

POWER OF APPOINTMENT LEGISLATION IN NEW YORK: IT'S TIME FOR MODERNIZATION

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I. INTRODUCTION

Power of appointment legislation has existed in New York since 1830.¹ Indeed, the 1830 legislation remained largely intact until 1964 when the legislature effectively repealed existing power of appointment legislation that was contained in Article 5 of the Real Property Law² and replaced it with a new Article 5.³ In turn, new Article 5 was essentially reenacted under Article 10 of the New York Estates, Powers & Trusts Law (“EPTL”) effective on September 1, 1967.⁴ With few exceptions, current New York power of appointment legislation has remained unchanged since 1967.⁵

Although New York power of appointment legislation has remained largely static for almost fifty years, major developments in the area have occurred. Two significant developments were made under the Second and Third Restatements of Property. Published in 1986 as an entire volume of the Restatement (Second) of Property,⁶ the power of appointment division effectively updates the treatment of powers of appointment that is found in the First Restatement.⁷ A significantly updated treatment of powers of appointment, running over two hundred pages, is found in the

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¹ See *infra* Part III.

² Laws of 1964, ch. 864 (repealing N.Y. REAL PROP. LAW art. 5 (1945)).

³ N.Y. REAL PROP. LAW art. 5 (McKinney 1965) (repealed 1967).

⁴ See *infra* Part III.

⁵ See *id.*

⁶ See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 11.1–24.4 (1984) [hereinafter RESTATEMENT (SECOND)].

⁷ The First Restatement of Property, published in 1940, included chapter 25 on powers of appointment, which ran for almost 250 pages. RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS ch. 25 §§ 318–69 (1940) [hereinafter RESTATEMENT (FIRST)].

Restatement (Third) of Property: Wills and Other Donative Transfers, which was published in 2011.⁸

There is another important and very recent national development in the power of appointment area. A draft Uniform Powers of Appointment Act (“Draft UPOA”) is in progress,⁹ which is effectively based on translating the power of appointment provisions in the Restatement (Third) of Property into statutes.¹⁰

The purpose for this article is to recommend updated power of appointment legislation for New York.¹¹ Specifically, I will recommend specific statutory treatment for important substantive aspects in the power of appointment area.¹² The Restatement provisions as well as their translation into statutes by the Draft UPOA¹³ will frequently provide the basis for my recommended statutes.

Before addressing how New York law should be changed, a few preliminaries are in order. First, Part II provides a brief explanation of powers of appointment, as many readers may not be familiar with this fairly arcane, but important, topic.¹⁴ Next, Part III briefly considers the historical development of power of

⁸ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS chs. 17–23 (2011) [hereinafter RESTATEMENT (THIRD)]. In his capacity as a member of the Members Consultative Group for the Restatement (Third), the author was actively involved in the formulation of the powers of appointment division of the Restatement (Third).

⁹ See NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, DRAFT POWERS OF APPOINTMENT ACT § 101 (2012) [hereinafter DRAFT UPOA], available at http://www.uniformlaws.org/shared/docs/Powers_of_Appointment/2012_POAPPA_AMdraft.pdf.

¹⁰ Hereinafter, any textual reference to the “Restatement” will be to the RESTATEMENT (THIRD).

¹¹ Indeed, New York’s wholesale power of appointment revisions in the 1960s were largely based on the common law of powers of appointment as provided in the First Restatement of Property, which in turn was published in 1940.

¹² Due to the enormity of the area, I have only focused on the most significant areas. Specifically omitted are recommendations involving contracts to appoint and the release of powers under EPTL 10-9.1 (McKinney 2012). See EPTL 10-5.2–10-5.3. Also omitted are recommendations regarding perpetuities, not because perpetuities rules are unimportant but because they are extremely complex and for the most part the existing statutes are still satisfactory. See EPTL 10-8.1–10-8.4.

¹³ As an observer to the Draft UPOA, on October 27, 2012, I participated in an almost five-hour meeting of the Drafting Committee. This article reflects several decisions that were made during the meeting—decisions which will be incorporated into the next draft that is scheduled to be issued in the spring of 2013. The Uniform Powers of Appointment Act is expected to be finalized and approved by the National Conference of Commissioners on Uniform Laws at its summer meeting in 2013.

¹⁴ See *infra* Part II.

appointment legislation in New York.¹⁵

Parts IV–VII recommend specific power of appointment statutes for New York in four major areas: general provisions, creation, exercise, and creditors’ rights.¹⁶ Part IV involves general provisions, including definitions.¹⁷ Part V focuses on the creation of powers of appointment.¹⁸ Part VI recommends statutes involving the exercise of powers of appointment¹⁹ while Part VII addresses the importance of creditors’ rights.²⁰

Parts IV–VII are structured similarly. First, I provide the current New York law on the particular issue; in most cases this will be by reference to existing New York statutes.²¹ Next the applicable Restatement provision or provisions are identified. I then set forth my recommended statute for the issue. Finally, I include a discussion which explains my recommendation.²²

II. A PRIMER ON THE POWER OF APPOINTMENT DEVICE

The late Barton Leach of Harvard Law School began his 1938 law journal article as follows: “The power of appointment is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out.”²³ Before noting the historical development of the power of appointment device and thereafter explaining its important function in the contemporary estate planning world, a working definition for a power of appointment

¹⁵ See *infra* Part III.

¹⁶ See *infra* Parts IV–VII. Not every issue covered within an area by the Restatement will be addressed, especially issues that are already covered by well established New York common law. For example, the doctrine of marshaling assets, which is also known as selective allocation, applies in New York. See, e.g., *Fargo v. Squiers*, 48 N.E. 509 (N.Y. 1897). See IRA MARK BLOOM & WILLIAM P. LAPIANA, *DRAFTING NEW YORK WILLS AND RELATED DOCUMENTS* § 9.07[3][g][4] (4th ed. 2012). As a result, Restatement section 19.18 (selective allocation) is not considered in this article.

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part V.

¹⁹ See *infra* Part VI.

²⁰ See *infra* Part VII.

²¹ In a few instances, New York law does not have a specific statute that deals with an issue. In such cases, I have tried to identify New York current law based on case law. See, e.g., Part IV.G.1, *infra*.

²² Many of my recommendations are based on the Restatement treatment for an issue, but I also draw on the Draft UPOA, including changes that will be made as a result of the Drafting Committee’s meeting on October 27, 2012. See *supra* note 13 and accompanying text.

²³ W. Barton Leach, *Powers of Appointment*, 24 A.B.A. J. 807, 807 (1938).

will be useful.²⁴ Consider my formulation in 1981: “In essence, a power [of appointment] is a right given by the owner of property (donor) to an individual (donee) to determine which party shall enjoy an interest in property ([permissible] appointee or taker in default).”²⁵ In effect, the donee of a power of appointment gets to choose who will receive an interest in the donor’s former property; the choice is between the persons who the donor specifies as permissible recipients (permissible appointees),²⁶ and those who would take if the power is not exercised (takers in default).²⁷

The power of appointment device has been around for centuries. It was used to circumvent England’s prohibition on transferring land restrictions by will, which endured until the Statute of Wills was enacted in 1540.²⁸ Although the device was used in America before the twentieth century,²⁹ its use became more widespread with the advent of federal estate, gift, and income taxation in the early part of the twentieth century.³⁰ Indeed, in 1986, the Restatement (Second) of Property explained the tax minimizing opportunities afforded by the power of appointment device:

Powers of appointment have been extensively employed in various kinds of estate plans in the hope that the powerholder will have many of the benefits of ownership of the property subject to the power without the income, gift, and estate tax burdens that accompany outright ownership.³¹

Today the power of appointment device is a staple in the estate

²⁴ The power of appointment device has many facets and nuances that will be explored later on in this article. See *infra* Parts IV–VII.

²⁵ Ira Mark Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation*, 45 ALB. L. REV. 261, 276 (1981). I suggest a more precise definition in *infra* Part IV.A.3.

²⁶ If the donee validly exercised the power, the relation back doctrine applied at common law. As I explained: “Because the donee was merely acting for the donor by deciding who should receive title to the property, the appointee was deemed to have received title from the donor. In effect, the instrument exercising the power related or was read back into the instrument creating the power.” Bloom, *Transfer Tax Avoidance*, *supra* note 25, at 276. The relation back doctrine has fallen into disuse as an overarching theory. See RESTATEMENT (THIRD) § 17.4 cmt. f.

²⁷ Technically, the persons who would take if the donee does not exercise the power have immediate interests that are subject to divestment if the donee validly exercises the power.

²⁸ See JOHN A. BORRON, JR., SIMES & SMITH: THE LAW OF FUTURE INTERESTS § 872 (3d ed. 2003); RESTATEMENT (FIRST) § 319.

²⁹ Indeed, New York thought it prudent to enact power of appointment legislation as part of the Revised Statutes of 1830. See *infra* Part III.

³⁰ See RESTATEMENT (FIRST) § 319.

³¹ RESTATEMENT (SECOND) pt. V, Powers of Appointment.

planner's arsenal because both significant nontax and tax advantages can be obtained by its use.³² Consider how the power of appointment device can be used by contemporary estate planners to achieve important nontax dispositive goals for their clients: flexibility, control, and creditor protection. Client wants to create a testamentary trust for Client's Child for life, with the trust property passing to Client's Grandchildren on trust termination. Client does not like the rigidity of fixed remainders that would result if the remainder was simply left to Client's Grandchildren.³³ Rather, Client wants Client's Child to decide up until death how the trust principal will be enjoyed by Client's Grandchildren.³⁴

One solution is for Client (donor) to give Child (donee) a testamentary power of appointment pursuant to which Child will name in Child's will who among the Grandchildren (permissible appointees) will take and in what proportions.³⁵ In this way, the trust remains flexible until Child dies, gives Child control over the principal,³⁶ and the principal is not subject to reach by Child's creditors.³⁷

Tax advantages will also be obtained. The trust principal will not be subject to federal (or New York) estate taxation on Child's death.³⁸ Nor will federal (or New York) estate generation-skipping

³² The remainder of this paragraph and the next two paragraphs adapt a portion of my 2007 law review article on powers of appointment. See Ira Mark Bloom, *Powers of Appointment Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 755, 755–56 (2007).

³³ In New York future interest parlance, the grandchildren have a vested remainder subject to open. See EPTL 6-3.2(a)(2)(B).

³⁴ Leach actually used the following example: a life estate to child, remainder to grandchildren—as the vehicle to discuss the attractiveness of powers of appointment. See Leach, *supra* note 23, at 807. He explained that the gift equally to the grandchildren “ignores the fact that at [the life tenant's death] those children may be in the most diversified possible situations with reference to need of funds.” *Id.*

³⁵ A well-drafted power of appointment provision would include a gift in default provision specifying who would take the trust property if the donee failed to validly exercise the power.

³⁶ Client could have given Child greater control by allowing Child to exercise his power during lifetime as well as by will. In addition, Client could have included issue of any predeceased grandchild as permissible appointees. See *infra* Part VI.F.

³⁷ Because Child had a limited power of appointment, a so-called special power, Child's creditors could not reach the trust property under current New York law. See EPTL 10-7.1, set forth in Part VII.A.1, *infra*. Client could have given Client's child even greater control by permitting the child to appoint to anyone other than the child, the child's creditors, the child's estate or estate creditors. Because the power would still be classified as a special power, see EPTL 10-3.2(c), set forth *infra* Part IV.C.1, creditor immunity would still result. EPTL 10-7.1. Tax immunity would also be achieved. See *infra* text accompanying notes 38–39.

³⁸ The child as donee does not have an interest in the trust principal that would require gross estate inclusion under Internal Revenue Code section 2033, nor is the power a general

transfer tax be imposed on the trust principal when Child dies if the transfer falls under the federal generation-skipping transfer tax exemption.³⁹

III. A BRIEF HISTORY OF NEW YORK POWER OF APPOINTMENT LEGISLATION

Prior to the Revised Statutes of 1830, the law of powers in New York was based on English common law.⁴⁰ Declaring English common law to be essentially an abomination,⁴¹ the Revisers determined to jettison the common law of powers in favor of statutory power law. The result was the enactment of the third Article of the Revised Statutes of 1830.⁴² The first section of Article Third (Of Powers) provided as follows:

§ 73. Powers, as they now exist by law, are abolished; and from the time this Chapter shall be in force, the creation, construction and execution of powers, shall be governed by

power that would require gross estate taxation under Internal Revenue Code section 2041. Because New York estate tax law is based on federal estate taxation laws, *see* N.Y. TAX LAW § 952(a) (McKinney 2012), no New York estate tax would result.

Although trust income in the form of ordinary dividends will be taxable to the child by dint of being the income beneficiary, *see* I.R.C. § 651, trust income in the form of capital gains will not be attributable to the Child because she holds a special power of appointment. *Cf.* I.R.C. § 678 (2006) (effectively taxing capital gains to the holders of a general power of appointment). Because New York generally follows federal income tax law, no New York income tax would be imposed on capital gains income.

³⁹ If the Client's generation-skipping transfer exemption had been used, then a taxable termination would result on the death of the Child. *See* 26 U.S.C. § 2611 (2006). New York generation-skipping transfer would also result. *See* N.Y. TAX LAW § 1022 (McKinney 2012). *See generally* BLOOM & LAPIANA, *supra* note 16, at § 16.11.

⁴⁰ *See* ROBERT LUDLOW FOWLER, THE REAL PROPERTY LAW OF THE STATE OF NEW YORK 573–76 (1909) [hereinafter FOWLER 1909]. As Fowler notes, the common law of powers was with respect to real property not personal property. *Id.* at 576. Courts subsequently tried to treat the law for both types of property the same. *Id.*

⁴¹ *Id.* at 1298–1305 app. III (Notes of the Original Revisers of the Revised Statutes).

⁴² Article Third (Of Powers) was enacted under Title 2 of Chapter 1 of Part II of the Revised Statutes of 1830. N.Y. REV. STAT. pt. 2, ch. 1, tit. 2, art. 3, §§ 73–135 (1830). Article Third, which included sections 73–135, is discussed in ROBERT LUDLOW FOWLER, HISTORY OF THE LAW OF REAL PROPERTY IN NEW YORK 151–67 (1895) [hereinafter FOWLER 1895]. Fowler also discusses the overall enactment of the Revised Statutes of 1830 as they relate to real property. *See id.* at 89–107. Part I of the Revised Statutes of 1830 (“Concerning the territorial limits and divisions, the civil polity, and the internal administration of this State”) was a massive enactment running over 650 pages! *See* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 131–157 (1944). As Cook noted: “[T]he Revised Statutes, resulted in a true, if limited, codification of New York law, the first in any common law jurisdiction.” *Id.* at 136.

the provisions of this Article.⁴³

Section 74 made clear that Article (Third) only applied to real property:

A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power, might himself lawfully perform.⁴⁴

Sections 75–135 of Article (Third) ensued. Interestingly, however, none of the statutes under Article Third specifically referred to power of appointment; reference was only to “power” in the statutes. Nonetheless several sections had direct application to powers of appointment.⁴⁵

Subsequent to 1830, legislative enactments resulted in mostly cosmetic changes to the statutes that were originally enacted under the Revised Statutes of 1830.⁴⁶ The major cosmetic change was to renumber the original sections as part of powers legislation under New York’s Real Property Law. For example, legislation in 1896 included a powers article under Article 4 of the Real Property Law of 1896.⁴⁷ Legislation in 1909 enacted powers legislation under Article 5 of the Real Property Law article.⁴⁸

Strikingly, the 1909 legislation on powers, which in substance reflected the substance of the powers article that was enacted by the Revised Statutes of 1830,⁴⁹ remained virtually intact until June 1, 1965.⁵⁰ Significant changes to Article 5 of the Real Property Law became effective on June 1, 1965 as a result of 1964 legislation.⁵¹ In turn, Article 5 of the Real Property Law was enacted without

⁴³ N.Y. REV. STAT. pt. 2, ch. 1, tit. 2, art. 3, § 73. As Fowler explained: “This article was intended by the revisers to be the Alpha and Omega of the entire future law of powers related to estates in lands.” FOWLER 1895, *supra* note 42, at 152.

⁴⁴ N.Y. REV. STAT. pt. 2, ch. 1, tit. 2, art. 3, § 74. Courts subsequently tried to treat the law for both types of property the same. *See* FOWLER 1909, *supra* note 40, at 576.

⁴⁵ *See, e.g.*, N.Y. REV. STAT. pt. 2, ch. 1, tit. 2, art. 3, §§ 77–78 (defining general and special powers), § 105 (reserved powers), § 106 (creation of powers), § 109 (exercise of power), § 108 (irrevocability of powers).

⁴⁶ In his book comprehensively treating the 1909 real property legislation, Fowler observed: “The act which is the subject of this volume is in the main only a re-enactment without change of chapter 46 of the General Laws [of 1896], which were in turn but a re-revision of Part II of the Revised Statutes of 1830.” FOWLER 1909, *supra* note 40, at 51.

⁴⁷ N.Y. REAL PROP. LAW, ch. 547 (1896). Article Four consisted of sections 110–63.

⁴⁸ N.Y. REAL PROP. LAW, art. 5 (1909). Article Five consisted of sections 130–82.

⁴⁹ FOWLER 1909, *supra* note 40.

⁵⁰ There were a few amendments. *See, e.g.*, 1963 N.Y. Laws, ch. 378, § 4 (amending N.Y. REAL PROP. LAW § 141); 1958 N.Y. Laws, ch. 359, § 1 (amending N.Y. REAL PROP. LAW § 70).

⁵¹ Laws of 1964, ch. 864.

significant change as Article 10 of the EPTL, which became effective on September 1, 1967.⁵² Apart from a few amendments, Article 10 remains unchanged since 1967.⁵³

The circumstances behind enactment of the EPTL, including Article 10 (Powers), bear discussion. In 1961, the legislature created the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates to the Governor and the Legislature.⁵⁴ The Commission, which was chaired by Nassau County Surrogate John D. Bennett, came to be known as the Bennett Commission.

The enabling legislation for the Bennett Commission stated as follows:

The commission shall make a comprehensive study of the relevant provisions of the real property law, the personal property law, the decedent estate law, the surrogates court act and such other statutes as the commission may deem advisable for the purpose of correcting any defects that may appear in the laws relating to estates and their administration, the descent and distribution of property, and the practice and procedure relating thereto, and for the purpose of modernizing, simplifying and improving such law and practice.⁵⁵

Pursuant to its charge, the Bennett Commission diligently pursued the monumental task of reviewing and reforming New York law on estates.⁵⁶ One area for review and reform involved powers of appointment. As explained in the Bennett Commission's Third Report:

⁵² BENNETT COMM'N ON ESTATES, FIFTH REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE 55–57 (Mar. 31, 1966) [hereinafter BENNETT COMM'N FIFTH REPORT].

