

The Uniform Powers of Appointment Act (2013)

A Summary

A power of appointment is an estate planning tool. A good estate planning attorney can help clients plan to distribute wealth in accordance with their goals, but even the best attorneys cannot predict the future. A power of appointment allows clients to avoid naming specific beneficiaries to receive specific property, and instead name a trusted third party to direct the distribution of property after the donor's death taking all future conditions into account. Harvard Law Professor W. Barton Leach once described the power of appointment as "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out."

To illustrate its use, imagine a client who wants to minimize estate taxes by using a generation skipping trust (GST). The GST would pay income to the client's children, but the principal would be reserved for eventual distribution to the client's grandchildren. The trust instrument could simply direct the trustee to distribute the principal to the donor's grandchildren in equal shares after the death of the last income beneficiary. However, that fails to account for the grandchildren's actual needs. What if one grandchild shows great academic promise and needs to access the principal sooner to pay for a postgraduate education? What if one grandchild becomes a substance abuser and wants to spend the inherited funds on illegal drugs? In either case, the plan of distribution probably would not conform to the donor's actual wishes.

A more effective plan would grant a power to appoint the GST principal to a trusted family member or advisor. The powerholder would have discretionary authority to direct distributions of principal to any of the client's grandchildren in any amount, with appropriate restrictions to prevent tax disqualification. By using a power of appointment rather than a rigid formula for distribution of principal, the donor greatly increases the likelihood that the inherited funds will be put to good use.

Types of Powers

A power of appointment may be general or non-general, presently exercisable or testamentary.

General powers of appointment permit the powerholder to appoint himself or herself as the recipient of the property, or one of the powerholder's creditors. For example, a will or trust might contain the following term: "I grant to my son Alan the power to distribute my collection of antique cars as he sees fit." Alan might love antique cars and decide to appoint the entire collection to himself. Or, Alan may have no interest in antique cars and decide to donate the collection to a museum, or give it to a relative who loves cars. Finally, Alan might give the collection to one of his creditors in satisfaction of a debt. Alan has a general power of appointment over the car collection.

Non-general powers of appointment prevent the powerholder from appointing property to himself or herself, or to any of the powerholder's creditors. For example, a will or trust might contain the following language: "I grant to my wife Barbara the power to distribute all assets in the family trust to any or all of our descendants as she determines is appropriate." The restrictive clause "to any or all of our descendants" precludes the distribution of trust property to Barbara or to any of her creditors. Barbara has a non-general power of appointment over the assets in the family trust.

Similarly, a will or trust might state: "I leave my private jet to a charitable organization that will use it to transport wounded veterans, my sister Connie to choose the recipient." The class of permissible appointees is restricted to a certain type of charity; therefore, Connie has a non-general power of appointment over the private jet.

A presently exercisable power of appointment allows the powerholder to appoint the recipient of the property at the time in question. For example, a term that states: "I leave \$100,000 to my nieces and nephews for the sole purpose of funding their college educations, my brother Daniel to distribute the gift to any or all of them as he sees fit" is a presently exercisable power of appointment, even if none of the nieces and nephews are of college age at the time of the gift. The relevant time is the time of the appointment to a recipient. Whenever one of the nieces or nephews incurs college expenses, Daniel may pay for them out of the gifted funds. Moreover, the eligible recipients are the donor's nieces and nephews, and not Daniel or his creditors. Thus, Daniel has a presently exercisable, non-general power of appointment over the \$100,000 gift.

In contrast, a will or trust might state, "My wife Ellen may use any income generated by the marital trust assets during her lifetime. When Ellen dies, all of the marital trust assets shall be distributed for the benefit of any or all of our descendants as directed by Ellen in her will." In that case, Ellen holds a testamentary power of appointment over the assets in the marital trust, because she may not direct distribution of the trust assets during her lifetime.

It should now be evident that the power of appointment is an extremely flexible tool that can be used to produce many different outcomes.

Powerholder versus Trustee

One could, of course, entirely forego the use of powers of appointment and instead grant a trustee the discretionary authority to distribute trust property. However, it is often preferable to split the authority and give a non-trustee the power to direct distributions. For instance, when a corporate trustee is employed to manage personal wealth, it makes good sense to grant powers of appointment to a family member or confidant who has a closer relationship to the

permissible appointees. The family member is likely to be in a better position than the trustee to judge the relative needs of those who are eligible to receive the property.

Furthermore, a trustee is a fiduciary, and subject to all of the fiduciary duties imposed by law. The uniform act clearly states that the holder of a power of appointment acts in a nonfiduciary capacity to designate the recipient of appointive property. Therefore, a person without the skill to manage financial assets and with no special knowledge of fiduciary duties still may be qualified to hold a power of appointment.

The Need for a Uniform Law

Although powers of appointment are common, there is very little statutory law governing their use; practitioners instead rely on a patchwork of state court decisions. The Uniform Powers of Appointment Act codifies major provisions of the common law as expressed in the Restatement (Third) of Property: Wills and Other Donative Transfers.

Article 1 of the uniform act contains general provisions and definitions. Article 2 governs the creation, revocation, and amendment of powers of appointment. Article 3 provides rules for exercising the authority granted by a power of appointment. Article 4 governs disclaimers and releases, and the usepower of of contracts to appoint or not to appoint property. Article 5 addresses the rights of a powerholder's creditors in appointive property. Finally, Article 6 contains miscellaneous provisions common to uniform acts.

The goal of the drafters was not to change the law, but to provide both practitioners and courts with a statute that is clear, consistent, and easy to reference. Estate planners will already be comfortable with the concepts in the uniform act, and are likely to welcome the legal certainty that will result from its enactment.

Conclusion

Powers of appointment are already widely used by estate planning attorneys in every state. The Uniform Powers of Appointment Act codifies the existing common law rules governing the creation and use of powers of appointment and provides statutory authority that is currently lacking. The drafting committee for the uniform act received helpful input from the American College of Trust and Estate Counsel (ACTEC) and the ABA Section of Real Property, Trusts, and Estates, both of which strongly supported the project. The Uniform Powers of Appointment Act is appropriate for enactment in every jurisdiction and should be strongly considered by each state legislature.