Powers of Appointment and Selective Allocation

Joel E. Hoffman
POWERS OF APPOINTMENT AND SELECTIVE
ALLOCATION

Doctrinal Assistance for the Erring Donee*

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Avoiding invalid appointments by selective allocation of owned and
appointive property among the provisions of the donee's will has become
a potentially important method of controlling the impact of intent-de-
defeating legal doctrines on estate plans incorporating powers of ap-
pointment. This application of the selective allocation principle can most
easily be seen in the context of the rules governing special powers.¹

Suppose that the will of X transfers ten thousand dollars to A for life,
remainder as A shall by will appoint to or among C, D, and E. Suppose
also that the will of A combines the fund with an additional ten thou-
sand dollars and transfers the aggregate to B and C to be divided equally
between them. The limited scope of the power forbids transfer of any
of the X-derived fund to B while permitting its transfer to C; yet neither
B nor C is in any way barred from receiving any of A's own ten thou-
sand dollars. By selectively allocating to C the ten thousand dollars
received from X and leaving A's contribution for B, A's executor can
satisfy the entire legacy without exceeding the power. Yet any other
division of the aggregate would partially fail because it would involve
the illegal transfer of appointive property to B. Only selective allocation
can save A's dispositive plan from destruction.

Although the use of selective allocation, here and in other cases, can
be shown to be consistent with the policies governing the transmission
of wealth from generation to generation, judicial rationalizations of the
doctrine have fallen far short of establishing it on a firm theoretical
basis. Application of the device, moreover, has been unnecessarily re-
stricted; it is susceptible of use in a far greater variety of cases than
the courts have as yet considered appropriate for its employment. Be-

¹ The scope of the class of possible appointees, the members of which are called "objects,"
Restatement, Property § 319(3) (1940), determines the classification of the power as general
or special. See also 3 Powell, Real Property § 386, at 297 (1952) [hereinafter cited as
Powell]. For present purposes a general power is defined as any power of which the donee
or his estate is an object. See 2 Simes & Smith, Future Interests § 875, at 351 (2d ed. 1955)
[hereinafter cited as Simes & Smith]; 5 American Law of Property § 23.4, at 467 (Casner
ed. 1952) [hereinafter cited as Am. L. Prop.].
cause it is both a desirable and a potentially effective method of controlling the arbitrary effect of intent-defeating rules on the use of powers of appointment, a close evaluation of selective allocation is long overdue.

**In General**

*The Use and Misuse of Powers of Appointment*

The power of appointment, known to English law since the fifteenth century,\(^2\) has become significant in the United States only in the last few decades.\(^3\) To explain the negligible role of powers in this country prior to 1900 is difficult, but the reasons for their growing popularity are clear. In an age of increasingly heavy taxation, owners have turned to complex methods of holding and transferring property in the hope of minimizing their tax burden. But tax reduction is not the only concern. Coping effectively with the exigencies of modern life requires ever more flexible techniques of property enjoyment and transfer. The power of appointment, at once complex in theory and flexible in practice, serves these modern needs more fully than any other device in the law of property.\(^4\)

This is especially so with respect to death transfers.\(^5\) Capable of both creation and exercise by either inter vivos or testamentary instrument, and variable in scope, the power of appointment can be integrated into a variety of estate plans. And with knowledge of its potential benefits becoming increasingly common, estate-planners no longer hesitate to fulfill the testator's desires with this exceedingly old, yet exceedingly modern, device.

Use of the power of appointment, of course, is not without its problems. The legal consequences flowing from a particular property disposition depend largely on its doctrinal characterization, and the courts have recognized in the power of appointment elements both of property

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\(^3\) See 3 Powell § 385, at 287-88; Restatement, Property 1810 (1940).

\(^4\) See Restatement, Property 1809 (1940); 2 Simes & Smith § 861, at 343. Professor Leach has suggested that yet another benefit of powers is the assurance of respect for the donee by the objects. 5 Am. L. Prop. § 23.1, at 461.


Uses of powers outside the field of testamentary transfers are, of course, also possible. Among these are attempts to reduce personal income taxes while still retaining some measure of control over productive assets, by transferring them subject to a reserved power of appointment exercisable inter vivos. For the legislative counterattack, see Int. Rev. Code of 1954, §§ 671-78.
and agency law.\(^6\) Sometimes reflecting the one and sometimes the other doctrine, the case law on powers has not been entirely consistent.\(^7\) The ambivalent nature of his interest is usually less apparent to the donee, whose understandable lack of legal sophistication frequently leads him either to dispose of the appointive property and his own assets in one mass,\(^8\) or, if he does recognize a responsibility to treat them separately, to ignore the special problems which attend the transfer of property under a power.\(^9\) To the extent that the facts of the donee's behavior are nonetheless subjected to agency-oriented rules, the legal consequences may differ from those he contemplated and desired.\(^10\) The flexibility sought, therefore, becomes mere unpredictability, and tax consequences a matter of chance.\(^11\)

Rather than permit such disorganizing consequences, courts are sometimes willing to preserve the parties' general goals by employing selective allocation.

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\(^6\) It can readily be seen that, historically, the donee acted under the authority conferred upon him by the donor in selecting the appointee. Such action was a type of agency. Similarly, it can be readily realized that in making this selection the donee was exercising one of the most important prerogatives of ownership. By deciding upon the ultimate recipient of beneficial ownership the donee was exercising an incident of property ownership, namely, the power of disposition. 3 Powell \$ 385, at 287. Professor Leach, on the other hand, minimizes the property aspect of the interest of the donee of a special power, although he recognizes this feature when the power is general. 5 Am. L. Prop. \$ 23.4-5. His attitude toward special powers is even more firmly expressed in his Restatement. Restatement, Property 1815 (1940) ("[the special power] is in no proper sense ownership").

\(^7\) This historical agency approach to powers has produced the relation-back doctrine, first mentioned in Oke v. Heath, 1 Ves. Sen. 136, 27 Eng. Rep. 940 (Ch. 1748). The essence of relation-back is that the donee, in exercising the power, is merely performing an act of amanuensis for the donor. The donee is said to be filling in the blanks in the donor's will. See generally 5 Am. L. Prop. \$ 23.3; 2 Simes & Smith \$ 911-13. The doctrine is, however, merely a method of explaining the much older rule that the appointee takes directly from the donor rather than from the donee. See 2 Simes & Smith \$ 920, at 391. But see McDougal, "Future Interests Restated: Tradition Versus Clarification and Reform," 55 Harv. L. Rev. 1077, 1109 (1942). ("The purely tautological character of all of this reasoning in terms of 'relation back' . . . and so forth, is obvious and has often been deplored.")

\(^8\) For an example of a common corrective statute, see N.Y. Real Prop. L. \$ 176 (donee will be deemed to have exercised power when he makes a total testamentary disposition of his owned property).

\(^9\) This type of situation is contemplated by statutes like N.Y. Real Prop. L. \$ 175 (donee will be deemed to have exercised power if he makes a total testamentary disposition of his owned property).

\(^10\) The effect of relation-back in distinguishing the legal status of appointive and owned property appears in a variety of contexts: application of the Rule Against Perpetuities, application of the Rule in Shelley's Case, dower and curtesy rights of the donee's spouse, the donee's covenants respecting land use, jurisdiction of the donee's domicile to tax, rights of the donee's creditors, choice of law governing the exercise of the power, capacity of the donee, jurisdiction to tax the donee's estate, applicability of statutory restrictions on gifts to charity, extent of the statutory share belonging to the donee's spouse. See 3 Powell \$ 387, at 298-99; 2 Simes & Smith \$ 911.

