

CHAPTER 702

POWERS OF APPOINTMENT

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

(1) “Appointee” means the person to whom an interest is appointed.

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

(3) “Donee” means the person in whom the power of appointment is created or reserved.

(4) “Donor” means the person who creates or reserves the power of appointment.

(5) “General power of appointment” 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 also exercisable in favor of others. A power to appoint to any person or a power of appointment that 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.

(6) “Power of appointment” means a power to appoint legal or equitable interests in real or personal property. A power of appointment is created or reserved by a person having property subject to his or her disposition which enables the donee of the power of appointment 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. A power of appointment does not include a power of sale, a power of attorney, a power of revocation, or a power exercisable by a trustee, a directing party, as defined in s. 701.0103 (7), another fiduciary in his or her fiduciary capacity, or a trust protector, as defined in s. 701.0103 (31).

(7) “Special power of appointment” means a power of appointment that is not a general power of appointment.

History: 1971 c. 66; 1983 a. 189; 1993 a. 486; 2013 a. 92 ss. 302 to 310; Stats. 2013 s. 702.02.

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

(2) In the case of other powers of appointment, a creating instrument manifests an intent to exercise the power of appointment if the creating 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 of appointment, even though the power of appointment is not recited or referred to in the creating instrument, or if the creating 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 of appointment. If there is a

general power of appointment 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 of appointment 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 of appointment exercisable by will.

History: 1997 a. 188; 2005 a. 216; 2013 a. 92.

Sub. (1) recognizes that a specific power of appointment requirement creates a presumption that the specific reference was intended to prevent inadvertent exercise. This presumption can be overcome if it can be demonstrated that the donee had knowledge of and intended to exercise the power. *Czaplewski v. Shepherd*, 2012 WI App 116, 344 Wis. 2d 440, 823 N.W.2d 523, 11–2521.

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

(2) KIND OF INSTRUMENT AND FORMALITIES OF EXECUTION. A donee can exercise a power of appointment only by an instrument which meets the intent of the donor as to kind of instrument and formalities of execution. If the power of appointment 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 of appointment 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 of appointment, such consent must be expressed in the creating instrument exercising the power of appointment 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 of appointment may be exercised by the donee without the consent of that person unless the donor has manifested a contrary intent in the creating instrument.

(4) POWER OF APPOINTMENT VESTED IN 2 OR MORE DONEES. Unless the donor manifests a contrary intent, when a power of appointment 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 of appointment, or renounces, releases, or disclaims the power of appointment, the power of appointment may be exercised by the others.

(5) PRESUMPTION OF NONEXERCISE OF A POWER OF APPOINTMENT. A personal representative, trustee, or other fiduciary who holds property subject to a power of appointment may administer that property as if the power of appointment was not exercised if the personal representative, trustee, or other fiduciary has no notice of the existence of any of the following within 6 months after the death of the donee of the power of appointment:

(a) A document purporting to be a will of the donee of the power of appointment if the power of appointment is exercisable by a will.

(b) Some other documentation of the donee purporting to exercise the power of appointment if the power of appointment is exercisable other than by a will.

History: 1971 c. 66; 1977 c. 309; 2005 a. 253; 2013 a. 92.

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 Power of appointment to be construed as exclusive. The donee of any power of appointment 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.

History: 2013 a. 92.

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

History: 1977 c. 309; 1997 a. 188; 2005 a. 216; 2013 a. 92.

702.09 Release of a power of appointment. (1) Unless the creating instrument expressly provides that the power of appointment cannot be released or expressly restricts the time, manner, or scope of release, the donee of any power of appointment may do any of the following:

(a) At any time completely release the donee's power of appointment.

(b) At any time or times release the donee's power of appointment 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 such power of appointment is exercisable.

3. So as to limit in any other respect the extent to or manner in which the power of appointment 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 of appointment 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 of appointment.

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

History: 1993 a. 301, 486; 2013 a. 92.

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

History: 2013 a. 92.

702.13 Recording instruments relating to a power of appointment. (1) Any of the following instruments relating to a power of appointment 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 of appointment.

(b) An instrument expressing consent to exercise.

(c) A disclaimer.

(d) A release.

(2) If a power of appointment 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; 2013 a. 92.

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

(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 special power of appointment, then to the permissible appointees equally, but if the special power of appointment 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.

(3) (a) Except as provided in par. (b), 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 special power of appointment, then by reversion to the donor or the donor's estate.

(b) 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 special power of appointment is to be disregarded and the interests shall pass in accordance with sub. (2).

History: 1993 a. 486; 2013 a. 92.

702.17 Rights of creditors of the donee. (1) **GENERAL POLICY: GENERAL POWER OF APPOINTMENT.** If the donee has a general power of appointment, 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 general power of appointment, and can presently exercise the general power of appointment in favor of the donee or the donee's creditors, 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 general power of appointment, 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.** (a) Except as provided in par. (b), if the donee has at the time of the donee's death a general power of appointment, whether or not the donee exercises the general power of appointment, 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 or filed with and approved by the trustee of a trust that is revocable, as defined in s. 701.0103 (22), by the donee or jointly by the donee and the donee's spouse but not paid because the assets of the estate or revocable trust are insufficient.

(b) If the donee fails to exercise a general power of appointment, in whole or in part, that the donee has at the time of the donee's death and neither the donee nor the donee's spouse is the donor of the power, a creditor of the donee may not reach an interest subject to the power, to the extent the power was not exercised.

(4) **ASSIGNMENT FOR BENEFIT OF CREDITORS.** Under a general assignment by the donee for the benefit of the donee's creditors,

3 Updated 17–18 Wis. Stats.

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 of appointment 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.

(6) GENERAL POLICY: SPECIAL POWER OF APPOINTMENT. If the donee has a special power of appointment, property subject to the donee's special power of appointment is exempt from a claim of a creditor of the donee or the donee's estate.

History: Sup. Ct. Order, 67 Wis. 2d 585, 777 (1975); 1975 c. 218; 1993 a. 486; 2013 a. 92.

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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 of appointment existing on May 16, 1965, as well as a power of appointment created after such date.

History: 2013 a. 92.

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.