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Powers of Appointment: The Missouri Potential for Conflicting Standards on the Admissibility of Evidence As to Intent to Exercise

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POWERS OF APPOINTMENT: THE MISSOURI POTENTIAL FOR CONFLICTING STANDARDS ON THE ADMISSIBILITY OF EVIDENCE AS TO INTENT TO EXERCISE

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I. INTRODUCTION

As part of the 1983 trust law revision,¹ the Missouri General Assembly enacted a provision prohibiting the blind exercise of a testamentary power of appointment.² Prior to the enactment, Missouri was in the minority of jurisdictions which looked to case law to determine whether a power of appointment had been exercised.³ The legislature may have eliminated some of the problems inherent in Missouri's prior law,⁴ but the present situation opens ground for the development of two differing sets of rules for testamentary powers of appointment.⁵

Powers of appointment⁶ are estate planning devices which are generally recognized as most important for flexibility in the disposition of family set-

1. 1983 Mo. Laws 785 (currently enacted Mo. REV. STAT. § 456.235 (Supp. 1986)). For analysis of another 1983 trust-related revision, see Wiedenbeck, *Missouri's Repeal of the Calflin Doctrine—New View of the Policy Against Perpetuities?* 50 Mo. L. REV. 805 (1985) (discussing Mo. REV. STAT. § 456.590.2 (Supp. 1986)).

2. Mo. REV. STAT. § 456.235 (Supp. 1986). For the text of the statute, see *infra* text accompanying note 128.

3. See *infra* notes 130-36; see also French, *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred from a General Disposition of Property?*, 1979 DUKE L.J. 747, 753-54.

4. See *infra* notes 82-88, 165, and accompanying text.

5. See *infra* notes 157-68 and accompanying text.

6. A power of appointment may be general or special. A general power may be exercised in favor of the donee or the donee's estate. A special power may only be exercised in favor of a designated group. In either case, the permissible appointees are called objects of the power. RESTATEMENT OF PROPERTY §§ 318-320 (1940) [hereinafter RESTATEMENT].

lements.⁷ The donor of property delays the designation of transferees of that property by vesting in a donee⁸ the power to appoint those transferees at a time post-dating the gift of property.⁹ Powers of appointment may be classified into two broad groups, testamentary powers and nontestamentary powers.¹⁰ Testamentary powers may only be exercised in a will.¹¹ Similarly, a nontestamentary power may only be exercised in a deed.¹² However, a donor may grant a power which is exercisable in either a will or deed.¹³ At common law, the donee must manifest an intent to exercise the power in a manner designated by the donor.¹⁴ Problems arise when a court must determine whether there is a sufficient manifestation of intent to exercise the donee's disposition.¹⁵ While many solutions have been proposed and instituted, their effects are often confusing and, as in Missouri's case, often do not simplify the problem. This Comment will outline both the common law and statutory responses to the determination of intent to exercise and analyze the relevant issues concerning Missouri's statute and the differing sets of rules for powers of appointment.

7. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* 861 (2d ed. 1956); see, e.g., A. CASNER, *ESTATE PLANNING* 689-782 (3d ed. 1961); J. TRACHTMAN, *ESTATE PLANNING* 201-11 (1968).

8. The donor may retain the power or grant it to another, as well as name a taker or takers in default to receive the property in the event the donee fails to exercise the power. *RESTATEMENT, supra* note 6, §§ 318-320.

9. L. SIMES & A. SMITH, *supra* note 7, § 861. The power of appointment may be employed to ensure an intelligent disposition of property. An elderly testator, A, may devise his property in trust to T, with instructions to pay the income to A's son S for life, and may give S the special power to appoint among S's now-infant children. A could just as easily have designated his grandchildren as the beneficiaries of the trust. But in leaving the decision to his son, the special needs and abilities of the grandchildren may be considered when they mature and such traits become evident. *Id.*

10. *RESTATEMENT, supra* note 6, § 321 (referring to nontestamentary powers as powers presently exercisable).

11. L. SIMES & A. SMITH, *supra* note 7, § 874. A donor may limit a general power (see *supra* note 6) by giving the donee a general testamentary power. Thus, the donee could only appoint his estate, and not himself, as the object of the power. L. SIMES & A. SMITH, *supra* note 7, § 874.

12. L. SIMES & A. SMITH, *supra* note 7, § 874. Professors Lewis M. Simes and Allan F. Smith note that nontestamentary powers may be further subdivided into powers presently exercisable and powers limited to future exercise, such as those conditioned on a future occurrence. *Id.* This Comment deals only with the broad classifications of testamentary and nontestamentary as used by the American Law Institute. *RESTATEMENT, supra* note 6, § 321.

13. L. SIMES & A. SMITH, *supra* note 7, § 874.

14. *Id.* §§ 972-973; *Standley v. Allen*, 349 Mo. 1115, 163 S.W.2d 1012 (1942); *Seltzer v. Schroeder*, 409 S.W.2d 777 (Mo. Ct. App. 1966).

15. L. SIMES & A. SMITH, *supra* note 7, §§ 972-974.

II. TESTAMENTARY EXERCISE OF POWER OF APPOINTMENT

If a statute¹⁶ or a donor specifically details the manner in which a power of appointment is to be exercised and the donee follows the directions, the court does not become embroiled in intent determinations.¹⁷ Most of the determination of intent to exercise problems arise when the power is purportedly exercised by, but not specifically referred to in, a general devise of all the donee's property or the residuary clause of the donee's will.¹⁸ At common law, the rule developed that a will which did not refer to a power of appointment was presumed not to exercise the power.¹⁹ The judiciary responded to the rule, and legislatures later responded to these judicially-created solutions.

A. *Determination of Intent to Exercise at Common Law*

Both early English²⁰ and American²¹ courts held that a power of appointment was exercised only through a reference²¹ to the power or by an instrument which would otherwise be inoperative unless construed as an exercise of the power.²² Similarly, where a donee executed a general residuary clause or a general devise of all the donee's property without referring to the power,

16. *Id.* § 972. Some statutes require that powers of appointment must be exercised with the same formalities necessary for execution of a will, such as a signed writing and attestation. *Id.*; see also RESTATEMENT, *supra* note 6, § 346 comment i, statutory note 1.

17. L. SIMES & A. SMITH, *supra* note 7, § 972.

18. See French, *supra* note 3, at 749-51. The general devise of the donee's property could be all of the donee's property, or all of the donee's real property, or all of the donee's personal property. See, e.g., Jones v. Tucker, 2 Merivale 533, 35 Eng. Rep. 1044 (1802); Hollister v. Shaw, 46 Conn. 248 (1878); Standley v. Allen, 349 Mo. 1115, 163 S.W.2d 1012 (1942); Seltzer v. Schroeder, 409 S.W.2d 777 (Mo. Ct. App. 1966).

19. L. SIMES & A. SMITH, *supra* note 7, § 973.

20. Jones v. Tucker, 2 Merivale 533, 35 Eng. Rep. 1044 (1817); Lowson v. Lowson, 3 Bro. C.C. 272, 29 Eng. Rep. 532 (1791).

