

# CRAFTING THE IDEAL POWER OF APPOINTMENT

## INTRODUCTION

Greek journalist Philippos Syrrigos once said “[m]y best dreams and worst nightmares have the same people in them.”<sup>1</sup> The same is often true for estate planners. Their best dreams are uncontested transmissions of wealth from a parent to a child. Their worst nightmares are acrimonious litigation over that same transmission of wealth.<sup>2</sup> Both instances involve the same parties. In some cases, the only difference is the flexibility of the client’s plan. Flexible estate plans often avoid some of these “worst nightmare” scenarios.

The power of appointment is one of the most effective mechanisms for implementing flexibility into a client’s estate plan. A power of appointment is a right granted to a trust beneficiary (also known as a powerholder) that authorizes her to direct trust assets to her preferred recipient (subject to certain limitations discussed below).<sup>3</sup> This means that the powerholder has the ability to choose the recipient of the trust assets, even if that person is not the named remainder beneficiary under the terms of the trust.<sup>4</sup> Unfortunately, the current landscape of statutory law governing powers of appointment limits the strategic effectiveness of such discretion.

There are a variety of potential permutations on a power of appointment. Delineating these variations is necessary in order to fully analyze the problems posed by state power of appointment laws.

Powers of appointment can apply to various classes of permissible appointees. When a powerholder is granted full discretion to decide the recipient of trust assets, she has a “general power of appointment.”<sup>5</sup> States define this more technically as “a power of appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.”<sup>6</sup> This definition tracks the one articulated in the Internal Revenue Code (IRC).<sup>7</sup> Conversely, when a power of appointment excludes the powerholder, her estate, her creditors, and the creditors of her estate, it is a limited power of appointment. Thus, any power that is non-general is limited, or “special.”<sup>8</sup> A donor may have

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<sup>1</sup> Philippos Syrrigos, GOODREADS.COM (last accessed Feb. 3, 2021).

<sup>2</sup> See, e.g., Jeffrey N. Pennell, *Ethics for Estate Planners: Not a Boring Parade Through the Rules*, AM. LAW. INST. CONTINUING LEGAL EDUC. (Feb. 14–15, 2013) (“[E]state planners are do-good types: they hope to fashion results that are a win-win for everyone involved, and they absolutely loathe the creation of unnecessary conflict.”).

<sup>3</sup> See A. James Casner, *Estate Planning—Powers of Appointment*, 64 HARV. L. REV. 185, 185 (1950).

<sup>4</sup> See Howard Zaritsky, *Lifetime Family Wealth Transfers and the 2017 Tax Cuts and Jobs Act*, TAX PLAN. FOR FAM. WEALTH TRANSFERS: ANALYSIS WITH FORMS, Jan. 2021, at Appendix F (“[O]ne spouse can create a trust of which the other spouse is not named as a beneficiary, but over which a third party is granted a special power of appointment that enables him or her to add the other spouse as a beneficiary at a later date.”).

<sup>5</sup> *General Power of Appointment*, BLACK’S LAW DICTIONARY (11<sup>th</sup> ed. 2019) (defining a general power of appointment as “[a] power of appointment by which the donee can appoint — that is, dispose of the donor's property — in favor of anyone at all, including oneself or one's own estate; esp., a power that authorizes the alienation of a fee to any alienee.”).

<sup>6</sup> KY. REV. STAT. ANN. § 390.020(6) (West 2021).

<sup>7</sup> 26 U.S.C. § 2041(b)(1) (2018).

<sup>8</sup> CAL. PROB. CODE § 611(d) (West 2021).

various reasons for granting a general power of appointment over a limited one. She may want to attain favorable tax treatment for the powerholder. She may also want to ensure that the powerholder is privy to more information before determining the ultimate distribution of trust assets. These examples and others are discussed in more detail below.

Powers of appointment can also vest in the powerholder at different times. An *inter vivos* power of appointment can be exercised at any point during the powerholder's lifetime.<sup>9</sup> A testamentary power of appointment vests upon the death of the powerholder and is exercisable by will.<sup>10</sup> This allows the powerholder to ascertain new information about the circumstances around the trust throughout the course of her life before identifying the beneficiary of the trust assets. For example, she might know if there was a change in the IRC that would require the creation and funding of a new trust, or whether a dispute between family members arose after the donor executed the trust.

A donor may also require the powerholder to comply with certain requirements before exercising her power.<sup>11</sup> For example, the powerholder will often be required to make "specific reference" to the power in the exercising instrument. The donor's trust could impose such a requirement as follows:

The trust shall terminate upon the death of the beneficiary, and the then remaining trust corpus shall be distributed free of the terms of the trust to, or for the benefit of, such one or more persons or corporations (including his or her estate, his or her creditors, or the creditors of his or her estate) in such proportions and in such manner, whether outright, in trust, or otherwise, as the beneficiary may appoint by his or her last will and testament, making specific reference to this general power of appointment in so doing. To the extent that the beneficiary fails to exercise effectively this testamentary general power of appointment, any unappointed assets shall be distributed to [set out disposition in default of exercise of power of appointment].<sup>12</sup>

In a minority of states, the specific-reference requirement is required by law.<sup>13</sup>

State power of appointment laws implicate all of the distinctions discussed above, but vary in how they approach two different scenarios. First, states vary in their treatment of powers

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<sup>9</sup> See Ronald D. Aucutt, *The Impact of Estate Tax Repeal—Going Blindly Where No One Else Has Gone Before*, ADVANCED EST. PLAN. TECH. (Feb. 18–20, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> See *Dollar Sav. & Trust v. First Nat. Bank of Boston*, 285 N.E. 2d 768 (Oh. Ct. Com. Pl. 1972) (involving a will that read, in part, "after the decrease of my said daughter, the principal of said Trust Fund shall be distributed among her legal heirs in such manner as it would be distributable, had she at her death, been the absolute owner thereof, in her own right. It is hereby provided however, that my said daughter shall have power to direct by her Will, the manner in which said Trust Fund shall be distributed and the persons to whom the same shall go.").

<sup>12</sup> Russell H. Riggs, James L. Coorssen, Kevin L. Johns & Carter C. Ruml, *Creation of Power of Appointment*, 4 KY FORMS & TRANSACTIONS § 29:46 (2020 ed.).

<sup>13</sup> See 20 PA. CONSOL. STAT. ANN. § 7602 (a)(1) (West 2021) ("Subject to subsection (c), in the absence of a contrary intent appearing in the instrument creating a broad power of appointment or in the donee's instrument exercising the power, a broad power of appointment may be exercised only by the donee's instrument making . . . specific reference to the power").

that do not have a specific-reference requirement. In states that have adopted the Uniform Power of Appointment Act (as adopted by the Uniform Probate Code) the existence of a residuary clause in a powerholder's will may be sufficient to support her exercise of a testamentary power of appointment.<sup>14</sup> Other states do not permit a residuary clause, without more, to effectively exercise such a power.<sup>15</sup> States also differ in their approach to powers of appointment that impose a specific-reference requirement. States adopting the Uniform Power of Appointment Act (as adopted by the Uniform Probate Code) find that a powerholder's substantial compliance with such a requirement is sufficient if: (i) she knows of and intends to exercise the power; and (ii) her manner of exercise does not impair a material purpose of the donor in imposing the requirement.<sup>16</sup> Other states are less flexible, requiring strict compliance with any formal requirement imposed on the exercise of the power (and even imposing some requirements by statute).<sup>17</sup>

This Paper will explore the problems with the existing approaches to each scenario. It will then propose an alternative law that uses extrinsic evidence, instead of presumptions, to determine the intent of the donor and the powerholder when one of these scenarios arise.

