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Memorandum 68-21

Subject: Study 69 - Powers of Appointment

Attached to this memorandum is a staff draft of a tentative recommendation on powers of appointment. The memorandum points out changes in substance and drafting that have been made by the staff in the consultant's recommended statute. We have not had time to check this tentative recommendation carefully, but we plan to do so after the meeting.

We plan to go through the statute section by section at the meeting.

Location of statute. Notwithstanding the numbers allocated to the statute in the tentative recommendation, the staff has concluded that the new powers of appointment statute should be Title 7 (commencing with Section 1380) of Part 4 of Division 2 of the Civil Code. If you are concerned about the location of the statute, please give some consideration to the matter prior to the meeting.

Organization of statute. The consultant's suggested statute followed basically the organization of the Restatement of Property. The statute has been reorganized by the staff so that it now follows the New York organization more closely than the Restatement organization.[1]

Revisions of consultant's statute. All sections have been worked over to improve their language and to conform to California style.

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1. The major changes involve placing the effectiveness of exercise sections with the exercise sections and placing the rights of creditors sections after the exercise sections. This seems to be a more logical order: the reader first determines what kind of power it is (§§ 752.06-752.08); then how to create one (§ 752.11); then the scope of donee's discretion (§§ 752.21-752.24); then how to exercise one and what happens if it is exercised incorrectly (§§ 752.31-752.42); then rights of creditors (§§ 752.51-752.54); the relationship of the power to the rule against perpetuities (§§ 752.61-752.62); and finally the power of revocation (§ 752.71).

Definitions. The staff will consider whether some definitions should be included in the statute when we redraft it after the meeting. The definitions can be reviewed at the next meeting.

Section 752.01 (old § 1). Section 752.01 and the Comment thereto have been drafted in accordance with the Commission's direction at the last meeting.

Section 752.06 (old § 2). An exception for joint powers has been added to Section 752.06 to clarify the law on that point. The Commission should consider whether or not it is wise to include such a provision in view of its possible misuse by astute attorneys. It might be better to leave such a decision up to the courts.

Subdivision (c) has been added to this section to clarify the law where a power of appointment is general as to some property and special as to other property.

Section 752.07 (old § 3). Section 752.07 has been redrafted to correspond to the Restatement of Property Section 321. The definition of "postponed power" has been deleted since it is rarely used. As originally drafted, the definition of a postponed power overlapped with "testamentary power" and caused a circular definition with a "presently exercisable" power. Whenever it is necessary to refer to all postponed powers, the term "not presently exercisable" is used.

Section 752.08 (old § 4). Section 752.08 has been redrafted so as to remove the emphasis from the word "duty" in subdivision (a).

Old § 5. Section 5 of the consultant's statute has been deleted as unnecessary. It is included as part of Section 752.34.

Section 752.11 (old § 6). The first three subdivisions of the consultant's Section 6 comprise this section. The fourth subdivision has

been removed and is now part of the chapter dealing with creditors. The staff made this change because the last subdivision had nothing to do with the capacity of the donor or the formalities necessary to create a power.

Section 752.21 (old § 7). This section is unchanged from the consultant's draft.

Section 752.22 (old § 13). Section 752.22 has been redrafted slightly for clarity.

Section 752.23 (old § 14). Section 752.23 has been redrafted slightly for clarity and consistency.

Section 752.24 (old § 12). Section 752.24 is substantially unchanged from the consultant's draft. The subdivisions have been renumbered, and slight changes in wording have been made.

Section 752.31 (old § 15). This section has been extensively redrafted. Subdivision (b) is new. It is a statement of the formalities required to effectively exercise a power of appointment and is based on Wisconsin Statutes Section 232.05(2).

Subdivision (c) has been redrafted to eliminate the ambiguity present in the former wording of this portion of the section.

Because of the concern over the relationship between the exercise of a consent and the exercise of joint power, subdivision (e) has been redrafted to include a statement of the requirements for recording a consent. This is based on the Michigan statute, and states the inferrable California law. Subdivision (e) is broken down into paragraphs to aid comprehension of its rather lengthy provisions.

Subdivision (f) has been redrafted only to conform it with subdivision (e) in form.

Section 752.32 (old § 17). Subdivision (d) has been broken down into paragraphs for clarity. There is no change in substance.

The Commission deferred action on the policy question involved in subdivisions (a)(3), (a)(4), and (b) until this meeting. Those subdivisions supersede Probate Code Sections 125 and 126 (Exhibit I) as far as powers of appointment are concerned. The result is that it is no longer possible to exercise a power by a general residuary clause where there is a gift in default unless there is clear intent that it was meant to do so. Section 752.32 (a)(3). If the creating instrument does not provide for a gift in default and does not require an express reference to the power, a residuary clause will exercise it if it disposes of all of his property of that kind and does not indicate an intent to not exercise the power. This departure from the common law was recommended by the consultant. The Commission should read the discussion in Wisconsin Law Review 594-599 (Exhibit II yellow).

Section 752.33 (old § 16). Changes are made in numbering and slight changes in wording.

Section 752.34 (old § 18). This section has been redrafted to include the terms "exclusive" and "nonexclusive" powers formerly defined by Section 5. The definitions in Section 5 were useless and conflicted with Section 18. However, the terms should be included because they provide a ready phrase for the use of the courts and lawyers to explain a complex principle.

Section 752.35 (old § 19). This section has been redrafted to indicate that the choices available are not exclusive.

Section 752.36 (old § 20). This section has been reworded for clarity.

Section 752.37 (old § 21). This section has been reworded for clarity.

The redrafting may present the Commission with a policy decision. Under the former wording of the section, if the donee of a special power

exercised the power in a manner intended to benefit a nonobject, to any extent, the exercise was ineffective. The consultant's Section 22 provided that, if an exercise of a power of appointment was "more extensive" than was authorized by the power, interests created were nevertheless valid if permitted by the terms of the power. Under the wording of the latter section, there is some question whether an attempt to benefit a nonobject is an exercise "more extensive" than was authorized. If it is not, then any attempt to benefit a nonobject invalidates the exercise.

Under the Restatement of Property, Sections 352 to 355, which deal with the problems involved in attempting to benefit a nonobject, the exercise is invalidated to "whatever extent it was motivated by the purpose to benefit the non-object." The staff has redrafted Section 752.37 to incorporate this concept rather than the language used by the consultant.

The redrafted section is consistent with Restatement Section 352, comment b:

> b. "To whatever extent it was motivated by the purpose to benefit the non-object." Fulfillment of the intent of the donor that the property shall be devoted exclusively to the benefit of the objects requires that appointments should be ineffective so far as they are motivated by the purpose of benefiting a non-object, but does not require the entire appointment to be invalidated in all cases where there is a condition, charge or trust intended to benefit a non-object. Circumstances may indicate that the desire to benefit non-objects was the predominant motive for the appointment, that such desire affected only the amount of the appointment, or that such desire had no substantial effect. Ineffectiveness ensues only so far as it is necessary to neutralize the impropriety of motive. The appointee is entitled to receive the appointed property so far as the donee intended to give it to him beneficially and otherwise than as an inducement to confer the benefit upon the non-object.
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> The rule that an appointment is ineffective only to the extent that it was motivated by the purpose to benefit a non-object is applicable to cases in which the device wrongfully used by the donee is a condition upon the appointment as well as to cases in which it is a charge, a trust or a collateral promise. The

> function of the court in all of thsse cases is the same: to examine the substance of the appointment (regardless of its form) in the light of the circumstances of its formulation for the purpose of arriving at a conclusion as to what part of the appointment would have been made by the donee if there had been no desire on his part to benefit the non-object. The fact that in some cases evidence sufficient to justify a segregation of part of the appointment may be lacking does not justify a failure to make such a segregation when the language and the circumstances indicate that a portion of the appointment was not infected by the improper motive. There is no rule that if an appointment is made upon an improper condition the appointment must fail; nor is there a rule that if the appointment is validated at all it must be validated in toto.