21. There is disagreement over whether the reference to the power must be express. One line of authority requires an express reference to the power of appointment. E.g., Rice v. Park, 223 Ala. 317, 135 So. 472 (1931); Beecher v. Newton, 157 Ga. 113, 120 S.E. 779 (1923); Standley v. Allen, 349 Mo. 1115, 163 S.W.2d 1012 (1942); *In re Neill's Estate*, 222 Pa. 142, 70 A. 942 (1908). Professors Simes and Smith maintain that "express language referring to the power" of appointment was never a requirement. The professors cite no authority for this proposition. L. SIMES & A. SMITH, *supra* note 7, § 973.

22. E.g., President & Fellows of Harvard College v. Balch, 171 Ill. 275, 49 N.E. 543 (1898); Patterson v. Wilson, 64 Md. 193, 1 A. 68 (1885); Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S.W. 1162 (1909).

the power was not exercised.²³ Early English courts applied a strict standard: the “evidence of the donee’s intent to exercise must be such that any other attribution of intent is impossible.”²⁴ In *Blagge v. Miles*,²⁵ Justice Story began

23. *E.g.*, *Hollister v. Shaw*, 46 Conn. 248 (1878); *Wilmington Trust Co. v. Grier*, 19 Del. Ch. 34, 161 A. 921 (1932); *Northern Trust Co. v. House*, 3 Ill. App. 2d 10, 120 N.E.2d 234 (1954); *Crececius v. Smith*, 255 Iowa 1249, 125 N.W.2d 786 (1964); *Seltzer v. Schroeder*, 409 S.W.2d 777 (Mo. Ct. App. 1966); *Faulkner v. Faulkner*, 93 N.H. 451, 44 A.2d 429 (1945); *Farnum v. Pennsylvania Co.*, 87 N.J. Eq. 109, 99 A. 145, *aff’d per curiam*, 87 N.J. Eq. 652, 101 A. 1053 (1916); *Wachovia Bank & Trust Co. v. Trust*, 267 N.C. 173, 148 S.E.2d 41 (1966); *see also* RESTATEMENT, *supra* note 6, § 343(1).

24. *Andrews v. Emmot*, 29 Eng. Rep. 162 (Ch. 1788).

The King’s Bench decided its first case on the exercise of a power not mentioned in a will in *Sir Edward Clere’s Case*, 77 Eng. Rep. 279 (K.B. 1599). The court found that the devise which contained a description of the land subject to the power must have exercised the power, “otherwise the devise shall be utterly void.” *Id.* at 280. The rules on admissibility of extrinsic evidence for the interpretation of written documents relaxed from one of general exclusion (except in cases of equivocation) to one in which all relevant extrinsic facts were admissible (direct declarations of intent were only admissible in cases of equivocation). 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2470-2473 (3d ed. 1940). From 1599 to the statutory reforms of the 1830’s, English courts’ decisions on powers of appointment demonstrated the uncertainty the evolving rules of admissibility were causing. French, *supra* note 3, at 756-58. Early in the eighteenth century, English courts held that a residuary bequest of personal property did not exercise a power over stock, rejecting extrinsic evidence to the contrary, *Molton v. Hutchinson*, 26 Eng. Rep. 351 (M.R. 1739), and that a general devise of real and personal effects did not exercise a power over land, *Ex parte Caswall*, 26 Eng. Rep. 351 (M.A. 1744) (after considering extrinsic evidence). In *Wallop v. Earl of Portsmouth*, Rolls, April 25, 1752, *reprinted in* E. SUGDEN, A PRACTICAL TREATISE OF POWER 916 (8th ed. 1861) [hereinafter *Wallop*], the court used extrinsic evidence to find that a general devise of real estate exercised a power over land, where the donee owned no land on which the devise could operate. In *Andrews v. Emmot*, 29 Eng. Rep. 162 (Ch. 1788), in which the strict standard for determination of intent to exercise was set forth, (*see supra* text at note 24) extrinsic evidence was considered in order to reach a result which did not frustrate the donee’s intent. *Andrews*, 29 Eng. Rep. at 166. Lord Eldon’s first decision as Chancellor on implied exercise of powers strictly applied the *Andrews* standard and announced a new rule: a general description of property preceded by the pronoun “my” could not operate as a description of property subject to a power. *Nannock v. Horton*, 32 Eng. Rep. 158 (Ch. 1802). From the holding in *Nannock*, the rule evolved that, except in cases of specific bequests, no disposition of personalty would exercise a power, including the situation where the donee possessed no personalty but the subject of the power. This rule, which excluded extrinsic evidence of donee’s assets, led to frustration of the donee’s intent because proof of intent to exercise was inadmissible. *See, e.g.*, *Hughes v. Turner*, 40 Eng. Rep. 254 (Ch. 1835); *Jones v. Curry*, 36 Eng. Rep. 300 (M.R. 1818); *Jones v. Tucker*, 35 Eng. Rep. 1044 (M.R. 1817). Extrinsic evidence of real property owned by the donee at the will’s execution was admissible and the rule of *Wallop, supra*, continued to operate to exercise a power where the donee owned no land on which a general devise could operate. However, where the donee both owned and held a power over separate pieces of land located in the same

the American movement toward a more flexible approach to ascertaining intent to exercise.²⁶

Justice Story recognized that three situations²⁷ had operated as exceptions to the general rule presuming no intent to exercise without reference to the power:

Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will or other instrument, to the power; (2) or a reference to the property, which is the subject, only which it is to be executed;²⁸ (3) or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity;²⁹ in other words, it would have no operation, except as an execution of the power.³⁰

county, a general devise of land in that county would not exercise the power. *Napier v. Napier*, 57 Eng. Rep. 489 (V.C. 1826). At this point, English courts no longer attempted to find the probable intent of the donee, but applied strict rules of exclusion and repeatedly frustrated the donee's intent. This finally prompted legislation. See *infra* note 91.

25. *Blagge v. Miles*, 3 F. Cas. 559 (C.C.D. Mass. 1841) (No. 1,479).

26. See *infra* notes 27-81 and accompanying text.

27. The second of Story's categories is often reclassified as a subclass of the third category. Thus, Professors Simes and Smith maintain there are but two situations in which a power is exercised without reference to the power. L. SIMES & A. SMITH, *supra* note 7, § 973; see, e.g., *Lee v. Simpson*, 134 U.S. 572 (1890); *In re Stork's Estate*, 233 Iowa 413, 9 N.W.2d 273 (1943); *Seltzer v. Schroeder*, 409 S.W.2d 777 (Mo. Ct. App. 1966).

28. *Lee v. Simpson*, 134 U.S. 572 (1890); *Wilmington Trust Co. v. Grier*, 19 Del. Ch. 34, 161 A. 921 (1932); *Boyle v. John M. Smyth Co.*, 248 Ill. App. 57 (1928); *In re Stork's Estate*, 233 Iowa 413, 9 N.W.2d 273 (1943); *Seltzer v. Schroeder*, 409 S.W.2d 777 (Mo. Ct. App. 1966); *Price v. Ouiga Realty Co.*, 113 S.C. 556, 101 S.E. 819 (1920); *RESTATEMENT, supra* note 6, § 342.

