UNIFORM POWERS OF APPOINTMENT ACT

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I. UNIFORM POWERS OF APPOINTMENT ACT ("UPOA Act")

A. A power of appointment is an estate planning tool that permits the owner of property to name a third party and give that person the power to direct the distribution of that property among some class of permissible beneficiaries. It is an effective and flexible technique used in a wide variety of situations, but there is very little statutory law governing the creation and use of powers of appointment. Instead, estate planning attorneys must rely on a patchwork of state court decisions. The drafters of the Uniform Powers of Appointment Act did not set out to change the law, but rather to codify the existing common law, relying heavily on the Restatement (Third) of Property: Wills and other Donative Transfers.

B. Uniform Powers of Appointment Act was created in 2013 and has been adopted by eight states other than Illinois (Colorado, Missouri, Montana, Nevada, New Mexico, North Carolina, Utah, Virginia), and has been introduced in 1 additional state (Kentucky).

C. Illinois House Bill 4702 – creates new 760 ILCS §105 et. seq.

D. Takes effect in Illinois on January 1, 2019.

II. UNIFORM POWERS OF APPOINTMENT AS ADOPTED BY ILLINOIS – GENERAL PROVISIONS (ARTICLE 1)

A. Definitions (§102)

1. "Power of Appointment" (hereinafter "POA") means 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 appointive property.

a) Does not include:

(1) A power of attorney.

(2) Powers held in a fiduciary capacity, such as a decanting power, which is covered by other Uniform Law Commission legislation.

(3) A power of sale or management of property (sometimes called an administrative power).

(4) A power to designate or replace a trustee.

(5) A power to designate beneficiary of a life insurance policy or a pension plan.

b) Includes:

(1) A power to revoke or amend a trust.

(2) A power to withdraw income or principal.

(3) A power to direct a trustee to distribute income or principal to another, but does not include a fiduciary distributive power.

(4) A POA created by a powerholder of the original POA.

2. Parties and Elements Involved:

a) "Donor" creates the POA.

b) "Powerholder" is the person in whom the power was conferred or in whom the power was reserved.

c) "Appointee" is a "person" (defined as an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other

legal entity), to which a powerholder appoints the appointive property through the exercise of the POA.

(1) A "permissible appointee" means a person in whose favor a POA may be properly exercised by the powerholder.

(2) An "impermissible appointee" means a person that is not a permissible appointee.

d) "Appointive property" means the property or property interest subject to a POA.

e) "Instrument" means a writing.

f) "Terms of the Instrument" is "the manifestation of the intent of the maker of the instrument" (such as the donor creating a POA or a powerholder exercising a POA), "regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in legal proceeding."

g) "Taker in Default of Appointment" means a person that takes part, or all, of the appointive property to the extent the powerholder does not effectively exercise the power of appointment.

3. <u>Types of POAs</u>

a) "Exclusionary Power of Appointment" means a POA exercisable in favor of any one or more of the permissible appointees, to the exclusion of the other permissible appointees.

(1) Example: A power to appoint "to such of my descendants as the powerholder may select".

(2) A nonexclusionary POA is one in which the powerholder cannot exercise the POA to exclude any permissible appointee from a share of the appointive property. An example is a power "to appoint to all and every one of my children in such shares and proportions as the powerholder shall select".

b) "General Power of Appointment" means a POA exercisable in favor of one or more of the following: a powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

(1) Includes a power to revoke, amend, or withdraw trust property if it is exercisable in favor of the powerholder, the powerholder's estate, or the creditors of either.

c) "Nongeneral Power of Appointment" means a POA that is not a general POA.

(1) Example of a "broad" nongeneral POA: a power to appoint to anyone in the world other than the powerholder, the powerholder's estate, and the creditors of either.

(2) Example of a "limited" nongeneral POA: a power given to the donor's spouse to appoint among the donor's descendants.

4. When POA May Be Exercised

a) "Presently Exercisable POA" means a POA exercisable at the relevant time, and not at some later time or in a document such as a Will that only takes effect at a later time.

b) A "Postponed Power" or "Deferred Power" cannot be exercised until the occurrence of a specified event, such as the occurrence of the specified event, the passage of a specified time, or upon the satisfaction of the ascertainable standard (e.g. a power to withdraw income or principal subject to an ascertainable standard).

c) "Testamentary POA" is a POA exercisable only at the powerholder's death.

5. Types of Clauses Exercising a POA

a) "Specific-Exercise Clause" – a clause in an instrument which specifically refers to and exercises a particular POA.

(1) Example: "I exercise the power of appointment conferred upon me by [Section ___] of [my father's Will] as follows: I appoint [fill in details of appointment]."

(2) Use of specific-exercise clauses is encouraged.

b) "Blanket-Exercise Clause" – a clause in an instrument which exercises a POA and is not a "specific-exercise clause". It includes a clause that:

(1) Expressly refers to exercising "any power" that the powerholder may have;

(2) Expressly refers to appointing "any property" over which a powerholder may have a POA; or

(3) Disposes of all of all property subject to disposition by the powerholder.

(4) Example: "I exercise any power of appointment I may have as follows: I appoint [fill in details of appointment]."

