

PROBATE CORNER

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ARTICLE: The Decanter Side-Step. A Primer On Powers Of Appointment.

A power of appointment is a delegation of one's right to dispose of property and is usually exercised through a will or trust. This power is primarily used to address unforeseen changes in family circumstances. The terms "power of appointment" and "power" are used interchangeably in this article.

The rules governing powers of appointment are less stringent than Florida's new decanting statute [§736.04117, Fla. Stat.]. There are few, if any, restrictions on the donee's authority to control the distribution of assets. Additionally, since the donee is not a fiduciary, she may have no fiduciary responsibility (or liability) to the named beneficiaries of the power. Refer to Restatement (Third) of Trusts §50 (2003).

DEFINITIONS:

- The term "Power of appointment" means an authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property. Refer to §731.201(30), Fla. Stat.
- The donor is the person who creates the power.
- The donee (or holder/appointee of the power) controls the distribution of the assets subject to the power. Title to the property concerned remains with the donor until the power has been effectively exercised by the donee, at which time the title passes through the donee as a conduit to the beneficiary. Estate tax issues aside, a power of appointment does not vest ownership of the property in the donee of the power; the property remains the property of the donor of the power, and the donee in execution of the power is considered to be a mere agent of the donor. *See Smith v. Bank of Clearwater, 479 So.2d 755 (Fla. 2nd DCA 1985); In re Estate of Wylie, 342 So. 2d 996 (Fla. 4th DCA 1977).*
- The beneficiary (or object of the power) is the person in whose favor the power is exercised.
- A special (or nongeneral) power of appointment authorizes the donee to appoint the property among members of a class of beneficiaries designated by the donor. *See Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940).* A special power does not create a property interest in the donee because the donee can never appoint the property subject to the power to herself. *See Estate of Stewart v. Caldwell, 271 So.2d 754 (Fla. 1972).* Therefore, the trust assets are *not* included in the donee's estate upon death. *See Estate of Wylie, 342 So.2d 996 (Fla. 4th DCA 1977).*
- A general power of appointment is defined under Florida's elective share statute as "a power of appointment under which the holder of the power, whether or not the holder has the capacity

to exercise it, has the power to create a present or future interest in the holder, the holder's estate, or the creditors of either. The term includes a power to consume or invade the principal of a trust, but only if the power is not limited by an ascertainable standard relating to the holder's health, education, support, or maintenance.” Refer to §732.2025(3), Fla. Stat. This definition is contained in I.R.C. §2041(b)(1)(A). Additionally, the Florida Trust Code defines a general power of appointment as “a power of appointment exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate.” Refer to §736.0103(7), Fla. Stat.

RULES GOVERNING POWERS OF APPOINTMENT:

- A power is “personal” to the donee when the document creating the power refers to the donee by name and may be exercised only by that person and no other. In contrast, when the power is conferred on a person in her fiduciary capacity (i.e., PR or trustee), the power may be exercised by any person holding that position at the time the power is to be exercised. *See Estate of Serrill*, 159 So.2d 246 (Fla. 2nd DCA 1964). *But see* §736.0302, Fla. Stat. (a sole trustee cannot be the holder of a power of appointment).
- If the instrument creating the power sets forth the manner in which the power is to be exercised, the donee must exercise the power in the prescribed manner. Failure to comply with the donor’s requirements for exercising the power defeats the power. *See Talcott v. Talcott*, 423 So.2d 951 (Fla. 3rd DCA 1982). A general residuary clause in a will, or a will making general disposition of all the testator's property, does *not* exercise a power held by the testator unless specific reference is made to the power or there is some other indication of intent to include the property subject to the power. Refer to §732.607, Fla. Stat.
- Partial invalidity of the power: If one part of the power is ineffective and another part, if standing alone, would be effective, the effective part is given effect, except to the extent the donee's scheme of disposition is more closely approximated by allowing some or all of the effective part to pass in default of appointment. *See Vetrick v. Keating*, 877 So. 2d 54 (Fla. 4th DCA 2004) *citing* Section 23.1 of the Restatement (Second) of Property.
- If a donee fails to exercise a power, and the instrument that created the power specifies who the takers shall be in the event of a default, the property subject to the power passes in accordance with the default rules. *See DePass v. Kansas Masonic Home*, 181 So. 410 (Fla. 1938).
- The power vested in a donee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the donor clearly indicates a contrary intent. *See Phipps v. Palm Beach Trust Co.* As a result, the donee has the power to appoint in trust (or in further trust) and if appropriate, select her own trustee to administer that trust. *See Vetrick v. Keating* and §736.0401, Fla. Stat.
- The Florida Uniform Statutory Rule Against Perpetuities applies to power of appointments. Refer to §689.225, Fla. Stat.

- The rules regarding release of a power of appointment over property are contained in §§709.02 through 709.07, Fla. Stat.