

# Blind Exercises of Powers of Appointment

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## BLIND EXERCISES OF POWERS OF APPOINTMENT

*Edward H. Rabin†*

*"All the rest, residue and remainder of my estate, including any property over which I may have a power of appointment, I give to X." The advantages and disadvantages of this frequently used will clause are assessed in the light of tax and other factors. The author concludes that most testators should attempt to exercise all powers which they "may have" and suggests, in the appendix, a form which will avoid the major disadvantages attendant upon such an attempt.*

### INTRODUCTION

All authorities agree that the will draftsman should diligently attempt to discover any powers of appointment which his client possesses.<sup>1</sup> If he learns of any such powers he should not rely on any "blanket" or general exercise of "all powers" but should key the exercise to the specific power and to the problems unique to that power.<sup>2</sup> Frequently, however, the draftsman may fail to discover an existing power.<sup>3</sup> In addition, the draftsman has no way of knowing what powers the testator may acquire after executing his will. These possibilities pose problems for the testator-donee and for the donor. (1) Should the testator who does not have any specific powers of appointment in mind attempt to exercise "all powers" which he "may have" at his death, and if so how? (2) Should the donor of a power of appointment seek to prevent such a blind exercise by the donee, and, if so, how?

### I

#### SHOULD THE DONEE ATTEMPT TO EXERCISE UNKNOWN POWERS?

Most modern authorities agree with Professor Casner's opinion that a blanket exercise of unknown powers is usually undesirable.<sup>4</sup> Professor

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The author wishes to thank Professor Lewis M. Simes of the Hastings College of the Law, University of California, who read this article and contributed valuable suggestions.

<sup>1</sup> E.g., Casner, *Estate Planning* 701 (3d ed. 1961); Leach & Logan, *Cases on Future Interests and Estate Planning* 621 (1961); 3 Powell, *Real Property* ¶ 396 (1952); Schwartzberg & Stocker, *Drawing Wills* 221-23 (1964); Trachtman, *Estate Planning* 156 (1964); *Restatement, Property*, ch. 25, *Introductory Note* 1817 (1944); Schuyler, "Some Problems With Powers," 45 *Ill. L. Rev.* 57, 61 (1950).

<sup>2</sup> See authorities cited note 1 *supra*. See also Durand, "Draftsmanship: Wills and Trusts," 96 *Trusts & Estates* 871, 876 (1957).

<sup>3</sup> See H.R. Rep. No. 327, 82d Cong., 1st Sess. 6 (1956).

<sup>4</sup> See, e.g., Casner, "Estate Planning—Powers of Appointment," 64 *Harv. L. Rev.* 185,

Powell suggests, however, that the blanket exercise of some unknown powers is usually desirable.<sup>5</sup> Professors Simes and Smith neatly straddle the fence.<sup>6</sup> Such disagreement among the experts imposes upon us the unpleasant task of thinking for ourselves.

To start, we may ask, "Why should not the donee attempt to exercise all powers which he may possess at the time of his death?" The testator-donee ordinarily wishes to benefit his legatees to the maximum extent of his ability. He wants to pass any property which he can to his legatees. A failure to dispose of unknown or after-acquired appointive property is as unnatural as a failure to dispose of unknown or after-acquired owned property. Unless there are disadvantages to disposing of unknown appointive property which outweigh the donee's natural desire to benefit his legatees, the donee should attempt to exercise unknown powers.<sup>7</sup> There are, of course, some disadvantages attendant upon the blind exercise of powers of appointment. They are discussed below. It is believed, however, that one should exercise unknown powers and attempt to minimize these disadvantages by careful draftsmanship. A suggested form for exercising unknown powers appears in the appendix.

### A. Federal Estate Taxes

The federal estate tax treatment of a power of appointment depends upon whether the power is general or special;<sup>8</sup> whether it is "considered" as created before October 22, 1942 ("preexisting power") or on or after that date ("post-1942 power");<sup>9</sup> and upon whether the power is held by

202 (1950); Fleming, "Provisions for Trusts and Powers of Appointment," 1950 U. Ill. L.F. 341, 362; Lauritzen, "Drafting Powers of Appointment Under the 1951 Act," 47 Nw. U.L. Rev. 314, 328 (1952); Sargent, "Drafting of Wills and Estate Planning," 43 B.U.L. Rev. 179, 197 (1963).

<sup>5</sup> 3 Powell, *supra* note 1, ¶ 396.

<sup>6</sup> Simes & Smith, *Future Interests* § 988 (1956).

<sup>7</sup> Cf. Leach & Logan, *supra* note 1, at 961 ("Generally speaking, more trouble may be caused by the blind and unknowing exercise of powers of appointment than can possibly be gained by their exercise.")

<sup>8</sup> Int. Rev. Code of 1954, § 2041(b)(1), defines a general power of appointment as, in general, one which is "exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate . . ." Various exceptions to this broad definition of a general power of appointment are then set out. The statute does not mention "special" powers. For purposes of discussion, however, it is convenient to speak of all powers which are not "general" as "special," although "hybrid" powers, which are neither general nor special, are possible. See generally McCoid, "The Non-General Power of Appointment—A Creature of the Powers of Appointment Act of 1951," 7 Vand. L. Rev. 53 (1953).

<sup>9</sup> A power of appointment created by will is, in general considered as created on the date of the testator's death. However, § 2041(b)(3) provides that a power of appointment created by a will executed on or before Oct. 21, 1942, is considered a power created on or before that date if the testator dies before July 1, 1949, without having republished the will, by codicil or otherwise, after Oct. 21, 1942. A power of appointment created by an *inter vivos* instrument is considered as created on the date the instrument takes effect. Such a power is not considered as created at some future date merely because it is not exercisable on the date the instrument takes effect, or because it is revocable, or be-

the grantor ("grantor power") or by someone else ("nongrantor power").<sup>10</sup> Although state law determines what substantive rights are possessed by the donee, for federal tax purposes federal tax law, not state law, determines how the power is classified.<sup>11</sup>

The exercise of a power of appointment will not increase federal estate taxes if the power is a nongrantor special power or a nongrantor general post-1942 power. Irrespective of whether such powers are exercised, the former are not taxed;<sup>12</sup> the latter are.<sup>13</sup> Similarly, if a power is taxable as a grantor power it will be taxed whether or not the power is exercised.<sup>14</sup> In contrast, the exercise of a power will increase federal estate taxes if it is a preexisting, general, nongrantor power.<sup>15</sup> Property subject to such a power is included as part of the donee's estate only if the donee exercises the power.<sup>16</sup> Thus a donee's blind exercise of all powers will increase federal estate taxes if (but only if) preexisting, general, nongrantor powers are exercised. If a donee exercises all unknown powers except preexisting, general, nongrantor powers, he benefits his legatees without incurring additional federal estate taxes. The clause suggested in the appendix is designed to accomplish this.

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cause the identity of its holders is not ascertainable until after the date the instrument takes effect.

Treas. Reg. § 20.2041-1(e) (1965).

<sup>10</sup> See Int. Rev. Code of 1954, §§ 2036(a)(2), 2038.

<sup>11</sup> *Morgan v. Commissioner*, 309 U.S. 78 (1940); *Estate of Rebecca Edelman*, 38 T.C. 972 (1962); Treas. Reg. § 20.2041-1(b)(1) (1965) ("The term 'power of appointment' includes all powers . . . regardless of local property law connotations.")

<sup>12</sup> Int. Rev. Code of 1954, § 2041(a). In certain rare circumstances a nongrantor special power created after October 21, 1942, may be taxed. Int. Rev. Code of 1954, § 2041(a)(3).

<sup>13</sup> Int. Rev. Code of 1954, § 2041(a)(2).

<sup>14</sup> Int. Rev. Code of 1954, §§ 2036(a)(2), 2038. In certain rare situations such grantor powers would not be taxed, but in any event it is irrelevant whether or not the powers are exercised. See Int. Rev. Code of 1954, §§ 2036(b), 2038(c).

