

CHAPTER 232.

POWERS.

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232.01 How far abolished. Powers, except as authorized and provided for in this chapter, are abolished; and the creation, construction and execution of powers shall be governed by the provisions herein contained.

232.02 Definition. A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

232.03 Who cannot grant. No person is capable, in law, of granting a power who is not at the same time capable of alienating some interest in the lands to which the power relates.

232.04 Division of powers. Powers, as authorized in this chapter, are general or special, and beneficial or in trust.

232.05 General power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever.

232.06 Special power. A power is special:

(1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated.

(2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee.

232.07 Beneficial power. A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.

232.08 Life estate, when changed to fee. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the lands should not be sold for the satisfaction of the debts.

This section, though made applicable to real estate only, shows the legislative purpose which ought to be followed in the disposition of personalty. Will of Zweifel, 194 W 428, 216 NW 840.

The general rule is that where there is a gift to a person indefinitely, with super-added power of disposal, the donee takes an absolute estate. The life tenant is a trustee in the sense that he cannot injure or dispose of the property to the injury of the rights of the remaindermen but he differs from a pure trustee in that he may use the property for his exclusive benefit and take all of the income and profits, which principle was recognized by the county court in

this case in assigning the property "in trust" to the testator's widow for her use and benefit during her lifetime, and the remainder to the residuary legatees. Estate of Larson, 261 W 206, 52 NW (2d) 141.

232.09 Power creates a fee, when. When a like power of disposition shall be given to any person to whom no particular estate is limited such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers.

232.10 Same subject. In all cases where such power of disposition is given and no remainder is limited on the estate of the grantee of the power such grantee shall be entitled to an absolute fee.

232.11 Power to devise inheritance. When a general and beneficial power to devise the inheritance shall be given to a tenant for life or for years such tenant shall be deemed to possess an absolute power of disposition within the meaning and subject to the provisions of sections 232.08 to 232.10.

232.12 What powers absolute. Every power of disposition shall be deemed absolute by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit.

232.13 Power to revoke. When the grantor in any conveyance shall reserve to himself for his own benefit an absolute power of revocation, such grantor shall still be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

232.14 Power to life tenant; leases. A special and beneficial power may be granted to a tenant for life of the lands embraced in the power to make leases for not more than twenty-one years and to commence in possession during his life.

232.15 Power of life tenant to lease. The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate and will pass, unless specially excepted, by any conveyance of such estate; and if specially excepted in any such conveyance it is extinguished.

232.16 Release of such power. Such power may be released by the tenant to any person entitled to an expectant estate in the lands, and shall thereupon be extinguished.

232.17 Mortgage by life tenant. A mortgage executed by a tenant for life having a power to make leases, by virtue of any beneficial power, does not extinguish or suspend the power, but the power is bound by the mortgage in the same manner as the lands embraced therein.

232.18 Power, how affected by mortgage. The effects of such a lien by mortgage on the power are:

(1) That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt may require.

(2) That any subsequent estate created by the owner in execution of the power becomes subject to the mortgage in the same manner as if in terms embraced therein.

232.19 Other powers prohibited. No beneficial power, general or special, hereafter to be created, other than such as are enumerated and defined in the preceding sections of this chapter, shall be valid.

232.20 Rights of creditors. Every special and beneficial power is liable to the claims of creditors in the same manner as other interests that cannot be reached by an execution, and the execution of the power may be adjudged for the benefit of the creditors entitled.

232.21 General powers, when in trust. A general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds or any portion of the proceeds or other benefits to arise from the alienation of the lands according to the power.

232.22 Special powers in trust. A special power is in trust:

(1) When the disposition which it authorizes is limited to be made to any particular persons other than the grantee of such power.

(2) When any person or class of persons, other than the grantee, is entitled to any benefit from the disposition or charge authorized by the power.

The power of appointment given by the testator's will to the widow to appoint the residue of the trust estate, on her death, to nieces and nephews of the deceased, their descendants, and certain charities, constituted a "special power in trust." Will of Uihlein, 264 W 362, 59 NW (2d) 641.

232.23 Trust powers imperative. Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee the performance of which may be compelled by action for the benefit of the parties interested.

232.24 Effect of right of selection. A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust.

232.25 Construction of power. When a disposition under a power is directed to be made to or among or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion.

