LITIGATION INVOLVING POWERS OF APPOINTMENT

Written & Presented by:

BRANDY BAXTER-THOMPSON
Baxter-Thompson Law, PLLC
Dallas, Texas

BRANDY BAXTER-THOMPSON
Baxter-Thompson Law, PLLC
500 N. Akard St., Suite 2150
Dallas, Texas 75201
Phone: 214-217-2427
Fax: 214-975-2055
Email: brandy@b-tlaw.com
www.baxterthompsonlaw.com

LITIGATION INVOLVING POWERS OF APPOINTMENT

I. INTRODUCTION

It is unlikely that most estate planners would appreciate the possibility of litigation arising out of a power of appointment, particularly in their exercise. The primary reasons planners include a power of appointment are for tax considerations and flexibility to address future circumstances unforeseen at the time of their creation. Some planners include these powers in trusts to permit decanting.

Historically, powers of appointment have rarely been the subject of litigation. The sparse caselaw on the subject confirms this point. However, the issue of a beneficiary's standing to demand an accounting or sue a trustee if their interest is subject to a power of appointment has arisen more and more. Other potential litigation issues include challenging the creation of a power of appointment (rarely litigated) and challenging the exercise of a power of appointment (more frequently litigated). This article will address both the standing concerns as well as the potentially litigated topics of whether a power is created and whether it was properly exercised.

II. POWERS OF APPOINTMENT

A "power of appointment" is a power of disposition given to a person over property not his own, by someone who directs the mode in which that power shall be exercised by a particular instrument. *Wright v. Greenberg*, 2 S.W.3d 666 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). A power of appointment is neither property nor an estate, but merely a right of power; the authority given to the donee to appoint property to another does not vest that interest in the donee. *Doggett v. Robinson*, 345 S.W.3d 94 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283 (Tex. App.—Houston [1st Dist.] 1995, no writ). A power of appointment is created when one person, the donor, grants another person, the donee, the authority to designate the recipient of the donor's property.

The Property Code defines "power" as "the authority to appoint or designate the recipient of property, to invade or consume property, to alter, amend, or revoke an instrument under which an estate or trust is created or held, and to terminate a right or interest under an estate or trust, and any authority remaining after a partial release of a power." TEX. PROP. CODE § 181.001(2).

Other definitions of a power include the following:

- a power enabling the donee to designate, within such limits as the donor may prescribe, the transferees of property or the shares in which it shall be received
- a power of disposition given to a person over property not his or her own, by someone who directs the mode in which that power shall be exercised by a particular instrument
- authority to do an act which the owner granting the power might him- or herself lawfully perform

- a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property

See 62 Am. Jur. 2d Powers of Appointment § 2. A power of appointment created under a will is called a testamentary power.

a. Key Terms: Donor, Donee, Appointee

Every power of appointment has a donor, a donee, and an appointee. These terms of art are defined as follows:

- The **donor** is the individual who creates the power of appointment. The donor must own the appointive property at the time the power of appointment is created. When a testator has granted a power of appointment, the testator is the donor. Restatement (Third) of Property § 17.2(a).
- A **donee** is a person who may exercise a power as authorized by the donor. TEX. PROP. CODE § 180.001(1).
- An **appointee** is the person or entity to whom the property is appointed by the donee. Restatement (Third) of Property § 17.2(e). Reference to a "permissible appointee" means that the appointee has not yet had property appointed to him or her.
- A **taker-in-default** is a person who will receive the property subject to the power if the property is not effectively appointed. Restatement (First) of Property § 319.

b. Classifications of Powers of Appointment

It is necessary to determine a couple of classifications of powers of appointment for the purposes of this article. First, whether the power is a general power or a nongeneral power is important to note. Second, when and how the power can be exercised is also important in our analysis of standing.

i. General Power of Appointment vs. Nongeneral Power of Appointment

Powers of appointment are classified as either general or nongeneral. A general power of appointment allows the donee to appoint the property to anyone, including the donee, the donee's estate, the donee's creditors, or the donee's estate creditors. 26 U.S.C.A. § 2041(b). A nongeneral power of appointment is a power that is not a general power. Generally, a nongeneral power is exercisable only among the members of a small group, such as the donee's descendants, or can be much broader, such as the ability to appoint the property to anyone other than the donee, her estate, her creditors, or the creditors of her estate. *See* Bogert's, The Law of Trusts and Trustees (Third Edition) § 299.

ii. Presently Exercisable, Testamentary, or Postponed

A power of appointment is further defined based on when the power can be exercised: currently or upon the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time. Thus, a power is either presently exercisable, testamentary, or a postponed power. This categorization applies to both a general and

nongeneral power of appointment. *See* Bogert's, The Law of Trusts and Trustees (Third Edition) § 299.

Making this distinction is necessary in analyzing whether the power was exercised properly. As noted in Section V, *infra*, whether the power was exercised properly is the most frequently asserted claim in litigation involving powers of appointment.

