QUINNIPIAC PROBATE LAW JOURNAL

VOLUME 26 2013 NUMBER 3

OLD DOCTRINE MISUNDERSTOOD, NEW DOCTRINE MISCONCEIVED: DECONSTRUCTING THE NEWLY-MINTED RESTATEMENT (THIRD) OF PROPERTY'S POWER OF APPOINTMENT SECTIONS

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Abstract

The United States Constitution is quickening into an organism with common law attributes, while state common law as enhanced by equity, once a principles-based regime, is suffocating under the weight of layer upon layer of partial, hyper-technical codifications. Major players in the codification movement are the Uniform Law Commission and The American Law Institute. The latter drafts model statutes, while the former drafts legislation, that, when enacted into law by the states, partially codifies or fills perceived gaps in assorted corners of state common law, as that body of law has been enhanced by equity. The Institute doctrinally supports the Commission's efforts via the serial revision of myriad law restatements. Coordinating the entire codification process is a small cadre of academics, some of whom are non-practicing lawyers. One influential cadre member involved in the crafting of the power of appointment sections of the newly-minted Restatement (Third) of Property (Wills and Other Donative Transfers), for example, has had minimal experience practicing in the areas of the law he would presume to reform.[1] Those sections are the

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[1] See trial testimony of Yale Law School Professor John H. Langbein in *Shelton v. Tamposi*, No. 2007-2109, at 6 (Strafford Cnty. Prob. Ct. Dec. 2009), where he stated, "I don't practice law. I'm an academic and a scholar, a writer, and I don't want to practice law."

subject of this Article. The focus, however, is ultra-narrow and deep, deep into the weeds: I critique their *quality*. My conclusion: The coverage of power of appointment doctrine in the prior two property restatements was generally superior.

I. INTRODUCTION

Throughout the 19th century and into the early part of the 20th century, the foundation of the American legal system was state common law as enhanced by equity, not statutory law. It was an aggregation of cross-pollinating principles-based regimes, each operating within reliably fixed state and federal constitutional boundaries, but each otherwise free, in keeping with the Anglo-American common law tradition, to develop over time creative ways for private parties to employ the tools of agency, contract, and trust in the private allocation and administration of property rights. The trusteed mutual fund, a state common-law invention, particularly comes to mind.[2] While the common law regimes would show themselves at times to be unruly,[3] their applications were more or less comprehensible and predictable to both laymen and lawyers. The "law" was the product of a gradual evolution of custom and practice, nudged only by the occasional judicial decision and ad hoc statute.

Is this a caricature of the way things were jurisprudentially in the good old days? Perhaps—still, it captures the gist of the way it was up until the 1930s, at least on this side of the Atlantic. And then, something strange began to happen. The U.S. Constitution began morphing into a free-ranging living thing with common law attributes, while the common law began to fossilize under the weight of layer upon layer of hyper-technical and poorly-drafted partial codification.[4] As an example of the former process, one need only look to Chief Justice John Roberts' tax-based reasoning in the decision upholding the constitutionality of the Affordable Care Act (commonly re-

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[2] *See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U. J.L. & BUS. 473 (2007) [hereinafter *Publicly-Traded Open End Mutual Funds*].

[3] *See* HENRY ADAMS, THE EDUCATION OF HENRY ADAMS 500 (Random House 1931). Adams found the huge business trusts of the late nineteenth century charged with "vigorous and unscrupulous energy." *Id.* He found these creatures of equity to be "revolutionary, troubling all the old conventions and values, as the screws of ocean steamers must trouble a school of herring." *Id.*

[4] *See generally* Bradley C. S. Watson, *Progressivism and the New Science of Jurisprudence*, FIRST PRINCIPLES SERIES REPORT, No. 24, (February 24, 2009), *available at* http://www.heritage.org/research/reports/2009/02/progressivism-and-the-new-science-of-jurisprudence; John H. Langbein, *Why Did Trust Law Become Statute Law in the United States*?, 58 ALA. L. REV. 1069 (2007).

ferred to as Obamacare).[5] No one on either side of the divide saw that decision coming. As an example of the latter process, one need only look to the Uniform Probate Code's exhaustively convoluted spousal election provisions.[6] These processes are ongoing. The result: Ever more subjectivity in the judicial application of constitutional principles and ever more confusion in the judicial application of common law principles, each process in its own way rendering the law increasingly arbitrary, capricious, and unpredictable. The marginalization of the common law in the American law school curriculum has not helped matters.[7]

This Article is not about the untethering of the U.S. Constitution, nor is it a general policy discussion of the ongoing process of fossilizing the common law by uniform act and supporting restatement. The focus of this Article is ultra-narrow and deep, deep into the weeds: I critique the *quality* of the power of appointment sections of the newly-minted Restatement (Third) of Property (Wills and Other Donative Transfers), which is referred to in this Article simply as "The Restatement (Third)." My conclusion: The newly-minted power of appointment sections are making a proper muddle of equitable power of appointment doctrine. Professor W. Barton Leach, the godfather of modern power of appointment doctrine, at least on this side of the Atlantic, must be rolling over in his grave.[8] So must Professor John Chipman Gray.[9] The hubris of presuming to sensibly reform great swaths of the common law, as enhanced by equity, in sudden lurches by means of uniform act and supporting restatement is staggering. The hubris of the codifier is not a new phenomenon. As far back as 1828, the New York legislature was busy meddling with remoteness doctrine. Professor John Chipman Gray was not amused:

> Before the year 1828, the forty or fifty volumes of the New York Reports disclose but one case involving a question of remoteness. In that year the reviewers (clever men they were, too) undertook to remodel the Rule against Perpetuities, and what a mess they made

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[5] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593–2600 (2012).

[6] *See* UNIF. PROBATE CODE §§ 2-201 to 2-214 (2010).

[7] *See generally* Charles E. Rounds, Jr., *Bricks without Straw: The Sorry State of American Legal Education*, 24 ACAD. QUESTIONS 172 (2011) [hereinafter *Bricks without Straw*]; Bradley C.S. Watson, *Republics of Conscience, Progressive Law Schools and the Crisis of Constitutionalism*, NATIONAL REVIEW, Oct. 29, 2012, at 37.

[8] *See generally* A. James Casner, *In Memoriam: W. Barton Leach*, 85 HARV. L. REV. 717 (1972).

[9] *See Bricks without Straw*, *supra* note 7, at 176–78 (in part a celebration of the remarkable professional life of Professor John Chipman Gray, 1839–1915, who practiced law full-time at Ropes and Gray, the firm he co-founded, while also working full-time as a law professor at Harvard Law School).

> of it! Between four and five hundred cases [as of 1886] have come before the New York Courts under the statute as to remoteness,—an impressive warning on the danger of meddling with the subject.[10]

It was in the course of preparing the 2013 edition of *Loring and Rounds: A Trustee's Handbook,* that I came to realize that something was structurally and substantively amiss with the Restatement (Third)'s power of appointment coverage.[11] Questions and concerns mounted as I ploughed section by section through the text. I had allocated several days to culling out new strands of content to be woven into the fabric of the *Handbook*; however, the exercise ended up taking much longer. This Article gathers in one place those questions and concerns.

II. THE POWER OF APPOINTMENT: DOCTRINE AND DEFINITIONS

In England, up until the second half of the 17th century, certain interests in land could not be transferred by will. The power of appointment was invented by creative lawyers to circumvent such proscriptions. An owner could "achieve the practical equivalent of a devise by granting the property in the owner's lifetime upon uses to be appointed by the owner's will."[12] Thus, "[t]he exercise of the power was effective, although a devise would have been void."[13] In the 1930s, the modern law of powers of appointment on this side of the Atlantic was still in its infancy.[14] It is now fully developed, or at least it was until recently, in large part thanks to the pioneering work of Professor Leach, who died in 1971.[15] He considered the power of

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[10] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES, APPENDIX G, § 871 (Roland Gray, ed., 4th ed. 1942) (alteration in the original).

[11] Is this the tip of the iceberg, or just some aberrational slip-shoddery going on over there in the power of appointment legal assembly line? That question must be the subject of a future article authored by someone else, if it is to be authored at all. Also, whether the sections are salvageable is beyond the scope of this Article. One thing is for certain, however: These sections would have benefited from the services of a proofreader. Take the section of the Restatement (Third) that is devoted to the intersection of powers of appointment and contract, namely section 21.1. The caption reads "Enforceability of Contract to *Appoint* a Presently Exercisable power." (emphasis added). It should read contract to *exercise*, not to appoint. A power is exercised. It is the subject property that is appointed. In the trust context that would generally be the property to which the trustee has the legal title. The identical error is repeated in the captioning of section 21.2, which deals with contracts to exercise powers that are not presently exercisable.

[12] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS Scope of Division VI (2011).

[13] *Id*.

[14] *See* Casner, *supra* note 8, at 718.

[15] *Id.*

appointment to be "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out."[16]

Here are the basic outlines of power of appointment doctrine: Take a simple grant of legal estates in a single parcel of land, such as a grant of a legal life estate and a legal remainder. A personal power granted to X in the instrument of conveyance to divert the legal remainder from the designated remainderman to, say, X's issue would be an example of a power of appointment. Had the land been entrusted, a trust term authorizing X to direct the title-holding trustee to dispose of the land in a way that would extinguish the property interests of the expressly-designated equitable quasi remaindermen would be an example of a non-fiduciary equitable power of appointment. In the case of a property transfer other than to a trustee, the transferor is the donor of the power. In the case of entrusted property, it is the settlor who is the donor of the power. X in each case is the donee of the power. 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."[17] All other nonfiduciary powers of appointment are nongeneral.[18] A nongeneral power is sometimes referred to as a special or limited power of appointment.[19] The power of appointment is structurally as elastic as the contract and the trust.

For purposes of this Article, a "legal power of appointment" is a power of appointment that is created incident to a clutch of legal interests, such as a legal life estate in realty and its associated legal remainder. Those interests are the product of the fee having been "cut across" into successive interests.[20] "But they are all parts of the

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[16] Ira Mark Bloom, *How Federal Transfer Taxes Affect the Development of Property Law*, 48 CLEV. ST. L. REV. 661, 664 (2000) (internal quotation marks omitted) (citing W. Barton Leach*, Powers of Appointment*, 24 A.B.A. J. 807, 807 (1938)).

[17] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3(a) (2011).

[18] *Id.* § 17.3(b).

[19] The Restatement (First) of Property section 320(2)(a) (1940), had defined a special power as one that could "be exercised only in favor of persons, not including the donee [or his estate], who constitute a group not unreasonably large . . . ." Expansively-drawn powers, such as the power to appoint to anyone in the world except the power-holder, were thought of as general/special hybrids. *Id.* at cmt. a. Such powers were adjudged so rare that "it would not be useful to state the rules applicable to them in situations where the distinction between general and special powers is significant." *Id.* By the time the Restatement (Second) was promulgated in 1983, however, such powers had become fairly common, as the tax laws were now treating them as nontaxable. In the late 1930s, law professors had been engaged in heated debates between and among themselves over whether the holders of unexercised powers of appointment should be taxed for federal estate and gift tax purposes as if the holders had owned outright the appointive property. For a brief but colorful account of these debates, see Casner, *supra* note 8, at 718.

[20] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 352 (59th prtg. 1923).

same fee . . . ."[21] Thus, in the case of the exercise of a legal power of appointment that is exercisable during the lifetime of the legal life tenant, the legal title to the fee comes to the appointee directly from *both* the legal life tenant and the legal remainderman.

An "equitable power of appointment" is a power of appointment that is created incident to the entrustment of property. Here, the donee of the power exercises the power by issuing a direction to the title-holding trustee.[22]

A "fiduciary power of appointment," is a discretionary power in a trustee to make distributions of trust property. The power is constrained by the fiduciary principle.[23] When a trustee possesses such a power, the arrangement is called a discretionary trust.[24] A power of appointment whose exercise is not subject to fiduciary constraints is a nonfiduciary equitable power of appointment, such as an untrammeled power in a trust beneficiary to appoint the trust property by will.

III. OLD DOCTRINE MISUNDERSTOOD

The law of nonfiduciary powers of appointment has been restated three times now, each time not in the Restatement of Trusts, but in the Restatement of Property. The newly-minted Restatement (Third)'s treatment of the power of appointment, sections 17.1 to 21.3, has a coherence problem attributable, in large part, to a failure to adequately accommodate certain critical differences between how a power of appointment operates incident to a clutch of legal interests and how one operates incident to a trust relationship. True, equity tends to follow the law, but it cannot always do so. This is particularly the case with the power of appointment. The legal power of appointment and the equitable power of appointment are not, and can never be retro-fitted into, full doctrinal clones of one another. This is because in the case of an equitable power, the title to the subject property is in a trustee and not with those who share the beneficial ownership in the subject property. Still, legal scholars are earnestly endeavoring to do just that as part of a larger fool's errand, namely, to fashion a unified theory of the will (a creature of law) and the revocable inter vivos

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[21] *Id.*

[22] *See* CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK § 8.1.1 (2013) [hereinafter ROUNDS & ROUNDS].