⁵³ See, e.g., 1967 N.Y. Laws, ch. 686 (amending EPTL 10-3.3, 10-5.1 and 10-6.7); 2005 N.Y. Laws, ch. 700, §§ 1–2 (amending EPTL 10-7.1 and 10-7.2).

⁵⁴ 1961 N.Y. Laws, ch. 731 (effective Apr. 22, 1961).

⁵⁵ *Id.*, reproduced in BENNETT COMM'N ON ESTATES, FIRST REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE 9 (Mar. 31, 1962) [hereinafter BENNETT COMM'N FIRST REPORT].

⁵⁶ Ultimately, the Bennett Commission produced one introductory report and five massive reports during its several years' existence. An earlier commission, the so-called Foley Commission, undertook reformation efforts in the area of estates from 1927–1933. See BENNETT COMM'N FIRST REPORT, *supra* note 55, at 14–15. However, the Foley Commission did not undertake to review New York's law on powers.

The New York law as to powers of appointment and other types of powers is now contained in article 5 of the Real Property Law, which has existed in substance since the Revision of 1830. The present statute contains many complex, confusing definitions and overlapping provisions. The bill deals separately with powers of appointment and with other types of powers in order to eliminate the ambiguity generated in the present law by the intermingling of rules applicable to two distinctly different types of powers.⁵⁷

The legislation recommended by the Bennett Commission was the repeal of Article 5 of the Real Property Law with the enactment of a new Article 5 of the Real Property Law.⁵⁸ Although the Bennett Commission referred to powers of appointment,⁵⁹ the proposed legislation involved not only powers of appointment but also other powers.⁶⁰ The Bennett Commission's recommended legislation on powers was enacted in 1964 and became effective on June 1, 1965.⁶¹

The Bennett Commission's Fifth Report, submitted in 1966, contained a major recommendation that involved powers: the enactment of an estates, powers and trusts law, whereby all of the substantive provisions relating to these areas would be consolidated in place.⁶² To that end, the 1964 legislation on powers was effectively transported, with minor changes, into Article 10 (Powers) of the EPTL.⁶³ As part of the Reviser's Notes, each section within Article 10 is explained, including how a section varies from the 1964 legislation from which it was derived.⁶⁴

There is one striking aspect of Article 10 of the EPTL.

⁵⁷ BENNETT COMM'N ESTATES, THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE 9 (Mar. 31, 1964) [hereinafter BENNETT COMM'N THIRD REPORT].

⁵⁸ *Id.* at 601 app. O (Powers of Appointment).

⁵⁹ *See id.*

⁶⁰ *See, e.g.*, N.Y. REAL PROP. LAW §§ 159–64 (relating to certain powers that are not powers of appointment).

⁶¹ 1964 N.Y. Laws, ch. 864.

⁶² BENNETT COMM'N FIFTH REPORT, *supra* note 52, at 45–46.

⁶³ *See id.* at 55–57 (discussing major features of Article 10).

⁶⁴ *Id.* at 389–95. Only one section, EPTL 10-2.2 (defining basic terminology), was not derived from Article 5 of the Real Property Law, as enacted by laws of 1964, ch. 864. As explained, “included words are defined for purposes of drafting convenience and to assist the Bar.” BENNETT COMM'N FIFTH REPORT, *supra* note 52, at 390. *See infra* Part IV.B.4 (discussing problems with EPTL 10-2.2).

Approximately over half of the provisions are in substance the statutes that were enacted under Article Third (Of Powers) of the Revised Statutes of 1830.⁶⁵

IV. RECOMMENDED POWER OF APPOINTMENT LEGISLATION GENERAL PROVISION

A. Power of Appointment Defined: What Arrangements Constitute a Power of Appointment

1. Current New York Law

New York power of appointment legislation is found in Article 10 of the EPTL, which is captioned “Powers.” In turn, “power”, which includes a power of appointment,⁶⁶ is broadly defined by EPTL 10-2.1 as follows:

Power

A power is an authority to do any act in relation to property, including the creation or revocation of an estate therein or a charge thereon, which the donor of the power might himself do, except that the term, as used in this article, does not apply to a power of attorney to convey property in the name of the owner, regulated by other statutes.⁶⁷

EPTL 10-3.1(a) relates to, and defines a power of appointment as follows:

This article applies to powers of appointment. A power of appointment, as the term is used in this article, is an authority created or reserved by a person having property

⁶⁵ Recall that Article 10 effectively enacted Real Property Law sections 130–66, as enacted by the laws of 1964, ch. 864. In turn, the 1964 legislation was derived from Article 5 of the Real Property Law of 1909, which in substance contained the provisions in Article Third of the Revised Statutes of 1830.

The Bennett Commission Report on the 1964 powers of appointment legislation included an Appendix which compared the treatment of the sections in Article 5 that were enacted in 1909 to those in the 1964 legislation. See BENNETT COMM’N THIRD REPORT, *supra* note 57, at 628 (Appendix O-1). The Appendix identifies approximately one-half of the 1909 statutes as being “largely retained.” *Id.* at 629. Appendix O-2 shows the sources for the new sections in the 1964 legislation. *Id.* at 630. Approximately one-half of each new statute shows as its source the “Present” statute. In other words, the source for the new statute is effectively a statute enacted by the Revised Statutes of 1830.

⁶⁶ EPTL 10-3.1(a).

⁶⁷ EPTL 10-2.1. See N.Y. GEN. OBLIG. LAW § 5-1501, tit. 15 (McKinney 2012) (listing provisions dealing with powers of attorney for estate and financial planning).

subject to his disposition, enabling the donee to designate, within such limits as may be prescribed by the donor, the appointees of the property or the shares or the manner in which such property shall be received.⁶⁸

EPTL 10-3.1(b) provides further clarification of the power of appointment definition by enumerating various powers that are not power of appointment:

This article applies, generally to powers which are not powers of appointment, such as a power to revoke a disposition previously made, a power during minority to manage property vested in an infant, a power to disburse the principal of a trust, a power to sell in a mortgage and a power in a life tenant to make leases. This enumeration is not exclusive but illustrative.⁶⁹

The comment to the enactment of Real Property Law section 132, which became EPTL 10-3.1, is instructive:

One source of confusion in Article 5 (powers legislation article), as it has existed since 1830, is the mass treatment of two types of significantly different powers, namely, powers of appointment and other powers. The proposed substitute article treats powers of appointment in sections 133-158 (now EPTL 10-10-3.2-10-9.2) and segregates into sections 159-166 (now EPTL 10-10.1-10.8), the provisions dealing with other powers.⁷⁰

2. Restatement Provision

Section 17.1 provides as follows:

Power Of Appointment Defined

A power of appointment is a power that enables the donee of the power to designate recipients of beneficial ownership interests in or powers of appointment over the appointive property.⁷¹

⁶⁸ EPTL 10-3.1(a).

⁶⁹ EPTL 10-3.1(b).

⁷⁰ BENNETT COMM'N THIRD REPORT, *supra* note 57, at 615.

⁷¹ RESTATEMENT (THIRD) § 17.1.

3. Recommended Statute

Power of Appointment Defined

A power of appointment is a power, either created or reserved by a donor, that enables the donee of the power, acting in a nonfiduciary capacity, to designate recipients, within the limits prescribed by the donor, of beneficial ownership interests in or powers of appointment over the appointive property. A power of appointment does not include a reserved power to revoke or amend a disposition.

4. Discussion

My recommended statute encompasses a few important aspects.⁷² The basic definition provided in the first sentence relies on both EPTL 10-3.1(a) and Restatement section 17.1, which in some respects provides a more succinct and precise definition than is found under EPTL 10-3.1(a).⁷³

Indeed, New York's current definition is confusing in at least one respect insofar as a power of appointment may include a power to decide "the manner in which such property shall be received." This phrase was mysteriously added because the Bennett Commission report states that EPTL 10-3.1 "reenacts RPL (Real Property Law) § 132 without change,"⁷⁴ even though that section did not include the phrase.⁷⁵ The likely reason for the addition was to ensure that property that could be appointed to more than one recipient could on exercise be appointed not only outright but also in trust.⁷⁶

⁷² If the current structure of EPTL Article 10 is retained, rather than the structure of the Draft UPOA, my recommended statute should be located in Part 2 (Definitions), along with current EPTL 10-3.1(b), which deals with powers that are not powers of appointment. See *infra* Part VIII (recommending that structure of the Draft UPOA be utilized).

⁷³ EPTL 10-3.1(a) is based on the 1940 definition provided in section 318 of the First Restatement of Property. See BENNETT COMM'N THIRD REPORT, *supra* note 57, at 615.

⁷⁴ BENNETT COMM'N FIFTH REPORT, *supra* note 52, at 390.

⁷⁵ As proposed by the Bennett Commission and as enacted, REAL PROP. LAW § 132 provided in part as follows: "This Article applies to powers of appointment. A power of appointment, as the term is used in this Article is a power created or reserved by a person having property subject to his disposition, enabling the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received." BENNETT COMM'N THIRD REPORT, *supra* note 57, at 614–15.

⁷⁶ See, for example *In re Finucane's Will*, 82 N.Y.S.2d 471, 473 (Sur. Ct. Monroe County 1948) (emphasis added), allowing appointment in trust where decedent gave in his will authority to his son to appoint among issue: "[A]nd after his death I direct my said trustees to distribute the share thus set apart for him to his children and descendants and *in such*

Confusion arises regarding whether the ability to change the time and manner of enjoyment would be a power of appointment under current law. Consider the following example: S creates a trust with income to A for life, remainder to B. A is given the testamentary power to provide that B may not receive the property outright but that the property could be continued in trust for B until B reaches 40, with trust principal then distributable to B and if B dies before age 40, then the principal goes to B's estate. Is this a power of appointment under EPTL 10-3.1(a) because A can determine the manner in which the property can be received even though A cannot change the recipient? I would think not but a literal reading might suggest otherwise.

My recommended statutory definition for powers of appointment makes clear that a power of appointment involves the ability to designate recipients. Indeed, a Reporter's Note to Restatement section 17.1 provides further support for the position that the mere power to affect time and manner of enjoyment by one person is not a power of appointment:

The Restatement Second also treated a power to terminate as a power of appointment, but such a power is not treated as a power of appointment in this Restatement Third, because such a power merely enables the donee of the power to convert ownership interests into possessory interests, but does not enable the donee to shift ownership interests from one beneficiary to another.⁷⁷

A second aspect of my recommended definition provides, unlike the definition under Restatement section 17.1, that statutory powers held in a fiduciary capacity would be excluded as powers of appointment. This was the salutary position that was taken in the Tentative Draft of section 17.1 based on the following explanation:

Fiduciary distributive powers. As used in this Restatement and in the Restatement Third of Trusts, a fiduciary distributive power is not a power of appointment. See Restatement Third, Trusts § 50, Comment a. Fiduciary distributive powers include a trustee's power to distribute principal to or for the benefit of an income beneficiary, or for

manner and in such proportions as my said son may direct and appoint by his last Will and Testament" allowed appointment in trust.

⁷⁷ RESTATEMENT (THIRD) § 17.1, reporter's note 4. Regarding the treatment of a power to withdraw income or principal that is subject to an ascertainable standard, see *id.* § 17.4(c).

some other person, or to pay income or principal to a designated beneficiary, or to distribute income to principal among a defined group of beneficiaries. Unlike the exercise of a power of appointment, the exercise of a fiduciary distributive power is subject to fiduciary standard. Unlike a power of appointment, a fiduciary distributive power does not lapse upon the death of the fiduciary, but survives in a successor fiduciary. Nevertheless, a fiduciary distributive power, like a power of appointment, cannot be validly exercised in favor of or for the benefit of someone who is not a permissible appointee and may be subject to a common-law or statutory rule relating to perpetuities under the same rules applicable to a nongeneral power of appointment.⁷⁸

Because fiduciary powers are comprehensively covered by New York trust law, I see no reason to include fiduciary powers as powers of appointment.⁷⁹ In effect, the exclusion of fiduciary powers from the definition of powers of appointment continues existing New York law.⁸⁰

The second sentence of my recommended statute clarifies an important point of departure from the Restatement and would continue existing New York law: retained powers of trust revocation, amendment and withdrawal should not be treated as part of New York power of appointment legislation.⁸¹ For convenience, my discussion of the reserved power to revoke a trust includes the reserved power to amend and withdraw.⁸²

⁷⁸ *Id.* § 17.1 cmt.g (Tentative Draft No. 5, 2006).

⁷⁹ DRAFT UPOA, *supra* note 9, § 102(12) (excluding fiduciary powers as powers of appointment).

⁸⁰ See EPTL 10-3.1(b) (providing that certain fiduciary powers are not powers of appointment). *But cf.* EPTL 10-6.6(d) (treating trustee's exercise of a decanting power as a special power of appointment).

⁸¹ As provided in my recommended statute, a donor may also be the donee of a power of appointment, that is, the donor can retain a power of appointment by holding the power as the donee. See *supra* Part IV.A.3. Although the retained power to revoke (amend or withdraw) a trust may conceptually be a power of appointment since the settlor can change beneficial interests by revoking, amending, or withdrawing, this does not mean that such retained powers should be treated as powers of appointment by statute.

⁸² The retained power to amend is implied in the retained power to revoke. See RESTATEMENT (THIRD) OF TRUSTS § 56 cmt. B (2003). Although a retained power to amend but not to revoke is unusual, the rules for trust amendment, like the rules for the retained power to revoke a trust, are adequately addressed by trust law.

The retained power to withdraw property from a trust is functionally the same as the power to partially revoke a trust. As a result, the power to withdraw as a subset of the power to revoke should not be made part of power of appointment legislation.

My rationale for excluding the retained power to revoke a trust is simple: retained powers to revoke a trust are more than adequately handled under New York's well established trust laws. Specifically, New York already has rules for creating and revoking trusts as well as rules governing the rights of creditors and surviving spouses.⁸³ To include the power to revoke under the rules for powers of appointment would be not only duplicative and therefore unnecessary but also confusing. Confusion is likely to result since existing New York law treats a power to revoke a trust differently from a power of appointment.⁸⁴ As one of the leading authorities concludes regarding the exercise of a power of appointment, "[a] power to revoke a trust is not the equivalent of a power of

⁸³ See EPTL 7-1.17(a) (creation); EPTL 7-1.17(b) (revocation and amendment); EPTL 7-3.1; EPTL 10-6.6 (creditors); EPTL 5-1.1-A(b)(1)(F) (outlining elective shares rights in retained powers of revocation and amendment).

⁸⁴ Compare EPTL 5-1.1-A(b)(1)(F) (power to revoke), with EPTL 5-1.1-A(b)(1)(H) (detailing presently exercisable general power of appointment). Compare EPTL 10-8.1(a)(1) (discussing when perpetuities period begins for holders of presently exercisable powers of appointment), with EPTL 10-8.2(b) (revocable trust time period).

Under New York's power of attorney legislation, agents can only revoke trusts with the express grant of authority, see N.Y. GEN. OBLIG. LAW § 514(3)(c)(8) (McKinney 2012), whereas an agent can exercise a presently exercisable general or specific power of appointment held by the principal without an express grant if gift-making authority is authorized. See *id.* § 514(3) (last sentence).

Most uniform laws also distinguish between the retained power to revoke a trust and a power of appointment. See, for example, UNIF. PROBATE CODE § 1-403(2) (2010), holder of "power of revocation or a presently exercisable general power of appointment" for virtual representation purposes. *Id.* § 2-902 (distinction made for perpetuities purposes).

Similar to New York law, under the Uniform Powers of Attorney Act agents can only revoke trusts with the express grant of authority, see UNIF. PROBATE CODE § 5B-217(b)(1) (2010), whereas an agent can exercise a presently exercisable general (but not special) power of appointment held by the principal without an express grant if gift making authority is authorized. See *id.* § 5B-217(b)(1) (last sentence).

Rather than treating the power to revoke as a power of appointment, the Uniform Trust Code effectively treats powers of appointment as a branch of revocable trusts. See UNIF. TRUST CODE §§ 103(11), 505(b), 603(b) (2000). Indeed the Restatement's reliance on comment b of section 56 of the Restatement of Trusts for the proposition that revocable trusts are powers of appointment ("[A retained] power to revoke . . . a trust is recognized as a power of appointment over the principal of the trust . . ."), see RESTATEMENT (THIRD) § 17.1 cmt. e, is belied by the fact that comment b is entitled "Powers of revocation or appointment," and a reading of the comment makes it abundantly clear that a settlor's power to revoke is not treated as a power of appointment. Further, section 74(2) of the Restatement of Trusts makes it clear that revocable trusts are not powers of appointment; indeed just the opposite:

To the extent that a trust is subject to a presently exercisable general power of appointment or power of withdrawal and the donee of the power has capacity to act, the donee has authority similar to the authority that the settlor of a revocable trust has under Subsection (1).

RESTATEMENT (THIRD) OF TRUSTS § 74(2) (2003)

appointment.”⁸⁵

My recommended statutory definition would also exclude other arrangements where an owner can revoke or amend the transaction. Indeed, if the power to revoke a trust was treated as a power of appointment as under the Restatement, there is no principled way to exclude other arrangements that involve reserved powers to revoke that are not in trust.⁸⁶ Consider the following arrangements which all involve the retained power to revoke where interests may be deemed created in third persons: gifts causa mortis, as well as life insurance and pension arrangements.⁸⁷ 529 college savings plans also fit within the description.⁸⁸ Does it make sense to say that these retained powers of revocations should be subject to the rules governing powers of appointment? Not in my judgment, especially since each such arrangement has its own built in set of rules, many of which differ from the rules for powers of appointment.⁸⁹ To me, it makes no sense to treat the retained power of revocation in such arrangements as part of power of appointment legislation.⁹⁰

⁸⁵ MARY F. RADFORD, GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 1001 (3d ed. 2006).