(1) **Presently Exercisable Powers**

A power that is exercisable currently is a "presently exercisable" power of appointment. A power is presently exercisable if the donee may exercise it at the time in question, regardless of whether it is *also* exercisable by will. Thus, a power exercisable by deed only or by deed or will is a presently exercisable power. Restatement (Third) of Property § 17.3(a).

(2) Testamentary Powers

A power of appointment is testamentary if it can only be exercised in the donee's will. Restatement (Third) of Property § 17.3(b).

(3) Postponed Powers

A power is a postponed (or deferred) power if it is not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period of time. After the condition has been satisfied, however, the postponed power becomes presently exercisable. Restatement (Third) of Property § 17.3(c).

III. STANDING ISSUES

This section addresses standing of a taker-in-default and an appointee to demand an accounting, sue a trustee, and contest the instrument either creating or exercising the power of appointment.

a. Standing in General

Standing is an issue that arises frequently in the context of trusts and wills. A party must have standing to pursue a cause of action. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). If the party lacks standing, then the court has no jurisdiction over the claim. *Thomas v. Long*, 207 S.W.3d 334, 338 (Tex. 2006) (holding trial court properly dismissed claims over which it had no subject matter jurisdiction).

The key to standing is whether the party has a justiciable interest in the outcome of the lawsuit. The general test for standing in Texas requires a real controversy between the parties, which will be determined by the judicial declaration sought. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Standing is a component of subject-matter jurisdiction and may not be waived. *Id*. at 443–44.

Other bases for standing is if the person (1) has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; (2) has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) has a personal stake in the controversy; (4) has suffered some injury in fact, either

economic, recreational, environmental, or otherwise; or (5) is an appropriate party to assert the public's interest in the matter, as well as his own. *Wassmer v. Hopper*, 463 S.W.3d 513, 523 (Tex. App. 2014).

b. Contingent Remainder vs. Vested Remainder

One consideration in standing is to note whether the beneficiary is a contingent remainder beneficiary or a vested remainder beneficiary. Whether the beneficiary's interest is contingent or vested can affect their standing to pursue certain actions. The language creating the interest will determine if the remainder interest is vested or contingent.

A *contingent remainder* beneficiary is an unascertainable taker whose interest is dependent on a future event. The right to take is contingent upon surviving the testator / settlor or upon the happening of some event. If the beneficiary is identified as an heir-at-law, for example, then the interest is subject to surviving the person from whom the heir would take because a person's heirs cannot be ascertained until he dies. *Glenn v. Holt*, 229 S.W. 684, 685-86 (Tex. Civ. App.—El Paso 1921, no writ); *see also* Restatement (Third) of Property § 249 cmt. e (1940).

A *vested remainder* beneficiary must be living, an ascertainable person, and have no conditions precedent other than the termination of prior estates. *In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 715, 717 (Tex. App.—Texarkana 2008, pet. denied). A vested remainder is an immediate right of present enjoyment or a present right of future enjoyment. It is a fixed interest with only the right of possession postponed until the ending of a particular estate. *Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 288 (Tex. App.—Houston [14th Dist.] 1995, pet. denied). For example, a devise by A to B for life with remainder at his or her death to C creates a vested remainder in C on the death of A, subject to B's life estate. The phrase "at his or her death" or words of similar import denotes the time when the right of possession and enjoyment of the estate begins and not the time when the estate in remainder vests.

Texas law favors a construction that allows vesting at the earliest possible time, and Texas courts will not construe a remainder as contingent when it can reasonably be taken as vested. *McGill v. Johnson*, 799 S.W.2d 673, 675 (Tex. 1990). Under Texas' rules of construction, if a condition precedes or is incorporated into the gift of the remainder, it is a condition precedent; but if the condition is added after a vested gift is made, the remainder is vested subject to divestment. *Id.*

c. Revocable Trusts – Horse of a Different Color

The general rule is that no remainder beneficiary has standing to demand an accounting or pursue a cause of action related to a revocable trust while the settlor is living. *See Moon v. Lesikar*, 230 S.W.3d 800, 804 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (concluding remainder beneficiary lacked standing to pursue action against trustee after settlor's death when settlor (father) was also sole beneficiary and co-trustee of trust with power to revoke trust during his lifetime). In a revocable trust, the rights of non-settlor beneficiaries are generally subject to the settlor's control. Thus, the trustee cannot

be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime. *See* Bogert's, The Law of Trusts and Trustees (Third Edition) § 964.

So long as the settlor or current beneficiary has capacity and retains the power to revoke or amend the trust, then that individual has the functional equivalent of outright ownership of the trust assets. As a result, the trustee of a revocable trust, while subject to normal fiduciary duties to the settlor, is not accountable to and under no duty to provide information about the trust to any non-settlor beneficiaries. *See* Bogert's, The Law of Trusts and Trustees (Third Edition) § 964. Once no person has the right to revoke or amend a trust, the remaining beneficiaries may hold the trustee accountable for its administration of the trust.

