

## Power of Appointment – Best Thing Since Sliced Bread

Joel S. Lubner, Esq.

**Introduction.** The power of appointment is a staple of modern estate planning practice. With the repeal or extension of the rule against perpetuities in many states, and the ability of grantors to create trusts invoking the law of those states, there has been much written and discussed about perpetual trusts or dynasty trusts. But in crafting such trusts for our clients, are we not, on some level, just trying to predict the future? The very first rule in creating trusts is flexibility; and the most common method to create flexibility is the use of a power of appointment. With a power of appointment, a trust may, effectively, be re-examined at every generation.

In the prefatory note to the Uniform Powers of Appointment Act ("Uniform Act") promulgated by the National Conference of Commissioners in 2013, there is this quote from Professor W. Barton Leach, who described the power of appointment as "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." 24 A.B.A. J. 807 (1938). Curiously, the Uniform Act has been adopted and enacted into legislation in only 10 states so far (Pennsylvania is not one of them). However, Chapter 76 of the Probate, Estate and Fiduciaries Code of the Commonwealth of Pennsylvania (the "PEF Code") does provide some statutory guidance.

**The Basics.** A power of appointment is a nonfiduciary power of disposition over property. The power is granted by the owner of property—the "donor"—in a will or trust and is given to a person traditionally called the "donee" in the Restatements of Property but called the "powerholder" in the Uniform Act. A powerholder appoints property to an appointee who must be a "permissible appointee," and the person who would receive the property if no appointment is made is the "taker in default."

There are both general and non-general powers of appointment. The latter are sometimes referred to as "special" or "limited" powers of appointment. The PEF Code uses the term "broad power of appointment" for a general power. A general power is exercisable in favor of any one or more of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate. A non-general power of appointment is a power of appointment that is not a general power. A right to withdraw assets from a trust is considered a general power of appointment because withdrawing assets is the equivalent of appointing those

assets to the powerholder.

**The Relation Back Doctrine.** As a technical matter of property law, a powerholder is not the owner of the appointive assets. Upon the exercise of a power of appointment, the doctrine of relation back provides that the appointed property passes directly from the donor to the appointee. As a result, the powerholder's appointment is deemed to relate back to and become part of the donor's original instrument. The powerholder is viewed as akin to the donor's agent, as it were; an appointment retroactively fills in the blanks in the original instrument. Technical ownership aside, when it comes to federal taxation and the rights of the powerholder's surviving spouse and creditors, the law does not always follow the relation-back doctrine.

**Applicable Tax Provisions.** The following are many of the tax provisions one must keep in mind when the scrivener adds powers of appointment to any trust document, and when advising powerholders whether to exercise them or to allow them to lapse.

**Section 2041 of the Internal Revenue Code of 1986, as amended (the "Code"),** defines a general power in the manner described above. There are numerous cases and rulings dealing with whether powers are general. However, Section 2041 excepts three circumstances from the definition of general power:

- if the powerholder's authority is limited by an ascertainable standard relating to the powerholder's health, education, support or maintenance (See Treas. Reg. § 20.2041-1(c)(2) for further discussion on what is, and is not, an ascertainable standard);
- if the power is exercisable only in conjunction with the donor of the power; or

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- if the powerholder can exercise the power only in conjunction with a person holding an adverse interest in the property (typically the takers in default) (See Rev. Rul. 79-63 and *Greve v. Commissioner*, TC Memo 2004-91, for a discussion of this issue).

Section 2041 of the Code requires the estate of a powerholder to include all property over which the powerholder has at death a general power of appointment. Mere existence of the power is sufficient, even if the powerholder does not know about the power or is incapable of exercising it at death (for instance, due to incapacity). See *Estate of Freeman v. Commissioner*, 67 T. C. 202 (1976).

Section 2207 of the Code provides that a powerholder's estate may recover transfer taxes from the recipient of property subject to a general power of appointment unless that right of recovery is waived by the powerholder/decedent. This mitigates the unfairness of including property in a powerholder's estate if the powerholder did not know of or could not exercise the power.

Section 2514 of the Code provides that the exercise or release of a general power of appointment is deemed to be a transfer of the property by the powerholder. If the power expires by its terms, rather than by an action of the powerholder, then the power is said to lapse, and Section 2514(e) of the Code provides that the lapse of a power during the life of the powerholder is considered a release of the power—and thus a transfer of property—but only to the extent the amount of property subject to the release exceeds the greater of \$5,000 and 5% of the aggregate value of the assets (the “5 and 5 Power”) out of which the exercise of the lapsed powers could be satisfied.