(5) UPOA discourages the use of blanket-exercise clauses.

c) "Blending Clause" – (not a defined term) – "All the residue of my estate, including the property over which I have a POA under my mother's Will, I devise as follows:"

d) "Gift-in-Default Clause" means a clause identifying a taker in default of appointment.

B. Governing Law (§103). Unless the terms of the instrument creating a POA manifest a contrary intent:

1. The law of the donor's domicile at the relevant time governs the actions of the donor, such as the creation, revocation, or amendment of a POA.

2. The law of the powerholder's domicile at the relevant time governs the powerholder's actions, such as the powerholder's exercise, release or disclaimer of the POA, or the powerholder's revocation of such exercise, release, or disclaimer.

3. "At the relevant time" means at the time the action is taken; for example, the donor's creation of a POA is governed by the law of the donor's domicile at the time the donor created the POA.

a) This is a change from older law, which held that the law of the donor's domicile governed acts of both the donor and the powerholder. This adopts the approach supported by the Restatement Third of Property and more recent cases.

C. Common Law (§104). The statute is supplemented by common law and principles of equity, except to the extent modified by the statute.

III. UPOA – CREATION , REVOCATION, AND AMENDMENT POWERS OF APPOINTMENT (ARTICLE 2)

A. Creation of Power of Appointment (§201). The instrument (e.g. Will or trust) originally creating the POA must be valid under applicable law:

1. Properly executed; follows formalities imposed by law (if any). Creator of instrument (donor) must have capacity and be free of undue influence.

2. Requires a transfer of property over which the POA may be exercised (unless POA is created through the exercise of another POA). This would include a declaration by an owner of property.

3. Instrument must manifest the donor's intent to create, in a powerholder, a POA over the appointment property exercisable in favor of a permissible appointee.

4. POA is still created if instrument is partially invalid, but only if the provisions creating the POA are valid.

5. Proper parties:

a) Donor

b) Powerholder (who may also be the donor)

c) Permissible appointees.

d) Notes:

(1) A POA cannot be created in a deceased person.

(2) If it is impossible to identify any person who would be a permissible appointee, then no POA is created.

(3) A powerholder can be an unborn or unascertained individual, but this is a "postponed" POA that will arise when the powerholder is born or becomes ascertainable.

(4) The effective date of a POA created in a donor's Will is the donor's death, whereas the effective date of a POA created in a donor's revocable trust is the date the trust is established.

B. Nontransferability (§202). A powerholder cannot transfer a POA; if the powerholder dies, the POA lapses. The POA does not pass through the

powerholder's estate to the powerholder's successors in interest (unless the original instrument states otherwise).

C. Presumption of Unlimited Authority (§203). The general principle of construction is that the powerholder is given the maximum discretionary authority and flexibility in exercising the POA except to the extent the terms of the instrument creating the POA imposes restrictions to limit that authority. Accordingly, unless the instrument creating the POA states otherwise, a POA is:

1. "Presently Exercisable" – exercisable by the powerholder at the relevant time, and not at some later time or in a document such as a Will that only takes effect at a later time.

2. "Exclusionary" – exercisable in favor of one or more of the permissible appointees, to the exclusion of the other permissible appointees (do not have to exercise in favor of all permissible appointees; no appointee is required to receive a certain amount or portion).

3. A "general" POA – exercisable in favor of one or more of the following: the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

D. Exception to Presumption of Unlimited Authority (§204). Unless the terms of the instrument creating the POA express a contrary intent, a POA is nongeneral if:

1. It is exercisable only at the powerholder's death, and

2. The permissible appointees are a defined and limited class that does not include the powerholder's estate, creditors, or the creditors of the powerholder's estate.

3. This provision is designed to prevent drafting mistakes.

   a) For example, a testamentary POA granted by the powerholder's mother, and exercisable by the powerholder at his death in favor of his mother's descendants, is typically intended to be nongeneral (that is, not include the powerholder as a permissible appointee).

   b) The Internal Revenue Service has ruled that a testamentary POA in the donor's son, exercisable in favor of the donor's "issue", is a nongeneral POA for estate tax purposes.

E. Rules of Classification (§205).

1. If a powerholder may exercise a POA only with the consent or joinder of an adverse party, the power is nongeneral.

a) "Adverse party" means a person with a substantial beneficial interest in property which would be adversely affected by a powerholder's exercise or nonexercise of a POA in favor of the powerholder, the powerholder's estate, a creditor of the powerholder or of the powerholder's estate.

2. If the permissible appointees are not "defined and limited", the power is exclusionary.

a) "Defined and limited" means referring to a reasonable number of permissible appointees, and might be described in class-gift terms (e.g. "children", "nieces and nephews", "descendants").

b) A POA exercisable in favor of "such person or persons other than powerholder, the powerholder's estate, the creditors of the powerholder, and creditors of the powerholder's estate" has countless permissible appointees, so that it would administratively impossible for the POA to be nonexclusionary.

F. Power to Revoke or Amend (§206).

1. A donor may revoke or amend a POA only if:

a) The instrument creating the POA is revocable by the donor, or

b) The donor reserves a power of revocation or amendment in the instrument creating the POA.

