CHAPTER 502

POWERS OF APPOINTMENT

Sections 502.01 to 502.61 repealed by L. 1943, c. 322, s. 1; superseded by sections 502.62 to 502.78.

The power of appointment, particularly the special power, is the most efficient device yet contrived by which an owner may obtain flexibility while still controlling the general purposes to which his property shall be devoted. Restatement of the Law of Property, Vol. III, Chapter 25, p. 1808.

NOTE: The chapter repealed was originally Chapter 45, Revised Statutes of the Territory of Minnesota 1851. That chapter was derived from the New York Revised Statutes of 1830, drafted by a committee on revision created in New York in 1825. The chapter was repealed for several reasons. It purported to be a complete code on the subject of powers, but in terms it applied only to powers in respect to land, and could be applied to powers in respect to things other than land only by analogy. Even in respect to land it was incomplete, and resort to common law rules was necessary to fill in the gaps. It contained a number of rules now obsolete. Its provisions were in some instances inconsistent and in others arbitrary. Its terminology differed from that of the common law, and made it difficult to use authorities from other jurisdictions.

502.62 COMMON LAW OF POWERS.

THE FUNCTION OF POWERS OF APPOINTMENT

Owners often wish to control the devolution of their property through two or more generations; and the rule against perpetuities does not prevent an owner who is competently advised from exercising such control for about a century. Plainly no human foresight is adequate to frame in advance dispositions which will meet the exigencies of the maximum period of control or even of the comparatively small fraction thereof commonly utilized by testators and settlors. Births and deaths in varying combinations, the commercial success of some family members and the failure of others, the varying capacities of individuals as to the husbanding of resources, fluctuation in income returns and the value of the monetary unit, legislative action and constitutional amendment reflecting social and political change—all these are factors whose unpredictability indicates the folly of rigid predetermined future limitations and the desirability of gifts containing a substantial element of flexibility. Restatement of the Law of Property, Vol. III, Chapter 25, p. 1809.

In the history of English law powers of appointment were primarily the outgrowth of efforts to circumvent the rule, existing prior to 1540, that many of the most important types of interests in land could not be devised. Despite this rule it became possible for an owner to achieve the practical equivalent of a devise by granting the property inter vivos upon uses to be appointed in his will; the exercise of the power by will was effective though a devise would have been void. From this origin the law of powers developed in substantial quantity and in minute detail, providing a type of disposition which became increasingly popular with testators and settlors. On the whole the law, as it developed, was essentially simple and workable though it labored under three handicaps: (1) it had an unnecessarily complex terminology; (2) it was concerned in its formative years almost exclusively with dispositions of land and thus became encrusted with some of the medievalisms which a too-sparing use of the legislative process allowed to remain in the English land law; (3) it was considered as closely analogous to the law of powers of attorney, a misconception which long obscured the close analogy of a general power to ownership and of a special power to a trust.

As late as the beginning of the twentieth century it could fairly be said that there was no such thing as an American law of powers of appointment. Cases were few and opinions tended to reach conclusions upon uncritical citation of English authorities. There was little independent consideration of particular doctrines and little reliance upon the salutary principle that the English common law is controlling only so far as it is compatible with American legal institutions. Even at the present time (1940) the American case authority on powers of appointment is distinctly thin in quantity—so thin that in nearly all states there are many important matters upon which local decisions are not yet conclusive, and in many states practically the entire field remains free for future development. However, the number of cases presented to the courts is now rapidly increasing, due largely to the very substantial estate and inheritance tax advantages which often can be obtained by the creation of trusts with powers of appointment. This situation makes it possible for the American law of powers in the course of its growth to adopt the benefits but avoid the anomolies of the English law. The reported cases of the last two decades indicate that in the main this possibility is being realized; and in this Restatement, wherever a choice has been possible, there has been selected that rule which promises present utility rather than that which merely embalms historical accident. Restatement of the Law of Property, Vol. III, Chapter 25, p. 1809-1811.

Where a will appoints an executor and a trustee and defines the duties and powers of each of them, the executor has no right and cannot be compelled to exercise a discretionary power of sale devised exclusively to the trustee; and an equitable conversion of a testator's realty into personalty cannot be predicated on a discretionary power of sale devised to the trustee named in the will or a direction to the executor to pay debts. Estate of Hencke, 212 M 407, 4 NW(2d) 353.