[23] *See* Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 541 (1949) (stating that "fiduciaries . . . are subject to the fiduciary principle of loyalty" to their principals).

[24] *See generally* ROUNDS & ROUNDS, *supra* note 22, § 3.5.3.2(a) (2013) (discussing the discretionary trust).

trust (a creature of equity).[25] Presumably, their thinking is that to exempt power of appointment doctrine from the process would be to leave too much hanging out. The admonition, "first, do no harm," however, should apply to the law reformer as well as to the physician. What follows are twenty-seven examples, presented in two parts, of how the reformers of power of appointment doctrine have failed to heed the admonition.

A. Example #1: But Power of Appointment Can Be Created by Declaration, Not Just by Transfer.

The Restatement (Third)'s overhaul of power of appointment doctrine gets off to an inauspicious start by asserting that a power of appointment is created by a *transfer* that manifests an intention to create a power of appointment.[26] Good as far as it goes. But what about the declaration of trust with a power of appointment feature? For an enforceable declaration of trust to arise, all the prospective settlor need do is declare himself or herself trustee of the property to be entrusted. There is no need to transfer the property from the owner to a straw man, and then from the straw man back to the owner, as trustee.[27] This failure to take into account trust declarations is more evidence that the initial drafts of the Restatement (Third)'s power of appointment sections dealt only with powers that were incident to legal estates, and that the trust-related content was tossed in as an afterthought in the final stages of production. Had the legal and the equitable power of appointment been seriously treated as separate constructs *ab initio*, it is unlikely that the declaration of trust would have fallen between the cracks.

B. Example #2: But Equity's Quasi Remainder Incident to the Trust Relationship is Autonomous.

The Restatement (Third)'s failure to accommodate critical law/equity distinctions is unfortunate. Restatements are supposed to clarify the background law, not muddy it. Take, for example, the Restatement (Third)'s coverage of the equitable quasi remainder.

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[25] *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1113 (1984). For an argument detailing why crafting a unified theory of the will and the will substitute, particularly the revocable inter vivos trust, is a fool's errand, see generally ROUNDS & ROUNDS, *supra* note 22, section 8.15.55.

[26] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 18.1 (2011).

[27] *See* ROUNDS & ROUNDS, *supra* note 22, § 3.4.1 (confirming that the services of a straw man need not be enlisted for an enforceable declaration of trust to arise).

1. *But an equitable power to appoint principal is over the entrusted property itself.*

In the case of an equitable power of appointment, title to the appointive property is lodged in the trustee, at least until the power is exercised. The Restatement (Third) loses sight of this core principle, as evidenced by the following illustration:

> Donor died, leaving a will that devised property in trust, directing the trustee to pay the net income to Donee for life, then to distribute the trust principal to such persons as Donee shall appoint. Donee has a power of appointment over the remainder interest in the trust.[28]

The problem, however, is that there is, strictly speaking, no such thing as a remainder incident to a trust relationship; the legal title to the entrusted property is in the trustee.[29] Unlike a legal future interest, no such equitable future interest requires a previous estate to support it.[30] In other words, the packets of equitable property interests thrown off by a trust may be independent and discrete. The interests may even be separated by time gaps, because legal title to the subject property, as previously noted, is safely in the trustee. For that reason, Professor Gray over a century ago was wont to refer to the equitable property interest of the person designated to receive the legal title to the trust property from the trustee upon the trust's termination as a quasi remainder, a practice I continue in this Article.[31]

The second sentence of the illustration should have read either that the Donee has a power of appointment over the property to which the trustee had the legal title, or that the Donee has a power to designate equitable quasi remaindermen. But upon the death of the Donee, there is no property interest in existence comparable to a legal remainder that could be the subject of such an appointment. In this particular fact pattern there is only the vested equitable reversion, which is in the settlor or his successors in interest, and the entrusted property itself, title to which is in the trustee.[32]

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[28] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. d, illus. 1.

[29] GRAY, *supra* note 10, § 324 (discussing quasi remainders).

[30] *Id.*

[31] *Id.*

[32] *See* ROUNDS & ROUNDS, *supra* note 22, § 4.1.1 (discussing the equitable reversion), § 3.5.1 (discussing the trustee's legal estate).

The comment in which the illustration is nestled has the following sentence, which is unsupported by any commentary in the reporter's note: "The appointive property is the remainder interest."[33] If the suggestion is that the equitable quasi remainder is the appointive property, then the sentence would seem nonsensical. If the suggestion is that the entire trust corpus, legal title to which was in the trustee, shall be deemed a remainder under these special circumstances, then there is probably some logic to it. A plain reading of this sentence could support either interpretation, but which is intended? Here is one restatement comment that is desperately in need of some attention in the reporter's note.

> 2. *But the creditor of a donee of an equitable reserved general testamentary power of appointment would have access to the property titled in the trustee.*

The Restatement (Third)'s failure to appreciate or acknowledge that the equitable quasi remainder and the legal remainder are imperfectly analogous property interests surely accounts for its muddled coverage of the creditor-accessibility of property subject to a reserved testamentary power of appointment. Section 22.2 provides that "[p]roperty 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."

The Restatement (Third), however, muddles its explanation of the mechanics of reaching the entrusted appointive property. It suggests in an illustration supporting section 22.2 that on the donor-donee's death, the claims against the donor-donee's estate "can be satisfied *out of the remainder* . . . to the same extent as if the Donor-Donee owned the remainder interest at Donor-Donee's death."[34] Because the *full legal title* to entrusted appointive property is in the trustee, it is the entire legal interest in the hands of the trustee *at the time of the Donor-Donee's death*, not just the equitable quasi remainder that is vulnerable to the claims of the Donor-Donee's postmortem creditors. That the underlying trust property itself is vulnerable to the claims of the donor-donee's creditors is buttressed by the wording of section 22.2: It is the property that is "subject to a general power of appointment" that is vulnerable to external claims. There is nothing stated about going after the equitable property interests. Nor can there be a legal remainder in the traditional sense; full legal title to the entrusted appointive property, as stated, is in the trustee. The bottom line: the Restatement (Third) appears to have conflated and

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[33] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. d.

[34] *See id.* § 22.2, illus. 4.

confused reaching entrusted property subject to an equitable power of appointment and attaching the equitable property interests that are thrown off incident to the trust relationship itself.

C. Example #3: But Equitable Reversions Become Possessory Incident to the Imposition of a Resulting Trust.

A legal reversion does not become possessory incident to the imposition of a resulting trust. The holder of a legal reversion in a parcel of real estate shares the legal title with the life tenant and the remainderman.[35] There is no title-holding trustee in the picture.

In the case of an equitable reversion incident to an express trust relationship, the legal title to the subject property is in the trustee. If the settlor or the settlor's probate estate is entitled by operation of law, i.e., pursuant to the imposition of a resulting trust, to a return of the trust property should the trust fail, the settlor possesses an equitable reversionary interest. Such an interest itself is a property right. Moreover, this right is vested in the settlor from the trust's inception whether or not the trust ever does fail.[36] Reversionary interests, whether legal or equitable, are always vested.[37]

The resulting trust is equity's procedural mechanism for getting title from the express trustee to the owner of the equitable reversion, such as in the event of the failure of the express trust.[38] Take an express trust which terminates upon the demise of the current beneficiary but which lacks a designated quasi remainderman. Upon the death of the current beneficiary, the express trustee morphs into a resulting trustee. The express trustee would be unjustly enriched were he to keep the property. Equity compels him to transfer the legal title back to the settlor, or to the settlor's personal representative (executor or administrator) should the settlor be then deceased. That the Restatement (Third) ignores the entirety of this critical equitable procedural doctrine is what makes its treatment of powers of appointment so incoherent. Here are some of the more obvious pockets of incoherence.

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[35] HOLMES, *supra* note 20, at 325, 352.

[36] JOHN MOWBRAY ET. AL., LEWIN ON TRUSTS ¶ 5–66 (17th ed. 2000) (England).

[37] GRAY, *supra* note 10, § 113.

[38] *See* ROUNDS & ROUNDS, *supra* note 22, § 4.1.1.1 (a general discussion of the resulting trust and the equitable reversionary interest).

1. *The very definition of a power of appointment is incoherent.*

The Restatement (Third) muddles the very definition of a power of appointment. Under the Restatement (Second) of Property (Donative Transfers), a power of amendment, revocation, or termination among other powers qualified as a power of appointment.[39] The Restatement (Third) deletes a power of termination from the list.[40] Here is the reason given in the reporter's notes for the deletion: A power of termination "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."[41] Really?

Let's apply this proposition to the classic trust formula: A to B, for C for life, then to D. X is granted an equitable power to terminate D's equitable interest. D's equitable interest vests *ab initio*, subject to being divested upon X's exercise of the termination power. In the event of exercise, a resulting trust would be triggered, and A's vested equitable reversionary interest would become possessory. But does X not then also possess a power to shift an "ownership" interest between D and A? This seems different from the mere power to terminate C's interest and, in so doing, open the way for D's interest to become possessory by acceleration. No wonder the Restatement (First) and Restatement (Second) had deemed a power of termination to be a power of appointment, as does section 2041 of the Internal Revenue Code. For tax purposes, a retained power to terminate would be taxable, whether exercise triggers an equitable acceleration or an equitable reversion.[42]

2. *The coverage of the fate of unappointed trust property should the trust fail is incoherent.*

The Restatement (Third)'s tenacious aversion to acknowledging applicable resulting trust doctrine comes through loud and clear in the sections devoted to unexercised or ineffectively exercised powers of appointment.[43] The result is an unhelpful dearth of context, particularly when it comes to following chains of title. Take, for example, section 19.22(b), which reads in part, "but if the donee released

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[39] *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 11.1 cmt. c (1986).

[40] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. e (2011).

[41] *Id.* § 17.1, reporter's note to cmt. e.

[42] *See* Lober v. United States, 346 U.S. 335, 336–37 (1953).

[43] *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 25.2 (although the title to the sections is *Reversion or Remainder*, the resulting trust is mentioned once, and only in passing).

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." The phrase "passes under a reversionary interest" is inappropriate in the trust context. What actually happens is that the legal title to the unappointed property passes from the express trustee, now a resulting trustee, back to the settlor-donor or his personal representative upon a resulting trust such that the equitable reversion, which had vested *ab initio*, flowers into possession.[44] Nothing is passing from the express trustee under, over, or in an equitable reversionary property interest.

3. *The description of power-in-trust mechanics is incoherent.*

The *generic power-in-trust doctrine* works as follows: Assume a nongeneral equitable power of appointment over a defined and limited class of permissible appointees has expired without the donee having exercised it. For whatever reason, there is no provision-in-default-of-exercise in the trust instrument that granted the power. Under the power-in-trust doctrine, the donee of the power is deemed to have held the power itself in trust for the benefit of the permissible appointees with an attendant quasi-fiduciary obligation to exercise it.[45] If the power is not exercised, upon expiration of the power, title to the appointive property passes upon a resulting trust from the express trustee back down the line to the settlor-donor of the power, or to the probate estate of the settlor-donor if the settlor-donor is not then living.[46] The settlor-donor or the settlor-donor's estate, as the case may be, then holds the appointive property upon a constructive trust for the benefit of the permissible appointees back up the line. The constructive trustee is then compelled by equity to transfer legal title to them, usually per capita.[47] Otherwise, the holders of the equitable reversion would be unjustly enriched by the donee's nonfeasance.

The *mandatory-power-in-trust doctrine* is a variation on the entrusted-power theme. In the absence of a taker-in-default provision in the power-granting trust instrument, an equitable nongeneral

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[44] GRAY, *supra* note 10, § 113 ("All reversions are vested interests. From their nature they are always ready to take effect in possession whenever and however the preceding estates determine."). In the case of an equitable reversion that has become possessory, legal title to the entrusted property somehow still needs to get from the trustee to the holder of the equitable reversion. That is where the resulting trust comes in. It is essentially a procedural equitable device for divesting the express trustee of a failed trust of the legal title to the subject property. *See generally* ROUNDS & ROUNDS, *supra* note 22, § 4.1.1.1 (the resulting trust as an equitable title-transfer mechanism).

[45] *See* RESTATEMENT (FIRST) OF PROP. § 367 cmt. c (1940).

[46] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 24.2 cmt. b (1986).

[47] *Id.*

power is considered mandatory such that "upon the donee's wrongful failure to exercise it the court will make an appointment in the donee's place by ordering a distribution among the defined limited class of objects."[48] No resulting trust is imposed. The title to the appointive property would pass directly from the express trustee to the permissible appointees. Note here that the fraud-on-a-special-power doctrine generally addresses wrongful affirmative exercises of nongeneral powers, not the wrongful failure to exercise.[49]

The Restatement (Second) confirmed, although somewhat inartfully, that the power-in-trust doctrine relies on two equitable procedural devices, the resulting trust and the constructive trust, to effect a shuttling of the legal title to the appointive property back down and then back up the line: "The donor or the donor's estate receives the reversionary interest in the property as a consequence of the breach of trust, and therefore . . . the reversionary interest is held by the donor or the donor's estate upon a constructive trust for the objects of the power."[50] Unfortunately, the Restatement (Second) neglected to point out that the vested equitable reversion in the donor (or his personal representative) is rendered possessory by means of the imposition of a resulting trust. Also, it is the appointive property itself, not the equitable reversionary interest, that is the subject of the constructive trust.