This result was not clear in Sections 21 and 22 of the consultant's draft.

Section 752.38 (old § 22). This section has been reworded for clarity.

Section 752.39 (old § 23). This section has been reworded for clarity.

Section 752.40 (old § 26). This section has been changed only insofar as the words "his guardian or conservator" have been substituted for "the committee of his person" in subdivision (c).

Section 752.41 (old §§ 27, 28). Both provisions on capture are consolidated in one section in the Restatement. In view of the internal reference in the second provision, it seems best to also include them in one section in our statute rather than in two.

The Commission's attention is drawn to the fact that the term "resulting trust" has been deleted from (b). The Restatement language has been adopted in subdivision (b) because that seemed more clear than the language referring to "resulting trusts" suggested by the consultant. Technically, subdivision (b) does not involve a resulting trust.

Section 752.42 (old § 29). This section is unchanged. This provision is included in the same section of the Restatement as the provisions on capture. The Commission should consider whether or not it wishes to consolidate the sections, in view of the internal reference in this section to Section 752.41.

Section 752.51 (old § 6). This provision was part of the old Section 6. Since it related to creditors and not to capacity or formalities, it has been split off from Section 6 and placed with the other sections on creditors.

Section 752.52 (old § 8). This section is unchanged except for its title.

Section 752.53 (old § 9). This section has been redrafted to include the consultant's suggested change and to clarify the rule where the power of appointment has been exercised.

Old Section 10. The consultant's Section 10 has been deleted.

Section 752.54 (old § 11). Subdivision (2) has been deleted as unnecessary in view of the additional language in Section 752.53. The remaining language has been only slightly changed.

Sections 752.61, 752.62 (old §§ 24, 25). These sections are substantially the same as in the consultant's draft.

Section 752.71 (old § 30). This section is unchanged.

Section 752.81 (old § 31). This section has been slightly redrafted for clarity.

Severability clause. The severability clause is substantially unchanged. It is necessary because of Section 752.81 of the act, which provides that the new law governs the release, the exercise, or the assertion of a right under a power created prior to its effective date.

Section 860 of the Civil Code. Section 860 has been amended to conform to subdivisions (e) and (f) of Section 752.31.

ADDITIONAL MATTERS TO BE CONSIDERED

Wisconsin Section 232.15. Consideration should be given to the desirability of including the substance of Wisconsin Statutes Section 232.15 in the recommended legislation. Section 232.15 deals with the failure to exercise a special power. The Commission deferred action on the problems at the last meeting. See discussion in attached Wisconsin Law Review, pages 604-605 (Exhibit III--green).

Takers where no appointment made. Section 752.42 provides that, where there is an ineffective appointment or a release, the property passes to the takers in default or, if there are none, to the donor. Section 752.24 defines release but does not include nonexercise. Thus, the statute at present does not appear to provide for the disposition of the assets where there is no attempt to appoint at all, although the law as to exercise by a general residuary clause has been changed so that exercise will be harder to accomplish by inadvertence. The Commission should consider adding a provision on this to Section 752.42.

Assets available to creditors of donee having a general power. Our statute provides that the creditors of the donee of a general power of appointment which is presently exercisable may reach the appointive assets. We place no limit on the creditor's ability to reach the assets. Under the Restatement of Property provisions, the creditors could reach the assets only to the extent that the donee did not have other available assets. The Commission should consider whether or not the creditors should be able to reach the appointive assets if the donee has other discoverable assets capable of paying his debts. For example, suppose A transfers property to B for life with the power in B to appoint the property to B's estate, C, D,

or E. C, D, and E are all grandchildren of A and the children of B. B leaves a will which bequeaths all of his property to his brother X. He appoints the property by will to C, D, and E, equally. When the creditors of B and his estate claim the property covered by the power of appointment, should there be a priority given so that the property of B which would go to X will be taken first? Section 26.155(113)(2) of the Michigan Statutes provides that the property under the power is available when other assets are not sufficient. Wisconsin (Section 232.17(2)), and Minnesota (Section 502.70) also use the Restatement approach.

Same disposition that would be obtained in default of power. In the recent court of appeal case of Estate of Dobbins, 258 A.C.A. 334, the court held that, because decedent's will provided for the same disposition of trust property that would have obtained in default of any exercise of the power of appointment bequeathed to him by his father, he did not "exercise" his power of appointment, so that no "transfer" of a beneficial interest took place which would subject the property to state inheritance taxes.

Under the will of the decedent's father, who died in Pennsylvania in 1893, decedent received a life estate in the property with a power of appointment over the remainder, the property to be distributed to decedent's children if he defaulted in exercising the power. Decedent died in California in 1962. His will left everything to his children including "all property in trust or otherwise over which I have or may have power of appointment . . . ."

The court held that, since the children received exactly what they would have received if the power had not been exercised, that the decedent failed to exercise his power. The statutes subject only the exercise of a

power to taxation. This decision was based on established common law. Therefore, there could be no tax imposed on the transfer.

The Restatement of Property, Section 369, provides that if the donee appoints the property by will or by an inter vivos instrument which exhausts the power to any person who is a taker in default: (a) if the total property passing to such appointee is identical to his interest in default, the property passes in default; (b) if it differs in that it is smaller, it passes in default; (c) if it differs in that it is larger, the property passes by appointment as to the excess and by default so far as the appointed interest is identical to the interest in default.

Thus, the Restatement agrees with Estate of Dobbins. However, the Restatement has two caveats under which it takes no position as to (1) whether the property passes in default if the donee makes an inter vivos appointment to a taker in default but does not exhaust the power (i.e., A creates in B a power to appoint $20,000 between B's two children, and B appoints $10,000 to one by inter vivos instrument and then dies without appointing the remainder); (2) whether the property passes in default if the interest appointed differs from the interest in default (i.e., the interest in default is a fee simple absolute and the appointed interest is a life estate).

In view of the unanswered questions in this area of the law, the staff recommends the Commission not include a provision in this recommendation attempting to cover the point decided by Estate of Dobbins.

Respectfully submitted,

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RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

POWERS OF APPOINTMENT

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

A power of appointment, of course, is simply a power conferred by the owner of property (the "donor") upon another person (the "donee") to designate the persons ("appointees") who will receive the property at some time in the future. Although such powers can be created as to legal (or "nontrust") interests in property, today powers are almost always incident to inter vivos or testamentary trusts. In the typical situation, the creator of the trust transfers legal title to a trustee. The trustee is directed to pay the income from the trust to one or more beneficiaries during their lifetime. Then, upon the death of those beneficiaries, the property passes in accordance with the "appointment" made by the life-beneficiary or, occasionally, by the trustee or another person. The most common use of powers today is in connection with the so-called marital deduction trust. Under this arrangement, the husband leaves his wife a sufficient portion of his estate to obtain full benefit of the marital deduction. She is given a life interest together with an unrestricted power to appoint the remainder. The so-called "second" tax is avoided and yet the property is conferred in accordance with her wishes.