2. If an irrevocable inter vivos trust confers a presently exercisable POA on a powerholder who is not the settlor/donor of the trust, then the donor has no power to revoke or amend the POA except to the extent the donor expressly reserved that authority, and in that case only until the powerholder irrevocably exercises the POA.

3. If the donor is also the powerholder, he or she can indirectly revoke or amend the POA by a partial or total release of the POA as the powerholder.

IV. UPOA – EXERCISE OF POWER OF APPOINTMENT (ARTICLE 3)

A. Requisites for Exercise of POA (§301)

1. The instrument (e.g. Will, trust, or other instrument) exercising the POA must be valid under applicable law. Creator of instrument (powerholder) must have capacity and be free of undue influence. POA is still exercised if instrument is partially invalid, but only if the provisions exercising the POA are valid.

2. The terms of the instrument must manifest the powerholder's intent to exercise the POA, and substantially comply with the requirements of exercise, if any, imposed by the donor, and

3. The appointment must be a permissible exercise of the POA.

B. Intent to Exercise: Determining Intent from Residuary Clause (§302)

1. A residuary clause in a powerholder's Will or codicil, or similar clause in the powerholder's revocable trust, manifests the powerholder's intent to exercise a POA only if:

   a) Nothing else in the instrument containing the residuary clause manifests a contrary intent;

   b) Power is a general POA exercisable in favor of the powerholder's estate;

   c) There is no gift-in-default clause for the POA, or any such clause is ineffective, and

   d) The powerholder did not release the POA.

2. "Residuary clause" in this section does not include a residuary clause containing a blanket-exercise clause or a specific-exercise clause.

3. Notes:

   a) In most circumstances a typical residuary clause such as "All of the residue of my estate, I devise to . . . ." does not manifest an intent to exercise a general POA.

   b) A residuary clause never manifests an intent to exercise a nongeneral POA.

   c) The benefit of this provision is that it allows the appointive property to pass under the powerholder's Will, instead of defaulting back to the donor (because there is no gift-in-default clause for the POA) and being distributed as part of the donor's estate (assuming the donor is then deceased).

C. Intent to Exercise: After-Acquired Power (§303)

1. Unless the terms of the instrument exercising the POA manifest a contrary intent:

a) A blanket-exercise clause extends to a POA acquired by the powerholder after executing the instrument containing the clause;

b) If the powerholder is also the donor of the POA, the blanket-exercise clause does not extend to the POA unless there is no gift-in -default clause or the gift-in-default clause is ineffective.

2. Notes:

a) Using a specific-exercise clause would make clear whether or not the exercise of the POA is intended to extend to an after-acquired POA, but using a blanket-exercise clause makes it more difficult to determine the intent of the powerholder. This section is intended to provide default rules of construction for blanket-exercise powers.

b) Using a clause to exercise "all the powers I have" would be construed under this section as also exercising any after-acquired POAs, because it does not clearly exclude them.

c) Using a clause to exercise "all the powers I have at the date of execution of this Will" indicates an intention to exclude any after-acquired POAS.

d) Even if the blanket-exercise clause clearly intends to also exercise after-acquired POAs, it may not be effective if the donor in creating the POA restricts any exercise that predates the creation of the POA, although this is not common.

D. Substantial Compliance with Donor-Imposed Formal Requirement (§304)

1. A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the POA make reference or specific reference to the POA, is sufficient if:

a) The powerholder knows of and intends to exercise the POA;

b) The powerholder's manner of attempted exercise does not impair a material purpose of the donor in imposing the requirement.

2. This applies only to donor-imposed formalities; it does not apply to formal requirements imposed by law, such as the requirements that a Will be signed and witnessed.

3. What is the donor's purpose in imposing the additional requirement?

a) Requirement that POA be exercised in a Will might be satisfied by a powerholder's exercise of the POA in a non-testamentary instrument (such as the powerholder's revocable trust) that is functionally similar to a Will.

b) Requirement of specific reference to the POA dates back to pre-1942 tax laws and was intended to prevent an inadvertent exercise of a general POA, which would cause estate taxation. Because Federal tax laws have changed so that a general POA is included in the powerholder's taxable estate regardless of whether it was exercised, the purpose of the specific reference formality is no longer necessary.

E. Permissible Appointment (§305)

1. A general POA exercisable in favor of the powerholder or the powerholder's estate may be appointed by the powerholder in any way, including in trust or creating a new POA, that the powerholder could make in disposing of the powerholder's own property.

2. A general POA exercisable in favor of only the creditors of the powerholder or of the powerholder's estate is restricted to appointing to those creditors.

3. Unless the terms of the instrument creating a POA manifest a contrary intent, a powerholder may exercise a nongeneral POA:

a) In any form, with any conditions and limitations, including in trust, in favor of a permissible appointee;

b) To create a general or nongeneral POA in a permissible appointee that may be exercised in favor of persons other than the permissible appointees of the original nongeneral POA;

c) To create a nongeneral POA in any person to appoint to one or more of the permissible appointees of the original nongeneral power.

F. Appointment to Deceased Appointee or Permissible Appointee's Descendant (§306)

1. An appointment to a deceased appointee is ineffective.

G. Impermissible Appointment (§307)

1. An exercise of a POA in favor of an impermissible appointee is ineffective.

2. An exercise of a POA in favor of a permissible appointee is ineffective to the extent the appointment is a fraud on the power.