## I. BACKGROUND

### A. IMPORTANCE OF POWERS OF APPOINTMENT

The flexibility of a power of appointment offers a number of tax and non-tax planning benefits to a powerholder.

Powers of appointment can be an effective tax planning tool. Lawyers use different types of powers of appointment depending on a client's circumstances. In some cases, a testamentary general power of appointment could save a client, or their estate, millions. For instance, it might be favorable to modify an irrevocable gift trust holding closely-held stock in a family corporation (an increasingly common and favorable option as more states adopt the Uniform Trust Code) to grant a beneficiary a testamentary general power of appointment. The possession of this general power of appointment causes inclusion in the powerholder's gross estate for estate tax purposes.<sup>18</sup> This modification would allow the powerholder's estate a basis step up in the stock under IRC 1014. This modification, in conjunction with the presently-high unified credit amount, could help the estate beneficiaries avoid millions in capital gains if they later decide to sell the stock.<sup>19</sup> In other circumstances, the donor may want to avoid inclusion in the powerholder's estate. This could be because of: (i) a fear of a potential decrease in the estate tax exemption amount before the powerholder's death; (ii) the powerholder's independent wealth (such that the powerholder may be at risk for incurring estate tax at her death); or (iii) because

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<sup>14</sup> UNIF. POWER OF APPOINTMENT ACT [hereinafter, the "UPAA"] § 302(b) (UNIF. LAW COMM'N 2013); UNIF. PROB. CODE [hereinafter, the "UPC"] § 2-608 (UNIF. LAW COMM'N, amended 2019).

<sup>15</sup> See FL. STAT. ANN. § 732.607 (West 2021).

<sup>16</sup> UPAA § 304; UPC § 2-704 (amended 2019).

<sup>17</sup> Estate of Albert W. Schede, 231 A.2d 135, 137 (Pa. 1967).

<sup>18</sup> See 26 U.S.C. § 2041(a)(2) (2018) (defining the gross estate to include "property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942").

<sup>19</sup> These savings would only be possible to the extent that the powerholder's gross estate is under the presently-large estate tax exemption at her death.

the powerholder has already made substantial gifts during her lifetime that significantly reduced her unified credit. A testamentary limited power of appointment would avoid inclusion in the powerholder's estate while also providing her with several non-tax benefits, such as: (i) mitigating the risk of litigation; (ii) the option to divert assets to a trust with better terms; or (iii) the option to divert closely-held business assets to a trust with different beneficiaries.

It is impossible to know how family relationships will change over time. Imagine a scenario where a donor's family generally gets along at the time of the trust's creation. The trust might provide for separate, lifetime trusts for each of the donor's then-living children at her death. At the death of each of those children, their children (the donor's grandchildren) receive a per stirpital share of their parent's trust outright. Unfortunately, after the donor's death, her children and grandchildren begin to fight. Further imagine that the tax laws change such that the modification of the trust would be favorable to the current income beneficiaries of the trust, the parents. The parents' possession of a power of appointment could be used as a "stick" to induce the grandchildren's cooperation where they might otherwise resist (out of spite or for some other reason).<sup>20</sup> In other words, the presence of the power would mean that there would be no guarantee that they would receive their share of the trust at their parents' deaths.

Powers of appointment also help avoid other unforeseen problems. They can be utilized to divert assets to a trust on more favorable terms. They can also divert closely-held stock to a new class of beneficiaries who are more involved with a family business.<sup>21</sup> Of course, there are practical boundaries to these techniques. They can often implicate further consequences for the client. The lawyer should therefore always be wary of the Delaware Tax Trap<sup>22</sup> and the special requirements imposed by the Internal Revenue Code on a trust holding s-corporation stock (otherwise known as a QSST or ESBT).<sup>23</sup>

The usefulness of powers of appointment illustrate the importance of crafting a law that maximizes their effectiveness. Part of doing so requires an understanding of the historical foundations of powers of appointment.

## B. HISTORY OF POWERS OF APPOINTMENT

Powers of appointment were recognized as early as 1599 in *Sir Edward Clere's Case*, where the Court of the King's Bench decided that "the owner of a fee simple might have a power of appointment."<sup>24</sup> The popularity of the power of appointment continued to increase over the next two centuries.<sup>25</sup> Early-American law governing powers of appointment primarily arose

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<sup>20</sup> See Nancy G. Henderson & David P. Jones, *Estate Planning After the Fiscal Cliff*, EST. PLAN. IN DEPTH (Jun. 23–28, 2013) ("The surviving spouse's fiduciary duties to remainder beneficiaries can be dampened by providing the survivor a broad testamentary special power of appointment (or, as Prof. Halbach used to say, a power of 'disappointment'), such as a power to appoint trust assets to charity, thereby discouraging descendants or others from unduly interfering in the surviving spouse's affairs.").

<sup>21</sup> See Eve Preminger, John M. Thomas, Susan C. Frunzi & Anne K. Hilker, *Avoidance of Transfer Taxes*, TR. AND EST. PRAC. N.Y., at § 13:323 ("The legislature's intent . . . was to allow the beneficiary to appoint to a new trust for new beneficiaries in order to gain tax advantages . . .").

<sup>22</sup> See 26 U.S.C. § 2041(a)(3) (2018).

<sup>23</sup> See 26 U.S.C. § 1361(d) (2018).

<sup>24</sup> 5 AMERICAN LAW OF PROPERTY, § 23.1 (A. Casner ed. 1952).

<sup>25</sup> *Id.*

from English authorities.<sup>26</sup> These authorities used the “relation-back doctrine” to frame the law governing powers of appointment.<sup>27</sup> This doctrine recognized that the exercise of a power of appointment equates to “merely a filling in of a blank in the will of the person who created the power.”<sup>28</sup> As American tax law became more robust throughout the twentieth century, so too did the laws around powers of appointment.<sup>29</sup> Indeed, the “law of the several states with respect to the release of powers” was “shaped to a large extent by statutes enacted to enable local taxpayers to obtain . . . some of the tax advantages possible under the Revenue Act of 1942.”<sup>30</sup> Scholars proposed additional changes to these state laws after the introduction of the Powers of Appointment Act of 1951.<sup>31</sup>

This history shows that laws governing powers of appointment must change to account for new circumstances. In 2021, these laws are again due for a change. Clients need a way to account for the ever-changing federal tax laws and an increasingly litigious society. Powers of appointment can often solve these problems, but only if they are governed by state laws that ensure adequate protection of peoples’ interests. Presently, state laws fail to offer these protections.

## II. CURRENT STATE OF THE LAW

### A. SCENARIO 1: POWERS OF APPOINTMENT WITHOUT FORMAL REQUIREMENTS

State laws diverge on what constitutes a sufficient exercise of a power of appointment when a specific-reference requirement is not required. Donors today use these types of powers less frequently, but problems with them still occasionally arise.<sup>32</sup> All state laws governing these types of powers of appointment start from a common understanding. They agree that the exercise of any power of appointment is effective where the powerholder’s intent is clearly ascertainable from the terms of the powerholder’s will.<sup>33</sup> Such a case exists where a will “recites the existence of the power, describes the property subject to the power, and then states that the donee does or does not intend to exercise the power” or “[w]hen the donee’s will does not

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *See* Dollar Sav. & Trust v. First Nat Bank of Boston, 285 N.E. 2d 768 (Ct. Comm. Pleas Oh 1972); Cleveland Trust Co. v. Shuman, 317 N.E.2d 256 (Ct. Comm. Pleas Oh 1972) (involving a will that provided, in part, “[i]n the event of the decease of any of my said children whether before or after the death of the survivor of myself and my wife, and before receiving full distribution of the trust estate to be so established for his or her primary benefit, the said trust estate of such deceased child shall vest in such of the surviving spouse and/or issue of such deceased child in such manner as such deceased child may have appointed under his or her Last Will and Testament.”).