Apart from their usefulness in minimizing death taxes, powers make possible a flexibility of disposition that can be achieved in no other way. Thus, when a husband leaves his property in trust for the benefit of his wife during her lifetime and, upon her death, to such of his children and in such proportions as his wife may appoint, he makes it possible for the ultimate distribution to be made in accordance with the changes that have occurred during her lifetime. In short, he has limited the benefits of his property to the objects of his bounty, but he has also permitted future distributions of principal and income to take account of changes in the needs of beneficiaries that the donor could not possibly have foreseen. Births, deaths, financial successes and failures, varying capacities of individuals, and fluctuations in income and property values can all be taken into account. Moreover, the donor has broad control over the manner of exercising the power and over the scope of persons to whom appointments can be made. Thus, he can make the power exercisable during the lifetime of the donee ("presently exercisable power") or he can make the power exercisable only by will ("testamentary power"). He may permit the donee to appoint only among a specified group of persons, such as his children ("special power"), or he may create a broad power permitting the donee to appoint to himself, his estate, or his creditors ("general power").

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

law of powers obtains in this state.[1] This decision was helpful in a assuring donors and their counsel that powers of appointment are available devices and are governed by the evolving law declared in judicial decisions. However, the declaration left the question of which of conflicting rules the courts might follow and, in any event, has made it necessary for lawyers and judges to investigate large numbers of cases, usually from other jurisdictions, before using a power or deciding a question in litigation. Moreover, this uncertainty as to the non-tax consequences of powers has caused legal draftsmen not to use them. Thus, the law of powers in this state remains in a state of arrested development for want of a sufficient case law to resolve the significant issues. Lawyers knowledgeable in the field have reached a consensus of opinion that this is a matter warranting the attention of the Legislature.

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

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1. Estate of Sloan, 7 Cal. App.2d 319, 47 P.2d 1007 (1935).
In 1872, California adopted, as a part of the Civil Code, an elaborate statute relating to powers of appointment. The complexity of that statute and certain ill-considered provisions that it contained, in addition to the general unfamiliarity with powers of appointment prevalent at that time, caused the Legislature, in 1874, to repeal the entire statute.

1. Distinction between "general" and "special powers." "General" and "special" powers should be defined so as to conform to the definitions of "general" and "limited" powers found in the state inheritance tax law and the definition of "general power" in the Federal estate tax law. This approach would accord with the general professional usage of the terms and would base the distinction upon the equivalency of ownership in the donee of the general power, rather than upon the number of permissible appointees. This distinction, however cast, is important primarily in regard to the rights of creditors and the rule against perpetuities.

2. Exercise by general residuary clause. In Estate of Carter, 47 Cal.2d 200, 302 P.2d 201 (1956), the Supreme Court interpreted Probate Code Section 125 to require a holding that a residuary clause in a will, which did not mention the testator-donee's general testamentary power, exercised the power despite the clearly provable intent of the donee not to exercise the power. This rule should be changed. The statute should provide that, if the holder of the power does not expressly exercise it, the property passes to those persons designated to take in default of appointment and, if no such persons are designated, that the property passes under the residuary clause only if the circumstances indicate that such was the intent of the donee. This will eliminate the uncertainty caused by exercising a power by implication and will prevent the donee from inadvertantly creating disadvantageous tax consequences in his estate. See California Will Drafting § 13.12 (Cal. Cont. Ed. Bar 1965).

3. Preference for exclusive powers of appointment. Where a power is created in a donee to appoint to a class such as his children, the question arises whether he can appoint all of the property to one of

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

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

Section 2041 of the Internal Revenue Code requires that a general power of appointment be included in the donee's gross estate for estate tax purposes. Similarly, California Revenue and Taxation Code Section 13696 provides that a taxable inheritance occurs whenever a person takes either by the exercise or the nonexercise of a general power. Thus, on death, both the Federal and California statutes treat a general power as the equivalent of full ownership. In addition, the Federal Bankruptcy Act has taken this position as to all general powers of the bankrupt which are presently exercisable at the moment of bankruptcy. U.S.C.A., Tit. 11, § 110(a)(3). If this is true with regard to taxes and bankruptcy, it should also be true with respect to any other creditor of the donee of a general power. Accordingly, the Commission recommends that the enactment provide that the creditors of the donee can reach the assets under any presently exercisable general power or under a general testamentary power where the donee has died.

PROPOSED LEGISLATION

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

An act to add Title 4 to Part 1 of Division 2 (commencing with Section 752.01), and to repeal Section 1060, of the Civil Code, relating to powers of appointment.

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

TITLE 4. POWERS OF APPOINTMENT

Section 1. Title 4 (commencing with Section 752.01) is added to Part 1 of Division 2 of the Civil Code, to read:

TITLE 4. POWERS OF APPOINTMENT

Comment. This chapter 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. However, many minor matters are not covered by this chapter or other statutes; these are left to court decision under the common law which remains in effect. See Section 752.01 and the Comment to that section.

Other states that have recently enacted legislation dealing with powers of appointment have taken the same approach. They have codified the important common law principles and have left minor problems to court determination. See Minn. Stats. §§ 502.62-502.78 (Supp. 1967); Wis. Stats. §§ 232.01-232.21 (Supp. 1967); N. Y. Estates, Powers and Trust Law §§ 10-1.1 to 10-9.2 (1967); Mich. Stats. §§ 26.155(101)-26.155(122)(Supp. 1967).

CHAPTER 1. GENERAL PROVISIONS

Article 1. Common Law of Powers of Appointment Retained

Section 752.01. Common Law of Powers of Appointment Established; Exceptions

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

Comment. Section 752.01 codifies the holding in Estate of Sloan, 7 Cal. App.2d 319, 47 P.2d 1007 (1935), that the common law of powers of appointment is in effect in California as to matters not covered by statute. As used in this section, the "common law" does not refer to the common law as it existed in 1850 when the predecessor of Civil Code Section 22.2 was enacted; rather, the reference is to the contemporary and evolving rules of decisions developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions. See, e.g., Fletcher v. Los Angeles Trust & Sav. Bank, 182 Cal. 177, 187 Pac. 425 (1920). Compare Civil Code Section 22.2 (common law of England in force in California) and Section 4 (statutes in derogation of common law) with Code of Civil Procedure Section 1899 (definition of "unwritten law"). This section uses the term "common law" as the equivalent of "unwritten law" under Section 1899. In determining the common law rule, assistance may be obtained from the Restatement of Property, Sections 318 to 369. For other statutes that take a similar approach, see Mich. Stat. Ann. § 26.155(119)(Supp. 1968); Minn. Stat. Ann. § 502.02 (1947); N. Y. Estates, Powers and Trust Law § 10-1.1 (1967); Wis. Stat. Ann. § 232.19 (Supp. 1967).