<sup>15</sup> Int. Rev. Code of 1954, § 2041(a)(1). It is possible that a prompt renunciation by the appointee of a preexisting power would avoid the tax. If the appointment is totally ineffective because of a renunciation it can be argued that the appointive property should not be included in the donee's estate since the word "exercised" in § 2041(a)(1) should be construed to mean "effectively exercised." Although neither the committee report nor the statute foreclose this argument the regulations take the position that the power is exercised even though ". . . the appointee renounces any right to take under the appointment." Treas. Reg. § 20.2041-1(d) (1965). The committee report, H.R. Rep. No. 327, 82d Cong., 1st Sess. 4 (1951), merely states the following:

The former statute taxed property "passing" under a general power of appointment exercised by the decedent. This sometimes gave rise to litigation where the decedent appointed part or all of the property to persons who would also have taken it under the terms of the original instrument creating the power. The bill eliminates this possibility by taxing all property with respect to which the decedent has "exercised" a general power of appointment.

Thus the committee report does not explicitly deal with the effect of renunciation. If Treas. Reg. § 20.2041-1(d) were clearly wrong there would be an advantage in exercising even unknown, preexisting powers. See text following note 26 *infra*. However, since the Regulation would probably be upheld it would be most unwise to exercise such a power. However, if a preexisting power is inadvertently exercised, renunciation might be a possible escape. See generally, Freeman, "If This be Simplification—A View of Pre-1942 Powers of Appointment and the 1954 Internal Revenue Code § 2041," 40 Cornell L.Q. 500 (1955).

<sup>16</sup> Int. Rev. Code of 1954, § 2041(a)(1).

As shown above, the tax on unknown grantor powers<sup>17</sup> and on unknown post-1942 general powers cannot be avoided by not exercising such powers. This raises a serious problem. Under the Code "unless the decedent directs otherwise in his will," the estate tax attributable to appointive property is payable by the appointee.<sup>18</sup> Thus, if the decedent were content to let well enough alone—to rely on the statute—the tax on the appointive property would be paid by the appointee out of the appointive assets and no difficulty would arise. Frequently, however, the will directs that the tax on appointive property should be paid out of the residue.<sup>19</sup> If there are no unknown powers, and the residuary estate is deliberately made large enough to absorb the tax on known appointive assets, no harm is done. But if the tax liability accruing because of appointive property is unexpectedly large, it may disastrously deplete the residuary estate.<sup>20</sup> In this respect many wills are inconsistent.<sup>21</sup> When the testator attempts to exercise (or refrains from exercising) "all" powers he recognizes that unknown powers may exist. Yet in effect he denies that unknown powers may exist by providing that all taxes on property passing outside the will (e.g., appointive property) shall be paid out of the residuary estate. It would seem that the proper approach is to direct that taxes attributable to unknown appointive assets be charged against such assets. The form in the appendix takes this approach.

### B. State Death Taxes

It has been suggested that the exercise of all unknown powers is likely to result in increased state death taxes if unknown powers in fact exist.<sup>22</sup> Ordinarily, however, this possibility should not deter one from attempting

<sup>17</sup> Where the donee himself created the power, it may seem incongruous to think of the power as "unknown" to him. Nevertheless, the problem is a real one. The donee may forget about a power which he created many years ago; he may know about it but neglect to mention it to the lawyer drafting his will; and finally, he may create the power after drawing his will and without changing his will. See e.g. *County Trust Co. v. Quencer*, 183 Misc. 922, 54 N.Y.S.2d 29 (Sup. Ct. Westchester County 1944), *aff'd*, 269 App. Div. 861, 56 N.Y.S.2d 542 (2d Dep't), *aff'd*, 296 N.Y. 559, 68 N.E.2d 864 (1946).

<sup>18</sup> Int. Rev. Code of 1954, § 2207. Many states have similar statutes and these statutes apply to federal as well as state taxes. See e.g. *Mass. Gen. Laws*, ch. 65A, § 5, 1964; *N.J. Stat. Ann.*, 3A:25-30 to 26-38 (1953); *N.Y. Deced. Est. Law* § 124.

<sup>19</sup> For an exhaustive discussion of the authorities see Annot., 37 A.L.R.2d 7 (1954).

<sup>20</sup> See, e.g., *In re Parker's Estate*, 98 Cal. App. 2d 393, 220 P.2d 580 (1950); *Whitbeck v. Aldrich*, 341 Mass. 326, 169 N.E.2d 882 (1960); cf. *Matter of Rogers*, 249 App. Div. 238, 291 N.Y.S. 815 (2d Dep't 1936), motion for leave to appeal denied, 273 N.Y. 680 (1937).

<sup>21</sup> See, e.g., *Schwartzberg & Stocker*, *supra* note 1, at 317, 322 (1964), where article "Twentieth" of the model will refers to any power "which I may have" whereas article "Twenty-Eighth" provides that taxes "Payable by reason of my death . . . with respect to . . . property not passing under this will" shall not be apportioned. See also *Klipstein, Drafting New York Wills* § 17, at 31-38 (Form No. 2) (1948); 7 *Page, Wills* § 62.15, at 97, 99 (Form No. 10) (rev. ed. *Bowe-Parker* 1963).

<sup>22</sup> See, e.g., *Durand*, *supra* note 2, at 875; *Halbach*, "The Use of Powers of Appointment in Estate Planning," 45 *Iowa L. Rev.* 691, 712 (1960).

to exercise all unknown powers. First, state death taxes are comparatively insubstantial—in part because a portion of their cost can be used as a credit against the federal estate tax.<sup>23</sup> Second, in thirty-eight states and the District of Columbia the exercise of a power of appointment is treated in exactly the same way as the nonexercise, for death tax purposes.<sup>24</sup> Although in the remaining 12 states the statutes at first glance appear to impose a tax penalty upon the exercise of the power, closer inspection shows that in most cases the supposed penalty is illusory.

1. *Death Taxes Avoidable by Prompt Renunciation.* Iowa, Mississippi, New York, Oregon, Tennessee, and Texas tax certain transfers of property passing “under” exercised powers of appointment.<sup>25</sup> The scope of the statutes differs greatly. The Tennessee and Iowa statutes are the most inclusive. They apply to all powers, whenever made, whether general or special. The New York statute is the narrowest. It applies only to certain “limited” powers (as that term is defined by the statute) created before 1930. The Oregon, Mississippi, and Texas statutes are similar to each other insofar as each of them applies only to general powers of appointment, whenever created.

Because these statutes provide that the tax is imposed only if the appointive property passes “under” or “only by reason of” the exercise of the power, probably no tax would be imposed if an appointee effectively renounced his interest as soon as he learned of it. Such a renunciation would cause the property to pass “under” the clause providing for a distribution in default of appointment, and not “under” the appointment. In fact, if Supreme Court precedents construing the former federal statute

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<sup>23</sup> Int. Rev. Code of 1954, § 2011.