3. Notes:

a) An appointment that is partially valid is not ruined by the partially invalid exercise of the POA.

b) In Restatement Third of Property: Wills and Other Donative Transfers §19.16, "fraud on the power" includes an exercise of a POA to extent that it was:

(1) Conditioned on the appointee conferring a benefit on an impermissible appointee,

(2) Subject to a charge in favor of an impermissible appointee,

(3) To a trust for the benefit of an impermissible appointee,

(4) In consideration of a benefit conferred upon or promised to an impermissible appointee,

(5) Primarily for the benefit of the appointee's creditor, if that creditor is an impermissible appointee, or

(6) Motivated in any other way to be for the benefit of an impermissible appointee.

H. Selective Allocation Doctrine (§308)

1. If a powerholder exercises a POA in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property must be allocated in the permissible manner that best carries out the powerholder's intent.

2. Notes:

a) Selective allocation is required when the powerholder disposes of property to both permissible and impermissible appointees. This rule of construction provides for appointed property to be allocated to dispositions favoring permissible appointees, and the owned property to dispositions for impermissible appointees.

b) Example from Restatement Third of Property: Wills and Other Donative Transfers:

(1) Beneficiary (B) of a trust has a testamentary nongeneral POA exercisable in favor of B's descendants.

(2) B's Will states: "All property I own or over which I have any power of appointment shall be used first to pay my debts, expenses of administration, and death taxes, and the balance I give outright to my daughters."

(3) At B's death:

(a) Appointive property of trust is $200,000.

(b) B's debts, expenses of administration and death taxes total $200,000.

(c) B owns property in his own name valued at $800,000.

(d) Selective allocation allows B's owned assets to be used to fully pay the debt, expenses of administration and death taxes, with the rest of B's own property and all of the appointed property passing to B's daughters, who are permissible appointees of the POA.

I. Capture Doctrine: Disposition of Ineffectively Appointed Property Under General Power (§309). To the extent a powerholder of a general POA (other than a power to revoke, amend or withdraw property from a trust) makes an ineffective appointment:

1. The gift-in-default clause controls the disposition of the ineffectively appointed property, or

2. If there is no gift-in-default clause or to the extent the clause is ineffective, the ineffectively appointed property:

a) Passes to:

(1) The powerholder, if the powerholder is a permissible appointee and is living; or

(2) If the powerholder is an impermissible appointee or is not then living, the powerholder's estate, if the estate is a permissible appointee, or

b) If there is no taker under (a), passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

3. Notes:

a) This does not apply if the powerholder fails to exercise the general power or releases the power.

b) Including an effective gift-in-default clause will avoid the need for application of this doctrine.

J. Disposition of Unappointed Property Under Released or Unexercised General Power (§310). To the extent a powerholder releases or fails to exercise a general POA (other than a power to revoke, amend, or withdraw property from a trust):

1. The gift-in-default clause controls the disposition of the unappointed property; or

2. If there is no gift-in-default clause or the extent such a clause in ineffective:

a) Except as otherwise provided in (b), the unappointed property passes to:

(1) The powerholder, if the powerholder is a permissible appointee and living; or

(2) If the powerholder is an impermissible appointee or is not living, the powerholder's estate, if the estate is a permissible appointee; or

b) To the extent the powerholder released the power, or if there is no taker under (a), the unappointed property passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

3. Notes:

a) This does not apply to a powerholder failing to exercise a power to revoke, amend, or withdraw assets from a trust (which are powers pertaining to the trust itself).

b) Having an effective gift-in-default clause will avoid application of this rule.

c) If the powerholder releases the POA and no gift-in-default clause is effective, there is a different result than if the powerholder simply did not exercise the POA. If the powerholder releases the POA, the powerholder has affirmatively rejected the chance to gain ownership of the property, and the unappointed property

passes under a reversionary interest back to the donor or the donor's transferee or successor in interest.

d) If the POA is a general power only because it is exercisable in favor of the powerholder's creditors (and not in favor of the powerholder or the powerholder's estate), then the unappointed property passes under the gift-in-default clause, otherwise it reverts back to the donor or the donor's transferee or successor in interest.

K. Disposition of Unappointed Property Under Released or Unexercised Nongeneral Power (§311). To the extent a powerholder releases, ineffectively exercises, or fails to exercise a nongeneral POA:

1. The gift-in-default clause controls the disposition of the unappointed property; or

2. If there is no gift-in-default clause or the extent such a clause in ineffective, the unappointed property:

a) Passes to the permissible appointees if:

(1) The permissible appointees are defined and limited; and

(2) The terms of the instrument creating the power do not manifest a contrary intent; or

b) If there is no taker under (a), passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

3. Notes:

a) Having an effective gift-in-default clause will avoid application of this rule.

b) To the extent there is no gift-in-default clause or it is ineffective, the unappointed property passes to the permissible appointees if they are "defined and limited."

(1) If the defined and limited class of permissible appointees is a multigenerational class such as "descendants", "issue", or "heirs" the default rule of construction is that they take by representation or per stirpes.