\(^11\) While, for powers created after October 21, 1942, the tax consequences to the donee are unaffected (Int. Rev. Code of 1954, \$ 2041; compare Edith Wilson Paul, 16 T.C. 743 (1951) (pre-1942 power)), a default taker's unexpected acquisition of income or property may seriously disrupt an over-all tax plan for the donee's entire family.
SELECTIVE ALLOCATION

The Allocation Problem

Because the donee is empowered, within the limits imposed by law or by the donor, to appoint as he sees fit, he may establish the proportions of owned and appointive property in which each gift in his will is to be satisfied. Going further, it is his function and therefore his duty as appointor to establish these proportions, and the rule has been formalized that his intent governs. The donee, however, often fails to allocate the two types of property over which he has control. Since the fiduciaries under his and the donor’s will must nevertheless be instructed as to the disposition of the property, the duty devolves upon the courts to establish the proportions.

No problems attend such an all-embracing or common disposition if it is entirely void or valid irrespective of the proportions; here ratable allocation suffices, and is universally used. On the other hand, the distinction between owned and appointive property may mean, as it did in the opening illustration, that although all are valid respecting owned property, only some of the gifts in the common disposition are valid as appointments. Here ratable allocation will impair the total effectiveness of the disposition. In these circumstances the court can, without ignoring the owned-appointive distinction, allocate appointive property to the gifts valid as appointments and owned property to those remaining. This procedure is known as selective allocation.

The Common-Disposition Requirement

A preliminary question which must be answered affirmatively before allocation becomes an issue, however, is whether the donee has actually made a common disposition of owned and appointive property. To do this the donee must blend owned and appointive assets into a single fund and dispose of it as an entity. When the donee indicates that specific property is to pass to a named taker there is no occasion for courts to allocate; both as owner and as donee his expressed desires control.14

12 See 5 Am. L. Prop. § 23.59, at 625; Gulliver, Cases on Future Interests 592 (1959); Restatement, Property §§ 363-64 (1940); id. at 2000.
13 Restatement, Property §§ 363(1)(b), 363(2)(b), 363(3)(b), 364(1)(b), 364(3)(b) (1940); 2 Simes & Smith § 975, at 438-39, 441, 445, 447. Ratable allocation is best defined by the Restatement illustration:
if the donee gives owned property worth $6,000 and appoints appointive property worth $4,000 to A, B and C, each one of these persons receives owned and appointive property in the proportions of 6 to 4.
Restatement, Property § 363, comment h at 2015 (1940). Thus, ratable allocation is the apportionment of owned and appointive property to each gift in the same proportions as those in the total common disposition.
14 See 3 Powell ¶ 401 at 371; Restatement, Property § 363, comments d, e at 2011 (1940); id. § 364, comments e, f at 2011-14; 2 Simes & Smith § 975, at 439. See also note 12 supra.
The requisite blending of owned and appointive property may occur through the donee's express exercise of the power of appointment or through acts amounting to such an exercise; or blending may result from the operation of statutes which create under certain conditions the presumption that a power has been exercised. Many combinations of factors, both in testamentary language and in surrounding circumstances, have been held to produce blending, and no useful generalizations can be drawn from the cases save that the result is wholly subject to judicial conclusions respecting the donee's intent. The statutes usually provide that unless a contrary intent is shown a testamentary disposition of all a decedent's property or a residuary clause in his will shall be deemed an exercise of all or some powers of appointment of which he was the donee. Depending on judicial interpretation of the statutory requirements, the power may be considered exercised by the will as a whole or by the residuary clause alone. But in any case, if a blending disposition—whether a complete will, a smaller group of dispositive clauses, or merely a residuary clause—makes two or more distinct gifts, the allocation problem must be met.

Allocation in Inter Vivos Instruments

Although, as a matter of theory, an inter vivos common disposition of owned and appointive property could present an allocation problem, no controversy involving selective allocation in the context of an inter vivos transfer has yet reached the American case reports. This is not surprising. Selective allocation becomes useful only when one or more of the gifts in a common disposition, valid with respect to owned property, is void as an exercise of the power of appointment. The relation-back method of applying the Rule Against Perpetuities to testamentary powers, which is the most common cause of invalidity in appointment cases, does not govern the donee's exercise of a general inter vivos power; the period of the Rule is instead computed from the date of the exercise. Hence, with respect to general inter vivos powers, no

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17 See 3 Powell § 397, at 345 n.38 (collecting statutes). Massachusetts has arrived at a similar rule without benefit of legislation. Amory v. Meredith, 89 Mass. (7 Allen) 397 (1863).
18 E.g., Lockwood v. Mildeberger, 159 N.Y. 181, 53 N.E. 803 (1899) (residuary clause only); Merwin v. Carroll, 171 Md. 346, 188 Atl. 803 (1937) (whole will).
19 Gray, The Rule Against Perpetuities § 524 (4th ed. 1942). Relation-back has led to the rule that in determining the validity of a testamentary appointment, the permissible period is computed from the date of the power's creation rather than that of its exercise, although the facts are viewed as of the time of exercise. Id. at §§ 515, 525-23.2. But see Del. Code Ann. tit. 25, § 501 (1953) (applying inter vivos rule to all powers).
distinction exists for perpetuities purposes between owned and appointive property, and a gift valid under the Rule as an inter vivos transfer of owned property is also valid as an exercise of the power. As the testamentary rules probably would be applied in cases of special inter vivos powers, the development of a distinct inter vivos branch of the selective allocation principle is unlikely.

**PRESENT LAW**

Selective allocation first appeared on the American scene in the New York Court of Appeals case of *Fargo v. Squiers*. The testatrix, who was the donee of a general testamentary power created by her father's will, died leaving a will whose preamble expressed an intent to exercise that power. After granting specific bequests of about $50,000, the will, again referring to the power, created a residuary trust whose beneficiaries were not lives in being at the death of the father. The combined effect of New York's Rule Against Perpetuities and the state's statutory relation-back doctrine was to invalidate the appointment to the extent that the residuary trust beneficiaries were appointees.

The Appellate Division apparently assumed that the residuary clause alone exercised the power and affirmed the trial court's decision that the donee had failed to make a valid appointment. In the Court of Appeals, however, the donee's executors argued that "the legacies and expenses of administration should be paid out of the property which she had the power to appoint, either in whole or *pro rata*. The argument seems to have been that, contrary to the Appellate Division's assumption, the whole will exercised the power and that, accordingly, the court should either partially validate the appointment by ratably allocating appointive property to the charges and legacies, or employ selective allocation to save as much of the appointment as possible.

\[20\] See 5 Am. L. Prop. § 23.59, at 629; 3 Tiffany, Real Property § 713, at 94 (3d ed. 1939).

\[21\] The commentators are in agreement that the testamentary rule should apply to inter vivos instruments. Restatement, Property § 363, comment g at 2014 (1940); id. § 364, comment g at 2020; 2 Simes & Smith § 975, at 447. See 3 Powell ¶ 401, at 373.

\[22\] 154 N.Y. 250, 48 N.E. 509 (1897).

\[23\] "[T]he testatrix, who was the donee of a general testamentary power created by her father's will, died leaving a will whose preamble expressed an intent to exercise that power..."

\[24\] 154 N.Y. 250, 48 N.E. 509 (1897).

\[25\] "intending hereby... to direct the payment and distribution... of the sum held in trust for me, under the provisions of... such last will... hereby executing each and every power of appointment vested in me by said will..." *Fargo v. Squiers*, 6 App. Div. 485, 490, 39 N.Y. Supp. 648, 650 (1st Dep't 1896), modified, 154 N.Y. 250, 48 N.E. 509 (1897).


