

# Powers of Appointment Primer

## Part 1: The Colorado Uniform Powers of Appointment Act

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*This is the first in a two-part series exploring the powerful benefits and complex issues confronting estate planning attorneys in using the power of appointment. Part 1 discusses Colorado law relating to powers of appointment. Part 2 will address associated federal income and transfer tax issues.*

*“The power of appointment is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out.”<sup>1</sup>*

A power of appointment is the power given by the owner of property, who has the authority to decide who will enjoy his or her property, to another person to determine who will enjoy the ultimate beneficial ownership interest in that property. Powers of appointment are often created in trusts. For example, assume your client, Ms. Wilson, wants to create a lifetime trust for her

daughter, Julie. If the trust has assets at Julie's death, Ms. Wilson wants the trust assets to benefit Julie's children. Ms. Wilson understands that circumstances may change for her grandchildren and she trusts Julie will be in the best position to make appropriate adjustments to the bequest to Julie's children. The estate planning attorney may consider drafting a trust providing Julie with a testamentary nongeneral power of appointment, such as:

Julie shall have the power to appoint, by valid will that refers to and specifically exercises this power, the principal and all

accrued and undistributed net income of Julie's trust among Julie's descendants as she selects. If this nongeneral power is not validly exercised, in whole or in part, then upon Julie's death, the trustee shall distribute the unappointed principal and accrued and undistributed net income to such of Julie's then living descendants, per stirpes, or if there are none, to my then living descendants, per stirpes.

By creating a power of appointment, Ms. Wilson confers the authority to determine who will enjoy the ultimate beneficial ownership

of her property on Julie. In other words, once a power of appointment is created, Julie gets to choose who will receive an interest in Ms. Wilson's property.<sup>2</sup>

The decision of whether to use a power of appointment involves significant federal income and transfer tax<sup>3</sup> issues. Additionally, depending on the confidence the client has in the powerholder, its use may not even be desired. Moreover, the granting of a power of appointment (and how broadly or narrowly it can be drafted) demands an understanding of Colorado law on the requirements of creating and exercising powers of appointment.

When estate planners draft trusts, they are challenged to provide maximum flexibility for the trustees and beneficiaries while maintaining the intent, wishes, and purposes of the client. But circumstances change over time, and almost all estate planning attorneys who represent beneficiaries or trustees have had the uncomfortable experience of grappling with an inflexible trust drafted years ago. To address unforeseen circumstances, such as a change in a remainder beneficiary's circumstances or a federal tax system overhaul, the Colorado legislature has devised methods to alter inflexible trusts.<sup>4</sup> But altering these instruments may be challenging. For example, corporate fiduciaries are understandably reluctant to reform, amend, or decant a trust document without court approval, which involves expense and depletion of trust assets.

Little understood except by estate planners, and considered mysterious or even arcane by other members of the Bar, the power of appointment is a tool that can provide flexibility and achieve tax planning objectives, even in uncertain times, avoiding the need for later costly alteration. This article suggests that the strategic use of the power of appointment by estate planners may enable a trust drafted in 2018 to meet unknown future challenges and provide enough flexibility to be administered in 2068.

### **A Clever Device**

The power of appointment originated in England. It was a clever device to get around the inflexibility created by Parliament prohibiting transfers of real property by will.<sup>5</sup> Instead of devising the property by will, some English solicitors

used the power of appointment to name in a will a person who had the power to devise the property.<sup>6</sup> Today, powers of appointment are most commonly used in trusts.

In the past, many estate planners used trusts to plan for and attain certain tax results (tax issues will be covered in more detail in Part 2). Due to the increase of the transfer tax exclusions, many clients can transfer a large amount of wealth at death tax free.<sup>7</sup> Even though an estate may not be subject to estate or generation-skipping taxes, a trust may still be the most appropriate vehicle for this transfer. A trust provides beneficiaries a wide array of benefits, not the least of which is creditor protection and opportunities for appropriate management of assets. But it is also important that the trust provide the flexibility to react to future conditions and reflect changes in beneficiary needs, as well as revisions of income tax, transfer tax, creditor rights, and trust administration laws. The power of appointment is one tool that provides increased flexibility to trusts.

For example, assume client Mr. Smith wants to create a trust for his son, Sam, giving Sam access to trust funds at certain stages in Sam's life. The attorney can draft for increased flexibility by using the power of withdrawal (which is considered a general power of appointment) instead of a mandatory distributive scheme. Consider two alternative clauses:

1. When Sam attains the age of 30 the trustee shall distribute to Sam one-half of the principal of the trust as then constituted. When Sam attains the age of 35 the trustee shall distribute to Sam the balance of the principal and all accrued and undistributed net income of Sam's trust.
2. When Sam attains the age of 30 he may withdraw up to one-half of the principal of the trust as then constituted. When Sam attains the age of 35 he may withdraw the balance of the principal and all accrued and undistributed net income of his trust.

As detailed later in this article, under present Colorado law, there may be significant differences in treatment with respect to Sam's creditors by employing a power of withdrawal rather than mandating distributions.

### **Overview of the Colorado Uniform Powers of Appointment Act**

Before 2014, Colorado statutory law on powers of appointment was minimal and case law was sparse. Colorado was one of the first states to enact a version of the Uniform Powers of Appointment Act (UPAA). While the UPAA was in draft form, a subcommittee of the Statutory Revisions Committee of the CBA's Trusts and Estates section (SRC Subcommittee) studied the Act and made a few changes to it to reflect Colorado law on the subject. Although it did not significantly change Colorado statutory or common law, the Colorado Uniform Powers of Appointment Act (Colorado Uniform Act) provides comprehensive guidance to lawyers and judges regarding issues yet to be addressed by Colorado statutes or case law.<sup>8</sup>

### **Structure of the Act**

The Colorado Uniform Act is divided into six parts:

1. General Provisions
2. Creation, Revocation, and Amendment of Power of Appointment
3. Exercise of Power of Appointment
4. Disclaimer or Release; Contract to Appoint or Not To Appoint
5. [Reserved]<sup>9</sup>
6. Miscellaneous Provisions

The most pertinent provisions of each part are described in more detail below.

### **General Provisions**

The Colorado Uniform Act starts with a definitions section, CRS § 15-2.5-102. The definitions of specific roles central to the power of appointment are particularly important. The person who creates a power of appointment is the "donor."<sup>10</sup> A person in whom a donor creates a power of appointment (the person who may exercise the power) is the "powerholder."<sup>11</sup> "Powerholder" replaces the traditional term "donee," which was a source of potential confusion.<sup>12</sup> A "permissible appointee" is a person who may receive appointive property, while an "appointee" is a person to whom a powerholder makes an appointment of appointive property.<sup>13</sup> A "taker in default of appointment" is the person who takes all or part of the appointive property to

the extent the powerholder does not effectively exercise the power of appointment.<sup>14</sup> Finally, an “impermissible appointee” is a person who is not a permissible appointee.<sup>15</sup> In the Wilson example above,

- Ms. Wilson is the “donor,” Julie is the “powerholder,” Julie’s descendants are the “permissible appointees,” and Julie’s then living descendants, per stirpes, are the “takers in default of appointment.”
- If Julie exercises her power in favor of anyone other than her descendants (such as her creditors, or her husband Herb) she has exercised her power in favor of an impermissible appointee.