(2) If the defined and limited class of permissible appointees is a single generation class, the default rule of construction is that the eligible class members take equally.

(3) If the permissible appointees are identified in broad and inclusive terms, then they are not "defined and limited" and this part of the rule does not apply.

(4) If the donor manifests an intent that the permissible appointees should receive the appointive property only by the exercise of the POA, then this part of the rule would not apply.

(5) Examples:

(a) If B (the powerholder) has a testamentary POA exercisable in favor of her descendants, but does not exercise it, and if there is no effective gift-in-default clause, the unappointed property passes to B's descendants who survive her, by representation.

(b) If B's testamentary POA is exercisable in favor of "such one or more persons, other than B, B's estate, B's creditors, or creditors of B's estate," then the permissible appointees are not a defined and limited class. Assuming there is no effective gift-in-default clause, the unappointed property reverts back to the donor or the donor's transferee or successor in interest.

L. Disposition of Unappointed Property If Partial Appointment to Taker In Default (§312).

1. Unless the terms of the instrument creating or exercising a POA manifest a contrary intent, if the powerholder makes a valid partial appointment to a an appointee who is also a taker in default of appointment, the taker in default of appointment may share fully in unappointed property.

2. The donor's intent controls. If there is no indication of the donor's intent, then the assumption is that the taker in default can take in both capacities.

M. Appointment to Taker in Default (§313).

1. If a powerholder of a general POA makes an appointment to a taker in default of appointment and the appointee would have taken the property anyway under a gift-in-default clause had the property not been appointed, the POA is deemed not to have been exercised and the appointee takes under the gift-in-default clause.

2. To the extent the appointed property is different from what the taker in default would have received (for example, a lesser estate in the property), or if the taker in default receives a greater portion of the trust property as an appointee under the exercise of the POA than such person would receive as a taker in default, then the exercise of the POA is treated as effective.

N. Powerholder's Authority to Revoke or Amend Exercise (§314). A powerholder may revoke or amend an exercise of a POA only to the extent that:

1. The powerholder reserves a power of revocation or amendment in the instrument exercising the POA and, if the POA is nongeneral, the terms of the instrument creating the POA do not prohibit the reservation; or

2. The terms of the instrument creating the POA provide that the exercise is revocable or amendable.

O. Disposition of Trust Property Subject to Power (§315). In disposing of trust property subject to a POA exercisable by an instrument other than a will, a trustee acting in good faith shall have no liability to any appointee or taker in default of appointment for relying upon an instrument believed to be genuine purporting to exercise a POA or for assuming that there is no instrument exercising the POA in the absence of actual knowledge thereof within 3 months of the last date on which the POA may be exercised.

1. Illinois specific language; not part of the Uniform Powers of Appointment Act.

2. Added to incorporate current Illinois law regarding non-testamentary POAs (765 ILCS 320/1(c)).

3. Does not address POAS exercisable by Will.

V. UPOA – DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT (ARTICLE 4)

A. Disclaimer (§401). As provided by Section 2-7 of the Probate Act of 1975:

1. A powerholder may disclaim all or part of a POA.

2. A permissible appointee, appointee, or taker in default of appointment may disclaim all or part of an interest in appointive property.

3. Notes:

a) A disclaimer is different than a release. A release occurs after the powerholder accepts the power. A disclaimer prevents the acquisition of the power.

b) Partial disclaimers are allowed.

B. Authority to Release (§402). A powerholder may release a POA, in whole or in part, except to the extent the terms of the instrument creating the power prevent the release.

1. A partial release is allowed; it would narrow the freedom of choice the powerholder otherwise has, but does not completely eliminate the POA. A partial release can relate either to the manner of exercising the power or to the appointees.

2. A powerholder who is also the donor cannot effectively impose a restraint on such person's ability to release the POA.

3. If the POA is exercisable jointly by two or more powerholders, and one of them releases the POA, the other powerholders continue to have a POA unless the continuation of the power is inconsistent with the donor's purpose in creating the joint power.

C. Method of Release (§403). A powerholder of a releasable POA may release the power in whole or in part:

1. By substantial compliance with a method provided in the terms of the instrument creating the power; or

2. If the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive, by an instrument manifesting the powerholder's intent by clear and convincing evidence.

3. Notes:

a) A failure to comply with a technical requirement, such as required notarization, may be excused as long as the powerholder substantially complies with the method for release specified in the terms of the instrument creating the POA.

b) Methods of releasing a POA include:

(1) Delivering an instrument declaring the extent to which the POA is released to an individual who could be adversely affected by the exercise of the POA;

(2) Joining with some or all of the takers in default to make an otherwise effective transfer of the appointive property;

(3) Contracting with an individual who could be adversely affected by an exercise of the POA, to not exercise the POA;

(4) Communicating intent to release the power in a record.