\[27\] N.Y. Sess. Laws 1896, ch. 547, § 158 (realty), held by the court to apply to personality by virtue of N.Y. Pers. Prop. Law § 11 (inter alia, applying reality rules to personality). The statute was amended in 1959 to apply in terms to personality. N.Y. Real Prop. Law § 178.


\[29\] 154 N.Y. at 252.
Despite the complete failure of the meagre authority cited by the executors to support this theory, the Court of Appeals more or less agreed. Holding that each clause of the will exercised the power and that the gifts contained in each could therefore validly be satisfied with appointive assets, it ordered the specific bequests (but not expenses) to be paid as far as possible from appointive property. Since the specific bequests consumed more than the value of the appointive property, the residuary trust remained fully intact. The court buttressed its decision by reference to two well-established, if somewhat remote, doctrines. The first was that allowing departure from the usual rule making personalty primarily liable for a decedent’s debts when the rule would do violence to the testamentary plan. The second was that which denies a creditor with a claim on two funds the right to take satisfaction from the one constituting another creditor’s only resource. To what extent the disposition of the property was actually affected by the court’s decision is unclear, as the residuary beneficiaries may well have been some or all of the takers in default of appointment. Irrespective of the relative effects on the takers, however, the court appeared to sanction the use of selective allocation to mitigate the damage done by the relation-back application of the Rule Against Perpetuities.

Somewhat contemporaneously with the Fargo decision arose the Pennsylvania case of Van Syckel’s Estate. From the court’s opinions in this case and in a later proceeding involving the same estate, it appears


29 The court cited three unconvincing English cases, Wilday v. Barnett, L.R. 6 Eq. 191 (1868) (holding that where will exercised power, residuary legatees were restrained from reaching appointive property until specific legacies were paid in full); Wollaston v. King, L.R. 8 Eq. 164 (1869) (denying selective allocation despite violation of Rule Against Perpetuities where default takers were legatees of donor’s owned property and appointee wished to receive this instead of appointive property); Gainsford v. Dunn, L.R. 17 Eq. 405 (1874) (allowing ratable allocation where whole will, exercising nonexclusive power, made some objects specific, and some residuary, legatees), and an irrelevant earlier decision of its own, Rice v. Harbeson, 63 N.Y. 493 (1876) (restricting mortgagee to owned realty to save owned personalty for legatees).

30 The default takers were those who would have been the donor’s heirs had he died in New York immediately after the death of the donee, his wife predeceasing him. 154 N.Y. at 256, 48 N.E. at 510. The residuary beneficiaries were the donor’s grandchildren. Id. at 258, 48 N.E. at 510. Neither the Appellate Division nor the Court of Appeals indicated whether the beneficiaries’ mother, the donor’s daughter, was alive. Nor can those who would have taken under the capture doctrine be ascertained.


31 9 Pa. Dist. 367 (Orphans’ Ct. 1900).

that the donee exercised a nonexclusive special testamentary power by her whole will, which unfortunately included a gift to a nonobject of the power. One of the permissible appointees, who had received a smaller share than the others, argued that the entire appointment was invalid because of the offending gift—a conclusion which would have required distribution of the appointive property equally among the objects in their capacity as default takers under the donee's will. The Orphans' Court, affirming the adjudication of the auditing judge, sustained the appointment by allocating all the appointive property to the objects of the power and ordering payment of the unauthorized appointee's gift from owned property. Looking not to the analogies employed in New York but to the maxim *reddendo singula singulis*, the court theorized that the will in effect made two dispositions to two classes of takers and that each disposition should be attributed to the appropriate class. Failure of an appointment as beyond the scope of the power was thus added to invalidity of an appointment under the Rule Against Perpetuities as a result which legitimately might be avoided by selective allocation.

Subsequent cases have secured the use of selective allocation in the two fact patterns involved in the *Fargo* and *Van Syckel* decisions. Despite the seeming availability of the doctrine in the context of other intent-defeating rules, however, these categories have remained the only ones in which it has been employed.

**The Special-Power Cases**

The cases utilizing selective allocation to save appointments made partially to nonobjects have been relatively straightforward, although infrequent. Having denied a petition to review its *Van Syckel* decision, the Philadelphia County Orphans' Court has allowed selective allocation in the only two special-power cases which have since arisen. Aside from these Pennsylvania cases, no tribunal has spoken on the matter except the Massachusetts Supreme Court. Apparently without any awareness of the Pennsylvania precedent, that court, in an early common-disposition case, reserved appointive property to the objects of a

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33 "By referring each to each; referring each phrase or expression to its appropriate object." Black, Law Dictionary 442 (4th ed. 1951).


35 In *Tower's Estate*, 5 Pa. D. & C. 369 (Orphans' Ct. 1924), the court ordered debts and expenses to be paid from owned property, despite protests from the remaindermen, where the donee's whole will, consisting entirely of a residuary gift to the sole object, exercised a special power over income. In *Jessup's Estate*, 17 Pa. D. & C. 517 (Orphans' Ct. 1933), all appointments were held valid where the donee expressly exercised two special powers by a single disposition to the objects of both, the default takers being among the appointees.
special power on the Van Syckel theory of selective allocation. As in Fargo, the appointees in the Massachusetts case may have been some or all of the takers in default of appointment, so that the actual effect of the decision upon them is uncertain.

_The Perpetuities Cases_

_Pennsylvania._ While the development of selective allocation as a means of avoiding perpetuities problems has been more extensive, it has also been more confused. Pennsylvania, the leader in using selective allocation to validate the exercise of special powers, has rejected the device in the perpetuities context. In _Jackson's Estate_ the same court which decided Van Syckel avoided allocation problems by holding that the two general testamentary powers held by the decedent had been exercised by her residuary clause and not by her whole will. The court nevertheless went on to say that if its decision should be reversed on appeal so that appointive property should become available to satisfy legacies, it favored ratable rather than selective allocation despite possible perpetuities difficulties. Reversing the Orphans' Court on the preliminary question, the Pennsylvania Supreme Court held the whole will to be an exercise of the powers and the total of owned and appointive property to constitute a common fund, any or all of which was available for legacies. It endorsed the lower court's suggestion on the allocation problem, however, simply quoting the opinion below and adding, "with this we agree." The court's refusal to employ selective allocation may well have eased the residuary legatee's pain on being deprived of exclusive rights to the appointive assets since the residuary legatees were in this case entitled to receive at least part of any of that property not validly appointed.

The rule rejecting selective allocation in perpetuities cases, so effortlessly established in _Jackson's Estate_, received more detailed considera-

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37 The reports do not identify the named default takers, if indeed there were any. The appointees were among the intestate successors of the donor. Id. at 166, 75 N.E. at 141.
39 It is not necessary for us to determine the question, but in case our conclusion on the principal question should be reversed we express the opinion that the legacies (including the benefits of the tax free clause) should be apportioned between testatrix's own estate, and the two trust funds upon the basis of the net values of the three funds. We see no reason why testatrix's own estate should be appropriated first, or why a choice should be made between the two appointed funds. Id. at 339.
40 _Jackson's Estate_, 337 Pa. 561, 12 A.2d 338 (1940).
41 Id. at 570, 12 A.2d at 343.
42 One of the donee's powers had been reserved by her under an inter vivos transfer with no gift in default of appointment. Id. at 563, 12 A.2d at 340. The default takers under the other power cannot be identified, but the power had been created by the donee's father. Id. at 564, 12 A.2d at 340.
tion thirteen years later. In *Harris Trust*, the only Pennsylvania case since *Jackson* to raise an allocation question, the donee appointed part of the property subject to her general testamentary power to an inter vivos trust which she had established some years before her death. All parties conceded that the relation-back theory of the Rule Against Perpetuities would invalidate the appointment to the extent that the donee’s great-grandchildren, who were income beneficiaries and remaindermen of the trust, received appointive property. But the guardian *ad litem* of the great-grandchildren urged that their gifts be saved under the New York doctrine of *Fargo v. Squiers* by allocating owned property to the trust and the appointive property to the other dispositions in the donee’s will. The auditing judge of the Orphans’ Court, without invoking *Jackson*, rejected the argument on the theory that evasion of the Rule Against Perpetuities was in no circumstances to be countenanced and hence was not a legitimate goal of selective allocation. The full bench, on review, also refused to employ selective allocation, but on the ground that the donee, rather than making a common disposition, had specifically exercised the power solely by her bequest to the trust. The court half-heartedly mentioned as an alternative reason for its action the certainly erroneous view that the New York doctrine itself did not permit allocation “in violation of the rule against perpetuities.” Since no appeal was taken, the *Jackson-Harris* view presumably will govern the disposition of future Pennsylvania attempts to mitigate perpetuities problems by selective allocation.