**Power of Appointment.** The Colorado Uniform Act defines “power of appointment” as “a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property.”<sup>16</sup> “Appointive property” is defined as property (or a property interest) subject to a power of appointment.<sup>17</sup> Defining a power of appointment as the powerholder acting in a nonfiduciary capacity is a very important distinction from the fiduciary powers held by a trustee.<sup>18</sup>

- If Julie exercises her power of appointment she may do so arbitrarily, as long as the exercise is within the scope of the power.<sup>19</sup>

The UPAA Comments state that a power to revoke or amend a trust, or a power to withdraw income or principal from a trust, are powers of appointment. In addition, the power to direct a trustee to distribute income or principal to another is considered a power of appointment.<sup>20</sup> Conversely, the following are not considered powers of appointment under the UPAA: a power over management of property; a power to designate or replace a trustee or other fiduciary; a power of attorney; and a trustee’s distributive power over trust assets (including the ability to decant property from one trust to another), as these distributive powers are held by the trustee subject to fiduciary standards.<sup>21</sup>

The UPAA Comments distinguish among three different types of powers of appointment based on when they may be exercised: presently exercisable, postponed, or testamentary.<sup>22</sup> Testamentary powers of appointment are only

exercisable at the powerholder’s death, most often in a will or will substitute.<sup>23</sup>

- Julie has a testamentary power of appointment because it is exercisable upon her death.

A “presently exercisable power of appointment” is a power exercisable by the powerholder at the relevant time, typically during the powerholder’s life<sup>24</sup> and at the powerholder’s death.<sup>25</sup> Postponed powers (also known as deferred powers) are not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time.<sup>26</sup> After the occurrence of the event, the satisfaction of the standard, or the passage of the specified time, a postponed power becomes a presently exercisable power under the Colorado Uniform Act definition.<sup>27</sup>

- Until Sam reaches age 30, he has a “postponed power of appointment.” Once Sam reaches age 30, he has a “presently exercisable power of appointment” over one-half of the trust corpus and a “postponed power of appointment” over the other half.

The definitions also distinguish between a general power of appointment and a nongeneral power of appointment. A “general power of appointment” is “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>28</sup> This definition is generally the same as that used for federal transfer tax purposes, except that the Internal Revenue Code definition uses “creditors” as a plural term.<sup>29</sup> A nongeneral power of appointment is defined as any power that is not a general power of appointment.<sup>30</sup> A nongeneral power was called a “special” power of appointment in the former Colorado statute and is also sometimes referred to as a “limited” power of appointment.<sup>31</sup> Practitioners should consider updating the language in their documents to conform to the statutory definitions to avoid confusion about what type of power is intended.

- Julie has a nongeneral power of appointment because she can only appoint to her descendants. She cannot exercise her power in favor herself, her estate,

her creditors, or creditors of her estate.

- Once Sam reaches age 30 he has a general power of appointment over one-half of his trust because he can appoint to himself.

**Other Definitions.** The Colorado Uniform Act contains many other definitions, which are described below in the appropriate context.

**Governing Law.** The final general provision contains the default rules for governing law. Although the terms of the instrument creating the power of appointment can provide otherwise, the laws of the donor’s domicile at the relevant time govern the creation, revocation, or amendment of a power of appointment,<sup>32</sup> while the laws of the powerholder’s domicile at the relevant time govern the exercise, release, or disclaimer of a power of appointment.<sup>33</sup> The latter is a departure from the laws of many other states, which often will apply the law of the donor’s domicile to the exercise of a power of appointment.<sup>34</sup> Due to the unique position that Colorado law takes regarding creditor rights relative to powers of appointment, the importance of this provision is discussed in more detail below.

In updating their forms or administering older instruments, practitioners should be careful to review “boilerplate” terms for power of appointment language—terms on formalities of exercise, tax treatment intentions, and governing law often exist in these provisions, separate and apart from the language creating the power.

### *Creation, Revocation, and Amendment of Power of Appointment*

The Colorado Uniform Act covers the creation, revocation, and amendment of powers of appointment.

**Creation.** At a basic level, a power of appointment requires a donor, a powerholder, and appointive property, as well as one or more (or possibly unlimited) permissible appointees.<sup>35</sup> CRS § 15-2.5-201 contains the requirements for a valid creation of a power of appointment. A power of appointment is created only if the power is created in an instrument valid under applicable law that transfers the appointive property and the terms of the instrument “manifest the donor’s intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible

appointee.<sup>36</sup> An instrument creating a power of appointment by the exercise of a power of appointment need not transfer the appointive property.<sup>37</sup> An instrument can be a writing or other “record”—information inscribed on a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.<sup>38</sup> A power of appointment cannot be created in a deceased individual; the powerholder must be living at the effective date of an instrument purporting to confer a power of appointment.<sup>39</sup>

- Assume Julie knows that Ms. Wilson has provided Julie with a testamentary power of appointment in her will. Julie executes a will exercising the power of appointment. Unfortunately, Julie predeceases Ms. Wilson. The effective date of the power of appointment in Ms. Wilson’s will is the date of Ms. Wilson’s death, not the execution date of her will. Therefore, Ms. Wilson has appointed a powerholder who was deceased at the time the power became legally operative. The creation of the power and Julie’s attempted exercise of the power are ineffective.
- Assume, instead, that Ms. Wilson created the testamentary power of appointment in her revocable trust. The effective date of an inter vivos trust is the date the trust is established, even if the trust is revocable.<sup>40</sup> In this scenario, the creation of the power and Julie’s attempted exercise of the power would be effective.