D. Revocation or Amendment of Release (§404). A powerholder may revoke or amend a release of a POA only to the extent that:

1. The instrument of release is revocable by the powerholder; or

2. The powerholder reserves a power of revocation or amendment in the instrument of release.

E. Power to Contract: Presently Exercisable Power of Appointment (§405). A powerholder of a presently exercisable POA may contract:

1. Not to exercise the power; or

2. To exercise the power if the contract when made does not confer a benefit on an impermissible appointee.

3. A contract not to exercise a POA ensures that the appointive property will pass to the takers in default.

F. Power to Contract: Power of Appointment Not Presently Exercisable (§406). A powerholder of a POA that is not presently exercisable may contract to exercise or not to exercise the POA only if the powerholder:

1. Is also the donor of the power; and

2. Has reserved the power in a revocable trust.

3. Generally, a contract to exercise (or not exercise) a POA that is not presently exercisable is unenforceable, with the exception of a donor/powerholder and a POA in a revocable inter vivos trust. In that case a contract to appoint is enforceable because the donor/powerholder could have revoked the trust and recaptured outright ownership of the trust assets, or could amend the trust to change the POA into one that is presently exercisable.

G. Remedy for Breach of Contract to Appoint or Not to Appoint (§407).

1. The remedy for a powerholder's breach of a contract to appoint or not to appoint is limited to damages payable out of the appointive property or, if appropriate, specific performance of the contract.

2. Notes: the powerholder's owned assets are not available to satisfy a judgment for damages.

VI. RIGHTS OF POWERHOLDER'S CREDITORS IN APPOINTIVE PROPERTY (ARTICLE 5).

A. Creditor Claim; General Power Created by Powerholder (§501)

1. Provisions of statute:

a) In this section, "POA created by the powerholder" includes a POA created in a transfer by another person to the extent the powerholder also contributed value to the transfer.

b) Appointive property subject to a general POA created by the powerholder is subject to a claim of a creditor of the powerholder or of the powerholder's estate to the extent provided in the Uniform Fraudulent Transfer Act.

c) Subject to (b), appointive property subject to a general POA created by the powerholder is not subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent the powerholder already irrevocably appointed the property in favor of a person other than the powerholder or the powerholder's estate.

d) Subject to (b) and (c), and notwithstanding the presence of a spendthrift provision or whether the claim arose before or after the creation of the POA, appointive property subject to a general POA created by the powerholder is subject to a claim of a creditor of:

(1) The powerholder, to the same extent as if the powerholder owned the appointive property, if the power is presently exercisable; and

(2) The powerholder's estate, to the extent the estate is insufficient to satisfy the claim and subject to the right of a decedent to direct the source from which liabilities are paid, if the POA is exercisable at the powerholder's death.

2. Under (b), a donor of a POA cannot use a fraudulent transfer to avoid creditors by retaining a POA. If so, the creditors of the donor can reach the appointive property.

3. Under (c), if there is no fraudulent transfer of appointive property, and the donor/powerholder has irrevocably appointed the property to third parties (that is, not to the powerholder himself or to his estate), the creditors of the donor/powerholder cannot reach that property.

4. If the donor/powerholder retains a presently exercisable general POA over appointive property for which there was neither a fraudulent transfer nor any irrevocable appointment, then the creditors of the powerholder are able to reach the appointive property as if the powerholder owned the appointive property outright.

5. If the donor/powerholder retains a general POA that is not exercisable until death, the creditors of the powerholder's estate are able to reach the appointive property if the estate is insufficient to satisfy the creditor's claim (subject to the donor/powerholder's ability to direct the source from which liabilities of the estate are paid).

    a) This rule applies regardless of the presence of a spendthrift clause.

    b) This rule also applies regardless of the whether the creditor's claim arose before or after the creation of the POA.

6. Examples of the creation of a general POA by another person, with the contribution of property by the powerholder, are as follows:

    a) D purchases real estate from A. At D's request, A transfers the real estate "to D for life, then to such person as D may appoint by Will." The rule §501(d) applies to D's testamentary general POA.

    b) D's father bequeathed real estate "to D for life, then to such persons as D may appoint by Will." The real estate is valued at $20,000, but is subject to mortgage indebtedness of $10,000. D pays the mortgage. The rule of §501(d) applies to half of the value of the real estate, even though D's father's Will created the general POA in D.

    c) D contests her father's estate on the grounds of undue influence. The Will contest is settled by transferring D's father's real estate in trust for D's benefit. The trustee is directed "to pay the net income to D for life and, on D's death, the principal to such

persons as D shall appoint by Will." The rule of §501(d) applies, even though D did not create the general POA.

B. Creditor Claim: General Power Not Created by Powerholder (§502).

1. Provisions of statute:

a) Except as otherwise provided in (b), appointive property subject to a general POA created by a person other than the powerholder is subject to a claim of a creditor of:

(1) The powerholder, to the extent the powerholder's property is insufficient, if the POA is presently exercisable; and

(2) The powerholder's estate if the POA is exercised at the powerholder's death, to the extent the estate is insufficient, subject to the right of the deceased powerholder to direct the source from which liabilities are paid.

b) Subject to §504(c), a POA created by a person other than the powerholder which is subject to an ascertainable standard relating to an individual's health, education, support, or maintenance within the meaning of 26 U.S.C. §2041(b)(1)(A) or §2514(c)(1), as amended, is treated for purposes of this Article as a nongeneral power.

2. Notes:

a) If a powerholder has a presently exercisable general POA created by someone else, her creditors can reach the appointive property.

b) If the powerholder's general POA is testamentary, and if she exercises it at her death, her creditors can reach the appointive property if her estate is insufficient to satisfy the creditors' claims, subject to the powerholder's ability to direct the source of payment for liabilities of her estate.

c) This rule does not apply to a general POA subject to an ascertainable standard.