After settlor's death, courts have allowed beneficiaries to pursue breach of fiduciary duty claims related to the administration of the trust during settlor's lifetime. Circumstances giving rise to the beneficiary's standing to sue after settlor's death include when the settlor had lost capacity, was under undue influence, or did not approve or ratify the trustee's conduct. *See Mayfield v. Peek*, 546 S.W.3d 253, 262 (Tex. App.—El Paso 2017, no pet.) (concluding that while the settlors unfettered right to alter the trust is highly relevant to the merits of any claim asserted here, it does not deny the trial court subject matter jurisdiction over an undue influence or lack of mental capacity claim).

d. Standing to Seek Trust Accounting of Irrevocable Trust

Only a beneficiary or interested person has standing to compel an accounting. TEX. PROP. CODE § 113.151. The Trust Code permits a beneficiary to make written demand for an accounting from the trustee. TEX. PROP. CODE § 113.151(a). If the trustee does not provide an accounting within the 90-day prescribed period, then a beneficiary may sue the trustee seeking an order compelling the trustee to account for his actions. *Id*.

A beneficiary is defined as "a person for whose benefit property is held in trust, regardless of the nature of the interest." TEX. PROP. CODE § 111.004(2). An "interest" is "any interest whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible." TEX. PROP. CODE § 111.004(6).

An "interested person" may seek an accounting, but only by filing suit to compel the trustee to account. TEX. PROP. CODE § 113.151(b). An interested person is defined as:

> A trustee, beneficiary, or any other person having an interest in or claim against the trust. *Whether a person, excluding a trustee or named beneficiary, is an interested person* ***may vary from time to time*** *and* ***must be determined according to the particular purposes and matter involved in the proceeding***.

TEX. PROP. CODE § 111.004(7) (emphasis added). An interested person is not permitted to make a written demand for an accounting, but must first establish, through a court action, that their interest is sufficient to give rise to disclosure of such sensitive information. *See* TEX. PROP. CODE § 113.151(a).

The terms of an irrevocable trust may not limit a trustee's duty to respond to an accounting demand under Section 131.151 "if the demand is from a beneficiary who, at the

time of the demand (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if the trust terminated at the time of the demand." TEX. PROP. CODE § 111.0035(b). Thus, the settlor can limit a beneficiary's right to an accounting if the beneficiary isn't entitled to distributions and would not receive a distribution if the trust terminated at the time of the demand.

Vested remainder beneficiaries of a trust should always meet the "interested person" standard. Contingent remainder beneficiaries should also meet this standard. Nevertheless, some courts have determined that certain remainder beneficiaries are not "interested persons" because "[w]hether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." TEX. TRUST CODE § 111.004(7); *see Berry v. Berry*, No. 13-18-00169-CV, 2020 WL 1060576, at *4 (Tex. App.—Corpus Christi–Edinburg Mar. 5, 2020, no pet.) (mem. op.)(holding contingent remainder beneficiary seeking relief individually did not have standing to sue trustee because contingent remainder beneficiary not a necessary party).

Note: At least one court has found that while a beneficiary had sufficient standing to bring a cause of action against the trustees, the contingent beneficiary did not have an interest sufficient to require the trustee to account to him. *Hill v. Hunt*, 2009 WL 5125085, No. 3:07-CV-2020-0 at *7 (N.D. Tex. Dec. 29, 2009) (holding plaintiff had insufficient interest to demand accounting); see also *Hill v. Hunt*, 2009 WL 5178021, No. 3:07-CV-2020-0 (N.D. Tex. Dec. 30, 2009) (holding plaintiff had sufficient interest to bring suit).

i. Taker-in-default's Standing to Demand Accounting

A taker-in-default is a beneficiary of the trust and, therefore, has standing to demand an accounting. *See Arnold v. Southern Pine Lumber Co.*, 58 Tex. Civ. App. 186, 123 S.W. 1162 (1909), writ dism'd (holding children who took in default if power not exercised were vested remaindermen); *see also* Bogert's, The Law of Trusts and Trustees (Third Edition) § 962. Even if the beneficiary's interest is a contingent one, the Trust Code provides that he would have standing to make written demand for an accounting. *See* TEX. PROP. CODE § 111.004(2), (6).

Once the power of appointment is exercised and the taker-in-default is divested of his beneficiary status, then he would lack standing to demand an accounting. *See Fisher v. Linthicum*, No. 05-91-01228-CV, 1993 WL 96118, at *11 (Tex. App. Mar. 31, 1993), writ denied (Sept. 10, 1993).

ii. Appointee's Standing to Demand Accounting

The general rule provides that permissible appointees of a power of appointment, who do not otherwise have an interest in the trust, are not owed fiduciary duties by the trustee and are not "beneficiaries" entitled to receive information from the trustee about the trust. *See* Bogert's, The Law of Trusts and Trustees (Third Edition) § 962. If the power is presently exercisable, then once the power is exercised to appoint property to the appointee the appointee would have standing as a beneficiary and could make written demand for an accounting.

