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Powers of Appointment in Wisconsin

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COMMENTS

POWERS OF APPOINTMENT IN WISCONSIN

At common law a power of appointment is an authority created or reserved by a person (the donor) having property subject to his disposition enabling the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received.[1] Wisconsin has abolished common law powers of appointment and has replaced them with statutory powers.[2] Powers, as defined in Section 232.02 of the Wisconsin Statutes, are broader than the definition in the Restatement of Property and include powers not considered powers of appointment in the Restatement. For example, a power to encroach upon the corpus is not considered a power of appointment in the Restatement;[3] yet Chapter 232 of the Wisconsin Statutes covers them.[4] These statutory powers are divided, first, into general and special powers according to the degree of control given over the property and, secondly, into beneficial powers and powers in trust.[5]

A statutory power is general if it authorizes alienation of a fee to any alienee whatever.[6] A statutory power is special if it authorizes alienation of less than a fee or if a person or class of persons is named or designated.[7] A beneficial power is one in the execution of which no person other than the donee has an interest.[8] Powers in trust entitle those designated, other than the donee, to the benefit of the execution of the power.[9]

In *Will of Uihlein*,[10] the Wisconsin court concluded that a power of appointment granted to a widow in her husband's will was a special power in trust and could not be extinguished by the widow's election to take under the law.[11] This case raises two problems for Wisconsin attorneys: *viz.*, when is a power considered a power in trust, and what powers are extinguishable.

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[1] RESTATEMENT, PROPERTY §318.
[2] WIS. STATS. (1951) §232.01.
[3] RESTATEMENT, PROPERTY §318, Comment j.
[4] Osborne v. Gordon, 86 Wis. 92, 56 N.W. 334 (1893).
[5] TIFFANY, REAL PROPERTY 88 (3d ed.).
[6] WIS. STATS. (1951) §232.05. Although this language appears limited to powers concerning land, Chapter 232 has been also held applicable to personal property. See Will of Zweifel, 194 Wis. 428, 216 N.W. 840 (1927); Cawker v. Dreutzer, 197 Wis. 98, 221 N.W. 401 (1928).
[7] WIS. STATS. (1951) §232.06.
[8] WIS. STATS. (1951) §232.07. The statute uses the terms grantor-grantee as defined in §232.58, wheras the terms most commonly used are donor-donee.
[9] WIS. STATS. (1951) §232.08. Neither sections 232.07 nor 232.08 determine whether a power is beneficial or in trust where the power names the donee as a possible appointee.
[10] 264 Wis. 362, 59 N.W. 2d 641 (1953).
[11] 264 Wis. at 378-85, 59 N.W. 2d at 649-652.

POWERS IN TRUST

At common law a special power is in trust[12] if the donee is under a duty to exercise the power at some time.[13] The imperative nature of the power is determined, of course, by the axiomatic rule that the intent of the donor is to govern.[14] If the intent of the donor is not clear, resort must be had to rules of construction. One of the rules used is that if the donor makes it optional with the donee whether he should exercise the power or not, the power is not one in trust.[15] Thus if the donee can exercise the power if he wishes to do so and yet can decline to exercise the power if he so wishes, the power is not in trust. A second rule of construction which makes a special power one which is in trust is the lack of a gift over in default of appointment. The court then infers that the donor intended to benefit the class in any event and makes the exercise of the power imperative upon the donee and, hence, in trust.[16] Conversely, if there is a gift over in default of appointment, no power in trust is created.[17]

New York, a state with statutory powers, has also accepted these common law rules of construction to determine whether a special power is in trust or not.[18] In New York, a special power, if its exercise or non-exercise depends wholly upon the volition of the donee, is discretionary and not coupled with a duty.[19] Neither is a special power in trust if the donor himself named remaindermen in default of appointment.[20] Lack of a gift over in default of appointment makes the power one which is in trust.[21]

Although Chapter 232 of the Wisconsin Statutes was adopted almost bodily from New York in 1849,[22] there have been surprisingly few Wisconsin cases on the appellate level interpreting the statute defining special powers in trust. In the *Uihlein* case, the court simply stated, "The power of appointment given by the testator's will to the

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[12] At common law a general power could not be in trust since if the power was not exercised, no one could force execution of it, the whole world being potential appointees. Merrill v. Lynch, 13 N.Y.S. 2d 514 (1939); Lyon v. Alexander, 304 Pa. 288, 156 A. 84 (1931).

