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POWERS OF APPOINTMENT*

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FOR centuries, the power of appointment has been used as an excellent tool in planning the disposition of property. Once used to circumvent law governing the transfer of property, it was developed into a handy device for family settlements. In the United States, the power of appointment enjoyed relative obscurity until the advent of the estate and inheritance tax. Now it has become a popular and important device for use in minimizing taxes and for achieving other important objectives of persons seeking to preserve property for the benefit of their descendants. In the modern complex task of planning an estate of any size, an understanding of the nature and operation of the power of appointment is essential.

A power of appointment is a capacity on the part of one individual to direct the succession of property without necessarily having any other interest in the property.[1] For example, A may transfer Blackacre to B for life and then to such persons as C may by will direct. C has, in this illustration, a type of power of appointment. C does not "own" Blackacre from the standpoint of

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[1] This paper is intended to be a survey of the nature and operation of the power of appointment with special reference to its use in estate planning. For detailed treatment of the law relating to powers of appointment see the following recognized treatises: 5 AMERICAN LAW OF PROPERTY, Part 23 (1952); THE RESTATEMENT OF THE LAW OF PROPERTY, §§ 318-369 (1940), 1948 SUPPLEMENT (1949); Simes, HANDBOOK ON THE LAW OF FUTURE INTERESTS, §§ 51-74 (1951); Simes, THE LAW OF FUTURE INTERESTS, §§ 243-293 (1936); Tiffany, THE LAW OF REAL PROPERTY, 3rd edition, §§ 672-713 (1939); Thompson, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, §§ 2274-2305. For special treatment see, Casner, *Estate Planning—Powers of Appointment*, 64 HAR. L. REV. 185 (1950).

enjoyment, but he has the power to select the person or persons who may "own" or enjoy it.

Before seeking a more accurate definition and more complete description of the operation of the power, definition of terms is necessary.

1. Donor—The Donor is the person who creates the power. This may be done by either grant or reservation.
2. Donee—The donee is the person in whom the power is created or reserved.
3. Objects—The objects of the power are those persons among whom the donee is given the power to appoint.
4. Appointees—The appointees are the persons to whom interests are appointed by the donee.
5. Takers in Default—The takers in default of appointment are the persons who will receive the property if the power is not effectively exercised, whether named or not.
6. Appointive Property—The appointive property covered by a power is the interest which the donee can create in appointees by an exercise of the power.
7. Owned Interest—The owned interest is the interest of the donee (other than his power) in land or other things over which he has a power.

An accurate definition of the power of appointment, then, is: "A power of appointment is a power created or reserved by a person (the donor) having property subject to his disposition enabling the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received."[2]

We must make one more refinement before proceeding. There is a difference between special powers on one hand and general powers on the other. By rule of thumb, a general power is one under which the donee may appoint to himself or his estate. All other powers are special.

The theory of operation of the power is interesting and a consideration of such theory may make subsequent problems less

[2] RESTATEMENT, PROPERTY § 318(1), 1940).

difficult. For most purposes, the appointive property is considered to pass from the donor of the power rather than from the donee. For example, A transfers Blackacre to B for life and then to such persons as C may direct. When C directs that Blackacre should go to X, X is considered for most purposes to have taken his property interest from A rather than from C.

Theory is consistent with reality and practicality insofar as the special power is concerned because it appears as a practical matter that C merely filled in the blanks in A's conveyance when he named X. The law has thus developed with relative uniformity to the end that the property is considered to have passed from A for purposes of determining the rights of C's creditors, C's spouse, and C's heirs. Further, the rule against perpetuities is computed on the basis of lives in being at the time of the creation of the special power rather than its exercise.

Insofar as the general power of appointment is concerned, theory is not consistent with reality and practicality and the development has not been uniform. For all practical purposes, if C can appoint property in his own favor, he should be looked upon as being its owner in reality. This, however, is not the invariable attitude of the courts. For purposes of the rights of C's heirs in absence of appointment, the property is considered to have passed to A's heirs from A. The creditors of C may not reach the property in most jurisdictions, although in some jurisdictions, the creditors may reach the appointive property if the general power is exercised. The rights of a surviving spouse of C do not attach to the appointive property.