For whatever reason, the Restatement (Third) leaves out of its explanation of the procedural mechanics of the power-in-trust doctrine any mention whatsoever of the equitable reversion, let alone of the resulting trust.[51] To make matters worse, it conflates the generic power-in-trust doctrine and its variant, the mandatory-power-in-trust doctrine, although their procedural mechanics are very different.[52] As noted above, no resulting trust is imposed under the variant doctrine.

These critical errors and omissions in large part account for the Restatement (Third)'s ultra-oblique and sketchy explanation of the context in which the *implied-gift-in-default* rationale has evolved.[53] The implied-gift-in-default is a third rationale for getting appointive property into the hands of the permissible appointees, as-

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[48] *Id.*

[49] *See generally* ROUNDS & ROUNDS, *supra* note 22, § 8.15.26 (the fraud on a special power doctrine).

[50] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 24.2 cmt. b.

[51] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.23 cmt. b (2011).

[52] *See id.*

[53] *See* RESTATEMENT (FIRST) OF PROP. § 367 cmt. b (1940); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 24.2 cmt. a; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.23(b).

suming that there is no express taker-in-default provision in the instrument that granted the power and that the class of permissible takers is sufficiently defined and limited.[54] The logic of the implied-gift-in-default is not derived from the fiction that someone, somehow, holds a nongeneral power in trust. Rather, it is derived from the inference that the grantor of the power intended the permissible appointees to benefit from the appointive property, come what may. "His mind is focused on having them receive the property through an appointment by the donee, but if this particular method of transfer fails, there is apparent a fundamental intent of the donor to pass the property to the objects . . . ."[55] It is this third rationale, the implied-gift-in-default, that the restatements, including the Restatement (Third), have endorsed.

4. *But equitable future interests are also property.*

The Restatement (Third)'s failure to appreciate the intersection of resulting trust procedural doctrine and equitable future interest property doctrine comes through loud and clear when it purports to reform in one fell swoop the substantive law of future property interests:

> The reason for categorizing future interests as either reversions or remainders is that the legal profession, especially in describing future interests created in a trust, is accustomed to referring to a future interest retained by a transferor as a 'reversion' and a future interest created in a transferee as a 'remainder.' In addition, the Restatement Third of Trusts refers to a resulting trust as a 'reversionary, equitable interest'. . . and the Restatement Third of Restitution and Unjust Enrichment variously refer to property as 'reverting' or 'reverting back' to the transferor or the transferor's estate or successors in interest in certain cases.[56]

Where to begin? First, a resulting trust is not a property interest. It is an equitable procedural device for moving title from the express trustee to the possessor of the equitable reversion.[57] The resulting trust, itself, is not the reversion.

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[54] *See* RESTATEMENT (FIRST) OF PROP. § 367 cmt. b; RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 24.2 cmt. a; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.23(b).

[55] RESTATEMENT (FIRST) OF PROP. § 367 cmt. b.

[56] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 25.2 cmt. e.

[57] *See generally* ROUNDS & ROUNDS, *supra* note 22, § 4.1.1.1 (the resulting trust as an equitable title-transfer mechanism).

Second, an equitable future property interest is not created "in a trust." It is not the entrusted property title to which is in the trustee. An equitable future property interest is property that is created incident to the trust relationship itself. A share of a trusteed mutual fund is an equitable property interest.[58] Legal title to the fund itself is in the trustees.[59]

Third, the always-vested equitable reversion and the sometimes vested equitable remainder are critically different property concepts, largely because of the former's inconvenient linkage with the resulting trust. In other words, far more is keeping the equitable reversion and the equitable remainder apart than just the collective stodginess of unenlightened trust lawyers.

Could it be that equitable future property interests are not even intended to be covered in the Restatement (Third)? It is hard to tell, but it would not be surprising if they were beyond its contemplated scope as coverage of equitable property interests years ago "dropped out" of the standard American law school curriculum and soon thereafter "became unfamiliar to American lawyers, including law professors."[60] But if equitable future property interests are intended to be covered in the Restatement (Third), then its earnest obsession with simplification, with purging the law of future property interests of its few remaining feudal vestiges, may be doing more conceptual harm than good.[61] This is because the cleansing exercise may be perversely mucking up, and in the process profoundly obfuscating, critical and still-prevailing differences between the two foundational *property* regimes of the Anglo-American legal tradition: the legal and the equitable. Here is one such difference: In the case of a non-possessory *legal* reversion, a piece of the fee is in the holder of the reversion.[62] In the case of a non-possessory *equitable* reversion, full legal title to the subject property is in the express trustee, who may

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[58] *See Publicly-Traded Open End Mutual Funds, supra* note 2, at 476.

[59] *See id.* at 473.

[60] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, reporter's note *e* (2011).

[61] The Restatement (Third) states in its Introductory Note:

> The system of classification of present and future interests originated in feudal patterns of land holding and governmental finance that has been obsolete for centuries. This Restatement simplifies classification for its present purposes. The principal function of classification today is descriptive—a short-hand way of describing an interest that has specific characteristics.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS, Chpt. 25, Introductory Note.

[62] *See* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 104 (2nd ed. 1988) (discussing the quantum theory of legal estates).

pass good title to a BFP (good faith purchaser for value) in derogation of the equitable reversion.[63]

Here is another critical difference: A legal remainder must be supported by a prior estate, such as a legal life estate.[64] This is not true in the case of an equitable quasi remainder.[65] This ground I have already gone over several times.

Let us assume that equitable reversions and equitable remainders are, for whatever reason, simply not subjects of the Restatement (Third), at least not directly. In other words, on its face, section 25.2, which compares and contrasts the reversion and the remainder, is only about legal property interests. If one assumes that the adjective "legal" in the commentary to section 25.2 means "as opposed to equitable," then the assertion that no *legal* consequences in property law flow from maintaining the reversion and remainder as separate future interest classifications would seem to confirm that their equitable counterparts, *particularly the property attributes of those counterparts*, are the domain of some other restatement, one that has yet to see the light of day. This is also supported by the absence of a trust fact pattern in any of the twelve illustrations in the section 25.2 commentary.[66] But as "equity follows the law," the equity

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[63] *See generally* ROUNDS & ROUNDS, *supra* note 22, § 8.15.63 (discussing the BFP in the trust context).

[64] GRAY, *supra* note 10, § 8 ("The particular estate and the remainders form an unbroken series. Each remainder is said to be supported by the preceding estates.").

[65] *Id.* § 324 (discussing equitable quasi remainders).

[66] Congress, for its purposes, has had no problem conflating the equitable reversion and equitable remainder. The term "reversionary interest," as employed in section 2037(a)(2) of the Internal Revenue Code, encompasses both equitable reversions and equitable remainders expressly reserved by settlors. Under section 2037(a), the value of property transferred by a decedent during the decedent's lifetime is includible for federal estate tax computation purposes in the gross estate of the decedent, provided *both* of the following conditions are met: (1) possession or enjoyment of the property can be obtained only by surviving the decedent; and (2) the decedent had a reversionary interest in the property, the value of which immediately before death exceeded 5 percent of the value of such property.

For purposes of section 2037, the term "reversionary interest" in part includes a possibility that property transferred by the decedent "may return to him or his estate." It is this language that picks up contingent remainders expressly reserved by settlors, as well as reversions.

Finally, none of this should be confused with the situation where a settlor impresses a trust on a partial *legal* interest, such as on a *legal* term of years, but reserves the *legal* reversion. "If the subject matter of a trust was a partial interest in certain property (for example, a [*legal*] term of years), and consequently the settlor retained a [*legal*] reversion, the settlor may secure protection of the [*legal*] reversionary interest." GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 42 (Rev. 3d ed. 2007).

property regime is eventually bound to feel the ripple effects of all this slapdash "law" reform.[67]

D. Example #4: The Agency Analogy Misapplied to General Power of Appointment Doctrine.

Inherent in an equitable *nonfiduciary* power to revoke a trust and take ownership of the subject property is the power to constructively transfer such a power *irrevocably* via an exercise of the power in further trust.[68] The Restatement (Third) falsely analogizes such a constructive transfer to a delegation of the power of revocation.[69] Rather, such a constructive transfer is analogous to an irrevocable transfer by assignment of the entrusted property itself.[70] "A presently exercisable general power of appointment is an ownership-equivalent power."[71] An agency, on the other hand, is revocable at the will of either party to it. Also, a discretionary agency imposes fiduciary duties on the agent.

E. Example #5: But the Constructive-Receipt-and-Assignment Doctrine Would not Validate an Impermissible Direct Appointment.

Assume a *permissible appointee* constructively receives appointive property incident to the exercise of an equitable nongeneral power of appointment. Possession, however, remains back with the trustee. The permissible appointee is free to turn around and assign the legal property interest to an impermissible appointee without running afoul of the fraud on a special power doctrine.[72] The express trustee is merely acting as the ministerial agent of the permissible appointee/assignor in honoring the assignment. There is no fraud on the special power.[73] The Restatement (Third) is in accord, although its explanation is flawed: "The appointment directly to the impermissible appointee in this situation is effective, being treated for all purposes as an appointment first to the permissible appointee, followed

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[67] *See* Charles E. Rounds, Jr., *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 U. TOL. L. REV. 673, 691–92 (2011) (explaining the jurisdictional underpinnings of the specific maxim "equity follows the law.").

[68] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.13 cmt. f; *see also* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 19.2.

[69] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.13 cmt. g.

[70] *See* Marx v. Rice, 67 A.2d 918, 920–21 (N.J. Super. Ct, Ch. Div. 1949) (In the case of a *general* inter vivos power of appointment, such as a right of revocation, the donee of the power is the constructive owner of the subject property, not just some kind of quasi agent of the donor of the power.).

[71] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f(1).

[72] *See generally* ROUNDS & ROUNDS, *supra* note 22, § 8.15.26 (the fraud on a special power doctrine).

[73] *Id.*

by a transfer by the permissible appointee to the impermissible appointee."[74] The appointment itself is not to the impermissible appointee. Not even indirectly. The appointment of the legal title is to the permissible appointee. The *subsequent* assignment of the legal title is to the impermissible appointee. It is only mere possession that is the subject of a direct transfer from the express trustee to the impermissible appointee.

F. Example # 6: Glitching Basic Good-Faith Purchase Doctrine.

As a general rule, an impermissible appointee of an equitable nongeneral power of appointment may transfer to a BFP good title to the appointed property.[75] The Restatement (Third)'s explanation of how the rule actually works in practice is inaccurate. Here is the description: "If an appointee of an ineffective appointment transfers the appointive assets to a purchaser for value, the purchaser is protected from liability, unless the purchaser knows or has reason to know that the appointment was in violation of the donee's scope of authority."[76] Absent special facts, the issue is not whether the purchaser incurs liability by taking the legal title from an impermissible appointee, but whether equity will compel the purchaser to disgorge the property by means of a conveyance of legal title back to the trustee. This is particularly so in the case of a good faith transferee who furnishes no value in return. All he or she would need to do is relinquish the title. The Restatement (Second) of Property had it right: The transfer to a BFP of title to impermissibly-appointed property is generally *effective*.[77] "The equitable right to upset the transfer, like other equitable interests, cannot be asserted against a bona fide purchaser . . . ."[78]

Now, it is possible that the phrase "protected from liability" is an oblique and fragmentary reference to the unfortunate concept of "liability in restitution" which underpins the newly-minted Restatement (Third) of Restitution and Unjust Enrichment: "A person who is unjustly enriched at the expense of another is subject to liability in restitution."[79] But where is the commentary linking the two Restatement (Third)s?[80] The Restatement (First) of Restitution quite sensibly

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[74] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.15 cmt. f.
[75] *Id.* § 19.18.
[76] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.15 cmt. f.
[77] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 20.4.
[78] *Id.* at cmt. a.
[79] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (2011).
[80] *See id.*

refrained from characterizing the generic obligation to make restitution as a liability.[81]

G. Example #7: But the Donee of an Equitable General Inter Vivos Power of Appointment is Deemed to Have Full Legal Ownership of the Entrusted Property.

The Restatement (Third) provides that the donee of an accepted general inter vivos power of appointment may irrevocably release the power in whole or in part, unless the donor of the power has effectively manifested an intent that it not be releasable.[82] The Restatement (Second) does as well.[83] Why the holder of an equitable general inter vivos power of appointment, which is tantamount to an absolute ownership interest in the subject property, may be restrained from alienating it other than by exercising it into oblivion is not explained.[84] The Restatement (First) of Property provided, quite sensibly, that such a power is releasable even if the donor had expressly provided in the power grant to the contrary.[85] The analogy of a nonreleasable equitable general inter vivos power of appointment to a spendthrifted equitable interest under a trust, mentioned in the Restatement (Second), is a false one.[86] It should be to a *legal* alienation restraint, which the law has traditionally disfavored in principle.

