

Restatement (Third) of Property (Wills & Don. Trans.) § 19.10 (2011)

Restatement of the Law - Property | March 2017 Update
Restatement (Third) of Property: Wills and Other Donative Transfers
Division VI. Powers of Appointment
Chapter 19. Exercise of a Power of Appointment
Part B. Effectiveness of Donee's Attempted Exercise

§ 19.10 Substantial Compliance with Donor-Imposed Formal Requirements

[Comment:](#)

[Reporter's Note](#)

[Case Citations - by Jurisdiction](#)

Substantial compliance with formal requirements of an appointment imposed by the donor, including a requirement that the instrument of exercise make reference or specific reference to the power, is sufficient if (i) the donee knew of and intended to exercise the power, and (ii) the donee's manner of attempted exercise did not impair a material purpose of the donor in imposing the requirement.

Comment:

a. Scope. This section adopts a substantial-compliance rule for donor-imposed formal requirements. This section only applies to formal requirements imposed by the donor. It does not apply to formal requirements imposed by law. That topic is covered in § 19.9.

b. Historical note. The English courts of Chancery developed the rule that “equity will aid the defective execution of a power.” Such aid was given only for the benefit of persons favored by courts of equity.

[Restatement Second of Property \(Donative Transfers\) § 18.3](#) followed the historical rule. Under the Restatement Second, the donee's attempted appointment had to approximate the manner of appointment prescribed by the donor, and the appointee had to be a natural object of the donee's affection, a person with whom the donee had a relationship akin to that with someone who would be a natural object of the donee's bounty, a creditor of the donee, a charity, a person who has paid value for the appointment, or some other person favored by a court applying equitable principles. A court wishing to continue to adhere to the historical rule should give the term “natural objects of the donee's bounty” the meaning attributed to it in § 8.1, Comment *c*.

This Restatement continues the requirement that the donee's attempted appointment approximate the manner of appointment prescribed by the donor, but changes the word “approximate” to the more familiar term “substantial compliance.” This Restatement also requires that the evidence establish that the donee knew of and intended to exercise the power, and that the donee's manner of exercise did not impair the donor's purpose in imposing the requirement.

This Restatement does not require that the appointee be someone favored by equitable principles. The substantial-compliance standard supersedes that limitation. The Restatement Second's list of those who are favored covers virtually anyone to whom the donee would normally appoint.

c. Additional requirements imposed by the donor. Whenever the donor imposes formal requirements with respect to the instrument of appointment that exceed the requirements imposed by law, the donor's purpose in imposing the additional

requirements is relevant to whether the donee's attempted exercise satisfies the rule of this section. To the extent that the failure to comply with the additional requirements will not impair the accomplishment of a material purpose of the donor, the donee's attempted appointment in a manner that substantially complies with a donor-imposed requirement does not fail for lack of compliance with that requirement.

Illustrations:

1. Donor transfers Blackacre to Donee (Donor's son) for life, with remainder as Donee shall appoint by a deed under seal. The applicable law has abolished the necessity of a seal on a deed of real property. In the controlling jurisdiction, a deed is a recordable document though it lacks a seal; and when it has been recorded, no one can be a bona fide purchaser who will cut off the equitable rights acquired by the appointees under the defective appointment. Donee executes a deed not under seal disposing of the fee-simple title to Blackacre in favor of his children. Donee's deed substantially complies with the requirement of a document under seal.
2. Same facts as Illustration 1, except that the applicable law, in addition to not requiring a seal on a deed of real property, does not require that the deed be witnessed but does require that the deed be acknowledged before a notary public; and Donor prescribes that the appointment be by a deed under seal that is witnessed by one witness. Donee appoints Blackacre to his children by a deed not under seal and not witnessed, but the deed is acknowledged. Donee's deed substantially complies with the requirement of a witnessed document under seal.
3. Same facts as Illustration 2, except that the deed executed by Donee is not acknowledged. The appointment is ineffective. If, however, the appointees paid value for the appointment, the deed will operate as a contract to appoint. The appointees can obtain specific performance of the contract and obtain a deed that satisfies the formal requirements imposed by law.
4. Donor by will transfers property to Trustee in trust. Trustee is directed to pay the income to Donee (Donor's daughter) for life, with remainder as Donee may appoint by an inter vivos instrument. Donee executes a will under which she purports to exercise the power in favor of her issue. An appointment by Donee's will accomplishes all the material purposes Donor could have intended when prescribing an appointment by an inter vivos instrument, and the will is an instrument executed in Donee's lifetime. Thus, the Donee's use of her will to exercise the power substantially complies with the requirement of an inter vivos instrument.