On the other hand, the law has developed in some areas on the theory that the donee is, for practical purposes, the owner of the appointive property under the general power. For example, the rule against perpetuities is computed as if the donee were the owner; the donee may create new interests, create trusts, etc., as if he were the owner; and, of greatest importance at the moment, for purposes of imposing inheritance and estate taxes, the donee is treated as the practical owner of the property.

A good question at this point would be: "Why ever do such a

foolish thing as to let someone, not the owner, control property?" Or, in the case of a retained power of appointment, why retain the control and not the full ownership? There is a variety of reasons why the power should be used. The first reason, historically, arose long before the 16th century. Before the enactment of the Statute of Wills in 1540, certain estates would not pass by will. The owner A, could not leave Blackacre by will to B, but he could transfer the property in such a manner as to reserve a life estate or even a fee and power of appointment. He could then exercise the power of appointment by will and Blackacre would go to B just as effectively as if left to B directly by will. That is, the power was used to do indirectly that which could not be done directly. There were other reasons for using the power, too, having to do with family settlements, creditors, and marital rights in property.

In the early days of the United States, where family settlements and ancestral estates were not as common as in England, the power of appointment was little used, at least there was little litigation involving its use until the coming of estate and inheritance taxes. With the coming of such taxes, the old device was revived and readied for service again in an attempt to do by indirection that which could not be done directly without tax liability.

Perhaps we should examine the general provisions of the federal law imposing estate, gift and income taxes insofar as they relate directly to powers of appointment, and then consider the specific application to a few illustrations.

When the Estate Tax first became effective in 1916, there was no provision regarding powers in the Act. A few months later, Treasury regulations which had been issued with no reference to the subject, were amended to include a provision regarding the exercise of a general testamentary power.[3] In 1918, Congress added the paragraph that continued up to 1942[4] and which was held to require that property which passed by the exercise of a general power of appointment be included in the donee's estate.[5] Prior to 1942, the power was a wonderful device for achieving

[3] T.D. 2477.
[4] INT. REV. CODE § 811(f) (1939).
[5] Helvering v. Grinnell, 294 U.S. 153, 55 Sup. Ct. 354, 79 L. Ed. 825 (1934).

flexibility in an estate plan without undesirable tax consequences. In 1942, complex provisions were added in lieu of the old provisions. Such changes are not material to this discussion because the 1951 Revenue Act revised the system of taxing property subject to powers of appointment, and such revised system was reenacted in the 1954 Internal Revenue Act. The fundamental pattern is relatively simple to state.

1. Estate Tax.[6]

   a. Pre-1942 powers (created on or before October 21, 1942, with decedent dying before July 1, 1949 in case of will executed prior to October 21, 1942.)

      Appointed property is includible in the estate only if the power is general, only if the power is exercised, and only if the property actually passes by virtue of the power.

      A general power could have been reduced to a special power by partial release prior to Novemebr 1, 1951. Then an exercise would not be considered the exercise of a general power. By implication and according to the old Estate Tax Regulations,[7] if the power were reduced to a special power after the 1951 cut-off date, then the property subject to such power is includible in the estate if the power is exercised although it is a special power.

   b. Post-1942 powers—

      (1) Property subject to general power is included in estate of donee if:

         (a) Donee had the power at death, or,

         (b) Donee exercised or released the power under conditions which would cause it be included in his estate if it were a transfer of property. *(e.g.* contemplation of death, exercise with retained life estate.)

         (c) In case of any post-1942 powers, i.e. general or special, which decedent exercised, by will or under conditions which would cause it to be included in his estate if it were a transfer of property, so as to create another power, *i.e.*, if decedent appointed in the described manner so as to create another power of appointment, any property subject to such post-1942 power would be included in the estate whether the power were general or

[6] INT. REV. CODE § 2041 (1954).
[7] Regulation 105, § 81.24.

special if the appointment be valid under local law without regard to date of creation of the first power.

