

In poorly planned estates, on the other hand, there may be no gift-in-default clause. In the absence of a gift-in-default clause, it seems better to let the property pass under the donee's will than force it to return to the donor's estate, for the reason that the donor died before the donee died and it seems better to avoid forcing a reopening of the donor's estate.

Cross Reference. See also Section 2-704 for a provision governing the meaning of a requirement that a power of appointment be exercised by a reference (or by an express or specific reference) to the power.

POWERS OF APPOINTMENT

Civ. Code §§ 1380.1-1392.1 (repealed). Powers of appointment

SEC. . Title 7 (commencing with Section 1380.1) of Part 4 of Division 2 of the Civil Code is repealed.

Comment. The power of appointment statute of former Civil Code Sections 1380.1-1392.1 is continued without substantive change in Probate Code Sections 600-695. The following table indicates the disposition of each of the former Civil Code Sections in the Probate Code.

<u>Civil Code</u>	<u>Prob. Code</u>	<u>Civil Code</u>	<u>Prob. Code</u>
1380.1	600	1387.2	651
1380.2	601	1387.3	652
1381.1	610	1388.1	660
1381.2	611	1388.2	661
1381.3	612	1388.3	662
1381.4	613	1389.1	670
1382.1	620	1389.2	671
1384.1	625	1389.3	672
1385.1	630	1389.4	673
1385.2	631	1389.5	674
1385.3	632	1390.1	680
1385.4	633	1390.2	681
1385.5	634	1390.3	682
1386.1	640	1390.4	683
1386.2	641	1390.5	684
1386.3	642	1391	690
1387.1	650	1392.1	695

Prob. Code §§ 600-695 (added). Powers of appointment

SEC. . Part 14 (commencing with Section 600) is added to Division 2 of the Probate Code, to read:

PART 14. POWERS OF APPOINTMENT

Comment. This part supersedes Title 7 (commencing with Section 1380.1) of Part 4 of Division 2 of the Civil Code. The former power of appointment statute is continued in this part largely without substantive change. The former statute was originally enacted and later revised on recommendation of the California Law Revision Commission. See *Recommendation and Study Relating to Powers of Appointment*, 9 Cal. L. Revision Comm'n Reports 301 (1969); *Background Statement Concerning Reasons for Amending Statute Relating to Powers of Appointment*, 14 Cal. L. Revision Comm'n Reports 257 (1978);

Recommendation Relating to Revision of the Powers of Appointment Statute, 15 Cal. L. Revision Comm'n Reports 1667 (1980); see also *Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2484 (1982); *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 755 (1986); [*Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501, 2538-39 (1990)].

This part 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 part or other statutes; these are left to court decisions under the common law which remains in effect. See Section 600 & Comment. This approach was taken in other states. See Mich. Stat. Ann. § 26.115(119) (19__); Minn. Stat. Ann. § 502.62 (19__); N.Y. Est. Powers & Trusts Law § 10-1.1 (19__); Wis. Stat. Ann. § 232.19 (19__).

CHAPTER 1. GENERAL PROVISIONS

§ 600. Common law applies unless modified by statute

600. 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 600 continues former Civil Code Section 1380.1 without change. This section 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 P. 425 (1920).

§ 601. Law applicable to powers created prior to July 1, 1970

601. 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 of appointment or at the time of the assertion of a right given by this part differ, the law existing at the time of the release, exercise, or assertion of a right controls. Nothing in this section makes invalid a power of appointment created before July 1, 1970, that was valid under the law in existence at the time it was created.

Comment. Section 601 continues former Civil Code Section 1380.2 without substantive change. This section makes this part applicable where a release is executed, a power is exercised, or a right is asserted on or after the July 1, 1970 (the operative date of former Civil Code Sections 1380.1-1392.1), regardless of when the power was created. However, Section 1380.2 deals only with the "release" or "exercise" of a power of appointment or the "assertion of a right" given by this part. The section does not deal with "creation" of powers of appointment, and nothing in the section makes invalid a power of appointment created before July 1, 1970, where the power was valid under the law in effect at the time it was created.

Under this section, 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 680-683. Likewise, after July 1, 1970, such matters as the exercise of a power of appointment are governed by this part, even though the power of appointment was created before July 1, 1970.

Provisions similar to this section have been enacted in other states. See Mich. Stat. Ann. § 26.155(122) (19__); Wis. Stat. Ann. § 232.21 (19__).

CHAPTER 2. DEFINITIONS; CLASSIFICATION OF POWERS OF APPOINTMENT

§ 610. Definitions

610. As used in this part:

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

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

(c) "Creating instrument" means the deed, will, trust, or other writing or document that creates or reserves the power of appointment.

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

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

(f) "Permissible appointee" means a person in whose favor a power of appointment is exercised.

Comment. Section 610 continues former Civil Code Section 1381.1 without substantive change. The definitions have been reorganized in alphabetical order. See also Sections 56 ("person" defined), 62 ("property" defined), 82 ("trust" defined), 88 ("will" defined).