d. Specific-reference requirement. A formal requirement commonly imposed by the donor is that, in order to be effective, the donee's attempted exercise must make specific reference to the power. Specific-reference clauses were a pre-1942 invention to prevent an inadvertent exercise of a general power—an exercise produced, not by the donee's deliberate decision to exercise the power, but by case law or statutory law attributing such an intent to the residuary clause in the donee's will. The federal estate-tax law then provided that the value of property subject to a general power was included in the donee's gross estate only if the general power was exercised. The Massachusetts rule then provided that a general residuary clause in the donee's will presumptively exercised a general power of appointment. The idea of requiring specific reference was designed to thwart the Massachusetts rule from unnecessarily causing estate taxation.

The federal estate-tax law provides that the value of property subject to a general power is included in the donee's gross estate whether the power is exercised or not, if the power was created after October 21, 1942. See *I.R.C. § 2041*. Consequently, an inadvertent exercise of a general power created after October 21, 1942, no longer has adverse estate-tax consequences. Moreover, the Massachusetts rule is no longer followed in Massachusetts, is not widely followed, and is not followed in this Restatement. See § 19.4.

Nevertheless, donors continue to impose a specific-reference requirement. Because the original purpose of the specific-reference requirement was to prevent an inadvertent exercise of the power, it seems reasonable to presume that that was the donor's purpose in doing so. Consequently, a specific-reference requirement overrides any applicable state law that presumes that a residuary clause was intended to exercise a general power. See § 19.4, Comment *e*.

A more difficult question is whether a blanket-exercise clause (see § 19.2, Comment *d*) satisfies a specific-reference requirement. If it could be shown that the donee had knowledge of and intended to exercise the power, the blanket-exercise clause would be sufficient to exercise the power, unless it could be shown that the donor's intention was not merely to prevent an inadvertent exercise of the power but was to prevent any exercise of the power, intentional or inadvertent. The possibility of applying § 12.1 to reform the donee's attempted appointment to insert the required specific reference should also be explored.

e. Appointment not intended. Under the rule stated in this section, the donee must have intended to exercise the power. If, for whatever reason, the donee did not intend to exercise the power, the rule stated in this section does not apply. See § 19.2. The donee could not have intended to exercise the power if the donee released the power (see Chapter 20), or if the donee's will or other document contained a nonexercise clause (see § 19.2, Comment *f*). Particularly in the case of an instrument not carefully drafted, language of the donee partaking of futurity is not necessarily inconsistent with a present intent to exercise the power.

Illustrations:

5. Donor died, leaving a will that devised property to Trustee in trust. Trustee is directed to pay the income to Donee (Donor's son) for life, with remainder as Donee may appoint by deed or will, and in default of appointment to Donee's issue. Donee dies leaving a memorandum as follows: "Although this is not a legal document, I hope that my issue will comply with my desire to have \$10,000 of the trust property of the trust under Donor's will go to my wife." The inference is justified that the precatory language of the memorandum does not indicate an intent on Donee's part to exercise the power. Therefore, the rule of this section is not applicable.

