Restatement (First) of Property § 347 (1940)

Restatement of the Law - Property | March 2017 Update
Restatement (First) of Property
Division III. Future Interests
Part IV. Special Topics
Chapter 25. Powers of Appointment
Topic 7. Effectiveness of Appointments

§ 347 Sufficiency of Appointments Defective With Respect to Formalities

Failure of an appointment to satisfy formal requirements imposed by the donor does not cause the appointment to be ineffective in equity if

(a) the appointment approximates the manner of appointment prescribed by the donor; and

(b) the appointee is a wife, child, adopted child or creditor of the donee, or a charity, or a person who has paid value for the appointment.

First Caveat:

The Institute takes no position as to whether a "child" includes an illegitimate child with respect to the rule stated in this Section.

Comment:

a. Origin of the rule. The rule stated in this Section arose in the English courts of Chancery and is still expressed as a rule that "equity will aid the defective execution of a power." Such aid is given only for the benefit of certain classes of persons traditionally favored by courts of equity [see Clause (b)].

Second Caveat:

The Institute takes no position as to whether the equitable origin referred to in Comment *a* causes interests of appointees under the rule stated in this Section to have the characteristics of other equitable interests. Thus the Institute takes no position as to whether (1) the appointee must seek relief in a court of equity as distinguished from a court of law, or (2) whether the rule stated in this Section can be asserted against a bona fide purchaser.

b. What constitutes an approximation of the donor's requirements. Where the donor specifies that an appointment inter vivos shall be under seal or witnessed or both, an unsealed and unwitnessed instrument in writing purporting to operate inter vivos approximates the donor's requirements. Where the donor specifies that an appointment shall be by will, or by deed or will, an instrument in writing which purports to be a will but which lacks the witnesses necessary to a valid will, approximates the donor's requirements.

Where the donor specifies that an appointment shall be by will, an appointment operating inter vivos is not an approximation of the donor's requirements; for it is of the essence of a testamentary power that the discretion as to its

exercise be retained by the donee up to the moment of death (but compare § 327, Comment *d*, as to statutory changes). Where the donor specifies that an appointment shall be by an inter vivos instrument, a will or instrument in writing purporting to be a will approximates the donor's requirements; for a will accomplishes all purposes of substance which the donor could have intended in prescribing an appointment by an inter vivos instrument (but compare § 346, Comment *i*, Statutory Note 2, as to statutory changes).

The enumeration in this Comment of situations in which the appointing instrument approximates the manner of appointment prescribed by the donor is not all-inclusive but covers the cases most commonly arising.

c. Formal requirements imposed by law. Approximation of requirements imposed by law with reference to the formalities of instruments of appointment is not sufficient; the appointment, if defective in this particular, fails. Thus in a state where a statute provides that a power can be exercised only by an instrument sufficient to pass the estate if owned by the donee, an appointment is ineffective if the legal formalities are not present (see § 346, Comment *i*). On the other hand a statute which prescribes the formalities for deeds or wills and which is construed not to apply to the exercise of powers (see § 346, Comment *h*) does not prevent an instrument lacking these formalities from being an effective appointment if the requirements of this Section are met.

Illustrations:

1. State X has a statute which provides that a power over land can be executed only by a written instrument which would be sufficient to pass the property if owned by the donee. State X also has a statute requiring conveyances of land to be under seal. A by will transfers Blackacre to B for life, remainder to such person as B shall by deed appoint and in default of appointment to C. B executes an instrument in writing not under seal which purports to appoint Blackacre to B's wife. The appointment is ineffective.
2. State Y has a statute requiring conveyances of land to be under seal; this statute is construed not to apply to instruments of appointment. A by will transfers Blackacre to B for life, remainder to such persons as B shall by deed appoint and in default of appointment to C. B executes an instrument in writing not under seal which purports to appoint Blackacre to B's wife. The appointment is effective in equity.

d. Appointment not intended. Under the rule stated in this Section certain formal defects are ignored where the donee has attempted to make an appointment to certain favored classes of appointees. But it is a prerequisite that the intent to appoint be found. If, for whatever reason, the donee did not intend to exercise the power, the rule stated in this Section has no application.

Illustrations:

3. A by will transfers Blackacre to B for life, remainder to such person as B shall by will appoint. B is advised that if he shall die intestate Blackacre will pass to his children. He therefore makes no will. B dies. Blackacre passes to the heirs of A. There is no execution of the power; but under some circumstances, if the advice given to B was fraudulent with respect to the heirs, the takers in default would hold the property upon constructive trust for B's children (see Restatement of Restitution, § 184).
4. A by will transfers a fund in trust for B for life and then in trust for such person or persons as B shall by deed or will appoint and in default of appointment to B's children equally. B dies leaving a memorandum as follows: “Although this is not a legal document I hope my children will comply with my desire to have $1000 of the trust fund under A's will go to my wife.” The inference is justified that this precatory language does not indicate an intent on B's part to exercise the power. Therefore, the power is not exercised and the fund passes to the children of B.

However, particularly in the case of instruments inartificially drafted, a certain element of futurity in the expressions used by the donee is not necessarily inconsistent with a present intent to exercise the power (compare § 339, Comment *b*).

Illustration:

5. A by will transfers Blackacre to B for life, remainder to such person or persons as B shall appoint by deed with two witnesses. B, about to undergo an operation, writes an unwitnessed memorandum as follows: "I want my son, C, to have Blackacre and will make it over to him legally if my life is spared." B dies. The inference is justified that B intended a present exercise of the power but had in mind the execution of some later confirmatory instrument due to doubts as to the legal efficacy of his present action. Therefore in equity this is an effective appointment and C is entitled to Blackacre.

e. Cross-references. As to what constitutes "value," see Restatement of Trusts, §§ 298 to 309. As to what constitutes a charity, see Restatement of Trusts, §§ 368 to 377.