<sup>33</sup> *Compare* UPAA § 302(b) and UPC § 2–608 (amended 2019) (“A residuary clause in a powerholder’s will . . . manifests the powerholder’s intent to exercise a power of appointment . . . if . . . the terms of the instrument containing the residuary clause do not manifest a contrary intent”) *with* UPC § 2–610 (1969) (“A residuary clause in a will . . . does not exercise a power of appointment . . . unless . . . there is some . . . indication of intention to include the property subject to the power.”).

mention the power, but disposes of the property subject to the power . . . .”<sup>34</sup> State laws deviate when the intent of the powerholder is unclear. This occurs when the powerholder’s will includes a residuary clause, but makes no reference to her power of appointment (“Scenario 1”). Most state laws adopt one of two approaches to Scenario 1.

i. TEXT AND JUSTIFICATION OF THE LAWS

a. UPAA RESIDUARY CLAUSE APPROACH

In 2013, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Powers of Appointment Act (UPAA). The purpose behind the UPAA was to “codify the law on powers of appointment.”<sup>35</sup> This provided some much-needed guidance for estate planners across the country.<sup>36</sup> UPAA 302 sets forth the first approach to Scenario 1 (hereinafter referred to as the “UPAA Residuary Clause Approach”). It provides two alternatives to the effective exercise of a power of appointment under Scenario 1.

If the power at issue is a testamentary general power, a residuary clause in the powerholder’s will is an effective exercise of such power, provided that there is no “gift-in-default” clause.<sup>37</sup> The application of this alternative to general powers of appointment is based on the notion that general powers are often used to obtain federal tax benefits. These benefits are available even if the powerholder does not effectively exercise her power. This alternative also makes an inference from the absence of a gift-in-default clause. A gift-in-default clause is “the clause that identifies the taker—or takers—in-default.”<sup>38</sup> A “taker in default of appointment is a person who takes part or all of the appointive property to the extent that the power is not effectively exercised.”<sup>39</sup> This limit on gift-in-default clauses reflects an attempt by lawmakers to deduce the donor’s intent. It is based on the idea that a donor who accounts for the default of a power would not want that power to be exercised. This presumes that a gift-in-default provision is only used when the donor grants a general power of appointment for tax reasons.<sup>40</sup> Thus, the UPAA Residuary Clause Approach adopts the reasoning that if the donor accounted for a default of the power, she did not want it to be exercised. The official comment to UPC 2-608 illustrates this reasoning, arguing that

In well planned estates, a general power of appointment will be accompanied by a gift in default. The gift-in-default clause is ordinarily expected to take effect; it

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<sup>34</sup> Susan F. French, *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred from a General Disposition of Property*, 1979 DUKE L.J. 747 (1979).

<sup>35</sup> UPAA, *Prefatory Note*.

<sup>36</sup> *Id.* (“[M]any jurisdictions within the United States have very little statutory or case law on powers of appointment.”).

<sup>37</sup> UPAA § 302(b).

<sup>38</sup> RESTATEMENT (THIRD) OF THE LAW OF PROPERTY § 17.2(f) (AM. L. INST. 2011).

<sup>39</sup> *Id.*

<sup>40</sup> As discussed, some powerholders can ensure that the beneficiaries of their estate minimize capital gains tax on the sale of future estate assets through the basis step-up authorized under 26 U.S.C. § 1014(a)(1) (2018). This benefit is only available for assets included in the powerholder’s gross estate at her death. Assets outside of the gross estate (usually titled in an irrevocable trust) can be “included” by granting the powerholder a general power of appointment over the assets before her death. The powerholder does not have to exercise this power to achieve inclusion.

is not merely an after-thought just in case the power is not exercised. The power is not expected to be exercised, and in fact is often conferred mainly to gain a tax benefit—the federal estate-tax marital deduction under § 2056(b)(5) of the Internal Revenue Code or, now, inclusion of the property in the gross estate of a younger-generation beneficiary under § 2041 of the Internal Revenue Code, in order to avoid the possibly higher rates imposed by the federal generation-skipping tax.<sup>41</sup>

The Comment goes on to note that

In poorly planned estates, on the other hand, there may be no gift-in-default clause. In the absence of a gift-in-default clause, it seems better to let the property pass under the powerholder's will than force it to return to the donor's estate, for the reason that the donor died before the powerholder died and it seems better to avoid forcing a reopening of the donor's estate.<sup>42</sup>

A residuary clause in a powerholder's will is also an effective exercise of a general *or* non-general power if it reflects the powerholder's intent to include the property subject to the power.<sup>43</sup> The will conveys this intent through language such as “[a]ll the residue of my estate, including any property over which I have a power of appointment, I devise to . . . .”<sup>44</sup> Including this language is important, because courts are precluded from relying on extrinsic evidence to determine the powerholder's intent under this approach. The justification behind this limitation is likely based on the widely-accepted principle that “[t]he testator's intent is to be gathered from the four corners of the instrument itself.”<sup>45</sup> The Uniform Probate Code (UPC 2-608) and at least eight states have adopted this approach as of the time of this Paper.<sup>46</sup>

#### b. 1969 UPC RESIDUARY CLAUSE APPROACH

Other states take a different approach to Scenario 1. They apply the rules set forth in the 1969 Uniform Probate Code (hereinafter referred to as the “1969 UPC Residuary Clause Approach”).<sup>47</sup> A residuary clause is not an effective exercise of a testamentary general power of appointment in these states, even absent a gift-in-default clause. This is a more limited approach

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<sup>41</sup> UPC § 2–610, cmt. (1969).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> UPC § 2–608, cmt. (amended 2019) (“A simple example of a residuary clause that manifests [an intention to include the appointed property] is a so-called ‘blending clause,’ such as ‘[a]ll the residue of my estate, including any property over which I have a power of appointment, I devise to . . . .’”).

<sup>45</sup> *Taylor v. Woods*, 282 S.W.3d 285, 296 (Ark. Ct. App. 2008).

<sup>46</sup> *2013 Powers of Appointment Act*, UNIFORM LAW COMMISSION (last accessed Feb. 5, 2021), <https://www.uniformlaws.org/committees/community-home?CommunityKey=70faefab-5c3d-4146-a51b-9b0a5b1f490d> (listing the following states as having enacted the UPAA: Kentucky (KY REV. STAT. ANN. § 390.120 (West 2021)); Illinois (760 ILL. COMP. STAT. 3/1311 (West 2021)); Utah (UTAH CODE ANN. § 75–10–302 (West 2021)); Nevada (NEV. REV. STAT. ANN. § 162B.305 (West 2021)); Missouri (MO. ANN. REV. STAT. § 456.1020 (West 2021)); Virginia (VA. CODE ANN. § 64.2–2714 (West 2021)); Montana (MONT. CODE ANN. § 72–7–302 (West 2021)); North Carolina (N.C. GEN. STAT. ANN. § 31D–3–302 (West 2021)); and Colorado (COLO. REV. STAT. ANN. § 15–2.5–302 (West 2021))).

<sup>47</sup> See UPC, § 2–610 (1969), file:///Users/evan/Downloads/upc\_scan\_1969.pdf.

to Scenario 1. Like the UPAA Residuary Clause Approach, the 1969 UPC Residuary Clause Approach assumes that the donor intended for the assets subject to a general power to pass to the trust beneficiaries, not the powerholder.<sup>48</sup> It suggests that this is because “most powers of appointment are created in marital deduction trusts [which only require possession of a general power of appointment],” and not for any non-tax purposes.<sup>49</sup> Based on this reasoning, a residuary clause is not an effective exercise of a power of appointment under the 1969 UPC Residuary Clause Approach.

