

CHAPTER 702

POWERS OF APPOINTMENT

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702.01 Definitions. As used in this chapter, unless the context indicates otherwise:

(1) “Creating instrument” means the will, trust agreement or other document which creates or reserves the power.

(2) “Donor” means the person who creates or reserves the power; “donee” means the person in whom the power is created or reserved; and “appointee” means the person to whom an interest is appointed.

(3) “General power” means a power exercisable in favor of the donee, the donee’s estate, the donee’s creditors or the creditors of the donee’s estate, whether or not it is exercisable in favor of others. A power to appoint to any person or a power which is not expressly restricted as to appointees may be exercised in favor of the donee or the donee’s creditors if exercisable during lifetime, and in favor of the donee’s estate or the creditors of the donee’s estate if exercisable by will.

(4) “Power” means a power of appointment over legal or equitable interests in real or personal property. A power of appointment is a power created or reserved by a person having property subject to his or her disposition which enables the donee of the power to designate, within such limits as may be prescribed, the transferees of the property or the shares or the interests in which it shall be received; it does not include a power of sale, a power of attorney, a power of revocation or a power exercisable by a trustee or other fiduciary in his or her fiduciary capacity.

(5) “Special power” means a power exercisable only in favor of one or more persons not including the donee, the donee’s estate, the donee’s creditors or the creditors of the donee’s estate and, when exercisable in favor of a class, so limited in size by description of the class that in the event of nonexercise of the power a court can make distribution to persons within the class if the donor has failed to provide for this contingency.

(6) “Unclassified power” means a power which is neither a general power nor a special power as defined in this section.

History: 1971 c. 66; 1983 a. 189; 1993 a. 486.

702.03 Manifestation of intent to exercise powers.

(1) Unless the person who executed it had a contrary intention, if a governing instrument, as defined in s. 854.01 (2), or an inter vivos governing instrument, as defined in s. 700.27 (1) (c), creates a power of appointment that expressly requires that the power be exercised by any type of reference to the power or its source, the donor’s intention in requiring the reference is presumed to be to prevent an inadvertent exercise of the power. Extrinsic evidence, as defined in s. 854.01 (1), may be used to construe the intent.

(2) In the case of other powers, an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property which the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording interpreted in light of the circumstances surrounding its drafting and execution manifests an intent to exercise the power. If there is a general power exercisable by will with no gift in

default in the creating instrument, a residuary clause or other general language in the donee’s will purporting to dispose of all of the donee’s estate or property operates to exercise the power in favor of the donee’s estate, but in all other cases such a clause or language does not in itself manifest an intent to exercise a power exercisable by will.

History: 1997 a. 188; 2005 a. 216.

702.05 Exercise of powers. (1) CAPACITY TO EXERCISE POWER. A power can be exercised only by a person who would have the capacity to transfer the property covered by the power.

(2) **KIND OF INSTRUMENT AND FORMALITIES OF EXECUTION.** A donee can exercise a power only by an instrument which meets the intent of the donor as to kind of instrument and formalities of execution. If the power is exercisable by will, this means a will executed with the formalities necessary for a valid will. A written instrument signed by the donee is sufficient if the donor fails to require any additional formalities or fails to indicate a will, but if the power is to appoint interests in land, it can be exercised only by an instrument executed with sufficient formalities for that purpose.

(3) **CONSENT OF 3RD PERSONS.** When the consent of the donor or of any other person is required by the donor for the exercise of a power, such consent must be expressed in the instrument exercising the power or in a separate written instrument, signed in either case by the persons whose consent is required. If any person whose consent is required dies or becomes legally incapable of consenting, the power may be exercised by the donee without the consent of that person unless the donor has manifested a contrary intent in the instrument creating the power.

(4) **POWER VESTED IN 2 OR MORE DONEES.** Unless the donor manifests a contrary intent, when a power is vested in 2 or more persons, all must unite in its exercise, but if one or more of the donees dies, becomes incapable of exercising the power or renounces, releases or disclaims the power, the power may be exercised by the others.

History: 1971 c. 66; 1977 c. 309; 2005 a. 253.

A warranty deed grants a present fee simple interest. A purported reservation of a power of appointment in a warranty deed is ineffective. Powers may be reserved and a lesser interests granted, but not by warranty deed. *Lucareli v. Lucareli*, 2000 WI App 133, 237 Wis. 2d 487, 614 N.W.2d 60, 99–1679.

702.07 Powers to be construed as exclusive. The donee of any power may appoint the whole or any part of the appointive assets to any one or more of the permissible appointees and exclude others, except to the extent that the donor specifies either a minimum share or amount to be appointed to each permissible appointee or to designated appointees, or a maximum share or amount appointable to any one or more appointees.

702.08 Disclaimer of powers. The donee of any power may disclaim all or part of the power as provided under s. 700.27 or 854.13.

History: 1977 c. 309; 1997 a. 188; 2005 a. 216.