<sup>24</sup> Ala. Code tit. 51, §§ 432-49 (1958); Ariz. Rev. Stat. Ann. §§ 42-1501 to -1535 (1958), as amended § 42-1506(1) (Supp. 1964); Ark. Stat. Ann. §§ 63-101 to -151 (1947), as amended §§ 63-103, 63-104, 63-144 (Supp. 1963); Colo. Rev. Stat. Ann. § 138-4-12 (1953); Conn. Gen. Stat. Rev. §§ 12-341 to -343 (Supp. 1964); D.C. Code Ann. § 47-1601(j) (1961); Fla. Stat. Ann. § 198.02 (1958); Ga. Code Ann. § 92-3401 (1961); Hawaii Rev. Laws § 122-4(a) (1964 Supp.); Idaho Code Ann. § 14-402(6) (1948); Ind. Ann. Stat. §§ 7-2401 to -2442 (1954), as amended (Supp. 1965); Kan. Gen. Stat. Ann. § 79-1520 (1965); Ky. Rev. Stat. § 140.040 (1962); La. Rev. Stat. §§ 47:2401-47:2435 (1950); Me. Rev. Stat. § 36-3466 (1964); Md. Ann. Code art. 81, § 151 (1957), *Connor v. O'Hara*, 188 Md. 527, 53 A.2d 33 (1947); Mass. Gen. Laws ch. 65, § 2 (1964); Mich. Stat. Ann. § 7.561(4) (Supp. 1963); Minn. Stat. Codes Ann. § 91:4404 (1964); Mo. Rev. Stat. § 145.030 (1959); Mont. Rev. Code § 91-4404 (1947); Neb. Rev. Stat. § 77-2008.04 (1958); N.H. Rev. Stat. Ann. § 86:1 to 87:13 (1955); N.J. Rev. Stat. §§ 54:34-2, 54:36-4 (1960); N.M. Stat. Ann. § 31-16-21 (1953); N.C. Gen. Stat. § 105-2(5) (Supp. 1963); N.D. Cent. Code § 57-37-07 (Supp. 1965) (adopts federal law); Ohio Rev. Code Ann. § 5731.05 (Page 1953); Okla. Stat. tit. 68, § 989 (1961); Pa. Stat. Ann. tit. 72, § 2485-408 (1964); R.I. Gen. Laws Ann. § 44-22-7(3) (1964 Supp.); S.C. Code Ann. §§ 65-453, 65-564 (1962); S.D. Code § 57.2104 (1939); Utah Code Ann. § 59-12-1 to 59-12-44 (1953); Vt. Stat. Ann. tit. 32, § 6501 (1959); Va. Code Ann. § 58-152, 58-157 (1950); W. Va. Code Ann. § 842(e) (1965 Supp.); Wis. Stat. § 72.01(5) (1961); Wyo. Stat. Ann. § 39-337 (1957).

<sup>25</sup> Iowa Code Ann. § 559.1-59.9 (1956); Miss. Code Ann. § 9264-04 (Supp. 1964); N.Y. Tax Law § 957; Ore. Rev. Stat. § 118.010 (1963); Tenn. Code Ann. § 30-1602(h) (1955); Tex. Rev. Civ. Stat. art. 14.01 (1955).

were followed, even if the default takers were exactly the same people as the appointees, no tax would be imposed.<sup>26</sup>

In Illinois, the exercise of any power, general or special, will bring the appointive property into the donee's estate for state death tax purposes.<sup>26a</sup> However, prompt renunciation by the appointees has been held sufficient to defeat the tax on the donee's estate despite the absence of the "passing under" phraseology, and despite the fact that the takers in default were also the appointees.<sup>27</sup>

Because a prompt renunciation by the appointee will probably avoid the state death tax in these states, this consideration should not discourage an attempted exercise of "all powers." Since, by hypothesis, the donee does not know if he has any powers, he is in no position to determine whether the increased state taxes which might accrue because of his exercise would be substantial enough to affect his desire to benefit his legatees to the maximum extent possible. In contrast, if any powers are in existence, his appointee will have the benefit of hindsight. The appointee will be able to calculate the exact tax impact of the appointment. He will also know who the takers in default are. True, the appointee's choice of whether to renounce will be colored by self-interest. However, since the appointee will ordinarily be one of the principal objects of the donee's bounty, it would probably be the donee's wish to have the appointee take his own self-interest into account. In effect, by exercising all powers, the donee who is completely ignorant of his power, and of the tax consequences of exercise, can substitute for his own uninformed judgment the judgment of his appointee, who will be able to weigh the tax consequences more intelligently.

The "passing under" test used in the state statutes discussed above probably represents faulty draftsmanship rather than a conscious legislative decision. We can expect that ultimately the states will abandon the "passing under" test, just as the federal statute abandoned it.<sup>28</sup> It might therefore be argued that it is unwise to rely on such a test to justify the exercise of "all" powers of appointment. This criticism is valid so

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<sup>26</sup> *Helvering v. Grinnell*, 294 U.S. 153 (1935); cf. *Matter of Lansing*, 182 N.Y. 238, 74 N.E. 882 (1905).

<sup>26a</sup> *Cook v. Dove*, 32 Ill. 2d 109, 203 N.E.2d 892 (1965).

<sup>27</sup> Ill. Stat. ch. 120 § 375(4) (Smith-Hurd 1954); cf. *Estate of Curtis*, 28 Ill. 2d 172, 190 N.E.2d 723 (1963). Prior to the Curtis case it had been thought by many that if the donee were taxed, the donor's estate would receive a refund, and hence the total tax disadvantage of exercising a power of appointment would be minimal. See e.g. *Dicus & Zartman*, "Inheritance Taxation in Illinois of Powers of Appointment Upon Donee's Death," 44 Ill. B.J. 267 (1955); cf. *Thompson*, "State Death Taxes and Powers of Appointment," 26 Iowa L. Rev. 549, 567-570 (1941). The Curtis case has cast doubt on this position.

<sup>28</sup> The federal "passing under" test was repealed by the Revenue Act of 1942, ch. 619, § 403(a), 56 Stat. 942. Current federal law is discussed at text accompanying note 13 supra.

far as it goes, but it does not go far enough. If the state statutes are ever modified, more than the "passing under" test will be abandoned. Most likely, if the states follow the federal example by eliminating the "passing under" test they will also follow the federal example by eliminating any possibility of saving taxes through not exercising a power of appointment. Sufficient unto each day is the evil thereof. For the present, because of the power of the appointee to renounce, the death tax statutes of New York, Texas, Tennessee, Oregon, Mississippi, Iowa, and Illinois<sup>29</sup> afford no reason for not exercising all unknown powers.

2. *Other State Statutes.* In Alaska the exercise of any power, general or special, probably will bring the appointive assets into the donee's estate for state death tax purposes.<sup>30</sup> In Delaware, only the exercise of a general power will have this effect.<sup>31</sup>

In California, most powers are taxed in the donor's estate but not in the donee's estate.<sup>32</sup> Hence, the donee's exercise of the power will not have any tax consequences. However, where a power "made in conjunction with a disposition of the property before 5 P.M. June 25, 1935, by a donor who died prior to that date," is exercised by the donee, it is taxable to his estate although a power which is not exercised escapes taxation.<sup>33</sup>

In Washington, the exercise of a power created after June 6, 1951, has no tax disadvantage.<sup>34</sup> Although the exercise of pre-1951 powers would probably result in additional taxation,<sup>35</sup> it appears that such powers are very rare in Washington.<sup>36</sup>

In none of the states discussed in this subsection is it clear that a prompt renunciation by the appointee would avoid death taxes on the appointive assets in the donee's estate. Therefore, if the death tax laws of the states are a serious consideration with respect to unknown powers, a clause preventing any exercise of powers which would increase these state death taxes can be inserted in the will.<sup>37</sup>

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<sup>29</sup> In Iowa, despite the wording of the statute, it is the practice of the taxing authorities not to tax property in the donee's estate even if the power is exercised. Halbach, *supra* note 22, at 698.

<sup>30</sup> Since statehood (and presumably before) Alaska has never had a tax case involving a power of appointment. The statute, Alaska Stat. § 43.30.010(5)(6) (1962), is unclear. The Alaskan Department of Revenue, however, has indicated that it would probably follow Estate of Curtis, *supra* note 27. Letter from Michael M. Holmes, Deputy Attorney General (for Warren C. Colver, Attorney General) to the author, Sept. 24, 1964.

<sup>31</sup> Del. Code Ann. tit. 30, 1304 (1953).

<sup>32</sup> Cal. Rev. & Tax Code § 13693. See generally Barnett, "California Inheritance & Gift Taxes, A Summary," 43 Calif. L. Rev. 49, 55 (1955).

<sup>33</sup> Cal. Rev. & Tax Code § 13693.

<sup>34</sup> Wash. Rev. Code §§ 83.05.010-.090 (1962).

<sup>35</sup> Wash. Rev. Code § 83.04.080 (1962).

<sup>36</sup> Letter from Roberta Kaiser, Chief, Inheritance Division, to author, Sept. 28, 1964.

<sup>37</sup> See note 107 *infra*.