iii. *Testamentary Power of Appointment*

A power of appointment exercised in a donee's will is not effective until the donee is deceased and the will is admitted to probate. *See* TEX. EST. CODE § 265.001. Thus, the taker-in-default would have standing to seek an accounting as a beneficiary even if the donee has exercised the power in a will. Conversely, the appointee(s) would not have standing until the will's admission to probate. *See Greene v. First Nat. Bank of Chicago*, 162 Ill. App. 3d 914, 114 Ill. Dec. 156, 516 N.E.2d 311 (1st Dist. 1987) (finding that prior to testator's death, trustee owned no duty to appointee). Note: the *creation* of a power of appointment in a will is effective at the death of the testator. *See* TEX. EST. CODE § 101.001(2).

e. Standing to Sue Trustee of Irrevocable Trust

Under Section 115.011, an interested person, which includes a beneficiary or trustee, may bring a trust action. TEX. PROP. CODE § 115.011(a). Further, the Trust Code provides that the following are parties necessary in any trust action:

- Beneficiary on whose act or obligation the action is predicated;
- Person designated by name in the instrument creating the trust other than a beneficiary whose interest has been distributed, extinguished, terminated or paid;
- Person actually receiving distributions from the trust estate at the time the action is filed; and
- Trustee, if the trustee is serving at the time the action is filed.

See TEX. PROP. CODE § 115.011(b).

For declaratory judgment actions involving a trust, all persons who have an interest that would be affected by the outcome must be joined as a party, which may include contingent beneficiaries. See TEX. CIV. PRAC. & REM. CODE § 37.006(a).

i. Presently Exercisable General Power of Appointment

The holder of a presently exercisable general power of appointment may appoint the property, at any time, by will or deed, to himself, his estate, his creditor's or his estate's creditors. When the trustee or beneficiary has legal capacity to exercise a presently exercisable general power of appointment, then no other beneficiary has standing to maintain an action. *See* Bogert's, The Law of Trusts and Trustees (Third Edition) § 964. This power is the equivalent of the power to revoke or amend by a settlor in a revocable trust.

ii. Presently Exercisable Nongeneral Power of Appointment

The holder of a presently exercisable nongeneral power of appointment (either the trustee or a beneficiary) may appoint the property, at any time, by will or deed, as the donor directs, but may not appoint to himself, his estate, his creditor's or his estate's creditors.

(1) Taker-In-Default

A taker-in-default has standing to pursue a claim against the trustee unless and until the power of appointment is exercised to remove the taker-in-default as a beneficiary. Once the power of appointment over the property has been exercised in favor of another, the taker-in-default has no standing to complain of the disposition of property. *Dickerson v. Keller*, 521 S.W.2d 288, 292 (Tex. App.—Texarkana 1975, writ ref'd n.r.e.). They have been divested of their interest and, therefore, lose standing. *Aubrey v. Aubrey*, 523 S.W.3d 299 (Tex. App.—Dallas 2017, no pet.)(finding that even if purported beneficiary's interest in trust was contingent, she was an "interested person" who had standing to bring action for removal of trustee).

(2) Appointee

A potential appointee lacks standing to sue the trustee because he is not a beneficiary. The potential appointee has no more rights than a potential beneficiary. *See Davis v. Davis*, 734 S.W.2d 707, 709-10 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (holding plaintiff did not have standing based on his claim that he is a *potential* beneficiary of the trust because "the possibility of inheritance does not create a present interest or right of title in property").

In *Davis v. First National Bank of Waco*, the court held that "[a]n expectant heir has no present interest or right in property that he may subsequently inherit and consequently he cannot maintain a suit for the enforcement or adjudication of a right in the property." 161 S.W.2d 467, 472 (Tex. 1942). This same analysis would apply to the rights of an appointee in a power of appointment.

iii. Testamentary Power of Appointment

The exercise of a testamentary power of appointment is not effective until the donee dies and the donee's will is admitted to probate. *See* TEX. EST. CODE § 256.001 (will not effective until probated). A beneficiary's standing to sue the trustee while the donee is alive is not affected by the exercise of a power of appointment under a will while the donee lives. *See Reilly v. Huff*, 335 S.W.2d 275 (Tex. App.—San Antonio 1960, no writ)(finding that a remainder interest that passes upon the death of a life tenant vests at death of the testator, not at the termination of the life estate). Conversely, a permissible appointee would not gain standing unless and until the power is exercised in the will, the donee dies, and the donee's will is admitted to probate. *Fisher v. Linthicum*, No. 05-91-01228-CV, 1993 WL 96118, at *11 (Tex. App. Mar. 31, 1993), writ denied (Sept. 10, 1993) (finding after donee's codicil exercising power of appointment takers-in-default were deprived of standing).

When the donee holds a testamentary power of appointment, a permissible appointee is a potential beneficiary of trust assets who lacks standing to sue a trustee because he is not an "interested person" under the Texas Trust Code. *See* TEX. PROP. CODE § 111.004(7); *see also Davis v. Davis*, 734 S.W.2d 707 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). The Northern District of Texas went a step further in the *Cote* decision. *See Cote v. Bank One, Tex., N.A.*, No. 4:03-CV-296-A, 2003 WL 23194260 (N.D. Tex. Aug. 1, 2003)(mem. op.)(holding that any remainder beneficiary lacked standing to sue where primary beneficiary holds testamentary power of appointment and could appoint property to different beneficiary). *See also Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270 (Comm. App. 1942) (finding that beneficiary lacks standing to maintain suit or adjudicate right in property he expects to inherit because he has no present right or interest in property).

f. Standing to Challenge Instrument Creating or Exercising Power of Appointment

Standing to challenge a particular instrument, such as a will, trust, or deed, is dependent on whether the party pursuing the action has an interest that would be affected by setting aside the instrument. If there is no financial impact in setting aside the instrument, it is unlikely he would have standing to contest the document's validity.