In general, California statutes are considered to state common law principles unless the principle is specifically modified by the statute. Cf. Civil Code Section 5. This section recognizes that, in a few situations, the common law rules are changed by the provisions of this chapter (e.g., Sections 752.51, 752.53-752.54) and are modified by other statutes for specific purposes (e.g., Revenue and Taxation Code Sections 13691-13697).

Article 2. Classification of Powers of Appointment

Section 752.06. "General" and "Special" Powers of Appointment

752.06. (a) A power of appointment is general to the extent that it is exercisable in favor of the donee, his estate, his creditors, or creditors of his estate, whether or not it is exercisable in favor of others, except that a power created in favor of two or more donees is not a general power.

(b) All other powers of appointment are special.

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

Comment. Section 752.06 is based on the distinction between "general" and "limited" powers in the California inheritance tax law and the distinction between "general" powers and all other powers in the federal estate tax law. See Cal. Rev. & Tax. Code § 13692; Int. Rev. Code § 2041(b)(1). Although this chapter generally follows the prevailing modern terminology, Section 752.06 departs from the common law distinction stated in Restatement of Property, Section 322. Instead, it adopts the general professional usage which is in accord with the definitions contained in the federal and state death tax laws. Section 752.06 is similar to subdivision (b) of the New York Estates, Powers and Trust Law Section 10-3.2 (1967), Wisconsin Annotated Statutes Section 232.01(4)-(6)(Supp. 1967), and Michigan Annotated Statutes Section 26.155(102)(h), (i)(Supp. 1968).

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

Wisconsin, and Michigan.

Subdivision (a) contains an exception for joint powers to clarify an ambiguity that would exist in the absence of the exception.

Suppose, for example, that A creates a trust for the benefit of B for ten years, with the corpus to be distributed as B and C direct to either B, D, or F. Despite the fact that B is a donee of a power of appointment and the property may be appointed to him, he does not have a general power of appointment. This result is necessary because B does not have the equivalent of substantial ownership of the property. Therefore, the consequences of having a general power of appointment should not be attributed to him. One of these consequences is that the creditors of a general power of appointment may reach the appointive assets. See Section 752.53. The reason for that rule is that the donee has the equivalent of ownership; here, B does not have the equivalent of ownership because C may prevent him from appointing the property to himself.

The language of the first clause of subdivision (a) of Section 752.06 has the same meaning as the comparable language of the Internal Revenue Code that defines a general power for purposes of the federal estate tax law. The power is general so long as it can be exercised in favor of any one of the following: the donee, his estate, his creditors, or the creditors of his estate. To be classified as general, the power does not have to give the donee a choice among all of this group. It is sufficient if the power enables him to appoint to any one of them; otherwise no testamentary power could be

general, since the testator cannot appoint to himself by his will. A special power, on the other hand, is one that permits the donee to appoint to a class that does not include himself, his estate, his creditors, or the creditors of his estate. If the class among whom the donee may appoint includes specified persons and also includes himself, his estate, his creditors, or the creditors of his estate, the power is general rather than special.

Subdivision (c) makes it clear that a power of appointment may be general as to some of the appointive assets and special as to others. Thus, where A devises property to B for life and at B's death to be distributed, one-half to any person B by will directs, and one-half to C, D, or F as B by will directs, B has a general testamentary power as to one-half the property and a special testamentary power as to the remaining one-half.

Section 752.07. "Presently Exercisable" and "Testamentary" Powers of Appointment

752.07. (a) A power of appointment is presently exercisable whenever the creating instrument does not manifest an intent that its exercise shall be solely by will or otherwise postponed.

(b) A power of appointment is testamentary whenever the creating instrument manifests an intent that it is to be exercised only by a will of the donee.

Comment. Section 752.07 differentiates among powers of appointment by focusing upon the time at which the power may be exercised. Under this section, powers are "presently exercisable," "testamentary," or "otherwise postponed." A power that is otherwise postponed is one which cannot be exercised until some event other than the death of the donee, as, for example, a power to appoint among the children of A by an instrument executed after the youngest child reaches the age of twenty-five. In this title, when it is necessary to refer to all postponed powers, whether the postponement is until the death of the donee or another event, the term "power not presently exercisable" is used.

Section 752.07 follows the common law embodied in the Restatement of Property, Section 321. For comparable sections in other recently enacted statutes, see Mich. Stats. Ann. § 26.155(102)(1) (Supp. 1968) (defining a power of appointment that is "presently exercisable"); N. Y. Estates, Powers and Trust Law § 10-3.3 (1967).

Section 752.08. "Imperative" and "Discretionary" Power of Appointment

752.08. (a) A power of appointment is imperative when the creating instrument manifests an intent that the permissible appointees, rather than any takers in default, be benefited even if the donee fails to exercise the power. An imperative power can exist even though the donee has the privilege of selecting some and excluding others of the designated permissible appointees.

(b) All other powers of appointment are discretionary. The donee of a discretionary power is privileged to exercise, or not to exercise, the power as he chooses.

Comment. A power of appointment must be either imperative or discretionary. Section 752.08 defines these terms. If a power is imperative, the donor must exercise it or the court will divide the assets among the potential appointees rather than among any default takers. See Section 752.40. The duty to make an appointment is normally considered unenforceable during the life of the donee. See Restatement of Property § 320 (special note at 1830)(1940). A discretionary power, on the other hand, may be exercised or not exercised as the donee chooses. Nonexercise will result in the property's passing to the takers in default or returning to the donor's estate. See Section 752.42.

Section 752.08 is similar to New York Estates, Powers and Trust Law Section 10-3.4 (1967). The Restatement of Property does not define or use these terms in discussing the distribution of property on the failure of the donee to exercise the power. See Restatement of Property §§ 320 (special note at 1830) and 367 (statutory note at 2033)(1940).

CHAPTER 2. CREATION OF POWERS OF APPOINTMENT

Section 752.11. Creation of a Power of Appointment

752.11. To effectively create a power of appointment, the donor:

(a) Must be a person capable of transferring the interest in property to which the power relates;

(b) Must have executed the instrument claimed to create the power in the manner required by law for such an instrument; and

(c) Must manifest an intent to confer the power on a person capable of holding the interest in property to which the power relates.

Comment. Section 752.11 states the general requirements for creation of a power of appointment. The section is the same in substance as the first three subdivisions of New York Estates, Powers and Trust Law Section 10-4.1 (1967).

Subdivision (a) codifies existing California law. See Swart v. Security-First Nat'l Bank, 48 Cal. App.2d 824, 120 P.2d 697 (1942). Subdivisions (b) and (c) also state existing California law. See Estate of Kuttler, 160 Cal. App.2d 332, 325 P.2d 624 (1958).

CHAPTER 3. DONEE'S POWER TO APPOINT OR CONTRACT TO APPOINT; RELEASES

Section 752.21. Scope of the Donee's Authority

752.21. The scope of the authority of the donee to determine appointees and to select the time and manner of making appointments is unlimited except to the extent that the creating instrument manifests a contrary intent.

Comment. Section 752.21 embodies the common law rule stated in Restatement of Property, Section 324, and is substantially the same as New York Estates, Powers and Trust Law Section 10-5.1 (1967).

Section 752.22. Contract to Appoint; Power Presently Exercisable

752.22. The donee of a power to appoint that is presently exercisable, whether general or special, can contract to make an appointment if neither the contract nor the promised appointment confers a benefit upon a person who is not a permissible appointee under the power.