(2) Property subject to the donated special power is not included in the estate of the donee unles it is exercised to create another power.

c. A general power is one which is exercisable in favor of the decedent, his creditors, his estate, or creditors of his estate. By exclusion, then, a power is a special one if the donee cannot exercise it in favor of self, creditors, estate, or creditors of his estate. Further, a power to invade, according to an ascertainable standard relating to health, support, education, and maintenance, shall not be deemed a general power of appointment.

d. Re-exercise in conjunction with other persons:

(1) If a pre-1942 power, then it is not a general power if it must be exercised with some other person.

(2) If a post-1942 power, it is not a general power if it:

(a) must be exercised with donor of power, or

(b) must be exercised with some person having a substantial interest adverse to exercise in favor of donee. *(e.g.* default taker.)

2. Gift Tax.[8]

a. Pre-1942 powers

(1) An exercise of a general power is taxable as a gift.

(2) A failure to exercise or a complete release is not a gift.

(3) A partial release so as to make a special power is not a gift, if released before November 1, 1951, or within 6 months after removal of disability if donee was under disability.

b. Post-1942 powers

(1) An exercise or release, partial or complete, of a general power of appointment is a gift.

(2) A general power for gift tax purposes is the same as the general power for estate tax purposes.

(3) Creation of another power is a taxable gift if the vesting is thereby validly postponed for a period ascertainable without regard to the date of creation of the first power.

[8] INT. REV. CODE § 2514 (1954).

(4) A lapse of a power can be a gift to the extent that the value of the property subject to the power exceeds the greater of $5,000 or 5% of aggregate value of asests out of which the exercise could be satisfied.

3. Marital Deduction.[9]

Substantially the same provisions appear in both the estate and gift tax provisions. The new law made two changes in both of them. As in the old law, a bequest or gift in trust will qualify for the martial deduction if it is a gift of a life estate with a general power of appointment. The new change is that a legal life estate and general power will qualify, and further, if the life interest and power relate only to a part of the property, it will qualify as to such a part. A general power is defined parenthetically to be a power exerciseable in favor of the donee spouse or the estate of such donee spouse.

4. Income Tax Problems.[10]

The powers as used in the income tax provisions are broader than the classical powers of appointment with which we are dealing and relate generally to retained or granted powers of a character that yield to the holder of such power the economic satisfaction which the owner of the property normally enjoys.

From the standpoint of the estate and gift tax, the power of appointment may fall into one of two possible categories which I believe to be mutually exclusive although definition is not identical in all parts of the code. If the power is used to secure the marital deduction, it must be a general one. A necessary consequence is that the property subject to the power must be included in the estate of the donee unless the power is released in which case a taxable gift is made.

On the other hand, if the estate of the donee is of concern, the special power is the device to use. It cannot be used to secure the martial deduction, but it likewise will not result in the property subject to it being included in the estate of the donee.

In the light of the foregoing, it is obvious that the power of appointment is a valuable tool for the planning of estates and fits well into the accepted methods of reducing estate tax, viz: (1) Use of marital deduction, (2) use of terminable interests to pre-

[9] INT. REV. CODE §§ 2056, 2523 (1954).
[10] INT. REV. CODE §§ 671-678 (1954).

vent inclusion of property in successive estates, and (3) use of inter vivos gifts to reduce the amount of the eventual estates. Such methods are used, of course, in combination, also. There are other devices, too, but they are not relevant to our subject.

In order to have a single illustration for application of all principles, let us create an hypothetical family with an hypothetical estate. H, the husband, and W, the wife, had three children born of the marriage, John, Charles and Thomas. Thomas died leaving a son, Thomas, Jr., and a widow, Vera. There are other grandchildren who may remain nameless. H has sufficient property to be concerned about the estate tax. H has all of the desires common to most men regarding the disposition of his wealth. He desires to provide well for his widow, but he also desires to benefit his children and his grandchildren. Further, he dislikes the idea of enriching a successor husband.

Consider his possible simple plans.

1. By will, H may leave his property in fee to W. This plan provides a maximum of flexibility but does not assure him that his children will ever enjoy the property and gives no assurance regarding the successor husband. The plan has one merit and one merit only, and that is, he enjoys the maximum marital deduction. This advantage is moderated, however, by the fact that the property, if not dissipated, will be taxed again in his widow's estate.