*Massachusetts.* The contrary position has been adopted by Massachusetts. Applying the same theory generally used to justify selective allocation in the special-power cases, the Supreme Judicial Court in *Minot v. Paine* approved use of the device to sustain the validity of an appointment under the Rule Against Perpetuities. The donee of a general testamentary power had left a will “wherein she exercised the power” but “made no distinction between her own and the property appointed.” One trust established by the will would have violated the Rule were it considered an appointment, but the other trusts and all of the pecuniary legacies were free of any invalidity. The trustees under the donor’s will specifically requested instructions on the question

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44 Id. at 431. The named takers in default were the donee’s surviving children, while the beneficiaries were the donee’s great-grandchildren. Id. at 418-19.
45 Id. at 427.
46 Id. at 431. Compare notes 70-77 infra and accompanying text.
47 See note 33 supra and accompanying text.
49 Id. at 523, 120 N.E. at 171.
of selective allocation.\textsuperscript{50} Whether they argued the line of New York cases headed by \textit{Fargo} does not appear; however, the court expressly disclaimed the rationale of that case as a basis for its conclusion.\textsuperscript{51} Instead, citing its earlier special-power decision,\textsuperscript{52} the Massachusetts court applied the \textit{reddendo singula singulis} theory to allow allocation of the appointive property to those trusts and legacies valid as appointments. The beneficiary of the sustained trust thereby received a life estate, to be followed by a remainder for life to his adopted daughter and a remainder in fee to his issue, in four times the amount of property he would have received as a default taker under the donor's will.\textsuperscript{53}

Even Massachusetts, however, has limited the extent to which it will employ selective allocation. In the state's only allocation case since \textit{Minot v. Paine}, the Supreme Court held that the requirement of a common disposition precludes selective allocation among the provisions of the donee's will when the gifts invalid as appointments are made not by that will but by the will of one exercising a secondary power created by the donee's appointement.\textsuperscript{54} The court's application of the capture doctrine, the effect of which was to give at least some of the appointive property to the same persons who would have taken had selective allocation been allowed, probably made its decision an easier one than it might otherwise have been.\textsuperscript{55}

\textit{New York.} The most extensive development of the selective allocation doctrine has been in New York, the state of its origin. Since the decision in \textit{Fargo v. Squiers} the New York courts have dealt with the allocation problem some twenty-seven times. While a few aberrational cases exist, the principle of allocating selectively to avoid perpetuities problems has in general found judicial acceptance.\textsuperscript{56}

\textsuperscript{50} "If it shall appear to the court that any of said trusts are invalid ... whether it is now the duty of said trustees to marshal the funds held by them so as to satisfy such trusts entirely out of the property held by them which was derived from the individual property of said ... [donee] and use the appointed funds only for such of said trusts as are not invalid..." Id. at 515.

\textsuperscript{51} "It is unnecessary to determine whether the same result could be reached by the operation of the doctrine of marshalling of assets..." Id. at 525, 120 N.E. at 172.

\textsuperscript{52} Stone v. Forbes, 189 Mass. 163, 75 N.E. 141 (1905).

\textsuperscript{53} The beneficiary was one of the donee's four children, while the gift in default of appointment was to the donee's issue. 230 Mass. at 523-24, 120 N.E. at 171. Had the capture doctrine been applied, the difference would possibly have been even greater. See generally the material cited note 30 supra.


\textsuperscript{55} Id. at 660, 88 N.E.2d at 133. The income appointees under the secondary power were among the second donee's intestate successors, and were in addition the default takers under the first donee's will. Id. at 652-53, 88 N.E.2d at 129. One of them was living and might have had subsequent issue who would have been appointees of the corpus. Id. at 653, 88 N.E.2d at 129-30. See generally note 30 supra.

\textsuperscript{56} This acceptance has extended beyond the usual case of a common disposition of owned and appointive property. Cheever v. Cheever, 172 App. Div. 353, 157 N.Y. Supp. 428 (1st Dep't 1916) (allowing selective allocation of two masses of appointive property under separate powers in order to avoid use of one mass in violation of the Rule).
SELECTIVE ALLOCATION

Of the nine cases in which selective allocation has been denied two were decided on procedural issues not going to the merits or applicability of the doctrine. The first of these cases refused to consider the allocation problem on the ground that the record contained insufficient facts to permit a decision. In the other case an estoppel notion was used to bar a request for selective allocation by parties who had acquiesced in a decision entered twenty-seven years before. That decision had held that, to the extent the donee’s appointments via a common disposition were void under the Rule Against Perpetuities, default takers and remaindermen were entitled to the appointive property. After twenty-seven years of acceptance, the Surrogate held, the parties could no longer challenge the previous order; and since, of course, no disposition under that order violated the Rule, there was obviously no need for selective allocation.

In cases which have come closer to the merits of selective allocation the New York courts have three times refused to utilize the doctrine on the ground that a common disposition embracing both valid and void gifts was lacking. In all three cases the donee’s residuary bequest alone constituted a common disposition, and all residuary gifts were valid as appointments. Absence of a true common disposition has also been the reason for denial of selective allocation in a case in which the donee of a power specifically provided for substitutional appointments to take effect should the initial appointments fail. Selective allocation to maximize validity, the court reasoned, was unnecessary since full validity could be attained simply by following the donee’s expressed intent.

None of these six decisions casts any doubt on the vitality of the selective allocation doctrine as a method of avoiding perpetuities problems in appropriate cases. Twice, however, the inferior courts have adopted the Pennsylvania view and have refused to minimize the destructive effect of the Rule Against Perpetuities with selective alloca-

68 Matter of Littleton, 124 N.Y.S.2d 440 (Surr. Ct. Westchester County 1953). The prior decision, unreported, is summarized at 443-44.
69 Id. at 444-45.
70 Low v. Bankers Trust Co., 270 N.Y. 143, 200 N.E. 674 (1936); Farmers’ Loan & Trust Co. v. Kip, 192 N.Y. 265, 85 N.E. 59 (1908); Matter of Creem, 147 N.Y.S.2d 634 (Surr. Ct. Kings County 1955). The confusion engendered by the decisions concerning the factors which mark a common disposition is noteworthy. Typifying the frustration of the courts in this area is the dilemma of Surrogate Wingate:
The court is faced with the somewhat hazardous necessity of attempting to chart a safe course between the Scylla of Fargo v. Squiers . . . and the Charybdis of Low v. Bankers Trust Company . . . .
62 Id. at 87-88, 9 N.Y.S.2d at 588-89.
tion. Although selective allocation would have preserved substantial amounts of property for the donee's nominees, in *Matter of Berwind* the Surrogate's Court rejected the doctrine, apparently in direct disregard of *Fargo*. It found that inequity would result from the diversion of the funds within the donor's estate to the payment of the donee's debts or for other purposes, in order to swell the residuary estate in which the undue suspension so grossly violates the public policy of our State designed to vest future interests within a reasonable period.