In addition, the permissible appointees must not be so indefinite that it is impossible to identify any person to whom the powerholder can appoint the property.<sup>41</sup> Finally, a power of appointment can be created in an unborn or unascertained powerholder, subject to the applicable rule against perpetuities.<sup>42</sup>

A power of appointment cannot be transferred by the powerholder.<sup>43</sup> If the powerholder dies without exercising or releasing the power, it lapses.<sup>44</sup> Under certain circumstances a powerholder’s agent acting under a power of attorney or the powerholder’s conservator may exercise or release the power of appointment on behalf of the powerholder.<sup>45</sup>

The Colorado Uniform Act also provides rules and presumptions that determine the

extent of the power when the applicable terms of the power are not sufficiently clear. First, there is a presumption of unlimited authority, which presumes that a power of appointment is presently exercisable;<sup>46</sup> exclusionary, meaning the donor has authorized the powerholder to appoint to any one or more permissible appointees to the exclusion of the other permissible

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appointees;<sup>47</sup> and general.<sup>48</sup>

- Julie’s power of appointment is “exclusionary” because she can pick and choose which of her descendants she will benefit.
- If, however, the power Ms. Wilson created for Julie stated that Julie could “appoint to all and every one of Julie’s descendants in such shares and proportions as she shall select” the appointment is “nonexclusion-

ary.”<sup>49</sup> The doctrine of “forbidding illusory appointments” would require that Julie confer a reasonable benefit to all of her descendants.<sup>50</sup>

A second presumption provides an exception to the presumption that a power is general: a power of appointment is nongeneral if the power is testamentary and the permissible appointees are a “defined and limited class that does not include the powerholder’s estate, the powerholder’s creditors, or the creditors of the powerholder’s estate.”<sup>51</sup> The UPAA Comments explain that this presumption is designed to remedy a common drafting mistake, where a defined and limited class happens to include the powerholder but is usually intended to be a nongeneral power.<sup>52</sup> For example:

- Ms. Wilson creates a trust for her daughter Julie and includes a testamentary power of appointment allowing Julie to appoint the trust property to “any of my descendants, in such proportions and in such manner as she shall select.” Absent this presumption or other limiting language, the permissible appointees would include Julie and the power would be considered a general power of appointment. The presumption acts to exclude Julie as one of the permissible appointees and make the power a nongeneral power of appointment.

When a practitioner does not want one or more of these presumptions to apply, clear drafting will avoid the application of these presumptions and the terms of the instrument will control.

CRS § 15-2.5-205 contains two mandatory rules that cannot be avoided through drafting. The first is an exception to the presumption of unlimited authority: If a power of appointment can be exercised only with the consent or joinder of an adverse party, the power is nongeneral.<sup>53</sup> An “adverse party” is defined as a person with a substantial beneficial interest in property, if that interest would be affected adversely by a powerholder’s exercise or nonexercise of a power in favor of the powerholder, the powerholder’s estate, or a creditor of the powerholder or the powerholder’s estate.<sup>54</sup>

- Assume Ms. Wilson provides that Julie may appoint the remainder of her trust

to anyone, with the consent of Julie's grandson; in default of appointment, the remainder would be distributed to Julie's then living descendants, per stirpes. Even though Julie could conceivably appoint to her estate, her creditor, or a creditor of her estate, she needs the consent of an "adverse party," so the power of appointment is nongeneral.

The second mandatory rule states that a power is exclusionary if the permissible appointees are not defined and limited.<sup>55</sup> Hence, only a power of appointment with defined and limited permissible appointees can be nonexclusionary.<sup>56</sup> The UPAA Comments highlight that "defined and limited" is a well-accepted term of art and typically (although not exclusively) refers to class-gift terms such as "children," "grandchildren," "issue," and "descendants."<sup>57</sup>

**Revocation and Amendment.** A donor may only revoke or amend a power of appointment where (1) the instrument creating the power is revocable by the donor, or (2) the donor reserves a power of revocation or amendment in the governing instrument creating the power.<sup>58</sup> Further, if the powerholder exercises the power, it can eliminate the donor's ability to amend or revoke the power even in those limited circumstances.<sup>59</sup>

### Exercise of Power of Appointment

Part 3 of the Colorado Uniform Act addresses the exercise of a power of appointment. A power of appointment may be exercised only in a valid instrument that manifests the powerholder's intent to exercise the power, satisfies the requirements of exercise, if any, imposed by the donor, and only to the extent the appointment is a permissible exercise of the power.<sup>60</sup>

The recommended method for exercising a power of appointment is by a specific-exercise clause, such as "I exercise the power of appointment conferred upon me by [my father's will] [my father's trust] as follows: I appoint [fill in details of appointment]."<sup>61</sup>

A blanket-exercise clause<sup>62</sup> that purports to exercise "any" power of appointment the instrument creator may hold as powerholder is not recommended because it raises the highly litigated question of whether it satisfies any requirement of specific reference imposed by the donor in the instrument creating the power, as discussed below.<sup>63</sup>

Similar to the presumptions surrounding the nature and extent of powers of appointment, the Colorado Uniform Act provides presumptions that help interpret the powerholder's intent to exercise a power when that intent is unclear.

Ordinarily, a standard residuary clause such as "All of the residue of my estate, I devise to . . ." does not manifest a powerholder's intent to exercise a general power of appointment.<sup>64</sup> However, the CRS § 15-2.5-302 presumption states an exception in the very limited case where a standard residuary clause will manifest such an intent, but only if (1) the terms of the instrument containing the residuary clause do not manifest a contrary intent; (2) the power is a general power exercisable in favor of the powerholder's estate; (3) the donor did not provide for takers in default, or the gift-in-default clause<sup>65</sup> is ineffective; and (4) the powerholder did not release the power.<sup>66</sup> A "residuary clause" referred to in this provision does not include residuary clauses containing a blanket-exercise clause or specific-exercise clause.<sup>67</sup> The UPAA Comments explain that the rationale behind this presumption has to do with efficiency concerns, in that it will often be more efficient to attribute the intent to exercise a power to the powerholder and distribute the appointive property to the residuary beneficiaries than to trace the interests of multiple estates of those who have predeceased the powerholder due to the passage of time since the donor's death.<sup>68</sup>

A second presumption states that a powerholder does exercise a power acquired after the execution of the governing instrument through a blanket-exercise clause.<sup>69</sup> If the donor and powerholder are the same, the presumption applies only if there is no gift-in-default clause or such clause is ineffective.<sup>70</sup> This presumption is aimed at providing default rules of construction surrounding the powerholder's likely intent in a blanket-exercise clause.<sup>71</sup> However, it is important to remember that even if the powerholder intends to exercise an after-acquired power, or this presumption applies to presume the powerholder's intention, the exercise may be ineffective because of limitations created by the donor to preclude such an exercise.<sup>72</sup>

- Julie executes a will before Ms. Wilson's death. The will contains a blanket-exercise clause that states, "I exercise any and all powers of appointment that I may hold at my death, and appoint the property to my son, James." As long as Ms. Wilson dies before Julie, Julie will be deemed to

## PRACTICE TIPS FOR POWERS OF APPOINTMENT

- Review "boilerplate" terms for power of appointment language—terms on formalities of exercise, tax treatment intentions, and governing law often exist in these provisions, separate and apart from the language creating the power.
- An exercise of a nongeneral power of appointment to a powerholder's revocable trust would be ineffective if the trust did not provide restrictions relating to the use of the appointive property. Otherwise, the appointive property could be subject to the claims of the powerholder's creditors (a class of impermissible appointees).
- Where the practitioner has given a beneficiary a general power of appointment over trust assets, such as a withdrawal right, consider giving an independent trustee the power to eliminate the power or change it to a nongeneral power, such as a general power subject to an ascertainable standard.

intend to exercise the power of appointment created in Ms. Wilson’s will under this presumption. However, due to the requirements in the power of appointment that Julie specifically refer to the power, the exercise may be ineffective, unless substantial compliance applies.