The statute providing for inclusion in gross estate for estate tax purposes of property passing under a general power of appointment recognizes the distinction that under a "general power of appointment" donee may appoint to anyone, including his own estate or creditors, whereas under "special power of appointment" donee may appoint only amongst a restricted class of persons other than himself. Janes v Reynolds, 57 F. Supp. 609.

Application to personalty of statutes abolishing all powers except as authorized in the chapter relating to realty. 13 MLR 389.

Obligation of the holder not to use a general power in trust for his own benefit. 23 MLR 390.

General power of appointment under the federal estate tax. 24 MLR 886.

502.63 CREATION.

Section 502.63 is declaratory of the common law. Restatement of the Law of Property, Vol. III, Chapter 25, Section 323.

Power of disposal of life estates by implication. 5 MLR 320.

Inclusion in gross estate of property distributed under compromise agreement. 7 MLR 96.

502.64 MANNER OF EXERCISE.

At common law a power of appointment might be exercised by an instrument lacking the formalities necessary to pass title to the property covered by the power, when so authorized by the donor; e.g., by an instrument in the nature of a will, but not legally a will. The first sentence thus changes this common law rule. The second sentence is declaratory of the common law rule. With respect to the third sentence, at common law courts of law required that a power be exercised as directed by the donor; if directed to be by will, it could be exercised only by will; if by deed, only by deed. In respect to powers directed to be exercised by will, courts of equity followed the law; but in respect to powers directed to be exercised by deed they enforced an appointment made by will, on the ground that since a power by deed may be exercised by deed up to the last moment of the life of the donee, there is no sound reason for denying the validity of an execution made by will effective at his death. This equitable rule aided only persons in certain relationships

to the donee. The third sentence adopts the equitable rule without restriction in respect to persons. Restatement of the Law of Property, Vol. III, Sections 346, 347.

Validity of appointment for lesser estates or in trust; power to appoint in fee. 24 MLR 587.

502.65 WHEN NOT VOID.

The question is: Can the administrator of the estate of a deceased person recover in an action for wrongful death of a decedent where the sole beneficiary, in case recovery is had, is the wife of defendant, the defendant being the person whose negligence caused the death. The statute under which this action is brought created a new cause of action unknown to the common law and non-existent in Minnesota up to the time it was enacted. The statute is remedial and is given a liberal construction. The above question is answered in the affirmative. Albrecht v Potthoff, 192 M 557, 257 NW 377.

Validity of appointment for lesser estates or in trust; power to appoint in fee. 24 MLR 587.

502.66 WHO MAY EXERCISE.

Section 502.66 is declaratory of the common law. Restatement of the Law of Property, Vol. III, Section 345.

See, Estate of Hencke, 212 M 407, 4 NW(2d) 353, noted under section 502.62.

502.69 INTENT.

The first sentence is declaratory of the common law. The first part of the second sentence changes the common law rule of construction that a direction to appoint "too" or "among" or "between" two or more objects manifests an intention to create a non-exclusive power. With respect to the proviso, by the common law decisions each object of a non-exclusive power must receive a "substantial" share; otherwise, the appointment is "illusory." No definite rule has been formulated to determine what is a "substantial" as distinguished from an "illusory" share. The requirement is thus productive of litigation and later cases have expressed dissatisfaction with it. The proviso is intended to remedy this defect in common law. Restatement of the Law, Vol. III, Section 360.

A deed conveying real estate to a tenant for life, remainder to his children living at the time of his death, with a provision that the tenant shall have full power to sell and convey the premises, if in his judgment it is advisable to do so and the benefit of his children at the time demands it, and providing further that the provision above stated shall never be construed into a power to mortgage or in any other manner to encumber the premises, creates a vested remainder in the children living at the time of the death of the tenant. Ashbaugh v Wright, 152 M 57, 188 NW 157.

502.70 POWERS OF CREDITOR OF DONEE.

Amended by L. 1947 c. 206 s. 1.

This section states the right of creditors of a donee to reach the property covered by the power. At common law, courts of law never subjected such property to claims of the donee's creditors. Courts of equity followed the same rule so long as the donee did not exercise the power. But when the donee was authorized to appoint the property covered by the power to himself, which is the description of a general power, and the donee made an appointment to a person who was not a purchaser for value including a creditor, courts of equity subjected the appointed property to the claims of the donee's creditors to the extent, and only to the extent, that the donee's other property available for payment of creditors was insufficient for such payment. The first sentence adopts this equitable rule and applies it even though no appointment has been made, following other states in this respect. The second sentence is self-explanatory. The third sentence is merely declaratory of

the equitable rule at common law, but is inserted to show that the rule of the first sentence applies even if an appointment has been made. Restatement of the Law of Property, Vol. III, Sections 327 to 331.