### C. *Nontax Factors*

Three nontax reasons might be advanced against blind exercises of powers of appointment.

First, in most states the creditors of a donee can reach assets subject to a general power not created by the donee only if the donee exercises his power.<sup>38</sup> Therefore it might be argued that known general powers, or unknown powers which might be general, should not be exercised.<sup>39</sup> But in the usual case where the donee dies solvent the creditors will be satisfied in full whether or not the power is exercised. Thus, unless there is a reasonable possibility that the testator-donee will die insolvent, fear of the testator-donee's creditors should not discourage the exercise of all powers.

Some have argued that any blind exercise of powers of appointment is undesirable because it may be ineffective.<sup>40</sup> There is no doubt that a blind exercise is more likely to be ineffective in whole or in part than a knowing exercise. It does not necessarily follow, however, that the donee should not attempt to exercise unknown powers. To the extent that the exercise is totally ineffective the property will go to the same persons who would have taken had no exercise been made. To the extent that it is partly effective, the objects of the donee's bounty are benefited. Although an ineffective appointment is likely to cause litigation, this drawback is more than outweighed by the potential benefits to the appointees. Furthermore, as shown below, careful draftsmanship can greatly increase the probability that the exercise will be clearly valid.

The third argument against a blind exercise of powers of appointment is that it substitutes a careless exercise for what may have been a carefully worked out plan of disposition in default of appointment.<sup>41</sup> However, there is no reason to believe that the donor's default provision drafted long ago will be better than a well-drafted blind exercise provision included in the will of a donee who is personally familiar with current needs. Both clauses are equally "blind" and the donee at least has the benefit of knowing personally the beneficiaries and their needs. Even if a well-drafted default clause were superior to a well-drafted blind exercise, the donee who does not know whether he has any power cannot assume that the default clause is well-drafted.

To summarize, unless there is a serious possibility that the decedent may die insolvent, there are no valid nontax reasons (and few valid tax

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<sup>38</sup> See generally 5 American Law of Property §§ 23.17, 23.66(b) (Casner ed. 1952) [hereinafter cited as *Am. L. Prop.*]; 3 Powell, *supra* note 1, ¶¶ 389-90.

<sup>39</sup> See Simes & Smith, *supra* note 6, § 988.

<sup>40</sup> See Casner, *supra* note 4, at 208; cf. Halbach, *supra* note 22, at 707 n.75.

<sup>41</sup> See 5 *Am. L. Prop.* § 23.7, at 474; Halbach, *supra* note 22, at 707-08 n.75.

reasons which cannot be avoided by good draftsmanship) for not attempting to exercise all unknown powers.

#### D. *Proper Method of Exercise*

Once the donee has decided to exercise all unknown powers, he must decide how best to do this. There are three possible methods: (1) he can rely on the residuary clause in his will automatically to exercise all powers without specifically mentioning powers; (2) he can insert in his residuary clause a clause specifically referring to powers ("all the residue of my estate (including any property over which I have a power of appointment) . . ."); (3) he can exercise all powers by a clause not connected with the residuary clause. Most draftsmen use the second approach.<sup>42</sup> For reasons which will appear below, I recommend the third.

1. *Residuary Clause not Mentioning Powers.* By statute, in England,<sup>43</sup> the District of Columbia,<sup>44</sup> and in eighteen states a general residuary clause not specifically referring to powers of appointment will exercise all general powers owned by the decedent at the time of the execution of his will and still owned by him when he dies.<sup>45</sup> In Massachusetts the same result has been achieved without statute.<sup>46</sup> Presumably most of these states would also find that a general residuary clause would exercise all general powers owned by the decedent at his death even if he did not own them when he executed his will.<sup>47</sup> In eleven of the eighteen states having a statute, a residuary clause probably will exercise all special powers,<sup>48</sup>

<sup>42</sup> See, e.g., Prentice-Hall, *Wills Course* ¶ 1054 (1953); Stephenson, *Drafting Wills & Trust Agreements* 478 (1955).

<sup>43</sup> *Wills Act, 1837*, 7 Will. 4 & 1 Vict., ch. 26, § 27.

<sup>44</sup> D.C. Code Ann. § 19-203 (1961).

<sup>45</sup> Cal. Prob. Code §§ 125-26; Ky. Rev. Stat. § 394.060 (1962); Md. Ann. Code art. 93, § 359 (1957); Mich. Stat. Ann. § 26.143 (1957) (land only); Minn. Stat. § 502.71 (1961); Mont. Rev. Codes Ann. § 9-217 (1947); N.Y. Real Prop. Law § 176; N.Y. Pers. Prop. Law § 18; N.C. Gen. Stat. § 31-43 (1960); N.D. Cent. Code § 56-05-14 (1960); Okla. Stat. tit. 84, § 164 (1951); Pa Stat. Ann. tit. 20, § 180.14(14) (1950); R.I. Gen. Laws Ann. 33-6-17 (1956); S.C. Code Ann. § 19-233 (1962); S.D. Code §§ 56.0315-.0316 (1939); Utah Code Ann. §§ 74-2-14 to -16 (1953); Va. Code Ann. § 64-67 (1950); W. Va. Code Ann. § 4057 (1961); Wis. Stat. § 232.51 (1959) (land only). Many of the statutes do not refer to residuary clauses as such, but merely provide that a will disposing of all testator's property will be deemed to exercise general powers of appointment.

<sup>46</sup> *Boston Safe Deposit & Trust Co. v. Painter*, 322 Mass. 362, 77 N.E.2d 409 (1948). Although New Hampshire originally followed the Massachusetts rule it has since abandoned it. Compare *Emery v. Haven*, 67 N.H. 503, 35 Atl. 940 (1893), with *Faulkner v. Faulkner*, 93 N.H. 451, 44 A.2d 429 (1945).

<sup>47</sup> Compare *Restatement, Property* § 344 (1944); 5 Am. L. Prop. § 23.41, with *Lauritzen*, supra note 4, at 330-31. *Lauritzen*, however, admits that when there is a statute, after-acquired powers will be held exercised.

<sup>48</sup> New York has so held. *Lockwood v. Mildeberger*, 159 N.Y. 181, 53 N.E. 803 (1899); *Matter of Sheedy's Estate*, 20 Misc. 2d 900, 192 N.Y.S.2d 220 (Surr. Ct. N.Y. County 1959). The following states have statutes similar to the New York statute and would presumably follow the New York interpretations: California, Kentucky, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, Utah and Wisconsin. But see *Note*, 47 Minn. L. Rev. 473, 484 (1963), where it is urged that states having statutes similar to the New York statute should not follow New York.

including after-acquired special powers.<sup>49</sup> In the remaining seven states with statutes covering general powers, and in the District of Columbia,<sup>50</sup> England,<sup>51</sup> and Massachusetts,<sup>52</sup> special powers would not be exercised by a residuary clause.<sup>53</sup> In the other thirty-one states (and in Michigan and Wisconsin as to personalty)<sup>54</sup> a general residuary clause, without more, will not exercise any powers owned by the decedent.<sup>55</sup>

The question of whether a residuary clause, which does not mention powers, exercises all powers is not governed by the law of the donee's domicile.<sup>56</sup> If the property consists of immovables (real estate) the whole law of the situs of the immovables controls. If the property consists of intangibles or movables, the whole law of the donor's domicile is controlling if the power is created by will. But if the power is created by an *inter vivos* instrument, the whole law of the jurisdiction governing the creating instrument is said to govern.<sup>57</sup> Therefore, a donee attempting to exercise unknown powers cannot know what law will determine the effect of a residuary clause which does not explicitly mention powers of appointment. Consequently, because the states vary so much in the effect which they give to such clauses, it is necessary to use a more explicit method to exercise powers of appointment.