2. By will, H may leave his property directly or in trust to W for life with remainder in fee to John, Charles and Thomas, Jr., but this has objectionable features, also. First, W may require more than the income from the property. This may be taken care of by adding a right to invade the corpus in case of a trust, and if such right is measured by proper standards regarding health and maintenance, it will not be taxed in the widow's estate upon her death. Another difficulty is that W has no control over the disposition of the property and may possibly not enjoy the degree of consideration from her sons and grandchildren that she would otherwise enjoy. Most objectionable, however, is its inflexibility. John may not need the property when W dies, whereas Charles may have been the victim of a disaster that has made him entirely dependent upon others. Other reasons may develop why he would have preferred one over the others, either among children or grandchildren or their spouses.

3. A better solution possibly lies in the direction of a power of appoint-

ment. By will, H could leave his property on trust for W for life (with right to invade) with a special power of appointment, *i.e.* a power to appoint to one or more of his descendants. This method yields greater flexibility, assures W of support and maintenance, guards against enriching the successor husband, and permits W to exert parental discipline over her family. The only difficulty is that, although it is not taxable in W's estate, H does not enjoy the marital deduction for his own estate.

4. Possibly a variation might lie in the direction of a similar trust arrangement, but with a general power of appointment in the wife. This would yield all of the non-tax advantages plus greater flexibility, but could permit enrichment of the successor husband. Further, such a trust would qualify for the marital deduction, but unfortunately, would be taxed in W's estate upon her death whether she exercised the power or not.

5. A better testamentary plan would include elements of several of the foregoing suggestions. By will, H could create a widow's trust (with power to invade) with general power of appointment on a sufficient amount of property to secure maximum benefit from the marital deduction. A testamentary trust could be created on the residue of the property giving W a life interest plus a special power of appointment. This would not qualify for the marital deduction, but that is immaterial because the maximum marital deduction was realized by the other trust. Further, flexibility is realized; *as to the property subject to the special power,* the successor husband is frustrated; and the property will not be taxed in the estate of W even though she exercises the power. Taxwise and perhaps otherwise, this is the best plan utilizing a testamentary scheme which we have considered. There is another step to consider in refinement of such plan. W could execute a release of her general power of appointment, pay a gift tax, and still be better off in that the property will not be included in her estate.

6. Consider the feasibility of inter vivos gifts in trust with powers of appointment. Before going further, there are certain advantages to be gained by an inter vivos transfer aside from the tax considerations. For example, there are reasons not associated with tax why H may desire to set up a trust with a life interest reserved, a life interst in his wife, and possible provisions for continuing the trust during minority of his children.

There is no interruption of management of the trust, no loss of income, no additional expense upon the death of the various parties, no delay or expense through probate. Further, there is no likelihood of attack as there could be upon the will, or if there

is an attack, it would probably be during the lifetime of the settlor and he would be present to defend his act. There would be no problem of the widow's taking a forced share or insisting upon dower, or its statutory substitute. If H persuaded W of the advantages of the transaction long enough to secure her joinder in the trust instrument, he would not have to worry about her changing her mind after his death and taking against his testamentary plan. To a certain extent, H may also select the law to be applied to the trust.

From the standpoint of taxation, inter vivos transactions have an advantage up to a point. Until that point is reached, they are valuable in reducing the estate of the donor, the gift tax being smaller, and not being paid out of the gift itself. In the plan last examined, it would be good planning to compute the amount which could be given with advantage and make the inter vivos gift of the life interest plus special power. This would not qualify for the marital deduction on the gift tax, but it would serve to reduce the amount of the estate, and thus the estate tax. Of course, if the inter vivos gift were too great, full advantage could not be taken of the marital deduction in the estate tax. This is strictly a problem in computation if tax is the only remaining consideration to control the decision. It is true that the marital deduction on the gift tax has been lost by using the special power of appointment, but by the same token, the property will not be taxed subsequently in the estate of W.