The primary bases for challenging a will, trust, or deed is that the maker lacked capacity to execute the document or the maker was unduly influenced to execute the document.

i. Will Contest – Creating or Exercising Power of Appointment

A person seeking to have a will declared invalid must file a will contest alleging the testator lacked testamentary capacity, was unduly influenced to create the will, or did not comply with the formalities in making a will. Under the Estates Code and related case law, only an "interested person" has standing to participate in a probate proceeding. An "interested person" is generally one who has a pecuniary interest that will be affected by the probate proceeding. Anyone else is a "mere meddlesome intruder" and lacks standing. Texas Estates Code Section 22.018 defines an "interested person" or "person interested" as follows:

> [A]n heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered; and anyone interested in the welfare of an incapacitated person, including a minor.

A person named as a remainder beneficiary of a testamentary trust has standing to contest the probate of another will. *Schindler v. Schindler*, 119 S.W.3d 923 (Tex. App.—Dallas 2003, no writ). An appointee under the exercise of a power of appointment was an interested person with sufficient standing to challenge distribution of assets under the will where appointee claimed property right in one-half of assets of estate by virtue of donee's exercise of power of appointment. *Foster v. Foster*, 884 S.W.2d 497 (Tex. App.—Dallas 1993, no writ).

ii. Challenging Deeds or Trusts Exercising or Creating a Power of Appointment

A person seeking to have a deed or trust declared invalid may file a declaratory judgment action to declare the documents invalid. *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a). Most often deeds or trusts are challenged on the basis that the grantor lacked contractual capacity or was unduly influenced to create the deed or trust. *See* TEX. PROP. CODE § 112.007 (capacity of settlor); *In re Estate of Johnson*, 340 S.W.3d 769 (Tex. App.—San Antonio 2011, pet. denied)(certain trusts invalidated based on jury's finding that settlor's wife unduly influenced settlor).

Like a will contest, a taker-in-default or an appointee would have standing to challenge a deed or trust. Their standing would turn on whether a previously executed document was validly executed. For example, a taker-in-default who was "removed" as a beneficiary under a validly executed will would not have standing to pursue an action to set aside a trust. Their standing was contingent upon the will's admission to probate. Likewise, if a donee never exercised the power to appoint property to the permissible appointee, then the appointee would have no interest in the validity of the trust.

IV.LITIGATING THE CREATION OF A POWER OF APPOINTMENT

The basic requirements to create a power of appointment are addressed below. Interestingly, the law provides for great flexibility in the language used to create the power, but that is the very issue litigated in the cases noted below. This suggests that, while the language may be flexible, clarity and use of the phrase "power of appointment" would remove any doubt as to the donor's intent.

a. Requirements to Create Power of Appointment

While no technical, special or particular form of words is necessary to create a power of appointment, a valid power of appointment must be in a writing and include the following:

- a donor
- a donee
- property owned by the donor
- an appointee or appointees

Restatement (Third) of Property § 17.2, Comment a; § 18.1, Comment a.

The document creating the transfer must be (a) properly executed and (b) the donor must have capacity. *See* Restatement (Third) of Property § 18.1, Comment a. A power of appointment is created only if the instrument creating the power is valid under applicable law. If the power is created under a Texas inter vivos trust, the trust must be executed with the formalities required under Chapter 112 of the Property Code. If the power is created in a will, then the will must be properly executed in accordance with the Estates Code. *See* TEX. EST. CODE, Chapter 251 (Fundamental Requirements and Provisions Relating to Wills).

Chapter 181 of the Texas Property Code does not address how a power of appointment may be created except when a donee creates a new power of appointment in the exercise of a power of appointment. *See* TEX. PROP. CODE § 181.083.

i. Effective Date of Power

Powers of appointment granted in a will become effective upon the testator's death. *See* TEX. EST. CODE § 101.001(2). Thus, the will need not be admitted to probate before the donee may exercise the power of appointment. *Id.*; *see also Foster v. Foster*, 884 S.W.2d 497 (Tex. App.— Dallas 1993, no writ).

A power of appointment created in a deceased individual never becomes effective. Unif. Powers of Appointment Act § 201(c). Likewise, if the donee dies before the effective date of a document purporting to confer on the donee a power of appointment, the power is not created. Restatement (Third) of Property § 19.11.

b. Challenging the Creation of a Power of Appointment

The following cases consider the issue of whether a testamentary instrument created a power of appointment. The documents themselves were not challenged. The court looked at the language used and discerned the intent of the testator. In both circumstances, the court of appeals found that the instruments did not create powers of appointment; rather, they created a power of sale.