The only decision wholly to agree with *Berwind* has been *Matter of Barrett*. Simply citing the former case, the court held that selective allocation was unavailable to keep appointive property out of trusts which as appointments violated the Rule Against Perpetuities.

While not rejecting the principle of selective allocation as a legitimate means of avoiding perpetuities problems, the Surrogate's Court has in one other case refused so to employ the device. It found that to do so would merely effect "a rearrangement of the share of the parties to the greater advantage of some and to the detriment of others"—a consequence elsewhere considered appropriate to selective allocation.

These three variants aside, New York appears to be wholeheartedly committed to selective allocation in the perpetuities context. In order to sustain the validity of appointments under the Rule, the courts have allocated appointive property to those residuary gifts valid as appointments, to legacies, debts and expenses, to legacies only, to debts

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63 181 Misc. 559, 42 N.Y.S.2d 58 (Surr. Ct. N.Y. County 1943). The default takers were the donee's surviving descendants, id. at 561, 42 N.Y.S.2d at 61; the appointees were the donee's husband, one of her children, and the latter's children, id. at 562, 42 N.Y.S.2d at 62.

64 Id. at 565, 42 N.Y.S.2d at 64. Even though selective allocation would not, as the court feared, have violated the principle of the Rule, see text accompanying note 91 infra, it would have kept the appointive property tied up longer than did the court's decision.


66 Id. at 763. The donee, who was the donor's brother, appointed to his own wife and son, id. at 760, but the decision caused the property to go to the donor's intestate successors because there was no default gift. Id. at 762. It is, of course, possible that the donor's brother was his only distributee and that the same persons would have taken as appointees and as the donor's successors; the likelihood of this is slight, however, as it appears from the report of earlier litigation involving the estate that the appointive property was merely a part of the donor's estate, the rest having been given to others than the donee. *Matter of Barrett*, 206 Misc. 363, 132 N.Y.S.2d 755 (Surr. Ct. N.Y. County 1954).


68 Id. at 525.


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and expenses only, depending on which elements of the will besides the offending gift were held to make up the common disposition. A majority of these decisions justify selective allocation, either expressly or impliedly, by the general constructional preference for that reading which gives an instrument its maximum effectiveness. In effect, the reasoning is that, absent an ascertainable intent concerning allocation, the court must postulate what the donee's intent was, or, as most often is the case, would have been. Since the donee presumably desired his disposition to be as fully effective as possible and selective allocation is the adoption of one possible construction of the instrument, selective allocation should be ordered. The remaining decisions merely invoke Fargo v. Squiers as justification for the doctrine.

Summary

By way of recapitulation, then, selective allocation requires a common disposition of owned and appointive property, partially valid and partially void as an appointment, but totally valid as a transfer of owned property. Absent such a disposition the doctrine is inapplicable. Use of the doctrine has been justified by the analogies of marshalling assets for creditors and subjecting realty to debts and legacies, by the rule of


76 The constructional preference for maximum validity is described in 2 Page, Wills § 925 (3d ed. 1941); 2 Powell ¶ 318, at 688 (1950); 3 Powell ¶ 401, at 371 (1952).

construction in favor of giving an instrument maximum effectiveness, and by the maxim *reddendo singula singulis*. Pennsylvania permits selective allocation to minimize the difficulties arising from special powers but not to accomplish the same purpose vis-à-vis the Rule Against Perpetuities. Massachusetts applies the doctrine in both situations. New York's experience with selective allocation has been confined to perpetuities cases; in this context the doctrine has been accepted. Its applicability to the special-power situation in New York remains an open question. No other state has considered any facet of the allocation problem.

**Theoretical Bases**

While the courts have on occasion propounded one or another of the three theories of selective allocation just described, they have often applied the doctrine without offering any explicit rationale for their action. This is not to say that these cases do not abound with expressions to the effect that the court is merely "executing the donee's plan of distribution"; to that extent they follow the pattern of most decisions in the decedents' estates field. But the donee's "plan," if indeed any existed, is not enough to justify selective allocation, or any other legal conclusions in this area of the law. The accepted philosophy of decedents' estates is that a testator's freedom to transfer property at death is subject to external limitations which may in no event be exceeded. Limits such as the Rule Against Perpetuities and the special-power restrictions are indeed the very reasons for the existence of allocation problems. Designedly intent-defeating, their application and enforcement, by definition, cannot depend upon the donee's preference. Whether they are to be given a wider or narrower range of application must turn on notions of social desirability and not on the wishes of those whom the rules are established to curb.

In short, if selective allocation is to be used, there must be a reason besides "testator's intent" to refrain from applying the relevant intent-defeating rule. Indeed, intent is completely irrelevant if the justification for selective allocation is the effectuation of some policy taking precedence over the intent-defeating rules. With this in mind, the three judicially-propounded justifications may be examined.

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78 Not atypical is the view of the Pennsylvania court: No rule regarding wills is more settled than the great General Rule that the testator’s intent, if it is not unlawful, must prevail! Cannistra's Estate, 384 Pa. 605, 607, 121 A.2d 157, 158 (1956).

79 The Rule arose through efforts to block the intent of landed Englishmen to perpetuate their control over their property. 6 Am. L. Prop. § 24.4, at 14; Gulliver, Cases on Future Interests 362 (1959); 5 Powell ¶ 759, at 537 (1956). Special-power restrictions are grounded in the policy that the intent of the donor is paramount over that of the donee.
Marshalling of Assets

The theory of marshalling assets for creditors is totally independent of the debtor's intent.80 A principle of equity jurisprudence, marshalling seeks to ensure fair and just treatment, not of the debtor, but of each of his creditors.81 Thus, courts invoke the principle to restrain a creditor whose debt is adequately secured by each of two funds from depleting that fund which represents a junior creditor's only security.82 Each creditor is thereby assured of payment and neither is unnecessarily deprived of any right. It is this doctrine which some courts have found to provide an analogy for selective allocation.

The universal requirement that all debts be paid before legacies are satisfied attests to one basic difference in the legal position of creditors and testamentary beneficiaries. But even on the assumption that the two creditors in the marshalling situation can profitably be compared with the two groups of takers under a common disposition, in the case of marshalling, the policy of fully paying all creditors is unopposed by competing values. In the selective allocation situation, however, the restrictive rules enter the picture. The question that the analogy falls short of answering is whether the equitable policy of favoring full payment of all takers is more important than the policies underlying the relevant intent-defeating rule. These policies could well require that each group of takers be restricted to a ratable share, or could even dictate an allocation that would maximize the invalidity of gifts.83

Nonexoneration of Realty

The second analogy of Fargo—the doctrine of subjecting realty to debts, expenses and legacies in certain circumstances—rests, as do the other two major justifications for selective allocation, upon the donee's intent. Under the normal rule, a decedent's realty is exonerated from