232.26 Same subject. But when the terms of the power import that the estate or fund is to be distributed between the persons so designated in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons in exclusion of the others.

232.27 When court to execute power. If the trustee of a power with the right of selection shall die, leaving the power unexecuted, its execution shall be adjudged in the circuit court for the benefit equally of all the persons designated as objects of the trusts.

Where no specific provision was made by the testator for the disposition of a certain portion of the residue, in the event that the widow failed to exercise her special power to appoint the residue of the trust estate, on her death, to the nieces and nephews of the deceased, their descendants, and certain charities, the provisions of this section require, in such event, that the circuit court exercise the power for the equal benefit of all persons in the class to whom the widow might appoint as to such portion, subject to the provision in the will that a certain hospital should not receive more than one twentieth of the residue. Will of Uihlein, 264 W 362, 59 NW (2d) 641.

232.28 Same subject. When a power in trust is created by will and the testator has omitted to designate by whom the power is to be executed its execution shall devolve on the circuit court.

232.29 Sections 231.22 to 231.27 apply. The provisions contained in sections 231.22 to 231.27, in relation to express trusts and trustees, shall apply equally to powers in trust and the grantees of such powers.

232.30 Execution of power on behalf of creditors. The execution, in whole or in part, of any trust power may be adjudged in the circuit court for the benefit of the creditors or assignees of any person entitled, as one of the objects of the trust, to compel its execution when the interest of the objects of such trust is assignable.

232.31 Effect of assignment. Every beneficial power and the interest of every person entitled to compel the execution of a trust power shall pass to the assignees of the estate and effects of the person in whom such power or interest is vested under any general assignment of the estate and effects of such person for the benefit of creditors, made pursuant to law.

232.32 Reservation of power. The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power so reserved shall be subject to the provisions of this chapter in the same manner as if granted to another.

232.33 How powers granted. A power may be granted:

(1) By a suitable clause contained in the conveyance of some estate in the lands to which the power relates.

(2) By a devise contained in a last will and testament.

232.34 Power a lien; recording; creditors; notice. Every power shall be a lien or charge upon the lands which it embraces, as against creditors and purchasers in good faith and without notice of or from any person having an estate in such lands, only from the time the instrument containing the power shall be recorded; but as against all other persons the power shall be a lien from the time the instrument in which it is contained shall take effect.

232.35 When power irrevocable. Every power beneficial or in trust is irrevocable unless an authority to revoke it is reserved or granted in the instrument creating the power.

232.36 Who may take and convey. A power may be vested in any person capable in law of holding lands, but cannot be executed by any person not capable of alienating lands holden by such person.

232.37 Joint powers; survivors. When a power is vested in several persons all must unite in its execution; but if previous to its execution one or more of such persons shall die the power may be executed by the survivor or survivors.

232.38 How executed. No power can be executed except by some instrument in writing which would be sufficient in law to pass the estate or interest intended to pass under the power if the person executing the power were the actual owner.

232.39 Conveyances, what are. Every instrument, except a will, made in execution of a power, whether it be a power of revocation or otherwise, shall be deemed a conveyance within the meaning and subject to the provisions of chapter 235.

232.40 When made by will or devise, how executed. When a power of disposition is confined to a disposition by devise or will the instrument must be a will duly executed according to the provisions of law relating to wills of real and personal estate.

232.41 What cannot be executed by will. When a power is confined to a disposition by grant it cannot be executed by will, although the disposition is not intended to take effect until after the death of the party in whom the power is vested.

232.42 Execution by married woman. If a married woman execute a power by grant such grant shall be acknowledged by her in the manner prescribed in chapter 235 in relation to conveyances by married women, and shall not be valid unless so acknowledged.

232.43 Informality. When the grantor of a power shall have directed or authorized it to be executed by an instrument not sufficient to pass the estate such power shall not be void, but its execution shall be governed by the rules prescribed in this chapter.

232.44 Directions of grantor. When the grantor shall have directed any formalities to be used in the execution of a power, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power.

232.45 Nominal conditions. When the conditions annexed to a power are merely nominal and evince no intention of actual benefit to the party to whom or in whose favor they are to be performed they may be wholly disregarded in the execution of the power.