29. *Lee v. Simpson*, 134 U.S. 572 (1890); *Hartford-Connecticut Trust Co. v. Thayer*, 105 Conn. 57, 135 A. 155 (1926); *Grant v. Mullen*, 15 Del. Ch. 174, 138 A. 613 (1926); *Hakalau v. De la Dux*, 35 Haw. 59 (1939); *Northern Trust Co. v. Cudahy*, 339 Ill. App. 603, 91 N.E.2d 607 (1950); *Osburn v. Murphy*, 135 Ind. App. 291, 193 N.E.2d 669 (1963); *In re Stork's Estate*, 233 Iowa 413, 9 N.W.2d 273 (1943); *Balls v. Dampman*, 69 Md. 390, 16 A. 16 (1888); *Andrews v. Brumfield*, 32 Miss. 107 (1856); *Seltzer v. Schroeder*, 409 S.W.2d 777 (Mo. Ct. App. 1966); *Paul v. Paul*, 99 N.J. Eq. 498, 133 A. 868 (1926); *Price v. Ouiga Realty Co.*, 133 S.C. 556, 101 S.E. 819 (1920).

Professors Simes and Smith give several examples of the third situation in which a sufficient demonstration of intent to exercise is found. A devises his ranch to B for life, remainder to whomever B appoints by will. At his death, B's will includes the provision: "I leave my ranch to C in fee simple." Under Story's third situation, the power is presumed to be exercised. B's interest in the ranch was a life estate and as such he had no interest to devise. The clause in B's will devising the ranch to C is ineffective unless the court treats it as an exercise of B's power of appointment. See, e.g., *Lee v. Simpson*, 134 U.S. 572 (1890); *Cooper v. Haines*, 70 Md. 282, 17 A. 79 (1889); *Dapin v. Piednor*, 205 Mo. 321, 104 S.W. 63 (1907). Similarly if the

After an analysis of authorities, Story articulated the new American standard: the evidence of the donee's intent "must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation."³¹ With the recognition that circumstances other than the three classic situations could be properly considered,³² New York adopted the modern trend and said it was proper to examine extrinsic evidence of the donee's intent.³³ From these early decisions arose the common law exercise of powers by implication.³⁴ Three lines of authority have been traced from these early decisions.³⁵

Massachusetts developed a rule creating a presumption in favor of the donee's intention to exercise a general power.³⁶ The rationale for the Massachusetts Rule is based on the donee's probable understanding of the nature of the interest a power of appointment creates.³⁷ The rule rests on the theory that many donees equate power with property, and the donee intends to pass along property subject to a power along with his own property.³⁸ Denying a

only provision of B's will reads, "I leave all my real property to C," and B possessed no real property, a court would find an intent to exercise. Unless the will is construed as an exercise of the power, the will is ineffective. *See Hartford-Connecticut Trust Co. v. Thayer*, 105 Conn. 57, 134 A. 155 (1926). *But see infra* notes 89-127 and accompanying text.

30. *Blagge v. Miles*, 3 F. Cas. 599 (C.C.D. Mass. 1841) (No. 1,479).

31. *Id.* at 566.

32. *Id.*

33. *White v. Hicks*, 33 N.Y. 383 (1865); *see also Funk v. Eggleston*, 92 Ill. 515 (1879). In *Funk*, the donee devised all of her property to her daughters without reference to a power of appointment. The donee had a life estate and a power of appointment in two-thirds of a parcel of which she owned a one-third interest outright. In her will, the donee directed that the land be sold. The court decided she must have intended to exercise the power because the direction to sell one-third of the parcel while 222 takers in default shared the two-thirds interest made little sense. *Funk*, 92 Ill. at 521-43.

34. *L. SMES & A. SMITH, supra* note 7, § 974. Implied execution is also referred to as the doctrine of capture. *Id.*; *In re De Lusi's Trusts*, 3 L.R. Irish 232 (1879); *Fiduciary Trust Co. v. Mishou*, 321 Mass. 615, 75 N.E.2d 3 (1947).

35. *French, supra* note 3, at 782.

36. *E.g.*, *Amory v. Meredith*, 89 Mass. (7 Allen) 397 (1863); *Fiske v. Fiske*, 173 Mass. 413, 53 N.E. 916 (1899); *Harvard Trust Co. v. Frost*, 258 Mass. 319, 154 N.E. 863 (1927); *New England Trust Co. v. Wood*, 326 Mass. 239, 93 N.E.2d 547 (1950); *Fiduciary Trust Co. v. First Nat'l Bank*, 344 Mass. 1, 181 N.E.2d 6 (1962).

Dictum in *Stone v. Forbes*, 189 Mass. 163, 75 N.E. 141 (1905), suggested that the presumption in favor of exercise should extend to special powers. The court could find "no just ground for a distinction" between a general and special power in regard to exercise of a power. *Id.* at —, 75 N.E. at 142. *Compare Fiduciary Trust Co. v. First Nat'l Bank*, 344 Mass. 1, 181 N.E.2d 6 (1962) *with* *Beals v. State St. Bank & Trust*, 367 Mass. 318, 326 N.E.2d 896 (1975) (presumption applies to general power later released creating a special power for tax purposes; concurring opinion critical of *Fiduciary Trust*).

37. *See Willard v. Ware*, 92 Mass. (10 Allen) 263 (1865).

38. *Fiduciary Trust Co. v. First Nat'l Bank*, 344 Mass. 1, 181 N.E.2d 6 (1962); *Boston Safe Deposit & Trust Co. v. Painter*, 322 Mass. 362, 77 N.E.2d 409 (1948).

general disposition or residuary clause the effect of exercising a power would then defeat the donee's intention.³⁹ New Hampshire accepted⁴⁰ and followed⁴¹ the Massachusetts Rule until its abandonment in 1945,⁴² as an arbitrary rule of construction prohibited by New Hampshire law.⁴³ The Massachusetts legislature rejected the rule by statute,⁴⁴ because it often frustrated the intent of a donee who *did not* intend to exercise the power.⁴⁵ The presumption of intent to exercise applied only where there was *no* evidence of intent,⁴⁶ and as no extrinsic evidence of any intent was allowed, the presumption operated to frustrate the intent of the donee who had no intention to exercise the power by will.⁴⁷

The second⁴⁸ and third⁴⁹ lines of authority survive as modern common-law approaches to intent to exercise powers of appointment.⁵⁰ The conservative approach draws its standard from *Blagge v. Miles*.⁵¹ In *DiSesa v. Hickey*,⁵² the Supreme Court of Errors of Connecticut stated the standard: the intent to exercise must be "so clearly demonstrated by words or acts . . . that the transaction is not fairly susceptible of any other interpretation."⁵³

39. *Boston Safe Deposit*, 322 Mass. 362, 77 N.E.2d 409.

40. *Emery v. Haven*, 67 N.H. 503, 35 A. 940 (1894).

41. L. SIMES & A. SMITH, *supra* note 7, § 973.

42. *Faulkner v. Faulkner*, 93 N.H. 451, 44 A.2d 429 (1945).

43. *Id.* at 454-55, 44 A.2d at 431.

44. MASS. GEN. LAWS ANN. ch. 191, § 1A (West Supp. 1978-1979) provides: No general residuary clause in a will and no will making general disposition of all the testator's property shall exercise a power of appointment created by another instrument which does not specify a specific method of exercise unless reference is made to powers of appointment or there is some other indication of intention to exercise the power.

Id.