A residuary clause can trigger the exercise a power (general or specific) under this approach if there is “some other indication” of the testator’s intent to include the property subject to the power.<sup>50</sup> Unlike the UPAA Residuary Clause Approach, the 1969 UPC Residuary Clause Approach allows for the introduction of extrinsic evidence to prove this intent.<sup>51</sup> This is supported by the plain text of the rule. Courts in states applying this rule agree, holding that “[i]f the trust contains no specific limitation on the manner of executing the power, other evidence that the power had been executed may be considered to determine intent . . . .”<sup>52</sup> The most useful extrinsic evidence often pertains to the circumstances surrounding the creation of that text.<sup>53</sup>

## B. SCENARIO 2: POWERS OF APPOINTMENT WITH FORMAL REQUIREMENTS

Where a specific-reference requirement exists, a different set of laws apply.<sup>54</sup> These laws dictate how a powerholder should comply with these requirements to effectively exercise her power. Approaches to this scenario also vary by state.<sup>55</sup>

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<sup>48</sup> See UPC § 2–610, cmt. (1969) (“Although a substantial number of states have legislation to the effect that a will with a general residuary clause does manifest an intent to exercise a power, the contrary rule is stated in the present section for two reasons: (1) this is still the majority rule in the United States, and (2) most powers of appointment are created in marital deduction trusts and the donor would prefer to have the property pass under his trust instrument unless the donee affirmatively manifests an intent to exercise the power.”).

<sup>49</sup> *Id.*

<sup>50</sup> FLA. STAT. ANN. § 732.607 (West 2021) (Florida) (“A general residuary clause in a will, or a will making general disposition of all the testator’s property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intent to include the property subject to the power.”); OR. REV. STAT. § 112.410 (West 2021) (Oregon).

<sup>51</sup> UPC § 2–610, cmt. (1969) (“A Court [may] find the manifest intent if the language of the will *interpreted in light of all the surrounding circumstances* shows [the donee’s intent].”) (emphasis added).

<sup>52</sup> See *Cessac v. Stevens*, 127 So. 3d 675, 680 (Dist. Ct. App. Fl. 2013)

<sup>53</sup> *Id.* (“[I]ntent is to be ascertained not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed.”) (internal quotations and citation removed).

<sup>54</sup> See *id.* (“[W]here, as here, a settlor of a trust places specific restrictions on the exercise of a power of appointment, [the residuary clause statute] is inapplicable.”); UPC § 2–608 (amended 2019) (“In the absence of a requirement that a power of appointment be exercised by a reference . . . .”); UPAA § 304, cmt. (“An ordinary residuary clause may manifest the powerholder’s intent to exercise (under Section 301(2)(A)) but does not satisfy the requirements of exercise if the donor imposed a specific-reference requirement (this section and Section 301(2)(B)).”).

<sup>55</sup> See *Murstein v. Central Nat. Bank of Cleveland*, 495 N.E.2d 37, 40 (Oh. Ct. App. 1985) (“[T]here is some disagreement among other jurisdictions as to when a power of appointment has been validly exercised . . . .”).



Most (if not all) states generally agree that: (i) a residuary clause in a powerholder's will, without more, is insufficient to satisfy a specific-reference requirement; and (ii) a reference to the power by name in the powerholder's will satisfies a specific-reference requirement.<sup>56</sup>

Still, "[t]he question of whether the powerholder has made a sufficiently specific reference is much litigated."<sup>57</sup> The primary question in this litigation, and the one on which states disagree, is "whether a so-called blanket-exercise clause—a clause referring to 'any property over which I have a power of appointment' constitutes a sufficient reference to a particular power to exercise that power."<sup>58</sup> It is important that state laws properly resolve this disagreement, as blanket-exercise clauses are increasingly popular among estate planners.<sup>59</sup> Presently, states take two different approaches to a powerholder's compliance with a specific-reference requirement under a blanket-exercise clause ("Scenario 2"). Some states take a more liberal approach to Scenario 2. Other states strictly enforce the specific-reference requirement.

i. TEXT AND JUSTIFICATION OF THE LAWS

a. UPAA SPECIFIC-REFERENCE REQUIREMENT APPROACH

States taking a liberal approach to Scenario 2 adopt language codified under the UPAA and current UPC. Those laws provide that a powerholder's substantial compliance with a specific-reference requirement is sufficient if: (i) the powerholder knew of and intended to exercise the power; and (ii) the manner of the exercise *does not impair a material purpose of the donor* in imposing the requirement (hereinafter the "UPAA Specific-Reference Requirement Approach").<sup>60</sup> This approach creates a presumption that the donor's material purpose in imposing the specific-reference requirement was to prevent an inadvertent exercise of the power of appointment.<sup>61</sup> The need for a specific-reference requirement originated from old tax laws.<sup>62</sup> Powerholders who inadvertently exercised a general power of appointment used to face adverse tax consequences. Those adverse consequences no longer exist.<sup>63</sup> Nevertheless, "donors continue to impose a specific-reference requirement."<sup>64</sup> Those supporting the UPAA Specific-Reference Requirement Approach argue that "because the original purpose of the specific-reference requirement was to prevent an inadvertent exercise of the power," "it seems reasonable to [continue to] presume that that was the donor's purpose in doing so."<sup>65</sup> The Comment to UPC

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<sup>56</sup> Compare UPAA § 302(b) and UPC § 2-704 (amended 2019) with UPC § 2-610 (1969).

<sup>57</sup> See UPC § 2-704, cmt. (amended 2019).

<sup>58</sup> *Id.*

<sup>59</sup> See 62 Am. Jur. 2d Powers of Appointment § 94 (2021) ("[B]lanket exercises of powers of appointment have become common practice, and the efficacy of such clauses in exercising powers is well-recognized.").

<sup>60</sup> UPAA § 304; UPC § 2-704 (amended 2019).

<sup>61</sup> UPAA § 302(b), cmt. ("If it could be shown that the powerholder had knowledge of and intended to exercise the power, the blanket-exercise clause would be sufficient to exercise the power, *unless it could be shown that the donor's intent was not merely to prevent an inadvertent exercise of the power . . .*") (emphasis added).

<sup>62</sup> See *Eimers v. Saletta*, 2018 WL 5962525 (Ca. Ct. App. 2018).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW OF PROPERTY § 19.10 cmt. d (AM. L. INST. 2011)).

<sup>65</sup> *Id.*

2–704 reiterates this fear of blind exercise.<sup>66</sup> However, it also concedes that the primary advantage of such requirement is no longer necessary under the tax code.<sup>67</sup>

b. COMMON LAW SPECIFIC-REFERENCE REQUIREMENT APPROACH

Laws in states like Pennsylvania and Florida are less flexible under Scenario 2. In those states, “strict and literal compliance with the terms of a special power of appointment,” is “absolutely necessary for its valid and effective exercise” (hereinafter, the “Common Law Specific-Reference Requirement Approach”).<sup>68</sup> This approach is justified primarily on the idea of compliance with the donor’s intent. Courts adopting it reason that the donor’s intent can only be effectuated through strict compliance with the text of the instrument granting the power.<sup>69</sup> In other words, no matter how arbitrary or insignificant the requirement may appear under the circumstances, it is up to the lay powerholder (and her attorney if she has one) to interpret and comply strictly with such requirements.<sup>70</sup>

III. PROBLEMS WITH THE CURRENT STATE OF THE LAW

A. PROBLEMS WITH SCENARIO 1

Both approaches under Scenario 1 place considerable weight in the idea that the use of general powers of appointment are limited to obtaining federal tax advantages. They also rely on varying degrees of evidence to determine the powerholder’s intent. An effective power of appointment law would maximize the availability of evidence to the court, even if it was not contained in the powerholder’s will.

i. UPAA RESIDUARY CLAUSE APPROACH

The UPAA Residuary Clause Approach presumes that a gift-in-default clause and a general power of appointment are only used together for tax purposes, and therefore, should not be exercised by a residuary clause.<sup>71</sup> However, it is typically only the poorly drafted estate plans that completely omit a gift-in-default clause.<sup>72</sup> Conversely, good estate planners always address the consequences of various events, irrespective of the donor’s intent. For example, the terms of

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<sup>66</sup> See UPC § 2–704, cmt. (amended 2019); *see also* UPAA § 304, cmt.