Comment. Section 752.22 provides that the donee of a presently exercisable general or special power may contract to appoint the assets to a permissible appointee. A contract by a donee to make an appointment in the future which he could have made at the time the contract was executed does not conflict with any rule of the law of powers. The objection to such promises under testamentary powers--that if the promise is given full effect, the donee is accomplishing by contract what he is forbidden to accomplish by appointment--is inapplicable to a power of appointment that is presently exercisable.

Section 752.22 states the common law rule. See Restatement of Property § 339 (1940). The section is substantially the same as New York Estates, Powers and Trust Law Section 10-5.2 (1967) and Michigan Statutes Annotated Section 26.155(110)(1)(Supp. 1968).

Section 752.23. Contract to Appoint; Power not Presently Exercisable

752.23. The donee of a power of appointment that is not presently exercisable cannot contract to make an appointment. If a promise to make an appointment under such a power is not performed, the promisee cannot obtain either specific performance or damages, but he can obtain restitution of any value given by him for the promise.

Comment. Section 752.23 provides that the donee of a testamentary power or other power not presently exercisable cannot contract to make an appointment. By giving a testamentary or postponed power to the donee, the donor expresses his desire that the donee's discretion be retained until the donee's death or such other time as is stipulated. To specifically enforce a promise to appoint under such a power would permit the donor's intent to be defeated. To allow damages for breach of the promise would also defeat the donor's intent, because the compulsion of a prospective suit for damages would be sufficient to eliminate any practical freedom of choice after the contract has been made. The rules stated in Section 752.23 apply to all promises that are, in substance, promises to appoint. This would include, for example, a promise not to revoke an existing will which makes an appointment in favor of the promisee.

Section 752.23 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). Section 752.23 is similar to New York Estates, Powers and Trust Law Section 10-5.3 (1967) and Michigan Statutes Annotated Section 26.155(110)(2) (Supp. 1968).

Section 752.24. Release of Powers of Appointment

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

(b) A releasable power may be released with respect to the whole or any part of the property subject to the power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such power might be exercised. No release of a power shall be deemed to make imperative a power that was not imperative before such release unless the instrument of release expressly so provides. No release of a power is permissible when the result of the release is an inter vivos exercise of a solely testamentary power.

(c) A release may be delivered to any of the following:

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

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

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

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

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

Comment. Section 752.24 is the same in substance as former Civil Code Section 1060 (repealed).

The last sentence of subdivision (b) is new. California has taken the position that a power created to be exercisable only by will cannot be exercised by inter vivos act. Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940); Briggs v. Briggs, 122 Cal. App.2d 766, 265 P.2d 587 (1954). Section 346(a) of the Restatement of Property takes the same view. The language added to subdivision (b) will prevent this position from being nullified by use of a release. Otherwise, a release as to all persons except a designated person would permit the donee, in effect, to exercise by inter vivos act the power which the creator of the power intended to remain unexercised until the donee's death. The added language thus precludes the use of a release to defeat the donor's intention.

CHAPTER 4. EXERCISE OF POWERS OF APPOINTMENT; EFFECT OF APPOINTMENTS

Section 752.31. Donee's Capacity; Formalities

752.31. (a) An effective exercise of a power of appointment can be made only by a donee capable of transferring the interest in property to which the power relates.

(b) An effective exercise of a power of appointment can be made only by an instrument sufficient to transfer the title to the property to which the power relates. If the power is testamentary, this means a will executed with the formalities necessary for a valid will. If the power is exercisable by an instrument other than a will, this means a written instrument sufficient to convey the kind of property included in the appointive assets.

(c) An effective exercise of a power of appointment can be made only by a written instrument which complies with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise of the power, except that:

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

(2) A power stated to be exercisable by an instrument not sufficient in law to pass the appointive assets can be exercised only by an instrument conforming to the requirements of subdivision (b).

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

(d) If the creating instrument explicitly so directs, an effective exercise of the power can only be made by an instrument which contains a specific reference to the power or to the instrument that creates the power.

(e) (1) If the creating instrument requires the consent of the donor or other person to exercise a power of appointment, an effective exercise of the power can only be made when the required consent is contained in the instrument of exercise or in a separate written instrument, signed in each case by the person or persons whose consents are required.

(2) Notwithstanding paragraph (1), if any person whose consent is required dies or becomes legally incapable of consenting, the power may be exercised by the donee without the consent of the person unless the creating instrument explicitly forbids.

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

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

(f) (1) An effective exercise of a power of appointment created in favor of two or more donees can only be made when all of the donees unite in its exercise.

(2) Notwithstanding paragraph (1), if one or more of the donees dies, becomes legally incapable of exercising the power, or releases the power, the power may be exercised by the others, unless the creating instrument explicitly forbids.

(g) Nothing in this section affects any power a court of competent jurisdiction may have to remedy a defective exercise of any imperative power of appointment.

Comment. Section 752.31 deals with the donee's capacity and specifies the formalities that must be observed in exercising a power of appointment.

Subdivision (a). Under subdivision (a), the normal rules for determining capacity govern the capacity of the donee to exercise a power of appointment. The subdivision states the common law rule embodied in the Restatement of Property, Section 340, and is substantially the same as Michigan Statutes Annotated Section 26.155(105)(1)(Supp. 1968), Minnesota Statutes Annotated Section 502.66 (1947), and Wisconsin Statutes Annotated Section 232.05(1)(Supp. 1967).

Subdivision (b). Subdivision (b) specifies that the instrument purporting to exercise the power of appointment must conform to the formalities required to transfer the appointing property. It is based on Wisconsin Statutes Section 232.05(2)(Supp. 1967).

Subdivision (c). Subdivision (c) states the common law rule embodied in the Restatement of Property, Section 346, but adds three exceptions not found in the common law. Paragraph (1) of subdivision (c) provides that a power of appointment exercisable only by deed is also exercisable by will. This exception is also contained in Minnesota Statutes Section 502.64 (1947), Michigan Statutes Section 26.155(105)(2)(Supp. 1968), and New York Estates, Powers and Trust Law Section 10-6.2(3)(1967). It is based on the premise that few donors intend to dictate that a power of appointment be exercised only by an inter vivos instrument. If and when

such a prescription is encountered, it is reasonable to say that "all the purposes of substance which the donor could have had in mind are accomplished by a will of the donee." Restatement of Property § 347 (comment b)(1940).

Paragraph (2) of subdivision (c) requires the donee to follow normal formalities in exercising a power of appointment even if the creating instrument dispenses with the requirement. Thus, if the creating instrument prescribes that the donee may exercise the power by mailing a letter to John Smith, that exercise may not conform to the requirements of law. If it does not conform to the legal requirements, the donee may exercise the power by an instrument that does conform and thus ignore the directions of the donor. In such a case only the donor's directions are invalid; the power is not invalidated by the designation of a legally insufficient means of exercising the power. This paragraph is substantially the same as Michigan Statutes Annotated Section 26.155(105)(3) (Supp. 1968) and New York Estates, Powers and Trust Law Section 10-6.2(1) (1967). See Restatement of Property § 346(comment g)(1940)(accord).