45. Probate Committee, *Report*, BOSTON B.J., June 1975, at 28 [hereinafter Probate Committee].

46. *Harvard Trust Co. v. Frost*, 258 Mass. 319, 322, 154 N.E. 863, 864 (1927) ("This rule excludes extrinsic evidence tending to show that the testator meant to make a different disposition of his property from what appears on the face of the will.").

47. Probate Committee, *supra* note 45, at 28. A few jurisdictions expressed interest in, but did not adopt, the Massachusetts Rule. See *Bar Harbor Banking & Trust Co. v. Preachers' Aid Soc'y*, 244 A.2d 558 (Me. 1968); *Johnston v. Knight*, 177 N.C. 122, 23 S.E. 92 (1895). *Contra* *Wachovia Bank & Trust Co. v. Hunt*, 267 N.C. 173, 145 S.E.2d 41 (1966).

48. See *infra* notes 51-62 and accompanying text.

49. See *infra* notes 63-77 and accompanying text.

50. French, *supra* note 3 at 786-90; see *infra* notes 51-81.

51. 3 F. Cas. 559 (C.C.D. Mass. 1841) (No. 1,479); see *supra* text accompanying notes 25-31.

52. 160 Conn. 250, 278 A.2d 785 (1971).

53. *DiSesa*, 160 Conn. at _____, 278 A.2d at 790 (quoting *Morgan Guar. Trust Co. v. Huntington*, 149 Conn. 331, 344-45, 179 A.2d 604, 612 (1962)).

In *DiSesa*, the testator created an inter vivos trust reserving both inter vivos and general testamentary powers of appointment.⁵⁴ At his death, his will did not mention the power. The court held that the power was unexercised despite evidence from which intent could have been inferred.⁵⁵ According to the terms of the will, half the residue of the estate went to testator's wife, \$50,000 was designated for legacies, and the remainder was to pass to his niece.⁵⁶ At the testator's death, the trust assets were approximately \$660,000 and his probate estate amounted to approximately \$26,000.⁵⁷ When the testator executed his will, the trust assets were approximately \$740,000 and the property which would have been included in his probate estate amounted to approximately \$29,000.⁵⁸ Neither at the time of execution nor at the testator's death did his personal estate cover even the amount of the legacies. The court ignored the testator's clearly articulated intent to benefit his wife, nieces, and nephews,⁵⁹ and said that because both the testator and the scrivener were experienced lawyers, it was "fairly susceptible" of the interpretation that there was no intent to exercise.⁶⁰ The testator's wife of ten years took the entire trust as his sole intestate taker and the niece received nothing.⁶¹ The *DiSesa* court's strict application of the general rule against a presumption of intent to exercise⁶² clearly frustrated the testator's intent.

The liberal approach to intent to exercise is followed in Illinois⁶³ and New Jersey.⁶⁴ Illinois courts have consistently held that "the intention of the

54. 160 Conn. at 253, 278 A.2d at 787.

55. *Id.* at 259-60, 278 A.2d at 791.

56. *Id.* at 254, 278 A.2d at 788. After providing a fee for the executor and giving jewelry and a car to the testator's wife, the will provided:

All of the remainder of my estate, both real and personal . . . to be distributed . . . as follows: (a) one-half to Mrs. Hickey; (b) \$5,000 to a nephew, Harold Hickey; (c) \$10,000 to a nephew, Marvin N. Hickey; (d) \$10,000 to a niece, Joan; and (e) \$25,000 to establish a scholarship fund . . . All the rest and residue of my estate, of every kind and description not otherwise disposed of herein, I give, devise and bequeath to my niece, Marian Harrell . . . daughter of my said late sister Jessie Standish, to be hers absolutely.

Id.

57. *Id.*

58. *Id.*

59. See *supra* note 56.

60. *DiSesa*, 160 Conn. at 260, 278 A.2d at 791 ("Both Hickey and *DiSesa* were lawyers and we are loath to assume that they did not know or failed to ascertain the long and well-established Connecticut law concerning the testamentary exercise of powers of appointment.").

61. *Id.* at 261, 278 A.2d at 790-91.

62. See *supra* text accompanying notes 22-23.

63. See *Rettig v. Zander*, 364 Ill. 112, 4 N.E.2d 30 (1936); *Illinois State Trust Co. v. Southern Ill. Nat'l Bank*, 29 Ill. App. 3d. 1, 329 N.E.2d 805 (1975); *Northern Trust Co. v. Moscatelli*, 34 Ill. App. 2d 316, 203 N.E.2d 447 (1964); *Northern Trust Co. v. Cudahy*, 339 Ill. App. 603, 91 N.E.2d 607 (1950).

64. *Bank of New York v. Black*, 26 N.J. 276, 139 A.2d 393 (1958). In *Black*, the New Jersey Supreme Court rejected the standard of *Blagge v. Miles*, 3 F. Cas.

testator supercedes the formal requirement with respect to the exercise of a power of appointment, and that extrinsic evidence may be introduced to show that intention The primary object . . . is therefore to discover the testator's intention."⁶⁵ In *Illinois State Trust Company v. Southern Illinois National Bank*,⁶⁶ the donee held a testamentary power of appointment over the principal and undistributed income of a trust established by her husband, of which the donee was a life income beneficiary. The trust provided that in event of default⁶⁷ the balance after expenses should be distributed to the St. Louis Shriner's Hospital for Crippled Children.⁶⁸ The donee's will provided for specific bequests of \$50,500.⁶⁹ Through the residuary clause, the donee devised the remainder of her estate in one-third shares to a nephew and a former son-in-law and his present wife.⁷⁰ There was no reference to either the trust or the power of appointment in the donee's will.⁷¹ The trial court allowed extrinsic evidence through the testimony of several witnesses,⁷² including testimony to the effect that the donee had no intention of giving any trust property to the Shriners.⁷³

The appellate court upheld the trial court's finding that there was sufficient evidence of an intent to exercise. The court noted the donee was advised both orally and in writing as to the existence of and her right to exercise the power.⁷⁴ Further, absent the exercise, the donee's personal assets

559 (C.C.D. Mass. 1841) (No. 1,479) (see *supra* text accompanying note 31 for a discussion of the *Blagge* standard). The court said the object of its investigation was to determine by a preponderance of the evidence the probable intent of the testator. Certainty to the point of being unable to form any other interpretation was unnecessary, according to the court, and "probabilities should customarily be sufficient." 26 N.J. at 286-87, 139 A.2d at 398.

65. *Northern Trust Co. v. Moscatelli*, 54 Ill. App. 2d 316, 327, 203 N.E.2d 447, 452 (1950); see also *Funk v. Eggleston*, 92 Ill. 515 (1879); *Rettig v. Zander*, 364 Ill. 112, 4 N.E.2d 30 (1936); *Northern Trust Co. v. Cudahy*, 339 Ill. App. 603, 91 N.E.2d 607 (1950).

66. 29 Ill. App. 3d 1, 329 N.E.2d 805 (1975).

67. The donor provided for both total and partial default. The trustee was instructed to deal with any part of the trust assets "insofar as such appointment shall not extend to or take effect." *Id.* at 3, 329 N.E.2d at 807.

68. *Id.*

69. *Id.* at 5, 329 N.E.2d at 808.