<sup>67</sup> *Id.* (“Because the original purpose of the specific-reference requirement was to prevent an inadvertent exercise of the power, it seems reasonable to presume that that this is still the donor’s purpose in doing so.”).

<sup>68</sup> *Estate of Albert Schede*, 231 A.2d 135, 137 (Pa. 1967); *see also* *Cessac v. Stevens*, 127 So. 3d 675 (Dist. Ct. App. Fl. 2013).

<sup>69</sup> *See* *Estate of Albert Schede*, 231 A.2d 135, 137 (Pa. 1967) (“The donee of a power is simply a trustee for the donor to carry into effect the authority conferred by the power. In exercising the power, he must observe strictly its provisions and limitations. The estate appointed is that of the donor, and not of the donee, and in making the appointment the intention of the donor, and not that of the donee, must prevail. In case of a restricted power, the donee’s discretion in exercising the power is defined by the will, and the limit there placed upon it must be observed.”).

<sup>70</sup> *Id.* (“The donor of a power, inasmuch as he is disposing of his own property, may prescribe whatever ceremonies he pleases for its execution; and although these may be perfectly arbitrary, yet, being required by the creator of the power, they can be satisfied only by a strictly literal and precise performance of them.”).

<sup>71</sup> *See supra* text accompanying note 41.

<sup>72</sup> *See supra* text accompanying note 42.

a trust should provide for what happens in the event that a powerholder predeceases the donor, or if the powerholder declines to exercise her power. In other words, the presence of a gift-in-default clause is not necessarily evidence of a donor's intent that the power not be exercised.<sup>73</sup> Rather, it simply could be evidence that her attorney is "worth his salt."<sup>74</sup>

Evidence of the powerholder's intent is confined to the four corners of her will under the UPAA Residuary Clause Approach. This makes sense when the powerholder's intent can be easily or inferred from the terms of the will. Sheldon Kurtz provides the following example:

[S]uppose the donee's will purports to give all the "rest, residue, and remainder of my estate having an approximate value of \$1,000,000" to X. At the time the will was executed, the donee's personal estate only consisted of \$300,000 and the donee had the power to appoint assets having a value of \$725,000. Section 2-608 of the 1990 UPC should be construed to evidence the donee's intent to exercise the power because the donee's reference to \$1,000,000, in the will, was made at a time when the donee's personal estate and the assets over which the donee had a power approximated that value.<sup>75</sup>

Determining the powerholder's intent is not always this easy. For instance, it is difficult to know a powerholder's intent under Scenario 1, where her will includes a residuary clause but fails to reference her power of appointment. Does this silence manifest an intent to exercise, or alternatively, does it show an intent not to exercise? Trying to derive a meaning from silence is ineffective. As a result, many courts recognize that "extrinsic evidence may be received on the issue of the testator's intent . . . ."<sup>76</sup>

## ii. 1969 UPC RESIDUARY CLAUSE APPROACH

A residuary clause is generally insufficient to exercise a general power of appointment under the 1969 UPC Residuary Clause Approach. This conclusion is based on outdated tax practices and fails to acknowledge the non-tax benefits of a general power of appointment.

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<sup>73</sup> See (RESTATEMENT (THIRD) OF THE LAW OF PROPERTY § 19.22 cmt. d (AM. L. INST. 2011) ("To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, *the donor's trust or other property arrangement was not well planned.*") (emphasis added); (RESTATEMENT (FIRST) OF THE LAW OF PROPERTY ch. 25, intro. note (AM. L. INST. 1940) ("*A gift in default of appointment should always be made; and such gift, being usually a class disposition, should be drafted with the problems of dispositions to classes in mind.*") (emphasis added); Ira Mark Bloom, *Powers of Appointment Under the Restatement (Third) of Property*, 33 OHIO N. U. L. REV. 755, 791 ("The consequences of completely releasing general powers will depend on whether the donor provided an effective taker in default clause, *which all estate planners routinely use and should use*") (emphasis added).

<sup>74</sup> See e.g., Robert Bellatti, *Drafting to Meet the "Pass to Qualified Heir Requirement"*, EST. PLN. FARMS & FAM. BUS. (Nov. 2019) ("[A]ny estate planner 'worth his salt' will insert a provision to cure default by providing for an ultimate taker if no descendant is living at the time a family trust terminates.").

<sup>75</sup> Sheldon F. Kurtz, *Powers of Appointment Under the 1990 Uniform Probate Code: What was Done – What Remains to be Done*, 55 ALB. L. REV. 1151, 1166 (1992).

<sup>76</sup> Taylor v. Woods, 282 S.W.3d 285, 296 (Ark. Ct. App. 2008); Cleveland Trust Co. v. Shuman, 317 N.E.2d 256, 260–61 (Oh Ct. Comm. P. 1974) ("Modern courts have relaxed the rule regarding how intent to exercise a power of appointment may be proved and have been willing to find such intent from all of the facts and circumstances.").

The Comment to the 1969 UPC 2–610 suggests that most general powers of appointment are granted to qualify for the marital deduction under IRC 2056.<sup>77</sup> From this, the Comment concludes that the donor likely did not intend for the power to be exercised.<sup>78</sup> Prior to 1981, this was correct. At that time, deathtime transfers of terminable interest property to a surviving spouse could only qualify for the marital deduction by using a Life Estate with Power of Appointment (LEPA) Trust. This changed under the Economic Recovery Tax Act of 1981. That legislation introduced a superior alternative to the LEPA Trust: the Qualified Terminable Interest Property (QTIP) Trust.<sup>79</sup> The QTIP Trust is usually preferred over the LEPA Trust because it qualifies for the marital deduction without granting a general power of appointment to the surviving spouse.<sup>80</sup>

While there remain other tax motivations for using the general power of appointment today, there are also non-tax reasons for doing so. For instance, if “an only child [were] to be designated with a general power of appointment—they are able to take property for themselves, as well as have the ability to distribute any leftovers to others that they feel their parent would have desired to receive. The client is able to provide for the child, while allowing the child to determine what else goes to whom, if anything.”<sup>81</sup> The 1969 UPC Residuary Clause Approach does not consider this scenario. Instead, it assumes the donor’s intent. It thereby potentially fails to protect an appointee’s interests in the event that the powerholder dies before she can effectively exercise her power. *Dean*<sup>82</sup> illustrates the consequences of this problem. The powerholder in that case told her attorney that she had an “income interest” in a trust, but failed to mention that she also held a power of appointment over the trust principle.<sup>83</sup> During the course of this conversation, and without further investigation, “the attorney stated and [the powerholder] agreed that it would not be necessary to mention the trust in the will.”<sup>84</sup> Unfortunately, even when an attorney knows about the power of appointment, he cannot always be trusted to draft a document that effectively exercises it.<sup>85</sup>

## B. PROBLEMS WITH SCENARIO 2

### i. UPAA SPECIFIC-REFERENCE REQUIREMENT APPROACH

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<sup>77</sup> UPC § 2–610, cmt. (1969).

<sup>78</sup> *Id.*

<sup>79</sup> Pub. L. No. 97–34, 26 U.S.C. § 2056(b)(7), 95 Stat. 172, 302.