Crummey withdrawal rights are often structured to lapse within the limits of a 5 and 5 Power. These are commonly referred to as “hanging” powers. The reason the power needs to “hang,” even though the right to withdraw is set for a limited period of time (for example, 30 days), is that there could be a lapse in excess of the 5 and 5 power. For example, the annual exclusion amount is \$15,000 per year, and if the value of the trust assets from which the withdrawal power is granted is less than \$300,000 [ $\$15,000 = 5\%$  of \$300,000], there will be a lapse in excess of the 5 and 5 Power. The usual solution is to provide that the power may carry over (“hang”) for several years until each lapse is fully protected by the 5 and 5 Power. There are both potential gift tax and estate tax consequences when there is a lapse without the exercise of a power to withdraw assets that exceeds the 5 and 5 Power.

The transfer tax effects of non-general powers of appointment are variable. The exercise or release of a non-general power has no transfer tax effect. However, if the exercise or release has an effect on the powerholder's other interests in the trust, there may be a transfer tax. For example, a powerholder is entitled to receive all the income from a trust during her life and also has a presently exercisable power to appoint the trust property to her children. If she exercises that power, by vesting a portion of trust property in her children, she will reduce the income interest to which she is entitled. Thus, the powerholder has made a gift. See TAM 9419007.

Section 2042 of the Code says a power of appointment will be an incident of ownership over a life insurance policy. See PLR 201327010.

Section 678 of the Code states that there are income tax consequences to powerholders. In particular, Section

678(a)(1) of the Code provides that a powerholder will be treated as the owner for income tax purposes of any portion of a trust from which the powerholder has the power, exercisable by himself, to vest the corpus or income in himself unless the grantor of the trust is treated as the owner for income tax purposes. If a power is released or lapses, whether the powerholder is treated as the owner of the portion over which the power existed depends on whether the powerholder would have been treated as the owner of the trust were the powerholder the grantor of the trust.

Section 1014 of the Code deals with the income tax consequences to those who receive assets either by the exercise of a general power of appointment or the takers in default if a general power is not exercised. In particular, Section 1014(b)(9) of the Code provides that property required to be included in a powerholder's estate by reason of the existence of a power of appointment will be deemed to have been acquired from the decedent powerholder and thus will have, in the hands of the recipients, basis equal to the fair market value of the property at the decedent's death as a result of Section 1014(a) of the Code.

## Common Uses of Powers of Appointment.

Second Look. As first described above, the most important use of powers of appointment is to create the flexibility to address changes in circumstances not originally envisioned by the grantor of a trust, especially when the grantor is no longer alive, or has not otherwise reserved a power for herself to revise trust terms. The powerholder may be able to appoint the assets of a trust to an entirely new trust with different administrative provisions (e.g., governing law; situs; or the spendthrift or investment provisions or provisions for investment

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or distribution committees that advise or direct the trustee) or dispositive provisions (e.g., removing existing beneficiaries and adding new ones, or changing the terms under which income and principal may be distributed to one or more beneficiaries). Many decanting statutes do not allow trustees to change the dispositive provisions of a trust but do allow the creation of powers of appointment which the powerholder may then use to change the trust's dispositive provisions. There are similar limitations with non-judicial settlement agreements. See PEF Code §7740.1.

Power to Disappoint. Senior generation grantors who are married most often want to leave assets to each other, first, before directing assets to children or more remote issue; and most often, they do so with a QTIP trust, which avoids the need to give the surviving spouse a general power of appointment and the risk that assets will leave the family line, or become subject to the creditor claims of the surviving spouse. But even with a QTIP trust (and every other trust) there will be an onus on the trustee to fulfill its duty of impartiality, which creates the prospect of children complaining of "lifestyle" choices of the surviving spouse and proposed discretionary principal distributions to the spouse. Enter the special testamentary power of appointment. The ability of the surviving spouse to reallocate the remaining assets among children and/or to skip children and distribute everything to grandchildren may be a powerful inducement for the children to remind the living parent of their love and affection, and maybe more importantly, to keep their opinions to themselves.