⁸⁶ Because the creation of power of appointment comprehends the transfer of property, *see infra* Part IV.A.3, certain arrangements involving an owner's ability to change beneficiaries may not be treated as a power of appointment. A good example would be a Totten trust. During the lifetime of the trustee, the depositor is still deemed to be the owner. *See Estate of Chaikowsky*, 404 N.Y.S.2d 510 (Sur. Ct. N.Y. County 1978) (construing EPTL 7-5.5(1)). A similar result would obtain under TOD security registration. *See EPTL* 13-4.6(a).

⁸⁷ As John Langbein observed: “Why is a transfer by life insurance policy or by pension plan not void for violation of the Wills Act? Because the beneficiary's interest is ‘vested’ during the transferor's lifetime.” John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1128 (1984).

⁸⁸ *See* I.R.C. § 529. 529 college savings plans are remarkable insofar as the account owner is deemed to make a completed gift for gift tax purposes even though the account owner can re-obtain the funds and change the designated beneficiary. *See generally*, IRA MARK BLOOM, ET AL., *FEDERAL TAXATION OF ESTATES, TRUSTS AND GIFTS* 236–37 (3rd ed. 2003).

⁸⁹ For example, creditors cannot reach IRA assets, *see EPTL* 7-3.1(b), or assets in 529 plans. *See* N.Y. C.P.L.R. 5205(c)(2) (McKinney 2012). On the other hand, because an IRA asset would be classified as a retained presently exercisable general power of appointment, creditors of the account owner would be allowed to reach such assets under both the Restatement and the draft Uniform Powers of Appointment Act. *See* RESTATEMENT (THIRD) § 22.2; DRAFT UPOA, *supra* note 9, § 301.

⁹⁰ I initially took this position in 2007 in an unsuccessful attempt to persuade the Reporter, Laurance Waggoner, to exclude the power to revoke a trust and other retained powers from the Restatement's treatment of powers of appointment. *See* Ira Mark Bloom, *Powers of Appointment Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 755, 799–804 (2007). Although the UPOA Drafting Committee recognized that duplication would result from treating the power to revoke a trust as a power of appointment, the rationale for doing so was that the UPOA might be adopted in different jurisdiction than the Uniform

In the final analysis, the second sentence of my recommended statute makes clear that neither the reserved power to revoke (including the power to withdraw) or the reserved power to amend a trust, nor any other power of revocation or amendment will be treated as a power of appointment.

B. Basic Definitions

1. Current New York Law

EPTL 10-2.2 provides definitions that apply to both general powers and powers of appointment, albeit on inspection none of the defined words are used in Article 10 other than in the context of powers of appointment. EPTL 10-2.2 specifically provides:

Other words defined

- (a) Donor. A donor is the person who creates or reserves a power.
- (b) Donee. A donee is the person to whom a power is given or in whose favor a power is reserved.
- (c) Appointee. An appointee is the person in whose favor a power of appointment is exercisable.
- (d) Appointive property. Appointive property is property which is the subject of a power of appointment.⁹¹

2. Restatement Provision

Section 17.2 provides as follows:

Terminology Associated with a Power of Appointment

- (a) “Donor.” The “donor” (“creator”) is the person who created or reserved the power of appointment. Before creating the power, the donor was either the owner of the appointive property or the donee of a power of appointment with respect to the appointive property.
- (b) “Donee.” The “donee” (“power holder”) is the person on whom the power of appointment was conferred or in whom

Trust Code. Regarding other retained powers of revocation, I am optimistic that the UPOA will discuss such arrangements and even if not excluded, recognize the need to provide for differences. For example, although 529 accounts are generally exempt from creditors, *see* N.Y. C.P.L.R. 5205(c)(2), but as a retained presently exercisable power of appointment, creditors would be able to reach 529 plans. *See* DRAFT UPOA, *supra* note 9, § 501.

⁹¹ EPTL 10-2.2.

the power was reserved. If the donor reserved the power in himself or herself, the donor is also the donee, and the term “Donor-Donee” is sometimes used to refer to such a person.

(c) “Permissible Appointees.” The “permissible appointees” (“objects”) are the persons to whom an appointment is authorized.

(d) “Impermissible Appointee.” An impermissible appointee (“nonobject”) is anyone who is not a permissible appointee.

(e) “Appointee.” An “appointee” is a person to whom an appointment has been made.

(f) “Taker in default of appointment.” A “taker in default of appointment” (“taker-in-default”) is a person who takes part or all of the appointive property to the extent that the power is not effectively exercised. The clause that identifies the taker- or takers-in-default is called the gift-in-default clause. The gift-in-default clause often identifies the takers-in-default as a class (i.e., a class gift).

(g) “Appointive property.” The “appointive property” is the property or property interest that is subject to a power of appointment.⁹²

3. Recommended Statute

Terminology Associated with a Power of Appointment

(a) “Donor.” The “donor” is the person who created or reserved the power of appointment. Before creating the power, the donor was either the owner of the appointive property or the donee of a power of appointment with respect to the appointive property.

(b) “Donee.” The “donee” is the person on whom the power of appointment was conferred or in whom the power was reserved. If the donor reserved the power in himself or herself, the donor is also the donee, and the term “Donor-Donee” is sometimes used to refer to such a person.

(c) “Permissible Appointees.” The “permissible appointees” are the persons to whom an appointment is authorized.

(d) “Impermissible Appointee.” An impermissible appointee is anyone who is not a permissible appointee.

⁹² RESTATEMENT (THIRD) § 17.2.

(e) “Appointee.” An “appointee” is a person to whom an appointment has been made.

(f) “Taker in default of appointment.” A “taker in default of appointment” (“taker-in-default”) is a person who takes part or all of the appointive property to the extent that the power is not effectively exercised. The clause that identifies the taker- or takers-in-default is called the gift-in-default clause. The gift-in-default clause often identifies the takers-in-default as a class (i.e., a class gift).

(g) “Appointive property.” The “appointive property” is the property or property interest that is subject to a power of appointment.

4. Discussion

Restatement section 17.2 admirably defines the key terms in the power of appointment area.⁹³ In contrast, New York’s current statute should be repealed because it is defective and woefully inadequate. The defect lies in the definition of “appointee,” which is properly defined as the person in whose favor a power is exercised, not as under EPTL 10-2.2(c) as the persons in whose favor a power of appointment is exercisable. The latter category is properly defined in Restatement section 17.1(c) as “permissible appointees.”⁹⁴

EPTL 10-2.2 also fails to define such important terms as “taker in default” and fails to update the definition of appointive property to include “property interest,” *e.g.*, a remainder interest.

C. Classification of Powers

1. Current New York Law

EPTL 10-3.2(b) and (c) define the different kinds of powers of appointment based on the permissible appointees as follows:

(b) A power of appointment is general to the extent that it is exercisable wholly in favor of the donee, his estate, his

⁹³ However, I would avoid the double definition for the same concept, *e.g.* donor-creator. Interestingly, the Draft UPOA opts for the term “power holder” rather than “donee.” *See* DRAFT UPOA, *supra* note 9, § 102(13). Because New York has such a well-developed body of power of appointment law based on using the term “donee,” I have opted to retain the familiar “donee” definition.

⁹⁴ RESTATEMENT (THIRD) § 17.1(c).

creditors or the creditors of his estate.

(c) All other powers of appointment are special.⁹⁵

2. Restatement Provision

Section 17.3 provides as follows:

General Power; Nongeneral Power

(a) A power of appointment is general to the extent that the power is exercisable in favor of the donee, the donee's estate, or the creditors of either, regardless of whether the power is also exercisable in favor of others.

(b) A power of appointment that is not general is a nongeneral power.⁹⁶

3. Recommended Statute

General Power; Special Power

(a) A power of appointment as defined in [section defining power of appointment], other than a power of appointment that the donor possesses as donee, is general to the extent that the power is treated as a general power of appointment pursuant to section 2041(b)(1) or section 2514(c) of the Internal Revenue Code of 1986, as amended.

(b) If the donor is the donee of a power of appointment the power is general if it is exercisable in favor of the donee, the donee's estate, the donee's creditors or the creditors of the donee's estate unless exercisable with the consent of a person having a substantial interest in the property subject to the power.

(c) A power of appointment that is not general is a special power.

4. Discussion

My recommendation essentially relies on the premise that, to the extent possible, the tax and nontax rules for powers of appointment should be the same. After all, virtually all powers of appointment granted to third parties are designed with tax purposes in mind, the

⁹⁵ EPTL 10-3.2(b)–(c).

⁹⁶ RESTATEMENT (THIRD) § 17.3.

main purpose of which is to create a special power of appointment and thereby avoid gross estate inclusion of a power of appointment under Section 2041 of the Internal Revenue Code or gift taxation under Code Section 2514.⁹⁷

New York's current statute as existing, and Restatement section 17.3(a), essentially rely on the main tax definition for a general power of appointment.⁹⁸ Specifically, Internal Revenue Code section 2041(b)(1) provides in part as follows:

(b) Definitions. For purposes of subsection (a)—

(1) General power of appointment.

The term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.⁹⁹

In effect, a power will be general only to the extent it is exercisable in favor of the decedent, his estate or the creditors of either—the so-called “fearsome four.” Both the EPTL and Restatement fail to take into account the major tax exception when a third party donee would otherwise possess a general power: an otherwise general power of appointment subject to the so called HEMS standard.¹⁰⁰ As a result, the ability of a donee to obtain property subject to a HEMS standard is a general power of appointment under both New York law and the Restatement.¹⁰¹

My recommendation simply completes what the EPTL and the Restatement have started: to have the tax and nontax definition of general power of appointment be coterminous to the extent possible.¹⁰² Although one might object to incorporating an Internal

⁹⁷ As will be seen, the tax rules distinguish between powers held by third parties and powers that are retained by the donor as donee.

⁹⁸ The Bennett Commission specifically provided that its definition was using “the line drawn, for [federal estate] tax purposes, in I.R.C. § 2041(b)(1).” BENNETT COMM’N THIRD REPORT, *supra* note 57, at 615.

⁹⁹ I.R.C. § 2041(b) (2006).

¹⁰⁰ I.R.C. section 2041(b)(1)(A) provides that an otherwise general power of appointment will not be a general power based on the HEMS exception: “A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.” *Id.*

¹⁰¹ *Accord* DRAFT UPOA, *supra* note 9, § 102(5). *But see* DRAFT UPOA, *supra* note 9, § 502(c) (not treating property subject to a HEMS standard as a general power of appointment for certain creditors’ rights purposes).

¹⁰² The Restatement section already incorporates the other main tax exception of I.R.C. § 2041(b)(1)(C)(ii): a power that would otherwise be a general power of appointment is not a general power of appointment if exercisable only with the consent of a person having a substantial interest in the property subject to the power. *See* RESTATEMENT (THIRD) § 17.3

Revenue Code provision into the EPTL, this is already done in several instances under the EPTL.¹⁰³

Unfortunately, the tax and property definitions cannot be completely in sync. A major difference is that the tax definition for powers of appointment is broader than it is for nontax purposes.¹⁰⁴ As a result, a fiduciary power can be a power of appointment for tax purposes but under my recommended statute a power of appointment only includes a power exercisable in a nonfiduciary capacity.¹⁰⁵ In other words, the tax definition is more inclusive than the property definition.

In one area, the property definition for power of appointment is more inclusive than the tax definition, hence the reason for separate subsection (2) of my recommended statute. When the donor is also a donee, the retained power is not a power of appointment for estate tax purposes although it still will be subject to estate taxation.¹⁰⁶ Yet, for property purposes the donor's retained power to appoint is treated as a power of appointment.¹⁰⁷ And, in my judgment, if the

cmt. e. *Accord* DRAFT UPOA, *supra* note 9, § 204(a), (b). The other exceptions under section 2041 would also apply but their application would be extremely rare. I.R.C. § 2041(b)(1)(B), (b)(1)(C)(i). *See also id.* § 2041(b)(1)(C)(iii) (limiting general power when power exercisable only with consent of non-adverse parties).

¹⁰³ *See, e.g.*, EPTL 5-1.1-A(b)(1)(B) (referring to I.R.C. §§ 2503(b), 2503(e)); EPTL 5-1.1-A(b)(1)(H) (referring to I.R.C. § 2041); EPTL 10-7.1; EPTL 10-7.2 (referring to I.R.C. §§ 2041, 2514).

¹⁰⁴ For tax purposes a power of appointment includes powers that are not powers of appointment for property purposes under my recommended statute. Thus, Treas. Reg. § 20.2041-1(b)(1) (2013) provides in part:

The term "power of appointment" includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. For example, if a trust instrument provides that the beneficiary may appropriate or consume the principal of the trust, the power to consume or appropriate is a power of appointment. Similarly, a power given to a decedent to affect the beneficial enjoyment of trust property or its income by altering, amending, or revoking the trust instrument or terminating the trust is a power of appointment.

¹⁰⁵ *See supra* Part IV.A.3.

¹⁰⁶ Treas. Reg. § 20.2041-1(b)(2) provides in part as follows: "For purposes of §§ 20.2041-1 to 20.2041-3, the term 'power of appointment' does not include powers reserved by the decedent to himself within the concept of sections 2036 through 2038." Such retained powers would invariably be taxed under sections 2036 and 2038. *See, e.g.*, *Comm'r of Internal Revenue v. Chase Nat'l Bank of N.Y.*, 82 F.2d 157 (2d Cir. 1936) which was decided under the forerunner of I.R.C. § 2038, a reserved power to appoint by will among the decedent's issue was held taxable.

¹⁰⁷ The donor-donee's power to appoint to herself or her creditors would fall within the general definition of a power of appointment. *See* EPTL 10-3.2(b). Although similar to a power to revoke a trust, such a retained power is not a power to revoke but a power to appoint.

donor-donee can exercise the power of appointment in favor of one of the fearsome four, the power should be treated as a general power of appointment—the donor-donee has not relinquished virtual ownership. In essence, the HEMS exception should not apply in such retained power situations. On the other hand, I think a power exercisable only with the consent of a person who would be adverse to the exercise means that the donee really does not have virtual ownership of the property. As a result, in my recommended statute, I would not treat such a retained power as a power of appointment even though it would be taxable for estate tax purposes.¹⁰⁸

Because most powers are tax-related, I would opt to retain New York's "special power" nomenclature, which is how nongeneral powers are conceptualized by estate planners. On the other hand, I recognize that nongeneral may better reflect the nature of power, which is not general¹⁰⁹ and would have no objection to using "nongeneral" in lieu of "special".¹¹⁰

¹⁰⁸ See I.R.C. §§ 2036(a)(2), 2038(b) (power exercisable with any person). By treating such a power as subject to estate tax, double reporting of the same transfer results since a completed gift occurs as dominion and control over the property has been relinquished.

¹⁰⁹ As explained:

b. Historical note: nongeneral power of appointment.

The Restatement of Property § 320 divided powers of appointment into two categories: general powers and special powers. Restatement Second, Property (Donative Transfers) § 11.4 divided powers into general powers and nongeneral powers.

In the Restatement, a special power was defined as one that can be exercised "only in favor of persons, not including the donee, who constitute a group not unreasonably large." Thus, the Restatement classified a power to appoint to anyone in the world except the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate as a hybrid, observing that such powers are so rare that it would not be useful to state the rules applicable to them.

By the time that the Restatement Second was promulgated, such powers had become "fairly common," because the tax laws treated them as nontaxable. In the Restatement Second, a nongeneral power was defined as any power that is not a general power. Thus, the Restatement Second's category of nongeneral power encompassed a power to appoint among a defined and limited class of permissible appointees and a power to appoint to anyone in the world except the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate. The Restatement Second noted, however, that "some legal consequences may be different with respect to a non-general power of appointment that has practically unlimited [permissible appointees] and one that has objects restricted to a defined limited class of persons." Among the legal consequences that differ are whether a nongeneral power is exclusionary or nonexclusionary or whether in certain cases there is an implied gift in default to the permissible appointees of a nongeneral power.

This Restatement continues the approach of the Restatement Second by recognizing the same categories—general and nongeneral powers—and by defining them the same way.

RESTATEMENT (THIRD) § 17.3 cmt. b (internal citations omitted).

¹¹⁰ Both Restatement section 17.3(b) and Draft UPOA section 102(9) use "nongeneral"

D. Classification of Powers as to Time of Exercise

1. Current New York Law

EPTL 10-3.3 provides as follows:

Classification of powers of appointment as to time of exercise; presently exercisable, testamentary and postponed

- (a) A power of appointment, as to the time of its exercise, is either presently exercisable, testamentary or postponed.
- (b) A power of appointment is presently exercisable if it may be exercised by the donee, during his lifetime or by his written will, at any time after its creation, and does not include a postponed power as described in paragraph (d).
- (c) A power of appointment is testamentary if it is exercisable only by a written will of the donee.
- (d) A power of appointment is postponed if it is exercisable by the donee only after the expiration of a stated time or after the occurrence or non-occurrence of a specified event.¹¹¹

2. Restatement Provision

Restatement section 17.4 provides the following:

Power Presently Exercisable; Testamentary Power; Postponed Power

- (a) A power of appointment is presently exercisable if it is exercisable by the donee at the time in question, whether or not it is also exercisable by will.
- (b) A power of appointment is testamentary if it is exercisable only in the donee's will.
- (c) A power of appointment is postponed if it is not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period of time. A postponed power becomes presently exercisable upon the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period of time.¹¹²

rather than "special."

¹¹¹ EPTL 10-3.3.

¹¹² RESTATEMENT (THIRD) § 17.4.

3. Recommended Statute

Power Presently Exercisable; Testamentary Power; Postponed Power

(a) A power of appointment is presently exercisable if it is exercisable by the donee at the time in question, whether or not it is also exercisable by will.

(b) A power of appointment is testamentary if it is exercisable only in the donee's will.

(c) A power of appointment is postponed if it is not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period of time. A postponed power becomes presently exercisable upon the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period of time.

4. Discussion

Although EPTL 10-3.3 and Restatement section 17.4 are very similar, in my judgment the Restatement provision, which forms the basis of my recommended statute, is clearer.¹¹³ Indeed, the disjunctive in EPTL 10-3.3(b) raises the question whether a power exercisable by will is presently exercisable. Of course, EPTL 10-3.3(c) makes it clear that that is not the case but Restatement section 17.4(a) is clearer on the point. Restatement section 17.4(c) also clarifies that a power subject to an ascertainable standard can be a postponed or presently exercisable power. Further, subsection (c) of my recommended statute clarifies that a postponed power can become a presently exercisable power.¹¹⁴

E. Classification of Power of Appointment as Exclusive or Nonexclusive; The Duty to Exercise

1. Current New York Law

EPTL 10-3.2(d) and (e) provide the following distinctions:

¹¹³ See *infra* Part IV.D.1–3.