2. *Residuary Clause Mentioning Powers.* If a residuary clause which does not explicitly mention powers is unsatisfactory, what of one which does? This, although widely used, is also unsatisfactory.<sup>58</sup> Most modern residuary clauses establish trusts. This is as it should be. However, to exercise unknown powers in such a way as to put the appointive property into the residuary trust, or any other trust, is most unwise. First, a trust which is good under the rule against perpetuities as to owned assets may

<sup>49</sup> See, e.g., *Matter of Davis*, 186 Misc. 397, 59 N.Y.S.2d 607 (Sup. Ct. N.Y. County 1946); cf. *Matter of Smith*, 279 App. Div. 140, 108 N.Y.S.2d 290 (1st Dep't 1951), *aff'd*, 304 N.Y. 612, 107 N.E.2d 92 (1952) (general power).

<sup>50</sup> D.C. Code Ann. § 19-203 (1961).

<sup>51</sup> Wills Act, 1837, 7 Will. 4 & Vict. c.26, § 27.

<sup>52</sup> *Fiduciary Trust Co. v. First Nat'l Bank*, 344 Mass. 1, 181 N.E.2d 6 (1962).

<sup>53</sup> Maryland, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia, and West Virginia. The statutes are cited in note 45 *supra*. In Pennsylvania, a special power will be exercised by a residuary clause if it is in favor of all permissible appointees. Compare *Jeffers' Estate*, 394 Pa. 393, 147 A.2d 402 (1959), with *Biddle's Estate*, 333 Pa. 316, 5 A.2d 158 (1939).

<sup>54</sup> See note 45 *supra*.

<sup>55</sup> See 3 Powell, *Real Property* ¶ 397 (1951); 5 Am. L. Prop. § 23.40a; Restatement, Property § 343(1) (1944). It is assumed that in the absence of statutory or decisional authority, the common law (which holds that a residuary clause is not an exercise) prevails.

<sup>56</sup> See generally Land, *Trusts in the Conflict of Laws* §§ 11, 20, 24 (1940); 3 Powell, *supra* note 55, ¶ 397 n.45; Durand, "Which State's Law Governs Exercise of Power of Appointment?" 95 *Trusts & Estates* 424 (1956); Durand & Herterich, "Conflict of Laws and the Exercise of Powers of Appointment," 42 *Cornell L.Q.* 185 (1957); Mulford, "Conflict of Laws and Powers of Appointment," 87 *U. Pa. L. Rev.* 403 (1939).

<sup>57</sup> See, e.g., *Matter of Bauer*, 14 N.Y.2d 272, 200 N.E.2d 207, 251 N.Y.S.2d 23 (1964).

<sup>58</sup> Cf. Halbach, *supra* note 22, at 708 n.75.

violate the rule as to appointive assets.<sup>59</sup> Where the donee cannot examine the instrument creating the power because he does not know of its existence, he can be sure of not violating the rule only by appointing outright, and not in trust. Second, under the donor's instrument, or under applicable state law, there may be a restriction against appointing the assets in trust, or creating limited interests as to them, or creating new powers by the exercise of old powers.<sup>60</sup> Since most residuary clauses involving substantial estates create trusts, a separate clause making an outright gift of unknown appointive assets is preferable.

3. *Appointment Separate from Residuary Clause.* Even if an appointment does not violate the rule against perpetuities, or a restriction against creating further trusts or powers of appointment, the blind exercise of a power of appointment may still be ineffective to pass the appointive property to the appointee. For example, the appointee may predecease the testator-donee, and the state antilapse statute may be inapplicable.<sup>61</sup> Another possible ground for invalidity may be an "exclusive" appointment (*i.e.* to only one person) when, under applicable law, the donee had no power to make such an appointment.<sup>62</sup>

A blind appointment is especially likely to fail if the power is a special power. First, the blind appointment may be made to one who is not within the permissible class of appointees. Second, directions which are inappropriate for a special power have been held to vitiate an apparently blind exercise of a special power.<sup>63</sup> Third, a few English cases seem to suggest, probably erroneously, that a formula clause will be held to exercise an after-acquired special power only in the very clearest case.<sup>64</sup>

Nevertheless, even if a blind appointment fails for any of these reasons it may be better to have made such an appointment than to have made no appointment at all. If the power is a general power, proper draftsman-ship can insure that the appointive property passes to the donee's estate

<sup>59</sup> See generally 5 Powell, *supra* note 55, §§ 785-88; Simes & Smith, *Future Interests* §§ 1271-77 (1956); 6 Am. L. Prop. §§ 24.30-36; Restatement, Property §§ 390-92 (1944); Bettner, "The Rule Against Perpetuities As Applied to Powers of Appointment," 27 Va. L. Rev. 149 (1940).

<sup>60</sup> See generally 3 Powell, *supra* note 54, ¶ 398; 5 Am. L. Prop. §§ 23.48-49.

<sup>61</sup> The antilapse statute may be inapplicable because the relationship between the donee and the appointee is not close enough to bring it into operation even as to owned property, or the statute may be considered not to apply to appointive property although it would apply to owned property. See generally 5 Am. L. Prop. § 23.47.

<sup>62</sup> See generally 3 Powell, *supra* note 54, ¶ 398, at 357-61; 5 Am. L. Prop. §§ 23.57-58.

<sup>63</sup> *In re Knight*, [1957] Ch. 441 (C.A.); *In re Holford*, [1945] Ch. 21 (C.A.); *In re Cotton*, 40 Ch. D. 41 (1888); *Montreal Trust Co. v. Royal Exch. Assur.*, 3 D.L.R.2d 455 (Sup. Ct. Ch. 1956). But see *Busch v. Dozier*, 375 S.W.2d 27 (Mo. 1964); *In re Mayhen*, 70 L.J. Ch. 428 (1901); *In re Boyd*, 63 L.T.R. (n.s.) 92 (Ch. 1890). Compare *Lippincott's Estate*, 52 Pa. D. & C. 273 (Orphan's Ct. Phil. County 1945) (incongruous directions affecting general power do not void appointment).

<sup>64</sup> *In re Hayes*, [1901] 2 Ch. 529 (C.A.); *In re Slack*, [1923] 2 Ch. 359. *Contra*, 5 Am. L. Prop. § 23.38, 23.41; Restatement, Property § 341, comment a (1944).

if the appointees are incapable of taking. If this occurs the donee is said to have "captured" the appointive property for his estate.<sup>65</sup> If the unknown power turns out to be special, good draftsmanship may still retain some benefits. The will can provide for alternative appointments so as to give maximum effectiveness to the testator-donee's dispositive plan.<sup>66</sup> The form in the appendix is designed to achieve both results.

## II

### SHOULD THE DONOR ATTEMPT TO PREVENT A BLIND EXERCISE BY THE DONEE?

The donor, of course, creates a power hoping that it will be exercised intelligently by a donee who is aware of its existence and of its terms. He must face the possibility, however, that it may not be so exercised. For this reason all well-drafted powers provide for disposition of the appointive assets in case the power is not exercised.<sup>67</sup> In addition, many authorities suggest that the donor should include a clause providing that the power can be exercised only if the donee specifically refers to the power.<sup>68</sup> I believe that such clauses are unwise.

#### A. *Tax Considerations*

Generally speaking, a specific reference clause inserted by a donor creating a power today serves no tax purpose. Since the federal estate tax on the powers created after October 21, 1942, is not affected by their subsequent exercise, no federal tax disadvantages result from a careless or inadvertent exercise in the future of a power created today. As far as

<sup>65</sup> See generally Carlton, "The Doctrine of Capture Under a General Power of Appointment," 35 *Mass. L.Q.*, May 1950, p. 23; Stokey, "Two Problems Arising from Powers of Appointment," 28 *B.U.L. Rev.* 335 (1948).

In most cases the intent to "capture" appointive assets has been inferred from the fact the donee has "blended" appointive assets with his own (as when the appointment is made in the residuary clause). See, e.g., *Amerige v. Attorney Gen.*, 324 *Mass.* 648, 88 *N.E.2d* 126 (1949); *Old Colony Trust Co. v. Allen*, 307 *Mass.* 40, 29 *N.E.2d* 310 (1940). However, if the donee clearly manifests his desire to capture the assets this desire will be honored by the courts even if there is no "blending." *Restatement, Property* § 365(3).