70. *Id.* The donee's son-in-law married an employee of the donee's husband approximately ten years after the death of the donee's daughter. *Id.* at 5, 329 N.E.2d 809.

71. *Id.* at 4, 329 N.E.2d at 808.

72. The trial court heard testimony from the bank-trustee, the former son-in-law's wife, the wife's aunt, the nephew's mother, the trust officer, and an attorney employed by the drafter of the donee's will (the drafter had been "unable to communicate for several years"). The court also received into evidence ledger sheets of the donee's checking and savings accounts. *Id.* at 6-10, 329 N.E.2d at 809-13.

73. *Id.* at 7-10, 329 N.E.2d at 810-12.

74. *Id.* at 11, 329 N.E.2d at 813.

were insufficient to cover even the specific bequests of \$50,500.⁷⁵ While the court noted that the residual legatees were the objects of the donee's inter vivos bounty,⁷⁶ the most significant point was the testimony establishing the donee's disapproval of her husband's bequest to the Shriners and her alleged statements that she had no intention of allowing the Shriners to receive any of the trust property.⁷⁷

The common law position that the residuary clause alone does not exercise a power of appointment is followed in the twenty-one states which have no statutory provisions on general dispositions or residuary clauses exercising powers.⁷⁸ While American courts were quick to recognize that circumstances surrounding the transaction should be examined for evidence of the donee's intent,⁷⁹ the principal⁸⁰ split in authority occurred over the standard to be applied.⁸¹

75. *Id.* At the time the will was drafted, the donee had approximately \$29,000 in personal assets. *Id.* at 10, 329 N.E.2d 812-13.

76. The donee gave her former son-in-law and his wife \$24,000 to purchase homes which she shared with them, \$30,000 in cash from the trust, and \$17,000 in bonds and savings. *Id.* at 6, 329 N.E.2d at 809. The donee gave her nephew an overcoat and "money all the time." In addition, she gave her nephew and his mother a television, an air conditioner, and a gun. *Id.* at 9, 329 N.E.2d at 811.

77. *Id.* at 11, 329 N.E.2d at 813.

78. *Mastin v. Merchants Nat'l Bank*, 278 Ala. 261, 177 So. 2d 817 (1965); *Welch v. Tarver*, 256 Ark. 272, 507 S.W.2d 505 (1974); *DiSesa v. Hickey*, 160 Conn. 260, 278 A.2d 785 (1971); *Carlisle v. Delaware Trust Co.*, 34 Del. Ch. 133, 99 A.2d 764 (1953); *May v. Citizens & S. Bank*, 223 Ga. 614, 157 S.E.2d 279 (1967); *Illinois State Trust Co. v. Southern Ill. Nat'l Bank*, 29 Ill. App. 3d 1, 329 N.E.2d 805 (1975); *Crawfordsville Trust Co. v. Elston Bank & Trust Co.*, 216 Ind. 596, 25 N.E.2d 626 (1940); *Crecelius v. Smith*, 255 Iowa 1249, 125 N.W.2d 786 (1964); *Sinke v. Muncie*, 110 Kan. 345, 203 P. 1102 (1922); *Bar Harbor Banking & Trust Co. v. Preacher's Aid Soc'y of the Methodist Church*, 244 A.2d 558 (Me. 1968); *Seltzer v. Schroeder*, 409 S.W.2d 777 (Mo. Ct. App. 1966); *Faulkner v. Faulkner*, 93 N.H. 451, 44 A.2d 429 (1945); *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Morrell*, 108 N.J. Eq. 188, 154 A. 416 (1931); *Trust Co. of Morris County v. Nichols*, 62 N.J. Super. 495, 163 A.2d 205 (1960); *Cathey v. Cathey*, 28 Tenn. (9 Hum.) 470 (1848); *King v. Richardson*, 7 Tenn. App. 535 (1928); *Republic Nat'l Bank v. Fredericks*, 155 Tex. 79, 283 S.W.2d 39 (1955).

There is law in Ohio to indicate that a residuary clause does not exercise a power of appointment. *See, e.g., Lepley v. Smith*, 13 Ohio C.C. 189 (1896); *Herron v. Jones*, 55 Ohio App. 274, 9 N.E.2d 703 (1936); *In Re Trust of Howald*, 65 Ohio App. 191, 29 N.E.2d 575 (1940); *Dollar Sav. & Trust Co. v. First Nat'l Bank*, 32 Ohio Misc. 81, 285 N.E.2d 768 (C.P. 1972).

79. *See* 4 W. BOWE & D. PARKER, PAGE ON WILLS § 32.9 (rev. ed. 1961); *see also supra* text accompanying notes 21-36.

80. Professor French notes there is also disagreement over the admissibility of extrinsic evidence of direct declarations of the testator's intent. French, *supra* note 3, at 752-53, 789. The majority rule is that such declarations are not admissible unless there is an equivocation; direct declarations of intent are then admissible to resolve the ambiguity. RESTATEMENT, *supra* note 6, § 242 comment j. The minority position

B. *Statutory Determination of Intent to Exercise*

One of the most common estate planning devices used by married couples is the marital deduction trust.⁸² The marital deduction,⁸³ enacted in 1948,⁸⁴ postpones federal estate taxation of the first-to-die spouse's property until the death of the survivor.⁸⁵ A marital deduction trust gives the surviving spouse a life estate in the decedent's property and a general testamentary power of appointment over the remainder.⁸⁶ Through this type of trust, a testator may control the ultimate disposition of his estate and still take advantage of the marital deduction. The testator may bequeath his spouse a life estate with a power of appointment with the understanding that the power not be exercised, and the property would pass to the testator's designated taker or takers in default. This plan qualifies for the marital deduction under the marital deduction trust.⁸⁷ However, a presumption in favor of exercise would frustrate an estate plan utilizing the tacit understanding that the property go to the testator's designated takers in default.⁸⁸

Legislators have acted⁸⁹ to prevent adoption of presumptions in favor of exercise by enacting statutes reinforcing the common law positions⁹⁰ or

is that direct declarations are admissible wherever relevant to the interpretation of wills regardless of the presence or absence of an equivocation. *See, e.g.*, *Smith v. Nelson*, 249 Ala. 51, 29 So. 2d 335 (1947); *Northern Trust Co. v. Cudahy*, 339 Ill. App. 603, 91 N.E.2d 607 (1950); *Wilson v. Flowers*, 58 N.J. 250, 277 A.2d 199 (1971).

81. *See supra* text accompanying notes 53, 65; *see also supra* note 64.

82. Russoff, *Powers of Appointment and Estate Planning*, 10 J. FAM. L. 443, 457 (1971).

83. The marital deduction of Internal Revenue Code section 2056(a) provides for an unlimited deduction of the value of property which passes or has passed from the decedent to the surviving spouse. Section 2056(b)(1)-(9) limits the deduction in certain situations. I.R.C. § 2056(a)-(b) (1984).

84. Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 1214.