The definitions of "appointee," "donee," and "donor" are substantially the same as provided in the Restatement of Property Section 319 (19__). The definition of "creating instrument" in subdivision (c) is similar to a Michigan provision. See Mich. Stat. Ann. § 26.155(102)(g) (19__). The definitions of "appointive property" and "permissible appointee" are different from the Restatement, but are

substantially the same in meaning as Restatement of Property Section 319(3) and (6).

Note. The Restatement (Second) of Property (Donative Transfers) (1983), which covers powers of appointment, has been prepared and adopted since the Commission did its work on the power of appointment statute in the late 1960's. As a consequence, some terminology has changed. At this stage, the staff is simply suggesting the relocation of the power of appointment statute with some minor technical revisions. We have not undertaken a substantive review in light of the new Restatement or other developments. Does the Commission want the staff to review the literature to see if any other changes should be made?

§ 611. "General" and "special" powers of appointment

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

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

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

(d) A power of appointment that is not "general" is "special."

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

Comment. Section 611 continues former Civil Code Section 1381.2 without substantive change. The reference to "persons" in subdivision (b) has been omitted as surplus. See Section 10 (singular includes plural).

Subdivisions (a), (c), and (d) of Section 611 were based on the distinction between "general" and "limited" powers in the former California inheritance tax law and the distinction between "general" powers and all other powers in the federal estate tax law. See former Rev. & Tax. Code § 13692 (repealed by initiative, _____); I.R.C. § 2041(b)(1). Although this part general codifies the common law, Section 611 departs from the common law distinction stated in Section 320 of the Restatement of Property. Instead, it adopts the

prevailing professional usage, which is in accord with the definitions contained in the federal estate tax law. See Mich. Stat. Ann. § 26.155(102)(h), (i) (19__); N.Y. Est. Powers & Trusts Law § 10-3.2(b), (c) (19__); Wis. Stat. Ann. § 232.01(4), (5) (19__).

A power of appointment is "general" only to the extent that it is exercisable in favor of the donee, the donee's estate, the donee's creditors, or creditors of the donee's estate. Thus, for example, A places property in trust, and gives B a power to consume the income from the trust in such amounts as are necessary to support B in accordance with her accustomed manner of living whenever B's annual income from all other sources is less than \$15,000. B's power is limited to consumption of the income from the trust; in no event can she (or her creditors under Section 682) reach the trust principal. Moreover, B's power is limited by one of a variety of commonly used ascertainable standards and is therefore under this section a "general" power only to the extent that that standard is satisfied. Finally, B's power is subject to the condition that her annual income from all other sources must be less than \$15,000, and is not, therefore, presently exercisable until that condition is met.

A power is general so long as it can be exercised in favor of any one of the following: the donee, the donee's estate, the donee's creditors, or the creditors of the donee's 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 the donee to appoint to any one of them. However, a power that is not otherwise considered to be a general power is not classified as general merely because a particular permissible appointee may, in fact, be a creditor of the donee or the donee's estate. A similar rule obtains under the federal estate tax and gift tax regulations. Treas. Reg. §§ 20.2041-1(c), 25.2514-1(c) (19__). Moreover, the mere fact that the donee has a power to appoint for the benefit of persons in discharge of an obligation of support does not make the power a general one if it is limited by an ascertainable standard relating to their support. See subdivision (b). This exception is not found in the tax law definition.

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

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

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

See also Sections 610(b) ("appointive property" defined), 610(d) ("donee" defined).

Note. While the staff does not recommend changing the terminology of the California statute, it may no longer be accurate to say that the

terminology used in this section is in accord with prevailing usage. For example, the new Restatement (Second) of Property (Donative Transfers) uses "non-general" rather than "special." See also Uniform Statutory Rule Against Perpetuities § 1(c) (1990); but see L. Waggoner, *Future Interests in a Nutshell* § 14.1 (1981) (using "general," "special" or "limited," and "hybrid").

§ 612. "Testamentary" and "presently exercisable" powers of appointment

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

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

(c) A power of appointment is "not presently exercisable" if it is "postponed." A power of appointment is "postponed" in either of the following circumstances:

(1) The creating instrument provides that the power of appointment may be exercised only after a specified act or event occurs or a specified condition is met, and the act or event has not occurred or the condition has not been met.

(2) The creating instrument provides that an exercise of the power of appointment is revocable until a specified act or event occurs or a specified condition is met, and the act or event has not occurred or the condition has not been met.

Comment. Section 612 continues former Civil Code Section 1381.3 without substantive change. This section differentiates among powers of appointment by focusing on the time at which the power may be effectively exercised. A power of appointment that can be exercised by inter vivos instrument as well as by will is not a power that can be exercised "only by a will," and hence is not a testamentary power under subdivision (a).

A power may be neither "testamentary" nor "presently exercisable" if it is "postponed," as provided in subdivision (c). When the term "power not presently exercisable" is used in this part, it includes both testamentary powers and powers that are otherwise postponed. The following is an example of a "postponed" power of appointment: The creating instrument provides that a wife's power of appointment over certain property held in trust by a bank is exercisable "only by a written instrument other than a will on file with the trustee at the death of my wife" and, to ensure that the wife retains unlimited discretion throughout her lifetime, the creating instrument further provides that any instrument of appointment shall be revocable during the donee's lifetime. Although the wife has filed a written instrument with the trustee designating the appointees, she is still alive.