<sup>66</sup> It would probably be possible to direct that unknown appointive assets be "selectively allocated" or "marshalled." That is, if an appointment were ineffective, the donee's own assets could be substituted for the appointive assets and the appointive assets could be used to satisfy other bequests of the testator. See generally Hoffman, "Powers of Appointment and Selective Allocation: Doctrinal Assistance for the Erring Donee," 46 *Cornell L.Q.* 416 (1961). However, where the appointment is intended to be a mere catch-all for any undiscovered powers it would be inappropriate to direct the testator's own assets to satisfy the appointment. It would be better, if the appointment were ineffective as made, to have the appointive assets used to satisfy other bequests of the testator and to have the resulting saving of his own estate pass into the residue.

<sup>67</sup> See, e.g., Schwartzberg & Stocker, *Drawing Wills* 270 (1964).

<sup>68</sup> See, e.g., Leach & Logan, *Cases on Future Interests and Estate Planning* 964 (1961); Lauritzen, "Drafting Powers of Appointment Under the 1951 Act," 47 *Nw. U.L. Rev.* 314, 328 (1952). But see Stephenson, *Drafting Wills & Trust Agreements* § 4.14, at 113-14 (1955) (sample clause disclaiming any requirement of specific reference).

state death taxes are concerned, only in Delaware, and possibly Alaska, would increased death taxes unavoidably result from the inadvertent exercise of a power created today.<sup>69</sup>

### B. *Nontax Considerations*

As shown above, tax considerations in most cases do not warrant a donor's imposing a specific reference clause. Neither do nontax considerations. The major nontax consideration troubling most donors is the possibility that a careless exercise may be ineffective because of the rule against perpetuities, or because it is in favor of a nonobject.<sup>70</sup> But imposing a requirement of specific reference merely increases the possibility that a careless exercise will be ineffective. If ineffectiveness is to be avoided, a requirement of specific reference increases the danger; it does not, as it is designed to do, lessen it.

Outweighing whatever slight advantages may accrue from preventing a careless exercise are two disadvantages. First, a careful and desirable blind exercise may be thwarted by a specific reference requirement. Second, a specific reference clause may cause wasteful litigation.<sup>71</sup> This latter question warrants some amplification.

American cases construing specific reference clauses are almost nonexistent.<sup>72</sup> One suspects that this is because specific reference clauses have only recently become popular, as have indeed powers of appointment themselves.<sup>73</sup> Probably not until the donees of powers of appointment presently being created die, will decisions establish the meaning of such clauses.

Such clauses raise at least three litigation provoking problems. First, do state statutes providing that "formalities" imposed by the donor may be disregarded, apply to specific reference clauses? Second, do state statutes providing, in effect, that residuary clauses exercise powers in the absence of a manifested intent of *the donee*, nullify the donor's specific

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<sup>69</sup> See notes 29-31 *supra* and accompanying text.

<sup>70</sup> Cf. Leach & Logan, *supra* note 68, at 620.

<sup>71</sup> But see *id.* at 621 where it is suggested, obliquely, that specific reference clauses tend to reduce litigation.

<sup>72</sup> Only one American case in point has been found. *Windolph Trust*, 374 Pa. 81, 97 A.2d 67 (1953). In the *Windolph* case it was held that a special power with a specific reference clause was not effectively exercised. Under the peculiar facts of the case, however, it is probable that the same result would have been reached even in the absence of a specific reference clause. The only other American case known to the author even remotely in point is *Boston Safe Deposit & Trust Co. v. Johnson*, 151 Me. 152, 116 A.2d 656 (1955). In this case there was a requirement of "specific and direct reference." It was stipulated that the power was not exercised and the sole issue was over the taxation of such an unexercised power.

<sup>73</sup> Before the 1930's powers of appointment were almost unknown to the American Bar. Leach & Logan, *supra* note 68, at 620. And the leading exponent of powers, Professor Leach, originally advocated the blanket exercise of all powers. See Leach, "Powers of Appointment," 24 A.B.A.J. 807, 811 (1938).

reference clause? Third, do formula clauses exercising "all powers" satisfy the donor's specific reference requirement? These questions are discussed in order below.

1. *Is a Requirement of Specific Reference a "Formality" Which May Be Disregarded?* Michigan, Minnesota, North Dakota, Oklahoma, and South Dakota have statutes<sup>74</sup> modeled after the New York Revised Statutes of 1830. The original New York statute (which has since been repealed) read as follows:

§ 119. When the grantor shall have directed any formalities to be observed in the execution of the power, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power.

§ 120. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the exercise of the power.

§ 121. With the exceptions contained in the preceding sections, the intentions of the grantor of a power, as to the mode, time and condition of its execution, shall be observed, subject to the power of the court of chancery, to supply a defective execution, in the cases herein after [sic] provided.<sup>75</sup>

Kentucky, Virginia, and West Virginia have statutes which provide as follows:

No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity.<sup>76</sup>

Apparently no American authority has discussed whether the above quoted statutes nullify specific reference clauses. If we turn to England, we obtain at least a little guidance. The English statute, (which was adapted from the New York statute quoted above<sup>77</sup>) reads as follows:

No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, *so far as respects the execution and attestation thereof*, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.<sup>78</sup> [Emphasis supplied.]

<sup>74</sup> Mich. Stat. Ann. § 26.136 (1957); Minn. Stat. Ann. § 502.65 (1947); N.D. Cent. Code § 59-05-26 (1960); Okla. Stat. Ann. tit. 60, § 229 (1963); S.D. Code § 59.0426 (1939).

<sup>75</sup> N.Y. Rev. Stat. of 1830, pt. 2, ch. 1, tit. 2, §§ 119-121.

<sup>76</sup> Accord, Ky. Rev. Stat. Ann. § 394.070 (1962); Va. Code Ann. § 64-52 (1950); W. Va. Code Ann. § 4042 (1961).

<sup>77</sup> See *Burdett v. Spilsbury*, 10 Clark & Fin. 340, 376, 8 Eng. Rep. 772, 785 (H.L. 1843).

<sup>78</sup> Wills Act of 1837, 7 Will. 4 & 1 Vict., c. 26, § 10. The test is presently codified in 26 Halsbury's Statutes of England 1335 (2d ed. 1951).

The North Carolina statute is basically the same.<sup>79</sup> In the English case of *Phillips v. Cayley*<sup>80</sup> it was held that the English statute did not nullify specific reference clauses. It was thought that the statute was inapplicable because the requirement of specific reference did not concern the "execution" or "attestation" of the will.<sup>81</sup> *Phillips v. Cayley* may not be persuasive to American courts. The assumption that a requirement of specific reference does not relate to the "execution" of the power is at least debatable as an original matter. More important, the key phrase in the English statute which emphasizes the fact that the statute is concerned only with the form of "execution" or "attestation" ("so far as respects the execution and attestation thereof. . .") does not appear in any of the American statutes, except that of North Carolina.

If *Phillips v. Cayley* will not be considered highly persuasive by American courts, how will American courts decide the question when it is first litigated? The problem has already caused some uneasiness. In 1958 the Association of the Bar of the City of New York recognized that "doubt exists as to the effect of such provisions and litigation is almost certain to result."<sup>82</sup> The statute, quoted above, which exists in Kentucky, Virginia, and West Virginia is equally likely to cause litigation when applied to a specific reference clause. Surely, under this statute, a specific reference requirement can be considered one that a will "be executed with some additional . . . form of . . . solemnity." Because of this uncertainty New York passed an act which made "clear that the creator of a power can effectively direct that the power will be validly exercised only by an instrument which specifically refers to it."<sup>83</sup> The next year Wisconsin adopted a similar act for similar reasons.<sup>84</sup> In the remaining states which have these statutes, however, the draftsman runs a risk of litigation when he uses a specific reference clause. It seems likely that the courts in

<sup>79</sup> N.C. Gen. Stat. § 31-4 (1950).