CRS § 15-2.5-304 aims to allow a powerholder’s exercise of a power of appointment to satisfy formal requirements imposed by the donor where the powerholder knows of and intends to exercise the power, and the manner of attempted exercise does not impair a material purpose of the donor in imposing the requirement.<sup>73</sup> The “substantial compliance” provision may allow, for example, a revocable trust to be used instead of a will when the donor required the exercise of the power “by will.”<sup>74</sup> While statutory authority may be helpful if not all of the formal requirements were met when a powerholder attempted to exercise a power of appointment, complicated questions arise surrounding whether a material purpose of some formal requirements is impaired by the exercise, for example, if requiring specific reference to a power to avoid inadvertent exercise is impaired by allowing a blanket-exercise clause to exercise the power.<sup>75</sup> Thus, best practice still dictates complying with all formal requirements imposed by the donor rather than relying on this provision.

Under the Colorado Uniform Act, a powerholder of a general power of appointment that permits appointment to the powerholder or the powerholder’s estate can make any appointment, including one in trust, or making a new power of appointment that the powerholder could make of her own property.<sup>76</sup> A general power of appointment permitting appointment only to the creditors of the powerholder or creditors of the powerholder’s estate may only be appointed to those creditors.<sup>77</sup>

Unless the terms of the instrument creating the power manifest a contrary intent, a powerholder of a nongeneral power of appointment may (1) make an appointment in any form, including in trust, in favor of a permissible appointee; (2) create a general or nongeneral power in a permissible appointee; or (3) create a nongeneral power in an impermissible appointee to appoint to one or more of the

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permissible appointees of the original nongeneral power.<sup>78</sup> Note that this wording is different from the final UPAA and was drawn from an earlier draft of the UPAA, as recommended by the SRC Subcommittee, which used the maxim “the greater includes the lesser.”<sup>79</sup>

- Julie has the power to appoint the principal and all accrued and undistributed

net income of Julie’s trust among Julie’s descendants as she selects. Julie’s will gives Julie’s daughter a present power to appoint among Julie’s descendants and Julie’s husband Herb. (The appointment is effective under the Colorado Uniform Act, but not the UPAA.<sup>80</sup>)

- If Ms. Wilson does not want a particular individual, such as Herb, to ultimately become a permissible appointee, a statement to this effect should state that intent: “No one other than Julie’s descendants may be a permissible appointee of a new power of appointment created by the exercise of this power of appointment.”

An appointment to a deceased appointee is ineffective under CRS § 15-2.5-306(1). However, unless the terms of the instrument creating the power direct otherwise, a powerholder may appoint to the descendant of a deceased permissible appointee, so long as the deceased appointee is a descendant of at least one grandparent of the donor.<sup>81</sup> This latter limitation is not one found in the UPAA,<sup>82</sup> but is consistent with the Colorado anti-lapse statutes—the theory being that only family should benefit from these default rules because that would most likely reflect the intent of the donor, which is less likely to be true of the descendants of a non-family member.<sup>83</sup>

- Assume Ms. Jones gives Julie a nongeneral testamentary power to appoint the residue of the trust among Ms. Wilson’s nephews, Harry and William, and Ms. Wilson’s friend Jack. Harry, William, and Jack all predecease Julie. If Julie appoints to Harry’s and William’s children, the appointment is effective even though Harry’s and William’s children are impermissible appointees. If Julie appoints to Jack’s son, this is an ineffective appointment because Jack is not a descendant of one or more of the grandparents of Ms. Wilson.

An exercise of a power of appointment in favor of an impermissible appointee, other than to the descendant of a deceased permissible appointee discussed above, is ineffective.<sup>84</sup>

An exercise of a nongeneral power of appointment to a powerholder’s revocable trust would be ineffective if the trust did not

provide restrictions relating to the use of the appointive property. Otherwise, the appointive property could be subject to the claims of the powerholder's creditors (a class of impermissible appointees).<sup>85</sup>

Further, an exercise in favor of a permissible appointee is "ineffective to the extent the appointment is a fraud on the power."<sup>86</sup> Examples of a "fraud on the power" include appointments conditioned on the permissible appointee conferring a benefit on an impermissible appointee or in consideration of a benefit to an impermissible appointee, or an appointment primarily for the benefit of a creditor of a permissible appointee when the creditor is an impermissible appointee.<sup>87</sup> These provisions do not prevent a permissible appointee from directing the powerholder to transfer the appointive property directly to an impermissible appointee. In this case, the exercise will be treated as an appointment in favor of the permissible appointee, and subsequently a transfer by the permissible appointee to the impermissible appointee.<sup>88</sup>

**Selective Allocation and Capture Doctrines.** The "selective allocation doctrine" provides that when a powerholder uses the same instrument to exercise a power and dispose of the powerholder's own property, the appointive property and owned property must be allocated to best carry out the powerholder's intent in a way that is also permissible.<sup>89</sup>

- Julie devises all property she owns or over which she has a power of appointment first to pay her debts and then to her daughter. Julie's daughter is a permissible appointee of the nongeneral power of appointment, but Julie's creditors are not. In this instance, Julie's own property will be allocated to paying debts and the appointive property will be allocated to the daughter's gift, rather than each type of property being allocated ratably to pay debts.<sup>90</sup>

The selective allocation doctrine avoids partial impermissible appointments that might trigger part of the appointive property passing in default of appointment,<sup>91</sup> governed in part by the UPAA version of the "capture doctrine."

The capture doctrine applies when a powerholder makes an ineffective appointment of

a general power of appointment (as opposed to failing to exercise or releasing a power, discussed below). Ineffectively appointed property under a general power of appointment is governed by CRS § 15-2.5-309. First, if there is a gift-in-default clause, it will control.<sup>92</sup> If there is no gift-in-default clause, the ineffectively appointed property passes to the powerholder, if living and a permissible appointee, or to the powerholder's estate, if the estate is a permissible appointee and the powerholder is either deceased or is an impermissible appointee.<sup>93</sup> If the powerholder or the powerholder's estate fails to qualify as a taker of the ineffectively appointed property, the property passes to the donor, the donor's transferee, or the donor's successor in interest, under a reversionary interest.<sup>94</sup> These rules do not apply to a power to withdraw property from, revoke, or amend a trust; if such a power is ineffectively exercised, the property would remain in the trust.<sup>95</sup> Under the traditional capture doctrine rule, ineffectively exercised property passed to the powerholder or the powerholder's estate if the ineffective appointment showed the powerholder's intent to gain control of the appointive property "for all purposes," in contrast to controlling the appointive property merely for the purpose of giving effect to the attempted, ineffective exercise.<sup>96</sup> This was the case even when the donor provided a gift-in-default clause.<sup>97</sup> UPAA Comments explain that in modern estate planning, the gift-in-default clause is a product of careful drafting and thus should be given effect if an attempted exercise is ineffective for any reason, regardless of the powerholder's intent in attempting the exercise.<sup>98</sup>