[13] 1 SIMES, LAW of FUTURE INTERESTS 435. Because of this duty execution can be had after the donee's death under Section 232.27. It also affects the rights of creditors. *Compare* Sections 232.08 and 232.20 *with* Section 232.30.

[14] Will of Uihlein, *supra,* note 10; Estate of Rosecrantz, 183 Wis. 643, 198 N.W. 728 (1924); Will of Waterbury, 163 Wis. 510, 158 N.W. 340 (1916).

[15] 1 SIMES, *op. cit. supra,* note 13, at 435.

[16] See cases collected in 80 A.L.R. 503.

[17] Baker v. Wilmert, 288 Ill. 434, 123 N.E. 627 (1919), and cases collected in 56 HARV. L. REV. 757, note 45. This view is accepted in Restatement of Trusts, Section 27, Comment d.

[18] Merrill v. Lynch, 13 N.Y.S. 2d 514 at 525.

[19] *In re* Leo's Estate, 170 Misc. 491, 10 N.Y.S. 2d 449 (1939).

[20] Waterman v. N.Y. Life Ins. Trust Co., 237 N.Y. 293, 142 N.E. 668 (1923).

[21] Merrill v. Lynch, *supra,* note 18 .

[22] Wis. Rev. Stats. (1849), ch. 58.

widow . . . clearly constituted a special power in trust under the definition of such a power contained in sec. 232.22, Stats. . . ."[23]

The particular paragraph of the will giving the widow the power to appoint is as follows:

> "(c) Notwithstanding the foregoing dispositions [to five named beneficiaries] I reserve to my wife Francis L. Uihlein, if she survives me, the right and power to dispose of both trust estates No. one (1) and No. two (2), by her last will and testament, *if she so desires,* to the persons hereinbefore named in fractional parts more or less than I have designated herein, and also to include in such disposition one or more of my nieces and nephews or their direct blood descendents, and also to Saint Mary's Hospital of Milwaukee, Wisconsin, and any worthy charities that she may desire to benefit. . . ." (emphasis added)

In analyzing this paragraph of the will several points are discernable. First, dispositions were made directly to five beneficiaries. These beneficiaries of direct gifts occupy a position similar to takers in default of appointment. Secondly, it appears that the power given was discretionary, *i.e.,* dependent upon the volition of the widow as to its exercise. If she did not so desire to make use of this power, the inference is that the "foregoing dispositions" would take effect. By the use of the phrase, "if she so desires," the exercise of the power is dependent entirely upon the will of the widow and would not seem to be imperative.[24] The case does not satisfy the two requirements of both the common law and the New York courts.

If the common law and New York rules of construction do not apply, what makes a special power a power in trust in Wisconsin? In *Derse v. Derse,*[25] the testator devised a life estate to his wife with "the right to devise and bequeath to the several members of my family in shares as she may see fit." The court held that the power was a special power in trust because "a class of persons other than the grantee was entitled to benefit from the disposition authorized by the power."[26] The power given to the wife in that case was a special power at common law (1) because the wife could appoint only to a named limited group other than herself, and (2) under Section 232.06 of the Wisconsin Statutes, because the person or class of persons to whom the disposition of the lands was to be made under the power was designated. That the power was not only a special power, but one in trust as well, was determined by the fact that "a class of persons other than the grantee was entitled to benefit from the disposition authorized by the power."

[23] 264 Wis. at 380, 59 N.W. 2d at 650.
[24] Section 232.23 seems to imply that a trust power need not be imperative.
[25] 103 Wis. 113, 79 N.W. 44 (1899).
[26] 103 Wis. at 115.