See also Section 610(c) ("creating instrument" defined).

§ 613. "Imperative" and "discretionary" powers of appointment

613. A power of appointment is "imperative" where 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 the donee chooses.

Comment. Section 613 continues former Civil Code Section 1381.4 without substantive change. A power of appointment is either imperative or discretionary. If a power is imperative, the donee must exercise it or the court will divide the appointive property among the potential appointees. See Section 671. 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 passing to the takers in default or returning to the donor's estate. See Section 672.

Section 613 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 determines when such an intent has been manifested. See Section 600 & Comment. See also *O'Neil v. Ross*, 98 Cal. App. 306, 277 P. 123 (1929) (discussion of "mandatory" powers but no holding concerning them).

Section 613 is similar to a New York provision. See N.Y. Est. Powers & Trusts Law § 10-3.4 (19__).

See also Sections 610(a) ("appointee" defined), 610(c) ("creating instrument" defined), 610(d) ("donee" defined).

CHAPTER 3. CREATION OF POWERS OF APPOINTMENT

§ 620. Donor's capacity

620. 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 620 continues former Civil Code Section 1382.1 without change. This section codifies case law. See *Swart v. Security-First Nat'l Bank*, 48 Cal. App. 2d 824, 120 P.2d 697 (1942). See also Code Civ. Proc. § 1971 (creation of power relating to real property). See also Section 610(e) ("donor" defined).

CHAPTER 4. EXERCISE OF POWERS OF APPOINTMENT

Article 1. Donee's Capacity

§ 625. Donee's capacity

625. (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 not exercise a power of appointment during minority.

Comment. Section 625 continues former Civil Code Section 1384.1 without change. Under this section, 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 (1940) and is substantially the same as provisions in Michigan and Wisconsin. See Mich. Stat. Ann. § 26.155(105)(1) (19__); Wis. Stat. Ann. § 232.05(1) (19__).

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., that the donee not judicially determined to be incapacitated) which a minor donee also must satisfy.

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined).

Article 2. Scope of Donee's Authority

§ 630. Scope of donee's authority generally

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

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

Comment. Section 630 continues former Civil Code Section 1385.1 without substantive change. Subdivision (a) codifies the common law rule embodied in Section 346 of the Restatement of Property (1940). See also Restatement of Property § 324 (1940).

Subdivision (b) states an exception to the rule codified in subdivision (a). This exception is not found in the common law, but a similar exception is found in the law of other states. See Mich. Stat. Ann. § 26.155(105)(2) (19__); Minn. Stat. Ann. § 502.64 (19__); N.Y. Est. Powers & Trusts Law § 10-6.2(a)(3) (19__). 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 would 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, the donor's clear intent should be enforced. For example, if the creating instrument requires exercise of the power "only by an instrument other than a will," subdivision (b) is not applicable. See also Code Civ. Proc. § 1971 (power relating to real property).

See also Section 610(c) ("creating instrument" defined).

§ 631. Requirement of specific reference to power of appointment

631. If the creating instrument expressly directs that a power of appointment be exercised by an instrument that 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 631 continues former Civil Code Section 1385.2 without substantive change. This section permits a donor to require an express reference to the power of appointment to ensure a conscious exercise by the donee. In such a case, the specific reference to the power is a condition to its exercise. This condition precludes the use of form wills with "blanket" clauses exercising all powers of appointment owned by the testator. The use of blanket clauses may result in passing property without knowledge of the tax consequences and may cause appointment to unintended beneficiaries. This section embodies the rule set out in Michigan and Wisconsin law. See Mich. Stat. Ann. § 26.155(104) (19__); Wis. Stat. Ann. § 232.03(1) (19__).

See also Section 610(c) ("creating instrument" defined).

§ 632. Power of appointment requiring consent of donor or other person

632. (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 whose consent is required.

(b) Unless expressly prohibited by the creating instrument:

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

(2) If a person whose consent is required becomes legally incapable of consenting, the person's guardian or conservator may consent to an exercise of the power.

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

Comment. Section 632 continues former Civil Code Section 1385.3 without substantive change. The reference to "persons" in subdivision (a) has been omitted as surplus. See Section 10 (singular includes plural). Section 632 reflects a policy similar to provisions in other states. See Mich. Stat. Ann. § 26.155(105)(4) (19__); Minn. Stat. Ann. § 502.68 (19__); N.Y. Est. Powers & Trusts Law § 10-6.4 (19__); Wis. Stat. Ann. § 232.05(3) (19__). 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 be recordable.

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined), 610(e) ("donor" defined).

§ 633. Power of appointment created in favor of two or more donees

633. 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 633 continues former Civil Code Section 1385.4 without change. This section is consistent with the rule applicable trustees under Section 15620 and the law of other states. See Mich. Stat. Ann. § 26.155(105)(5) (19__); Minn. Stat. Ann. § 502.67 (19__); N.Y. Est. Powers & Trusts Law § 10-6.7 (19__); Wis. Stat. Ann. § 232.05(4) (19__).