***Bridges v. First Nat'l Bank in Dallas*, 430 S.W.2d 376 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.)** – Testator created trust in will for benefit of Hong. In her first codicil, Testator gave trustees power to sell certain real property and "to give proceeds to Hong to spend as he desires." In her second codicil, Testator transferred all of her Texas Co stock to Trustees for Hong's benefit. The third and final codicil provided that the Trustees could sell any or all of the Texas Co stock for Hong's benefit, if requested by Hong.

In Hong's will, he left his estate to Ruth Bridges, including the real property Testator left in trust for Hong's benefit under her first codicil. A lawsuit was filed claiming Testator did not give Hong a general power of appointment through her testamentary instruments and, therefore, Hong had no right give the property to Bridges.

Bridges argued the testamentary documents granted Hong a general power of appointment. The court found that Hong was granted a life estate with the right to cause the sale of property by the Trustees, not a general power of appointment permitting him to appoint the property to himself and then make a gift of the property to Bridges. "When a life tenant is granted a power of sale such power is more restricted then a general power of disposition; and certainly, does not include a right to make a gift."

***Moore v. Wardlow*, 522 S.W.2d 552 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.)** – Wife's will gave her interest in a large ranch to her grandchildren subject to the right given her husband to "hypothecate or dispose of same during his lifetime, as he may see fit." Wife also gave certain oil and gas property to her husband with the right to sell or dispose as he saw fit and whatever was left at his death passed to their son for his life, then to their grandchildren in fee simple.

Husband sold the large ranch and kept the proceeds. Upon his death, the grandchildren sued the executor of Husband's estate for an accounting. The executor took the position that Husband sold the ranch leaving nothing to distribute to the grandchildren. At trial, the

court found that, while Husband could sell the ranch, any "traceable proceeds or mutations from such disposition" remaining intact at Husband's death passed to the grandchildren.

The court noted that a power of appointment is dispositive in nature and a power of sale is administrative in nature. After discussing the definition of a power of appointment and a power of sale, the court concluded that the language giving Husband the right to "hypothecate or dispose" of property during his lifetime did not equate to a power of appointment. Thus, the grandchildren had "all of the powers enjoyed by a fee-simple owner except for those reserved to Husband to hypothecate or dispose of their interest."

Author's Comment

In the event the testator / settlor does not want to give a beneficiary a power of appointment, the will or trust could specifically decline to give a power of appointment. This would leave no doubt as to whether one is created in the document.

V. LITIGATING THE EXERCISE OF A POWER OF APPOINTMENT

The largest source of litigation related to powers of appointment involves challenges to the exercise of a power. The basis for such challenges includes the alleged failure of the donee to exercise the power, an impermissible exercise of the power, and a challenge to the instrument exercising the power.

a. Requirements to Exercise a Power of Appointment

To properly exercise a power of appointment, the donee must:

- clearly **intend** to exercise the power,
- have sufficient **capacity** to exercise the power,
- exercise the power by an **instrument that satisfies the formal requirements** imposed by the donor and under the applicable law, and
- exercise the power **as permitted by the donor**.

Restatement (Third) of Property § 19.11.

Unless an instrument creating a power expressly provides to the contrary, a donee may exercise a power in any manner consistent with the Property Code provisions governing exercise of powers of appointment. TEX. PROP. CODE § 181.081. In exercising a power, a donee may make an appointment:

(1) of present, future, or present and future interests;
(2) with conditions and limitations;
(3) with restraints on alienation;
(4) of interests to a trustee for the benefit of one or more objects of the power; and
(5) that creates any right existing under common law.

TEX. PROP. CODE § 181.082.

A donee may make an appointment that creates in the objects of the power additional powers of appointment. TEX. PROP. CODE § 181.083(a). Such additional

powers must be exercisable in favor of objects of the power who would have been permissible objects under the original donee's power. TEX. PROP. CODE § 181.083(a).

A donee who may appoint outright to an object of the power may make appointments that create in the object of the power powers exercisable in favor of persons that the original donee may direct, even though the objects of the secondary power of appointment may not have been permissible objects of the original donee's power. TEX. PROP. CODE § 181.083(b).

i. Intent to Exercise Power* – Fredericks *Criteria

In addition to the technical rules required to exercise a power, the courts also look at the document to determine the donor's intent. To establish the donee's intent to exercise the power of appointment, the instrument purporting must satisfy one of the following criteria:

(1) The instrument must expressly reference the power, or
(2) The instrument must reference the property that is the subject of the power, or
(3) The instrument would have any other operation other than exercising a power of appointment

Republic Nat'l Bank v. Fredericks, 283 S.W.2d 39 (Tex. 1955).

ii. Exercise of Power of Appointment Through Residuary Clause in Will

In 1999, the court in *Wright v. Greenberg* held that Father validly exercised a power of appointment by merely stating at the beginning of his will the following: "I intend to dispose of all my property . . . **including any property over which I may have a power of appointment**." 2 S.W.3d 666 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). The will made no other reference to the power of appointment. The will's residuary clause left the residuary, which purportedly included the property over which he had a power of appointment, to an inter vivos trust created after his remarriage.