¹¹⁴ *In re Chappell*, 883 N.Y.S.2d 857 (Sur. Ct. N.Y. County 2009) (not clear under current New York law).

(d) A special power of appointment is exclusive if it may be exercised in favor of one or more of the appointees to the exclusion of the others.

(e) A special power of appointment is non-exclusive if it must be exercised in favor of all the appointees.¹¹⁵

EPTL 10-6.5(a) provides for the exercise of exclusive and nonexclusive powers as follows:

(a) Unless the donor expressly provides otherwise:

(1) The donee of an exclusive power may appoint all or any part of the appointive property to one or more of the appointees to the exclusion of the others.

(2) The donee of a non-exclusive power must appoint in favor of all of the appointees equally.¹¹⁶

2. Restatement Provision

Section 17.5 adopts the terms “exclusionary” and “nonexclusionary”:

Whether Power is Exclusionary or Nonexclusionary

A power of appointment whose permissible appointees are defined and limited is either exclusionary or nonexclusionary. An exclusionary power is one in which the donor has authorized the donee to appoint to any one or more of the permissible appointees, to the exclusion of the others. A nonexclusionary power is one in which the donor has specified that the donee cannot make an appointment that excludes any permissible appointee or one or more designated permissible appointees from a share of the appointive property. In determining whether a power is exclusionary or nonexclusionary, the power is exclusionary unless the terms of the power expressly provide that an appointment must benefit each permissible appointee or one or more designated permissible appointees.¹¹⁷

The Restatement makes clear that, unlike EPTL 10-6.5(a)(2), each appointee need not receive equal amounts:

j. Doctrine of illusory appointments. If a power is determined to be nonexclusionary because its terms provide that an

¹¹⁵ EPTL 10-3.2(d)–(e).

¹¹⁶ EPTL 10-6.5(a).

¹¹⁷ RESTATEMENT (THIRD) § 17.5.

appointment must benefit each permissible appointee, it is to be inferred that the donor intends to require an appointment to confer a reasonable benefit upon each permissible appointee. An appointment under which a permissible appointee receives nothing violates the requirement that each receive something. So also would an appointment that causes a permissible appointee to receive only a nominal sum. What constitutes a reasonable benefit depends upon the number of permissible appointees and the value of the appointive property. In the case of a nonexclusionary power to appoint among four permissible appointees, \$1000 is a reasonable benefit from a fund of \$10,000 but not from a fund of \$1,000,000.¹¹⁸

3. Recommended Statute

Whether Power is Exclusive or Nonexclusive

A power of appointment whose permissible appointees are not defined and limited is exclusive. A power of appointment whose permissible appointees are defined and limited is either exclusive or nonexclusive. An exclusive power is one in which the donor has authorized the donee to appoint to any one or more of the permissible appointees, to the exclusion of the others. A nonexclusive power is one in which the donor has specified that the donee cannot make an appointment that excludes any permissible appointee or one or more designated permissible appointees from a share of the appointive property. In determining whether a power is exclusive or nonexclusive, the power is exclusive unless the terms of the power expressly provide that an appointment must benefit each permissible appointee or one or more designated permissible appointees.

4. Discussion

I recommend that New York enact the substance of Restatement section 17.5 as a new statute, but retain the exclusive-nonexclusive terminology of the existing statutes. EPTL 10-3.2 (d) and (e) should be repealed as should EPTL 10-6.5.

¹¹⁸ *Id.* § 17.5 cmt. j.

Rather than have the rules for exclusive and nonexclusive powers situated in different statutes, I think it makes good sense to conflate the statutes into one, namely the substance of Restatement section 17.5. Because virtually all powers of appointment are exclusive, it makes sense to assume that a power is exclusive as the last sentence of Restatement section 17.5 provides. A big difference between current New York law under EPTL 10-6.5 and my recommended statute, is that a nonexclusive power would not have to be exercised equally in favor of all the permissible appointees.¹¹⁹

F. The Nature of a Power Of Appointment

1. Current New York Law

EPTL 10-3.4 classifies powers of appointment as either imperative or discretionary:

Classification of powers of appointment as to duty to exercise; imperative and discretionary

(a) A power of appointment is either imperative or discretionary.

(b) A power of appointment is imperative if the instrument creating it imposes on the donee a duty to exercise it, and it may be imperative even though it is exclusive.

(c) A power of appointment is discretionary if the donee is authorized to exercise or not to exercise it.¹²⁰

In turn, if an imperative power is not exercised, EPTL 10-6.8 provides that the power must be exercised by the supreme or surrogate's court as follows:

Imperative power of appointment; effectuation

(a) The exercise of an imperative power of appointment devolves upon the supreme court or, in the case of a will, the surrogate's court in the following cases:

(1) Failure to designate the donee.

¹¹⁹ Although the requirement that each permissible appointee receive an equal amount would obviate the need for judicial discretion, see *In re Weinstein*, 444 N.Y.S.2d 427 (Sur. Ct. Kings County 1981), the donor could have provided this result by making a direct gift to each. By choosing to create a nonexclusive power, I think it is reasonable to conclude, as does the Restatement, that the donee intended that each permissible appointee need only receive a reasonable amount by the exercise of the nonexclusive power. See also RESTATEMENT (SECOND) § 22.2 cmt. a.

¹²⁰ EPTL 10-3.4.

- (2) Death of the designated donee without exercising the power.
- (3) Incompetence of the sole donee.
- (4) Defective exercise of the power, either wholly or in part, by the donee.
- (b) Where an imperative power of appointment:
 - (1) Is exclusive, and the donee dies without exercising the power, it must be exercised for the benefit of all of the appointees equally.
 - (2) Has been exercised defectively by the donee, it may be properly exercised in favor of persons intended to be benefited by the donee.
 - (3) Has been exercised defectively by the donee, a purchaser for a valuable consideration claiming under such defective exercise is entitled to the same relief as a similar purchaser claiming under a defective disposition from an actual owner.
 - (4) Is non-exclusive, and the right of the appointee is assignable, creditors or assignees of such appointee can compel the exercise of such power for their benefit.
 - (5) Is non-exclusive, the committee of an appointee or his assignee for the benefit of creditors can compel the exercise of such power.¹²¹

2. Restatement Provision

The Restatement makes a significant advancement, albeit not in the black letter law; all powers of appointment are treated as discretionary. Specifically, comment k of Restatement section 17.1 explains:

k. "Imperative power." In this Restatement, unless otherwise indicated, the term "power of appointment" refers to a power of appointment regarding which the donee of the power is under no duty to exercise the power.¹²²

In effect, a power of appointment under the Restatement is discretionary and not mandatory unless otherwise indicated. Significantly, no Restatement section or any comments thereto

¹²¹ EPTL 10-6.8.

¹²² RESTATEMENT (THIRD) § 17.1 cmt. k.

mention imperative.

3. Recommended Statute

Nature of the Donee's Power

(a) The exercise of a power of appointment is discretionary with the donee.

(b) A power of appointment is not transferrable by the donee. The donee's power lapses if the donee has at the time of death a power but the donee does not validly exercise the power.

4. Discussion

I recommend that all powers of appointment be treated as discretionary. In my judgment, the concept of an imperative power of appointment should not be continued into the twenty-first century. I would also suggest that the new statute make clear that the donee's power is not transferrable and that on the death of the donee who possesses a power, the donee's power lapses.¹²³

Although the EPTL refers to "imperative powers,"¹²⁴ the use of imperative powers is essentially equivalent to the concept of a "power in trust".¹²⁵ The term "power in trust" was employed in the Revised Statutes of 1830 and subsequent revisions.¹²⁶ In rejecting

¹²³ The Draft UPOA would add a separate section to that effect. See DRAFT UPOA, *supra* note 9, § 202 ("A power holder may not transfer a power of appointment. If a power holder dies without exercising or releasing the power, the power lapses.").

¹²⁴ See EPTL 10-3.4(b), 10-6.8.

¹²⁵ Lord Eldens's discussion in *Brown v. Higgs* of "power in trust" is of interest:

But there are not only a mere trust and a mere power, but there is also known to this Court a power, which the party to whom it is given, is entrusted and required to execute; and with regard to that species of power the Court considers it as partaking so much of the nature and qualities of a trust that if the person, who has that duty imposed upon him, does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place.

Brown v. Higgs, (1803) 32 Eng. Rep. 473, (Ch.) 476. As was concluded: "It would seem that the distinguishing mark of a power in trust is that it is imperative." SIMES & SMITH, *supra* note 28, § 425.

¹²⁶ Section 153 of the Real Property Law was enacted without change as EPTL 10-6.8, which effectively gathered together all of the earlier statutes into one place but with one major change. Instead of referring to trustees or powers in trust as was done before 1965, the term "donee" was employed. BENNETT COMM'N FIFTH REPORT, *supra* note 52, at 392; BENNETT COMM'N THIRD REPORT, *supra* note 57, at 624. Those earlier sections, all of which derived from the Revised Statutes of 1830, essentially dealt with a "power in trust." For example, section 161 of the Real Property Law, which forms the basis of EPTL 10-6.8(a)(1), provided as follows: "When power devolves on court. Where a power in trust is created by

the use of “powers in trust” or “imperative powers,” the original Restatement of Property explained:

The use of the term “power in trust” in the sense of “mandatory power” or “imperative power” is potentially misleading. This usage seems to have arisen and to be chiefly important with reference to powers of sale in executors and trustees. To say that a power of sale is mandatory is to indicate that its exercise can and will be compelled. Judicial pressure upon the donee can force him to make the sale; or a substitute named by the court can make it for him. But the situation is different with reference to a power of appointment. Even though it is concluded that the donor intended to require the donee to appoint, judicial pressure upon the donee is normally an impossibility, since almost invariably there is no breach of the duty to exercise the power until the donee is dead; and even if the donee is alive the court will not undertake to compel him to appoint because the exercise of the discretion is considered incapable of being effectively compelled, and will not make an appointment in his stead because the discretion of choice among objects is considered personal to the donee.¹²⁷

In effect, the concept of an imperative power and the rules thereunder make no sense in the context of a true power of appointment as distinct from a power in trust.¹²⁸ The only possible situation where the concept of an imperative power can make sense is in one instance: when the donee of a special power with limited potential appointees fails to exercise the power. Consider the following example:

S creates a trust with income to A for life, remainder to such of A’s children as A appoint by will. A fails to exercise the power. By treating the power as imperative, that is, the donee had a duty to exercise the power, the trust property must be distributed equally to A’s children by the court.¹²⁹

will, and the testator has omitted to designate by whom the power is to be executed, its execution devolved on the supreme court.” N.Y. REAL PROP. LAW § 161 (1909).

¹²⁷ RESTATEMENT (FIRST) § 320, special note.

¹²⁸ The imperative power (“power in trust”) construct was necessary in 1830 because true trusts were only allowed in limited situations. N.Y. REV. STAT. pt. 2, ch. 1, tit. 2, art. 2 § 55 (1830). Today any trust having a valid purpose may be created. See EPTL 7-1.4.

¹²⁹ See EPTL 10-6.8(a)(2)–(b)(1). Interestingly, these provisions were derived from section 160 of the Real Property Law, which in turn was derived from the Revised Statutes of 1830.

The same result can be obtained without treating A's power as an imperative power but as implied gift to the potential appointees.¹³⁰ Indeed, this is the approach under the Restatement. As explained:

Sometimes the terms "imperative power," "mandatory power," or "power in trust" are used to refer to a nongeneral power in which there is an implied gift in default of appointment to the permissible appointees of the power. The terms "imperative power," "mandatory power," or "power in trust" are misleading and are not used in this Restatement to refer to a power in which there is such an implied gift in default.¹³¹

As discussed later,¹³² I recommend a section to provide that certain permissible appointees take unappointed property under an implied gift theory if the instrument fails to name takers in default. Hence, there will be no need for the concept of imperative powers of appointment under New York law.

G. Governing Law

1. Current New York Law

Governing law issues depend on whether real or personal property is involved and whether a lifetime instrument or will is implicated.¹³³ Regarding real property under a will, including issues involving a power of appointment in a will, the law of the situs of the real property will generally govern.¹³⁴ Regarding personal property under a will, including the creation of a power of appointment, the law of the decedent's domicile generally controls.¹³⁵ However, regarding the formal validity of a will,

See BENNETT COMM'N THIRD REPORT, *supra* note 57, at 624; FOWLER 1909, *supra* note 40, at 653. Section 160 of the Real property Law provided as follows: "If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust." N.Y. REAL PROP. LAW § 160 (1909).

¹³⁰ John Chipman Gray early on supported an implied gift approach. See John Chipman Gray, *Powers in Trust and Gifts Implied in Default of Appointment*, 25 HARV. L. REV. 1, 2-10 (1911).

¹³¹ RESTATEMENT (THIRD) § 17.1 cmt. k (citation omitted).

¹³² See *infra* Part VI.H.3.

¹³³ Differences may also arise depending on whether power is general or special. See EPTL 3-5.1(g).

¹³⁴ EPTL 3-5.1(b)(1).

¹³⁵ EPTL 3-5.1(b)(2). Issues involving interpretation are governed by the law of the

including a power of appointment created thereunder, a will may be admissible to probate if the will was validly executed in one of several jurisdictions.¹³⁶

EPTL 3-5.1(g) provides the current rules for the law governing the exercise of a power of appointment involving personal property:

(g) Subject to paragraphs (d), (e) and (f), the intrinsic validity, effect, revocation or alteration of a testamentary disposition by which a power of appointment over personal property is exercised, and the question of whether such power has been exercised at all, are determined by:

(1) In the case of a presently exercisable general power of appointment, the law of the jurisdiction in which the donee of such power was domiciled at the time of death.

(2) In the case of a general power of appointment exercisable by will alone or a special power of appointment:

(A) If such power was created by will, the law of the jurisdiction in which the donor of the power was domiciled at the time of death.

(B) If such power was created by inter vivos disposition, the law of the jurisdiction which the donor of the power intended to govern such disposition.

(C) If the donor is himself the donee of a general power of appointment exercisable by will alone, the law of the jurisdiction in which the donor of the power was domiciled at the time of death.

(3) The formal validity of a will by which any power of appointment over personal property is exercised is determined in accordance with paragraph (c) on the basis that the testator referred to therein is the donee of such power.¹³⁷

There are no specific statutes dealing with the exercise of a power

decedent's domicile at the time of will execution. EPTL 3-5.1(e).

¹³⁶ EPTL 3-5.1(c).

¹³⁷ EPTL 3-5.1(g). With respect to subsection (a)(1), *In the Matter of Chappell* involved a postponed power that became presently exercisable which is not specifically covered by EPTL 10-3.3. See *In re Chappell*, 883 N.Y.S.2d 857, 860 (Sur. Ct. N.Y. County 2009). The court looked to the common law rule—the law of the donor's domicile controls. *Id.* at 861–62. The exercise rules—absent a provision by the donor showing that another state law applies. *Id.*

of appointment over real property by will. As a result, the general rule of EPTL 3-5.1(b)(1), which relies on the situs of the real property, should be controlling.

EPTL 3-5.1(h) also permits a non-domiciliary to designate New York law as controlling for personal property and real property located in New York:

Whenever a testator, not domiciled in this state at the time of death, provides in his will that he elects to have the disposition of his property situated in this state governed by the laws of this state, the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation or alteration of any such disposition is determined by the local law of this state. The formal validity of the will, in such case, is determined in accordance with paragraph (c) [of EPTL 3-5.1].¹³⁸

EPTL 7-1.10, which is essentially the analogue of EPTL 3-5.1(h), is New York's only statute that implicates issues involving powers of appointment:

Provision by non-domiciliary creator as to law to govern trust

(a) Whenever a person, not domiciled in this state, creates a trust which provides that it shall be governed by the laws of this state, such provision shall be given effect in determining the validity, effect and interpretation of the disposition in such trust of:

(1) Any trust property situated in this state at the time the trust is created.

(2) Personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.¹³⁹

As a general matter, choice of law rules are confusing in New York, especially when intangible personal property is involved. As the Court of Appeals explained:

Much confusion has existed concerning the law that controls the validity and administration of inter vivos trusts of intangible personal property where the domicile of the settlor is in one state and the situs and place of

¹³⁸ EPTL 3-5.1(h).

¹³⁹ EPTL 7-1.10.

administration is in another. No invariable rule can be formulated for all cases involving varying facts. The domicile of the settlor is no longer the absolute and controlling consideration. Where the domicile of the owner of the res and the actual and business situs of the trust do not coincide, the law applicable to the interpretation, construction, and validity of the trust and the legal obligations arising out of it and to taxation depend upon facts involved in and circumstances surrounding the particular case. In such a situation, the express or clearly implied intent of the settlor may control. . . .

. . . . The instrument should be construed and a determination of its validity made according to the law chosen by the settlor unless so to do is contrary to the public policy of this state.¹⁴⁰

Choice of law rules involving the exercise of powers of appointment over personal property will typically apply the law applicable for determining the validity of the trust creating the power.¹⁴¹ For issues involving the creation and exercise of a power of appointment over real property, the applicable law will typically be the law that would be applied by the courts where the real property is located.¹⁴²

2. Restatement Provision

There is no black letter law provision dealing with governing law. However, a Restatement comment provides a default rule regarding the exercise of a power of appointment:

e. Choice of law. The law of the donee's domicile governs whether the donee has effectively exercised a power of appointment, unless the instrument creating the power expresses a different intention.¹⁴³

¹⁴⁰ *Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 793–94 (N.Y. 1937) (citations omitted). *Shannon* was recently followed insofar as the settlor's choice of law rule was respected for a power of appointment. See *Chappell*, 883 N.Y.S.2d at 860.

¹⁴¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274, reporter's notes (1971).

¹⁴² See *id.* §§ 278, 281.

¹⁴³ RESTATEMENT (THIRD) § 19.1 cmt. e.

3. Recommended Statute

Governing Law

(a) Except as provided in subsections (b) and (c), the following rules apply:

(1) the creation, revocation, or amendment of the power is governed by the law of the donor's domicile; and

(2) the exercise, release, or disclaimer, or the revocation or amendment of the exercise, release, or disclaimer, of the power is governed by the law of the donee's domicile.

(b) Subsection (a) shall not apply if the terms of the instrument creating a power of appointment manifest a contrary intent.