H. Example #8: How Would One Actually Go About Releasing an Equitable Power of Appointment?

Delivering a written declaration of release is the preferred way for a donee of a releasable *nonfiduciary* equitable power of appointment to release the power, but to whom? The answer cannot be found by looking to the Restatement (Third) for guidance. The donee should deliver the writing to those who could be adversely affected by an appointment, such as to the takers in default, *and to the trustee*.

In the case of an equitable nongeneral power of appointment, whose class of permissible beneficiaries is limited and defined, it would seem that they should at least receive some kind of notice of the release, they being not only quasi contingent trust beneficiaries,[87]

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[81] THE RESTATEMENT (FIRST) OF RESTITUTION (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

[82] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 20.1 (2011).

[83] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 14.1.

[84] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 20.1 cmt. d.

[85] *See* RESTATEMENT (FIRST) OF PROP. § 334 cmt. b.

[86] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 14.1 cmt. a.

[87] *See generally* UNIF. TRUST CODE § 103(3)(A) (2010) (deeming a permissible appointee to be a trust beneficiary).

but also the ones who would actually be adversely affected *by the release* after all. It is their contingent equitable property rights that are to be extinguished by the release. But from whom should they receive the notice? Presumably from the trustee, the trustee being the fiduciary in the equation, although the Restatement (Third) fails even to flag the issue.

The Restatement (Third), specifically section 20.3, catalogs various methods of releasing releasable powers, none of which seem appropriate when there is a trustee in the picture. In fact there is not a single illustration with an equitable power of appointment release fact pattern, which is yet more evidence that what coverage there is of the equitable power of appointment in the Restatement (Third) may have been an after-thought, and a last-minute one at that.

I. Example #9: How Does One Actually Undo the Exercise of an Equitable Power?

A trust contains the following terms: A (settlor) to B (trustee) for C1 (first income beneficiary) for life, then to C2 for life (second income beneficiary), and upon the death of C2, legal title to the entrusted property shall pass outright and free of trust from B to D (the remainderman). C2 is also granted a nongeneral *inter vivos* power of appointment over the trust property, *subject to C1's equitable life estate*. C2 exercises the power by deed in favor of X while C1 is still alive. Assume it is preordained that C2 survives C1. Can C2 undo the exercise prior to C2's death, legal title to the appointive property still being in the trustee? Or is the exercise irrevocable?

Here is the traditional black letter law: "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."[88] The rule of irrevocability of appointments has its origins in the 1717 English case of *Hele v. Bond*.[89] "When an appointment presently and unreservedly transfers appointive property to an object, the rule of irrevocability derived from *Hele v. Bond* . . . is recognized by American authorities without exception."[90] Now comes the Restatement (Third) and unsettles the doctrine.

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[88] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.7.

[89] Hele v. Bond, [1717] 24 Eng. Rep. 213, 213; *see also* Saunders v. Evans, [1861] 11 Eng. Rep. 611; Fisher v. Shirley, [1889] 43 Ch. 290 (Eng.).

[90] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 15.2 reporter's notes.

1. *But the exercise of a testamentary power of appointment cannot be undone.*

The Restatement (Second) of Property confirms that if C2's power were testamentary, then there could be no exercise until C2 dies, which is when the terms of C2's will speak. Any exercise of a testamentary power of appointment perforce is irrevocable, because the power itself is not exercisable until the donee's death.[91] The Restatement (Third) seems to be in accord, though it is hard to tell for sure. There may be some text missing. Here is what there is: "Because a will does not become effective as a dispositive instrument until the testator dies . . . a testamentary exercise of a power—whether the power is testamentary or presently exercisable—may be revoked or amended by the donee to the same extent as any other provision of the donee's will."[92] A testamentary exercise of a presently exercisable power of appointment may be revoked?[93] Again, once a testamentary power is exercised by will it is too late to revoke the exercise, because the testator is dead and thus unavailable to execute the revocation. Also, some preliminary background commentary on exercises by will of presently-exercisable powers would have been helpful. The revocability of such exercises is difficult enough to grasp.

2. *But what would an exercise by last unrevoked deed look like?*

The Restatement (Third) alludes to a "power that is exercisable by the donee's last unrevoked instrument."[94] No context or example is supplied. It is self-evident that a testamentary power of appointment can only be exercised by the donee's last unrevoked will. But what about an inter vivos power of appointment that is exercisable by the donee's last unrevoked exercise by deed? How would that work in practice? The reporter's notes are of no help.

Take the inter vivos power of appointment. Its terms provide that (1) the interests of the appointees can only become possessory upon the expiration of a prior equitable interest, such as the C1 equitable life estate in the A-B-C1-C2-D entrustment described immediately above, and (2) the power is exercisable by the donee's last unrevoked deed. In this context, the donee's "last unrevoked instrument" would be the last unrevoked deed of inter vivos exercise that was exe-

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[91] *Id.* § 15.2 cmt. c.

[92] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.7 cmt. c.

[93] The language of the Restatement (Second) of Property (Donative Transfers) is less muddled. It speaks in terms of revoking inter vivos the "terms" of a testamentary power exercise rather than revoking the testamentary exercise itself. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 15.2 cmt. b.

[94] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.7 cmt. b.

cuted before the termination of the preceding equitable life estate. This presumption is buttressed by the comprehensive and scholarly reporter's notes to the now-superseded section 15.2 of the Restatement (Second) of Property (Donative Transfers). But we are still left with the question of whether C2's exercise by deed was revocable in the first place. Presumably that would hinge on whether there has been an express reservation of such a right. The Restatement (Third), for example, would deem an exercise "by revocable trust" to be an "exercise by deed," a convoluted fiction that should have been fleshed out with some thoughtful commentary.

J. Example #10: Why Was Coverage of the Hotchpot Calculation in the Context of Fiduciary Powers of Appointment Dropped?

In its usual application to trusts, hotchpot is an equitable device for calculating what the recipients of a final distribution are to receive when the trustee has made prior partial distributions or advancements to one or more of the recipients pursuant to the trustee's fiduciary power of appointment.[95] The device is employed only when the terms of the trust call for offsetting prior partial distributions and advancements.[96] The Restatement (Third) makes no mention of hotchpot in the trust context, which is the context in which the calculation is most likely to be encountered in the real world.[97] The Restatement (Second) of Property, which unfortunately incorrectly suggests that a hotchpot contribution is actual, not notional,[98] at least proffers a trust hotchpot fact pattern:

> [A] by will transfers property to [B] in trust. [B] is given discretion to pay the income and principal from time to time "to such one or more of [A's] issue living from time to time as [B] in [B's] uncontrolled discretion may determine until the death of [A's] surviving [sic] child, at which time [B] shall distribute the trust property to [A's] issue then living, such issue to take per stirpes as though the trust property included all the amounts previous distributed by [B] to [A's] issue, the issue in each per stirpes line being charged with having received their [sic] share [sic] of the previous distributions."[99]

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[95] *See* ROUNDS & ROUNDS, *supra* note 22, § 8.15.51.

[96] MOWBRAY, *supra* note 36, ¶ 28–02.

[97] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.5 cmt. k.

[98] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 21.2 cmt. f.

[99] *Id.* at cmt. f, illus. 12.

K. Example #11: But the Terms *Collateral Power* and *Power in Gross* Do Carry Legal Consequences.

Section 17.3, comment f, of the Restatement (Third), explains the difference between a collateral power of appointment and a power of appointment in gross:

> In traditional terminology, a power of appointment is "collateral" if the donee has no owned interest in the appointive assets. A power of appointment is "in gross" if the donee has an owned interest in the appointive assets separate from the donee's power of appointment, such as when the income beneficiary of a trust has a power of appointment over the remainder interest.[100]

So far so good, although the term remainder in this context is not accurate.[101]

But the comment concludes with an assertion that is neither explained nor buttressed by supporting authority in the reporter's notes: "The terms collateral power and power in gross are descriptive only, and carry no legal consequences."[102] There is a 1990 English pension trust chancery case, *Mettoy Pension Trustees Ltd. v. Evans*, in which the judge said more-or-less the same thing. He described the dual-classification as "of antiquarian interest only."[103] I am not so sure. Consider the following three examples of where it might well be "legally consequential," even today, if a donee of an equitable power of appointment holds it in gross rather than collaterally.

First, a donee/holder of an equitable general testamentary power of appointment in gross may be able to ratify breaches of trust and in so doing eradicate the interests of the takers in default.[104]

Second, it may still be the case in some jurisdictions that property subject to a reserved collateral equitable general inter vivos power of appointment is not subject to the claims of the donee's creditors, whereas if the power were held in gross the property would be subject to the claims.[105]

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[100] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 cmt. f.

[101] *See* GRAY, *supra* note 10, § 324 (because an equitable future interest under a trust lacks a previous estate to support it, legal title being in the trustee, it is analogizing to refer to such an interest as a remainder).

[102] RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 17.3 cmt. f.

[103] Mettoy Pension Trustees Ltd. v. Evans, [1990] 1 W.L.R. 1587 (Ch.) at 1613.

[104] *See generally* ROUNDS & ROUNDS, *supra* note 22, § 8.14.

[105] *See id*. § 5.3.3.1(b.1).

Finally, take an equitable collateral power of appointment. The donee of the power is X. The trustee is Y. Both the equitable life estate and the equitable quasi remainder are in Z. If Y were to transfer the legal title to Z, there would be a merger in Z.[106] One consequence of the merger would be that X's collateral power of appointment would extinguish. Now assume that X's power is in gross. X is, say, both the donee of the power and owner of the quasi remainder. Z is the current equitable beneficiary. Were Y to transfer the legal title to Z, there would be no merger and thus no extinguishment of X's power of appointment in gross.

The terms *collateral power* and *power in gross* are not just descriptive. Their substantive differences can carry legal consequences, as well.

L. Example #12: How Exactly Is the Right to Amend or Terminate an Equitable Power of Appointment Reserved?

The donor of an equitable power of appointment may expressly reserve the right to amend the terms of the power, or to revoke the power altogether.[107] The donor also may reserve such a power *indirectly*. Take, for instance, a revocable inter vivos trust. Pursuant to its terms, following the death of the settlor (the one with the reserved right of revocation), various takers in default are to become holders of various types of powers of appointment over various portions of the trust property. Now, it is self-evident that the donee of a power of appointment can affect its extinguishment by exercising the power completely, such that the subject/appointive property is no longer a trust asset. But is it also possible for the *donor* of a yet-to-be-exercised power of appointment over trust property indirectly to undo the power grant, to effectively call back the power? The answer is yes, provided the *donor* has reserved to himself or herself a superior power of appointment over the very same property.[108] That seems to be the gist of section 18.2 of the Restatement (Third), although it is hard to tell. Here is the text: "The donor of a power of appointment lacks the authority to revoke or amend the power, except to the extent the donor reserved a power of revocation or amendment when creating the power."

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[106] *See id*. § 8.15.36 (the doctrine of merger).

[107] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 18.2 (2011).

[108] The reserved right to revoke a trust is generally superior to powers that become exercisable once the settlor has died for the simple reason that an inter vivos revocation of the trust will cause not only the relationship itself to extinguish but also the powers created incident to that relationship to extinguish with it.

In the trust context, the usual understanding of a power of revocation is a power to revoke the trust itself.[109] The usual understanding of a power of amendment is a power to alter the trust's terms.[110] In each case, however, the power meets the definition of a general inter vivos power of appointment, which, if superior, *encompasses a power to negate other powers*. But a superior reserved limited or testamentary power can also, under certain circumstances, effect the negation by its exercise of other powers. Bottom line: the qualification, *except to the extent that the donor reserved a power of revocation or amendment when creating the power,* should, by implication, encompass the reservation to the *donor* of any kind of superior power the exercise of which could have the effect of negating or altering the terms of other unexercised powers granted by the donor. The Restatement (Third)'s section 18.2 still needs a lot of work.

M. Example #13: Commentary on Exercising Equitable Powers in Favor of Impermissible Appointees Has Gone Missing.

In the case of an equitable nongeneral power of appointment, an attempted appointment to an impermissible appointee is ineffective to pass legal title to the trust principal from the trustee to the impermissible appointee.[111] The Restatement (Third) appears to address such ineffective appointments only in the non-trust context: "An attempted appointment of a *beneficial* interest to an impermissible appointee fails. The impermissible appointee receives no better *title* than the impermissible appointee would receive in any other case in which a nonowner purports to transfer property to another."[112] A power of appointment over a legal remainder comes to mind. This statement is problematic in the trust context, however, as legal title to entrusted property is in the trustee, while title to the equitable/beneficial interest is in the beneficiary. Generally it is the legal interest in the trustee that is the subject of any attendant power of appointment. While it is possible to grant a power that limits the donee of the power to appointing an equitable (beneficial) interest in trust principal, such as a stream of income, the usual power grant is more expansive, encompassing principal as well as income. Moreover, in the case of a failed exercise in further trust, not only does the appointment of the equitable/beneficial interest fail, but also the appointment of the legal title in the property that is the subject of the trust. The Restatement (Second) of Property did a better job of sorting out and keeping straight the shifting legal and equitable relation-

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[109] *See generally* ROUNDS & ROUNDS, *supra* note 22, § 8.1.1.

[110] *Id.*

[111] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.15 (2011).