**Disposition of Unappointed Property.** If a powerholder either releases or fails to exercise a general power of appointment (other than the power to withdraw property from, revoke, or amend a trust), the property is disposed of in the same manner as provided for by the capture doctrine provisions.<sup>99</sup> The only difference is that if the powerholder releases the power, the property cannot pass to the powerholder or the powerholder's estate and instead will pass either by the gift-in-default clause or as a reversionary interest to the donor or the donor's transferee or successor in interest.<sup>100</sup> In contrast, if a nongeneral power of appointment is released,

ineffectively exercised, or unexercised by the powerholder, CRS § 15-2.5-311 provides that the unappointed property is disposed of in the following manner:

1. The gift-in-default clause, if any, controls.<sup>101</sup>
2. If there is no gift-in-default clause, or the clause is ineffective, the property will pass to the permissible appointees, if the permissible appointees are defined and limited and the terms of the instrument creating the power do not manifest a contrary intent.<sup>102</sup>
3. Only if there is no taker qualifying under the previous provisions will the unappointed property pass by a reversionary interest to the donor or the donor's transferee or successor in interest.<sup>103</sup>

The UPAA Comments state that this result is based on the assumption that the donor intends the permissible appointees to benefit from the appointive property and thus implies a gift in default appointment to the permissible appointees, unless the donor's intent is shown to be contrary.<sup>104</sup>

Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, a taker in default of appointment may share fully in unappointed property if the powerholder makes a valid partial appointment to that taker in default of appointment.<sup>105</sup>

- Ms. Wilson gives Julie a nongeneral, presently exercisable power to appoint among Julie's sisters Jessie and Jill. The takers in default are Julie, Jessie, and Jill. Julie exercises the power one-third to Jessie, one-third to Jill, and one-third to Julie's husband Herb. The appointment to Jessie and Jill of one-third each is effective. The takers in default, Julie, Jessie, and Jill, are entitled to share the one-third ineffective appointment to Julie's husband.

Further, if a powerholder makes an appointment to a taker in default of appointment and the appointee would have received the property under the gift-in-default clause had the power not been exercised, the appointee takes under the gift-in-default clause, and the power is deemed unexercised.<sup>106</sup> The UPAA Comments acknowledge that it

[u]sually makes no difference whether the appointee takes as appointee or as taker in default. The principal difference arises in jurisdictions that follow the rule that estate creditors of the powerholder of a general testamentary power that was conferred on the powerholder by another have no claim on the appointive property unless the powerholder has exercised the power.<sup>107</sup>

Colorado is not such a jurisdiction; Colorado law is relatively unique with regard to powers of appointment and creditor rights, as explained below.<sup>108</sup> Note, however, that if the exercise of the power gives something different than the gift-in-default clause would give, such as a lesser estate, the property would pass under the appointment.<sup>109</sup>

**Powerholder’s Authority to Revoke or Amend Exercise.** An exercise of a power of appointment can only be revoked or amended when (1) the powerholder reserves the power to amend or revoke in the instrument exercising the power, and, if the power is nongeneral, the terms of the instrument creating the power did not prohibit such a reservation; or (2) the donor provided that the exercise is revocable or amendable in the instrument creating the power.<sup>110</sup>

- Ms. Wilson gives Julie a nongeneral, presently exercisable power to appoint among Julie’s sisters, Jessie and Jill. The document creating the power is silent as to the revocation or amendment of Julie’s exercise. Julie exercises the power through an instrument that appoints the property to a trust for Jessie and Jill’s benefit. Unless Julie specifically reserves the right to amend the exercise in the instrument exercising the power, her exercise cannot later be amended to appoint the property to a trust solely for Jessie’s benefit.

#### ***Disclaimer or Release; Contract to Appoint or Not To Appoint***

Part 4 of the Colorado Uniform Act deals with the disclaimer and release of powers of appointment. It also governs the ability of a powerholder to contract for the exercise or nonexercise of a power.

“  
A powerholder  
may disclaim all  
or part of a power  
of appointment,  
and a permissible  
appointee,  
appointee, or  
taker in default  
of appointment  
may disclaim all or  
part of an interest  
in appointive  
property.  
”

A powerholder may disclaim all or part of a power of appointment, and a permissible appointee, appointee, or taker in default of appointment may disclaim all or part of an interest in appointive property.<sup>111</sup> The Colorado Uniform Disclaimer of Property Interests Act applies to such disclaimers.<sup>112</sup>

A powerholder may release a power of appointment unless prohibited by the donor.<sup>113</sup> CRS § 15-2.5-403 provides the methods for release. This is another provision where the Colorado Uniform Act codified existing Colorado law<sup>114</sup>—the SRC Subcommittee recommended incorporating the methods for release as provided in current Colorado law concerning releases and as discussed in the *Restatement (Third) of*

*Property: Wills and other Donative Transfers* § 20.3.<sup>115</sup> Accordingly, in Colorado a power of appointment may be released by substantial compliance with the method provided for in the instrument creating the power, or if no such method of release is provided (or is nonexclusive), by one of four other methods, including delivering a written statement of the release to someone who would be adversely affected by its exercise and transferring the property subject to the power by joining with the takers in default of appointment to make an effective transfer, in which case the power would be released to the extent that a subsequent exercise would defeat the interest transferred.<sup>116</sup> CRS § 15-2.5-404 contains the rules for revoking or amending a release of a power: either the instrument of release is revocable by the powerholder, or the powerholder reserves a power of revocation or amendment in the instrument of release.

A powerholder of a presently exercisable power of appointment may contract to exercise or not to exercise a power, so long as the contract, when made, does not confer a benefit on an impermissible appointee.<sup>117</sup>

- Ms. Wilson gives Mr. Wilson a life interest in a trust and provides that Mr. Wilson may exercise a present power of appointment among Ms. Wilson’s three daughters, Julie, Jessie, and Jill. Mr. Wilson contracts with Jill to appoint all to Jill in exchange for \$4,000. Because the contract confers a benefit on an impermissible appointee, Mr. Wilson, the appointment to Jill is invalid under CRS § 15-2.5-405.

A powerholder of a power that is not presently exercisable may only contract to exercise or not exercise that power if the powerholder is also the donor of the power and has reserved the power to contract in the instrument creating the power of appointment.<sup>118</sup>

- Ms. Wilson gives Mr. Wilson a life interest in a trust and provides that Mr. Wilson has a testamentary power to appoint the balance of the trust among Ms. Wilson’s three daughters, Julie, Jessie, and Jill. Before his death, Mr. Wilson contracts with Jill to appoint all to Jill in exchange for \$4,000. Mr. Wilson was not the donor of the power, nor did he reserve the power in a revocable



trust. Therefore, the appointment is invalid under CRS § 15-2.5-406.