80 See generally 1 Pomeroy, Equitable Remedies 5078-86 (2d ed. 1919); 5 Pomeroy, Equity Jurisprudence § 1414 (5th ed. 1941).
81 The right to have assets marshalled belongs to the junior creditor, i.e., the one-lien creditor. See, e.g., Sowell v. Federal Reserve Bank, 268 U.S. 449 (1925); Women's Hosp. v. 67th St. Realty Co., 265 N.Y. 226, 192 N.E. 302 (1934); Evertson v. Booth, 19 Johns. R. 486 (N.Y. 1822). The debtor cannot invoke the doctrine, Sowell v. Federal Reserve Bank, supra, except, in some jurisdictions, to protect homesteads. 1 Pomeroy, Equitable Remedies 5084-85 (2d ed. 1919).
Yet another point at which the analogy falters stems from the rule that only the junior creditor can compel marshalling, note 81 supra. Often it is the donee's estate, corresponding to the debtor, that requests selective allocation.
the payment of these charges unless the personalty is insufficient for the purpose.\footnote{See 3 Am. L. Prop. § 14.21, at 646; 4 Page, Wills § 1438, at 214, § 1472, at 280 (3d ed. 1941) (collecting cases).} When, however, a court finds that satisfying debts, expenses and legacies exclusively from personalty would distort the decedent's plan of distribution, it may establish a scheme of contribution by realty which will result in closer approximation of the decedent's wishes.\footnote{E.g., Fargo v. Squiers, 154 N.Y. 250, 48 N.E. 509 (1897) (dictum); Rice v. Harbeson, 63 N.Y. 493 (1876); 4 Page, Wills § 1438, at 214, § 1472, at 280 (3d ed. 1941).}

It is true that equitable modification of the exoneration rule may be likened, in one respect, to the adoption of selective, rather than ratable, allocation. In both cases variation from what might be called the norm in order to favor the decedent's presumed intent represents merely the rejection of a more general assumption of intent.\footnote{Note 85 supra.} Here, however, the analogy ends. As in the case of marshalling, manipulation of the exoneration principle affects no external limitation on freedom of testamentary disposition. But any deviation from ratable allocation necessarily contracts the scope of the restrictive rules. To that extent, hinging a choice of selective allocation upon the exoneration analogy alone assumes the result sought to be justified.

**Constructional Preference**

Under the constructional preference rationale, the testator's intent with regard to allocation is found to be that which will accord the highest degree of validity to his general plan of distribution.\footnote{Note 76 supra.} One cannot quarrel with the premise that a decedent who made the effort of drawing (or paying to have drawn) a written disposition of his property intended that it be effective. And the courts which have applied this formalized theory of construction display the virtue, not to be found in those decisions speaking loosely of executing the testator's plan, of recognizing that it is the donee's intent respecting allocation and not his intent as to validity that furnishes the immediate basis for the use of selective allocation. Nevertheless, constructional preferences as a justification for selective allocation suffer from the general deficiency of the Fargo analogies, failure adequately to consider the relation of allocation to the policies underlying the major intent-defeating rules.

**Reddendo Singula Singulis**

Much the same criticism applies to the *reddendo singula singulis* maxim used for the first time to support selective allocation in *Van
Since the maxim presupposes that the decedent's actual intent to "attribute to each his own" cannot be ascertained,\textsuperscript{89} the primary question in considering selective allocation must be whether the intent-defeating rules are to be applied wherever possible or only in those cases in which the proscribed intent is clear. Here again the cases fail to meet the issue.

**Underlying Considerations**

So complete an absence of judicial self-analysis on a point of doctrine, while fortunately rare, does not necessarily imply that the courts allowing selective allocation in the face of the restrictive rules have done so improperly. To the contrary, analysis suggests that a broad use of selective allocation can further the precise policies underlying those rules. Nevertheless, the unadorned conclusion implicit in the reported cases, that invalidation serves no useful purpose when the proscribed intent is merely speculative, is insufficient in itself to provide the intellectual legitimation necessary for selective allocation to gain wider acceptance. What is required is a critical examination of the effects of selective allocation upon the restrictive rules in the several contexts in which allocation problems can arise.

The two intent-defeating rules which have thus far been emphasized are the donor-imposed limits on the donee's choice of appointees (special powers) and the Rule Against Perpetuities. On the theory that the appointee under a power takes directly from the donor, the donor is permitted to "choose his transferees" by restricting the class of objects to those whom he desires to benefit. The donor's primary intent is normally to benefit the members of this class, and not those he has named as default takers or residuary beneficiaries or who constitute his intestate successors.\textsuperscript{90} The use of selective allocation to validate appointments in a common disposition by confining the appointive property to permissible takers therefore executes the donor's intent far more accurately than allowing the appointive property to go by default. Since the sole function of special-power limitations on the donee is to effectuate

\textsuperscript{88} See note 33 supra and accompanying text.

\textsuperscript{89} The maxim is a rule of construction which, like all rules of construction, is used only to clarify an intent not apparent on the face of the will. 2 Page, Wills § 916, at 794, 796 (3d ed. 1941) (collecting cases).

\textsuperscript{90} Of course, a decedent's desire to have his tax advantage without foregoing dispositive control may often be fulfilled by a marital deduction trust in which the unexpressed premise is that the surviving spouse will fail to exercise her general power and will thereby permit the appointive property to go to carefully selected default takers named in the decedent's will. See generally Int. Rev. Code of 1954, § 2056; Lowndes & Kramer, Federal Estate and Gift Taxes 895 (1956); Shattuck & Farr, An Estate Planner's Handbook 26 (2d ed. 1953).
the intent of the donor, no reason appears why this salutary effect of selective allocation should not be sought.

Similar reasoning applies to cases raising problems under the Rule Against Perpetuities. An important purpose of the Rule is to keep property reasonably free for whatever use future circumstances disclose to be the most desirable. But when appointive property is allowed to pass to the donor's default takers, his residuary legatees or intestate successors, the donee's current evaluation of the most advantageous use of the resources is often discarded in favor of a determination made, if at all, a generation earlier. By employing selective allocation a court not only satisfies the literal requirements of the Rule, but it endorses an over-all distribution of property based on the donee's contemporary conclusions respecting contemporary needs. The flexibility of property use which is the object of the Rule is thereby maximized.

Mitigating by selective allocation the harsh effects stemming from agency-oriented restrictive rules, then, is defensible, and indeed desirable. Paradoxically, it furnishes a method of implementing both the fundamental policy of honoring private volition in the transfer of property and the policies represented by the rules limiting such volition, without the need of subordinating either value to the other.

**FUTURE USES**

The paucity of selective allocation decisions may be taken either as an indication that the device is destined to remain a judicial oddity or as merely the prelude to widespread use of a potentially significant wealth-transmission doctrine. Whether selective allocation will grow in importance depends primarily on three considerations: (1) the effect that recent changes in the Rule Against Perpetuities will have on the doctrine's utility; (2) the doctrine's applicability to transfers not now recognized as satisfying the common disposition requirement; (3) the possibilities of its employment for purposes other than minimizing the destructive effect of the Rule Against Perpetuities and special-power limitations.

**The Effect of Perpetuities Changes**

The bulk of selective allocation cases, it will be recalled, have involved common dispositions partially invalid under the Rule Against Perpetuities, and most of these cases have arisen in the New York courts. From 1830 to 1958 that state labored under a statutory version of the Rule 91

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91 5 Powell § 762 (1956); Simes, Public Policy and the Dead Hand 59 (1955). See note 79 supra.

which has been termed by Professor Powell "the most restrictive and unreasonable Rule Against Perpetuities in the Anglo-American legal world." Though not restoring the common-law Rule, in 1958 the New York legislature eliminated the numerical restriction of two on measuring lives-in-being. It thereby appreciably lengthened the permissible period for interests created on or after September 1 of that year. Further amendments in 1960 substantially completed New York's return to common-law principles. A gross term of twenty-one years was added to the permissible period for post-April 12, 1960, future interests, and various other statutory departures from traditional doctrine were repealed.