<sup>80</sup> 43 Ch. D. 222 (C.A. 1889); accord, *In re Tarrant's Trust*, 58 L.J. Ch. 780 (1889). Contra, *In re Marsh*, 38 Ch. D. 630 (1888).

<sup>81</sup> The Wills Act of 1963, 11 & 12 Eliz. 2, c. 44 probably does not affect the rule of *Phillips v. Cayley*. The Act, in pertinent part, provides as follows:

2.(2) A will so far as it exercises a power of appointment shall not be treated as improperly executed by reason only that its execution was not in accordance with any formal requirements contained in the instrument creating the power.

3. Certain requirements to be treated as formal.—Where (whether in pursuance of this Act or not) a law in force outside the United Kingdom falls to be applied in relation to a will, any requirement of that law whereby special formalities are to be observed by testators answering a particular description, or witnesses to the execution of a will are to possess certain qualifications, shall be treated, notwithstanding any ruse of that law to the contrary, as a formal requirement only.

<sup>82</sup> Ass'n of the Bar of the City of New York, "Memorandum," in 1958 N.Y. Legislative Annual 225-26.

<sup>83</sup> *Ibid*; see N.Y. Sess. Laws 1958, ch. 359, § 1. Unfortunately, the subsequent New York recodification of the statutes dealing with powers of appointment has raised new possibilities for litigation. See text accompanying notes 96-101 *infra*.

<sup>84</sup> Wis. Laws 1959, ch. 287, §§ 1-3, codified in Wis. Stat. Ann. § 232.44 (1957).

these states will stress the word "execution," construe that word narrowly and technically, and hold the statutes inapplicable to specific reference clauses; but this is by no means certain.<sup>85</sup>

2. *Do Statutes Which Have the Effect of Making Residuary Clauses Exercise Powers of Appointment Nullify Specific Reference Clauses?* The statutes in eighteen states which have the effect of making residuary clauses exercise powers of appointment have been discussed previously.<sup>86</sup> However, that discussion did not cover the case where the donor imposes a specific reference requirement. It appears that no American authority has considered the effect of such statutes on a specific reference requirement imposed by the donor. Nevertheless, the problem is very real. In England after considerable controversy it was decided that the analogous English statute did not nullify a specific reference clause.<sup>87</sup> The decision was based on a peculiar phrase which appears in the English statute but which appears in only six of the eighteen analogous American statutes. The English statute, in pertinent part, reads as follows:

27. A general devise of the real estate of the testator . . . shall be construed to include any real estate . . . *which he may have power to appoint in any manner he may think proper*, and shall operate as an execution of such power, unless a contrary intention shall appear by the will . . .<sup>88</sup> [Emphasis added.]

The New York statute which served as a prototype for ten other statutes (but which has since been repealed) read as follows:

§ 176. . . . Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication.<sup>89</sup>

It will be noted that the phrase italicized in the English statute does

<sup>85</sup> It could be argued that such a construction would defeat the policy behind such statutes. In the early nineteenth century donors frequently specified with particularity the details which the donee had to follow in order effectively to execute the power. The inevitable litigation over whether the details of execution were followed, and the injustice which frequently resulted from an insistence upon literal compliance with the directions of the donor, led to the passage of the statutes quoted above. The leading cases are discussed at length in *Burdett v. Spilsbury*, 10 Clark & Fin. 340, 8 Eng. Rep. 772 (H.L. 1843). See generally 1 Sugden, Powers 294-330 (1856). If specific reference clauses are held to be outside these statutes, litigation over whether a particular reference was "specific" will be inevitable. The evil which the statutes were designed to cure would still be with us.

<sup>86</sup> See text accompanying note 45 supra.

<sup>87</sup> *Phillips v. Cayley*, 43 Ch. D. 222 (C.A. 1889); accord, *In re Tarrant's Trust*, 58 L.J. Ch. 780 (1889).

<sup>88</sup> Wills Act of 1837, 7 Will. 4 & 1 Vict. c. 26, § 27.

<sup>89</sup> N.Y. Real Prop. Law § 176. The New York law has been replaced by a new law effective since June 1, 1965, N.Y. Sess. Laws 1964, ch. 864, §§ 130-68, but it is used here because it typifies statutes in California, Kentucky, Maryland, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, Utah, and Wisconsin. The new New York statute is discussed and quoted at note 99 and accompanying text infra. The statutory citations are set out in notes 44-45 supra.

not appear in the New York statute. It was largely because of this phrase that the English Court of Appeals held that the specific reference clause prevented a general residuary clause from exercising the power. Even with the clause, the question was difficult enough to have occasioned a split of authority.<sup>90</sup> How the District of Columbia and the eleven states which have statutes which omit the key phrase contained in the English statute will handle the problem is an open question.<sup>91</sup> The "intent" referred to by the statutes is clearly that of the testator-donee, not that of the donor. The donor's intention that the power should not be exercised without specific reference would seem to be immaterial under such statutes. It has frequently been held that a mere showing that the donee was ignorant of the power is not sufficient to show an intent not to exercise it.<sup>92</sup> A failure by a donee to refer specifically to a power requiring specific reference does not necessarily show anything more than ignorance of such a power. Therefore it seems that specific reference clauses could be nullified by such statutes. At the very least, the question will eventually cause litigation.

North Carolina, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Virginia all have statutes<sup>93</sup> which contain the key phrase "power to appoint in any manner he [the donee] may think proper . . .," and hence it is likely that in these states the English construction will be followed and it will be held that a power requiring specific reference will not be exercised by a residuary clause which does not refer to powers.

3. *Blind Exercises of "All Powers" and Specific Reference Clauses: The Irresistible Force Meets the Immovable Object.* Even if specific reference clauses were unaffected by the statutes discussed above, there remain other problems attendant upon the use of such clauses. Assume that the donor requires the donee specifically to refer to the power to exercise it effectively. What happens if the donee, employing widely used forms, attempts to exercise "all powers" which he "may have"? Is this a

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<sup>90</sup> See *In re Marsh*, 38 Ch. D. 630 (1888), which was overruled by *Phillips v. Cayley*, 43 Ch. D. 222 (C.A. 1889). In *Charles v. Burke*, cited in *Phillips v. Cayley*, supra, at 224 n.2, it was observed that the question was capable "of very considerable argument."

<sup>91</sup> See note 89 supra. Many of these states have statutes similar to § 121 of the New York Revised Statutes of 1830 which is quoted at text accompanying note 75 supra. See, e.g., Wis. Stat. Ann. § 232.46 (1957). It may be that a requirement of specific reference is a "condition" of execution which must be observed, although the English cases holding that it does not "respect the execution" weaken the validity of such a construction. See text accompanying note 80 supra.

<sup>92</sup> See, e.g., *Matter of Smith*, 279 App. Div. 140, 108 N.Y.S.2d 290 (1st Dep't 1951), aff'd, 304 N.Y. 612, 107 N.E.2d 92 (1952); *Matter of Thorne*, 9 Misc. 2d, 167 N.Y.S.2d 211 (Sup. Ct. N.Y. County 1957), aff'd, 6 N.Y.2d 967, 161 N.E.2d 391, 191 N.Y.S.2d 165 (1959); *Matter of Davis*, 186 Misc. 397, 59 N.Y.S.2d 607 (Sup. Ct. N.Y. County 1946); *Matter of Lynn*, 174 Misc. 361, 20 N.Y.S.2d 925 (Surr. Ct. N.Y. County 1940), modified on other grounds, 261 App. Div. 513, 26 N.Y.S.2d 96 (1st Dep't 1941), aff'd, 287 N.Y. 627, 39 N.E.2d 266 (1941).

<sup>93</sup> See statutes cited note 45 supra.

specific reference? So far as is known, no American case has ruled on the issue. English cases have held that a general formula exercising "all powers" will effectively exercise a power requiring an "express" reference—at least if the power is general.<sup>94</sup> Jarman has criticized these decisions.<sup>95</sup> No case has been found involving a specific reference clause relating to a special power where the purported exercise was a formula or blanket exercise of all powers. On principle it would seem that if a reference to "all powers" is sufficiently specific for general powers it should be sufficiently specific for special powers. However, dicta in some of the cases suggest that this reasoning might not be followed.<sup>96</sup> Whether American courts will follow the English cases is a question which cannot be answered with assurance. A requirement of "specific" reference is arguably distinguishable from one of "express" reference.<sup>97</sup> Moreover, as an original matter it is doubtful whether the donor who requires "specific reference to this power" would be satisfied by a general reference to "all powers."