Colorado did not enact UPAA § 407, which limits the remedies for breach of a contract to appoint or not to appoint to damages payable out of the appointive property, or specific performance where appropriate.

**Creditor Claims on Appointive Property**

Colorado did not enact Article 5 of the UPAA, pertaining to creditor claims on appointive property. The UPAA determines a creditor’s rights to appointive property based on the status of the power as a general or nongeneral power and based on whether the donor is also the powerholder. While some of the provisions contained in Article 5 were unobjectionable to the SRC Subcommittee and may already be in line with existing Colorado law, others are in direct contrast to Colorado’s unique statutory

and case law, which currently provide benefits to powerholders governed by Colorado law with respect to creditors.

The UPAA provides that where the holder of a general power is also the donor, a creditor should have rights in the property subject to the general power of appointment.<sup>119</sup> In addition, where a powerholder “contributed value” to the property subject to a general power of appointment created by someone else, the property subject to the power would be reachable by creditors of the powerholder, to the extent of the contribution.<sup>120</sup> The UPAA also provides that the state’s fraudulent transfer statutes apply to the creation of a nongeneral power of appointment. Thus, a donor cannot transfer the property in fraud of creditors and retain a nongeneral power of appointment in transferred property.<sup>121</sup> Property subject to a nongeneral power of appointment created by

someone other than the powerholder is exempt from a claim by the creditor of the powerholder or creditor of the powerholder’s estate.<sup>122</sup>

**Colorado’s Unique Position on Powers of Appointment and Creditors.** Under the “doctrine of relation back,” a powerholder is not considered the owner of the appointive property.

The beneficial owner of an interest in property ordinarily has the power to transfer ownership interests in or confer powers of appointment over that property to or on others by probate or nonprobate transfer. . . . By contrast, a power of appointment traditionally confers the authority to designated recipients of beneficial ownership in or powers of appointment over that property that the [powerholder] does not own.<sup>123</sup>

Upon the exercise of the power of appointment, the doctrine of relation back provides that the appointed property passes directly from the donor to the appointee. The appointed property is deemed to pass directly from the donor to the appointee. The powerholder’s appointment is deemed to relate back to and become part of the donor’s original instrument. The powerholder is viewed as akin to the donor’s agent, as it were; an appointment retroactively fills in the blanks in the original instrument.<sup>124</sup>

The UPAA does not follow the relation back doctrine when it considers the rights of the powerholder’s creditors and treats a presently exercisable general power of appointment, including the power to withdraw from a trust, as an “ownership-equivalent” power.<sup>125</sup> Thus, to the extent the powerholder’s property is insufficient, property subject to a presently exercisable general power of appointment would be subject to the claims of the powerholder’s creditors, regardless of whether the power is exercised or unexercised.<sup>126</sup>

Colorado case law establishes a contrary position to the UPAA more in keeping with the relation back doctrine. In *University National Bank v. Rhoadarmer*,<sup>127</sup> the Colorado Court of Appeals held that until a powerholder exercised her general power of appointment to withdraw up to \$5,000 or 5% of the current trust corpus, the powerholder did not hold a property interest in the trust, and the powerholder could not be



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forced to exercise her power to withdraw.<sup>128</sup> Although not specifically referring to the relation back doctrine, the language of the *Rhoardarmer* opinion incorporates many of its concepts.

When a donor gives to another the power of appointment over property, the [powerholder] of the power does not thereby become the owner of the property. . . . Rather, the [powerholder], in its exercise, acts as a "mere conduit or agent for the donor." . . . Thus, title to property over which the [powerholder] has power remains in the donor until altered by the exercise of the power within any limitations set out by the donor.<sup>129</sup>

However, in its opinion, the Court noted that an exercise of the power of appointment would allow a creditor to garnish appointive property transferred to the powerholder pursuant to such exercise.<sup>130</sup>

Another UPAA difference is that it treats property subject to a testamentary general power of appointment as an ownership-equivalent power.<sup>131</sup> Thus, property subject to a testamentary general power of appointment is subject to creditor's claims against the powerholder's estate, to the extent that the estate is insufficient.<sup>132</sup> Colorado statutory law stands in contrast: CRS § 15-15-103 gives a decedent's creditors rights in property subject to certain "nonprobate transfers" if the probate estate is insufficient.<sup>133</sup> However, the Colorado legislature exempted transfers of property over which the "transferor" had a power of appointment created by a person other than the transferor.<sup>134</sup> The exception applies to the exercise or default in exercise of a power of appointment, including a power of withdrawal.<sup>135</sup> This statutory exemption is also reflected in Colorado case law: "We recognize the right of the donor of a power of appointment to condition his bounty as he sees fit, and the creditors of the [powerholder] have no reason to complain that the donor did not give his bounty to them."<sup>136</sup>

Because Colorado law concerning creditor rights over a beneficiary's general power of appointment may be susceptible to change, where the practitioner has given a beneficiary a general power of appointment over trust assets, such as a withdrawal right, consider giving an independent trustee the power to eliminate the

power or change it to a nongeneral power, such as a general power subject to an ascertainable standard.

Unlike other states, the Colorado legislature has not sanctioned self-settled creditor protected trusts, and thus a settlor of a Colorado trust cannot take advantage of these laws as a beneficiary of that trust.

To ensure that trust assets are protected from the creditors of a non-settlor beneficiary who holds, but has not yet exercised, a general power of appointment, the trust instrument should specify that the law of Colorado will apply to the exercise and creation of a power of appointment. Otherwise, as previously discussed, the Colorado Uniform Act provides that the creation of the power is governed by the donor's domicile and the exercise is governed by the law of the powerholder's domicile.<sup>137</sup> The trust agreement can alter these default rules, with a choice-of-law provision similar to the following:

The laws of Colorado shall govern the creation, revocation, or amendment of a power of appointment created by this trust and the exercise, release, disclaimer, or other refusal of such a power of appointment.<sup>138</sup>

Because established Colorado law is contrary to some of the provisions contained in Article 5 of the UPAA, it seems unlikely the Article would be enacted in its entirety in Colorado. However, as stated above, there may be provisions of Article 5 that could be adopted in the future without materially altering existing law, and their enactment would likely benefit practitioners by providing additional clarity and statutory authority for this existing law, as the rest of the Colorado Uniform Act has done.


It is also important to note that the unadopted provisions of Article 5 of the UPAA were derived from the *Restatement (Third) of Property: Wills and other Donative Transfers*.<sup>139</sup> Even if Article 5 is not subsequently enacted in Colorado, it is possible that a Colorado court could adopt the *Restatement* position in an opinion in a manner that would invalidate, in full or in part, current Colorado common law that property subject to a presently exercisable general power of appointment is unavailable to creditors.