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined).

§ 634. Power of court to remedy defective exercise

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

Comment. Section 634 continues former Civil Code Section 1385.5 without change. This section is included to make clear that this chapter does not limit the power of a court under Section 671. The same provision is included in New York law. See N.Y. Est. Powers & Trusts Law § 10-6.2 (19__).

See also Section 1381.4 ("imperative" power defined).

Article 3. Donee's Required Intent

§ 640. Manifestation of intent to exercise power of appointment

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

(b) A manifestation of the donee's intent to exercise a power of appointment exists any of the following circumstances:

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

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

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

(c) The circumstances described in subdivision (b) are illustrative, not exclusive.

Comment. Section 640 continues former Civil Code Section 1386.1 without substantive change. This section codifies case law and the common law generally. See Childs v. Gross, 41 Cal. App. 2d 680, 107 P.2d 424 (1940); Reed v. Hollister, 44 Cal. App. 533, 186 P. 819 (1919); Restatement of Property §§ 342, 343 (1940).

Subdivision (b) gives examples of when the donee has sufficiently manifested the intent under this section to exercise the power. The list is not exclusive, as provided in subdivision (c), and is similar to New York law. See N.Y. Est. Powers & Trusts Law § 10-6.1(a)(1)-(3) (19__); see also Mich. Stat. Ann. § 26.155(104) (19__).

See also Sections 610(b) ("appointive property" defined), 610(d) ("donee" defined).

§ 641. Exercise of power of appointment by residuary clause or other language

641. A general residuary clause in a will, or a will making a general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intent to exercise the power.

Comment. Section 641 continues former Civil Code Section 1386.2 without substantive change. The word "intention" has been changed to "intent" for conformity with Section 640(a).

Section 641 adopts the substance of Uniform Probate Code Section 2-610 (1989). Under this 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 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 of appointment pass to the takers in default, particularly assets held in a marital deduction trust. See Uniform Probate Code Section 2-610 comment (1989); 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 641, 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 property 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 640 sets forth a nonexclusive list of types of evidence that indicate an intent to exercise a power of appointment. 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 641 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 630, 631.

Note. Civil Code Section 1386.2 was enacted on Commission recommendation in 1981 and, as noted in the Comment set out above, was drawn from UPC Section 2-610. The Comment also states that the new rule is adopted in part to promote uniformity. However, the UPC was revised in 1990 to refine the former rule. The 1990 revision, set out in Section 2-608, is as follows:

2-608. Exercise of power of appointment.

In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will, or a will making general disposition of all of the testator's property, expresses an intention to exercise a power of appointment held by the testator only if (i) the power is a general power and the creating instrument does not contain a gift if the power is not exercised or (ii) the testator's will manifests an intention to include the property subject to the power.

The revised UPC section is explained in greater detail in the UPC comment, which is attached as Exhibit 1 to Memorandum 91-9. A major effect of the new language is to distinguish between wills with a gift in default provision from less well-planned estates. The rule of existing Civil Code Section 1386.2 (the former UPC rule) would still apply where there is no gift in default, but if there is a gift over, it is better for the appointive property to pass in the donee's estate than in the donor's. See UPC § 2-608 comment (1990) in Exhibit 1.

The staff recommends adoption of the revised UPC rule in place of draft Section 641.

§ 642. Will executed before creation of power of appointment

642. If a power of appointment existing at the donee's death, but created after the execution of the donee's will, is exercised by the will, the appointment is effective except in either of the following cases:

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

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

Comment. Section 642 continues former Civil Code Section 1386.3 without substantive change. This section codifies the rule of California Trust Co. v. Ott, 59 Cal. App. 2d 715, 140 P.2d 79 (1943). It also states the rule in Section 344 of the Restatement of Property (1940). This section requires that a power of appointment be one "existing at the donee's death." Thus, where the donor executes a will creating a power exercisable by will, the donee executes a will purporting to exercise that power and thereafter dies, and later the donor dies without having changed his or her will, the attempted exercise by the donee is ineffective. This conclusion follows because the power of appointment was not one "existing at the donee's death" since the donor could have revoked or changed the will at any time before the donor died.

See also Section 610(d) ("donee" defined).

Article 4. Types of Appointments

§ 650. General power of appointment

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

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

(2) Of present or future interests or both.

(3) Subject to conditions or charges.

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

(5) In trust.

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

Comment. Section 650 continues former Civil Code Section 1387.1 without change. This section embodies the common law rules found in Sections 356 and 357 of the Restatement of Property (1940). It makes clear that, under a general power of appointment, the donee has the same freedom of disposition that the donee has with respect to property

he or she owns. The types of appointment mentioned in subdivision (a) are those about which questions have most often arisen.

See also Sections 610(b) ("appointive property" defined), 610(d) ("donee" defined), 611 ("general power of appointment" defined).

§ 651. Special power of appointment

651. 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 650.