(c) Subsection (a) shall not apply but the law of the jurisdiction having the most significant relationship to the appointive property shall govern if failure to apply that jurisdiction's law would contrive a strong public policy of the jurisdiction.

4. Discussion

I believe that a statute providing definite rules for choice of law questions will be very helpful. Subsection (a) of my recommended statute draws on Draft UPOA section 103 for the general rule. Subsection (a)(2) would change New York law regarding the exercise of many powers created by will because the law of the donee's domicile would control rather than the law of the donor's domicile.¹⁴⁴ Subsection (b) also tracks Draft UPOA section 305 by allowing the donor to override the default rules. Subsection (c) is not found in the Draft UPOA. I think it important to have this public policy exception because the governing law should not contravene the strong public policy of the jurisdiction having the most significant relationship to the appointive property.¹⁴⁵

¹⁴⁴ See EPTL 3-5.1(g)(2)(A) (applying the law of donor's domicile if special or testamentary general power).

¹⁴⁵ See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 270(a); *Shannon*, 9 N.E.2d at 793-94; see also UNIF. TRUST CODE § 107(1) (2000) (noting that a strong public policy can trump intention).

H. Common Law

1. Current New York Law

EPTL 10-1.1 provides as follows:

Common law of powers retained, except as modified by this article

The common law of powers as embodied in this article and as to matters not included herein, as heretofore established, is retained as the law of this state except as modified by the provisions of this article.¹⁴⁶

2. Restatement Provision

None. As part of the Restatement (Third) of Property: Wills and Other Donative Transfers, the Restatement's division on powers of appointment effectively "presents a comprehensive treatment of the American law" of powers of appointment.¹⁴⁷

3. Recommended Statute

Supplementation by Common Law and Principles of Equity

The common law of powers of appointment and principles of equity supplement this Article except to the extent modified by this [article] or law of this state other than this Article.

4. Discussion

My recommended statute tracks Draft UPOA section 104.¹⁴⁸ It deviates from EPTL 10-1.1, which emphasizes that Article 10 was essentially enacting the common law of powers as it then existed in more than forty states.¹⁴⁹ In my view, it is not necessary to

¹⁴⁶ See EPTL 10-1.1.

¹⁴⁷ RESTATEMENT (THIRD) Introduction at 3.

¹⁴⁸ DRAFT UPOA, *supra* note 9, § 104 ("The common law of powers of appointment and principles of equity supplement this [act], except to the extent modified by this [act] or other law of this state other than this [act].").

¹⁴⁹ BENNETT COMM'N THIRD REPORT, *supra* note 57, at 39. Until the 1965 enactment of the new section 130 of the Real Property Law, which was the forerunner of EPTL 10-1.1, New York's legislation from 1830–1965 was embodied in section 130 as follows: "Powers, as they existed law on the thirty-first day of December, eighteen hundred and twenty-nine, are abolished. Hereafter the creation, construction and execution of powers, affecting real

statutorily provide that the article on powers enacts the common law since by enacting legislation, inconsistent common law is supplanted. In short, the purpose for my recommended is to have common law and equitable principles apply when statutory law is not provided. The comment to Draft UPOA 104 provides the following helpful discussion:

To determine the common law and principles of equity in a particular state, a court might look first to prior case law in the state and to more general sources, such as the Restatement Third of Property: Wills and Other Donative Transfers. The common law is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the act in no way restricts.¹⁵⁰

V. CREATION ISSUES

A. *Creation of Powers of Appointment*

1. Current New York Law

EPTL 10-4.1 provides in full as follows:

Rules for creation of a power of appointment

(a) The donor of a power of appointment:

- (1) Must be a person capable of transferring the appointive property.
- (2) Must have created or reserved the power by a written instrument executed by him in the manner required by law.
- (3) Must manifest his intention to confer the power on a person capable of holding the appointive property.
- (4) Cannot nullify or alter the rights of creditors of the donee, as defined in this article, by any language in the instrument creating or reserving the power purporting to

property, shall be subject to the provisions of this article" N.Y. REAL PROP. LAW § 130 (1909).

¹⁵⁰ DRAFT UPOA, *supra* note 9, § 104 cmt.

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give the interest of such donee a spendthrift character.¹⁵¹

2. Restatement Provision

Section 18.1 provides as follows:

Power of Appointment: How Created

A power of appointment is created by a transfer that manifests an intent to create a power of appointment.¹⁵²

3. Recommended Statute

Creation of Power of Appointment

(a) A power of appointment is created only if:

(1) the instrument creating the power:

(A) is valid under applicable law; and

(B) except as otherwise provided in subsection (b), transfers the appointive property; and

(2) the terms of the instrument creating the power manifest the donor's intent to create a power of appointment, including the intention to confer the power on a person capable of holding the appointive property.

(b) Subsection (a)(1)(B) does not apply to the creation of a power of appointment by the exercise of a power of appointment.

(c) A power of appointment may not be created in a person who is deceased.

(d) Subject to any applicable rule against perpetuities, a power of appointment may be created in an unborn or unascertained powerholder.

4. Discussion

My recommended statute adopts section 201 of the Draft UPOA,¹⁵³ but also relies on EPTL 10-4.1(a)(3). Subsection (a)(1)(A)

¹⁵¹ EPTL 10-4.1.

¹⁵² RESTATEMENT (THIRD) § 18.1.

¹⁵³ Draft UPOA section 201 provides as follows:

(a) A power of appointment is created only if:

(1) the instrument creating the power:

(A) is valid under the law of this state; and

(B) except as otherwise provided in subsection (b), transfers the appointive property; and

of my recommended statute succinctly captures EPTL 10-4.1(a)(1) and 10-4.1(a)(2), which were derived from the Revised Statutes of 1830.¹⁵⁴ Subsection (a)(2) adapts EPTL 10-4.1(a)(3). Because creditors' rights are separately handled,¹⁵⁵ EPTL 10-4.1(a)(4) is unnecessary.¹⁵⁶ I reject Restatement section 18.1 because, among other reasons, it is too cryptic and fails to state essential requirements in the black letter.¹⁵⁷

B. Revocation of Power of Appointment

1. Current New York Law

Regarding the donor's right to revoke a created power of appointment, EPTL 10-9.1(a) provides as follows:

Revocability of a power of appointment
(a) A power of appointment is irrevocable unless the donor reserves the right to revoke it.¹⁵⁸

2. Restatement Provision

Restatement section 18.2 provides for revocation or amendment by the donor:

Donor's Authority to Revoke or Amend Power

The donor of a power of appointment lacks the authority to

(2) the terms of the instrument creating the power manifest the donor's intent to create, in a power holder, a power of appointment over the appointive property exercisable in favor of a permissible appointee.

(b) Subsection (a)(1)(B) does not apply to the creation of a power of appointment by the exercise of a power of appointment.

(c) A power of appointment may not be created in a deceased power holder.

(d) Subject to any applicable rule against perpetuities, a power of appointment may be created in an unborn or unascertained power holder.

DRAFT UPOA, *supra* note 9, § 201.

¹⁵⁴ EPTL 10-4.1(a)(1) and (2) enacted section 136 of the Real Property Law, which was derived from the 1909 statutes, which was in turn derived from the Revised Statutes of 1830. See BENNETT COMM'N FIFTH REPORT, *supra* note 52, at 392; BENNETT COMM'N THIRD REPORT, *supra* note 57, at 616; FOWLER 1909, *supra* note 40, at 598–99.

¹⁵⁵ See *infra* Part VII.

¹⁵⁶ Subsection (4) was enacted to ensure that creditors could still reach a donee's property even though a marital deduction trust included a spendthrift provision. See BENNETT COMM'N THIRD REPORT, *supra* note 57, at 616 (discussing N.Y. REAL PROP. LAW § 136(4), which was enacted as EPTL 10-4.1(4)).

¹⁵⁷ The comments to Restatement section 18.1 do mention some of the essential requirements. See RESTATEMENT (THIRD) § 18.1 cmts.

¹⁵⁸ EPTL 10-9.1(a).

revoke or amend the power, except to the extent that the donor reserved a power of revocation or amendment when creating the power.¹⁵⁹

3. Recommended Statute

Donor's Authority to Revoke or Amend Power

A donor may revoke or amend a power of appointment only to the extent that:

- (1) the donor reserves a power of revocation or amendment in the instrument creating the power of appointment; or
- (2) the instrument creating the power is revocable by the donor.

4. Discussion

Other than reversing the order, my recommended statute relies on section 205 of the Draft UPOA, which in turn is based on Restatement section 18.2 and its commentary.¹⁶⁰ Subsection (1) of my recommended statute follows EPTL 10-9.1(a) but also includes the power to amend a power that has been granted. Subsection (2) allows revocation or amendment if the created power was by a revocable instrument, for example, a revocable trust.

VI. EXERCISE

A. Requisites for Exercise of a Power of Appointment

1. Current New York Law

New York has several provisions regarding the exercise of the power of appointment. They include:

10-6.1 Exercise of a power of appointment; manifestation of intention of done

- (a) Subject to paragraph (b), an effective exercise of a power

¹⁵⁹ RESTATEMENT (THIRD) § 18.2.

¹⁶⁰ See DRAFT UPOA, *supra* note 9, § 205 (“A donor may revoke or amend a power of appointment only to the extent that: (1) the instrument creating the power is revocable by the donor; or (2) the donor reserves a power of revocation or amendment in the instrument creating the power of appointment.”).

of appointment does not require an express reference to such power. A power is effectively exercised if the donee manifests his intention to exercise it. Such a manifestation exists when the donee:

- (1) Declares in substance that he is exercising all the powers he has;
 - (2) Sufficiently identifying the appointive property or any part thereof, executes an instrument purporting to dispose of such property or part;
 - (3) Makes a disposition which, when read with reference to the property he owned and the circumstances existing at the time of its making, manifests his understanding that he was disposing of the appointive property; or
 - (4) Leaves a will disposing of all of his property or all of his property of the kind covered by the power, unless the intention that the will is not to operate as an execution of the power appears expressly or by necessary implication.
- (b) If the donor has expressly directed that no instrument shall be effective to exercise the power unless it contains a specific reference to the power, an instrument not containing such reference does not validly exercise the power.¹⁶¹

10-6.2 Exercise of a power of appointment; conformity to directions of donor

(a) Subject to the power of a court of competent jurisdiction to remedy a defective execution of an imperative power of appointment, the directions of the donor as to the manner, time and conditions of the exercise of a power must be observed, except that:

- (1) Where the donor has authorized it to be exercised by an instrument legally insufficient to dispose of the appointive property, the manner of exercise is to be determined by the provisions of this article.
- (2) Where the donor has directed any formality to be observed in its exercise, in addition to those which would be legally sufficient to dispose of the appointive property, such additional formality is not necessary to a valid exercise of such power.
- (3) Where the donor has made the power exercisable only

¹⁶¹ EPTL 10-6.1.

by deed, it is also exercisable by a written will unless exercise by will is expressly excluded.

(4) Where the donor of a general power of appointment has not expressly imposed a requirement of good faith or of reasonableness with respect to the donee's exercise of such power, neither such requirement shall be implied.¹⁶²

10-6.3 Exercise of a power of appointment; type of instrument

A power of appointment can be exercised only by a written instrument which would be sufficient to dispose of the estate intended to be appointed if the donee were the actual owner.¹⁶³

10-6.4 Exercise of a power of appointment; required consents

(a) When the consent of the donor or of a third person to the exercise of a power of appointment is required, such consent shall be expressed in a written instrument, subscribed by the person whose consent is required; and to entitle the instrument of exercise to be recorded, the signatures of the donee and of the person consenting must be acknowledged or proved in the manner required by the laws of this state for the recording of a deed of real property.

(b) Unless the donor expressly provides otherwise:

(1) When the consents of two or more persons are required for the exercise of a power of appointment, all must consent.

(2) If before the exercise of the power:

(A) One or more of such persons die, the consent of the survivor is sufficient.

(B) One or more of such persons become incompetent, the consent of the competent person is sufficient.¹⁶⁴

10-6.7 Exercise by all donees; exceptions

Whenever a power of appointment is created in two or more donees, all must unite in its exercise, unless the instrument creating such power provides otherwise. But, if before its execution, one or more of such donees dies or becomes incompetent, such power may be exercised by the survivor or the competent donee, unless such exercise is explicitly

¹⁶² EPTL 10-6.2.

¹⁶³ EPTL 10-6.3.

¹⁶⁴ EPTL 10-6.4.

barred by the terms of the instrument creating such power.¹⁶⁵

2. Restatement Provision

Restatement section 19.1 provides:

Requisites for Exercise of a Power of Appointment

A power of appointment is exercised to the extent that:

- (1) the donee manifests an intent to exercise the power in an otherwise effective document;
- (2) the donee's expression of an intent to appoint satisfies the formal requirements of exercise imposed by the donor and by applicable law; and
- (3) the donee's appointment constitutes a permissible exercise of the power.¹⁶⁶

3. Recommended Statute

Requisites for Exercise of a Power of Appointment

- (a) A power of appointment is exercised to the extent that:
 - (1) the donee manifests an intent to exercise the power in an instrument that would be effective under applicable law if the donee were the actual owner of the appointive property;
 - (2) the donee's expression of an intent to appoint satisfies the formal requirements of exercise imposed by the donor;
 - (3) the donee's appointment constitutes an exercise of the power which is consistent with the manner, time and conditions imposed by the donor for the exercise; and
 - (4) the donee's appointment constitutes an exercise of the power which satisfies applicable law.
- (b) If the exercise of a power requires the consent of one or more persons, such consent by a person with capacity to give consent shall be expressed in an instrument that would be effective if the person consenting to the donee's exercise of the power were the actual owner of the appointive property.

¹⁶⁵ EPTL 10-6.7.

¹⁶⁶ RESTATEMENT (THIRD) § 19.1.

(c) A power of appointment shall be deemed to be exercised by a provision in the donee's will or revocable trust if the donor expressly provides that the mere existence of the will or revocable trust provision is deemed to exercise the power.

4. Discussion

In lieu of the current EPTL provisions dealing with the exercise of a power of appointment, my recommended statute relies on Restatement section 19.1, as modified, but continues a few aspects under current New York law.¹⁶⁷

My overall goal is to prescribe a provision that is both concise and sufficiently comprehensive. Clearly, current New York law is not concise; several sections, many of which are detailed, involve the exercise of a power of appointment. Moreover, many current provisions are based on antiquated rules deriving from the Revised Statutes of 1830 and are not of great significance in the twenty-first century. As a result, I recommend that the EPTL statutes set forth above be repealed with my recommended statute serving as a replacement. Conciseness is demonstrated by subsection (a)(1) of my recommended statute. Manifestation of intent will be based on all the facts and circumstances. Subsection (a)(1) encapsulates this idea and renders unnecessary the specific indicia of intention provided in EPTL 10-6.1(a)(1)–(3). By requiring that the instrument be effectively exercised, the requirement of EPTL 10-6.3, which is captured EPTL 10-6.2(1), is subsumed within subsection (a)(1) of my recommended statute by the requirement that the instrument of exercise be effective. Accordingly, EPTL 10-6.2(1) should be repealed.

Regarding the elimination of antiquated rules, consider EPTL 10-6.2(a)(2), which is set forth above.¹⁶⁸ This section derives from the Revised Statutes of 1830.¹⁶⁹ It was designed to deal with “accumulative” or “redundant” powers, which under the common law before 1830, needed to be complied with to make a valid exercise.¹⁷⁰ In the modern world, such superfluous requirements are not imposed on donees by donors.

¹⁶⁷ My recommendation for repealing EPTL 10-6.1(a)(4) is discussed later. *See infra* Part VI.C.4.

¹⁶⁸ *See supra* Part VI.A.1.

¹⁶⁹ *See* FOWLER 1909, *supra* note 40, at 669.

¹⁷⁰ *Id.*

EPTL 10-6.7 provides another antiquated rule. Because powers today are rarely created with more than one donee, EPTL 10-6.7, which is based on the revised statutes of 1830,¹⁷¹ can be readily omitted.

Subsection (a)(2) of my recommended statute honors the wishes of the donor in imposing additional formal requirements. The most common type of formal requirement is that the donee makes specific reference to the power. If specific reference is lacking, the power is not effectively exercised under subsection (2), which is the result under EPTL 10-6.1(b).¹⁷²

Subsection (a)(3) of my recommended statute provides that the exercise of the power must be consistent with the rules imposed by the donor, *e.g.*, to whom the appointive property be appointed. If the donor conditions exercise on receiving the consent of another person, subsection (b) encapsulates the salutary features of EPTL 10-6.4.¹⁷³

Subsection (a)(4) of my recommended statute requires that the exercise must satisfy applicable law. This provision was derived from section 17.1 of the Restatement (Second).¹⁷⁴ As explained in the comment, “if the intended exercise would violate a rule of law, the power is not effectively exercised.”¹⁷⁵ An example is when the exercise would violate the rule against perpetuities.¹⁷⁶

Subsection (c) covers unusual situations: the donor expressly provides that a power will be deemed exercised by the donee merely by the donee making a will or revocable provision, most likely a residuary provision, without otherwise indicating an intention to exercise the power. Absent such an express provision by the donor, the mere existence of a will or revocable trust provision will not be enough to exercise a power of appointment.

Finally, EPTL 10-6.2(4) can be safely repealed. It was inserted out of an abundance of caution so that a marital deduction would not be denied for a life estate, general power of appointment arrangement.¹⁷⁷ Since a general power of appointment trust would

¹⁷¹ See *id.* at 662.

¹⁷² See EPTL 10-6.1(b).

¹⁷³ EPTL 10-6.4.

¹⁷⁴ See RESTATEMENT (SECOND) § 17.1(2) (“In order for a donee to exercise a power effectively it must be established . . . [t]hat the expression of the intention complies with the requirements of exercise imposed by the donor and by rules of law.”).

¹⁷⁵ *Id.* § 17.1 cmt. c.

¹⁷⁶ See *id.*

¹⁷⁷ See BENNETT COMM’N THIRD REPORT, *supra* note 57, at 622 (discussing N.Y. REAL

not qualify for marital deduction treatment if conditions were imposed on the donee's exercise, no court would construe such a trust to impose invalidating conditions on the donee's exercise of a general power of appointment.¹⁷⁸

B. Time for Exercise of a Power

1. Current New York Law

EPTL 10-6.2(3) provides as follows:

Exercise of a power of appointment; conformity to directions of donor

(a) Subject to the power of a court of competent jurisdiction to remedy a defective execution of an imperative power of appointment, the directions of the donor as to the manner, time and conditions of the exercise of a power must be observed, except that:

....