6. Donor died, leaving a will that devised Blackacre to Donee (Donor's daughter) for life, with remainder as Donee shall appoint by a deed with two witnesses. Donee, about to undergo a serious operation, writes an unwitnessed memorandum as follows: "I want my daughter Mary to have Blackacre and will make it over to her if my life is spared." Donee dies during the operation. The inference is justified that Donee intended a present exercise of the power, but had in mind executing a confirmatory instrument because she feared that her memorandum would not suffice. Therefore, the rule of this section is applicable, and Mary will be entitled to Blackacre.

Reporter's Note

1. *Comparison with previous Restatements.* The previous Restatements adhered to the historical rule described in Comment *b*. [Restatement Second of Property \(Donative Transfers\) § 18.3](#) provided:

§ 18.3 Appointment Defective with Respect to Formalities Effective in a Court Applying Equitable Principles

Failure of an appointment to satisfy the formal requisites of an appointment described in § 18.2, other than those required by law, does not cause the appointment to be ineffective in a court applying equitable principles if

- (1) The appointment approximates the manner of appointment prescribed by the donor; and
- (2) The appointee is
 - (a) A natural object of the donee's affection, or
 - (b) A person with whom the donee has had a relationship akin to that with one who would be a natural object of the donee's bounty, or

- (c) A creditor of the donee, or
- (d) A charity, or
- (e) A person who has paid value for the appointment, or
- (f) Some other person favored by a court applying equitable principles.

2. *Supporting legislation.*

California

Cal. Prob. Code § 631. Judicial relief from formalities specified in creating instrument.

- (a) Where an appointment does not satisfy the formal requirements specified in the creating instrument as provided in subdivision (a) of Section 630, the court may excuse compliance with the formal requirements and determine that exercise of the appointment was effective if both of the following requirements are satisfied:
 - (1) The appointment approximates the manner of appointment prescribed by the donor.
 - (2) The failure to satisfy the formal requirements does not defeat the accomplishment of a significant purpose of the donor.
- (b) This section does not permit a court to excuse compliance with a specific reference requirement under Section 632.

West Virginia

W. Va. Code § 41-1-4. Execution of power of appointment. No appointment made by will, in the exercise of any power, shall be valid unless the same be so executed that it would be valid for the disposition of the property to which the power applies, if it belonged to the testator; and every will so executed shall be a valid execution of a power of appointment by will, notwithstanding the instrument creating the power expressly requires that a will made in execution of such power shall be executed with some additional or other form of execution or solemnity.

3. *Comment b. Historical note.* Cases supporting the historical rule include [Freeman v. Eacho, 79 Va. 43 \(1884\)](#), in which a woman sought to direct her trustee, by exercising a power, to dispose of a house and lot. The power she had been given was to be exercised by a written document executed by her hand and seal and witnessed by two persons. She did not include her seal when she attempted to exercise the power. “Where ... the execution of a power is defective, not in substance but in form, and the defect is occasioned by inadvertence or mistake, a court of equity will relieve when the case stands upon a meritorious consideration, in favor of a wife or a legitimate child.” *Id.* at 45, citing [Morriss' Executor v. Morriss, 74 Va. \(33 Gratt.\) 51, 79 \(1880\)](#). Deciding the case on this principle, the court in *Freeman* held that the defects in executing the instruments exercising the power were such that they ought to be supplied in equity by the court. Thus, the exercise of the power was valid.

4. *Comment d. Specific-reference requirement.* Comment *d* is consistent with [section 2-704 of the Uniform Probate Code](#), which provides:

UPC § 2-704. Power of Appointment; Meaning of Specific Reference Requirement. If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.

Comment *d* is inconsistent with the following California statute:

Cal. Prob. Code § 632. Exercise of power by instrument making specific reference to power or instrument creating power. If the creating instrument expressly directs that a power of appointment be exercised by an instrument that makes a specific reference to the power or to the instrument that created the power, the power can be exercised only by an instrument containing the required reference.