Up to this point, in considering the planning problems which surround the power of appointment, we have considered only the question of creation of the power. We should consider, briefly, the exercise of a power.

Any pre-1942 general power should be carefully considered before being exercised. A failure to exercise the pre-1942 power is not a tax-significant event, whereas the exercise of a general power may result in a gift tax if exercised inter vivos, or will result in the appointive property being included in the estate of the donee if exercised by will. For these reasons, the default provisions should be carefully examined before any pre-1942 power is exer-

cised. Consider also the desirability of a general will provision which declares the intention not to exercise any power unless specific reference is made thereto. Consider, too, a general declaration of disclaimer or renunciation.

Regarding post-1942 powers, there is tax-significance in the exercise of the special power only. The mere existence of the general power is the tax-significant event. With regard to the special power, there is no taxable event in the exercise or non-exercise unless the special power is exercised so as to create another power, or is exercised in such a manner that the property would have been included in the estate of the donee if the situation had been one of property transfer.

By far the most complex problems involving powers are those which are present during the planning phase of the estate planner's operation. There remain, however, a few difficult problems which involve the draft-phase of the operation. One cause for difficulty in drafting powers of appointment is the lack of established law on all phases of the operation of the power. A further difficulty arises because in many instances there is no way of knowing as a certainty by which state's law the instrument will be construed and enforced. The will may involve land in many states, or the testator may change domicile. Since there is uncertainty in any event, it is best to make provisions for many contingencies. It is possible to tranform uncertainty to certainty because the intention of the donor of the valid power is the thing sought. In the exercise, it is the intention of the donee.

There are numerous details in drafting which do not merit lengthy discussion here but which must be mentioned.

A few drafting problems may be pointed out in our hypothetical case. Suppose we draft a deed of trust on one-third of H's property creating a life estate and special power of appointment in W. We draft a will for H which will create two trusts, each of one-half of the estate to be held for W for life with a special power in W over one and a general power in W over the other. The problem of distinguishing between the special and general power is a small one. Statutory language should be used, syn-

onyms should be avoided. In drafting the special power, merely provide that the donee does not have the power to appoint to herself, her estate, her creditors, or the creditors of her estate. In drafting the general power, merely provide that she may appoint in favor of herself. In the drafting phase, the tax pitfalls are few in number and obvious in nature. It is the non-tax pitfall that causes the greatest difficulty.

A common shortcoming in case of the special power of appointment is a failure on the part of the draftsman to indicate whether the power is exclusive or non-exclusive, i.e., may the donee exclude one or more of the objects. Unless care is taken to give such power to exclude members of the class the special power will be construed to be non-exclusive. In our hypothetical, unless we so provide, W could not appoint so as to deprive John, Charles or Thomas Jr. of an interest. Having once inadvertently created a non-exclusive power, the draftsman has inadvertently created another problem, and this is the problem of how much must the donee appoint as a minimum to the objects. Since the law is not established in all jurisdictions on both subjects, the matter should be the subject of express provision.

Assume that we have had the foresight to provide for an exclusive special power, i.e., to appoint in favor of one or more of H's descendants. Let us also assume that John and Charles are sufficiently wealthy that an exercise of the power in their favor would only create estate planning problems for them. It is the desire of W to appoint the property, then, to the grandchildren. It is obvious that she may do so in favor of Thomas, Jr., because technically he is a descendant, but it is not obvious as to the children of John and Charles. There are decisions to the effect that appointment cannot be made in their favor as descendants so long as their parents live. This also is a situation calling for special provision in creating the special power. Suppose W desired to appoint in favor of Vera. Assume a fact situation where John and Charles are independently wealthy and there is likewise no particular reason for benefiting their children. W desires to benefit Thomas, Jr., who is a minor. Unless special provision is made, this must be done directly in favor of Thomas, Jr., and not in-

directly through Vera the mother. It might very well develop that W, and even H if he were alive, would be anxious to do all possible for the loyal Vera who has devoted her life to rearing the child of Thomas. Unfortunately, it cannot be done unless special provision has been made in the instrument creating the power. Such provision could easily provide for the power to appoint in favor of the spouse or the estate of any deceased descendant and further provide that remote issue with living parents will be considered to be descendants for the purpose of exercising the power.