<sup>80</sup> The popularity of the QTIP Trust over the LEPA Trust makes good sense. After all, these trusts are only necessary when a decedent wants to limit the surviving spouse’s control over the trust assets. Granting a surviving spouse a general power of appointment falls well short of this goal. QTIP Trusts provide a more secure alternative that achieves the same tax objectives.

<sup>81</sup> Jill Roamer, *The Power of the Power of Appointment*, ELDER COUNSEL BLOG (Feb. 12, 2019), <https://blog.eldercounsel.com/the-power-of-the-power-of-appointment>.

<sup>82</sup> 151 N.E.2d 184, 187 (N.Y. 1958).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *Mieras v. DeBona*, 550 N.W.2d 202, 281 (Mich. 1996) (“Mieras and Ledbetter commenced this action against Ronald V. DeBona, the lawyer who prepared the will, claiming that, when he failed to include in the will a provision exercising the power of appointment to exclude Neville and to divide the corpus equally between Mieras and Ledbetter, he failed to draft the new will in accordance with Jackson’s instructions”).

The UPAA Specific-Reference Requirement Approach presumes that the donor imposed the specific-reference requirement to avoid an inadvertent exercise of the power.<sup>86</sup> This effectively creates a presumption in favor of an exercise via blanket-exercise clause, provided that the powerholder knows of and intends to exercise the power. In doing so, the UPAA Specific-Reference Requirement Approach turns a blind eye to a donor's other possible motivations for imposing this requirement. The donor may want to "require[e] that the donee exercise only after advice and counsel, or ensur[e] that the donee makes a well-reasoned and informed decision, especially when the result of the exercise is to disinherit one or more of the donor's children."<sup>87</sup> Moreover, estate planners now rely on more sophisticated techniques to avoid inadvertent exercises of powers of appointment, namely, by conditioning any exercise of a power on the consent of a disinterested third party.<sup>88</sup> These realities illustrate the problem with presuming the donor's intent under Scenario 2. Doing so could lead to the exercise of a power via blanket-exercise clause where the donor would not have wanted such an exercise to occur. Of course, there are various instances in the law where presumptions are effective. This efficacy is diminished, however, when the presumption is no longer supported by the circumstances on the ground.

## ii. COMMON LAW SPECIFIC-REFERENCE REQUIREMENT APPROACH

The Common Law Specific-Reference Requirement Approach focuses only on the intent of the donor in deciding whether a blanket-exercise clause complies with a specific-reference requirement. There are several problems with this approach.

First, it does not consider the powerholder's intent. In any litigation arising from Scenario 2, there is likely to be some question about the donor's intent in imposing the power, but the intent of the powerholder is also important. Ignoring evidence showing this intent blinds the finder of fact to half of the story at issue in the case.

Application of the Common Law Specific-Reference Requirement Approach can also lead to particularly harsh and unfair results for appointees. In *Cessac v. Stevens*, the Florida Court of Appeals conceded this.<sup>89</sup> *Cessac* involved the will of Sally Christensen.<sup>90</sup> Sally was the beneficiary of three trusts over which she held a testamentary power of appointment.<sup>91</sup> Her will made reference to the trusts, but did not specifically reference the powers of appointment contained therein, as required by the terms of the trusts.<sup>92</sup> The court focused only on the donor's intent in finding that Sally's will failed to exercise her powers of appointment.<sup>93</sup> It did so while

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<sup>86</sup> UPAA § 304, cmt.

<sup>87</sup> See Answer Brief, at 13, *Cure v. Hubbard* (In the Matter of the Estate of Ernest Richard Cure), No. 4391619, 2007 WL 1219773 at \*13.

<sup>88</sup> See e.g., Terence S. Nunan, *Basis Harvesting*, 25 PROB. & PROP. 54, 65 (2012) (discussing the consent of a disinterested third party over the exercise of a power of appointment for tax purposes).

<sup>89</sup> See *Cessac v. Stevens*, 127 So. 3d 675, 681 (Dist. Ct. App. Fl. 2013) ("We recognize the seemingly harsh result of our conclusion that Ms. Cessac will not receive the assets the decedent apparently intended for her to receive. However, this result is a function of the intent of the original donor, who had the right to place whatever restrictions he desired on the disposition of his property.").

<sup>90</sup> *Id.* at 676.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

acknowledging that the reason behind this failure was the fault of her attorney.<sup>94</sup> In a footnote, the court remarked:

The decedent's will was prepared by an attorney (not Appellants' counsel on appeal) who, had he read the trusts, could have easily drafted the will to comport with the original donor's intent. However, the attorney testified that he made no effort to ensure that the will complied with the trusts' requirements when preparing the decedent's final will in 2009 even though he had previously been provided a copy of at least one of the trusts.”<sup>95</sup>

It is illogical to apply the Common Law Specific-Reference Requirement Approach to deprive an appointee of the right to receive trust assets where there is evidence that the powerholder intended for her to receive them. It is even more questionable when courts are forced, because of adherence to outdated or poorly-reasoned laws, to arrive at this conclusion despite the admitted negligence of an attorney.

The ideal law would address each of the problems created under Scenario 1 and Scenario 2 by using extrinsic evidence, instead of presumptions, to determine the intent of the donor and powerholder.

#### IV. APPLICATION OF THE SOLUTION: THE IDEAL LAW

##### A. TEXT OF THE NEW LAW

- I. In the event that:
  - a. a dispute arises over a testator’s exercise of a testamentary power of appointment, whether specific or general in nature (as defined in IRC 2041); and
  - b. that dispute pertains to the effectiveness of the testator’s exercise of such power of appointment; and
  - c. that dispute pertains to either:
    - i. The effectiveness of a residuary clause in the testator’s will as exercising the testator’s power of appointment, provided that (i) no specific-reference requirement (as defined in UPAA 102(17)) exists in the instrument granting said power; and (ii) the testator’s intent is not clearly discernible from the four corners of the testator’s will; or
    - ii. The effectiveness of a blanket-exercise clause (as defined in UPAA 102(3)) in the testator’s will as exercising the testator’s power of appointment, provided that: (i) a specific-reference requirement (as defined in UPAA 102(17)) exists in the instrument granting said power; and (ii) the testator’s intent is not clearly discernible from the four corners of the testator’s will
- II. The Court (as defined in UPC 1–201(8) or its statutory equivalent if enacted, or, if not so enacted, as defined under the probate code of the state applying this law) shall, in its discretion, determine the effectiveness such exercise by considering the following factors

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<sup>94</sup> *Id.* at 681

<sup>95</sup> *Id.* at 681 n.4 (emphasis added).

(and giving weight to each such factor that the court, in its discretion, deems appropriate under the facts and circumstances of the case at bar):

- a. Evidence extrinsic to the testator's will to show the intent of the testator and the intent of the donor of the power;
- b. The identity and sophistication of the party drafting the testator's will; and
- c. The testator's knowledge of the power of appointment at issue in the case at bar.<sup>96</sup>

B. HOW THE PROPOSED LAW IMPROVES THE PROBLEMS POSED UNDER SCENARIO 1 AND SCENARIO 2

i. STEP 1: TESTATOR'S INTENT

The Proposed Law incorporates the idea that “the intention of the testator as expressed in his will controls the legal effect of his dispositions.”<sup>97</sup> This is consistent with the Uniform Probate Code's approach to the construction of wills. It is also widely recognized in other realms of estate planning law.<sup>98</sup>

ii. STEP 2: JUDICIAL DISCRETION

Potential appointees are not adequately protected by laws that make incorrect presumptions about the donor's intent. This problem exists in Scenario 1 and Scenario 2. Litigation around powers of appointment is technical and fact-intensive. Each case requires decisions that are tailor-made to the circumstances presented. The Proposed Law allows probate judges, in their discretion, to make the final determination regarding the intent of the donor and powerholder. This avoids the inequities faced by appointees in cases like *Dean*<sup>99</sup> and *Cessac*.<sup>100</sup>

Scholars recognize the utility of vesting discretion in probate judges.<sup>101</sup> Probate judges are particularly necessary in litigation over powers of appointment, as they are well-equipped to handle the technical issues that often accompany such disputes.<sup>102</sup>

iii. STEP 3: CABINED DISCRETION

Judicial discretion is important. But too much discretion can lead to uncertainty.<sup>103</sup> For this reason, the Proposed Law provides several factors to which the probate judge must defer in

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<sup>96</sup> [Hereinafter, the “Proposed Law”].