(3) Where the donor has made the power exercisable only by deed, it is also exercisable by a written will unless exercise by will is expressly excluded.¹⁷⁹

2. Restatement Provision

Although the black letter law does not provide rules to determine when a power is exercisable, the comments under Restatement section 19.9 provide the new rules that are set forth in my recommended statute.¹⁸⁰

3. Recommended Statute

Time for Exercise

(a) A power exercisable during lifetime is also exercisable by will unless otherwise provided by the donor.

(b) A power which does not specify the time for exercise is

PROP. LAW § 148(4), which was substantively enacted as EPTL 10-6.2(4)).

¹⁷⁸ Cf. *In re Will of Case*, 585 N.Y.S.2d 1004, 1005–06 (Sur. Ct. N.Y. County 1992) (modifying the will in order to enhance the tax benefits). See RESTATEMENT (THIRD) § 19.13 reporter's notes, 395–400 (discussing case involving modification to provide enhanced tax benefits).

¹⁷⁹ EPTL 10-6.2(3).

¹⁸⁰ RESTATEMENT (THIRD) § 19.8 cmts. (f), (g).

exercisable throughout the donee's lifetime and by the will of the donee.

4. Discussion

My recommended statute clarifies the rules when the donor does not make clear when a power can be exercised.¹⁸¹ Subsection (a) essentially codifies EPTL 10-6.2(3), which can be safely repealed.

C. Intent to Exercise as Evidenced by Will or Revocable Trust

1. Current New York Law

EPTL 10-6.1(a)(4) provides:

Exercise of a power of appointment; manifestation of intention of donee

(a) Subject to paragraph (b), an effective exercise of a power of appointment does not require an express reference to such power. A power is effectively exercised if the donee manifests his intention to exercise it. Such a manifestation exists when the donee:

....

(4) Leaves a will disposing of all of his property or all of his property of the kind covered by the power, unless the intention that the will is not to operate as an execution of the power appears expressly or by necessary implication.¹⁸²

2. Restatement Provision

Restatement section 19.4 provides as follows:

Donee's Residuary Clause

A residuary clause in the donee's will or revocable trust does not manifest an intent to exercise any of the donee's power(s) of appointment, unless the power in question is a general power and the donor did not provide for takers in default or the gift-in-default clause is ineffective.¹⁸³

¹⁸¹ This is also made more explicit in my recommended terminology section. *See supra* Part IV.B.3.

¹⁸² EPTL 10-6.1(a)(4).

¹⁸³ RESTATEMENT (THIRD) § 19.4.

3. Recommended Statute

Determining Intent to Exercise a Power of Appointment From a Donee's Will or Revocable Trust Provision

A residuary clause or other provision in the donee's will or revocable trust that does not manifest an intent by the donee to exercise a power of appointment shall not be deemed to manifest an intention to exercise any of the donee's power(s) of appointment.

4. Discussion

EPTL 10-6.1(a)(4), which is derived from the Revised Statutes of 1830,¹⁸⁴ generally infers that a donee's will exercises both general and special powers.¹⁸⁵ In contrast, most other states limit the inferred intent to exercise by a residuary clause to general powers.¹⁸⁶ The essential reason for inferring the donee's intent to exercise was to avoid having the property pass to the donor or the donor's successors in interest.¹⁸⁷

For two reasons, this justification no longer applies. First, most well-drafted powers include a gift-in-default of the exercise provision so that in such cases the property should pass under that clause. Passing under the donee's residuary clause would contravene the donor's intent that the takers in default succeed to the property.¹⁸⁸ More importantly, my recommended statute provides that if there is no effective gift-in-default clause, and the donee fails to exercise a general power, the property passes to the

¹⁸⁴ See FOWLER 1909, *supra* note 40, at 681. The original statute applied to real property as follows: "Lands embraced in a power to devise, shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall appear, expressly or by necessary implication." N.Y. REV. STAT. pt. 2, ch. 1, tit. 2, art. 3, § 126 (1830).

¹⁸⁵ It is unclear how the statute would apply if the residuary takers were not permissible appointees under the original power.

¹⁸⁶ See, e.g., UNIF. PROBATE CODE § 2-608 (2010) (requiring that the will manifest the intention to exercise the power). *Beals v. State Street Bank and Trust Company* is an interesting case where the testator's residuary clauses would have exercised a special power if New York law applied; the court reached the same result under Massachusetts law, construing the power as a general power. *Beals v. State St. Bank & Trust Co.*, 326 N.E.2d 896, 900 (Mass. 1975).

¹⁸⁷ See UNIF. PROBATE CODE § 2-608, cmt. (2010).

¹⁸⁸ Section 2-608(i) of the Uniform Probate Code provides this result—the residuary clause is not deemed to exercise the power if there is a gift in default clause. *Id.* § 2-608(i).

donee's estate, not the donor's estate.¹⁸⁹ As a result, a special statute for unexercised general powers where the donee makes a residuary or other provision in a will or revocable trust is unnecessary as the same result obtains under my later recommended statute.¹⁹⁰ Regarding unexercised special powers, I am of the opinion that on balance the default results under my later recommended statute are preferable.¹⁹¹

The bottom line for me is that it is time to retire the fiction that the mere existence of a residuary clause or other provision evidences a donee's intent to exercise a power of appointment.¹⁹² To that end, I recommend that EPTL 10-6.1(a)(4) be repealed.

C. Substantial Compliance

1. Current New York Law

EPTL 10-6.8 allows a court to correct defective execution but only in the context of imperative powers.¹⁹³ New York case law does not recognize the doctrine of substantial compliance in the area of discretionary powers of appointment.¹⁹⁴

2. Restatement Position

Restatement section 19.10 provides as follows:

Substantial Compliance with Donor-Imposed Formal Requirements

Substantial compliance with formal requirements of an

¹⁸⁹ See *infra* Part VI.H.3.

¹⁹⁰ Draft UPOA section 302 is a highly nuanced statute and more limited than Restatement section 19.4, which for example, does not distinguish between powers exercisable in favor of the donee's estate and in favor of the creditors of the donee's estate. See DRAFT UPOA, *supra* note 9, § 302. Indeed, a power exercisable only in favor of the creditors of the donee's seems functionally the same as a power exercisable in favor of the donee's estate. By exercising the power in favor of creditors, the donee's estate will not be diminished. If, instead, a power was exercisable in favor of the donee's estate, the creditors would have an enhance amount from which recovery could be obtained. See *id.*; RESTATEMENT (THIRD) § 19.4.

¹⁹¹ See *infra* Part VI.

¹⁹² My recommended statute would also embrace revocable trusts. See *infra* Part VI.H.3.

¹⁹³ EPTL 10-6.8.

¹⁹⁴ See, e.g., *In re Shinkman*, 737 N.Y.S.2d 39, 39–40 (App. Div. 1st Dep't 2002) ("The Surrogate correctly held that . . . the general reference in objectant's testator's will to powers of appointment was ineffective to exercise the specific power granted in the trust instrument.").

appointment imposed by the donor, including a requirement that the instrument of exercise make reference or specific reference to the power, is sufficient if (i) the donee knew of and intended to exercise the power, and (ii) the donee's manner of attempted exercise did not impair a material purpose of the donor in imposing the requirement.¹⁹⁵

3. Recommended Statute

Substantial Compliance with Donor-Imposed Formal Requirements

Substantial compliance with formal requirements of an appointment imposed by the donor, including a requirement that the instrument of exercise make reference or specific reference to the power, is sufficient if (i) the donee knew of and intended to exercise the power, and (ii) the donee's manner of attempted exercise did not impair a material purpose of the donor in imposing the requirement. The failure of a donee to make specific reference to a power as required by the donor shall be presumed to impair a material purpose of the donor in imposing the requirement.

4. Discussion

Unlike other jurisdictions that have embraced the substantial compliance doctrine,¹⁹⁶ New York courts have not been generally receptive to applying the doctrine.¹⁹⁷ In my view, the substantial compliance doctrine as applied to powers makes sense in most cases.¹⁹⁸ However, unlike Restatement section 19.10, I believe that donors who include the specific reference requirement do so to ensure that the donee is aware that he or she is exercising the

¹⁹⁵ RESTATEMENT (THIRD) § 19.10.

¹⁹⁶ Cf. UNIF. PROBATE CODE § 2-305 (2010) (dealing with dispensing power).

¹⁹⁷ Although EPTL 10-6.8(b)(2) recognizes the doctrine in the case of certain imperative powers, these provisions would not apply because I recommend that the doctrine of imperative powers not apply to powers of appointment. See *supra* Part IV.F.1. In a few instances, courts have recognized the doctrine in the will execution arena. See, e.g., *In re Frank*, 672 N.Y.S.2d 556, 557 (App. Div. 4th Dep't 1998) ("The record establishes that the will was duly executed pursuant to the requirements of EPTL 3-2.1(a)(3) and (4). Contrary to the court's determination, substantial compliance with those requirements is sufficient.") (citations omitted).

¹⁹⁸ In effect, the concept of a court effectively exercising a defectively exercised power under EPTL 10-6.8(b)(2) would be converted into my proposed substantial compliance statute.

power.¹⁹⁹ Hence I would require evidence to rebut the presumption that the failure to make specific reference to the power was a material purpose and that the failure cannot be saved by resorting to the substantial compliance doctrine.

In other cases, application of the substantial compliance may be justified. For example, the substantial compliance doctrine might apply if the donor required that the power be exercised by will but the donee exercised the power under a revocable trust.²⁰⁰

Another instance where the substantial compliance doctrine might apply is where the donor required that the power be exercised by will but the donee exercised the power under a revocable trust.²⁰¹

D. Permissible Appointments Under General Powers of Appointment

1. Current New York Law

EPTL 10-6.6(a) governs the exercise of all powers of appointment, including general powers of appointment:

10-6.6 Exercise of a power of appointment; effect when more extensive or less extensive than authorized; trustee's authority to invade principal in trust

(a) An exercise of a power of appointment is not void because its exercise is:

(1) More extensive than was authorized but is valid to the extent authorized by the instrument creating the power.

(2) Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.²⁰²

EPTL 10-6.9 deals with the exercise of all powers of appointment, including general powers of appointment:

10-6.9 Exercise of a power of appointment in further trust

If the donee of a power of appointment exercises the power in favor of the trustee of a trust under a will or deed other than

¹⁹⁹ RESTATEMENT (THIRD) § 19.10. Comment (b) suggests that the inclusion is a carryover from the pre-1942 practice to ensure that an unexercised general power not be inadvertently subject to estate tax. In my experience, the specific reference is not boilerplate language but a deliberate attempt to ensure that the donee knows that he or she is exercising the power.

²⁰⁰ Draft UPOA on substantial compliance suggests this possibility. See DRAFT UPOA, *supra* note 9, § 304 cmt.

²⁰¹ The Draft UPOA suggests this possibility. See DRAFT UPOA, *supra* note 9, § 304 cmt.

²⁰² EPTL 10-6.6(a).

that under which the power was created, and if said exercise is otherwise valid, the appointive property shall be paid over to and administered by the trustee of, and under the terms of, the trust under such will or deed and jurisdiction over said appointive property shall thereafter be in the court having jurisdiction of the trust under such will or deed.²⁰³

2. Restatement Position

Restatement section 19.13 provides as follows:

General Power—Permissible Appointments

(a) The donee of a general power that permits appointment to the donee or to the donee's estate is authorized to make any appointment, including one in trust and one that creates a power of appointment in another, that the donee could make by appointing to the donee or to the donee's estate and then disposing of the appointive assets as owned property.

(b) The donee of a general power that permits appointment only to the donee's creditors or to the creditors of the donee's estate is restricted to appointing to those creditors.²⁰⁴

3. Recommended Statute

General Power—Permissible Appointments

The donee of a general power that permits appointment to the donee or to the donee's estate is authorized to make any appointment, including one in trust and one that creates a power of appointment in another, that the donee could make by appointing to the donee or to the donee's estate and then disposing of the appointive assets as owned property.

The donee of a general power that permits appointment only to the donee's creditors or to the creditors of the donee's estate is restricted to appointing to those creditors.

If the donee of a general power of appointment exercises the power in favor of the trustee of a trust under a will or deed other than that under which the power was created, and if said exercise is otherwise valid, the appointive property shall be paid over to and administered by the

²⁰³ EPTL 10-6.9.

²⁰⁴ RESTATEMENT (THIRD) § 19.13.

trustee of, and under the terms of, the trust under such will or deed and jurisdiction over said appointive property shall thereafter be in the court having jurisdiction of the trust under such will or deed.

4. Discussion

In my judgment, Restatement section 19.13 succinctly captures all aspects governing the exercise of a general power of appointment. In contrast, EPTL 10-6.6(a) is simply too cryptic. Indeed, 10-6.6(a)(1)—which is derived from the Revised Statutes of 1830²⁰⁵—has no application to general powers exercisable in favor of the donee or the donee's estate because there is no exercise that could exceed the power. If a general power is exercisable in favor of the donee's creditor or the creditors of the donee's estate, and the power is more extensively exercised, then subsection (b) of my recommended statute would control.

EPTL 10-6.6(a)(2) was enacted to allow a donee to exercise a special power less extensively than authorized.²⁰⁶ Hence, it has no application to general powers.

My recommended statute makes clear what has been permitted under New York law, specifically that the donee of a general power can make an exercise in further trust and can exercise a general power to create new powers.²⁰⁷

Subsection (c) retains EPTL 10-6.9. As explained:

This section . . . allows a donee of a power of appointment to appoint the property into a new trust, where the appointive property is administered as part of the trust and becomes subject to the jurisdiction of the Supreme Court or the Surrogate's Court, as the case may be. The donee must exercise the power in accordance with the rules in this Article and in the instrument creating the power.

²⁰⁵ EPTL 10-6.6(a)(1) derived from N.Y. REAL PROP. LAW § 152 (McKinney 1945). See BENNETT COMM'N FIFTH REPORT, *supra* note 52, at 392. In turn N.Y. REAL PROP. LAW § 152 (McKinney 1945) enacted N.Y. REAL PROP. LAW § 177 (McKinney 1945). See BENNETT COMM'N THIRD REPORT, *supra* note 57, at 623. This was derived from the Revised Statutes of 1830. See FOWLER 1909, *supra* note 40, at 683.

²⁰⁶ See BENNETT COMM'N FIFTH REPORT, *supra* note 52, at 392.

²⁰⁷ In his practice commentaries to EPTL 10-6.6(a), Professor I. Leo Glasser referred to these matters as "collateral principles" surrounding EPTL 10-6.6(a)(2). See I. Leo Glasser, *Practice Commentaries*, 311, in EPTL 10-6.6 (McKinney 1991) (citing several cases to support these propositions).

Before this statute, the trustee of the new trust had to qualify as trustee of the trust that created the power (“old trust”) in the court with jurisdiction over the old trust. A typical case . . . was where the donee gave all of his property, including the property in the old trust over which he had power of appointment, to the new trust. The old trust was part of a will that had been probated in another jurisdiction, and that court required the trustee of the new trust to qualify there. The two trusts incurred double expenses and the trustee had to file accountings in both courts. The legislature enacted this statute to eliminate the duplication and waste.²⁰⁸

E. Permissible Appointments Under Special Powers of Appointment

1. Current New York Law

EPTL 10-6.6(a) governs the exercise of all powers of appointment, including special powers of appointment:

Exercise of a power of appointment; effect when more extensive or less extensive than authorized; trustee’s authority to invade principal in trust

An exercise of a power of appointment is not void because its exercise is:

- (1) More extensive than was authorized but is valid to the extent authorized by the instrument creating the power.
- (2) Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.²⁰⁹

EPTL 10-6.9 deals with the exercise of all powers of appointment, including special powers of appointment:

Exercise of a power of appointment in further trust

If the donee of a power of appointment exercises the power in favor of the trustee of a trust under a will or deed other than that under which the power was created, and if said exercise is otherwise valid, the appointive property shall be paid over to and administered by the trustee of, and under the terms

²⁰⁸ Margaret Valentine Turano, *Practice Commentaries*, in EPTL 10-6.9 (McKinney 2012).

²⁰⁹ EPTL 10-6.6(a).

of, the trust under such will or deed and jurisdiction over said appointive property shall thereafter be in the court having jurisdiction of the trust under such will or deed.²¹⁰

2. Restatement Provisions

Restatement section 19.14 provides as follows:

Nongeneral Power—Permissible Appointments

Except to the extent that the donor has manifested a contrary intention, the donee of a nongeneral power is authorized to make an appointment in any form, including one in trust and one that creates a power of appointment in another, that only benefits permissible appointees of the power.²¹¹

Restatement section 19.20 is as follows:

Effect of Partially Ineffective Appointment on Otherwise Effective Portion of Appointment

If part of an appointment is ineffective and another part, if standing alone, would be effective, the effective part is given effect, except to the extent that the donee's scheme of disposition is more closely approximated by concluding that some or all of the otherwise effective part should be treated as ineffective.²¹²

3. Recommended Statute

Special Power—Permissible Appointments

(a) The donee of a special power is authorized to exercise the power in favor of one or more persons who are permissible appointees.

(b) Except to the extent that the donor has manifested a contrary intention, the donee of a special power may:

- (1) Make an exercise less extensive than authorized by the instrument creating the power;
- (2) Make an appointment in any form, including one in trust;
- (3) Create a general or special power in a permissible

²¹⁰ EPTL 10-6.9.

²¹¹ RESTATEMENT (THIRD) § 19.14.

²¹² *Id.* § 19.20.

appointee; or

(4) Create a special power in an impermissible appointee to appoint to one or more of the permissible appointees of the original power.

(c) If the donee of a special power of appointment exercises the power in favor of the trustee of a trust under a will or deed other than that under which the power was created, and if said exercise is otherwise valid, the appointive property shall be paid over to and administered by the trustee of, and under the terms of, the trust under such will or deed and jurisdiction over said appointive property shall thereafter be in the court having jurisdiction of the trust under such will or deed.

(d) If part of an appointment is ineffective and another part, if standing alone, would be effective, the effective part is given effect, except to the extent that the donee's scheme of disposition is more closely approximated by concluding that some or all of the otherwise effective part should be treated as ineffective.