Suppose further that instead of being affluent, John is poor and, worse, is a drunkard. W would like to appoint in his favor, but W feels confident that such an appointment would inure to the benefit of the corner liquor store. First, W could, if we had the foresight to so provide, appoint in favor of John's children or spouse. But suppose that we are actually in sympathy with John and wish to help him rather than his dependents. A spendthrift trust is indicated. Can W appoint in trust with spendthrift provisions? That is a good question unless H specially so provided in creating the power. Possibly W would like to appoint successive interests. She may certainly do so if we specifically give her the power.

Suppose W fails to exercise the power, where does the property go? Here again, it is a good idea to spell out default provisions in detail.

Provision should be made for a partial release of the power. Texas, as have other states, has the standard form of statute authorizing partial releases and providing for methods of releasing. It may be desirable to provide in addition that a partial release may be made by filing such release in the court which admitted the will to probate.

The Internal Revenue Code refers to disclaimer and renunciation of a power of appointment and provides that they will not amount to an exercise. How does one disclaim or renounce a power? When is a disclaimer a release? Possibly a provision would be helpful here which would describe a simple method of disclaiming.

There also may be the need of a hotchpot clause. Suppose, in the case of a special power, that John, Charles, and Thomas Jr. are the named objects. They are likewise named as takers in default. If an appointment in equal shares were to be ineffective, for some technical reason as to John, it would go by default equally to the three takers in default with the result that John would take one-ninth whereas, Charles and Thomas, Jr. would take each one-third plus one-ninth. Where more than one power is involved, the risk of inequality is increased. This danger can be avoided by a hotchpot clause which would provide in substance that before any person could take in default of appointment, he must first contribute any share which he received by appointment to be distributed along with the property distributed in default.

Suppose W had prepared a will before H prepared his final will. Would W's will exercise the general power of appointment acquired through H's will? Could such will exercise the power if such an intention were found? To remove doubt, a specific expression of intention could provide that the testator does nor does not intend to exercise all powers, including those created after the execution of the will.

Other problems of drafting are the usual problems which are solved by using the English language in an accurate manner. For assistance in avoiding the less obvious drafting pitfalls, however, a check-list is attached, which I hope will prove to be helpful.

Suggestions for Creating Powers of Appointment

The possible variations of forms for creating the power of appointment are infinite in number. The principal evil to be avoided is future difficulty in determining the exact scope of the power. Since the scope of the power is a matter of expressed intention, care should be taken to express the full intention of the donor on all elements of the power. The check-list which follows should be helpful.

1. Is the power to be general or special for tax purposes?
   a. Is the donee restricted from appointing in favor of himself, his estate, his creditors, or the creditors of his estate?

b. May the donee appoint only in conjunction with the creator of the power?

c. May the donee appoint only in conjunction with a person having a substantial interest adverse to appointment in favor of the donee?

(Tax-wise, the power is special if the answer to a, b, or c, supra, is affirmative.)

d. In the case of a power to invade, is there a limiting ascertainable standard relating to health, etc., of the donee?

2. How is the power to be exercised?

a. Must specific reference be made to the instrument creating it?

b. Is the power exercisable inter vivos?

(1) Immediately?

(2) After some lapse of time or occurrence of an event?

c. Is the power to be exercised only by will?

(1) Is a prior executed will sufficient to constitute a valid exercise?

(2) Is there to be any limit on the time within which the will exercising the power must be admitted to probate?

3. If the power is special, is it to be exclusive or non-exclusive?

a. May the donee appoint so as to deny benefit to any member of the designated class?

b. If the donee may not exclude a member of the class from benefit, what is the minimum to be given each member?

4. If the power is special, among which persons may the donee appoint?

a. Is the designation of the class clear?

b. May the donee appoint in favor of the spouse or estate of any deceased member of the class?

c. May the donee appoint in favor of remote issue with living parents?

5. What interests may be appointed?

a. May the donee appoint less than a fee; may he appoint successive interests?

b. May the donee appoint in trust; may he impose spendthrift provisions?

c. May the donee create a new power of appointment?