C. Power to Withdraw (§503).

1. Provisions of statute:

a) For purposes of this Article, and except as otherwise provided in (b), a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general POA to the extent of the property subject to the power to withdraw.

b) A power to withdraw property from a trust ceases to be treated as a presently exercisable general POA upon its lapse, release, or waiver.

D. Creditor Claim: Nongeneral Power (§504)

1. Provisions of statute:

a) Except as otherwise provided in subsections (b) and (c), appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate.

b) Appointive property subject to a nongeneral power of appointment is subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent that the powerholder owned the property and, reserving the nongeneral power, transferred the property in violation of the Uniform Fraudulent Transfer Act.

c) If the initial gift in default of appointment is to the powerholder or the powerholder's estate, a nongeneral power of appointment is treated for purposes of this Section as a general power.

2. Notes:

a) The general rule is that a nongeneral POA is not an ownership-equivalent power, so the powerholder's creditors cannot reach the appointive property to satisfy their claims.

b) One exception is when the powerholder formerly owned the appointive property and transferred it in fraud of her creditors, reserving a nongeneral POA for herself. In this case, her creditors can reach the appointive property.

c) Another exception applies if the gift-in-default clause provides for the appointive property to pass to the powerholder or the powerholder's estate. This is treated as a general POA.

VII. MISCELLANEOUS PROVISIONS (ARTICLE 6)

A. Uniformity of Application and Construction (§601). In applying and construing this uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

B. No §602. §602 is left blank under the Illinois UPOA; in the UPOA, the title is "Relation to Electronic Signatures in Global and National Commerce Act.

C. Application to existing relationships (§603).

1. Provisions of statute:

a) Except as otherwise provided in this Act, on and after the effective date of this Act:

(1) This Act applies to a POA created before, on, or after its effective date;

(2) This Act applies to a judicial proceeding concerning a POA commenced on or after its effective date;

(3) This Act applies to a judicial proceeding concerning a POA commenced before its effective date unless the court finds that application of a particular provision of this Act would substantially interfere with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of this Act does not apply and the superseded law applies;

(4) A rule of construction or presumption provided in this Act applies to an instrument executed before the effective date of the Act unless there is a clear indication of a contrary intent in the terms of the instrument; and

(5) An act done before the effective date of this Act is not affected by this Act.

b) If a right is acquired, extinguished, or barred on the expiration of a prescribed period that commenced under law of this State other than this Act before the effective date of this Act, the law continues to apply to the right.

c) No trustee is liable to any person in whose favor a POA may have been exercised for any distribution of property made to persons entitled to take in default of the effective exercise of the POA to

the extent that the distribution shall have been completed prior to the effective date of this Act.

2. The Illinois POA Act is intended to have the widest possible effect, and will apply to all POAs whenever created, to judicial proceedings commenced on or after the Act's effective date, and unless the court otherwise orders, to judicial proceedings already in progress on the effective date.

3. However, there is no retroactive application of the Act to alter property rights that became irrevocable prior to the effective date, and rights already barred under former law are not revived by this Act.

4. No other action taken before the effective date will be affected by the Act's enactment.

VIII. OTHER CHANGES TO ILLINOIS LAW

A. The Illinois Disclaimer statute (755 ILCS 5/2-7) is revised to add language providing that "a powerholder, as that term is defined in Section 102 of the Uniform Powers of Appointment Act, with respect to property shall be deemed to be a holder of an interest in such property". This allows a powerholder to disclaim a POA in whole or in part, while complying with the other provisions of the Illinois Disclaimer statute.

B. The Testamentary Powers of Appointment statute (755 ILCS 5/4-2) is repealed.

C. The Power of Appointment Exercise Act (765 ILCS 320 et. seq.) is repealed.

D. The Termination of Powers Act (765 ILCS 325 et. seq.) is repealed.

IX. AVOIDING MISTAKES IN CREATING POAS AND EXERCISING POAS

A. Creating POAs. Generally, use clear language to achieve the desired objective, to avoid court construction.

1. Specify if the POA is intended to be a general or nongeneral power, and identify the permissible appointees accordingly. For example, specify if the power may or may not be exercisable in favor of the powerholder, the powerholder's estate, or the creditors of the powerholder or the powerholder's estate.

2. Consider the tax consequences.

3. Consider specifying what state law will govern the exercise, release or disclaimer of the POA by the powerholder; otherwise these actions will

be governed by the law of whatever domicile the powerholder has at the time the actions are taken.

4. The document creating the POAs must be valid and satisfy whatever formalities are required under applicable law (e.g., witnesses if the document is a Will).

5. Always include a gift-in-default clause, and include sufficient takers-in-default so that the clause is likely to be effective.