4. Discussion

My recommended statute incorporates existing EPTL 10-6.6(b) and EPTL 10-6.9; it also relies in part on Restatement section 19.14 and on portions of draft UPOA section 305(c).²¹³

Subsection (b)(1) of my recommended statute continues the rule of EPTL 10-6.6(a)(2), which was designed to allow a donee to appoint less than the entire estate in the appointive property.²¹⁴ For example, if a donee is authorized to appoint in fee, the donee could appoint only a life estate.

Similar to general powers of appointment,²¹⁵ under subsection

²¹³ Draft UPOA section 305(c) provides as follows:

(c) Unless the terms of the instrument creating the power of appointment manifest a contrary intent, the powerholder of a nongeneral power may:

(1) make an appointment in any form, including an appointment in trust, in favor of a permissible appointee;

(2) create a general or nongeneral power in a permissible appointee; or

(3) create a nongeneral power in an impermissible appointee to appoint to one or more of the permissible appointees of the original nongeneral power.

DRAFT UPOA, *supra* note 9, § 305(c).

²¹⁴ See BENNETT COMM'N FIFTH REPORT, *supra* note 52, at 392.

²¹⁵ See generally *supra* Part IV.C (discussing powers of appointment).

(b)(2) of my recommended statute, the donee of a special power may exercise the power in further trust,²¹⁶ but unlike a general power, the donor may restrict exercise to outright appointments.²¹⁷

The donor has not effectively prohibited the exercise of a special power by creating a new power, the rules for special powers, by creating new powers, are more nuanced than for the exercise of a general power.²¹⁸ Although Restatement section 19.14 permits the creation of a new power of appointment by the donee if the new power is a special power, it may only be exercised in favor of permissible appointees of the original power. The position in the draft UPOA, which I adopt, sensibly rejects this blanket rule in favor of a more nuanced rule, which is set out in subsections (b)(3) and (b)(4) of my recommended statute.²¹⁹

Subsection (b)(3) of my recommended statute changes New York case law.²²⁰ If not prohibited by the donor, the donee of a special power may exercise the power by creating a new power in an original permissible appointee, which may be either a general power or a special power. As a result, the new donee may be able to exercise a special power in favor of persons who were not original permissible appointees.²²¹ As explained:

The rationale for this rule is a straightforward application of the maxim that the greater includes the lesser. A holder of a nongeneral power may appoint outright to a permissible appointee, so the holder may instead create in a permissible appointee a general power or a nongeneral power. If the holder does the latter—creates a new nongeneral power in a permissible appointee—the permissible appointees of the

²¹⁶ *Accord In re Finucane's Will*, 100 N.Y.S.2d 1005, 1008–09 (Sur. Ct. Monroe County 1950).

²¹⁷ *See In re Kennedy's Will*, 18 N.E.2d 146, 149–50 (N.Y. 1938).

²¹⁸ Unlike a special power, the donor cannot bar the creation of new powers by the donee of a general power because the donee could achieve this result by appointing property outright to his estate or to the donee and then creating a power in the property.

²¹⁹ The position of the Draft UPOA is set forth in sections 305(c)(2) and (3). *See supra* note 203 and accompanying text.

²²⁰ *See McLean v. McLean*, 160 N.Y.S. 949 (App. Div. 2d Dep't 1916), *aff'd*, 119 N.E. 1056 (N.Y. 1918). *Cf In re Moore* 493 N.Y.S.2d 924, 929 (Sup. Ct. N.Y. County 1985) (criticizing *McLean* for reasons stated in *infra* text accompanying note 222).

²²¹ Under RESTATEMENT (THIRD) § 19.14, the donee of the original power could create a general power in favor of a permissible appointee, who then could exercise the power in favor of a person who was not a permissible appointee under the original power. *See id.* § 19.14 cmt. g.1. A special power could only be exercisable in favor of permissible appointees under the original power. *See id.* § 19.14 cmt. g.3.

second power may be broader than the permissible appointees of the first power. For example, the holder of a nongeneral power to appoint among the donor's "descendants" may exercise the power by creating a nongeneral power in the donor's child to appoint to anyone in the world except the donor's child, the estate of the donor's child, or the creditors of either.²²²

Pursuant to subsection (b)(4) of my recommended statute, a donee who was not originally a permissible appointee may be granted a new power but can only exercise the power in favor of permissible appointees under the original power.

Subsection (c) retains EPTL 10-6.9.²²³

Subsection (d) includes the substance of EPTL 10-6.6(a)(1) but also adopts the Restatement's nuance. In effect, in unusual circumstances the donor may have preferred that all or part of the valid appointment would not be respected.

F. Appointment to Deceased Appointee or Permissible Appointee's Issue

1. Current New York Law

New York has no specific statutes on the issues involved. However, New York's anti-lapse statute was held to apply when the donee of a general power exercised the power in favor of a child who predeceased the donee.²²⁴

2. Restatement Position

Restatement section 19.12 provides as follows:

Appointment to Deceased Appointee or Permissible Appointee's Descendants; Application of Antilapse Statute

(a) An appointment to a deceased appointee is ineffective, but an applicable antilapse statute may apply to pass the appointed property to the deceased appointee's descendants or other substitute takers.

(b) Even when the applicable antilapse statute does not

²²² DRAFT UPOA, *supra* note 9, § 305 cmt.

²²³ See *supra* Part VI.D (referring to text and notes).

²²⁴ *In re Goodman*, 155 N.Y.S.2d 424, 426 (Sup. Ct. N.Y. County 1956).

expressly address an appointment to a deceased appointee, its purpose and policy should apply to an appointment to a deceased appointee (i) as if the appointed property were owned by either the donor or the donee, and (ii) so that the substituted takers are treated as permissible appointees of the power.

(c) The donee of a nongeneral power is authorized to appoint to the descendants of a deceased permissible appointee, whether or not the permissible appointee's descendants are included within the description of the permissible appointees, but not if the deceased permissible appointee died before the execution of the instrument that created the power. This subsection does not apply if the donor specifically prohibited an appointment to the descendants of a deceased permissible appointee.²²⁵

3. Recommended Statute

Appointment to Deceased Appointee or Permissible Appointee's Descendants; Application of Anti-Lapse Statute

Unless otherwise provided by the donor:

(a) An appointment to a deceased permissible appointee is ineffective but if the permissible appointee was an issue or a sibling of the donor or the donee, the surviving issue of the issue or of the sibling take by representation as appointees unless otherwise provided by the donee.

(b) The donee of a special power is authorized to appoint to, or create a new power of appointment in, the surviving issue of a deceased permissible appointee.

(c) Subsections (a) and (b) shall not apply if the permissible appointee was part of a class gift who was dead at the time of the execution of the instrument that created the power.

4. Discussion

Subsection (a) of my recommended statute essentially tracks New York's limited anti-lapse rule under EPTL 3-3.3, that is, anti-lapse will apply only if the predeceasing will beneficiary was an issue or

²²⁵ RESTATEMENT (THIRD) § 19.12.

sibling of the testator and the testator did not override the rule that the surviving issue of the predeceasing beneficiary would be entitled to property.²²⁶ However, my recommendation would extend the anti-lapse result to not only the donee's relevant relatives but also to the donor's relevant relatives. As a result, it is more limited than Restatement section 19.12 which might apply an anti-lapse result to the surviving issue of a greater class of predeceasing appointees.²²⁷ On the other hand, the recommendation is more expansive than current New York case law, which only applies if the donee had a general power.²²⁸

Subsection (b) provides a helpful default rule by allowing the donee to appoint to or create a new power of appointment in the surviving issue of one or more deceased permissible appointees.²²⁹ Unlike subsection (a), which is limited to issue or siblings of the donee, subsection (b) would helpfully apply to the surviving issue of any deceased permissible appointee. Subsection (c) would bar this ability if the permissible appointee was dead at the time the power of appointment was created in the donee.

G. Impermissible Appointments

1. Current New York Law

New York does not have a statutory rule that specifically focuses on impermissible appointments. But by implication, EPTL 10-6.2, which requires that the "directions of the donor as to the manner, time and conditions of the exercise . . . must be observed,"²³⁰ would void an exercise in favor of an impermissible appointee. New York case law confirms that an appointment to an impermissible appointee is void.²³¹ New York also has a well-developed body of law dealing with "fraud on the power," that is, where an

²²⁶ Either the donor or donee can override this default rule. Subsection (c) of my recommended statute incorporates the concept of EPTL 3-3.3(a)(3).

²²⁷ See, e.g., UNIF. PROBATE CODE § 2-603 (2010) (stating that anti-lapse statute applies to broad class of relatives and near relatives). Nothing, of course, would prevent a donor from including, as permissible appointees, surviving issue of a New York predeceasing, permissible appointee.

²²⁸ See *Goodman*, 155 N.Y.S.2d 424, 426 ("Our courts have also held that the effect of conferring a general power of appointment is to invest the donee with the power of disposition as broad as though she were disposing of her own property.").

²²⁹ The provision draws on Draft UPOA § 306(b). See DRAFT UPOA, *supra* note 9, § 306(b).

²³⁰ EPTL 10-6.2.

²³¹ See, e.g., *In re Will of Carroll*, 8 N.E.2d 864, 868 (N.Y. 1937).

appointment is made in form to a permissible appointee but in substance is for the benefit to an impermissible appointee.²³²

2. Restatement Position

The comments under Restatement section 19.15 makes clear that an appointment to an impermissible appointee is void.²³³ Restatement section 19.16 provides the black law rule on an exercise, which is in “fraud on the power”:

An appointment to a permissible appointee is ineffective to the extent that it was (i) conditioned on the appointee conferring a benefit on an impermissible appointee, (ii) subject to a charge in favor of an impermissible appointee, (iii) upon a trust for the benefit of an impermissible appointee, (iv) in consideration of a benefit conferred upon or promised to an impermissible appointee, (v) primarily for the benefit of the appointee’s creditor, if that creditor is an impermissible appointee, or (vi) motivated in any other way to be for the benefit of an impermissible appointee.²³⁴

3. Recommended Statute

Impermissible Appointment

An exercise of a power of appointment in favor of an impermissible appointee is ineffective.

An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent that the appointment is a fraud on the power.

4. Discussion

My recommended essentially adopts Draft UPOA section 307. It codifies the “fraud on the power” doctrine without going into the details of what action can constitute a “fraud on the power”—which can be left to the courts to develop.

²³² See *id.* at 866–68 (“The purpose of the donee was to accomplish . . . an end entirely foreign to the intent of the donor of the power. Her act constituted a fraud on the power . . .”).

²³³ RESTATEMENT (THIRD) § 19.15 cmts. a, c.

²³⁴ *Id.* § 19.16.

H. Disposition of Unappointed Property by Donee of a General Power

1. Current New York Law

New York does not have any statutory provision either where the donee ineffectively exercises a general power or the donee does not even attempt to exercise the power. In such cases, New York has applied the traditional common law rule that the appointive property passes to the takers in default of the exercise or in the absence of takers in default, to the donor or to the donor's estate.²³⁵

2. Restatement Provisions

Restatement section 19.21 provides as follows:

Disposition of Ineffectively Appointed Property Under General Power

(a) To the extent that the donee of a general power makes an ineffective appointment, the gift-in-default clause controls the disposition of the ineffectively appointed property to the extent that the gift-in-default clause is effective.

(b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the ineffectively appointed property passes to the donee or to the donee's estate rather than under a reversionary interest to the donor or to the donor's transferees or successors in interest.²³⁶

Restatement section 19.22 provides:

Disposition of Unappointed Property Under Lapsed General Power

(a) To the extent that the donee of a general power fails to exercise the power, completely releases the power, or

²³⁵ See generally RESTATEMENT (SECOND) § 23.2, reporter's note 4 (noting the effect of ineffective exercise); RESTATEMENT (SECOND), *supra* note 6, § 24.1 (detailing the effect of failure to exercise a general power); see also *In re Will of Fowler*, 95 N.Y.S.2d 165, 166 (Sur. Ct. N.Y. County 1949) ("The property of decedent passes in intestacy by operation of law solely because decedent failed in her will to make any disposition of it in default of the exercise of the power of appointment."); *In re Estate of Hellinger*, 83 N.Y.S.2d 10, 11–12 (Sur. Ct. N.Y. County 1948) ("Since the power was ineffectually exercised, the property will pass under the terms of the donor's will which provides for an alternative disposition in default of the exercise of the power.")

²³⁶ RESTATEMENT (THIRD) § 19.21.

expressly refrains from exercising the power, the gift-in-default clause controls the disposition of the unappointed property to the extent that the gift-in-default clause is effective.

(b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes to the donee or to the donee's estate if the donee merely failed to exercise the power, but if the donee released the power or expressly refrained from exercising the power, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.²³⁷

3. Recommended Statute

Disposition of Unappointed Property by Donee of a General Power

(a) To the extent that the donee of a general power of appointment makes an ineffective appointment, fails to exercise the power, or completely releases a power, the gift-in-default clause controls the disposition of the unappointed property to the extent that the gift-in-default clause is effective.

(b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the ineffectively appointed property, or the unappointed property as a result of the donee's failure to exercise the general power, passes to the donee or to the donee's estate. However, if the donee completely released the power, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.

(c) Subsections (a) and (b) shall not apply to a donee's power to revoke, amend, or withdraw property from a trust.

4. Discussion

The ultimate effect of ineffectively exercising a general power or failing to exercise a general power will be the same in most instances: the takers in default will take under a gift in default

²³⁷ *Id.* § 19.22.

provision or the property will pass to the donee or to the donee's estate.²³⁸ As a result, I think it makes sense to conflate the two Restatement sections into one.²³⁹

The significant and, in my view, appropriate departure from New York law is that the property will usually pass to the donee or to the donee's estate if there is no taker in default. By possessing a general power, the donee essentially had virtual ownership of the property and if the general power is not exercised, then in the absence of takers in default, such unappointed property should pass to the donee or the donee's estate as an implied gift.²⁴⁰ This result avoids the tremendous problems of having property pass through the donor, who may be long dead.

The nuance for unappointed property is that such property will pass to or through the donor when the donee completely released the general power, because the complete release indicates that the donee had no further interest in the property. On the other hand, if the donee only partially released a general power, I would think that the donee still had an interest in the property.²⁴¹

Subsection (c) of my recommended statute excludes general powers that are classified as such, based on the power to revoke, amend, or withdraw property from a trust.²⁴² In such cases, the power will terminate and the property subject to the power will remain in the trust.²⁴³

²³⁸ Restatement section 19.21 sensibly abandons the so-called "capture doctrine" which had prominence in Massachusetts and which took hold in the Second Restatement. See RESTATEMENT (SECOND) § 23.2. New York has not adopted the capture doctrine, but instead, property that was ineffectively exercised, returned to or through the donor in the absence of an effective gift in default clause. See *Estate of Hellinger*, 83 N.Y.S.2d at 11–12.

²³⁹ Draft UPOA sections 309 and 310 also distinguish between ineffectively exercised powers and powers that are simply not exercised. See DRAFT UPOA, *supra* note 9, §§ 309–10.

²⁴⁰ See RESTATEMENT (THIRD) §§ 19.21 cmt.d, 19.22 cmt.b.

²⁴¹ For example, if the donee could appoint to herself or to her estate and release the power to appoint to herself, this would be a partial release that should redound to the benefit of the donee's estate if the power was not exercised.

²⁴² This provision is based on its effective inclusion in Uniform Power of Appointment Act sections 310 and 311. Such reserved powers are excluded as powers of appointment under my recommended definition for a power of appointment. *Contra* RESTATEMENT (THIRD) § 17.1 cmt.g, and DRAFT UPOA, *supra* note 9, § 102 (including such reserved powers within the definition of a power of appointment). As a result, only powers over trusts held by third parties in a nonfiduciary capacity will be affected by subsection (c).

²⁴³ See DRAFT UPOA, *supra* note 9, § 310 cmt.

I. Disposition of Unappointed Property by Donee of Special Power

1. Current New York Law

The key issue is who gets the appointive property if the donee of a special power fails to exercise the power. Under New York law, it will depend on who the permissible appointees were. If the appointees were definite, then the donee will have an imperative power, which must be exercised by a court equally among the permissible appointees.²⁴⁴ On the other hand, if the donee's power is limited to selecting one appointee among a definite class of permissible appointees, the court will not exercise the power in favor of all the permissible appointees, rather the property will pass to the donor or through the donor's estate.²⁴⁵

If a power is imperative, but the exercise is defective, a court may exercise the power in favor of the intended appointees.²⁴⁶ An imperative power cannot be released.²⁴⁷

2. Restatement Provision

Disposition of Unappointed Property Under Lapsed Nongeneral Power

(a) To the extent that the donee of a nongeneral power ineffectively exercises, fails to exercise the power, completely releases the power, or expressly refrains from exercising the power, the gift-in-default clause controls the disposition of unappointed property to the extent that the gift-in-default clause is effective.

(b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes under an implied gift in default to the original permissible appointees of the power (including [surviving issue by representation of deceased permissible appointees]) living when the power lapses, if:

²⁴⁴ See EPTL §§ 10-6.8(a)(2), 10-6.8(b)(1).

²⁴⁵ See *Waterman v. N.Y. Life Ins. & Trust Co.*, 142 N.E. 668, 669–70 (N.Y. 1923). A similar result—return of the appointive property to or through the donor—would occur if the class was not sufficiently limited. See *Holland v. Alcock*, 16 N.E. 305 (N.Y. 1888) (finding that statute does not apply when permissible appointees were indefinite).

²⁴⁶ EPTL 10-6.8(b)(2).

²⁴⁷ See EPTL 10-9.2(a).

(1) the permissible appointees are a defined and limited class and

(2) the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the donee elects to appoint it to them.

(c) If subsection (b) is inapplicable, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.²⁴⁸

3. Recommended Statute

Disposition of Unappointed Property under a Special Power

(a) To the extent that the donee of a special power ineffectively exercises the power, fails to exercise the power, or completely releases the power, the gift-in-default clause controls the disposition of unappointed property to the extent that the gift-in-default clause is effective.

(b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes under an implied gift in default to the permissible appointees of the power who are alive at the time property lapses and to the issue by representation of any deceased permissible appointees, if:

(1) the permissible appointees are a defined and limited class and

(2) the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the donee elects to validly appoint it to them.

(c) If subsection (b) is inapplicable, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.