6. Have gifts in default of appointment been described?

7. Has provision been made for a method of release of the power?

8. Has provision been made for a method of disclaimer or renunciation of the power?
9. Has the desirability of a hotchpot clause been considered?
10. If the power is a general testamentary power or a special power, has the rule against perpetuities been carefully considered?

Consider the use of a general provision to be inserted in the will, deed, or declaration of trust, which provision expresses an intention on such of the foregoing points as are relevant. Such provision could read, for example: "With regard to any power of appointment created in this instrument, the donee of any such power shall have the following powers in addition to and in no way restricting such powers as he would otherwise have: . . ."

Suggestions for Exercising Power of Appointment

In exercising the power of appointment, the following check-list of questions should be helpful:

1. When was the power created, *i.e.* when was the conveyance or will executed? (If executed on or before October 21, 1952, an exercise of the power may result in an estate tax or gift tax when a failure to exercise the power may not.)
2. What are the default provisions? (Exercise of the power may be unnecessary in any event.)
3. Has the provision creating the power been checked to determine whether or not the proposed exercise exceeds the power?
4. Have appointees been described with clarity?
5. Have alternative provisions been made in the event of the prior death of the appointee?
6. In case of testamentary power, does the testator express an intention to exercise powers acquired after execution of the will?
7. Has the proposed exercise been checked for validity in the light of the rule against perpetuities?

Suggested General Forms

Exercise of Power of Appointment by Specific Provision

"I exercise the power of appointment given to me in . . . (describe will or deed) . . . so as to appoint all of the property subject to such power at

the date of my death to the following persons who survive me: . . . (naming them) . . . and if none of such persons do survive me, then to . . . (describing additional appointees as may be necessary)."

An alternative provision could possibly be: ". . . and if none of such persons do survive me, then I do not desire to exercise such power of appointment notwithstanding any general or residuary provision contained herein."

Exercise of Power of Appointment by Residuary Appointing Provision

"All other property which I own at the time of my death or over which I might have any power of appointment, including but not limited to such powers of appointment that may have been created subsequent to the execution of this will, I devise, bequeath and appoint to . . ."

Refusal to Exercise Power of Appointment

"If, at the time of my death, I have any power of appointment (from a described anticipated source or which was created prior to 1942) from any source whatever except those described herein, it is my intention not to exercise such power in whole or in part, notwithstanding any general or residuary provision contained herein."

Creation of Special Testamentary Power of Appointment

(The power of appointment created by this form is tax-free to the donee, but does not qualify for the marital deduction.)

(After making provision for the preceding interest) ". . . and then to one or more of my descendants who are living at the time of my death and who are not creditors of my said wife or of her estate, to such extent, and in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as my said wife may appoint by will. Appointment may be in favor of any descendant, however remote, even though the parents of such appointee be living."

(If the property is in trust, the following language would be more appropriate after provisions for the preceeding interests:) ". . . and then said trustee shall pay over and distribute all undistributed net income and principal of the trust, as it is then constituted, to or for the benefit of any one or more of my descendants . . ."

(A further appropriate alternative provision should follow.)

"In the event that such power of appointment is not effectively exercised in whole or in part by my wife, then any property which fails to pass by virtue of such exercise shall go to . . ."

Creation of General Power of Appointment over Trust Property

(The power of appointment created by this form qualifies for the marital deduction, but the donee will have gift or estate tax consequences.)

(After providing for life estate for wife) "... Upon the death of my wife, John Doe, the trustee shall pay over and distribute all undistributed net income and principal of the trust, as it is then constituted, to or for the benefit of person or persons, corporation or corporations, or to the estate of my wife, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as my said wife may by will appoint; and, in the event that such power of appointment is not effectively exercised in whole or in part by my wife, then any property which fails to pass by virtue of such exercise shall . . ."

Creation of General Power of Appointment over Legal Title

(The same language as is used in the preceding form would be effective with slight variation to be applicable to legal title.)

(After providing for legal life estate for wife) ". . . and upon the death of my wife, Jane Doe, then to such person or persons . . ."