



LITIGATION INVOLVING POWERS OF APPOINTMENT

BRANDY BAXTER-THOMPSON
BAXTER-THOMPSON LAW, PLLC
DALLAS, TEXAS

Powers of Appointment

▶ What is a Power of Appointment?

Key Terms:

DONOR

DONEE

APPOINTEE

TAKER-IN-DEFAULT

Classifications of Powers of Appointment

▶ General Power of Appointment

- ▶ Allows **donee** to appoint to:
 - ▶ Donee
 - ▶ Donee's estate
 - ▶ Donee's creditors
 - ▶ Creditors of Donee's estate

▶ Nongeneral Power of Appointment

- ▶ Any power of appointment that is not a general power of appointment – limited or special power

When is the Power Exercisable?

Presently

May exercise at any time regardless of whether it is also exercisable by will

Testamentary

Only through a Last Will and Testament

Postponed

Exercisable upon the occurrence of specified event

Standing Issues – Demand for Accounting

- ▶ Contingent Remainder Beneficiaries

- ▶ Unascertainable taker whose interest is dependent on a future event
- ▶ Example: “heir-at-law”

- ▶ Vested Remainder Beneficiaries

- ▶ A living, ascertainable person
- ▶ Only condition of taking is termination of prior estate

Revocable Trusts

WHEN CAN A
TAKER-IN-DEFAULT
OR APPOINTEE
DEMAND AN
ACCOUNTING?

Irrevocable Trusts

INTERESTED
PERSONS ONLY

-

WHO IS AN
INTERESTED
PERSON?

Interested Persons

- ▶ Taker-in-default?
- ▶ Appointee under testamentary power of appointment?

Standing to sue Trustee

- ▶ Presently exercisable power of appointment
- ▶ Presently exercisable nongeneral power of appointment
- ▶ Testamentary power of appointment

Standing to
Challenge
Instrument
creating Power
of Appointment

WILL CONTEST

DECLARATORY JUDGMENT

TRUST CONTEST

Will Contest

- ▶ A will that creates or exercises a power of appointment may only be challenged through a will contest – a will is a nullity until it is admitted to probate and may not be contested during testator's lifetime
- ▶ Only an "interested person" may contest a Will – pecuniary interest

Declaratory Judgment

- ▶ To challenge a deed that exercises a power of appointment, an interested person would file a declaratory judgment action
- ▶ This same vehicle is appropriate to challenge a trust that creates or exercises a power of appointment

Declaratory Judgment

- ▶ Standing to file a Declaratory Judgment action to set aside a deed or trust:
 - ▶ Taker-in-default
 - ▶ Appointee
- ▶ Loss of standing by "removal" in other valid document



Litigating Creation of Power of Appointment

How to Create Power of Appointment

- ▶ A valid power must:
 - ▶ Be in writing
 - ▶ Donor
 - ▶ Donee
 - ▶ Property owned by donor
 - ▶ Appointee

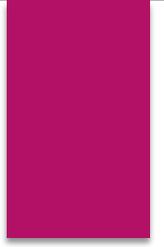
Caselaw Examples – Challenge Creation of Power of Appointment

- ▶ *Bridges v. First Nat'l Bank in Dallas* (1968)
 - ▶ Issue: Does power of sale equate to a power of appointment?
 - ▶ Rule: Power of sale is more restrictive and does not include right to make gift

Caselaw Examples – Challenge Creation of Power of Appointment

- ▶ *Moore v. Wardlow* (1975)
 - ▶ Issue: Does right to “hypothecate or dispose of real property during lifetime” equate to a power of appointment?
 - ▶ Rule: Power of sale is more restrictive and does not include right to make gift

Litigating the Exercise of a Power of Appointment



How to Exercise Power of Appointment

- ▶ To properly exercise a power of appointment, donee must:
 - ▶ Clearly intend to exercise the power
 - ▶ Sufficient capacity
 - ▶ Exercise through instrument that satisfies donor's formal requirements
 - ▶ Exercise as permitted by donor

Intent to Exercise Power of Appointment

- ▶ How does donee establish intent to exercise power?
 - ▶ Expressly reference power
 - ▶ Reference the property that is subject to the power
 - ▶ The instrument in which the power is exercised would have no other purpose than to exercise the power

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

Can Donee Exercise Power of Appointment through residuary clause?

- ▶ *Wright v. Greenberg* (1999)
 - ▶ Held: exercise of power through general statement, not referencing the power, and passing assets through residuary clause to a trust
- ▶ Texas Estates Code § 255.351 (2003)
 - ▶ Testator may **not** exercise power of appointment through general disposition of property unless power specifically referenced or some other written indication

Was language used by Donee sufficient?

- ▶ *Doggett v. Robinson* (2011)
 - ▶ Husband gave Wife special power of appointment
 - ▶ To exercise – make specific reference of it in her will
 - ▶ 2002 Will: All property, including “any other property over which I may have a power of appointment,” to pass according to residuary clause
 - ▶ Holding: not specific enough – NOTE DATE OF WILL

Does exercise of power violate trust terms?

- ▶ *Nowlin v. Frost Nat'l Bank* (1995)
 - ▶ Trust gave sons special testamentary power of appointment
 - ▶ Brother one died – will exercised power and left his share of assets to 2 charities
 - ▶ Brother two challenged exercise – “required” distribution at Brother one’s death
 - ▶ Holding: exercise valid – did not “require” distribution in violation of trust’s terms

Is instrument used to exercise power valid?

- ▶ *Foster v. Foster* (1993)
 - ▶ Will gave brother / executor authority to divide estate “as he sees fit”
 - ▶ Brother exercised power to divide estate equally between himself and third brother but failed to distribute
 - ▶ Brother filed dec action to confirm authority equivalent to general power, but before ruling . . .
 - ▶ Third Brother sued to compel distribution

Is instrument used to exercise power valid?

- ▶ *Foster v. Foster* (1993) (cont'd)
 - ▶ Brother argued the creation of power of appointment not valid until dec action ruling
 - ▶ Held: power of appointment effective immediately upon testator's death – the will need not be admitted to probate to vest in donee
 - ▶ Brother then argued – no standing to compel distribution because not named in Will
 - ▶ COA: by exercising power of appointment, third brother gave him an interest and he, therefore, had standing

Did Donor really mean to give Donee a power of appointment?

- ▶ *Fisher v. Linthicum* (1993)
 - ▶ Maybelle's will gave husband, Edward, power of appointment over trust assets
 - ▶ Takers-in-default: Maybelle's grandchildren
 - ▶ Edward exercised power to give a ranch to grandkids in Will, then a codicil giving it to Linthicum
 - ▶ Edward dies. Grandchildren sue Linthicum and to set aside codicil

Did Donor really mean to give Donee a power of appointment?

- ▶ *Fisher v. Linthicum* (1993) (cont'd)
 - ▶ Other arguments made by grandchildren:
 - ▶ Exercise of power didn't comport with Maybelle's intent – she never intended to disinherit her grandchildren
 - ▶ Power was fiduciary in nature
 - ▶ Maybelle's will was ambiguous and extrinsic evidence admissible to show her "true intent"
 - ▶ Linthicum challenged grandchildren's standing to demand accounting and serve her with discovery

Takeaways . . .

CLARITY

SPECIFICITY

REVIEW RELEVANT
DOCUMENTS CAREFULLY