[112] *Id.* at cmt. g (emphasis added).

ships incident to an ineffective exercise of an equitable power of appointment.[113]

N. Example #14: Confusing Power-Exercises Occasioned by Third-Party Wrongdoing and Power-Exercises Occasioned by the Donee's.

It is self-evident that in order for a purported exercise of a power of appointment to be effective, the exercise must not be the product of fraud, duress, or undue influence perpetrated against the donee by one who would be unjustly enriched by the exercise. The Restatement (Third), however, garbles the transmission. It asserts that the "donee must be free from . . . wrongdoing."[114] The power's exercise cannot be the result of wrongdoing perpetrated by others *against the donee*. Wrongdoing *by donees*, which is a whole other matter, implicates the unrelated fraud on a special power doctrine.[115]

O. Example #15: But a Power Exercisable by Deed or Will is a Brace of Powers, Not One Power.

The terms of a particular power might specify that the instrument of exercise shall be a will, or, perhaps, it might specify that it shall be a deed. In any case, the *will* and the *deed* traditionally have been the two general categories of exercise vehicles. A will that has been duly admitted to probate has generally more than sufficed.[116] So also has a deed "that would be formally sufficient under applicable law to be legally operative in the donee's lifetime to transfer an interest to the appointee if the donee owned the appointive assets."[117] What if the mode of exercise is not expressly specified in the power grant? "A power in which the document of exercise is not specified (as in 'to such as the donee shall appoint') is exercisable by deed or will."[118] A presently exercisable power of appointment is immediately exercisable inter vivos, that is to say during the lifetime of the donee/holder of the power.[119] A power is *testamentary* if it is exercisable only by the donee's will.[120]

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[113] *See, e.g.*, RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 20.1 cmt. e (an exercise in further trust in part entails the appointment of an equitable (beneficial) interest in the appointive property).

[114] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.8(b).

[115] *See* ROUNDS & ROUNDS, *supra* note 22, § 8.15.26 (fraud on a special power doctrine).

[116] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.19 rptr.'s note.

[117] *Id.* § 19.9 cmt. d.

[118] *Id.* § 19.9 cmt. g.

[119] *See id.* § 17.4 cmt. a.

[120] *See id.* at cmt. c.

A power of appointment that is exercisable either inter vivos or by will is in substance two powers, an inter vivos power and a testamentary power. Confusing syntax with substance, the Restatement (Third) conflates the two distinct powers and then labels the conflation a presently exercisable power, which the testamentary component of the conflation is not.[121]

P. Example #16: Why Resurrect the Power Appendant?

The United States has generally not been receptive to the appendant (or appurtenant) power of appointment.[122] The Restatement (Second) had endeavored to close the door once and for all on such powers.[123] The Restatement (Third) has now thrown the door wide open.[124] Its rationale for doing so, however, could be better explained.

An appendant power of appointment is a power of appointment over property that the donee beneficially owns.[125] In the context of legal interests, not equitable interests under trusts, here is an example of an appendant power: A devises Blackacre to such persons as X shall appoint, and in default of appointment to X in fee simple. X's power is said to be appendant.[126] In the United States, X's power was deemed invalid for two reasons: (1) the power had merged into the fee, and (2) the power to appoint was a superfluous addition to the power to convey that is incident to the fee.

> When the holder of a life estate has a power presently exercisable, the result should be that he has a power in gross as to the remainder but no power to appoint the life estate. So if he purports to make an inter vivos appointment of the fee, we could analyze this as being a conveyance of his life estate and an appointment of the remainder.[127]

In the trust context, however, an equitable quasi remainder is not supported by the intervening equitable income interest.[128] Thus, an equitable general inter vivos power of appointment would be over

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[121] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. a (2011).

[122] *See generally* William B. Stoebuck, *Infants' Exercise of Powers of Appointment*, 43 DENV. L. J. 255, 260 (1966).

[123] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.3.

[124] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 cmt. g.

[125] LEWIS B. SIMES, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 208 (2d ed. 1951).

[126] *Id*.

[127] Stoebuck, *supra* note 122, at 260.

[128] *See* GRAY, *supra* note 10, § 324.

the subject trust property, the property to which the trustee holds the legal title, not over the quasi remainder.

The Restatement (Second) provided that in both contexts, the legal and the equitable, an appendant power would be a nullity to the extent it covers the donee's beneficial interest. The Restatement (Third) would have the power come into existence, but extinguish upon a transfer of the beneficial interest.[129] So far, so good. It seems to address the fraud issue, namely by making it impossible for a donee/holder of a power appendant to first transfer the beneficial interest for value and then divest the transferee's interest by exercising the power in favor of the donee/holder himself, or another.

But further on in the reporter's notes, the following reason is given for resurrecting the power appendant: "The logical conclusion of treating a power appendant as invalid . . . would be that a power of revocation, amendment, or withdrawal held by the income beneficiary of a trust would be invalid to the extent of the donee's owned income interest."[130] In the trust context, this assertion is incompatible with basic property law doctrine. If legal title to trust principal passes from a trustee to the donee free of trust pursuant to the exercise of an equitable power of appointment, the income subsequently thrown off from the detached principal must follow that principal. This has been the case in the Anglo-American legal tradition since time immemorial.[131] A flame must follow its candle, or extinguish. It cannot exist on its own. Thus, a power to withdraw trust principal perforce brings with it a constructive power of appointment over future income no matter what.

The reporter's explanation might have made some sense if the example had featured an equitable quasi remainderman under a trust who happened also to possess a general inter vivos power of appointment over the subject property, a not inconceivable scenario in the real world. A literal reading of the Restatement (Second), for example, might suggest that in the case of a garden-variety nominee trust, the beneficiaries' collective power of revocation would be a nullity, which would not be good.[132] The Restatement (Third) appears to be on to something, but that is about all one can say.

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[129] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 cmt. g.

[130] *Id.* at reporter's note.

[131] *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980).

[132] *See* ROUNDS & ROUNDS, *supra* note 22, § 9.6 (the nominee trust).

Q. Example #17: How Might Precatory Words Give Rise to an Equitable Power of Appointment?

Precatory words are words of entreaty, request, desire, wish, or recommendation, rather than command. Today, courts are less inclined to read into precatory words a polite manifestation of intention to create an express trust than was the case in earlier times.[133] In earlier times, a devise from A to B coupled with an expression of desire that B at his death pass the property on to A's issue might well be construed as the manifestation of an intention to impress a trust upon the devised property.[134] Today, courts would be less inclined to find a trust under these facts. Instead, B would take the property outright and free of trust and would be free to do whatever he wanted with it. "[U]nder the modern view, the question is whether the [settlor] intended to impose an enforceable obligation to carry out the stated desire."[135]

Section 18.1 of the Restatement (Third), specifically comment e, begins with an endorsement of the presumption that precatory words alone are unlikely to give rise to an enforceable trust. It then suggests that such words might, however, "be a sufficient indication of intent to give the transferee a power of appointment over an interest not given to the transferee." The comment's precatory words discussion, however, does not get into the equitable power of appointment, such as when certain precatory words might suggest that the trustee, the transferee of the legal title, possesses a nonfiduciary equitable power of appointment over the beneficiary's equitable property interest. The only supportive illustration (Illustration 9) involves precatory words that might evidence an intention to grant someone a legal power of appointment over someone else's property. The reporter's notes are not particularly helpful either. For the most part they address when precatory expressions might indicate that a power is nongeneral rather than general, an issue that the comment itself addresses only obliquely, and not in the trust context.

R. Example #18: But What Would a Blanket Exercise "by Trust" Actually Look Like?

A provision in a will that expressly, or by implication, purports to exercise all testamentary powers of appointment that had been granted to the testator-donee generally captures powers created after

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[133] AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER, & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 4.3.2 (5th ed. 2006).

[134] *Id.* § 4.3.1.

[135] *Id.* § 4.3.2. *See generally* Frank L. Schiavo, *Does the Use of "Request," "Wish," or "Desire" Create a Precatory Trust or Not?*, 40 REAL PROP. PROB. & TR. J. 647 (2006) (concluding that there is no bright-line test for determining whether a wish is actually a command).

the will was duly signed and witnessed. "A will speaks as of the date it becomes legally operative, which is the date the testator dies. It disposes of after-acquired property, and by analogy after-acquired powers should be similarly treated."[136] Section 17.6 of the Restatement (Second) of Property sets forth the traditional law applicable to such blanket exercises: "A manifestation of intent in the donee's will to exercise powers includes powers acquired after the execution of the donee's will, unless the exercise of the after-acquired powers is specifically excluded."

The successor to section 17.6, namely section 19.6 of the Restatement (Third), is much broader in scope, so much so in fact, that it appears more has been bitten off than is chewable. Not only are blanket exercises by will covered, but apparently also blanket exercises by testamentary trust, revocable trust, and irrevocable inter vivos trust as well.[137] No illustrations, however, are supplied that would enlighten one as to what an exercise "by trust" would actually look like in practice. Presumably the internal exercise clause would have to be triggered by some event, such as someone's death. The illustrations address only exercises by will.[138] The cryptic reporter's notes are similarly silent. Here is the Restatement (Third)'s comment, specifically, comment b to section 19.6: "The donee's exercising document is any document that the donee executes that contains an exercise clause. Thus, the donee's exercising document could be the donee's will, a testamentary trust, a revocable or irrevocable inter vivos trust, or any other document that contains an exercise clause."[139] That is it. Even one illustration would have been nice.

S. Example #19: Constructive Transfers of Nongeneral Powers to Impermissible Appointees: Do the Constructive Transferees Become Fiduciaries?

In the case of an equitable nongeneral power that may be exercised in further trust, the holder of the power may grant a *general*

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[136] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 17.6 cmt. a. *See also* ROUNDS & ROUNDS, *supra* note 22, § 8.15.9 (discussing the doctrine of independent legal significance).

[137] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.6 rptr.'s note 1.

[138] *See, e.g.*, *id.* at cmt. c. illustration.

[139] The Restatement (Third)'s preoccupation with unifying the law of will substitutes is ubiquitous. See, for example, section 19.6's second illustration, which deals with the situation where the same person is both the donor and the donee of a power of appointment: "Since a revocable inter vivos trust is in practical effect a substitute for a will, it is not likely that Donee intended that the [blanket exercise] provisions of his existing will should in effect nullify the provisions of the gift-in-default clause in Donee's subsequently executed revocable trust."

inter vivos power of appointment to a permissible appointee of the nongeneral power.[140] The Restatement (Third) would go further and allow the holder to grant a *general testamentary* power of appointment to a permissible appointee of the nongeneral power.[141] Here is the rationale:

> If the general power created in the second donee is a testamentary power, the second donee does not have, in substance, the equivalent of ownership, but the second donee is close to having the equivalent of ownership, especially in a case in which the second donee is given an interest in the appointive assets.[142]

In the case of an equitable nongeneral power that may be exercised in further trust (Special Power #1), any grant of *another nongeneral power of appointment* incident to the exercise in further trust (Special Power #2) must be for the benefit of the permissible appointees of Special Power #1.[143] Under the Restatement (First) of Property, only a permissible appointee of Special Power #1 could be a grantee of Special Power #2.[144] Under the Restatement (Third), specifically section 19.14, however, an impermissible appointee of Special Power #1 may be a grantee of Special Power #2, as well.[145]

The impermissible appointee, however, holds Special Power #2 in "confidence" for the benefit of the permissible appointees of Special Power #1. Unexplained in the commentary and reporter's notes to section 19.14 is whether the impermissible appointee assumes any fiduciary duties incident to his stewardship of Special Power #2. Here is the only guidance proffered, guidance that is fraught with ambiguity: "Because the donor has imposed confidence in the donee to select which permissible appointees to benefit by an appointment, the donee is authorized to grant the selection power to any other person."[146]

By definition, the original donee of an equitable nonfiduciary nongeneral power is unconstrained by the fiduciary principle. The status of the donee's surrogate, however, is another matter. Loaded words like "confidence" and "benefit" suggest that the donee's surro-

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[140] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 cmt. g(1) (2011).

[141] *Id.*

[142] *Id. See also* RESTATEMENT (FIRST) OF PROP. § 359 cmt. a (1940).

[143] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14.

[144] RESTATEMENT (FIRST) OF PROP. § 359(2) ("The donee of a special power can effectively exercise it by creating in an object an interest for life and a special power to appoint among persons all of whom are objects of the original power, unless the donor manifests a contrary intent.").

[145] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 cmt. g(4).

[146] *Id.*

gate may well be holding Special Power #2 itself in trust for the benefit of the Special Power #1's permissible appointees. If what we have here is essentially the conversion of an equitable nonfiduciary power into some kind of a fiduciary one, then there is nothing in the Restatement (Third) about how the fiduciary duties of the surrogate are to be coordinated with those of the express trustee in whom the title to the trust property resides, or even what the scope of those duties might be. Perhaps some useful coordination analogies may be found elsewhere, such as in trust protector doctrine, which is rapidly moving out of the development stage.

T. Example #20: What is the Chain of Legal Title When an Exercise in Further Trust of a General Testamentary Power Later Fails?