### Trigger Transfer Tax and Income Tax.

General powers of appointment can be used to ensure that assets in trust are included in a powerholder's estate,

which may have the effect of preventing a generation skipping transfer tax, and achieving a new basis at the powerholder's death. The latter has become significantly more popular with the increase in federal estate tax exclusion amount (the "exclusion amount"). In many situations, trust beneficiaries do not have taxable estates. As a result, using a general power of appointment to cause inclusion in a beneficiary's estate will create an estate tax-free basis increase whether the power is granted in the original instrument, created through exercise of a trustee's specified authority to do so or through decanting or amending the trust.

Create Incomplete Gifts. Non-general powers of appointment have an important use in making gifts to trusts incomplete to reduce income taxes (but not transfer taxes). Incomplete gifts may be helpful for many purposes but a common one is the transfer of assets to a trust that is not a grantor trust (an "ING") for income tax purposes. If the grantor is domiciled in a high income-tax state, and the transfer can be made to a trust that will be taxed in a low or no income-tax state, then use of the trust may achieve income tax savings for the trust. In order to avoid gift tax, the grantor must retain a lifetime and testamentary power of appointment, but the powers of appointment must be sufficiently limited to avoid the grantor trust rules of §§ 671–677 of the Code. Powers of appointment can be used to move trusts from one taxing jurisdiction to another in order to accomplish such planning. In *Linn v. Department of Revenue*, 2013 WL 6662888 (Ill. App. 4 Dist.), the court held that Illinois could not tax an inter vivos trust created by an Illinois resident where the trust assets were moved via power of appointment to a Texas trust with a Texas trustee and no Illinois trust beneficiaries.

### Upstream Planning (Caution Advised).

Upstream planning, to shift values to a higher generation family member not subject to the estate tax, has been discussed by any number of commentators. This type of planning has been given considerable attention in light of the current large exclusion amount. Clients who have a net worth substantially in excess of the \$23.4 million per couple exemption (as of 2021), might consider upstream planning if, for example, one of the spouse's parents has a combined net worth well under the current exemption.

One approach to upstream planning is to create an irrevocable trust with a general power of appointment given to a person living in a non-decoupled state who has a modest estate of their own. The presence of that general power should cause estate inclusion of trust assets in that person's estate, generating no estate tax but an adjustment of tax basis at death. However, this type of planning raises a host of questions.

How can one protect against an unintended or undesirable exercise of the power granted? Possible solutions include (i) conditioning the exercise of the general power upon the consent of a non-adverse party; or (ii) instead of a general power, using a limited power of appointment and granting the power to another person, in a non-fiduciary capacity, to convert the limited power of appointment into a general power of appointment before the powerholder's death; or (iii) limiting the scope of the general power to the right to appoint to the creditors of the powerholder's estate, only, and/or to the descendants of the grantor of the power or trusts for their benefit. If creditor issues are a real risk, then one might consider conditioning the exercise of the power on the powerholder being solvent. One other risk for someone who qualifies for Medicaid – a general power

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may also subject the assets to a parent's or other powerholder's Medicaid claim for reimbursement.

Although many practitioners have touted the use of "upstream" planning to salvage otherwise unusable or lost exemptions that elderly relatives of clients have, the planning is not assuredly beneficial.

Consider the consequences of upstream planning if the new Congress is able to enact those parts of President Biden's tax proposals that call for a reduction of the exemption amount. For example, if a parent had an estate of only \$4 million, and the child created a trust with \$7 million and gave his or her parent a general power of appointment over that trust. The intent of the plan was that the parent's estate would include those assets in the trust and those assets would garner an estate tax free adjustment (hopefully step-up) in income tax basis at the parent's death. But if the exclusion amount is reduced to the \$3.5 million as in the Biden proposals, the plan intended to garner a basis step-up at no tax cost may instead trigger an unintended estate tax. A possible fix for this issue may be to use a formula general power of appointment.

Clients who only recently had planning updated to address the inclusion of general powers to a senior generation are likely fretting now over the prospect of yo-yo tax law changes that may be on the horizon very soon. Practitioners should be carefully reviewing those plans now to see if, for example, any general powers of appointment can be converted to special powers in the event such changes in the law occur.

Conclusion. Whether planning for one generation or six generations, powers of appointment must be considered the prime ingredient in every trust document presented to a client.

*Joel S. Luber, Esquire, is chair of the Estates & Trusts Group at Reger Rizzo Darnall LLP. Joel concentrates his practice in sophisticated estate planning for high-net-worth individuals, asset protection planning, estate administration, Orphans' Court practice, and general corporate and income tax planning.*