Comment. Section 651 embodies the rules stated in Sections 358 and 359 of the Restatement of Property (1940), except that this section 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 the donee to give such a person a special power to appoint. See 3 R. Powell, Real Property ¶ 398, at n.28-30 (1967). A special power is not, of course, the substantial equivalent of outright ownership and the creation of a special power in a permissible appointee may fail therefore to constitute a valid exercise of an imperative power. For example, where each of the permissible appointees under an imperative power is to receive not less than 10 percent of the appointive property, the creation of a special power in a permissible appointee would not satisfy this 10-percent requirement.

The donee of a special power of appointment may not have the same freedom as to types of appointments that the donee of a general power has. Other rules of law may limit the donee's 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 this section, 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 690. 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).

See also Sections 610(c) ("creating instrument" defined), 611 ("general" and "special" powers of appointment defined).

§ 652. Exclusive and nonexclusive powers of appointment

652. (a) Except as provided in subdivision (b), the donee of a 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 the specification.

Comment. Section 652 continues former Civil Code Section 1387.3 without substantive change. This section deals with the problem of whether the donee of a special power of appointment 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 the donee must give each child a share or whether the donee 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." This section provides, in effect, that all powers are construed to be exclusive except to the extent that the donor has specified a minimum or maximum amount. It embodies the constructional preference for exclusive powers contained in Section 360 of the Restatement of Property (1940).

The rule in this section changed California law as developed in Estate of Sloan, 7 Cal. App. 2d 319, 46 P.2d 1007 (1935), which was contrary to many common law decisions. See Annot., 69 A.L.R.2d 1285 (1960). Similar provisions have been adopted in other states. See Mich. Stat. Ann. § 26.155(107) (19__); N.Y. Est. Powers & Trusts Law § 10-5.1 (19__); Wis. Stat. Ann. § 232.07 (19__).

See also Sections 610(a) ("appointee" defined), 610(b) ("appointive property" defined), 610(d) ("donee" defined), 610(e) ("donor" defined), 610(f) ("permissible appointee" defined), 611 ("special" power of appointment defined).

Article 5. Contracts to Appoint; Releases

§ 660. Contracts to appoint

660. (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 the donee 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 the promisee is not prevented from obtaining restitution of the value given by the promisee for the promise.

(c) Unless the creating instrument expressly provides that the donee may not contract to make an appointment while the power of appointment is not presently exercisable, subdivision (b) does not

apply to the case where the donor and the donee are the same person. In this case, the donee can contract to make an appointment to the same extent that the donee could make an effective appointment if the power of appointment were presently exercisable.

Comment. Section 660 continues former Civil Code Section 1388.1 without substantive change.

Under subdivision (a), a contract by a donee to make an appointment in the future that the donee could have made at the time the contract was executed does not conflict with any rule of the law of powers of appointment. The objection to such promises under a testamentary power -- that if the promise is given full effect, the donee is accomplishing by contract what is forbidden 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 the law in Michigan and New York. See Mich. Stat. Ann. § 26.155(110)(1) (19__); N.Y. Est. Powers & Trusts Law § 10-5.2 (19__).

Section 660 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).

Under subdivision (b), by giving a 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 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 that makes an appointment in favor of the promisee. The rule with respect to releases of testamentary and postponed powers is similar. See Section 661. 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).

Subdivision (c) restricts the prohibition in subdivision (b) to cases where the donor and the donee are different persons. This follows a revision in New York law. See N.Y. Est. Powers & Trusts Law § 10-5.3 (19__); N.Y. Law Revision Comm'n, *Recommendation Relating to the Ability of a Donee of a Testamentary Power of Appointment to Contract to Appoint and to the Donee's Release of the Power, Under the Estates, Powers and Trusts Law*, N.Y. Leg. Doc. No. 65(C) (1977).

The purpose of subdivision (b) is to prevent the donor's intent from being defeated by the donee contracting to appoint under a power

of appointment that is not presently exercisable. By giving a 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. However, where the donor and the donee are the same person, the donor's intent is better protected by an exception permitting the option of dealing with the power during the donor-donee's lifetime. Subdivision (c) makes clear that the donee of a power of appointment may contract to make an appointment while the power of appointment is not presently exercisable if the donor and donee are the same person, unless the creating instrument expressly provides that the donor-donee may not make an appointment while the power of appointment is not presently exercisable.

Subdivision (c) reflects a policy consistent with Section 683 which makes an unexercised general power of appointment created by the donor in the donor's own favor, whether or not presently exercisable, subject to the claims of creditors of the donor or of the donor's estate and to the expenses of administration of the estate. A similar policy is reflected in Section 695(a) which permits the donor to revoke the creation of a power of appointment when the power is created in connection with a revocable trust.

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined), 610(e) ("donor" defined), 611 ("general" and "special" powers of appointment defined), 612(b) ("presently exercisable" defined).

§ 661. Release of discretionary power of appointment

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

(b) A 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 or a power shall be deemed to make imperative the remaining power that was not imperative before the release unless the instrument of release expressly so provides. 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 persons designated as provided by the donor.