702.09 Release of powers. (1) Except as the creating instrument expressly provides that the power cannot be released

or expressly restricts the time, manner or scope of release, the donee of any power may:

- (a) At any time completely release the donee's power;
- (b) At any time or times release the donee's power in any one or more of the following respects:

1. As to the whole or any part of the property which is subject thereto;

2. As to any one or more persons or objects, or classes of persons or objects, in whose favor power is exercisable;

3. So as to limit in any other respect the extent to or manner in which it may be exercised.

(2) A release may be effected, either with or without consideration, by written instrument signed by the donee and delivered.

(3) Delivery of a release may be accomplished in any of the following manners, but this subsection is permissive and does not preclude a determination that a release has been delivered in some other manner:

- (a) Delivery to any person specified in the creating instrument;
- (b) Delivery to a trustee or to one of several trustees of the property to which the power relates, or filing with the court having jurisdiction over the trust;

(c) Delivery to any person, other than the donee, who could be adversely affected by an exercise of the power; or

(d) Recording in the office of register of deeds in the county where the property is located.

History: 1993 a. 301, 486.

702.11 Irrevocability of creation, exercise and release of powers. The creation, exercise or release of a power is irrevocable unless the power to revoke is reserved in the creation, exercise or release of the power.

702.13 Recording instruments relating to powers.

(1) Any of the following instruments relating to powers is entitled to be recorded as a conveyance upon compliance with s. 706.05 (1):

- (a) An instrument, other than a will, exercising a power;
- (b) An instrument expressing consent to exercise;
- (c) A disclaimer;
- (d) A release.

(2) If a power is exercised by a will, a certified copy of the will and of the certificate of probate thereof may be recorded.

History: 1971 c. 41 s. 11; 1977 c. 309.

702.15 Disposition when special power is unexercised. If the donee of a special power fails to exercise effectively the power, the interests which might have been appointed under the power pass:

(1) If the creating instrument contains an express gift in default, then in accordance with the terms of such gift;

(2) If the creating instrument contains no express gift in default and does not clearly indicate that the permissible appointees are to take only if the donee exercises the power, then to the permissible appointees equally, but if the power is to appoint among a class such as "relatives," "issue" or "heirs," then to those persons who would have taken had there been an express gift to the described class; or

(3) If the creating instrument contains no express gift in default and clearly indicates that the permissible appointees are to take only if the donee exercises the power, then by reversion to the donor or the donor's estate. But if the creating instrument

expressly states that there is no reversion in the donor, then any language in the creating instrument indicating or stating that the permissible appointees are to take only if the donee exercises the power is to be disregarded and the interests shall pass in accordance with sub. (2).

History: 1993 a. 486.

702.17 Rights of creditors of the donee. (1) GENERAL POLICY. If the donee has either a general power or an unclassified power which is unlimited as to permissible appointees except for exclusion of the donee, the donee's estate, the donee's creditors and the creditors of the donee's estate, or a substantially similar exclusion, any interest which the donee has power to appoint or has appointed is to be treated as property of the donee for purposes of satisfying claims of the donee's creditors, as provided in this section.

(2) DURING LIFETIME OF THE DONEE. If the donee has an unexercised power of the kinds specified in sub. (1), and can presently exercise such a power, any creditor of the donee may by appropriate proceedings reach any interest which the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. Such an interest is to be treated as property of the donee within ch. 816. If the donee has exercised such a power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances the creditor could reach property which the donee has owned and transferred.

(3) AT DEATH OF THE DONEE. If the donee has at the time of his or her death a power of the kinds specified in sub. (1), whether or not the donee exercises the power, any creditor of the donee may reach any interest which the donee could have appointed or has appointed, to the extent that the claim of the creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

(4) ASSIGNMENT FOR BENEFIT OF CREDITORS. Under a general assignment by the donee for the benefit of the donee's creditors, the assignee may exercise any right which a creditor of the donee would have under sub. (2).

(5) THIRD PARTIES IN GOOD FAITH PROTECTED. Any person acting without actual notice of claims of creditors under this section incurs no liability to such creditors in transferring property which is subject to a power or which has been appointed; and a purchaser without actual notice and for a valuable consideration of any interest in property, legal or equitable, takes such interest free of any rights which a creditor of the donee might have under this section.

History: Sup. Ct. Order, 67 Wis. 2d 585, 777 (1975); 1975 c. 218; 1993 a. 486.

702.19 Matters governed by common law. As to all matters within the scope of those sections of ch. 232, 1963 stats., which have been repealed, and not within this chapter or any other applicable statute, the common law is to govern. This section is not intended to restrict in any manner the meaning of any provision of this chapter or any other applicable statute.

History: 1983 a. 192 s. 304.

702.21 Applicability of chapter. The provisions of this chapter are applicable to any power existing on May 16, 1965, as well as a power created after such date.

702.22 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under an instrument that creates or exercises a power of appointment.

History: 1997 a. 188.