Paragraph (3) of subdivision (c) adopts the same policy as Minnesota Statutes Section 502.65 (1947) and New York Estates, Powers and Trust Law Section 10-6.2(2)(1967). It is more liberal than the common law rule embodied in the Restatement of Property, Section 346. It provides that, where the donor prescribes greater formalities for the donee's exercise of the power of appointment than those normally imposed by law, the power may nevertheless be exercised by an instrument legally sufficient to transfer the appointive assets. The paragraph is designed to facilitate the exercise of a power of appointment without unnecessary

formalities and avoids a possible trap that would exist if the formalities normally imposed by law were observed but the additional formality prescribed by the donor was inadvertantly omitted.

Subdivision (d). The donor may require a specific reference to the power as a condition to its exercise, as is commonly done in creating marital deduction trusts. This condition precludes the use of form wills with "blanket" clauses exercising any powers of appointment. The use of blanket clauses may result in passing property without knowledge of the tax consequences and may cause appointment to unintended beneficiaries. Subdivision (d) permits the donor to require an express reference to the power to assure a deliberated exercise by the donee. The subdivision embodies the rule set out in Wisconsin Statutes Annotated Section 232.03(1)(1967) and Michigan Statutes Annotated Section 26.155(104) (Supp. 1968). As to the effect of subdivision (d) on prior California law, see the Comment to Section 752.32.

Subdivision (e). This subdivision, in paragraphs (1) and (2), reflects the same policy as Civil Code Section 860. It embodies the rule stated in Minnesota Statutes Annotated Section 502.68 (1947), New York Estates, Powers and Trust Law Section 10-6.4 (1967), Wisconsin Statutes Annotated Section 232.05(3)(Supp. 1967), and Michigan Statutes Annotated Section 26.155(105)(4)(Supp. 1968). Paragraph (3) merely makes it clear that the consent may precede or follow exercise of the power. Paragraph (4) is included to warn the unwary donee that lack of acknowledgement may result in his exercise of the power being unrecordable. It states existing California law. See Government Code Section 27287.

Subdivision (f). Subdivision (f) reflects the same policy as Civil Code Section 860. It embodies the rule stated in Minnesota Statutes Annotated Section 502.67 (1947), New York Estates, Powers and Trust Law Section 10-6.7 (1967), Wisconsin Statutes Annotated Section 232.05(4)(Supp. 1967), and Michigan Statutes Annotated Section 26.155(105)(5)(Supp. 1968).

Subdivision (g). This subdivision is included to make it clear that Section 752.31 does not limit the power of a court under Section 752.40. The same provision is included in the introductory clause of New York Estates, Powers and Trust Law Section 10-6.2 (1967).

Section 752.32. Manifestation of Intent to Exercise Power

752.32. (a) An effective exercise of a power of appointment requires a manifestation of the donee's intent to exercise the power. Such a manifestation exists when:

(1) The donee declares in a deed or will, in substance, that he exercises the specific power, or all powers that he has; or

(2) The donee executes a deed or leaves a will sufficiently identifying property covered by the power which purports to transfer the property; or

(3) The donee includes in his will pecuniary gifts, or a residuary gift, or both, which, when read with reference to the property which he owned and the circumstances existing at the time of the formation of the will, justifies a finding that the donee understood that he was disposing of the appointive assets; or

(4) The donee has a general power of appointment exercisable by will, and (i) the creating instrument does not provide for a gift in default and does not require that the donee make a specific reference to the power, (ii) the donee includes in his will a residuary clause, or other general language purporting to dispose of all of the donee's property of the kind covered by the power, and (iii) the donee's will does not manifest an intent, either expressly or by necessary inference, not to exercise the power.

(b) A devise or bequest of all of the testator's real or personal property within Probate Code Section 125 or a devise or bequest of the residue of the testator's real or personal property within Probate Code Section 126, exercise the power only under the circumstances stated in this section.

Comment. Paragraphs (1), (2), and (3) are accepted common law. See Restatement of Property §§ 342-343 (1940). They state existing California law. See Reed v. Hollister, 44 Cal. App. 533, 187 Pac. 167

(1919); Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940). The substance of these subdivisions is embodied in New York Estates, Powers and Trust Law Section 10-6.1(1), (2), (3)(1967), Wisconsin Statutes Annotated Section 232.03(2)(Supp. 1967), and Michigan Statutes Annotated Section 26.155(104)(Supp. 1968).

Paragraph (4) changes the rule developed by decisions interpreting Probate Code Section 125. In Estate of Carter, 47 Cal.2d 200, 302 P.2d 201 (1956), the Supreme Court interpreted that section to require a holding that a residuary clause, which did not mention a general testamentary power with gifts in default, exercised the power despite the donee's specific intent not to exercise the power. See also Childs v. Gross, 41 Cal. App.2d 680, 107 P.2d 424 (1940)(construing Probate Code Section 125 to apply to both land and personalty). Paragraph (4) represents a substantial return to the common law rule. Under the subdivision, a residuary clause exercises the power only under the circumstances stated. The paragraph does not apply where the creating instrument makes a gift in default, or where the creating instrument requires that the donee make a specific reference to the power, or where the will manifests an intent not to exercise the power. Paragraph (4) will eliminate the trap for the unwary that defeated the donee's clearly provable intent in Estate of Carter, supra. The paragraph embodies the rule of Wisconsin Statutes Annotated Section 232.03(2)(Supp. 1967).

Subdivision (b) is included to make it clear that Probate Code Sections 125 and 126 do not operate with respect to powers except under the circumstances in Section 752.32.

Section 752.33. Will Executed Before Power Created

752.33. A power of appointment existing at the donee's death, but created after the execution of his will, is effectively exercised by the will if the will is an otherwise effective appointment unless:

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

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

Comment. Section 752.33 codifies the rule of California Trust Co. v. Ott, 59 Cal. App.2d 715, 140 P.2d 79 (1943). It also states the rule contained in the Restatement of Property, Section 344.

Section 752.34. Exclusive and Nonexclusive Powers

752.34. (a) Except as provided in subdivision (b), the donee of any special power of appointment may appoint the whole or any part of the appointive assets to any one or more of the permissible appointees and exclude others. Such a power is an "exclusive power."

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

Comment. Section 752.34 deals with the problem of whether the donee of a special power can appoint all of the property to one appointee and exclude others or must appoint some of the property to each of the permissible appointees. For example, if the donee is given power "to appoint to his children," there is a question whether he must give each child a share or whether he can appoint all of the assets to one child. If the power is "exclusive," the donee may appoint to one or more of the permissible appointees and exclude others. If the power is "nonexclusive," he must appoint a minimum share or amount specified in the creating instrument to each member of the class of permissible appointees. Section 752.34 provides that all powers are construed to be exclusive except to the extent that the donor has specified a minimum or maximum amount. It embodies the common law constructional preference for exclusive powers as embodied in the Restatement of Property, Section 360.

Section 752.34 changes California law as developed in Estate of Sloan, 7 Cal. App.2d 319, 47 P.2d 1007 (1935), which is contrary to many common law decisions. See 69 A.L.R. 1285 (1960). A similar provision has been adopted in other states. N. Y. Estates, Powers and Trust Law § 10-5.1 (1967); Mich. Stat. Ann. § 26.155(107)(Supp. 1968); Wis. Stat. Ann. § 232.07 (Supp. 1967).