For the proposition stated in Comment *d* that a specific-reference requirement overrides any applicable state law that presumes that a residuary clause was intended to exercise a general power, see, e.g., [Schwartz v. Baybank Merrimack Valley, N.A., Trustee, 456 N.E.2d 1141 \(Mass. App. Ct. 1983\)](#); [In re Atwood Trust, 23 P.3d 309 \(Okla. Ct. App. 2001\)](#). In *Atwood*, the court held that a specific-reference requirement is not a procedural requirement, and therefore must be satisfied despite an Oklahoma statute providing that a donor-imposed formality for the “execution” of a power may be disregarded. The court held the statute inapplicable, because the statute referred to the “execution” rather than the “exercise” of a power.

In [Hudson v. Old Nat'l Trust, 2005 WL 2323344 \(Ky. Ct. App. 2005\)](#) (unpublished opinion), the donor-husband's will granted his donee-wife a general testamentary power of appointment over trust property to be exercised by “specific reference.” The donee-wife's will stated her intention to dispose of all property, including any “as to which I may have a general power of appointment by will.” The court, citing a Kentucky statute, held that, “where a donor requires some sort of specific reference to a power of appointment to exercise the power, substantial compliance by the donee with the donor's requirements will suffice.”

In [In re Strobel, 717 P.2d 892, 898 \(Ariz. 1986\)](#), the court said that “[t]he presumptive purpose of [a specific-reference] requirement is to ensure a considered and intentional, rather than an inadvertent exercise of the power.”

For a case in which the donor's intent in requiring specific reference was not merely to prevent an inadvertent exercise of the power, and thus the donee's use of a blanket-exercise clause, rather than one making specific reference to the power, would not be treated as satisfying the specific-reference requirement under the rule of Comment *d*, see [First Nat'l Bank v. Walker, 607 S.W.2d 469 \(Tenn. 1980\)](#). For a case in which the opposite result would be reached, see [Motes/Henes Trust v. Motes, 761 S.W.2d 938 \(Ark. 1988\)](#) (donor and donee were the same person; donor-donee's trust creating the power required specific reference; court held that the blanket-exercise clause in the donor-donee's will effectively exercised the power).

The court's opinion in [Schwartz v. Baybank Merrimack Valley, N.A., Trustee, 456 N.E.2d 1141 \(Mass. App. Ct. 1983\)](#), reviews a number of cases dealing with the question of whether a blanket-exercise clause satisfies a specific-reference requirement; most such cases hold that such a clause does not effectively exercise a power requiring specific reference to the power. The courts' analysis in these cases is inconsistent with the approach to the question posed in Comment *d*.

In *Estate of Anderson*, 65 Cal.Rptr.2d 307 (Ct. App.), rev. denied (1997), the court held that dependent relative revocation applied with regard to a provision in the testator's first will that was otherwise wholly revoked by her second will. As a result of an attorney error, the testator's second will failed to include a specific reference to a power of appointment that she had received under her husband's will. A valid exercise of the power depended on her will containing a specific reference to it. Extrinsic evidence established the testator's intent to exercise her power in the second will just as she had in article eighth of her first will. The court held that:

On these facts, we conclude that a “question [has] arise[n] as to the effectiveness of the second instrument, ... so that upon its failure to be operative for want of proper execution *or other cause*, the testator will be presumed to have intended the original instrument to stand *to the extent that the later proves ineffective*.” (*Estate of Salmonski*, [38 Cal.2d 199, 238 P.2d 966], italics added.) Because the second will did not effectively exercise the power of appointment, article eighth of the first will remained in effect under the doctrine of dependent relative revocation.

The result in *Anderson* is supported by § 4.3, Comment *d*.