Since by the very definition of a special power under Section 232.06(1) of the Statutes, a person or class of persons is designated as the appointee to whom the disposition of lands under the power is to be made, it can be argued that every special power under that section is a special power in trust. Those named appointees always benefit by the disposition or exercise of the power under Section 232.22(2) of the Statutes, which declares that such power is a power in trust. Because the court in the *Uihlein* case rejected the common law distinctions between special powers and special powers in trust, it is difficult to note any distinctions. A power of appointment which is special because it names possible appointees other than the donee becomes a special power in trust because these named persons are the only ones who benefit from the exercise of the power.[27] Perhaps the donor of the power could avoid this result by a clear statement that the power was not in trust.[28]

The possible indentification of special powers and special powers in trust was discussed by one New York court[29] which concluded that the notes of the revisor of statutes indicated an intention to differentiate powers according to whether they were exercisable for the donee's benefit or for the benefit of others.

> "For example, a general power of appointment of a fee by will may or may not be in trust while a similar special power is always so, provided the designated class of appointees consists of others than the grantee of the power."[30]

However, it appears from a later New York decision that the distinction between "beneficial" and "in trust" powers according to the persons affected by the power's exercise has been disregarded.[31] Further, New York has reverted to the common law distinction between "special" and "in trust" powers to avoid "unnecessary and misleading"[32] terminology and to avoid identifying a special power with a special power in trust.

Extinguishment of Powers

After deciding that the power of appointment given the widow in the *Uihlein* case[33] was a special power in trust, the Wisconsin court considered the effect on such power of the widow's election to take against the will, concluding that the election did not extinguish the power.

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[27] See Sparks, *Future Interests*, 29 N.Y.U. L.Q. Rev. 839, 845 (1954).
[28] *Cf.* Will of Doe, 232 Wis. 34, 285 N.W. 764 (1939).
[29] Chase National Bank v. Chicago Title and Trust Co., 155 Misc. 61, 279 N.Y.S. 327 (1935) *aff'd* in 246 App. Div. 210, 284 N.Y.S. 472 (1939).
[30] 279 N.Y.S. at 334.
[31] Merrill v. Lynch, *supra*, note 18.
[32] 5 American Law of Property §23.12.
[33] Supra, note 10 .

Writers generally conclude that all common law powers of appointment are releaseable, except special powers in trust, which, because of their trust-like nature, can be enforced by the appointees through the courts or the donee.[34] The Restatement of Property considers general powers of appointment releaseable whether presently exercisable (*e.g.* by inter vivos methods) or not (*e.g.* by will) so as to make the interest of the takers in default indefeasible and the appointive property alienable even though, in the case of a general power exercisable only by will, the intent of the donor to delay appointment until the donee's death is not fulfilled.[35] Special powers not in trust can be released unless the donor in creating the power manifests that it should not be releaseable,[36] and even where the special power is in trust if consented to by all the parties.[37]

Powers not in trust can be released in various ways at common law. Among the possible methods are the following:

(1) Release by the donee[38]
   (a) when the donee delivers to some person who would be adversely affected by an exercise of the power, an instrument for consideration or under seal, stating that he releases it.[39]
   (b) when the donee joins with some or all of the takers in default of appointment in a conveyance of the appointive interest.[40]
   (c) when the donee contracts with some person who would be adversely affected by an exercise of the power not to exercise it.[41]

(2) Release by the donor where he retained the privilege to revoke the power.[42]

(3) Release by the potential appointees.[43]

(4) By cessation of the purpose of the power as when a power to benefit a particular appointee ceased when the appointee died before the exercise of the power.[44]