It appears the Restatement (Third), specifically section 19.21, would change the rules applicable to successful testamentary exercises in further trust that ultimately fail, but how, as a practical matter? Take the trust instrument that grants an equitable general testamentary power of appointment (Trust #1). The instrument designates persons to take outright and free of trust in default of the power's effective exercise. The Restatement (Third) provides that the subject property passes not to the donee or to the donee's estate by capture but to those takers in default.[147] But how does it get to them? What is the chain of legal title? Assume, for example, an exercise in further trust of the general testamentary power of appointment. A new trust is effectively created (Trust #2), but it fails years later for want of an equitable quasi remainderman. Does the Restatement (Third) contemplate that the appointed property pass once the failure has occurred somehow directly to the designated takers in default under Trust #1 without an actual resulting trust having to be imposed? Or is the route to them legally more circuitous? Does title to the subject property in the first instance pass upon an actual resulting trust from the trustee of Trust # 2 to the express trustee of Trust #1, and then from the express trustee of Trust #1 to the takers in default under Trust #1?

The only explanation offered is found in comment c of section 19.21: "To the extent that the donee of a general power to *appoint* a future interest makes an ineffective appointment, the ineffective appointed property passes *under the gift-in-default clause*."[148] At least when it comes to an equitable power of appointment created incident

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[147] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.21(b); *see also* ROUNDS & ROUNDS, *supra* note 22, § 8.15.12 (discussing the capture doctrine).

[148] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.21 cmt. c (emphasis added).

to a trust relationship, it is the failure to effectively create an equitable future interest, and not the failure to *appoint* it that causes the dominoes to fall. Again, one needs to keep in mind that not all such failed exercises in further trust fail at the outset. An exercise in further trust may be effective for the life of the beneficiary designated in the exercise but then fail upon the beneficiary's death. The failure is likely to come about because there is no designated equitable quasi remainderman then capable of taking the legal title to the subject property from the trustee upon the beneficiary's death. Upon such failure, the property to which the trustee had the legal title ends up with the takers in default. But how does it procedurally get to them? A few illustrations would have been helpful.

U. Example # 21: Failed Exercises of General Inter Vivos Powers of Appointment: Capture Doctrine Made More Complicated.

The Restatement (Third), specifically comment f to section 19.21, breaks new ground by drawing a distinction between rights of revocation, amendment, and withdrawal on the one hand and other "types" of general power of appointment on the other when it comes to applying capture doctrine: "To the extent that the donee of this type of general power makes an ineffective appointment, the ineffectively appointed property remains in the trust as originally written." Presumably what is meant by *in the trust as originally written* is that legal title to the ineffectively appointed property remains in the express trustee. In other words, there is no capture in the face of an ineffective exercise of a right to revoke, amend, or withdraw. What is concerning is the implication that there are "types" of general *inter vivos powers of appointment* other than rights of revocation, amendment, and withdrawal. Otherwise, presumably, a blanket capture exemption for all general inter vivos powers of appointment of whatever "type" would have been proposed.

The Restatement (Third)'s limited-purpose taxonomy of equitable general inter vivos powers in the capture context makes no sense conceptually for the simple reason that (1) every equitable general inter vivos power of appointment in substance encompasses the right to revoke, amend, or withdraw, even when appointment may only be to one's creditors; and (2) every equitable inter vivos right to revoke, amend, or withdraw in substance encompasses the right to appoint to third parties.[149] Anyone who processes trust-revocation instruments in the real world operates under these assumptions. A nonfiduciary untrammeled right to *direct* or *demand* is a general inter vivos power of appointment for all purposes, not some "type" of gen-

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[149] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. e.

eral inter vivos power that needs to be fathomed by trust counsel. This was new ground that the Restatement (Second) had declined to break, and for good reason.[150]

V. Example #22: A General Power of Appointment's Expiration Could Give Birth to a Stealth Equitable Remainder by Capture: An Exquisitely Subtle Trap for the Unwary Trustee.

If the donee of an equitable general inter vivos power of appointment dies without having effectively exercised the power, the power expires.[151] Likewise, if the donee of an equitable general testamentary power of appointment fails to effectively exercise the power by will, the power expires at the donee's death. In either case, the gift-in-default clause in the granting trust instrument, if there is such a clause, controls the disposition of the unappointed property.[152] (So also if a power expires by inter vivos disclaimer or release.)[153] The time when a power expires "is almost invariably the death of the donee,"[154] although one could certainly fashion a grant of a general power that would be capable of expiring before its donee had, such as upon the exhaustion of an intervening equitable estate *pur autre vie*.[155]

But what has been the rule if the donor of an expired equitable power neglects in the granting trust instrument to provide for takers-in-default, or the instrument's gift-in-default clause is ineffective when the power expires? In that case the black-letter law was that unappointed property passed upon a resulting trust back to the donor if the donor was then living or into the probate estate of the donor if the donor was not then living, but, again, not until all valid intervening equitable interests had themselves expired.[156]

In a radical departure from settled doctrine, the Restatement (Third) provides that if the donee "merely failed to exercise the power," the unappointed property, in the absence of a taker in default, is

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[150] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 23.2.

[151] The Restatement (Third) speaks in terms of a general power "lapsing," an unfortunate innovation. Its predecessors spoke in terms of a power "expiring," which is less ambiguous in that the term lapse can mean "to pass to another through neglect or omission." A power of appointment itself is never directly transmissible. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.22 cmt. b.

[152] *Id.* § 19.22(a).

[153] *Id.*

[154] RESTATEMENT (FIRST) OF PROP. § 367 cmt. d.

[155] *See* ROUNDS & ROUNDS, *supra* note 22, § 8.15.64 (discussing the estate *pur autre vie* in the trust context).

[156] *See, e.g.*, RESTATEMENT (FIRST) OF PROP. § 367(1).

captured *by the donee or the donee's estate*.[157] There is no resulting trust. There is no antilapse.[158] A resulting trust in favor of the donor or the donor's estate, however, would still be imposed in the case of (1) expiration by disclaimer or release;[159] (2) expiration by any means of a power of revocation, amendment, or withdrawal;[160] and (3) the donee expressly refraining from exercising the power.[161] Pity the poor trustee on the front lines who has to sort out all of those nuances.

W. Example #23: Some Relevant Examples of the Nonexclusionary General Inter Vivos Power of Appointment Would Have Been Helpful.

The donee of an equitable *exclusive/exclusionary* nongeneral power may exercise the power in favor of fewer than all of the members of the permissible class of appointees (objects).[162] If the power were *nonexclusive/nonexclusionary*, for the exercise to be valid, it would have to be in favor of all members of the class and no one could be left out.[163] For such a qualification to be enforceable, the permissible appointees, however, would have to have been sufficiently defined and limited by the terms of the power.[164]

The Restatement (Third) would presume exclusivity: "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."[165]

There are some counterintuitive musings in the Restatement (Third) to the effect that even general powers of appointment can be nonexclusionary.[166] The example proffered in support of the proposition, however, is not all that supportive.[167] It involves an express power to appoint "to such of the donee's estate creditors as the donee

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[157] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.22(b).

[158] *See* ROUNDS & ROUNDS *supra* note 22, § 8.15.55 (a general discussion of the antilapse doctrine in the trust context).

[159] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.22(b).

[160] *Id.* at cmt. f.

[161] *Id.* § 19.22(b).

[162] *Id.* § 17.5.

[163] *See, e.g.*, Hargrove v. Rich, 604 S.E.2d 475, 477–78 (Ga. 2004) (holding that a limited power to appoint to a class of "nieces and nephews" is a nonexclusive power and thus could not be exercised in favor of only one niece to the exclusion of other members of the class, the court holding that the conjunctive "and" denotes nonexclusivity).

[164] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.5 cmts. b & h.

[165] *Id.* § 17.5.

[166] *Id.* § 17.5 cmt. b.

[167] *See id.* § 17.5 cmt. g.

shall by will appoint, but if the donee exercises the power, the donee must appoint $X to a designated estate creditor or must appoint . . . in full satisfaction of the donee's debt to a designated estate creditor."[168] But under the Kissel doctrine all estate creditors would have a pro rata crack at the $X in the event of the power's exercise in any case.[169] Even an equitable general inter vivos power to appoint to the donee and to X, Y, and Z on an ostensibly nonexclusionary basis would be nothing more than a plain vanilla equitable general inter vivos power over one quarter of the trust property, and a series of three equitable nongeneral nonexclusionary inter vivos powers over three quarters of it.

IV. SOME UNFORTUNATE POWER OF APPOINTMENT DOCTRINAL REFORMS

The Restatement (Third)'s grasp of traditional power of appointment doctrine is less than firm. Nevertheless, it would presume to "reform" critical aspects of it.

A. Example #24: Antilapse Run Amok.

1. *Indirect appointments to impermissible appointees.*

It has been traditional black-letter law that the exercise of an equitable testamentary power of appointment in favor of a permissible appointee who has predeceased the donee of the power is ineffective.[170] As the appointee's interest in the property subject to the unexercised power was a mere expectancy *at the time of the appointee's death*, no property interest in the subject property, whether vested or contingent, can pass at that time to the appointee's executor or administrator.[171] It is only later when the donee of the power of appointment dies that the donee's will, the instrument of power exercise, speaks. When that time comes, it is too late for the predeceasing designated appointee to benefit economically from the power exercise, and thus too late as well for those who stand in his shoes. To recapitulate: One may not effectively exercise a testamentary power of ap-

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[168] *Id.*

[169] *See* State St. Trust Co. v. Kissel, 33 N.E.2d 25, 29 (Mass. 1939).

[170] *See, e.g.*, MacBryde v. Burnett, 45 F. Supp. 451, 453–54 (D. Md. 1942) ("[I]t seems reasonable to suppose that the donor who did not permit the donee to make an effective appointment until the donee's death intended the donee to make an appointment only to persons who survived him.").

[171] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. a (providing that a will does not become operative until the testator's death to transfer property or exercise a testamentary power of appointment). It is said that a will speaks at death and not at the time of its execution. Thus, one's specified interest under the will of a living person is a mere hope or expectancy. It is not even a contingent property interest.

pointment in favor of someone who is dead at the time of exercise. This has been the rule at least since 1748 when it was enunciated by Lord Hardwicke in the English case of *Oke v. Heath*.[172]

The model Uniform Probate Code's section on antilapse, section 2-603, cheered on by the Restatement (Third), "rescues" not only failed beneficial interests under trusts, but also exercises of testamentary powers of appointment in favor of certain predeceasing appointees.[173] If the predeceasing appointee is a grandparent, a descendant of a grandparent, or a stepchild *of the donor of the power of the equitable appointment*, there is a substitute appointment in favor of that person's descendants.

> Unless the language creating [the] power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, *whether or not the descendant is an object of the power*.[174]

Apparently, a provision in default of exercise alone would not suffice as an expression of intent to negate the default substitution. The section's comment asserts, without explanation, that this radical departure from settled law is "a step long overdue."[175]

The Restatement (Third) is in full accord, and then some. It provides, for example, that even when a particular antilapse statute fails to expressly address appointments to deceased appointees, its "purpose and policy" should apply to such an appointment "as if the appointed property were owned by *either the donor or the donee*."[176] But what if a deemed ownership by the donor of the power would bring about a result that is different from a deemed ownership by a donee of the power? Which assumption is applied? The Restatement (Third) fails to address the conflict.

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[172] Oke v. Heath, [1748] 27 Eng. Rep. 940 (Ch.) 942.

[173] *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.12 (appointment to deceased appointee or permissible appointee's descendants; application of antilapse statute).

[174] UNIF. PROBATE CODE § 2-603(b)(5) (emphasis added).

[175] Massachusetts quite sensibly declined to enact this later version of UPC section 2-603 with all its pretentious complexities and convolutions. Instead it dropped into the slot a pre-1990 version of the section that made no mention of exercises of powers of appointment.

[176] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.12(b) (emphasis added).

The Restatement (Third) would have the substituted takers "treated" as permissible appointees of the power.[177] Such "treatment" could render the fraud on a special power doctrine inapplicable to an antilapse substitution who happened not to be a permissible appointee under the express terms of the power grant.[178]

Extending antilapse principles that have prevailed in the law of wills since time immemorial to failed equitable interests under trusts and failed exercises of equitable powers of appointment furthers in *form* the cause of enhancing law-equity symmetry in this particular corner of the Anglo-American legal tradition, but at what substantive cost? The richness and utility of the English language stems at least in part from the asymmetrical unification of the tongues of the Anglo-Saxon and Norman-French. The same goes for the English legal tradition. The trust relationship and the power of appointment just happen to be two extraordinarily useful, protean, and elegant products of the asymmetrical unification of the Anglo-Saxon and Norman-French legal traditions.

Practice tip:

Power of appointment drafting. In the case where there is a grant of an equitable power of appointment in the terms of a trust, the granting provision should indicate the settlor's intention regarding substitution of default takers-by-antilapse. The better practice, absent special facts, would be to negate all such substitutions in favor of specific language in the terms of the trust indicating the alternate appointees, or that there shall be no alternate appointees, as the case may be. No prudent trustee would distribute to a *default* taker-by-antilapse without first seeking authority to do so from the court, absent special facts. Luckily *for the trustee*, the costs of such an action would likely be a legitimate trust expense, albeit an expense that could have been avoided at the drafting stages. Scriveners take note.