Section 752.35. Permissible Appointments Under General Power

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

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

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

(3) An appointment subject to conditions or charges.

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

(5) An appointment in trust.

(6) An appointment creating a new power of appointment.

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

Comment. Section 752.35 embodies the common law rules found in Restatement of Property, Sections 356 and 357. It makes it clear that, under a general power to appoint, the donee has the same freedom of disposition that he has with respect to assets owned by him. In addition, it indicates that there are other types of appointments that can be made effectively. The types mentioned in subdivision (a) are the ones about which question has most often arisen.

Section 752.36. Permissible Appointments Under Special Power

752.36. The donee of a special power of appointment may make any of the types of appointment permissible for the donee of a general power if all of the persons benefited by the appointment are permissible appointees under the terms of the special power.

Comment. Section 752.36 embodies the rules stated in Restatement of Property Sections 358 and 359, except that it authorizes the donee of a special power to exercise the power by creating a general power of appointment in a permissible appointee. Since the donee can appoint outright to one of the permissible objects of the special power, it is irrational to refuse to allow him to give such a person a general power to appoint. See 3 Powell, Real Property ¶ 398 at n.76 (1967).

Section 752.37. Attempt to Benefit Nonobject of Special Power

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

Comment. Section 752.37 is a limitation on the rule stated in Section 752.36. Attempts by the donee of a special power to frustrate the desire of the donor that the appointive assets be devoted exclusively to the class of appointees designated by the donor are invalidated by Section 752.37. Where the intent to benefit a person who is not a permissible appointee encompasses all of the appointive assets, the property will pass to the takers in default. However, where the person who is not a permissible appointee is benefited by only part of the assets, that part of the exercise of the power is invalidated but the rest of the appointive assets pass to the permissible appointees of the power as appointed.

This aspect of the common law is treated extensively in Restatement of Property, Sections 352 to 355. Section 752.37 follows the decision in Horne v. Title Ins. & Trust Co., 79 F. Supp. 91 (S.D. Cal. 1948), which applied California law and Restatement Section 353. The leading case on the problem is Matter of Carroll, 153 Misc. 649, 279 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 752.38. Unauthorized Appointments Void as to Excess Only

752.38. An exercise of a power of appointment is not void solely because it is more extensive than authorized by the power. Interests created by such an exercise are valid insofar as they are permissible under the terms of the power.

Comment. Section 752.38 makes it clear that, whenever a power is exercised partly in favor of an unauthorized person, the exercise is valid to the extent that permissible appointees are benefited. See also § 752.37. In addition, Section 752.38 covers other nonpermissible exercises of the power. For example, if the donor of a power specifies that the donee is to appoint 20 percent or less of the corpus of a trust to each of six permissible appointees, and the donee appoints 25 percent to one of the permissible appointees, Section 752.38 permits the appointee to receive 20 percent of the assets. Thus, an appointment of an excess amount will not invalidate the appointment, but will instead be deemed to be an appointment of the maximum amount.

Section 752.38 is based on the rule found in New York Estates, Powers and Trust Law Section 10-6.6(1)(1967). No comparable rule is found in the Restatement of Property. However, Sections 352 to 355 of the Restatement do provide that an appointment intended to benefit a person who is not a permissible appointee of the power is invalid only to the extent that it was so intended. Under such a rule, if the exercise of the power also was intended to benefit permissible appointees, they would take the share appointed to them.

Section 752.39. Death of Appointee Before Effective Date of Exercise

752.39. If an attempted exercise of a power of appointment is ineffective because of the death of an appointee before the effective date of the exercise, the appointment is to be effectuated, if possible, by applying the provisions of Probate Code Section 92 as though the appointive assets were the property of the appointor, except that in no case shall property pass to a person who is not a permissible appointee under a special power.

Comment. This section embodies the theory of the Restatement of Property, Sections 349 and 350. It is broadened to cover special powers by employing the language used by Michigan Statutes Annotated Section 26.155(120)(Supp. 1968). Section 752.39 is necessary because Probate Code Section 92 does not deal with lapse of an appointment.

Section 752.40. Nonexercise or Improper Exercise of an Imperative Power

752.40. (a) Where an imperative power of appointment confers on its donee a right of selection, and the donee dies without having exercised the power, its exercise shall be adjudged for the benefit equally of all of the persons designated as permissible appointees.

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

(c) Where an imperative power of appointment has been so created as to confer on a person a right to compel the exercise of the power in his favor, its proper exercise may be adjudged in favor of such person, his assigns, his creditors, or his guardian or conservator.

Comment. Section 752.40 states the consequences flowing from the imperative character of a power of appointment. Under subdivision (a), if an imperative power is created and the donee of the power dies without exercising it, the appointive assets go equally to the permissible objects of the power.

Under subdivision (b), if the donee exercises the power defectively (e.g., without proper formalities), the court may allow the purported appointment to pass the assets to the person whom the donee attempted to benefit.

Under subdivision (c), if the power creates a right in the permissible appointee to compel the exercise of the power (e.g., where the donee must appoint to his children within ten years of the creation of the power and at the end of ten years he has only one child), that person may compel exercise of the power by the donee.

Section 752.41. Ineffective Appointments; the Rule of "Capture"

752.41. (a) Where the donee of a general power of appointment appoints to a trustee upon a trust which fails, there is a resulting trust in favor of the donee or his estate, unless either the creating instrument or the instrument of appointment manifests an inconsistent intent.

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

Comment. Section 752.41 embodies the rule of "capture" as set forth in Restatement of Property, Section 365(2), (3). Subdivision (a) provides that, if a donee appoints the property to a trustee on a trust that fails, there is a resulting trust in favor of the donee or his estate. If the donee manifests a contrary intent in the instrument exercising the power, or if the donor has manifested a contrary intent in the creating instrument, the property will pass to takers in default, or if there are none, to the donor or his estate under Section 752.42. Only England, Illinois, and Massachusetts have considered the problem, and all have adopted the rule of subdivision (a). See 3 Powell, Real Property ¶ 400 at n.35 (1967).

Subdivision (b) provides that, if the donee of the property makes an ineffective appointment and he has manifested an intent to take over the assets for all purposes, the property passes to the donee or his estate, unless the donee has manifested a contrary intent in the instrument exercising the power. Only England, Illinois, Maryland, and Massachusetts have considered this problem, and all have adopted the rule of subdivision (b). See 3 Powell, Real Property ¶ 400 at nn.36, 37, 38, and 39 (1967).

The intent of the donee to assume control of the assets "for all purposes" is most commonly manifested by provisions in the instrument of appointment which blend the property owned by the donee with the property subject to the power. Thus, where the donee's will provides that "I devise and appoint all property that I own at my death or over which I then have a power of appointment to A," the blending of the owned and appointive assets shows an intent of the donee to treat the appointive assets as his own. Thus, if A predeceases the donee, and the anti-lapse statute does not dispose of the property, the appointive assets will pass into the donee's estate to be distributed to his statutory heirs or next of kin. See Restatement of Property § 365 (comment d) (1940).

Section 752.42. Ineffective Appointment; Effect of in Absence of "Capture"

752.42. Where the donee of a discretionary power of appointment releases the entire power or makes an ineffective appointment that is not within the rules of Section 752.41, the appointive assets pass to the person or persons named by the donor as takers in default, or if there are none, revert to the donor.