The recent amendments will doubtless sanction many dispositions that were invalid under the old statute. To predict their effect on the incidence of cases presenting allocation problems is impossible. Although the relation-back approach to powers has been modified by applying to the interests of appointees the law in effect at the time the power is exercised and not the law obtaining at the time of its creation, neither the 1958 nor the 1960 changes are restrospective in operation. All three versions of the Rule will continue to be applied by New York courts for some time to come. Nor can satisfactory conclusions be drawn from an analysis of the cases to date in terms of the new amendments. The great majority of New York allocation cases decided under the pre-1958 statute fail to disclose sufficient facts to allow determinations of validity under the 1958 or the 1960 changes were the same fact patterns to be newly presented.

The "wait-and-see" doctrine represents a new approach to the Rule Against Perpetuities which rejects the Rule's traditional primary requirement—absolute certainty of timely vesting. Usually statutory, wait-and-see rules require the courts to decide the validity of future interests on the basis of actual rather than possible events.

97 N.Y. Real Prop. Law §§ 178-79.
99 While seven states have enacted wait-and-see by statute, notes 101-02 infra, only in New Hampshire have the courts clearly broken with tradition on their own initiative. Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).
100 See generally Simes & Smith § 1230; Simes, "Is the Rule Against Perpetuities Doomed?" 52 Mich. L. Rev. 179 (1953); Leach, "Perpetuities in Perspective: Ending the
states this means deferral of rulings of invalidity at least until the expiration of preceding life estates\textsuperscript{101} and, because of differing formulations of the doctrine, in at least four states even longer for certain types of future interests.\textsuperscript{102}

While wait-and-see saves many dispositions from invalidity predicated on farfetched contingencies whose occurrence would unduly postpone vesting, its price is often uncertainty. Under the classical requirement of absolute certainty of timely vesting, future interests could be determined to be either void or valid at the initial construction of the instrument creating them, and the need for selective allocation could at that time be definitely ascertained. Postponement of the time for testing validity renders the position of the interest uncertain, and with it, the need for selective allocation. However, this uncertainty should not affect a court's willingness to employ selective allocation when part of a common disposition is possibly invalid but not definitely so. If the goal of selective allocation is avoidance of distributions raising perpetuities problems, the fact that the problems are merely a possible consequence of a given distribution does not make it any less desirable to use selective allocation. Hence, if early adjudications to establish the validity (rather than the invalidity) of gifts are to be permitted in the wait-and-see states, selective allocation can function much as it does in jurisdictions retaining the common-law Rule. Of course, in those states which will defer all court questions until the termination of the wait-and-see period, the cases will be fewer in which selective allocation plays an important role.

Using Selective Allocation in Other Dispositions

The indispensable prerequisite to the use of selective allocation has always been a true common disposition of owned and appointive prop-


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When the donee has in some way evidenced his intent regarding the devolution of either of these classes of property, the courts have refused to alter the allocation he directs, regardless of the consequences which may flow from application of the intent-defeating rules. This position has been the logical outgrowth both of the maxim that courts will not vary the testator's expressed intent and of judicial reluctance to subordinate the restrictive rules in the face of clearly violative language. However, by finding both a general and a particular intent in the area of cy pres, courts have been making increasing inroads on the primacy of the testator's written words. This methodology, moreover, has already received some sanction in the context of the Rule Against Perpetuities.

In its traditional form cy pres is severely limited in scope. Restricted to the field of charitable trusts, the doctrine provides that the impossibility or illegality of a charitable use specified by a testator will not terminate the trust if a more general charitable purpose and intent can be ascertained and the trust corpus can be devoted in some manner to the effectuation of that purpose. The underlying theory is that the decedent would have wanted his general charitable intent executed even though the particular method he chose could not be employed. Most states recognize this doctrine, or the practically identical theory of approximation, either by judicial decision or by statute.

In a few states, however, cy pres has been extended to the field of the Rule Against Perpetuities. Again, presumably on the theory that the decedent would have desired that his general plan of benevolence toward his named legatees be effectuated even if the particular dispositive plan he specified could not legally be carried out, a few courts,
under enabling statutes or their own common law powers, have replaced offending testamentary provisions with valid substitutes equally effective to achieve the decedent's general purpose.

In those jurisdictions which have in this way implicitly approved a contraction of the Rule's scope, no reason appears why application of the selective allocation principle should be limited to the common disposition situation. In many cases in which the will specifies a plan of allocation, the donee-testator's general purpose is simply to confer economic benefits on the persons, and in the amounts, specified in his will, be the persons named appointees or legatees. His allocation of owned and appointive property among the dispositions in the will has no intrinsic importance to him and represents only a tidy scheme of distributing all the property subject to his power of disposal. In such a case, if the testamentary plan of allocation will fail under the Rule because of the invalidity of one or more appointments, but the legatees can validly take as appointees, a court would be executing the primary purpose of the decedent in allocating property owned to those named as appointees and leaving appointive property to the named legatees.

Much the same analysis applies to cases in which an appointment fails because made to one outside the class of permissible objects. Once a jurisdiction is willing to apply cy pres beyond the charitable trust context, it should be willing to allocate owned property to nonobjects, and appointive property to objects, and thereby to fulfill both the donee's primary intent to benefit all named takers and the donor's purpose of passing the appointive property to those he has named as permissible appointees. Nor would this be the first instance of the judicial use of cy pres to confine the exercise of a special power to its objects. The rule in England before abolition of the fee tail was that a donee's appointment to his children for life and then to his grandchildren, when the children alone were permissible appointees, would be converted by cy pres into an appointment to the children in fee tail.

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113 E.g., Ky. Rev. Stat. § 381.216 (1960) (authorizing cy pres reformation of any interest violating the Rule); N.Y. Pers. Prop. Law § 11-a (1959) (permitting reduction of age contingencies to 21); N.Y. Real Prop Law § 42-b (same). In addition, statutes regulating accumulations universally provide that a direction for accumulation beyond the permissible period is invalid only as to the excess period. E.g., N.Y. Real Prop. Law § 61. See Gulliver, Cases on Future Interests 433 (1959) (collecting statutes).
114 E.g., Edgerly v. Barker, 56 N.H. 434 (1891) (reducing age contingency to 21); Jackson v. Brown, 13 Wend. 437 (N.Y. Sup. Ct. 1835) (converting successive life estates into fee tail); Allyn v. Mather, 9 Conn. 114 (1832) (same); Gibson v. McNeely, 11 Ohio St. 131 (1860) (same).
The trend of courts and legislatures today is away from the "remorseless rule" approach to the Rule Against Perpetuities and towards a standard of flexibility; away from hostility to any private transfer running afoul of the Rule and towards a desire to permit insofar as possible reasonable dispositions which are technically, but not in spirit, contrary to its purposes. The adoption of cy pres and analogous theories to achieve this flexibility may accordingly be expected to spread. Similar policies would be served by a concomitant expansion of the selective allocation doctrine to cases in which, though a specific allocation appears, it is merely incidental to the donee's primary intent.

Using Selective Allocation for New Purposes

Besides its potentialities as a method of saving gifts which technically infringe the Rule Against Perpetuities and special-power limitations, selective allocation offers possibilities for solving other problems which may arise when appointments become entangled with statutory limitations on charitable gifts, statutory marital election provisions, and the conflict of laws.