85. I.R.C. § 2056 (1984).

86. *Id.* § 2056(b)(5). A qualifying life estate under section 2056(b)(5) is one in which the "surviving spouse is entitled for life to all income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint . . ." *Id.*

87. *Id.* Section 2056(b)(5) provides that such an interest is treated as passing to the surviving spouse alone. *Id.*

88. For instance, A bequeaths his entire estate to his wife B for life with a general testamentary power of appointment, and names their children C and D as takers in default. A and B have previously agreed that the property should go to C and D. At B's death, her will's residuary clause operates to leave the remainder of her estate to her sister E. If a common law or statutory presumption in favor of exercise exists, a court could find that B intended to exercise the power, and both A and B's intentions are clearly frustrated.

89. The primary source of pressure for statutory reform appears to be the marital deduction trust. UNIFORM PROBATE CODE § 2-610 comment (1982).

90. *See infra* notes 96-99.

limiting early reform statutes.⁹¹ Of the twenty states⁹² which have adopted

91. Dissatisfaction with the common law resolutions of intent to exercise situations led to enactment of reform statutes in both the United States and England. The 1830 New York statute provided that "[l]ands embraced in a power to devise, shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall appear, expressly or by necessary implication." I N.Y. REV. STATS. pt. II, ch. 1, tit. 2, § 126 (1836) (effective date Jan. 1, 1830). The statute applied to real property subject to any power, but was not applied where an intention not to exercise appeared in a will. *Lockwood v. Mildeburger*, 159 N.Y. 181, 53 N.E. 803 (1899). The statute was extended to personal property by analogy in the decision of *Hutton v. Benkard*, 92 N.Y. 294 (1883).

The 1830 English statute provided:

[A] general Devise of the Real Estate of the Testator . . . shall be construed to include any Real Estate . . . which he may have Power to appoint in any Manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will; and in like Manner a Bequest of the Personal Estate of the Testator . . . described in a general Manner, shall be construed to include any Personal Estate . . . which he may have Power to appoint in any Manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will.

7 Will. 4 to 1 Vict., ch. 26, § 27. The statute applied only to general powers, but covered both real and personal property.

Both the New York and English statutes treated property subject to a power as if it were the donee's property as to whether the property passed by the residuary or general clause. It has been noted that this suggests both statutes were enacted to thwart many courts' insistence on distinguishing between power and property. See French, *supra* note 3, at 770. Neither the New York nor the English statute distinguished between assets the donee actually owned and assets over which the donee held a power. Unfortunately, the statutes did not abolish the rule against extrinsic evidence, and courts interpreted the statutes as prohibiting any extrinsic evidence even in cases where the extrinsic evidence clearly demonstrated contrary intentions. *In Re Deane's Will*, 4 N.Y.2d 326, 151 N.E.2d 184, 175 N.Y.S.2d 21 (1958); *In re Estate of Beckwith*, 57 App. Div. 2d 415, 395 N.Y.S.2d 499 (1977), *modifying*, 87 Misc. 2d 649, 366 N.Y.S.2d 615 (1976); *In re Estate of Carter*, 47 Cal. 2d 200, 302 P.2d 301 (1956); *California Trust Co. v. Ott*, 59 Cal. App. 2d 715, 140 P.2d 79 (1943). North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia and West Virginia enacted statutes based on the English statute. The statutes are still in effect in these states. N.C. GEN. STAT. ANN. § 31-43 (1976); 20 PA. CONS. STAT. ANN. § 2514(14) (Purdon 1975); R.I. GEN. LAWS § 33-6-17 (1969); S.C. CODE ANN. § 21-7-430 (1976); VA. CODE ANN. § 64.1-67 (1973); W. VA. CODE § 41-3-6 (1966). Maryland's 1888 statute was also based on the English statute. MD. ANN. CODE art. 93, § 359 (1957) (repealed MD. EST. & TRUSTS CODE ANN. § 4-407 (1976)); see also D.C. CODE ENCYCL. § 180-303 (West 1967). California, Kentucky, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, Utah and Wisconsin had statutes based on the New York statute. RESTATEMENT, *supra* note 6, § 343 comment d.

92. Alaska, Arizona, California, Colorado, Florida, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Montana, Missouri (limited to instruments creating or amending a trust), Nebraska, New Mexico, New York, North Dakota, Oregon, Utah, and Wisconsin. See *infra* notes 96-97 for citations.

statutes determining whether a general disposition or residuary clause in a will exercises a power of appointment, all but New York and California⁹³ follow the common law rule. The majority of states have statutes based on the Uniform Probate Code,⁹⁴ while a small group enacted statutes designed to meet a variety of needs.⁹⁵

Twelve states have adopted the Uniform Probate Code (UPC),⁹⁶ and two states have enacted the UPC model provision on exercise of powers of appointment.⁹⁷ The UPC codifies the United States common law position as to the exercise of powers of appointment: the residuary clause alone does not exercise a power.⁹⁸ Section 2-610 of the UPC states that

[a] general residuary clause in a will, or a will making general disposition of all of 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 intention to include the property subject to the power.⁹⁹

The comment to section 2-610 does not suggest whether the liberal standard of Illinois and New Jersey¹⁰⁰ or the conservative standard of *Blagge v. Miles*¹⁰¹ should be followed as to the admission of extrinsic evidence. It has been noted that statutes predicated on the UPC model will prevent inadvertent exercise of a power, but that the statutes will not provide consistency in the admission of evidence without specification of the standard to be applied.¹⁰²

Three states have adopted statutes specifically designed to reverse statutes based on 1830s models.¹⁰³ The Maryland statute was enacted to reverse a

93. See *infra* notes 117-27 and accompanying text.

94. See *infra* notes 96-99 and accompanying text.

95. See *infra* notes 103-27 and accompanying text.

96. 8 U.L.A. 83 (Supp. 1979). See ALASKA STAT. § 13.11.265 (1972); ARIZ. REV. STAT. ANN. § 14-2610 (1975); COLO. REV. STAT. § 15-2-303, 11-610 (1973); FLA. STAT. ANN. § 732.607 (West 1976); 1976 Haw. Sess. Laws, act. 200, § 2-610; IDAHO CODE § 15-2-610 (1979); MINN. STAT. ANN. § 524.2-610 (West 1978); MONT. CODE ANN. § 91A-2-610 (1975); NEB. REV. STAT. § 30-2348 (1975); N.M. STAT. ANN. § 32A-2-610 (1976); N.D. CENT. CODE § 30.1-09-10 (1976); UTAH CODE ANN. § 75-2-610 (1977).

97. MASS. GEN. LAWS ANN. ch 191, § 1A (West Cum. Supp. 1978-79); OR. REV. STAT. § 112.410 (1975).

98. See *supra* notes 23-78 and accompanying text.

99. 8 U.L.A. 361 (1972).