Seemingly in light of the *Wright* opinion, in 2003, the legislature enacted Section 58c of the Probate Code (now Section 255.351) to address exercising a power of appointment through a residuary clause, which provides that "[a] testator may not exercise a power of appointment through a residuary clause in the testator's will or through a will providing for general disposition of all of the testator's property unless:

(1) the testator makes a specific reference to the power in the will; or

(2) there is some other indication in writing that the testator intended to include the property subject to the power in the will."

TEX. EST. CODE § 255.351.

b. Basis for Challenging Exercise of a Power of Appointment

The exercise of a power of appointment has been challenged in a variety of circumstances. Challengers have alleged the power was not exercised properly because the language is not clear. Others have challenged the validity of the document exercising

the power of appointment. Some cases require the courts to determine what property was appointed and whether it was intended to merge with the donee's own property.

i. Was the language used by Donee to exercise the power sufficient?

***Doggett v. Robinson*, 345 S.W.3d 94 (Tex. App.—Houston [14th Dist.] 2011, no pet.)** – Husband's testamentary trusts granted Wife a special power of appointment over certain trust assets if she made a "specific reference" to the exercise of the power in her will. If Wife failed to exercise the power, then Husband's will provided for a detailed scheme for distributing the assets. Wife's will directed all of her property, including "any other property over which I may have a power of appointment" to pass according to a residuary clause. The residuary clause left all of Wife's "estate and property" to her daughter, Beverly. Husband's remaining children sued Beverly.

The court held that the language used in Wife's will was insufficient to exercise the power of appointment. Citing the *Fredericks* criteria, the court examined whether her intent was expressed by either referring to the power of appointment, or the property subject to the power, or whether the will had no other purpose such that the only use would be to exercise the power. Looking back at the language used in Husband's will to create the power, it required that the exercise must be by "specific reference." Wife's will did not make specific reference to the power. Further, the court considered that the power of appointment was nongeneral and, therefore, Wife could not appoint the property to herself or her estate. The residuary clause, however, gave all of Wife's estate and property to Beverly, which the court concluded could not include the property over which she held a power of appointment.

Author's Comment

Section 255.351 of the Texas Estates Code (previously Section 58c of the Probate Code) became effective as of September 1, 2003. Any wills created thereafter are subject to this provision. The will in *Doggett* was executed in 2002; therefore, this section did not apply. Note, the same court of appeals previously found that Father's will with similar language exercising a power of appointment was valid. *See Wright v. Greenberg*, 2 S.W.3d 666 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

ii. Did Donee exercise the power of appointment in violation of the trust instrument creating it?

***Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283 (Tex. App.—Houston [14th Dist.] 1995, pet. denied) –** Carroll and Mary established trusts for the benefit of their two sons, Jack and Karl. Each trust terminated two years following the death of the last grantor to die or when the beneficiary reached the age of 35, whichever was later. The trusts gave each son a special testamentary power to appoint such beneficiary's trust to anyone related to the beneficiary or to any charity or charities. Carroll died in 1985, and Karl died in 1992. Karl

exercised his special testamentary power of appointment in favor of two charities. At Karl's death, his mother, Mary, and brother, Jack, were still living.

Jack contended that Karl's exercise was invalid because it *required* distribution of the property subject to the power of appointment in violation of the trust instrument. He argued that the assets in Karl's trust could not be distributed until two years following their mother's death. The court examined the language used in Karl's will to exercise the power and concluded that it did not "require" the trustee to make a distribution in violation of the terms of the trust creating the power. Therefore, the exercise was valid and the charities were entitled to the assets held in trust once the trust terminated.

Author's Comment

This case could have turned out very differently had the attorney used different language to exercise the power in Karl's will. The takeaway from this opinion is to carefully consider the entire trust creating the power, not just the language creating the power. The drafting attorney must balance clarity and conciseness without running afoul of other provisions in the trust.

iii. Is the instrument used to exercise the power valid?

***Foster v. Foster*, 884 S.W.2d 497 (Tex. App.—Dallas 1993, no writ)** – Testator executed a will leaving a dollar to his two sons and appointing his brother, Billy, as executor. He authorized his executor to divide the estate "as he sees fit." Billy filed a declaratory judgment action seeking confirmation that the language created a general power of appointment. Prior to the court's order in the declaratory judgment action, Billy executed a document purporting to exercise the power of appointment to divide testator's estate equally between himself and his other brother, William. Despite the appointment, Billy failed to equally divide the assets between himself and William. William filed an application to partition and distribute the estate's remaining assets.

Billy argued that the power of appointment was not valid when he exercised it because the court hadn't yet determined whether the language in the will was a power of appointment. The Dallas court of appeals rejected this argument citing Section 101.001 of the Texas Estates Code for the proposition that the power of appointment was effective immediately upon testator's death. The will need not be admitted to probate for the power to vest in the donee.

The court considered the *Fredericks* criteria and found that the document exercising the power of appointment satisfied the criteria. The document referenced the power of appointment, stated he was exercising the power, specifically stated that Bill "appointed one-half of the assets subject to the power of appointment" to William. Billy responded that the document was never filed with the county court, therefore it was invalid. Finding no such requirement under the law, the court dismissed this argument and found the document valid.

