

### **Highlights of the Utah Uniform Powers of Appointment Act**

The Utah Uniform Powers of Appointment Act (HB 21, sponsored by Rep. Lowry Snow), was adopted in Utah during the 2017 legislative session. It confirms some applicable concepts, and clarifies others in some important ways. Some of the key issues dealt with by the Act include:

The creation, revocation, amendment, interpretation, definition of terms, and determination of the rights of the appointee are governed by the law of the donor's domicile at the relevant time. Formalities of exercise, release, or disclaimer of the power, or the revocation or amendment of an exercise, release, or disclaimer of the power is governed by the law of the power holder's (sometimes referred to in other contexts as the donee of the power) state of domicile at the relevant time. UCA § 75-10-103(1). The instrument may indicate a contrary intent to these choice of law rules, except that a powerholder's state of domicile may not govern the interpretation and definition of terms or the determination of rights of the appointee; these are governed by the law of the donor's domicile. UCA § 75-10-103(1).

The Act provides for creation of a power under a valid instrument. Prior to 2018 it required that such instrument must transfer the appointive property; the official commentary indicates that a declaration of trust on the property is a sufficient transfer. However, this transfer requirement creates issues with "naked" grants of powers unless there is a strawman transfer of property. The official commentary notes that the transfer requirement does prevent a power to amend a beneficiary designation from being a power of appointment. The exercise of a power to create a further power did not (and still does not) require a transfer. UCA § 75-10-201(1) and (2). From May of 2018, a stand alone or "naked" power not involving a transfer may be granted.

A power may not be created in a deceased individual but may be created for unborn or unascertained powerholders. UCA § 75-10-201(3) and (4).

The power is not transferable and lapses on death. UCA § 75-10-202.

There is a presumption that the power is unlimited unless the instrument creating the power manifests a contrary intent; thus, unless provided otherwise in the grant, the power would be presently exercisable, exclusionary, and general. UCA § 75-10-203. It would not be presumed general, however, if exercisable only at death and the permissible appointees are a class defined not to include the powerholder's estate, creditors, or the creditors of that estate. UCA § 75-10-204.

A power requiring the joinder of an adverse party is treated as non-general. UCA § 75-10-205(2).

Donors may revoke powers unless the creating instrument is irrevocable by the donor or the presently exercisable power has been irrevocably exercised. UCA § 75-10-206.

To exercise the power the instrument of exercise must be valid, manifest an intent to exercise, and satisfy conditions or formal requirements for exercise imposed by the donor. The exercise is only to the extent it is a permissible exercise. UCA § 75-10-301. The exercise complies with such conditions or formal requirements only if the holder substantially complies with them. UCA § 75-10-304(1).

A residuary clause in a will that does not contain a blanket exercise clause (an exercise that's not a specific one – UCA § 75-10-102(3)) or a specific exercise clause (an exercise specifically referring to and exercising a particular power – UCA § 75-10-102(17)), manifests an intent to exercise only if the terms of the exercising instrument do not manifest a contrary intent, the power is general and exercisable in favor of the holder's estate, there is no gift over in default, and the power was not released. UCA § 75-10-302.

Generally, a blanket exercise clause applies to an after-acquired power, but where the holder is the donor, the clause does not extend to the power unless there is no effective gift in default. UCA § 75-10-303.

An exercise by will does not require the probate of a properly executed will unless the granting instrument requires this. UCA § 75-10-304(2).

Exercise of general or non-general powers may be quite broad including into trust or creating additional powers. UCA § 75-10-305.

Appointments to deceased appointees are not effective. However, unless the instrument provides otherwise, a non-general power may be exercised in favor of a descendant of a deceased permitted appointee whether or not the descendant is described as a permissible appointee. UCA § 75-10-306.

Under a general power (other than a withdrawal or revocation of trust) where the property is not effectively appointed, or where the power is not exercised or is released, the property passes under the gift-in-default or, if none, to the power holder (if living and a permissible appointee), or to the powerholder's estate (if a permissible appointee), or otherwise to the donor or donor's transferee or successor, as a reversionary interest. UCA §§ 75-10-309 and 310.

With respect to a non-general power, the unappointed property passes under the gift-in-default provision, but if none, to the permissible donees (if defined and limited), and if none, to the donor or donor's transferee or successor as a reversionary interest. UCA § 75-10-311.

Unless otherwise provided, a powerholder may revoke or amend an exercise of a power that is exercisable during life where the exercise is to be effective in the future where the time or the contingency for its effect has not yet occurred, as long as the revocation or amendment is done with the same formality as the original exercise. UCA § 75-10-314.

Powerholders and appointees or permissible appointees may disclaim all or a part of a power or property; also, a powerholder may release a power in whole or in part unless prevented by the creating instrument. UCA §§ 75-10-401 and 402. Any release must substantially comply with the terms of the instrument for release or, if none, manifest an intent to release by clear and convincing evidence. UCA § 75-10-403. The release may be revoked only if the instrument of release is revocable or the powerholder reserves a power of revocation or amendment in the instrument of release. UCA § 75-10-404.

Contracts relating to the exercise by a powerholder of a presently exercisable power are valid. UCA § 75-10-405. If the power is not presently exercisable, such a contract is valid only if the powerholder is the donor and the powerholder reserved the power under a revocable trust. UCA § 75-10-406. The remedy for breach is damages out of the appointive property or specific performance where appropriate. UCA § 75-10-407.

UCA 75-7-505(2) allows creditors of an irrevocable trust (other than an asset protection trust) to reach the maximum amount the settlor could reach. Thus, generally as to a retained general power whether exercisable during life or at death by will, the creditors can reach that amount of assets whether or not the power is exercised. However, under UCA § 75-10-501, property subject to general powers created by the holder of the power are subject to creditor claims where the power has not been irrevocably exercised. The property is subject to the claims of the creditor of the holder of a retained power if the power is exercisable during life, or to the claims of the creditors of the holder's estate if the power is exercisable at the holder's death and the holder's estate is insufficient to satisfy the claim. UCA § 75-10-501(4).

Powers granted by a third person, whether or not a general power, do not subject the property to creditors of the holder of the power unless the power is exercised. UCA § 75-10-502(1). Creditor claims are governed by the law of the donor's domicile at the time of the creation of the power. UCA §§ 75-10-103(3) and 502(2). Powers of withdrawal from a trust during the time the power may be exercised as a presently exercisable are treated as a general power to the extent of the property subject to it. UCA § 75-10-503(1). The lapse, release, or waiver of the power of withdrawal is treated as a presently exercisable power only to the extent in excess of the greater of the amounts of the gift tax annual exclusion (IRC § 2514(e)), or the \$5,000 or 5% exception to the general power of appointment rule (IRC § 2041(b)(2) or IRC § 2503(b)).

The Act became effective May 9, 2017, as to all powers whenever created but with an exception for judicial proceedings prior to that date where application would substantially interfere in the effective conduct of the proceeding or prejudice a party, and with an exception for actions done before that date. UCA § 75-10-603.

As of 2018, the Uniform Powers of Appointment Act had been adopted by nine jurisdictions.