100. See *supra* notes 63-77 and accompanying text.

101. *Id.*

102. French, *supra* note 3, at 793.

103. Minnesota, Montana, North Dakota and Utah reversed statutes based on the 1830 New York statute when those states enacted the UPC, see *supra* note 96 and accompanying text. Massachusetts' UPC based statute reversed a judicial rule based on the 1830 English statute. See *supra* note 97 and accompanying text.

statute based on the 1830 English model.¹⁰⁴ The statute provides:

Subject to the terms of the instrument creating the power, a residuary clause in a will exercises a power of appointment held by the testator only if: (1) An intent to exercise the power is expressly indicated in the will; or (2) The instrument creating the power of appointment fails to provide for disposition of the subject matter of the power upon its nonexercise.¹⁰⁵

*Leidy Chemicals Foundation, Inc. v. First National Bank*¹⁰⁶ was decided under the new Maryland statute. The court said the statute reinstated the law as it existed prior to 1888 and prevents the court from considering extrinsic evidence as to the donee's intent to exercise.¹⁰⁷ Even though the extrinsic evidence clearly indicated that the donee intended to exercise the power, the court held that there was no exercise under the statute.¹⁰⁸

Michigan and Wisconsin had statutes based on the 1830 New York State statute.¹⁰⁹ The statutes are substantively identical. The Michigan statute states that

[u]nless otherwise provided in the creating instrument, an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property which the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument or if the instrument either expressly or by necessary implication from its wording interpreted in the light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power [I]f there is a general power exercisable by will with no express gift in default in the creating instrument, a residuary clause or other general language in the donee's will purporting to dispose of all the donee's estate or property operates to exercise the power but in all other cases such a clause or language does not in itself manifest an intent to exercise . . . power exercisable by will¹¹⁰

In *Hund v. Holmes*,¹¹¹ the Michigan Supreme Court held that the statute prohibited extrinsic evidence to demonstrate that the donee intended to ex-

104. MD. ANN. CODE art. 93, § 359 (1957) (originally enacted in 1888) (repealed MD. EST. & TRUSTS CODE ANN. § 4-407 (1974)), stated that:

[e]very devise and bequest purporting to be of all real and personal property belonging to the testator shall be construed to include also all property over which he has a general power of appointment, unless the contrary intention shall appear in the will or codicil containing such devise or bequest.

Id.

105. MD. EST. & TRUSTS CODE ANN. § 4-407 (1974).

106. 276 Md. 689, 351 A.2d 129 (1976).

107. *Id.* at 693, 351 A.2d at 131.

108. *Id.*

109. 5 AMERICAN LAW OF PROPERTY § 23.40, at 563-64 n.15; see *supra* note 91 for the text of I N.Y. REV. STATS. pt. II, ch. 1, tit. 2, § 126 (1836) (effective date Jan. 1, 1830).

110. MICH. COMP. LAWS ANN. § 556-114 (Supp. 1979-1980).

111. 395 Mich. 188, 235 N.W.2d 331 (1975).

ercise a power in the residuary clause of his will.¹¹² The court stated that if allowed, the appellee's attempted use of the extrinsic evidence would render the statute meaningless.¹¹³

Wisconsin does not have case law interpreting the 1978 statute.¹¹⁴ Professor French suggests that if Wisconsin follows the Michigan interpretation of *Hund*, all three states will have the English common law of 1830;¹¹⁵ that is, courts will be forced to hold a donee did not exercise a power in the face of clear evidence the donee intended to do so.¹¹⁶

The New York and California legislatures enacted statutes which are substantively re-enactments of the prior statutes despite contrary recommendations.¹¹⁷ The New York statute provides a power is exercised when the donee "[l]eaves a will disposing of all his property of the kind covered by the power, unless the intention that the will is not to operate as an execution of the power appears expressly or by necessary implication."¹¹⁸ The statute is identical to the 1830 statute¹¹⁹ in that it applies to either a general or special power. Further, the power will be exercised unless a contrary intention ap-

112. *Id.* at 197, 235 N.W.2d at 335.

113. *Id.* at 198, 235 N.W.2d at 335.

114. WIS. STAT. ANN. § 702-03(2) (West 1978) provides:

(1) If the donor has explicitly directed that no instrument shall be effective to exercise the power unless the instrument contains a reference to the specific power, in order to exercise effectively such a power the donee's instrument must contain a specific reference to the power or the creating instrument and expressly manifest an intent to exercise the power or transfer the property covered by the power.

(2) In the case of other powers, an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property which the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording interpreted in light of the circumstances surrounding its drafting and execution manifests an intent to exercise the power. If there is a general power exercisable by will with no gift in default in the creating instrument, a residuary clause or other general language in the donee's will purporting to dispose of all of the donee's estate or property operates to exercise the power in favor of the donee's estate, but in all other cases such a clause or language does not in itself manifest an intent to exercise a power exercisable by will.

Id.

115. *See supra* note 24.

116. French, *supra* note 3, at 796-97.

117. Professor Richard Powell, the major drafter of both the New York and California statutes, was opposed to the 1830's statutes because they created a pitfall for the unwary. Powell, *Powers of Appointment in California*, 19 HASTINGS L.J. 1281, 1291 (1968).

118. N.Y. EST. POWERS & TRUSTS LAW § 10-6.1 (McKinney Supp. 1978-79).

119. *See supra* note 91 for the text of the 1830 statute.

pears expressly or by necessary implication, as in the prior statute.¹²⁰

The California statute, unlike the New York counterpart, changes the prior law.¹²¹ The present statute provides:

A general power of appointment exercisable at the death of the donee is exercised by a residuary clause or other general language in the donee's will purporting to dispose of the property of the kind covered by the power unless the creating instrument otherwise required or the donee manifested an intent not to exercise the power.¹²²

The statute applies only to general powers, whereas the prior statute applied to both general and special powers.¹²³ Although the language concerning extrinsic evidence of intent to exercise is similar to the New York statute,¹²⁴ the Comment of the California Law Revision Commission states that the new statute was designed to change existing case law¹²⁵ which held that extrinsic evidence of the donee's intent not to exercise was inadmissible.¹²⁶ Thus, California courts should hold that the statute allows consideration of extrinsic evidence of the donee's intent.¹²⁷

III. MISSOURI'S STATUTE PROHIBITING BLIND EXERCISE OF A POWER OF APPOINTMENT.

Missouri's new statute on the exercise of powers of appointment provides:

A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment granted in an instrument creating or amending a trust unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.¹²⁸

120. *Id.*

121. CAL. PROB. CODE § 125 (West 1956) provided:

A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death, including property embraced in a power to devise.

Id.

122. CAL. CIV. CODE § 1386.2 (West Cum. Supp. 1978).

123. In *United Cal. Bank v. Bottler*, 16 Cal. App. 3d 610, 94 Cal. Rptr. 227 (1971), the court held that CAL. PROB. CODE §125 (West 1956), applied to both special as well as general powers.

124. *See supra* text accompanying note 118 for the text of the New York statute.

125. *In re Estate of Carter*, 47 Cal. 2d 200, 302 P.2d 301 (1956).

126. CAL. CIV. CODE § 1386-2 comment (West. Supp. 1979).

127. *See French, supra* note 3, at 800.

128. MO. REV. STAT. § 456.235 (Supp. 1986) (emphasis added).

The language is identical to the UPC model provision¹²⁹ except for the modifying phrase limiting its application to powers granted in an instrument creating or amending a trust.