B. Exercising POAs.

1. Use a separate "specific-exercise clause" that refers to the POA, the instrument under which the POA is granted, and the details of how the property is to be appointed.

   a) Recommended: "I hereby exercise the POA conferred upon me by [Section ___ of my mother's Will] as follows: I appoint [fill in details]."

   b) Do not rely on a blanket exercise clause "I exercise any power of appoint I may have over any property . . . ."

   c) Do not rely on a blending clause, which may result in appointing assets to impermissible appointees: "All of the residue of my estate, including the property over which I have a POA under my mother's Will, I devise as follows:"

2. Rather than relying on silence to indicate a nonexercise of a POA, consider including a specific "nonexercise" clause in a powerholder's estate planning documents if the powerholder decides not to exercise a specific power, such as "I do not exercise the POA conferred on me by my father's trust . . . ."

3. Comply with any formalities imposed by the donor in exercising the POA, such as specifically referring to the POA. Although the UPOA includes §304 which permits "substantial compliance" with donor-imposed formalities to save some potentially ineffective exercises of POAs, it is best to simply avoid any question of whether a POA is exercised correctly.

4. The document exercising the POAs must be valid and satisfy whatever formalities are required under applicable law (e.g., witnesses if the document is a Will).

C. Common Problems.

1. Powerholder exercises POA and directs that the appointive property be added to the powerholder's revocable trust.

   a) If the POA is general and includes the powerholder or the powerholder's estate as permissible appointees, this may be acceptable.

   b) If the POA is general only because the powerholder's creditors are permissible appointees, this is probably ineffective.

   c) If the POA is nongeneral, the exercise of the POA may be invalid:

      (1) Typically, the powerholder's revocable trust is subject to the payment of administrative expenses, debts, and taxes. Because the powerholder's creditors are not permissible appointees, the appointed property cannot be used to pay these expenses, debts, and taxes. The exercise of the POA is invalid.

      (2) If the powerholder's revocable trust specifies that the appointed property shall be added to a subtrust and not subject to the payment of administrative expenses, debts, and taxes, then the exercise of the POA may be effective, depending upon the terms of the subtrust.

      (3) Another acceptable approach is for the instrument exercising the POA to direct that the appointive property be added directly to the subtrust created under the powerholder's revocable trust, again depending upon the terms of the subtrust.

2. Appointment of assets to impermissible appointees.

   a) If powerholder is appointing to a class of "descendants" or "issue", check that the definition of "descendants" or "issue" under the exercise of the POA is not broader than the definition under the instrument creating the POA.

   b) All beneficiaries under the exercise of a POA, including initial beneficiaries, successor beneficiaries, and contingent remainder beneficiaries – must be permissible appointees.

      (1) For example, assume the permissible appointees of a POA are limited to the donor's descendants. The POA is

exercised to appoint the assets to a new trust for the benefit of the donor's grandchild for the grandchild's lifetime. Upon the grandchild's death, the remaining assets continue to be held in trust for the benefit of the grandchild's spouse and descendants. This is an invalid exercise of the POA because spouses are impermissible appointees.

(2) In that same situation, assume that the POA is exercised to create the lifetime trust for the grandchild, but the grandchild is granted a testamentary POA exercisable in favor of the grandchild's spouse and descendants. If the POA is not exercised, the takers in default are the grandchild's descendants. This is a valid exercise of the POA because the powerholder is authorized to exercise the POA to grant a permissible appointee (the grandchild) a new POA that can be exercised in favor of individuals who were not permissible appointees under the original POA (such as the spouse of the grandchild).

(3) Using those same facts, assume that if the grandchild does not exercise his testamentary POA over his new trust, and the grandchild has no descendants living at his death, the remaining assets in the new trust pass to specific charities under a "Failure of Beneficiaries" or "Catastrophe" provision. This in an invalid exercise of the POA because charities are not permissible appointees under the original POA.

(4) Using those same facts again, assume that the "Failure of Beneficiaries" or "Catastrophe" provision provides for the remaining assets to pass to the grandchild's "heirs determined under the intestacy provisions of Illinois law." Because "heirs" under Illinois law could include spouses, or half-siblings who are not descendants of the donor, the exercise of the POA is invalid.

(5) The drafting attorney might avoid this problem by using the following bolded carve-out provision in the "Catastrophe" provision, to provide for the appointive property to revert back to the original trust under which the POA was created, so that its gift-in-default clause will apply:

"If at any time there is no living beneficiary of a trust, the trustee shall distribute any trust principal not otherwise effectively disposed of to those persons then living who would have been entitled at that time to receive my personal property under the laws of the State of Illinois, and in the proportions determined under those laws, had I died intestate on the date of such termination, unmarried and domiciled in the State of Illinois; **provided, however, that with respect to the extent a trust is holding property received as a result of my exercise of a power of appointment over the ABC TRUST, the trustee shall distribute such property to the trustee of the ABC TRUST**."

3. Powerholder's exercise exceeds the scope of the POA.

   a) The person exercising a POA must actually be a powerholder under a real POA.

   b) POA may be limited to a certain percentage of trust assets (perhaps 50%) and the powerholder attempts to appoint 100% of the trust assets.

   c) POA may be limited to changing only the method (in trust or outright) in which a beneficiary receives assets.

   d) POA might limit what can be appointed to a particular individual. For example, a spouse of a trust beneficiary may be a permissible appointee under a POA, but only an income interest in the appointive property may be appointed to such spouse.

4. Exercise of POA violates the rule against perpetuities.