Power of appointment exercise administration. Antilapse is yet one more thing that the trustee has to worry about when it comes to administering exercises of powers of appointment. "What about antilapse?" needs to be added to the appropriate administrative checklist. As noted, the trustee is generally personally liable for misdelivering the trust property.[179]

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[177] *Id.* § 19.12(b).

[178] *See id.* § 19.12(c).

[179] *See* ROUNDS & ROUNDS, *supra* note 22, § 7.1 (discussing misdelivery of trust property).

2. *Permitting direct appointments to impermissible appointees.*

The death of the last survivor of all possible permissible appointees of an equitable nonfiduciary nongeneral power of appointment prior to its exercise triggers a termination of the power.[180] Had all of them predeceased the entrustment that was to give rise to the power, then the power would never have come into existence in the first place.[181] This having been said, in the future, the pre-power-exercise death of all permissible appointees expressly specified in a power grant may not necessarily extinguish the power. Take, for instance, the radical departure from the settled law proposed by the Restatement (Third), specifically section 19.12(c).[182] It would afford the donee of an equitable nongeneral power of appointment default authority to exercise the power directly in favor of a descendant of a predeceasing permissible appointee, *even though the descendant himself was not a permissible appointee under the express terms of the power grant*.[183] The predeceasing appointee apparently need not even be a relative protected by some antilapse statute: "If an antilapse statute can substitute the descendants of a deceased appointee, the donee of the power should be allowed to make a direct appointment to one or more descendants of a deceased permissible appointee."[184] Why not just let the trust instrument speak for itself? Paper logic seems to be trumping common sense in this case. It should be noted that the Restatement (Third) proposes that even when an antilapse statute fails to expressly address an appointment to a deceased appointee, its "purpose and policy" should still apply to such an appointment *as if the appointed property were owned by either the donor or the donee*.[185]

Practice tip:

Power of appointment drafting. The scrivener of an equitable nongeneral power of appointment grant might consider expressly negating the authority of the donee to appoint to any taker-by-antilapse who is not specifically designated as a permissible appointee in the terms of the grant, so as to protect the grant from being second-guessed by the default law in all its ambiguity and convolution. If the settlor wishes to grant the donee authority to appoint to, say, the issue of a predeceasing permissible appointee, then simply bring those

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[180] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 18.1 cmt. h.

[181] *Id.*

[182] California has had such a statute since 1982. *See* CAL. PROB. CODE § 674 (2012) (death of permissible appointee before exercise of special power).

[183] The deceased permissible appointee, however, would have to have survived the execution of the instrument that created the power.

[184] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.12 cmt. f.

[185] *Id.* § 19.12(b).

issue into the class of permissible appointees, by, for instance, designating them as contingent permissible appointees.

Exercising powers of appointment. The scrivener retained by the donee of a yet-to-be-exercised equitable nongeneral power of appointment needs to be mindful that the class of permissible appointees may actually be more expansive than the express terms of the power grant would suggest. All is not what it seems in the Alice-in-Wonderland world of the Restatement (Third). In other words, counsel needs to check to see if the default takers-by-antilapse have been expressly denied access to the designated class of permissible appointees. If that is not the case, it is critical that the donee be so apprised before he or she proceeds to exercise or not exercise the power. This is another nasty trap for the unwary practitioner of trust law.

B. Example #25: The General Inter Vivos Power of Appointment Made Complicated.

In the days when the law of powers of appointment was based on a few simple principles, the general rule was that the donee of an equitable general inter vivos power of appointment had a constructive ownership interest in the subject property, though the legal title to the property was in the trustee. Now comes the Restatement (Third) which makes the law of powers of appointment a whole lot more complicated.

1. *Fiduciary downgrades of nonfiduciary general inter vivos powers of appointment.*

The settlor of a trust may empower the trustee, or a trust protector, to change a donee's equitable general testamentary power of appointment into an equitable nongeneral testamentary power, or to change a donee's equitable nongeneral testamentary power into an equitable general testamentary power prior to the donee's death.[186] As a living donee of an equitable naked testamentary power of appointment, whether general or nongeneral, does not enjoy the functional equivalent of an ownership interest in the subject property, a power in a trustee to upgrade and downgrade a nonfiduciary testamentary power does little more than give rise to a plain vanilla *discretionary trust*. The same can be said for a power in a trustee to upgrade a nongeneral inter vivos power of appointment, which would be the functional equivalent of a discretionary distribution that is outright and free of trust.

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[186] *Id.* § 17.3 cmt. d, illus. 4.

The Restatement (Third), however, would seem to contemplate the enforceability of downgrades of equitable general inter vivos powers of appointment as well.[187] Because the donee of an equitable nonfiduciary general inter vivos power of appointment enjoys the functional equivalent of a legal fee simple in the subject property, it is disappointing that neither the commentary nor the reporter's note addresses the public policy and practical aspects of bestowing on a trustee such a discretionary equitable defeasement power, particularly as such an encumbrance in the legal context would likely be void as an impermissible alienation restraint. As the authority in a trustee to downgrade a nonfiduciary general inter vivos power of appointment would certainly itself be held in a fiduciary capacity, it is also disappointing that the Restatement (Third) neglects to offer any practical guidance to the trustee as to how such a defeasement power should be administered.

Practice tip:

The prudent scrivener will want to sort out the fiduciary, tax, and fraudulent conveyance implications, if any, of bestowing on a trustee the discretionary authority to downgrade an equitable general inter vivos power of appointment. In a given situation a trustee who has been granted "toggling" authority will want to take into account the fiduciary, tax, and fraudulent conveyance implications, if any, when deciding whether or not to exercise the authority.

2. *The not-so-general inter vivos power of appointment: Only creditors are welcome.*

Assume the express terms of an equitable general inter vivos power restrict the donee to appointing the subject property only to his creditors. Breaking new ground, the Restatement (Third) proposes that such a restriction is somehow enforceable.[188] No light is shed on why it should be or how it would be enforceable. The proposition just hangs there. Presumably the donee could fairly easily circumvent the creditor-only limitation simply by contracting with third parties for goods and services using a credit card.

C. Example #26: Power Exercise Traps

1. *The general will-residuary clause power-exercise trap.*

At one time, section 2-608 of the Uniform Probate Code provided that a general residuary clause in a will or a will making a general disposition of all of the testator's property did *not* exercise a pow-

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[187] *See id.* § 17.3 cmt. d.

[188] *Id.* § 19.13(b).

er of appointment held by the testator, unless specific reference was made to the power or there was some other indication of intention to include the property subject to the power.[189] In 1990, the negative rule was made subject to several exceptions. One exception is that if a power is a general one and there is no gift over in default of its exercise, a general residuary clause or general disposition in the will of the donee of the power will serve to exercise it.[190] The Restatement (Second)'s section 17.3 was generally in accord with UPC section 2-608, although it had no absence-of-taker-in-default exception: "If the donee by deed or will manifests an intention to dispose of all of the donee's property, this of itself does not manifest an intention to exercise any power possessed by the donee."[191] Note that section 17.3 also contemplated exercises by deed.

The successor to section 17.3, namely section 19.4 of the Restatement (Third), leaves something to be desired in the grammar department. It also endorses, with a vengeance, the Uniform Probate Code's absence-of-taker-in-default exception, and ups the ante; in so doing, it sets a particularly nasty trap for the unwary trustee and estate planner. Here is the language:

> 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) [sic] of appointment, unless the power in question [sic] is a general power and the donor did not provide for takers in default *or the gift-in-default clause is ineffective*.[192]

Here is the trap: Assume the donee possessed an equitable general testamentary power of appointment at the time of his death under his grandmother's trust. There is no express or blanket power-exercise clause in the donee's will, just a plain vanilla residue clause. What if the gift-in-default clause in the grandmother's trust is rendered "ineffective" by some subsequent event, say, not until twenty years after the donee's death?[193] All equitable quasi remaindermen,

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[189] UNIF. PROBATE CODE § 2-608.

[190] *Id.*

[191] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 17.3.

[192] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.4 (emphasis added). If "any" is shorthand for "any one," then the option of selecting "power" in its singular form renders the sentence nonsensical.

[193] Assume, for example, that someone other than the donee of the general testamentary possesses an equitable life estate under the trust and that the trust is to terminate upon the death of the life beneficiary in favor of the settlor's (donor's) issue then living. Twenty years after the donee has died, but before the death of the life beneficiary, the last survivor of the settlor's (donor's) issue dies, rendering the gift-in-default clause "ineffective." Does this event now clear the way for the residuary takers under the donee's will (and the executors

say, end up predeceasing the equitable income beneficiaries. The comments, illustrations, and reporter's notes supporting the Restatement (Third)'s section 19.4 only address the trust that terminates on its own terms *upon the death of the powerholder*.

Practice tip:

The trustee of a terminated trust that, for whatever reason, has no remainderman entitled to take, needs to be careful. The trust property could actually now belong not to those who take incident to the imposition of a resulting trust, but to the lucky plain vanilla residuary takers under the will of some long-dead donee of an equitable testamentary power. The terms of the power grant are buried in some strange place within the governing trust instrument. The donee, himself, is buried who knows where.

2. *The post-exercise manifestation of intent to exercise trap.*

The Restatement (Second) of Property (Donative Transfers) generally tracked traditional black-letter law:

> If the donee's deed or will, read with reference to the property the donee owned and other circumstances existing *at the time of the execution of the donee's deed or will*, indicates that the donee understood that he was disposing of property covered by a power, the donee thereby manifests an intent to exercise the power.[194]

So as not to open wide the litigation floodgates, the Restatement (Second) emphasized that the only circumstances that were material were those that existed at the time the language of alleged appointment was formulated: "Later changes in circumstances have no importance except so far as they were foreseeable and therefore constituted elements in the situation then existing."[195] Donee intent is an important public policy consideration, but so is transactional finality.

The Restatement (Third), specifically section 19.5, would inject all kinds of uncertainty and instability into this once quiet corner of the law of powers of appointments. A powerholder's intent to exercise is manifested in a "disposition," a term that is not defined. Presumably not just inter vivos deeds of exercise and testamentary appointments are contemplated, but other types of property dispositions as well. Neither the illustrations, nor the reporter's notes that accompa-

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of those takers who have died in the interim) to take the legal title from the trustee once the trust terminates?

[194] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 17.5 (emphasis added).

[195] *Id.* at cmt. a.

ny the section, however, shed any light on what such dispositions might look like.[196] Might the term disposition, for example, capture inter vivos assignments of property to the trustees of revocable and irrevocable inter vivos trusts? Now there is a trap for the unwary trust practitioner, as is explained at the end of this segment.

But it gets worse. The Restatement (Third) ventures into territory which the Restatement (Second) had declared off-limits: Namely, the taking into account of future unanticipated changed circumstances in determining the intentions of the powerholder at the time he executes the instrument of exercise. Post-execution events apparently "can sometimes be relevant in determining the donee's intention,"[197] an insight the logic of which had escaped the more practical drafters of the Restatement (Second). Here is the Restatement (Third) speaking: "Post-execution evidence of intention may properly be considered in resolving an ambiguity, if it sheds light on the donee's intention at the time of execution or on what the donee's intention would probably then have been had the ambiguity been recognized *or had the subsequent event been anticipated*."[198] It will take decades for the courts to untangle the hairs of that fur ball, should they elect to apply its wisdoms and insights to actual cases and controversies. The term ambiguity, for example, is defined elsewhere as "an uncertainty in meaning that is revealed by the text or by extrinsic evidence other than direct evidence of intention contradicting the plain meaning of the text."[199] We take direct evidence of intention contradicting the plain meaning of the text to refer primarily to direct evidence of scrivener error.[200] Presumably, an ambiguity in the context of a possible exercise of a power of appointment has something to do with confusion as to the powerholder's intentions vis-à-vis the power, whether the confusion is language-based (a patent ambiguity in the instrument of exercise) or fact-based (a latent ambiguity revealed by extrinsic evidence).[201]

One can imagine a nightmare scenario where the settlor of a revocable inter vivos trust dies years after it had been funded with all

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[196] *But see,* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.3, illus. 2 (2011) (granting of a 50-year lease on real estate a partial exercise of a general inter vivos power of appointment over the real estate).

[197] *Id.* § 19.5 cmt. a.

[198] *Id.* (emphasis added).

[199] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 (2003).

[200] *See id.* at cmt. c.

[201] *See id.* at cmts. b & c. The traditional rule of construction has been that extrinsic evidence is not allowed in to resolve patent ambiguities, only latent ambiguities. *But see id.* at cmt. a ("Although it is customary to distinguish between latent and patent ambiguities, no legal consequences attach to the distinction.").

of his property. There are certain unforeseeable events subsequent to the execution of the inter vivos funding assignment that eroded the value of the trust corpus prior to his death. Perhaps his granddaughter became afflicted with a life-threatening disease. Someone post-mortem now raises the question of whether the inter vivos "disposition," by assignment, had actually exercised at the time a certain general inter vivos power of appointment which the settlor had possessed under his grandfather's trust? Or does the subject property now belong to the takers in default under the grandfather's trust?