In *Smith v. Brannan*, 954 P.2d 1259 (Or. Ct. App. 1998), and in *Estate of Hamilton*, 593 N.Y.S.2d 372 (N.Y. App. Div. 1993), the donor and donee were husband and wife. The donor's will in each case created a marital-deduction trust, granting the donee-wife a right to the income for life and a general testamentary power of appointment over the remainder interest. The donee in each case attempted to exercise her general testamentary power of appointment by a clause in her will that referred to the specific clause and date of her husband-donor's will. Before his death, however, the husband-donor executed a subsequent will that conferred a general testamentary power of appointment on the donee in identical terms as in the previous will. In the *Hamilton* case, the donor's will required specific reference “to said power in my last Will and Testament.” In the *Smith* case, the donor's will required specific reference “to this provision of my Will,” and the donee had become mentally incapacitated to execute a valid will when the donor executed his later will. The court in each case held that the donee's attempted exercise was ineffective, because it failed to comply with the donor's requirement of a specific reference.

For a case contrary to Comment *d*, see *Final Accounting of Shenkman*, 737 N.Y.S.2d 39 (App. Div. 2002). In a perfunctory opinion, the court held that a blanket-exercise clause in the donee's will did not effectively exercise a general testamentary power of appointment requiring specific reference to the power. The court made no inquiry and drew no inferences about the donor's reasons for imposing a specific-reference requirement and held that the donee's intent is irrelevant.

Calvert v. Scharf, 619 S.E.2d 197 (W. Va. 2005), was a malpractice action against the donee's drafting attorney, in which the trial court certified a series of questions to the Supreme Court of Appeals of West Virginia. The donor-husband's will created a trust providing that the donee-wife had a general testamentary power of appointment over the remainder interest in a marital-deduction trust, requiring that the power “shall be exercisable by my wife in her Will by a separate ITEM in which she specifically refers to this power of appointment and in which ITEM she does not dispose of or attempt to dispose of any other property.” The donee-wife executed a will that strictly complied with this requirement, but subsequently hired another law firm to prepare estate-planning documents for her. Her new lawyer prepared a new will for her that attempted to exercise her power of appointment by a blending-type blanket-exercise residuary clause. The court held that the donee's attempted appointment was ineffective, and was not saved by W. Va. Code § 41-1-4, supra Note 2, or by Restatement Second of Property (Donative Transfers) §§ 18.3 and 23.2. The court overlooked the possibility of reforming the donee-wife's new will in accordance with her previous will (see § 12.1) or the possibility of applying dependent relative revocation (see § 4.3, Comment *e*).

5. *References. Annot., Disposition of All or Residue of Testator's Property, Without Referring to Power of Appointment, as Constituting Sufficient Manifestation of Intention to Exercise Power, in Absence of Statute*, 15 A.L.R. 3d 346 (1967)

& Supp.); Annot., [Nontestamentary Transaction, Pecuniary Bequest, or Specific Devise or Bequest Not Referring to Power as Constituting Sufficient Manifestation of Intention to Exercise Power of Disposition Over Property](#), 16 A.L.R. 3d 951 (1967 & Supp.).

Case Citations - by Jurisdiction

Vt.

Vt.2013. Cit. in sup. Executor of testator's estate sought to physically partition and sell real property to make a division between the heirs of testator's residual estate. The probate court issued an order allowing executor to proceed with her partition plan, as modified. The court of appeals granted partial summary judgment for two of testator's sons, finding that, because legal title to the real property passed to beneficiaries immediately upon testator's death, executor could not partition the property. Reversing and remanding, this court held that the residuary clause of testator's will created a power of appointment in executor to partition or sell the property for distribution to testator's children. Noting that, under Restatement Third of Property: Wills and Other Donative Transfers § 19.10, the donee of a power of appointment had to substantially comply with any donor-imposed requirements, the court made clear that executor was bound by the residuary clause's requirement that the distribution shares be as equal as possible. [In re Estate of Fitzsimmons, 2013 VT 95, 86 A.3d 1026, 1038.](#)

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