Prior to the statute, Missouri's law as to the exercise of powers by a general disposition or residuary clause followed the common law rule.¹³⁰ In *Standley v. Allen*,¹³¹ the Missouri Supreme Court held that a clause purporting to dispose of the balance of donee's estate was not intended to exercise a power of appointment.¹³² In *Cross v. Cross*,¹³³ the court of appeals found the donee's language sufficient to exercise a power, although the donee failed to comply with the donor's requirement that the donee specifically refer to the donor's will and intent, and that the power of appointment was created in the donor's will.¹³⁴ Thus, the following language is sufficient to create a power:¹³⁵ "[A]ll the rest, residue and remainder . . . including all property over which I have power of appointment, which power I hereby exercise in favor of my residuary estate."¹³⁶

*Seltzer v. Schroeder*¹³⁷ involved a donee's residuary clause disposing of her share of a trust.¹³⁸ The trust agreement stated that the share of a deceased beneficiary was to be distributed to such persons as the beneficiary would appoint by will.¹³⁹ The donee's will included a residuary clause which provided:

I give, devise and bequeath all of the rest, residue and remainder of my estate to Frederick Schroeder and Cecile Schroeder Such residue and remainder of my estate shall include, although is not limited to, any property that may be coming to me or my heirs, or such persons as may be named in my will, from Anna K. Craig . . . or her estate, or under the terms of her will, and which may not have been paid to or received by me at the time of my death. It is my desire that whatever real or personal property would go to me or my estate or my legatees through or under the will of Anna K. Craig . . . go to Frederick Schroeder and Cecile Schreoder¹⁴⁰

Anna Neimer was party to a suit over the contested will of Anna K. Craig. As part of the settlement, the personal property after expenses and real property of Anna K. Craig was conveyed in trust to the trustee, Seltzer.

129. See *supra* text accompanying note 99.

130. See *supra* note 78.

131. 349 Mo. 1115, 163 S.W.2d 1012 (1942).

132. *Id.* at 1121, 163 S.W.2d at 1014.

133. 559 S.W.2d 196 (1977).

134. *Id.* at 209.

135. *Id.*

136. *Id.* at 199.

137. 409 S.W.2d 777 (1966).

138. *Id.* at 781.

139. *Id.*

140. *Id.* at 781-82.

During the three-year life of the trust, the trustee was to distribute income and after its expiration, the principal.¹⁴¹ The trust was subsequently amended, extending the life of the trust and providing for distribution of a deceased beneficiary's appointee.¹⁴²

The court looked to the three criteria of Justice Story:¹⁴³ an execution of power by will is recognized as intended when the will refers to the power itself, makes reference to the subject of the power, or where the will cannot operate except as an execution of the power.¹⁴⁴ The stumbling block in determining intent was the fact Anna Neimer had nothing coming to her from Anna Craig, her estate, or her will. The residuary devisee of Anna Craig conveyed the property to the trustee to establish a trust, for himself, Anna Neimer, and two other beneficiaries.¹⁴⁵ The court felt that this, coupled with the language of Anna Neimer's residuary clause,¹⁴⁶ created a latent ambiguity in the will.¹⁴⁷ In order to interpret the true intent of Anna Neimer, the court consulted extrinsic evidence. "Where the ambiguity is latent, it is created by evidence of extrinsic facts, and the same evidence is admissible to remove it."¹⁴⁸ The court correctly recognized the first sentence of Anna Neimer's¹⁴⁹ residuary clause was not sufficient to exercise the power.¹⁵⁰ But the court refused to accept appellant's argument that Anna Neimer "meant nothing" by the "'property that may be coming to me' from 'Anna K. Craig . . . or her estate.'" Instead, the court found that the testator could reasonably regard her interest in the trust as coming from Anna Craig, because the trust was a result of a settlement involving the estate of Anna Craig.¹⁵¹ The reference Anna Neimer made to her interest in the trust was sufficient when considered in the light of the language used to exercise the power and the extrinsic circumstances.¹⁵²

While the court did consult extrinsic evidence, under the *DiSesa v. Hickey*¹⁵³ standard, the transaction was not fairly susceptible of any other

141. *Id.* at 781.

142. *Id.* at 782.

143. *See supra* notes 28-30.

144. *Seltzer*, 409 S.W.2d at 782.

145. *Id.* at 783.

146. *See supra* note 140 and accompanying text.

147. *Seltzer*, 409 S.W.2d at 783.

148. *Id.* at 784 (citing *McMahan v. Hubbard*, 217 Mo. 624, 118 S.W.2d 481 (1909); *Willard v. Darrah*, 168 Mo. 660, 68 S.W. 1023 (1902)).

149. *Seltzer*, 409 S.W.2d at 785.

150. *Id.*

151. *Id.* at 786.

152. *Id.* Another of the grounds reinforcing the court's decision was the strong Missouri presumption that testators intend to dispose of the entire estate and not to die intestate as to any part of it. If a provision of a will is fairly open to more than one construction, the construction resulting in partial intestacy will not be adopted if it can be avoided by any reasonable construction. In determining the construction, the court must be guided by the circumstances surrounding the will. *Id.* at 787.

153. 160 Conn. 250, 278 A.2d 785 (1971).

interpretation.¹⁵⁴ There was, as the *Seltzer* court noted, no other possible interpretation.¹⁵⁵ The court appears to have adopted the conservative common law approach to admissibility of extrinsic evidence to determine intent to exercise.¹⁵⁶ This could set the stage for the development of two differing sets of rules for testamentary powers of appointment.

The new Missouri statute, section 456.235,¹⁵⁷ applies only to "a power of appointment granted on an instrument creating or amending a trust."¹⁵⁸ The statute will not apply to powers of appointment which do not involve trusts. Since the statute is patterned¹⁵⁹ after the UPC model provision,¹⁶⁰ Missouri courts could be persuaded to follow the recommendation of the UPC committee if and when the committee suggests a standard as to the admission of extrinsic evidence.¹⁶¹ If the committee recommends the liberal standard, Missouri would consequently follow a liberal standard as to the exercise of powers granted by an instrument creating or amending a trust and the conservative standard of *Seltzer*¹⁶² as to powers not involving trusts, such as powers to convey or sell real estate granted in a deed or a power of appointment granted in conjunction with a life estate.¹⁶³ Similarly, a donee could appoint *another* donee of the power created in a trust agreement and section 456.235¹⁶⁴ would not apply to the second donee's exercise. Thus the liberal standard would be applied to the first donee's exercise and the conservative *Seltzer* approach to the second donee's exercise.

Presumably the Missouri legislature meant to enact a provision protecting the marital deduction trust.¹⁶⁵ Under section 456.235,¹⁶⁶ such a trust would be protected. However, by modifying the UPC model provision¹⁶⁷ with the limiting language,¹⁶⁸ the legislature has laid the framework for conflicting standards for exercise of powers of appointment.

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154. See *supra* note 53 and accompanying text.

155. *Seltzer*, 409 S.W.2d at 785.

156. See *supra* notes 51-62 for a discussion of the conservative approach.

157. MO. REV. STAT. § 456.235 (Supp. 1986).

158. See *supra* note 128 for entire text of MO. REV. STAT. § 456.235 (Supp. 1986).

159. See *supra* notes 128-29.

160. See *supra* note 99.

161. See *supra* notes 100-02.

162. See *supra* notes 153-56.

163. The statute would apply to the marital deduction trust of IRC § 2056(a), which is a life estate in the surviving spouse with a power of appointment. See *supra* notes 82-87 and accompanying text.

164. MO. REV. STAT. § 456.235 (Supp. 1986).

165. See *supra* notes 82-87 and accompanying text.

166. MO. REV. STAT. § 456-235 (Supp. 1986).

167. See *supra* note 99.

168. See *supra* note 128 (emphasized language).

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