"Not to worry" say the non-practicing academics: "As with any other evidence bearing on the donee's intention, the probative force of post-execution evidence of intention is for the trier of fact to evaluate."[202]

Practice tip:

For estate planners practicing in the trenches who may not be convinced, and who, in any case, would prefer not to have their work products scrutinized retrospectively by "triers of facts" if at all possible, there is this advice: Never draft a power of appointment that is exercisable other than by a deed or a will that makes specific reference to the particular power. The Restatement (Third), in a welcome flush of common sense, is unambiguously supportive:

> Even if the donee's disposition would otherwise be deemed to manifest an intent to exercise a power, the intended exercise is not effective if the donor has imposed the requirement (which is common) that the power can only be effectively exercised by language that makes specific reference to the power.[203]

3. *The exercise by un-probated will trap.*

The Restatement would have an equitable power of appointment that is exercisable "by will" by an unprobated instrument that is "formally" sufficient to be admitted to probate under applicable law.[204] On the other hand, if the instrument ends up actually being submitted to probate and probate is denied, then the exercise is retroactively ineffective.[205] What is left unexplained is how prudent trustees are to practically and cost-effectively smoke out enforceable exercises of testamentary powers of appointment by unprobated wills. Recall the

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[202] *Id.* § 19.5 cmt. a (2011).
[203] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.5 cmt. d.
[204] *Id.* § 19.9 cmt. b.
[205] *Id.*

general rule that a trustee is absolutely liable for misdelivering the trust property.[206]

Practice tip:

Going forward, scriveners should give serious consideration to drafting testamentary powers of appointment that are expressly exercisable only by wills that have actually been probated.

With respect to testamentary powers that have already been granted, there are things that trustees can do to insulate themselves from personal liability for misdelivery in the absence of such an express limitation. In the face of reasonable doubt as to whether or not in a given situation a testamentary power may have been exercised via non-probated will, for example, the trustee is entitled, at trust expense, to seek guidance from the court, such as by filing a complaint for instructions and/or declaratory judgment.

4. *The exercise by revocable inter vivos trust trap: The testamentary exercise by deemed deed conundrum.*

The Restatement (Third) would have an equitable power of appointment that is exercisable "by will" exercisable "in a revocable trust document, as long as the revocable trust remained revocable at the donee's death."[207] Why? This is so, because "a revocable trust operates in substance as a will."[208] The problem with such one-dimensional thinking is that a self-settled revocable inter vivos trust is still not a true testamentary instrument and it is certainly much more than just a will substitute. It can also function, for example, as a static inter vivos property-management vehicle for competent and incompetent settlors alike, a function that wills can never perform for their testators, the will being merely a property transfer vehicle that speaks only at death. But things get even more muddled and convoluted . . . and ungrammatical. Apparently, "[t]he exercise of a power of appointment by [sic] a revocable trust would be deemed an exercise 'by deed.'"[209]

How would one who had been granted, say, an equitable nongeneral power of appointment exercisable "by will" actually go about exercising it "by revocable trust?" What would such an exercise look like? Presumably the power-grantee-settlor via the terms of his

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[206] *See* ROUNDS & ROUNDS, *supra* note 22, § 6.1.2 (discussing liability of trustees for misdelivery of trust property).

[207] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.9 cmt. b.

[208] *Id.* § 19.9 cmt. b.

[209] *Id.* at cmt. d.

revocable trust would direct the trustee of the revocable trust upon the grantee's death to, in turn, direct the trustee of the original trust—the trust containing the power grant—to distribute the subject property to one or more of the permissible appointees.

Guidance is lacking as to whether a trustee of a revocable trust may be granted fiduciary discretion to exercise or not exercise the power to appoint by will upon the death of the settlor of the revocable trust, that is to say, upon the death of the grantee of the power. If a trustee were granted such fiduciary discretion, how long would the trustee have to make up his mind following the death of the power grantee? And finally, what is the Restatement (Third)'s purpose in deeming an exercise by revocable trust to be an exercise by deed? And who would be the deemed grantor of the deed, the settlor or the trustee of the revocable trust that has the power-exercise provision?

Practice tip:

The grantor of a power to appoint "by will" may effectively prohibit exercise "by revocable trust" in the express terms of the power grant. The grantor who wishes to authorize exercise "by revocable trust" would be well-advised to specify with detailed precision in the terms of the power grant the process that must be followed to effect such an exercise, step-by-step.[210]

5. *Applying the doctrine of substantial compliance to grantor-specified power-exercise formalities: A litigator's dream.*

It was a rule of the English courts of Chancery that equity will aid the defective exercise of a power of appointment if doing so would benefit certain favored permissible appointees, specifically certain individuals who were regarded as having provided good "consideration," such as "a purchaser (including a mortgagee or a lessee), a creditor, a

[210] It is critical that the scrivener know whether the grantor of the testamentary power contemplated that the trustee of the exercising trust be a ministerial agent of the grantee of the power, or whether the grantor of the power contemplated something more intensive, such as that the trustee of the exercising trust being vested via the terms of the exercising trust with fiduciary discretion to exercise or not exercise the power. If the trustee of the exercising trust may be vested with fiduciary discretion via the terms of the exercising trust to exercise the power then the scrivener of the exercising trust needs to know the limits of the discretion and to whom the fiduciary duties are to be owed. In any case, as the trustee possesses the legal title to the property that is the subject of the exercising trust, a trust that was once revocable, it would seem that it is the trustee of the exercising trust who needs to be the mechanical centerpiece of any exercise "by revocable trust," the grantee-settlor perforce being dead. While the exercising trust may be a will substitute it is not a will. Rather, it is an ongoing fiduciary relationship with respect to property to which the trustee has the legal title. That being the case, a "testamentary" power-exercise by the trustee of an exercising trust would bear some resemblance to an exercise "by deed" in that the trustee would be alive at the time the instrument of exercise speaks. The Restatement (Third), however, fails to connect the dots so this is only a surmise.

wife, a legitimate child, and a charity."[211] The rule was a specific application of the general maxim that equity looks to substance (intent) rather than to form.[212]

The defect in execution had to have been formal, as opposed to substantive, and occasioned by accident or mistake. Thus:

> The court [would] grant relief against the execution by will of a power which should have been executed by deed because the defect [was] purely one of form. But no relief [could] be granted where [the donee] purport[ed] to exercise a power by will before the age of 25 and the power must be exercised by deed before he attains that age.[213]

A defect in execution was substantive if it undermined the accomplishment of a significant purpose of the power grant.[214]

The exercise formalities had to have been donor-imposed for equitable relief to be granted.[215] "Formal requirements imposed by law with reference to instruments of appointment [were] always regarded as fulfilling a significant purpose."[216] Consequently, consistent with the maxim that equity follows the law, substantial compliance was never sufficient grounds in equity to effectuate an exercise impermissible at law.

The Restatement (Third) sweeps away the limitations on who is entitled to benefit from application of the English rule, as the rule had been tweaked by the Restatement (Second). What remains is essentially a garden variety substantial compliance regime:

> 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

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[211] SNELL'S EQUITY ¶ 9–07 (John A. McGhee Q.C. ed. 31st ed. 2005) (internal footnotes omitted).
[212] *Id.*
[213] *Id.* ¶ 9–08.
[214] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 18.3 cmt. c.
[215] *Id.*
[216] *Id.* at cmt. b.

> not impair a material purpose of the donor in imposing the requirement.[217]

In the world of substantial compliance, certainty and finality are not high priorities—nor is litigation prevention. What did the powerholder subjectively know and subjectively intend? There are so many facts to assert and rebut, prove and disprove, find and not find.

Practice tip:

One should specifically address in the terms of a power grant whether there must be literal or substantial compliance with any exercise formalities.

6. *Saddling the trustee with a duty to make factual inquiries into the authority of an agent to exercise a non-fiduciary equitable power of appointment.*

There are now statutes on the books in some jurisdictions subjecting to liability one who, without reasonable cause, fails to honor the instructions of an agent acting under a durable power of attorney. The trustee's lot is not an easy one; however, it gets worse. The Restatement (Third) would arm the agent-fiduciary with a default "assumption" of authority to exercise a nonfiduciary general inter vivos power of appointment, such as a reserved right of revocation, but then impose *on the trustee* a duty to make a preliminary investigation of certain facts before honoring such an exercise.[218] The trustee would have such a duty even if the trustee were to lack actual or constructive notice of any wrongdoing on the part of the third-party agent-fiduciary.

Here is the actual wording:

> Unless the donor has manifested a contrary intent, it is assumed that the donor intends that the . . . agent under the authority of a durable power of attorney of the incapacitated donee of a presently exercisable general

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[217] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.10 (2011). Section 2-704 of the model Uniform Probate Code also adopts a substantial compliance approach to the donor-imposed specific reference requirement. It does so by creating a "presumption" that such a requirement is to prevent inadvertent exercises of the power of appointment. Thus, a power whose terms specify that any exercise be by an instrument making specific reference to the power might still have been exercised by a "blanket exercise" clause in, say, the powerholder's will. Those who would benefit from an effective exercise, however, would still have to prove by extrinsic evidence that the powerholder "had knowledge of and intended to exercise the power." Massachusetts has sensibly declined to enact the model UPC's section 2-704. Instead, it has dropped into the slot some totally unrelated content dealing with taxes on Qualified Terminable Interest Property (QTIP).

[218] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.8 cmt. d.

> power is to be permitted to exercise the power for the benefit of the donee to the same extent the . . . agent could make an effective transfer of similar owned property for the benefit of the donee.[219]

To paraphrase, the trustee, before honoring such an exercise, would not only need to assure himself of the agent-fiduciary's general authority, but also that the purported proxy power-exercise is sufficiently for the benefit of the donee of the power and that the agent-fiduciary would have the specific authority to make an effective transfer of "similar owned property" for the benefit of the donee. The concept of "similar owned property" presumably refers to property owned outright *by the principal*, although the reporter's notes are silent on the subject, as they are on the subject of how directly the donee needs to be benefited for the proxy exercise to be effective.

Practice tip:

The terms of a grant of a power of appointment should expressly address whether the power is exercisable by an agent of the grantee and if it is what the duties of the trustee are with respect to ascertaining the agent's authority.

D. Example #27: Untethering the Illusory Appointments Doctrine: Another Litigation Opportunity Opens Up.

The donee of an equitable nonexclusionary/nonexclusive power of appointment may not exercise the power in a way that excludes one or more of the permissible appointees from a share of the appointive property. Should the donee nonetheless attempt to exercise the power exclusively, such as by selectively appointing token or "illusory" shares of the appointive property, then the doctrine of illusory appointments might well be implicated. The doctrine is traceable back to the 1682 English Chancery case of *Gibson v. Kinven*, which held that if a donor of a nonexclusive power fails to give a *substantial* share of the appointive property to each permissible appointee, the appointment is void.[220] To enforce the appointment would thwart the express intentions of the settlor-donor. To judicially reform an exclusive exercise into a nonexclusive one would thwart the intentions of the donee/holder of the power. As to what makes one appointment illusory and another substantial, that is for equity to sort out incrementally over time. To make equity's task even more difficult, the Restatement (Third) would drop into the equation an "inference" that the donor of a nonexclusive power intends that any exercise confer a

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[219] *Id.*

[220] Gibson v. Kinven, [1682] 23 Eng. Rep. 315, 316.

reasonable benefit upon each permissible appointee.[221] Presumably, the reasonable benefit inference would supplant the substantial benefit inference, which was the centerpiece of the old doctrine of illusory appointments. As the very terms of a particular valid equitable nonexclusive power may be patently unreasonable, the reasonable benefit inference applicable to its exercise would seem a fish out of water. The illusory appointments doctrine should not be confused with the fraud on a special power doctrine.[222]

Practice tip:

The prospective donor of a nonexclusionary/nonexclusive power of appointment should give serious consideration to expressly requiring that there be strict compliance with the dispositive terms of the power grant. Keep it simple and unambiguous so as to minimize the chances of expensive complaints for instruction and/or declaratory litigation down the road. On the other hand, if the prospective donor is comfortable with reasonable deviations from the nonexclusivity requirement, then he or she can simply make the power exclusionary/exclusive to begin with, or go with a fiduciary power of appointment.

V. CONCLUSION

The power of appointment sections of the newly-minted Restatement (Third) of Property (Wills and Other Donative Transfers) are a step backward in that they fail to adequately address the idiosyncrasies of the equitable power of appointment. An equitable power of appointment, as opposed to a legal power of appointment, is granted by the term of an express trust. The coverage of equitable powers in the first and second property restatements was superior. In order for power of appointment doctrine to at least get back to the line of scrimmage, coverage of equitable powers, at the very least, needs to be assigned a separate chapter in an appropriately reorganized third restatement Better still, it could be deleted altogether. To the law reformer, I would caution: *First, do no harm.* To the consumer of this particular law-reform product in its current state, the admonition *caveat emptor* is in order.

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[221] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.5 cmt. j.

[222] *See* ROUNDS & ROUNDS, *supra* note 22, § 8.15.26 (discussing fraud on a special power doctrine).