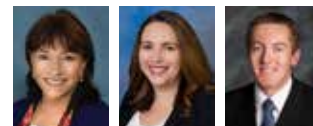
## Miscellaneous Provisions

The Colorado Uniform Act concludes with miscellaneous provisions dealing with, among other things, the uniformity of application and construction with other states enacting their own versions of the UPAA, and how the Colorado Uniform Act provisions relate to existing and yet-to-be-created powers of appointment.<sup>140</sup>

## Conclusion

A carefully drafted power of appointment may enable a trust drafted today to meet unknown future challenges. Colorado trust and estate practitioners must become familiar with the Colorado Uniform Act to fully understand and appreciate the consequences of powers of appointment included in estate planning documents.

Practitioners must also have a thorough understanding of federal tax law. Part 2 will discuss the federal income and transfer tax issues related to powers of appointment. 



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NOTES

1. Leach, "Powers of Appointment," 24 *A.B.A. J.* 807 (1938).
2. See UPAA prefatory note (Unif. Law Comm'n 2013), [www.uniformlaws.org/shared/docs/Powers\\_of\\_Appointment/2013\\_UPAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Powers_of_Appointment/2013_UPAA_Final.pdf).
3. For purposes of this article, the term "transfer tax" collectively refers to the gift, estate, and generation skipping transfer tax as described in Subtitle B of the Internal Revenue Code of 1986.
4. The Colorado legislature enacted the Colorado Uniform Trust Decanting Act in 2016 to give trustees an additional tool to address administrative inflexibility or changes in the beneficiaries' circumstances. CRS §§ 15-16-901 et seq. In response to radical changes in the federal estate tax code, in 2009 the Colorado legislature adopted CRS § 15-11-807 to allow the modification of a will or trust upon a petition to a court to achieve a transferor's tax objectives. CRS § 15-11-807 provides in part, "[t]o achieve the transferor's tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention."
5. Bloom, "Power of Appointment Legislation in New York: It's Time for Modernization," 76 *A/b. L.Rev.* 9, 12 (2013).
6. The power of appointment circumvented the rule of inheritance under common law that the first born son had the right to succeed to his father's inheritance, also known as primogeniture with fee tail male. For a brief summary of primogeniture and fee tail male, see Willcox, "You Can't Choose Your Family, But You Should Choose Your Co-Tenants: Reforming the UPC to Benefit the Modest-Means Family Cabin Owner," 87 *Colo. L.Rev.* 307, 311-12 (2016).
7. See Tax Cuts and Jobs Act of 2017, Pub. Law. No. 115-97, § 11061, 131 Stat 2054, 2091 (2017) (increasing the basic exclusion amount to \$10 million for estates of decedents dying after December 31, 2017 and before January 1, 2026). The \$10 million is indexed for inflation. See IRC § 2010. For the year 2018, the indexed amount is \$11,180,000. Rev. Proc. 2018-18, 2018-10 IRB 393.
8. Although enacted in 2014, the effective date of the Colorado Uniform Act was July 1, 2015. Colorado Uniform Powers of Appointment Act, ch. 209, § 5, 2014 Colo. Sess. Laws 772, 783.
9. The UPAA's fifth part, Creditor Claims on Appointive Property, has not been enacted by the Colorado legislature, in whole or in part, at the time of this publication. The Colorado Uniform Act has reserved Part 5 in the statute in the event any of these provisions are enacted in the future. See text accompanying notes 128-45 for further details.
10. CRS § 15-2.5-102(4).
11. CRS § 15-2.5-102(13).
12. See UPAA § 102 cmt. regarding paragraphs (4) and (14) (citing *Restatement of Property* § 319 (Am. Law Inst. 1940); *Restatement (Second) of Prop. (Donative Transfers)* § 11.2 (Am. Law Inst. 1986); *Restatement (Third) of Prop. (Wills and Other Donative Transfers)* § 17.2 (Am. Law Inst. 2011)).
13. CRS § 15-2.5-102(11) and (1).
14. CRS § 15-2.5-102(18).
15. CRS § 15-2.5-102(8).
16. CRS § 15-2.5-102(14).
17. CRS § 15-2.5-102(2).
18. Note, however, that the definition of a power of appointment for federal tax purposes includes a trustee who holds a fiduciary power. For example, if a trustee has an unrestricted power to appoint the income or the property of a trust among a group of persons including himself, the trustee, in spite of his role as a fiduciary, has a general power of appointment. Similarly, if a trustee is authorized to make distributions that would satisfy her obligation of support, the trustee has a general power of appointment. See Treas. Reg. § 20.2041-1(b)(1).
19. See *Restatement (Third) of Prop.*, supra note 12 at § 17.1 cmt. g.
20. UPAA § 102 cmt.
21. *Id.* Note that under Treas. Reg. § 20.2041-1(b)(1), there are circumstances where a power to remove and replace the trustee and appoint oneself as the trustee is considered a general power of appointment for federal tax purposes. The example in the regulation considers a person to have a general power of appointment if the terms of the trust provide that the trustee has the unrestricted power to appoint property among a group of persons including himself, and that person has the power to remove and replace the trustee and appoint himself as trustee (who would then have the power to appoint trust assets to himself under the terms of the trust.).
22. UPAA § 102 cmt.
23. *Id.*
24. CRS § 15-2.5-102(15); UPAA § 102 cmt.
25. UPAA § 102 cmt.
26. *Id.*
27. CRS § 15-2.5-102(15)(a).
28. CRS § 15-2.5-102(6).
29. IRC §§ 2041(b)(1) and 2514(c); Treas. Reg. § 20.2041-1(c)(1).
30. CRS § 15-2.5-102(10).
31. CRS § 15-2-103, repealed by Colorado Uniform Powers of Appointment Act, ch. 209, § 2, 2014 Colo. Sess. Laws 772, 782; Johns et al eds., *Colorado Estate Planning Handbook*, Powers of Appointment § 23.3 (CLE in Colo., Inc. 6th ed. Supp. 2016).
32. CRS § 15-2.5-103(1)(a).
33. CRS § 15-2.5-103(1)(b).
34. UPAA § 103 cmt.
35. *Id.* § 201 cmt.
36. CRS § 15-2.5-201(1)(b).
37. CRS § 15-2.5-201(2).
38. CRS § 15-2.5-102(9) and (16).
39. CRS § 15-2.5-201(3).
40. Berry et al., Powers of Appointment: From Snoozy to Sexy, American College of Trust and Estate Counsel, Annual Meeting, March 2018 (citing *Restatement (Third) of Prop.*, supra note 12 at § 19.11).
41. UPAA § 201 cmt.
42. CRS § 15-2.5-201(4).
43. CRS § 15-2.5-202.
44. *Id.*
45. See *Colorado Estate Planning Handbook*, supra note 31 at § 23.2 for a more thorough discussion of these circumstances and the Colorado laws that govern them.
46. CRS § 15-2.5-203(1)(a).
47. CRS §§ 15-2.5-203(1)(b) and -102(5).
48. CRS § 15-2.5-203(1)(c).
49. UPAA § 102 cmt.
50. *Id.* § 205 cmt. (citing *Restatement (Third) of Prop.*, supra note 12 at § 17.5 cmt. j).
51. CRS § 15-2.5-204(1)(b).
52. UPAA § 204 cmt. ("For example, a testamentary power created in one of the donor's descendants (such as the donor's child or grandchild) to appoint among the donor's 'descendants' or 'issue' is typically intended to be a nongeneral power.>").
53. CRS § 15-2.5-205(2).
54. CRS § 15-2.5-205(1).
55. CRS § 15-2.5-205(3).
56. See supra notes 49-50 and accompanying text.
57. UPAA § 205 cmt.
58. CRS § 15-2.5-206.
59. See UPAA § 206 cmt.
60. CRS § 15-2.5-301.
61. UPAA § 301 cmt. "Specific-exercise clause" is defined at CRS § 15-2.5-102(17) as "a clause in an instrument, which clause specifically refers to and exercises a particular power of appointment."
62. Defined at CRS § 15-2.5-102(3).
63. UPAA § 301 cmt.
64. *Id.*
65. A "gift-in-default clause" is defined at CRS § 15-2.5-102(7) as "a clause identifying a taker in default of appointment."
66. CRS § 15-2.5-302.
67. CRS § 15-2.5-302(1)(a).
68. UPAA § 302 cmt.
69. CRS § 15-2.5-303(1)(a).
70. CRS § 15-2.5-303(1)(b).
71. UPAA § 303 cmt.
72. *Id.*
73. CRS § 15-2.5-304.
74. UPAA § 304 cmt.
75. See *id.*
76. CRS § 15-2.5-305(1).
77. CRS § 15-2.5-305(2).
78. CRS § 15-2.5-305(3).
79. SRC Subcommittee Report, Uniform Powers of Appointment Act, at 158-62 (on file with authors).
80. See UPAA § 305(c)(2).
81. CRS § 15-2.5-306(2).