(c) A release shall be delivered as follows:

(1) If the creating instrument specifies a person to whom a release is to be delivered, the release shall be delivered to that

person, but delivery need not be made as provided in this paragraph if the person cannot with due diligence be found.

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

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

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

(B) 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) A release of a power of appointment that 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 apply to a 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 that is recorded pursuant to this subdivision does not affect the validity of any transaction with respect to the real property or obligation secured thereby, and the general laws of this state on recording and its effect govern the transaction.

(e) This section does not impair the validity of a release made before July 1, 1970.

Comment. Section 661 continues former Civil Code Section 1388.2 without substantive change.

Subdivision (b) requires 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 benefit all those so designated as provided by the donor. This requirement, added in 1981, substituted for the former rule that no release of a power was permissible when the result of the release was the present exercise of a power not presently exercisable. The language of the last sentence of subdivision (b) is taken from New York law. See N.Y. Est. Powers & Trusts Law § 10-5.3(b) (19__). This provision 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 (c) deals only with "delivery" of the release. Nothing in subdivision (c) precludes the recording of a release

delivered in accordance with paragraph (1), (2), or (3)(A) of subdivision (c). See Civil Code §§ 1213-1215.

Subdivision (d) 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.

See also Sections 610(b) ("appointive property" defined), 610(c) ("creating instrument" defined), 613 ("discretionary" power of appointment defined), 610(d) ("donee" defined), 611 ("general" and "special" powers of appointment defined), 612(c) ("not presently exercisable" power of appointment defined), 610(f) ("permissible appointee" defined), 612 ("testamentary" power of appointment defined).

§ 662. Release on behalf of minor donee

662. (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 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 or 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 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.

(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) Other persons as ordered by the court.

(d) After hearing, the court in its discretion may make an order authorizing or requiring the guardian to release on behalf of the ward a general or special power of appointment as permitted under Section 661, 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.

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

Comment. Section 662 continues former Civil Code Section 1388.3 without substantive change. This section 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 661. 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 Sections §§ 2580-2586. Section 662 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 625 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.

See also Section 610(d) ("donee" defined).

Note. This section should be given further review in light of the revisions made in the notice and procedural provisions in the guardianship and conservatorship statutes and in the general sections of the Probate Code.

CHAPTER 5. EFFECT OF FAILURE TO MAKE EFFECTIVE APPOINTMENT

§ 670. Validity of unauthorized appointment

670. 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 the exercise was permissible under the terms of the power.

Comment. Section 670 continues former Civil Code Section 1389.1 without substantive change. This section is based on a New York rule. See N.Y. Est. Powers & Trusts Law § 10-6.6(1) (19__).

Section 670 makes clear that, when a power is exercised partly in favor of an unauthorized person, the exercise is valid to the extent that it is permissible under the terms of the power. However, if a fraud on a special power is involved, the appointment is not permissible under the terms of the power and the disposition of the property should be determined by common law principles. See *Matter of Carroll*, 153 Misc. 649, 275 N.Y.S. 911, modified, 247 App. Div. 11, 286 N.Y.S. 307, rev'd, 274 N.Y. 288, 8 N.E.2d 864 (1937).

Section 670 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, this section 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.

§ 671. Nonexercise or improper exercise of imperative power of appointment

671. (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 in whole or in part, the persons designated as permissible appointees take equally of the property not already appointed. Where the creating instrument establishes a minimum distribution requirement that is not satisfied by an equal division of the property not already appointed, the appointees who have received a partial appointment are required shall be required to return a pro rata portion of the property they would otherwise be entitled to receive in an amount sufficient to meet the minimum distribution requirement.

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

(c) Where an imperative power of appointment has been created so that it confers on a person a right to have the power exercised in the person's favor, the proper exercise of the power can be compelled in favor of the person, or the person's assigns, creditors, guardian, or conservator.

Comment. Section 671 continues former Civil Code Section 1389.2 without substantive change. The reference to "persons" in subdivision (b) has been omitted as surplus. See Section 10 (singular includes plural).

Section 671 states the consequences flowing from the imperative character of a power of appointment. Under subdivision (a), if an imperative power of appointment is created and the donee of the power dies without exercising it, the appointive assets go equally to the permissible objects of the power. Where there has been a partial appointment, unless the creating instrument or the donee has manifested a contrary intent, the assets already appointed are not thrown into a

hotchpot and are considered only to the extent necessary to satisfy a requirement set by the donor that each of the permissible appointees receive a certain minimum amount. The following illustrates these rules. The donor of a power specifies that the donee is to appoint at least 25 percent of the corpus of a trust to each of three permissible appointees (A, B, and C). (1) Donee appoints 10 percent to A, but fails to appoint the remainder. B and C each take 30 percent and A takes 40 percent (30 plus 10). (2) Donee appoints 40 percent to A, but fails to appoint the remainder. Since 60 divided by 3 equals 20, the donee failed to satisfy the minimum distribution requirement set by the donor. A therefore must "return" a portion of the property he receives. The appointive property will be distributed 25 percent (20 plus 5) each to B and C and 50 percent (40 plus 20 minus 10) to A. (3) Donee appoints 60 percent to A, 40 percent to B. This again fails to satisfy the minimum distribution requirement. To obtain the 25 percent required, A and B must "return" on a pro rata basis and distribution is made accordingly -- 45 percent (60 minus 15) to A, 30 percent (40 minus 10) to B and 25 percent to C. The arithmetic can become quite complex but the principle remains the same. Unless the creating instrument or the donee, in writing, manifests a contrary intent, a partial appointment is to be treated as reflecting an intended preference. The requirement of a writing by the donee is consistent with Sections [6174 and 6409] concerning advancements.