<sup>97</sup> UPC § 2–601, cmt. (amended 2019).

<sup>98</sup> See Grant v. Hixon (*In re Estate of Strader*), 132 Cal. Rptr. 2d 649 (Ct. App. 2003) (“[A] court is required to strictly construe [*in terrorem* clauses] and may not extend [them] beyond what was plainly the testator's intent.”).

<sup>99</sup> 151 N.E.2d 184, 187 (N.Y. 1958).

<sup>100</sup> 127 So. 3d 675, 681 (Dist. Ct. App. Fl. 2013).

<sup>101</sup> See Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 183 (2002) (arguing for a change in probate law to grant probate judges broad discretion, ultimately encouraging private resolution of probate matters).

<sup>102</sup> See e.g., CT. GEN. STAT. ANN. § 45a–79b (West 2021) (Requiring probate judges to demonstrate “the special skill, experience, or expertise necessary to serve as a special assignment probate judge.”).

<sup>103</sup> See E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 283 (2002) (arguing that an intestacy scheme allowing a probate judge to consider the circumstances of the decedent's life to determine her testamentary intent would “produce great uncertainty, would

exercising her discretion. Those factors include: (i) extrinsic evidence; (ii) the identity and sophistication of the drafter; (iii) the powerholder's knowledge of and intent to exercise her power of appointment.

a. FACTOR 1: EXTRINSIC EVIDENCE

The New Proposal does each of the following: (i) allows extrinsic evidence; (ii) to determine the intent of the powerholder and the donor; and (iii) rejects the adoption of a presumption of that intent. This is the best approach for purposes of resolving disputes arising from Scenario 1 and Scenario 2. Allowing extrinsic evidence, in lieu of a presumption, to ascertain the intent of the donor and the powerholder helps the probate judge make an informed determination as to the outcome of the case.

For instance, imagine that a probate judge is presented with a case where a donor granted each of her four granddaughters a testamentary general power of appointment over each of their qualified subchapter-s (QSST) trusts. Each trust held a minority interest in the closely-held s-corporation owned by the donor. The donor did not want the granddaughters to exercise their powers in a way that might terminate the corporation's s-status. To mitigate this risk, the donor imposed a specific-reference requirement on each of the granddaughters' powers to encourage them to consult with a tax attorney before drafting their wills. There is extrinsic evidence showing this to be the case. The terms of each QSST provide that upon the powerholder's death, and subject to the exercise of her general power, the then remaining balance of that QSST would be commingled with the assets of the QSSTs owned by those granddaughters who were still living.<sup>104</sup> Many years later, one of the granddaughters predeceased the others. She left a pour-over will that included a blanket-exercise clause. The will poured the residue of her estate, including any property over which she had a power of appointment, into her revocable trust.<sup>105</sup> Due to poor drafting by her attorney, the powerholder's revocable trust did not provide for the creation of a separate QSST in the event that the revocable trust is funded with s-corporation stock. At her death, the powerholder's children became income beneficiaries of her revocable trust, thus compromising the corporation's subchapter-s status. Nevertheless, her children still argue in favor of an exercise, intending to have their shares redeemed by the corporation. Under the Proposed Law, the court would be able to consider the extrinsic evidence showing that the donor implemented the specific-exercise requirement to encourage the powerholder to consult a tax attorney before completing her will, and that she had not done so. From this extrinsic evidence, the court might determine that it would be unlikely that the powerholder would exercise her power of appointment against the best interests of the company.

The Proposed Law improves all approaches under Scenarios 1 and 2 by coupling the allowance of extrinsic evidence with judicial discretion and the other factors discussed below.

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be more time-consuming, and would be greatly more expensive than is administration under extant American intestacy schemes.”).

<sup>104</sup> This hypothetical assumes that at the time the QSSTs were funded, the corporation waived any restrictions on the transfer of shares at the death of a shareholder its shareholder agreement.

<sup>105</sup> The existence of the specific-reference requirement (mentioned above) and the existence of ambiguity surrounding the powerholder's compliance with it raises a Scenario 2 problem.



b. FACTOR 2: SOPHISTICATION AND IDENTITY OF THE DRAFTING PARTY

Courts should also consider the identity of the drafter when considering the effectiveness of an exercise of a power. A powerholder's reliance on an attorney to draft her will does not mean that the will adequately expresses her true intentions. Considering the identity of the drafter avoids harsh results for the powerholder (or more likely, the appointees of the power) that arise from the mistakes of a negligent attorney. This, coupled with any possible extrinsic evidence, could paint a very clear picture for the court in a way that the text of the will could not.<sup>106</sup>

Not all powerholders are lucky enough to have a will drafted by an attorney in place at the time of their death. This is particularly true in the midst of a global health pandemic, where young people might die within weeks of becoming sick. Armed with information on the necessary formalities from Google, these people could get lucky enough to execute a valid will. It is much less likely that the will effectively exercises any powers of appointment they might have. A problem could then arise if that will included a provision that could be construed as a residuary clause. Courts should not punish the appointees of these powerholders, particularly if there is credible extrinsic evidence supporting the powerholder's intent to exercise the power.

c. FACTOR 3: EVIDENCE SHOWING POWERHOLDER'S KNOWLEDGE OF THE POWER

Proving that the powerholder knew about the power at issue is important, as there is no way that she could intend to exercise a power that she did not know existed. By allowing admission of extrinsic evidence, the ideal law would aim to make this a relatively easy process.

C. COUNTERARGUMENTS TO THE PROPOSED LAW

As with any critique, there are counterarguments to the Proposed Law. This is especially true in the context of this Paper. The Proposed Law is a critique of the work of experienced lawyers and scholars in the area of estate planning law. Moreover, it expounds on a particular subset of that law that is "pretty satisfactory, and . . . pretty well developed."<sup>107</sup> Still, as outlined above, there are ways that the law governing powers of appointment could be improved. Thus far, this Paper has addressed these improvements without acknowledging that they appear to present their own set of problems. These problems include: (i) lack of certainty; (ii) potential increases in judicial resources; and (iii) the availability of extrinsic evidence. Each of these points is addressed in detail below.

i. LACK OF CERTAINTY

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<sup>106</sup> The liability of a drafting attorney to a third-party appointee is outside the scope of this Paper. The point of this argument is to find the best law within the power of appointment regime to recognize the powerholder's intent.

<sup>107</sup> *Discussion of Restatement of the Law, Third, Property (Wills and Other Donative Transfers*, AM. L. INST. ANN. PROC. (May 2018).

Many discussions about the expansion of a probate judge's discretion are met with concerns about increased uncertainty in the law.<sup>108</sup> It is likely that the Proposed Law would be no exception to this critique.

One issue with uncertainty is the fear of judicial misunderstanding. Of course, there is always a chance that some judges are simply bad actors and subject to influence by irrelevant factors like money or politics.<sup>109</sup> But even judges acting in good faith might not have the time or resources to completely understand the legal issue presented to them. The Proposed Law minimizes concerns of judicial misunderstanding by deferring questions related to powers of appointment to probate judges. These judges are frequently presented with complicated issues pertaining to the creation and administration of a person's will, as well as modifications of trusts to add powers of appointment. This experience provides them with the necessary tools to resolve a dispute over the effective exercise of a power of appointment.