Restrictions on Charitable Gifts. Thirteen American jurisdictions have statutorily circumscribed the privilege of testamentary transfer to charities.\textsuperscript{116} Designed to preserve the moral right of the decedent's immediate family to the major share of his estate\textsuperscript{117} and to protect the family from a kind of spiritual blackmail in which the decedent convinces himself, or is convinced by others, that the repose of his soul requires his property to be devoted to charitable uses,\textsuperscript{118} the statutes employ two basic devices. They make voidable a will of which a charity is a beneficiary if (1) the will was made within a specified period before death,\textsuperscript{119} or (2) the charitable gift exceeds a certain percentage of the estate.\textsuperscript{120}

The question of whether a donee's appointments to charity can render the donor's will voidable has never been the subject of reported litigation. If the relation-back or agency theory of powers is adhered to, however, a charitable appointee must be considered as taking directly from the donor of the power and under his will. If, then, the donee's exercise in

\textsuperscript{116} See generally 1 Page, Wills 85-97 (3d ed. 1941); 6 Powell \textsuperscript{117} § 969 (1958); Zollman, American Law of Charities 349-60 (1924); Joslin, "Legal Restrictions on Gifts to Charities," 21 Tenn. L. Rev. 761 (1951).

\textsuperscript{118} Simes, Public Policy and the Dead Hand 112 (1955); Joslin, "Legal Restrictions on Gifts to Charities," 21 Tenn. L. Rev. 761, 762, 764 (1951).

\textsuperscript{119} E.g., Cal. Prob. Code \textsuperscript{117} § 41 (30 days).

\textsuperscript{120} E.g., Cal. Prob. Code \textsuperscript{118} § 41 (one-third).
favor of a charity would have transgressed the statute if made by the donor, presumably the donor's will becomes subject to attack under the statute. When the donee appoints to charity in a will which also contains gifts of owned property to noncharitable legatees, the attack can be averted by allocating appointive property to the noncharities and relegating owned property to the charity. In cases in which allocation was of no intrinsic importance to the donee, or was merely of secondary importance, the intent of both donor and donee would unquestionably be served by distributing the property in this way. Moreover, neither of the policies served by these admittedly intent-defeating statutes would be nullified by selective allocation in the appointment situation. Fictions aside, it is the donee and not the donor who makes the decision to benefit a charitable appointee; the very fact that the donor has given the donee discretion in the matter almost conclusively shows that he was laboring under no delusions about the relation of his gift to salvation. Furthermore, selective allocation would not alter the protection afforded to a testator's family by the statutes; in allocating appointive property to the noncharitable bequests, the court would ensure that the total amount of property passing to charity through the donor's will did not exceed the statutory percentage limitation. Wholly aside from these considerations, it is arguable that those who would take only if the gift to charity were invalidated would in most cases be persons having no moral claim to, or at least no remaining need for, his property. The exercise of a testamentary power of appointment normally occurs a considerable time after its creation—often a full generation after. If those persons who would have taken the property as intestate successors at the donor's death are alive at all, they are probably economically adjusted to their failure to benefit from the donor's will.

Selective allocation could be used in the reverse situation as well—when the donee's gift to charity would fail if considered a gift of owned

121 While the more obvious difficulty arises under the percentage-limitation statutes, if the donor's will made no charitable gifts but was executed within the statutory period, the later appointment to charity might subject it to similar attack under the time-limitation statutes.

122 The situation was different under the true mortmain statutes, which attempted to limit the power of the Church vis-à-vis the Crown. 2 Bogert, Trusts and Trustees 452 (1951); Zollman, American Law of Charities 341 (1924). Until the Mortmain and Charitable Uses Act, 54-55 Vic. c. 73 (1891), the principle of the original enactment, 7 Edw. 1, St. 2 (1279), remained in force. [Etc., as at present.]

123 The donor's very reason for using the power of appointment device is often a desire to extend the duration of the period in which testamentary plans can be revised. See note 6 supra and accompanying text.

124 Years later, when the power is exercised, even the testator's children who were minors at his death ought to be self-sufficient. Compare Preface to Gray, Restraints on Alienation at iii-x (2d ed. 1895). And if the donor's spouse is donee, her need, of course, is at an end.
property. If the bequest, as part of the donor’s estate, would not raise the donor’s charitable gift total above the statutory percentage, allocation of appointive property to the charity would save the donee’s charitable gift without impairing his gifts to others. As before, this would infringe no policy of the percentage limitation statutes and would sacrifice neither the donor’s nor the donee’s intent. However, selective allocation to shield a charitable gift made by the donee within a statutory predeath period could not be reconciled with the statute’s purpose. Such a gift would be precisely the case contemplated by the statute—a gift which quite possibly resulted from hasty and irrational action.

When the total of the donor’s and donee’s charitable gifts exceeds the total of their legal maxima, or if the donee’s will was executed within the proscribed period before his death, even selective allocation would be unable to impart complete validity to the gifts. Its use would merely shift the burden of possible invalidity from the donor’s will to that of the donee. In such a case ease of administration would suggest that the invalid gift be allocated to the more-recently-deceased donee’s estate, since his intestate successors would probably be easier to ascertain than those of the donor.

Statutory Marital Rights. Similar to the family-protection policy underlying the statutory restrictions on charitable gifts is the purpose of the spouse’s election. Many states guarantee a fixed proportion of a decedent’s estate to the surviving spouse by allowing her an absolute or conditional right to elect that proportion in lieu of the provision made for her in the decedent’s will.\(^\text{125}\) Property over which the decedent had a power of appointment, even a general testamentary power, is not subject to the statutory share,\(^\text{126}\) and therefore is neither included in the decedent’s estate in computing the share nor, presumably, when the spouse is an appointee, considered as a testamentary provision for her in determining the existence of a right of election. In the latter situation, if the spouse is allowed to take as appointee as well as to exercise the right of election, the total amount of property passing to her at the decedent’s death may far exceed the amount contemplated by the legislature in prescribing the statutory share. One way of avoiding this result is refusal to permit the spouse to elect against the will without also renouncing the appointment, and two jurisdictions have adopted this

\(^{125}\) E.g., N.Y. Deced. Est. Law § 18.

requirement. An alternate method of achieving the same result would be to allocate owned property to the spouse in an amount sufficient to defeat her right of election and the appointive property to the will's remaining gifts. Here again, selective allocation would be appropriate only where the donee made a common disposition of owned and appointive property or where cy pres could be applied. Within these limits, however, the spouse would take in the manner contemplated by the election statute, and the decedent's desires respecting the distribution of the property within his power of testamentary disposition would be honored.

**Conflict of Laws.** Powers of appointment with multistate contacts may present choice-of-law problems and another use for selective allocation. If the donee of the power was domiciled in a state with an unusually restrictive perpetuities period while the appointment in his will is governed by the common-law Rule, the testamentary transfer of

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his own property may be partially void although the power was validly exercised. Differences between the two applicable laws as to charitable gifts or the rights of spouses may produce similar divergences in the effectiveness of the donee's will. Selective allocation could be as effective in maximizing validity here as in the purely domestic cases. Indeed, the doctrine has long been employed where the donee's appointment partially transgresses a short perpetuities period while his gift of owned property is valid under a more liberal Rule. The policy considerations which justify the device are constant, whether the invalidity problems stem from the divergences of two bodies of law or from differing principles within a single internal law.

CONCLUSION

A product of the fifteenth-century battle for the privilege of transferring land by will, the power of appointment still possesses legal characteristics which reflect the conceptual fictions of that era. While the device's modern utility in part derives from these very fictions, they can also destroy the reasonable testamentary plans of a donee unschooled in the metaphysical niceties of the common law. Adherence to the purpose of the rules governing the game of wealth transmission from generation to generation, rather than to the rules' literal requirements, has produced selective allocation as a means of upholding reasonable exercises of dead-hand control. Whether from a lack of courage to shake off too many of the doctrinal restrictions on the power of testators, or from lack of circumstances in which to do so, selective allocation has thus far been confined within narrow limits. But the trend away from rigid conceptualism, together with a widening appreciation of the contexts in which selective allocation is appropriate, may be expected to endorse the doctrine as a flexible tool for the achievement of relevant values.