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

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

See also Sections 610(b) ("appointive property" defined), 610(c) ("creating instrument" defined), 613 ("imperative" power of appointment defined), 610(d) ("donee" defined), 610(f) ("permissible appointee" defined).

§ 672. Effect of failure to make effective appointment

672. (a) Except as provided in subdivision (b), if 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 named by the donor as taker in default or, if there is none, reverts to the donor.

(b) If 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 672 continues former Civil Code Section 1389.3 without substantive change. The reference to "persons" in subdivision (a) has been omitted as surplus. See Section 10 (singular includes plural).

Section 672 states the rules determining to whom property passes that has not been effectively appointed. 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 this section, the property passes directly from the donor to the ultimate takers.

Subdivision (b) 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 that fails and other ineffective appointments has not been continued. In other respects Section 672 is intended to adopt the substance of the common law doctrine of capture or implied alternative appointment to the donee's estate. See L. Simes, Law of Future Interests § 69 (2d ed. 1966); Restatement of Property § 365(2)-(3) (1940).

See also Sections 610(b) ("appointive property" defined), 613 ("discretionary" power of appointment defined), 610(d) ("donee" defined), 610(e) ("donor" defined), 611 ("general" power of appointment defined).

§ 673. Death of appointee before effective date of appointment

673. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of the appointee take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee, except that the property passes only to persons who are permissible appointees, including appointees permitted under Section 674. If the surviving issue are all of the same degree of kinship to the deceased appointee, they take equally, but if of unequal degree, then those of more remote degree take in the manner provided in Section 240.

(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 673 continues former Civil Code Section 1389.4 without substantive change.

Section 673 embodies the theory of Sections 349 and 350 of the Restatement of Property (1940). It is broadened to cover special powers by employing the language used by Michigan law. Mich. Stat. Ann. § 26.155(129) (19__). This section is necessary because the general anti-lapse provision in Section 6147 does not specifically deal with lapse of a testamentary appointment. This section 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.

Section 673 permits 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 the 1981 amendment of former Civil Code Section 1389.4, the section apparently permitted only issue of an appointee related to the donee to take the appointed property where the appointee died before the appointment becomes effective. See French, *Application of Antilapse Statutes to Appointments Made by Will*, 53 Wash. L. Rev. 405, 432 (1978).

Section 673 provides a more liberal antilapse provision than the general antilapse provision of Section 6147, because Section 673 does not require that the issue of the predeceased appointee be related either to the donor or donee. This section permits the children of the donee's spouse to take if the donee's spouse is the appointee and dies before the appointment becomes effective. Likewise, an appointment to a brother, sister, niece, or nephew of the donee's spouse will not lapse. A person may not take under Section 673 unless the person is a permissible appointee.

Section 673 adopts the general rule of representation provided by Section 240. See also Sections 230-234 (proceeding to determine whether issue of an appointee survived the donee).

As provided in subdivision (b), this section applies only in the absence of a manifestation of a contrary intent by the donor or donee. It is intended 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.

See also Sections 610(a) ("appointee" defined), 610(b) ("appointive property" defined), 610(d) ("donee" defined), 610(e) ("donor" defined), 610(f) ("permissible appointee" defined).

§ 674. Death of permissible appointee before exercise of special power of appointment

674. (a) Unless the creating instrument expressly provides otherwise, 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 the 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.

(b) This section applies whether the special power of appointment is exercisable by inter vivos instrument, by will, or otherwise.

Comment. Section 674 continues former Civil Code Section 1389.5 without substantive change. Subdivision (a) permits an appointment under a special power to the issue of a predeceased permissible appointee. 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 674 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).

As provided in subdivision (b), this section applies in the absence of an express contrary provision in the creating instrument. The section is designed to fill the gap if the creating instrument is silent as to the desired disposition of the property when a permissible appointee dies before the time of the exercise of the power.

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined), 611 ("special" power of appointment defined), 610(f) ("permissible appointee" defined).

CHAPTER 6. RIGHTS OF CREDITORS

§ 680. Authority of donor to alter rights of creditors of donee

680. The donor of a power of appointment cannot nullify or alter the rights given creditors of the donee by Sections 682, 683, and 684 by any language in the instrument creating the power.

Comment. Section 680 continues former Civil Code Section 1390.1 without substantive change. This section 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. Est. Powers & Trusts Law § 10-4.1(4) (1967). This section prevents instruments utilizing Treasury Regulations Section 20.2056(b)-5(f)(7) (allowing a marital deduction despite a spendthrift clause in the instrument creating the power) from nullifying the rights given creditors under Sections 682 and 683. The addition of the reference to Section 685 protects the dependents' support rights from being avoided by language in the creating instrument.