In Wisconsin, as in many other states, there is a statute which

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[34] 1 SIMES *op. cit. supra,* note 13, §280; 37 YALE L. J. 63, 211 and cases cited therein.
[35] RESTATEMENT, PROPERTY §334, 1948 supplement.
[36] RESTATEMENT, PROPERTY §335, 1948 supplement. Thorington v. Thorington, 82 Ala. 489, 1 So. 716 (1887). Atkinson v. Dowling, 33 S.C. 414, 12 S.E. 93 (1890). Columbia Trust Co. v. Christopher, 133 Ky 335, 177 S.W. 943 (1909).
[37] Lewis v. Howe, 174 N.Y. 340, 66 N.E. 975 (1903).
[38] RESTATEMENT, PROPERTY §336.
[39] Lyons v. Alexander, *supra,* note 12.
[40] Ruggles v. Tyson, *infra,* note 47 (dictum).
[41] Lyons v. Alexander, *supra,* note 12.
Baker v. Wilmert, *supra,* note 12.
McLaughlin v. Industrial Trust Co., 28 Del. Ch. 275, 42 A. 2d 12 (1945).
[42] RESTATEMENT, PROPERTY §337(1).
[43] Lewis v. Howe, *supra,* note 37.
Ruggles v. Tyson, *infra,* note 47.
[44] Cotton v. Burkelman, 142 N.Y. 160, 36 N.E. 890 (1894).

regulates releaseability of powers.[45] The statute provides that general powers are releaseable in whole or in part whether the power is exercisable by will or deed or in any other manner. Since the statute concerns itself directly only with general powers, the question of releaseability of special powers and special powers in trust remains unanswered except through an interpretation of section 232.495(4), Wisconsin Statutes, which provides:

> "Nothing herein contained shall be deemed to prevent the release of any power which was releaseable, in whole or in part, prior to July 15, 1943."[46]

In the case of *Ruggles v. Tyson*[47] the Wisconsin court had stated:

> ". . . a special power, to be executed by will, cannot be executed in any other way, or released or extinguished so as to cut off a taker not participating in the extinguishment and who is entitled to take in case the power is not executed in the manner provided by the donor of the power."[48]

From the authority in the *Ruggles* case the court held in the *Uihlein* case that the widow did not extinguish the special power in trust by electing to take under the law, and "even if she intentionally desired to release such special power in trust, she could not legally do so."[49] If it can be said that every special power under Section 232.06(1) of the Statutes is a special power in trust, every power concerning a fee is not releaseable in Wisconsin although releaseable at common law; yet it seems reasonable to assume that Section 232.495(4) had not changed prevailing law as to the release of powers. New York had taken the attitude that common law principles should be used to interpret their statutes;[50] and since common law ordinarily allowed the release of special powers of appointment, such powers were releaseable.[51] To clear up any possible ambiguity, the New York legislature has definitely stated that special powers are releaseable.[52]

Doubt as to the releaseability of special powers in Wisconsin becomes an important question because of the inheritance tax on powers under Sections 72.15(8m) and 72.01(5). A second inheritance tax when the donee dies can be avoided under Section 72.01(5) as to those powers created prior to October 21, 1942, if the donee prior to death

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[45] WIS. STATS. (1951) §232.495.
[46] WIS. STATS. (1951) §232.495(4).
[47] 104 Wis. 500, 81 N.W. 367 (1916).
[48] 104 Wis. at 517. This implies that a special power could be released if all the possible appointees consented.
[49] 264 Wis. at 382, 59 N.W. 2d at 651.
[50] Chase National Bank v. Chicago Title and Trust Co., *supra,* note 29.
[51] *Ibid.*
[52] N. Y. REAL PROP. LAW §187: "Any power, general or special other than a power in trust which is imperative, is releaseable, with or without consideration, by written instrument signed by the grantee."

releases part of the power so that it becomes a "restricted power" under this section. Under present law it appears that this tax saving is not available to donees of special powers.

After reading Chapter 232 of the Wisconsin Statutes especially the sections entitled "Special powers" and "Special powers in trust," it is difficult not to conclude with one authority that

> "On the whole, although the term 'power in trust' is used in the several state statutes following the New York pattern, analysis would be aided if it were abandoned."[53]

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[53] 5 AMERICAN LAW OF PROPERTY §493.