Comment. Section 752.42 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).

Under Section 752.42, the property passes directly from the donor to the ultimate takers. This rule has the desirable effect of reducing taxes, fiduciary fees, and lawyer's fees in the estate of the donee.

CHAPTER 5. RIGHTS OF CREDITORS

Section 752.51. Donor Cannot Modify Rights of Creditors of Donee

752.51. The donor of a power of appointment cannot nullify or alter the rights given creditors of the donee by Sections 752.52 to 752.54, inclusive, by any language in the instrument creating the power.

Comment. Section 752.51 deals with a question that has not been considered by the California appellate courts. It is patterned after a provision adopted in New York. See N. Y. Estates, Powers and Trust Law § 10-4.1(4)(1967). The section prevents instruments utilizing Treasury Regulations Section 20.2056(b)-5(f)(7) (which allows a marital deduction despite a spendthrift clause in the instrument creating the power) from nullifying the rights given creditors under Sections 752.53 and 752.54 of this chapter.

Section 752.52. Creditors of Donee of Special Power

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

Comment. Section 752.52 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 as New York Estates, Powers and Trust Law Section 10-7.1 (1967).

Section 752.53. Creditors of Donee of Presently Exercisable General Power

752.53. Property covered by a general power of appointment that is, or has become, presently exercisable is subject to the claims of creditors of the donee or of his estate and to the expenses of the administration of his estate. It is immaterial that the power originally was exercisable only by will. It is also immaterial that the donee has, or has not, exercised or purported to exercise the power, except that creditors of the donee with claims arising after the inter vivos exercise of the power may not reach the appointed assets if the assets are appointed to someone other than the donee or his creditors.

Comment. One of the most unsatisfactory aspects of the common law of powers of appointment is the rule governing the rights of creditors of the donee. Under the common law doctrine of "equitable assets," creditors of the donee could reach the appointive assets only when a general power of appointment had been exercised in favor of a creditor or volunteer. Restatement of Property §§ 327, 329-330 (1940).

The common law rule is not logical. The rights of creditors should depend upon the existence of the power, rather than upon its exercise. Modern legislation confirms the desirability of permitting creditors of a donee to reach any appointive assets which the donee can appropriate to himself for the satisfaction of their claims. See N. Y. Estates, Powers and Trust Law § 10-7.2 (1967); Wis. Stats. Ann. § 232.17(1) (Supp. 1967); Mich. Stats. Ann. § 26.155(113)(Supp. 1968); Minn. Stats. Ann. § 502.70 (Supp. 1967).

Where the power to appoint is both general and presently exercisable, the donee has the equivalent of full ownership as to the appointive assets. His creditors should be able to reach property that their debtor can appropriate to his own uses. This is equally true where the property is covered by a general testamentary power which has become presently exercisable by the death of the donee. In such case, the appointive assets have come under the complete power of disposition by the debtor donee and hence are treated the same as the other assets of the decedent. The rights of creditors are not dependent upon the exercise of the power. Unlike the common law rule, the mere existence of the power is the operative fact essential to the right of creditors. In addition, it does not matter what the interest of the donee is in the property; the property available to creditors can be either a present or a future interest.

Section 752.54. Donee of General Power Not Presently Exercisable

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

Comment. Under Section 752.54, creditors of the donee of a general power of appointment, which is in terms exercisable only at a future date (as for example by the will of the donee), can reach the appointive assets, prior to the arrival of the stipulated future date if the donee of the power was also its donor. Section 752.54 codifies the common law rule. See Restatement of Property § 328 (1940).

CHAPTER 6. RULE AGAINST PERPETUITIES

Section 752.61. Rule Against Perpetuities; Time at Which Permissible Period Begins

752.61. The permissible period under the applicable rule against perpetuities begins:

(a) In the case of an instrument exercising a general power of appointment that is presently exercisable, on the effective date of the instrument of exercise.

(b) In all other situations, at the time of the creation of the power. This subdivision applies to the exercise of a general testamentary power.

Comment. Section 752.61 states the common law rule as embodied in Restatement of Property, Sections 391 and 392. It is substantially the same as New York Estates, Powers and Trust Law Section 10-8.1(a)(1967) and Michigan Statutes Annotated Section 26.155(114)(Supp. 1968). It follows the widely accepted American rule with respect to general testamentary powers. The English rule and the rule in some states is to the contrary. See 5 Powell, Real Property ¶ 788 (1962). Under subdivision (a), the rule against perpetuities does not apply to a presently exercisable general power of appointment until an appointment is made. Under subdivision (b), the permissible period is applied to all other powers as of the time of their creation.

Section 752.62. Rule Against Perpetuities; Facts to Be Considered

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

Comment. This is the accepted rule of the common law. See Restatement of Property, Section 392(a)(1940); Minot v. Paine, 230 Mass. 514, 120 N.E. 167 (1918). It is also the established rule in California. See Estate of Bird, 225 Cal. App.2d 196, 37 Cal. Rptr. 288 (1964). Section 752.62 is substantially the same as New York Estates, Powers and Trust Law Section 10-8.3 (1967) and Michigan Statutes Annotated Section 17 (Supp. 1968).

CHAPTER 7. REVOCABILITY OF POWERS OR OF THEIR EXERCISE OR RELEASE

Section 752.71. Revocability of Creation, Exercise, or Release of Power of Appointment

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

Comment. Section 752.71 embodies the common law as stated in the Restatement of Property, Section 366, and is identical to Michigan Statutes Section 26.155(109)(1968) and is similar to New York Estates, Powers and Trust Law Section 10-9.1 (1967) and Wisconsin Statutes Annotated Section 232.11 (Supp. 1967).

CHAPTER 8. MISCELLANECUS PROVISIONS

Section 752.81. Application to Powers Heretofore Created

752.81. If the law existing at the time of the creation of a power of appointment and the law existing at the time of the release or exercise of the power or at the time of the assertion of a right embodied in this title differ, the law existing at the time of the release, exercise, or assertion of a right controls.

Comment. Section 752.81 makes this chapter applicable where a release is executed, a power is exercised, or a right is asserted after the effective date of this chapter, regardless of when the power was created. This section applies not only to powers but also to the rules of lapse and the rule against perpetuities as applied to powers. However, this section cannot be applied to invalidate a power created prior to the effective date of the title. Similar provisions exist in other states. See Wis. Stat. Ann. § 232.21 (Supp. 1967); Mich Stat. Ann. § 26.155(122)(1968).

Severability Clause

Sec. 2. If any provision of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Comment. Section 752.81 of this act provides for the application of this act to the exercise, release, and assertion of rights under a power of appointment created prior to the effective date of this act. It is possible--but not likely--that this provision will be held unconstitutional. Section 2 is therefore included to preserve the remainder of the act in the event that a particular provision is held invalid or its application to a particular situation is held invalid.

Section 1060 (repealed)

Sec. 3. Section 1060 of the Civil Code is repealed.

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

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

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

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

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

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

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

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

Comment. Section 1060 is superseded by Section 752.24.

SEPARATE BILL

Section 860 (amended)

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

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

Comment. Section 860 has been amended to conform it to subdivisions (e)(2) and (f)(2) of Section 752.31.