See also Sections 610(c) ("creating instrument" defined), 610(d) ("donee" defined), 610(e) ("donor" defined).

§ 681. Creditors claims against property subject to special power of appointment

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

Comment. Section 681 continues former Civil Code Section 1390.2 without substantive change. This section 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 a New York provision. See N.Y. Est. Powers & Trusts Law § 10-7.1 (19__).

See also Section 610(d) ("donee" defined).

§ 682. Creditors claims against property subject to general power of appointment

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

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

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

Comment. Section 682 continues former Civil Code Section 1390.3 without substantive change. This section states the rule with respect to the availability of property subject to a general power of appointment to satisfy the donee's debts. It is intended to make appointive property available to satisfy creditors' claims where the donee has the equivalent of full ownership of the property. See Comment to Section 1381.2.

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

Estate of Masson, 142 Cal. App. 2d 510, 298 P.2d 619 (1956). Subject to this limitation, appointive property is treated just as the donee's owned property. Thus, where the property has been appointed by an inter vivos instrument, the property is liable if, had it been the donee's own property, the transfer would have been subject to the rules relating to fraudulent conveyances. - See Restatement of Property § 330 (1940).

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

Subdivision (c) provides that the rights of creditors are not dependent on the exercise of the power. Unlike the common law rule, which requires the exercise of the power, the mere existence of the power is the operative fact essential to the rights of creditors. In addition, the nature of the donee's interest in the property is irrelevant. The property available to creditors can be either a present or a future interest.

See also Sections 610(d) ("donee" defined), 611 ("general" power of appointment defined), 612(b) ("presently exercisable" power of appointment defined), 612 ("testamentary" power of appointment defined).

§ 683. Creditor claims against property subject to unexercised general power of appointment created by donor in donor's favor

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

Comment. Section 683 continues former Civil Code Section 1390.4 without substantive change. This section 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). This section codifies the common law rule. See Restatement of Property § 328 (1940).

See also Sections 610(e) ("donor" defined), 611 ("general" power of appointment defined), 612(b) ("presently exercisable" power of appointment defined).

§ 684. Status of support creditor

684. For the purposes of Sections 682 and 683, 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 the support.

Comment. Section 684 continues former Civil Code Section 1390.5 without substantive change. This section makes clear that the donee's support obligations can be enforced against (1) property subject to a general power of appointment that is presently exercisable (Section 682), and (2) property subject to an unexercised general power of appointment created in the donor's own-favor, whether or not presently exercisable (Section 683).

See also Section 610(d) ("donee" defined).

CHAPTER 7. RULE AGAINST PERPETUITIES

§ 690. Beginning of permissible perpetuities period

690. The statutory rule against perpetuities provided by Part 2 (commencing with Section 21200) of Division 11 applies to powers of appointment governed by this part.

Comment. Section 690 continues former Civil Code Section 1391 [as proposed in USRAP bill] without substantive change. See [proposed] Sections 21206 (statutory rule against perpetuities as to general power of appointment not presently exercisable because of condition precedent), 21207 (statutory rule against perpetuities as to nongeneral power of appointment or general testamentary power of appointment), 21210 (when power of appointment created), 21211 (postponement of time of creation of power of appointment), 21212 (time of creation of power of appointment arising from transfer to trust or other arrangement).

Note. Draft Section 690 is the same as proposed Section 1390 which is included as a conforming revision in the Recommendation Relating to Uniform Statutory Rule Against Perpetuities, in the 1991 legislative program. If the USRAP recommendation is not enacted, the power of appointment statute would continue Civil Code Sections 1391.1 and 1391.2.

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

§ 695. Authority to revoke or release power of appointment

695. (a) Unless the power to revoke is in the creating instrument or exists pursuant to Section 15400, the creation of a power of appointment is irrevocable.

(b) Unless made expressly irrevocable by the creating instrument or the instrument of exercise, an exercise of a power of appointment is revocable if the power to revoke exists pursuant to Section 15400 or so long as the interest in the appointive property, whether present or future, has not been transferred or become distributable pursuant to the 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. Section 695 continues former Civil Code Section 1392.1 without substantive change. Under subdivision (a), 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 that is revocable under the presumption in Section 15400. In the latter case, to avoid a conflict between this section and Section 15400, the 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 as long as the interest in the appointive property has not been transferred or become distributable, unless the creating instrument or instrument of exercise provides otherwise. This subdivision embodies a policy that the donee should be permitted to modify or revoke an exercise of the power as long as the appointive property has not been effectively transferred. A donee may exercise the power of appointment by creating a trust for the benefit of permissible appointees. To avoid conflict with Section 15400 (presumption of revocability of trusts), subdivision (b) permits the donee to revoke the exercise, even though there has been an effective transfer, if the power to revoke exists pursuant to Section 15400.

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 662.

See also Sections 610(b) ("appointive property" defined), 610(c) ("creating instrument" defined).