82. UPAA § 306(b).  
 83. See SRC Subcommittee Report, *supra* note 79 at 182. See also CRS §§ 15-11-603, -706, and -707.  
 84. CRS § 15-2.5-307(1).  
 85. *In re Robert McDowell Trust*, 894 NW 2d 810 (Neb. 2017).  
 86. CRS § 15-2.5-307(2).  
 87. See UPAA § 307 cmt.  
 88. *Id.*  
 89. CRS § 15-2.5-308.  
 90. UPAA § 308 cmt.  
 91. *Id.*  
 92. CRS § 15-2.5-309(1)(a).  
 93. CRS § 15-2.5-309(1)(b)(I)(A) and (B).  
 94. CRS § 15-2.5-309(1)(b)(II).  
 95. See CRS § 15-2.5-309(1); UPAA § 309 cmt.  
 96. See *id.*  
 97. *Id.*  
 98. *Id.*  
 99. See CRS § 15-2.5-310.  
 100. CRS § 15-2.5-310(1)(b)(II).  
 101. CRS § 15-2.5-311(1)(a).  
 102. CRS § 15-2.5-311(1)(b)(I).  
 103. CRS § 15-2.5-311(1)(b)(II).  
 104. See UPAA § 311 cmt.  
 105. CRS § 15-2.5-312.  
 106. CRS § 15-2.5-313.  
 107. UPAA § 313 cmt.  
 108. See *infra* text accompanying notes 127-138.  
 109. See UPAA § 313 cmt.  
 110. CRS § 15-2.5-314.  
 111. CRS § 15-2.5-401.  
 112. *Id.* See CRS §§ 15-11-1201 et seq.  
 113. CRS § 15-2.5-402.  
 114. See CRS § 15-2-203 (“How power

released”), repealed by Colorado Uniform Powers of Appointment Act, ch. 209, § 2, 2014 Colo. Sess. Laws 772, 782; CRS § 15-11-1202(3) (definition of “Disclaimer”); *Restatement (Third) of Prop.*, *supra* note 12 at § 20.3 (Methods of Releasing a Releasable Power).  
 115. SRC Report, *supra* note 79 at 281-82.  
 116. CRS § 15-2.5-403(1)(b)(I) and (II). The other two methods are “[c]ontracting with a person who could be adversely affected by an exercise of the power not to exercise the power, in which case the power is released to the extent that a subsequent exercise of the power would violate the terms of the contract”; and “[c]ommunicating in any other appropriate manner an intent to release the power, in which case the power is released to the extent that a subsequent exercise of the power would be contrary to manifested intent.” CRS § 15-2.5-402(1)(b)(III) to (IV).  
 117. CRS § 15-2.5-405. A contract not to exercise a power may also confer a benefit on a taker in default, in addition to a permissible appointee. CRS § 15-2.5-405(a).  
 118. CRS § 15-2.5-406.  
 119. See UPAA § 501(d).  
 120. *Id.* § 501(a).  
 121. See *id.* at § 501(b), § 501 cmt.  
 122. *Id.* at § 504.  
 123. See *Restatement (Third) of Prop.*, *supra* note 12 at § 17.1 cmt. c.  
 124. See *Berry*, *supra* note 40.  
 125. UPAA § 503 cmt.  
 126. UPAA § 502 and § 502 cmt.  
 127. *Univ. Nat’l Bank v. Rhoadarmer*, 827 P. 2d 561 (Colo.App. 1991), *cert. denied* (1992).  
 128. *Id.* at 563.  
 129. *Id.*  
 130. *Id.*

131. UPAA § 502 and § 502 cmt.  
 132. UPAA § 502. Note that the UPAA treats a power subject to an ascertainable standard of health, education, support, or maintenance within the meaning of 26 USC § 2041(b)(1)(A) or 26 USC § 2514(c)(1) as a nongeneral power. *Id.*  
 133. CRS § 15-15-103(2). “Nonprobate transfer” is defined in CRS § 15-15-103(1)(a) as “a valid transfer effective at death by a transferor whose last domicile was in this state to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.”  
 134. CRS § 15-15-103(1)(b)(II).  
 135. *Id.*  
 136. *Johnson v. Shriver*, 216 P.2d 653, 659 (Colo. 1950).  
 137. See *supra* notes 132-133 and accompanying text.  
 138. *Orange Book Forms: Colorado Estate Planning Forms*, Form 450, Section 14.2 (CLE in Colo., Inc. 8th ed. 2017).  
 139. See UPAA § 501 cmt. and § 504 cmt.  
 140. CRS §§ 15-2.5-601 and -603.

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