Billy's final argument claimed William lacked standing to file a partition application because he was not a beneficiary under the will. The court pointed out that, while he may

not be a named beneficiary, Billy's exercise of the power giving him estate assets provided William with standing because he now had an interest in the estate.

Author's Comment

The *Foster* opinion touches on a variety of issues involving powers of appointment: the creation of a power of appointment – the exercise of a power of appointment – the effective date of a power – and standing to sue.

iv. Did Donee intend to merge appointed property with her own property?

***Krausse v. Barton*, 430 S.W.2d 44 (Tex. App.—Houston [Dist.] 1968, writ ref'd n.r.e.) –** Nellie H. Wilson held a general power of appointment given her through her husband's will. The issue was whether Nellie could use the general power of appointment to pay taxes and the debts, expenses and other costs of her estate's administration. In Nellie's will, she appointed so much of the property under her power of appointment as would be necessary to pay these items with the balance passing to Anne Krausse in trust for the benefit of Jean Krausse Davies. The Court found that Nellie clearly referred to the power satisfying the *Fredericks* criteria.

The question the Court struggled with was whether Nellie intend to merge property under her power of appointment with her personal estate *or* whether she intended to devise her estate to the trust estate and also exercise the power of appointment in favor of the trust. The Court considered the other provisions of the will to glean Nellie's intent. Elsewhere in Nellie's will she made specific bequests of cash. The Court considered that, without the use of the property under her power of appointment, the estate would have insufficient cash after paying her debts to make the gifts. The Court looked at evidence establishing that Nellie understood the size of her estate and the extent of her debts. The Court also noted that it was clear she had professional advice in preparing her will and was aware that her estate would be subject to "substantial estate and inheritance taxes as well as the usual expenses of administration." *Id*. at 48. Given this evidence, the Court found it was her intent to merge property under the power with her personal estate.

Author's Comment

This a case where the will was not clearly drafted requiring the court to infer Nellie's intent by examining numerous outside factors. It is interesting that the court never determined the will ambiguous or unclear, but still considered extrinsic evidence. If the court had strictly construed the terms of the will, it is very possible they would have arrived at a different conclusion.

v. Did Donor really mean to give Donee a Power of Appointment??

***Fisher v. Linthicum*, No. 05-91-01228-CV, 1993 WL 96118 (Tex. App.—Dallas Mar. 31, 1993, writ denied)(not designated for publication)** – Maybelle died in 1968. In her will, Maybelle left some of her property to her husband, Edward, with the remainder

held in trust for Edward's benefit. She named Edward as the trustee. By her will, Maybelle also granted Edward a power of appointment over the trust assets. Her will provided that if Edward predeceased her, or failed to exercise the power of appointment, appellants, who were Maybelle's grandchildren, would receive the trust assets.

Edward executed a will that said he was exercising the power of appointment and appointing the Deep Creek Ranch to appellants. Shortly thereafter, Edward executed a codicil the made specific reference to the power of appointment (that power of appointment granted to me under paragraph (b) of Section III of the Last Will and Testament of Maybelle Goddard Linthicum) and the property he was appointing (the Deep Creek Ranch) and the person to whom he was appointing the property (Linthicum). After Edward's death, the grandchildren sued Linthicum alleging they were entitled to the trust assets, demanded an accounting of the trust, and that Edward had either failed to exercise the power or had ineffectively exercised the power. They also sought to set aside the codicil claiming Edward was unduly influenced to execute the codicil that exercised the power of appointment.

Maybelle's grandchildren alleged the exercise of the power of appointment was invalid because it did not comport with Maybelle's intent. According to the grandchildren, Maybelle did not intend to disinherit her grandchildren. They also argued that the power was fiduciary in nature, which the court rejected. The court found that Edward's exercise was valid. The grandchildren also asserted that Maybelle's will was ambiguous and, therefore, extrinsic evidence should be admitted to determine her intent. The court found that Maybelle's will unambiguously gave Edward a power of appointment. Thus, no extrinsic evidence was admissible.

The court also addressed the issue of standing in this case. When the grandchildren served Linthicum with discovery, she filed objections and a plea in abatement asserting they lacked standing to obtain information about the trust because they had no interest in the assets. Any remainder interest they had was extinguished when the power of appointment was exercised and became effective. The court abated the grandchildren's claims ordering them to first establish that the exercise of the power of appointment was invalid. Linthicum then filed her motion for partial summary judgment, which the court granted dismissing their claims regarding the validity of the exercise. The court then proceeded with the challenge to Edward's codicil based on undue influence. The case was severed, and the partial summary judgment order was appealed.

Author's Comment

Given the facts in this case, it is easy to see how Linthicum was granted summary judgment dismissing the grandchildren's claims. This case is a perfect example of how to properly exercise a power of appointment leaving no ambiguity or real basis for challenging the exercise. Despite a diligent search, the author was unable to locate further information regarding the results of the undue influence claim.