232.46 Directions to be observed. With the exceptions contained in the preceding sections the intentions of the grantor of a power as to the mode, time and conditions of its execution shall be observed, subject to the power of the circuit court to supply a defective execution in the cases hereinafter provided.

See note to 233.14, citing Will of Uihlein, 264 W 362, 59 NW (2d) 641.

232.47 Consent of third person. When the consent of a third person to the execution of a power is requisite such consent shall be expressed in the instrument by which the power is executed or shall be certified in writing thereon; and in the first case the instrument of execution, in the second the certificate, shall be signed by the party whose consent is required; and to entitle the instrument to be recorded such signature must be proved or acknowledged in the same manner as if subscribed to a conveyance of lands.

232.48 What dispositions not void. No disposition by virtue of a power shall be void in law or equity on the ground that it is more extensive than was authorized by the power; but every estate or interest so created, so far as embraced by the terms of the power, shall be good and valid.

232.49 Omission to recite power. Every instrument executed by the grantee of a power conveying an estate, or creating a charge, which such grantee is authorized by the power to convey or create, but which he would have no right to convey or create unless by virtue of his power, shall be deemed a valid execution of the power, although such power be not recited or referred to therein.

232.495 Release of powers. (1) A power to appoint real or personal property, whether acquired prior to or subsequent to July 15, 1943, which is exercisable by deed, by will, by deed or will, or otherwise, in favor of the grantee or holder of the power, his estate, his creditors, or the creditors of his estate is releasable, either with or without consideration, by written instrument signed by the grantee or holder.

(2) A power to appoint described in the next preceding subsection is releasable with respect to the whole or any part of the property subject to such power and is also releasable in such manner as to reduce or limit the persons or objects or classes of persons or objects in whose favor such power would otherwise be exercisable.

(3) It is declared that such releases described in the 2 preceding subsections are in accordance with the public policy of this state and are valid and effectual whether made before or after July 15, 1943.

(4) Nothing herein contained shall be deemed to prevent the release of any power which was releasable, in whole or in part, prior to July 15, 1943.

If the widow, electing to take under the law and not under the will, had intentionally desired to release the special power in trust, she could not legally do so, since it was not one releasable prior to July 15, 1943, under (4). Will of Uihlein, 264 W 362, 59 NW (2d) 641.

232.496 Mandatory powers. A power of sale or direction to sell in a testamentary or inter vivos instrument creating a trust in effect on or after June 28, 1950, which power or direction by its terms or the context of the instrument is or purports to be mandatory, shall, in respect to each parcel of real estate of the trust situate in this state as to which such power or direction has been in effect and not exercised for a period of 25 years, be deemed permissive.

232.50 Fraud. Instruments in execution of a power are affected by fraud in the same manner as conveyances by owners or trustees.

232.51 Power to devise passes by will. Lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator unless the intent that the will shall not operate as an execution of the power shall appear expressly or by necessary implication.

232.52 Suspension of period of alienation. The period during which the absolute right of alienation may be suspended by any instrument in execution of a power shall be computed from the time of the creation of the power and not from the date of such instrument.

232.53 Who not to take under power. No estate or interest can be given or limited to any person by an instrument in execution of a power which such person would not have been capable of taking under the instrument by which the power was granted.

232.54 Execution of power by court. When the execution of a power in trust shall be defective, in whole or in part, under the provisions of this chapter, its proper execution may be adjudged by the circuit court in favor of the persons designated as the objects of the trust.

232.55 Purchasers under defective execution of power. Purchasers for a valuable consideration, claiming under a defective execution of any power, shall be entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner.

232.56 Mortgages, power to sell under. When a power to sell lands shall be given to the grantee in any mortgage or other conveyance intended to secure the payment of money the power shall be deemed a part of the security and shall vest in and may be executed by any person, who, by assignment or otherwise, shall become entitled to the money so secured to be paid.

232.57 Power of attorney not affected. The provisions of this chapter shall not extend to a simple power of attorney to convey lands in the name and for the benefit of the owner.

232.58 Grantor and grantee defined. The term, grantor of a power, is used in this chapter as designating the person by whom a power is created, whether by grant or devise; and the term, grantee of a power, is used as designating a person in whom the power is vested, whether by grant, devise or reservation.