Uncertainty also raises questions about adequate protection of client interests. It is difficult for a lawyer to draft an estate plan to protect a client when the plan is always subject to a judge's future interpretation. This is a fair concern under the Proposed Law. But uncertainty still exists even under current state law regimes. The Comment to UPAA 304 acknowledges this uncertainty. It notes that "[a] more difficult question is whether a blanket-exercise clause satisfies a specific[-]reference requirement."<sup>110</sup> The Comment then goes on to articulate a confusing maze of requirements before creating a questionable presumption of the donor's intent.<sup>111</sup> Clients' interests are therefore no less vulnerable under the Proposed Law than they are under the laws currently in place throughout the country. More importantly, concerns of guidance for drafting lawyers are of less significance in the context of the laws on which this Paper focuses. The approaches adopted under Scenario 1, Scenario 2, and the Proposed Law are not relevant when a client's estate plan is executed properly. Good estate planning lawyers could (and should) avoid application of the Proposed Law by drafting their client's will so as to: (i) name the power of appointment and the instrument in which such power was granted in the terms of the will; (ii) read all trust instruments under which the client holds a beneficial interest; (iii) articulate that the client expressly declines to exercise any power of appointment not referenced by name in the will itself. Additionally, the Proposed Law would only become relevant after the powerholder's death. At that point, it would be too late for the attorney to take measures to incorporate the law (or a judge's decision thereon) into the powerholder's plan. The Proposed Law is a backstop. It is only relevant in the case of a lawyer's negligence or a client's failure to adequately articulate her intent to her lawyer.

## ii. JUDICIAL RESOURCES

Grants of judicial discretion often prompt fears of over-burdened court dockets as litigants rush to the courthouse seeking a judge's review of a particular issue.<sup>112</sup>

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<sup>108</sup> See Spitko, *supra* note 103.

<sup>109</sup> See Jessica Feinberg, *Gradual Marriage*, 20 LEWIS & CLARK L. REV. 1, 19 (2016) ("unfettered judicial discretion in [the context of divorce] [has] . . . resulted in judicial abuse.").

<sup>110</sup> UPAA § 304, cmt.; *see also* UPC § 2-704, cmt. (amended 2019).

<sup>111</sup> *See* UPAA § 304, cmt.; *see also* UPC § 2-704, cmt. (amended 2019).

<sup>112</sup> *See* Spitko, *supra* note 103, at 267 (proposing eligibility restrictions on potential claimants in order to "lessen the burden on the probate system").

Those taking this position would likely advocate for deference to a rigid statutory scheme such as the one adopted by the UPAA in lieu of the Proposed Law. They could argue that this would reduce the amount of litigation brought before the court. Lawyers could simply rely on a statute for guidance on what to do when a powerholder's intent is unclear. Unfortunately, this is not the case under the current laws. Courts often hear cases arising out of Scenario 1 and Scenario 2 concerning ambiguous exercises of powers of appointment.<sup>113</sup> The Proposed Law could actually reduce the amount of this litigation. For instance, removing the presumption of the donor's intent behind a specific-reference requirement could emphasize the importance of such requirements. This might encourage estate planners to incorporate the donor's reason for imposing a specific-reference requirement in the granting instrument. Doing so would clear up some of the confusion around the grant of the power, reducing the possibility of litigation down the road.

### iii. USE AND AVAILABILITY OF EXTRINSIC EVIDENCE

The Proposed Law takes a controversial position in permitting extrinsic evidence. Some courts argue that "[i]f the testator wanted [to express her intent], [the] testator would have used the appropriate language [in her will] to reflect that intention" but no "such language was used."<sup>114</sup> This makes sense in cases where the testator's will expresses her intent. However, by definition, Scenario 1 and Scenario 2 arise when the powerholder's will does not effectively communicate her intent. For example, how is a court to determine a powerholder's intent when her will does not contain any reference to that power? Should it presume that she did not intend to exercise the power? Should it presume that her attorney forgot to include reference to the power? Extrinsic evidence increases the chances that the court will be able to effectuate the powerholder's intent in these circumstances.

Even if a court is willing to admit extrinsic evidence under the Proposed Law, it could be argued that other rules would prevent the admission of such evidence. For example, any communications about the powerholder's plan between her and her lawyer are usually privileged, even after she dies. Any such writing would also be hearsay, as it would be an out of court statement used for the truth of the matter asserted.<sup>115</sup> There are however applicable exceptions to these rules in the context of the Proposed Law. Most states recognize an exception to the attorney-client privilege in cases involving a question about the execution of a will.<sup>116</sup> Virtually all states also recognize a hearsay exception for statements in documents affecting an interest in property.<sup>117</sup> These exceptions would allow courts to use extrinsic evidence under

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<sup>113</sup> See RESTATEMENT (THIRD) OF THE LAW OF PROPERTY, cmt. d (AM. L. INST. 2011) ("[Use of blanket exercise clauses] raises the often-litigated question of whether it satisfies the requirement of specific reference frequently imposed by the donor in the document creating the power.").

<sup>114</sup> *Polen v. Baker*, No. 99 CA 34, 2000 WL 776931, at \*1 (Ohio Ct. App. May 31, 2000) (first and third alteration in original) (quoting the trial court opinion), *aff'd*, 752 N.E.2d 258 (Ohio 2001).

<sup>115</sup> See *e.g.*, KY. R. EVID. 801(c).

<sup>116</sup> See *e.g.*, *Cleland v. Burke* (Estate of Meyer), 747 N.E.2d 1159, 1166 n.4 (Ind. Ct. App. 2001) ("[T]here is a testamentary exception to the posthumous survival of the attorney client privilege in regard to communications respecting the execution of the Will or other similar documents.").

<sup>117</sup> See *e.g.*, KY. R. EVID. 803(15).

most circumstances to ascertain the intent of the donor and the powerholder under the Proposed Law.

Another potential consideration is the availability of extrinsic evidence. People frequently do not leave additional writings outside of their estate plan. They presume that their lawyer adequately reflected their intention within the plan itself. Even where such writings do exist, they may be lost or forgotten in the years between the drafting of a will and the testator's death. These concerns are valid. It may therefore seem expedient to retain the current state laws that presume a donor's intent in various ways. This seems even more appealing because these presumptions are rebuttable with evidence to the contrary. But if it is true that extrinsic evidence might be difficult to obtain, a presumption like the one under the UPAA Specific-Reference Requirement Approach is problematic. Recall the QSST hypothetical referenced above. This time, imagine that no extrinsic evidence of the donor's intent exists, but the court remains bound by UPAA Specific-Reference Requirement Approach presumption. The court would be required to presume that the donor implemented the specific-reference requirement only to prevent a blind exercise. By law, it would then have to rule in favor of an exercise of the power, ultimately compromising the corporation's s-status. This is surely not what the donor intended. The Proposed Law avoids this situation in the absence of extrinsic evidence. It makes no presumptions about the intent of the donor and allows the probate judge to consider the circumstances surrounding the case before making a decision.

#### CONCLUSION

Powers of appointment are what estate planners' dreams, and nightmares, are made of. Their importance cannot be overstated. This importance means that the laws governing them should be scrutinized to maximize their effectiveness.

History shows that the interpretation of powers of appointment have changed since their first use in the 16th century. The 21st century is no different. It is again time for a change.

Today, disagreements persist amongst the states regarding the proper application of the law to powers of appointment. None of these laws fully maximize the effectiveness of powers of appointment. States adopting a law similar to that of the Proposed Law can solve the ongoing problems created by the current approaches to Scenario 1 and Scenario 2. At the same time, they can ensure that the power of appointment becomes more of a dream, and less of a nightmare, for estate planners and their clients in the future.