4. Discussion

My recommended statute essentially adopts Restatement section 19.23. This, in my judgment, makes important improvements over

²⁴⁸ RESTATEMENT (THIRD) § 19.23.

existing New York law. First, an effective gift in default clause will prevail over the class of permissible appointees when the donee fails to exercise the power.²⁴⁹ The change from New York law is to treat the donee's failure to appoint the appointive property as an implied gift to the members of the definite and limited class by representation, with surviving issue of a deceased appointee taking by representation.²⁵⁰ It substitutes for the arcane, confusing, and unnecessary concept that in such cases the donee had an imperative power that would trump the gift in default clause and unnecessarily require court involvement to reach the same or similar result as under the implied gift approach.²⁵¹

Although I recommend—following Restatement section 19.23(c)—that unappointed property pass to or through the donor when the class of permissible appointees is not definite and limited, I wonder whether it might make better sense to have unappointed property pass to the donee's intestate takers if the power is extensive—that is, the donee can appoint to anyone other than to the four classes of persons that would cause adverse estate tax consequences.²⁵² Such result would avoid the problems of tracing who are the long-ago deceased donor's transferees or successors in interest. Moreover, by having the property pass to the donee's heirs, the result would be consistent with the idea that the donor really wanted the donee to have virtual control but also wanted to avoid adverse tax consequences for the donee. By having the property pass to the donee's heirs rather than to the donee's estate, estate taxation of the appointive property would clearly be avoided.²⁵³

J. Donee's Power to Revoke or Amend an Exercise of a Power of

²⁴⁹ I clarify in subsection (a) that property can be unappointed when the donee ineffectively exercises the power. An ineffective exercise might be excused based on application of the substantial compliance statute. *See supra* Part VI.I.3.

²⁵⁰ My recommended statute clarifies that the implied gift passes to the members by representation.

²⁵¹ EPTL 10-6.8(b)(1); *see supra* Part IV.F (discussing why New York should not continue the concept of imperative powers).

²⁵² *See supra* Part IV.C.4 (discussing I.R.C. § 2041(b) (2006)).

²⁵³ An alternative would be to retain the 1830 notion, currently embodied in EPTL 10-6.2(a)(4), that a will provision manifests an intention to exercise a special power even though the will provision does not actually manifest an intention to exercise the power. However, because most donors require that a donee make specific reference to the granted power, the power would still not be exercised under such circumstances. *See* EPTL 10-6.2(b). Moreover, by continuing EPTL 10-6.2(a)(4) in its current form, the effect of a gift-in-default clause could be disregarded. On balance, I think it best to repeal EPTL 10-6.2(a). *See supra* Part VI.A.4 (recommending repeal).

Appointment

1. Current New York Law

EPTL 10-9.1 provides in applicable part:

Revocability of a power of appointment

(b) An exercise of power of appointment is irrevocable whenever:

- (1) The donor of a special power manifests his intention that its exercise be irrevocable, or
- (2) The donee does not manifest in the instrument exercising the power his intention to reserve a power of revocation.²⁵⁴

(c) If the donee in exercising a power reserves a power to revoke the appointment, but does not expressly reserve a power to reappoint, upon the exercise of the power of revocation, the donee can reappoint.²⁵⁵

2. Restatement Position

Section 19.7 provides as follows:

Donee's Authority to Revoke or Amend Exercise

The donee of a power of appointment lacks the authority to revoke or amend an exercise of the power, except to the extent that the donee reserved a power of revocation or amendment when exercising the power, and the terms of the power do not prohibit the reservation.²⁵⁶

3. Recommended Statute

Donee's Authority to Revoke or Amend Exercise

(a) A donee may revoke or amend an exercise of a power of appointment only to the extent that:

- (1) the donee reserves a power of revocation or amendment in the instrument exercising the power of appointment and, if the power is special, the terms of the instrument creating the power of appointment do not

²⁵⁴ EPTL 10-9.1(b).

²⁵⁵ EPTL 10-9.1(c).

²⁵⁶ RESTATEMENT (THIRD) § 19.7.

prohibit the reservation; or

(2) the terms of the instrument creating the power of appointment provide that the exercise is revocable or amendable.

(b) If a donee revokes or exercises a power of appointment, the donee may re-exercise the power.

4. Discussion

My recommended statute essentially adopts draft UPOA section 314, which states the rule in a positive fashion rather than Restatement section 19.7, which is negatively stated—that is, when the power to revoke or amend is not allowed.²⁵⁷ EPTL 10-9.1 also provides a rule of general irrevocability; moreover, it does not explicitly deal with the power to amend.²⁵⁸ Subsection (b) essentially adopts EPTL 10-9.1(c) to make clear that if a power is revoked or amended, the donee has the right to again exercise the power.

VII. CREDITORS' RIGHTS

A. Rights of Donee's Creditors in Appointive Property Where Donee Possesses a Special Power

1. Current New York Law

EPTL 10-7.1 provides as follows:

Property covered by a special power of appointment (or a general power of appointment that is exercisable solely for the support, maintenance, health and education of the donee within the meaning of sections 2041 and 2514 of the Internal Revenue Code) is not subject to the payment of the claims of creditors of the donee, his estate or the expenses of administering his estate.²⁵⁹

2. Restatement Provision

Section 22.1 provides as follows:

²⁵⁷ *Id.*

²⁵⁸ *See* EPTL 10-9.1.

²⁵⁹ EPTL 10-7.1.

Creditors of the Donee—Nongeneral Power

Property subject to a nongeneral power of appointment is exempt from claims of the donee's creditors and from liability for expenses of administering the donee's estate.²⁶⁰

3. Recommended Statute

Rights of Donee's Creditors in Appointive Property Where Donee Possesses a Special Power

(a) Except as provided in subsections (b) and (c), property covered by a special power of appointment is not subject to the payment of the claims of creditors of the donee, his estate or the expenses of administering the donee's estate.

(b) Appointive property subject to a special power of appointment is subject to a claim of a creditor of the donee or the donee's estate and the expenses of administering the donee's estate to the extent that the donee owned the property and, reserving the special power, transferred the property in violation of New York's fraudulent conveyance laws.

(c) If the initial gift in default of appointment is to the donee or to the donee's estate, a power of appointment that would be classified as a special power shall be treated as a general power.

4. Discussion

Subsection (a) of my recommended statute essentially adopts current law under EPTL 10-7.1. Its parenthetical relating to the so-called HEMS standard is deleted as unnecessary because under my recommended definition for a general power of appointment, property subject to a HEMS standard would not be classified as a general power, but rather a special power.²⁶¹

Subsection (b) of my recommended statute, which adopts draft UPOA section 504(b), provides an exception where the donor reserved a special power but the transfer creating the power was a fraudulent transfer.²⁶²

²⁶⁰ RESTATEMENT (THIRD) § 22.1.

²⁶¹ See *supra* Part IV.B.3.

²⁶² See N.Y. DEBT. & CRED. LAW §§ 270–81 (McKinney 2012). See generally N.Y. REAL PROP. LAW §§ 265–66 (McKinney 2012).

Subsection (c) of my recommended statute provides an important nuance, which is recommended under draft UPOA section 504(c). If the permissible appointees do not include any of the fearsome four, which would thereby result in a special power classification,²⁶³ but the property would pass to the donee or to the donee's estate on the failure to exercise the special power, the donee essentially has the equivalent of ownership. As a result, the property subject to such a power provision should be available for the donee's creditors.²⁶⁴

B. Rights of Donee's Creditors in Appointive Property Where Donee Created a General Power

1. Current New York Law

EPTL 10-7.2 provides:

Creditors of the donee; general power presently exercisable

Property covered by a general power of appointment (other than one exercisable solely for the support, maintenance, health and education of the donee within the meaning of sections 2041 and 2514 of the Internal Revenue Code) which is presently exercisable, or of a postponed power which has become exercisable, is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself or by some other person, or whether the donee has or has not purported to exercise the power.²⁶⁵

EPTL 10-7.4 provides:

Creditors of the donee; general power not presently exercisable

(a) Property covered by a general power of appointment which, when created, is not presently exercisable is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate, only:

(1) If the power was created by the donee in favor of himself .

. . .²⁶⁶

²⁶³ See *supra* Part IV.C.3.

²⁶⁴ See *infra* Part VII.C.

²⁶⁵ EPTL 10-7.2.

²⁶⁶ EPTL 10-7.4.

2. Restatement Provision

Creditors of the Donee—General Power Created by Donee

Property subject to a general power of appointment that was created by the donee is subject to the payment of the claims of the donee's creditors to the same extent that it would be subject to those claims if the property were owned by the donee.²⁶⁷

3. Recommended Statute

Rights of Donee's Creditors in Appointive Property Where the Donor Reserved a General Power

(a) Subject to subsection (c), appointive property subject to a general power of appointment that was effectively created by the donee is subject to the claims of the donee's creditors as if the donee owned the property.

(b) Subject to subsection (c), and the donee's right to direct the source from which liabilities will be paid, appointive property subject to a general power of appointment that was effectively created by the donee is subject to the claims of the creditors of the donee's estate and the expenses to administer the donee's estate to the extent the donee's probate estate is inadequate to satisfy the same.

(c) Subject to New York's fraudulent transfer rules,²⁶⁸ appointive property subject to a general power of appointment created by the donee is not subject to a claim of a creditor of the donee or the donee's estate or for the expenses to administer the donee's estate to the extent that the donee irrevocably appointed the property in favor of a person other than the donee or the donee's estate.

4. Discussion

My recommended statute is generally consistent with current New York law subject to one important modification.²⁶⁹ The

²⁶⁷ RESTATEMENT (THIRD) § 22.2.

²⁶⁸ See *supra* note 234 and accompanying text.

²⁶⁹ Subsection (a) is essentially the same as EPTL 10-7.2 and 10-7.4(a); any retained general power would be deemed the equivalent of ownership. See EPTL 10-7.2, 10-7.4(a). Under my formulation, the HEMS exception would not apply if the donor retained a general

modification would affect appointive property over which the donor also reserved a testamentary general power. Under current New York law, only property that can be appointed in favor of the donee is available for creditors and to pay administration expenses. Specifically subsection (b) would make appointive property under a retained testamentary general power of appointment subject to the claims of the donee's estate creditors and to administration expenses.

The rationale for allowing creditors to reach appointive property over which the donor-donee has any general power of appointment, including a testamentary general power, is simple: the donor has retained too much control over the property to allow the property to escape the reach of creditors—and payment of estate administration expenses.

Subsection (b) also deviates from current New York law insofar as appointive property will be available only after the donee's probate estate is exhausted. Under EPTL 10-7.4(a)(1), appointive property is not a second tier asset to satisfy estate creditors and to pay administration expenses.²⁷⁰

Another possible tweak of the statute could make appointive property subject not only to administration expenses but also to funeral expenses and the disposal of remains.²⁷¹ Again, appointive property would be available only after probate assets are exhausted.

C. Rights of Donee's Creditors in Appointive Property Where Donee Possesses a General Power Which the Donee Did Not Create

1. Current New York Law

EPTL 10-7.2 provides:

Creditors of the donee; general power presently exercisable

Property covered by a general power of appointment (other than one exercisable solely for the support, maintenance, health and education of the donee within the meaning of sections 2041 and 2514 of the Internal Revenue Code) which is presently exercisable, or of a postponed power

power. See *supra* Part VII.B.3. Indeed, it is not clear that the HEMS exception under EPTL 10-7.2 applies to retained general powers because the retained power would not be a power of appointment for tax purposes. See Treas. Reg. § 20.2041-1(b)(1) (1961).

²⁷⁰ See EPTL 10-7.4(a)(1).

²⁷¹ See UNIF. TRUST CODE § 505(a)(3) (2000).

which has become exercisable, is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself or by some other person, or whether the donee has or has not purported to exercise the power.²⁷²

EPTL 10-7.4 provides:

Creditors of the donee; general power not presently exercisable

Property covered by a general power of appointment which, when created, is not presently exercisable is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate, only:

....

(2) If a postponed power becomes exercisable in accordance with the terms of the creating instrument, except in the case of a testamentary general power.²⁷³

2. Restatement Provision

Creditors of the Donee—General Power Created by Someone Other Than the Donee

(a) To the extent that the property owned by the donee is insufficient to satisfy the claims of the donee's creditors, property subject to a presently exercisable general power of appointment that was created by someone other than the donee is subject to those claims to the same extent that it would be subject to those 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 insufficient to satisfy the claims of creditors of the donee's estate, property subject to a general power of appointment that was created by someone other than the donee and that was exercisable by the donee's will is subject to those claims and expenses to the same extent that it would be subject to those claims and expenses if the property had been owned by the donee.²⁷⁴

²⁷² EPTL 10-7.2.

²⁷³ EPTL 10-7.4.

²⁷⁴ RESTATEMENT (THIRD) § 22.3.

3. Recommended Statute

Creditors of the Donee—General Power Created by Someone Other Than the Donee

(a) Appointive property that is subject to a present exercisable general power of appointment created by someone other than the donee is, to the extent that the property owned by the donee is insufficient to satisfy the claims of the donee's creditors, subject to those claims to the same extent that it would be subject to those claims if the property were owned by the donee.

(b) Upon the death of the donee, appointive property that is 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 to the extent the donee's estate is insufficient to satisfy the claims of creditors and the expenses of administration of the donee's estate subject to those claims and expenses to the same extent that it would be subject to those claims and expenses if the property had been owned by the donee.

(c) For purposes of this section, if the initial gift in default of appointment is to the donee or to the donee's estate, a power that would be classified as special power of appointment shall be treated as a general power.

4. Discussion

My recommended statute relies on section 22.3 of the Restatement, with one significant modification as will be noted. My recommendation would dramatically change existing New York law as provided under EPTL 10-7.4(a) by extending creditors' rights to appointive property subject to testamentary general powers that were not created by the donee. My rationale is that the donee had virtual ownership of the property at death if the donee could exercise the power in favor of the donee's estate or estate creditors.²⁷⁵

The modification to the Restatement provision is that appointive

²⁷⁵ This is essentially the position taken under Internal Revenue Code section 2041: property that a decedent could exercise in favor of her estate should be treated as the equivalent of ownership for estate tax purposes. See I.R.C. § 2041 (2006).

property that was subject to a presently exercisable general power of appointment at death should also be available, on a second tier basis, for the payment of estate debts and expenses of administration.²⁷⁶ EPTL 10-7.2 essentially provides this rule but does not relegate appointive property to second tier status.

Another possible tweak of the statute could make appointive property subject not only to administration expenses but also to funeral expenses and the disposal of remains.²⁷⁷ Again, appointive property would be available only after probate assets are exhausted.

Subsection (c) of my recommended statute provides an important nuance, which is recommended under draft UPOA section 504(c). If the permissible appointees do not include any of the fearsome four—which would thereby result in a special power classification²⁷⁸—but the property would pass to the donee or to the donee's estate on the failure to exercise the special power, the donee essentially has the equivalent of ownership. As a result, the property subject to such a power provision should be treated as a general power and available for the donee's creditors and to pay estate administration expenses.

VIII. CONCLUSION

New York's power of appointment legislation needs to be modernized. Current New York law, which underwent major changes almost fifty years ago, simply does not reflect the latest developments in the area.²⁷⁹ The most significant recent development is found in the powers of appointment division of the 2011 Restatement,²⁸⁰ which is being translated into statutes by the Uniform Powers of Appointment Act.²⁸¹

With the Restatement and the draft UPOA as a starting point, but with deference to still viable New York statutes, I have

²⁷⁶ Restatement section 22.3 inexplicably omits this portion of CAL. PROB. CODE section 682(b), which otherwise was adopted verbatim. *Compare* RESTATEMENT (THIRD) § 22.3, *with* CAL. PROB. CODE § 682(b) (2012).

²⁷⁷ *See* UNIF. TRUST CODE § 505(a)(3) (2000).

²⁷⁸ *See supra* Part IV.C.3.

²⁷⁹ Although the 1967 enactment of EPTL Article 10 (Powers) relied on the treatment of powers of appointment in the first Restatement of Property, published in 1940, about one-half of the statutes in Article 10 are derived from the Revised Statutes of 1830 on powers. *See supra* Part III.

²⁸⁰ RESTATEMENT (THIRD) ch. 17–23. The division runs over 200 pages. *See id.*

²⁸¹ *See supra* Part I. The draft Uniform Powers of Appointment Act is expected to be finalized and approved in the summer of 2013. *See supra* note 13.

recommended modern power of appointment statutes for New York. I chose four areas for revisions: general provisions, creation, exercise, and creditors' rights.²⁸² Within each area, I have tried to recommend statutes that improve on existing New York law. My recommendations attempt to clarify, simplify, and update existing statutes,²⁸³ discard obsolete provisions,²⁸⁴ and in some instances, provide new and necessary rules.

My goal in writing this article is to start the process for modernizing New York's power of appointment legislation.²⁸⁵ Actual implementation will require further work and the making of one critical decision regarding the format for modernization: should new statutes be folded into the existing framework of Article 10 (Powers) or should New York consider using the structure of the UPOA, which could become new Article 10 (Powers of Appointment)?²⁸⁶ I would suggest the latter approach, thereby enabling legislation on powers of appointment to stand alone rather than be conflated with other powers, which is the current structure of Article 10.²⁸⁷ Reliance on the UPOA structure would also be appropriate because the Act is destined to be widely adopted by the states.²⁸⁸

It is high time to keep pace with the march of progress. Let the process begin for modernizing power of appointment legislation in New York.

²⁸² See *supra* Parts IV–VII.

²⁸³ See, e.g., *supra* Part IV.B (noting the definitions).

²⁸⁴ See, e.g., *supra* Part IV.F (rejecting concept of imperative powers).

²⁸⁵ Not all areas for modernization are addressed in this article. See *supra* note 12. Further, within the four selected areas for revision not every issue has been addressed. See *supra* note 16.

²⁸⁶ Another important decision is whether the new legislation should only be prospective. My view is that the legislation should also apply to existing powers of appointment. Cf. UNIF. TRUST CODE § 1106 (2000) (applying the Uniform Trust Code to preexisting trusts). However, in a few instances a section should only be prospective, especially where vested rights would adversely be affected. For example, my recommended statute that would allow creditors to reach property in which the decedent had a general testamentary power, should be prospective only. See *supra* Part VII.C.3.

²⁸⁷ Statutes that currently apply to powers that are not powers of appointment could be accumulated in a new Article 10-A.

²⁸⁸ Apart from a few other states, including California, Michigan, Minnesota, and Wisconsin, most states have no comprehensive power of appointment legislation. Enactment of the Uniform Powers of Appointment Act will fill this void.