The question is especially complicated in New York because of the recent statutory recodification of the law relating to powers of appointment. The recodification became effective on June 1, 1965.<sup>98</sup> The new statute in pertinent part reads as follows:

§ 147. *Exercise of a power; manifestation of intent of the donee.*

An effective exercise of a power of appointment by its donee requires a manifestation of the donee's intent to exercise such power. Such a manifestation exists when

- (1) the donee in a deed or will declares in substance that he exercises all powers that he has; or
- (2) the donee, sufficiently identifying property covered by the power, executes a deed or leaves a will purporting to convey such property; or
- (3) the donee included in his will, pecuniary gifts or a residuary gift, or both, which, when read with reference to the property which he owned and the circumstances existing at the time of the formulation of the will, indicates that the donee understood that he was disposing of the appointive assets; or
- (4) the donee leaves an effective will purporting to convey all of the assets of the testator, of the character covered by the power, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication, except that if the donor has explicitly directed that no instrument shall be effective to exercise the power

<sup>94</sup> Cf. *Belli v. Lane*, [1908] 2 Ch. 581; *Waterhouse v. Ryley*, 77 L.J. Ch. 30, 98 L.T.R.(n.s.) 30 (C.A. 1908); *Rolt v. Burdett*, 43 Weekly N. 76, 43 L.J. 177 (1908).

<sup>95</sup> 2 Jarman, Wills 805 (8th ed. 1951). ("It would not be respectful to question the accuracy of these decisions, but they certainly defeated the intention of the donor of the power in each case.")

<sup>96</sup> See *Waterhouse v. Ryley*, supra note 94; *Belli v. Lane*, supra note 94.

<sup>97</sup> See *Rolt v. Burdett*, supra note 94 ("expressly" referring, did not mean "specifically" referring).

<sup>98</sup> N.Y. Real Prop. Law §§ 130-68.

unless it contains a reference to the specific power, an instrument which lacks such reference does not validly exercise the power. Added L. 1964, c. 864, eff. June 1, 1965.

§ 148. *Exercise of power; conformity to directions of the donor.*

. . . the directions of the donor as to the manner, time and conditions of the exercise of a power must be observed, except that . . .

(2) where the donor has directed any formality to be observed in its exercise, in addition to those which would be sufficient in law to pass the appointive interest, the observance of such additional formality is not necessary to a valid exercise of such power; . . .<sup>99</sup>

Section 147(4) clearly provides that the donor's specific reference clause is not satisfied by a bare residuary clause of the donee. By implication it would seem that if the donee attempted to exercise "all powers" this might satisfy a specific reference requirement. Furthermore, if a specific reference requirement is "a formality to be observed in its [the power's] exercise . . ." under § 148(2) it would seem unnecessary to comply with such a requirement, provided the case were not strictly within § 147(4). This conclusion is somewhat reenforced by the Comments to the legislation.

The Comments to section 147(4) and section 148(2) state that these sections embody in a "somewhat narrowed" form the present section 170.<sup>100</sup> Since the part of section 170 dealing with a donor's specific reference requirement is copied almost verbatim in section 147(4) the "narrowed form" referred to in the Comments must result from its new location. Its new location seems to narrow its application to the case when there is only a bare residuary clause.<sup>101</sup>

One additional factor complicates the effect of a formula clause exercising "all powers" on a power which requires specific reference. Although American cases are sparse, presumably most American courts would follow the doctrine of equitable aid for defective execution. Under this doctrine when an appointment is made to "meritorious appointees" such as purchasers for value, creditors, charities, or a wife or child of the donee, purely formal defects in the execution of the appointment will be treated as immaterial by a court of equity.<sup>102</sup> The "formal defects" dealt with in the decided cases have involved such things as number of wit-

<sup>99</sup> N.Y. Real Prop. Law § 147.

<sup>100</sup> N.Y. Temporary State Comm'n on the Modernization, Revision, and Simplification of the Law of Estates, Third Report to the Governor and Legislature 621-22 [1209-10] (1964).

<sup>101</sup> It may also be significant that whereas old § 170 referred to "any formality to be observed in its execution . . . the observance of such additional formality is not necessary to the valid execution," The new § 148(2) substitutes the word "exercise" for the word "execution."

<sup>102</sup> See generally 5 Am. L. Prop. § 23.44; 3 Restatement, Property § 347 (1944); Simes & Smith, *supra* note 59, § 980.

nesses, requirement of a seal, etc.<sup>103</sup> No case has been found which dealt with the problem of whether a failure specifically to refer to a power would be treated as a mere formal defect deemed immaterial in the case of a "meritorious appointee." Surely, where the donee indicates his intent to exercise "all powers" the case would be a close one. Unfortunately, it seems only a matter of time before such a contention will be tested in litigation.

### CONCLUSION

Two major conclusions seem warranted. First, it is unwise for the draftsman to create a power which cannot effectively be exercised "unless specific reference is made to this power," both because little is gained by such a clause and because the effect of the clause is uncertain and is likely to produce litigation. Second, for most wills a well drafted formula clause exercising all unknown powers is desirable. It is hoped that the form in the appendix is well drafted.

### APPENDIX

#### *Suggested Form for Exercising Unknown Powers*

Article X: I appoint all property (but not including any property disposed of pursuant to Article —) over which I have a power of appointment at the time of my death (hereinafter known as "appointive property") to A.B.<sup>104</sup> If A.B. cannot take for any reason other than his renunciation of this appointment I intend such property to be used to satisfy all my devises and bequests to which it may lawfully be applied and to the extent not so used it should be captured for the benefit of my estate.<sup>105</sup> Notwithstanding the foregoing, I direct that if any appointive property would be taxed under § 2041 of the Internal Revenue Code of 1954 (as it or its successor provision exists at the time of my death)<sup>106</sup> if the power relating thereto were exercised, but not taxed if said power were not exercised, such power shall not be exercised.<sup>107</sup>

Federal or state death taxes attributable to appointive property dealt with in this Article shall be apportioned pursuant to applicable law notwithstanding anything contained in Article — hereof.<sup>108</sup>

<sup>103</sup> See, e.g., *Wade v. Paget*, 1 Bro. C.C. 363, 28 Eng. Rep. 1180 (Ch. 1784) (too few witnesses); *American Freehold Land Mortgage Co. v. Walker*, 31 Fed. 103 (C.C. S.D. Ga. 1887) (too few witnesses); *Freeman v. Eacho*, 79 Va. 43 (1884) (requirement of seal).

<sup>104</sup> Ordinarily A.B. will be the residuary legatee and the principal object of testator's bounty.

<sup>105</sup> See notes 65-66 supra and accompanying text.

<sup>106</sup> There is good authority for incorporating by reference a statute which may be changed after the execution of the will. For example, Professor Casner advocates referring to the intestacy laws of a state as they exist at the testator's death (or at a later time) when drafting limitations to "heirs." Casner, "Construction of Gifts to 'Heirs' and the Like," 53 *Harv. L. Rev.* 207, 228-41, 249-50 (1939).

<sup>107</sup> See text accompanying note 33 supra. If, under all the circumstances, the possible application of the state death taxes of Alaska, California, Delaware, Illinois, or Washington is a factor serious enough to consider, the following sentence may be added: "I further direct that if any appointive property would be taxed (under the death tax laws as they exist at my death) by the state of [insert appropriate state] if the power relating thereto were exercised, but not taxed if not exercised, such power shall not be exercised." See generally text accompanying notes 29-37 supra.

<sup>108</sup> This clause is appropriate only if the will elsewhere provides that taxes are not to be apportioned. See text at note 19 supra.