Where testator provided in his will that his wife was to have one-third of the crop of a certain farm or that she could sell the property, retaining a portion of the proceeds, and it appeared from all the surrounding circumstances and the will itself that the testator intended that the wife should elect at the time of his death or of probate which course she would pursue, by accepting one-third of the crop for a period of years after her husband's death she made her election and was precluded from claiming thereafter a right to dispose of the property. Stucky v Buchholtz, 198 M 445, 270 NW 141.

502.73 RIGHT OF ALIENATION SUSPENDED.

This section follows the rule of the common law as to the time from which the permitted period of suspension is to be computed. Restatement of the Law of Property, Tentative Draft No. 14, Sections 390, 391.

General power of appointment by will; rule against perpetuities. 3 MLR 134.

Suspension of the power of alienation. 9 MLR 314.

502.76 REVOCATION.

With certain exceptions a principal named in a power of attorney may revoke such an instrument at his mere pleasure, although the agency may be expressly declared to be irrevocable; but when the authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of a security, the power is irrevocable, whether so expressed or not. Buffalo Land Co. v Strong, 91 M 84, 97 NW 575.

Power to revoke a trust without express provision therefor. 17 MLR 230.

Rights of subsequent creditors in corpus of trust fund set up by debtor reserving life estate and general power of appointment. 19 MLR 328.

Termination and release of powers of appointment. 20 MLR 448.

Reservation of power of sale. 23 MLR 683.

502.77 IF PART OF SECURITY.

The inflexible rule "once a mortgage always a mortgage," and the doctrine where a deed absolute in form may be declared a mortgage if it was so intended, are an operation wholly independent of the statute of frauds; and however accurate the concept of the modern mortgage as mere lien or security, the power of sale, if any, is "part of the security" and may be exercised without judicial aid through foreclosure under power. Hatlestad v Mutual Trust, 197 M 643, 268 NW 665.

Is a mortgage only a power of sale. 15 MLR 147.

502.78 ABSOLUTE POWER OF DISPOSITION.

Gifts in default of appointment. Restatement of the Law of Property, Vol. III, Chapter 25, Sections 367, 368, and 369, pp. 2030 to 2045.

This section is designed to give effect to home-made wills in accordance with the probable intent of testators. Laymen often think that a devise by A to B for life with power to dispose of the property at his death, is a complete disposition of the property. A strict construction would find a reversion in A's heirs or residuary devisee, subject to the power in B, and if B died without disposing of the property it would be in A's heirs, or residuary devisee. By force of this section, B would have the complete property from the start. This result can be avoided in drafting by a limitation disposing of the property in case B does not dispose of it. Such a limitation clearly manifests an intent that B is to have a power and not complete property.

Under Minnesota Statutes 1941, section 502.09 (repealed), in a case where, as here, there is no express trust, a grant or devise of land for life with power of dispostion with remainder over creates, so far as the life tenant and the remaindermen are concerned, a conventional life estate coupled with a power of disposition with a remainder over, and, so far as creditors, purchasers, and encumbrancers of the life tenant are concerned, a fee simple. Beliveau v Beliveau, 217 M 235, 14 NW(2d) 360.

In the case of an active trust for life, and on the death of the life beneficiary to make title to a remainderman, the trust is executed, on the death of the life beneficiary, into a legal estate in the remainderman without the necessity of a conveyance from the trustee. Zuckman v Freiermuth, 222 M 172, 23 NW(2d) 541.

Where a testatrix willed the residue of her property to her stepsister for life with full power of alienation "for her own comfort, use, and enjoyment in sickness or in health" the remainder upon her death to go to a friend, there was an absolute power of alienation by virtue of Minnesota Statutes 1941, section 502.13; and under section 502.09 the life estate was changed into a fee absolute as respects the rights of creditors of the donee to the extent of the amount of the claims of such creditors allowed by the probate court and is subject to administration in the probate court. Riese v Park, 222 M 444, 24 NW(2d) 831.

Execution of powers; life estate with a power to dispose of the fee and to use the principal is not a fee simple. 7 MLR 66.

Life estate with absolute power of disposal. 18 MLR 488.