Case Citations - by Jurisdiction

Ariz.
Ariz.App.
Cal.App.
Colo.App.
Me.
Mass.
Mass.App.
Mo.App.
N.Y.Surr.Ct.
Okl.App.
Tenn.

Ariz.

Ariz.1986. Cit. in disc., quot. in sup., com. (a) cit. in sup., com. (d) cit. but dist., subsec. (b) cit. but not fol. A grantor created an inter vivos trust for his wife with instructions that her power of appointment was conditional on her making specific reference to the power being exercised. If she failed to properly appoint, the corpus would go to the grantor's son. The wife mistakenly referred to her husband's will in appointing the trust to her sister, and the trustee petitioned the court for instruction on distribution. The trial court held that the appointment was erroneous and entered summary judgment granting recovery to the son. The court of appeals affirmed, but the supreme court reversed. The defective appointment was rescued in equity because the donee intended to appoint, the sister was a favored beneficiary, and the appointment approximately complied with the donor's instructions and did not defeat the donor's intent. Matter of Strobel, 149 Ariz. 213, 717 P.2d 892, 896, 897.

Ariz.App.

Ariz.App.2000. Quot. in case quot. in disc. After mother amended the family trust to remove her daughter as remainder beneficiary and successor trustee, replacing her in those capacities with her granddaughter, daughter sued granddaughter, among others, for breach of fiduciary duty and unjust enrichment, claiming entitlement to the trust assets. Affirming the trial court's grant of summary judgment for defendant, this court held, inter alia, that mother's amendment of the trust, though ineffective as an amendment, was a valid exercise of the trust's special power of appointment so as to change the remainder beneficiary. Wetherill v. Basham, 197 Ariz. 198, 3 P.3d 1118, 1124.

Cal.App.

Cal.App.1999. Cit. in ftn. Beneficiary sought declaratory judgment as to the validity of trustor's exercise of a power of appointment over one of three related trusts. The trial court found the appointment to be invalid and entered judgment accordingly. Affirming, this court held that the otherwise applicable section of the Probate Code, which allowed a court to excuse a donor's failure to comply with certain requirements respecting the instrument of appointment as long as noncompliance did not defeat the accomplishment of a significant purpose of the donor, could not be invoked here, where trustor had failed to satisfy the legal prerequisite that power of appointment be exercised by will or codicil. Catch v. Phillips, 73 Cal.App.4th 648, 86 Cal.Rptr.2d 584, 589.

Cal.App.1982. Quot. in diss. op. and cit. in ftn. in diss. op. The administrator of a woman's estate brought this action to have the assets of a trust created by the woman's husband included in the estate. The husband and wife had executed wills in 1968. The husband's will contained a provision whereby if the wife elected to take under the will, two trusts would be set up: one for her benefit, the other for the husband's son. The wife's trust would provide her with a life income, her surviving sister with a life income, and would finally revert to the husband's son following the death of both the wife and the sister. The husband's will further provided the wife a testamentary general power of appointment over the principal and undistributed income of the wife's trust; however, this power would be effectively exercised only by a specific reference to it in her will. The wife's will contained a provision generally disposing of any property over which she held a power of appointment. Her will did not specifically mention or refer to her husband's will or the power of appointment granted her therein. In 1969, California revised its probate code, an amended provision of which statutorily required specific reference to the instrument creating a power of appointment, or to the power itself, if the creating instrument required such a reference. The purpose of the revised provision was to permit the power's creator to eliminate unintended exercise of the power of appointment in blanket residuary clauses. The husband died in 1973; the trusts and power of appointment were created when the wife elected to take under the will; the husband's son died in 1977; the wife's sister died soon thereafter; and the wife died in 1979, never having amended her will. The administrator of the wife's estate, her stepson, brought this action alleging that, by her will, the wife had exercised her power of appointment and that because of the deaths of the husband, the husband's son, the wife's sister, and the wife, the trust assets belonged in the wife's estate. The trustee for the wife's trust opposed this contention by asserting that the wife never sufficiently referred to either the husband's will or to the power of appointment in her purported attempt to exercise that power. The trial court granted judgment for the administrator, and the trustee appealed. This court reversed the decision below and stated that the wife did not validly exercise the power of appointment. This court found the language of the wife's will deficient both under the pertinent statute and under the requirements of the husband's will. The wife in her will did not sufficiently refer to the power of appointment or to the creating instrument. The purported exercise of the power of appointment was thus ineffective and the trust assets reverted to the husband's estate. A dissenting opinion cited the Restatement in arguing that the wife had substantially complied with terms of the husband's will in exercising the power of appointment. Estate of Eddy, 134 Cal.App.3d 292, 184 Cal.Rptr. 521, 536.

Colo.App.

Colo.App.1978. Cit. in sup. in diss. op. Personal representative of estate of deceased wife petitioned court to determine whether wife, in the residuary clause of her will, validly exercised a general testamentary power of appointment conferred upon her by the trust provisions of her late husband's will. Such provisions stipulated that the power be conferred in wife's will "only if such will specifically refers to this power." However, wife's will devised "any property in which I hold a power of appointment." The court held that the power of appointment had not been exercised in the manner prescribed by the donor, i.e., by making specific reference in her will to this power. The dissent agreed with the majority's rationale, but found that since the evidence had established that the power of appointment conferred upon wife by her late husband was the only power she possessed at the time she executed her will, under the circumstances, the manner in which she had exercised the power should have satisfied her husband's requirement of specificity. Matter of Estate of Smith, 41 Colo.App. 366, 585 P.2d 319, 322.

Me.

Me.1983. Cit. in sup. The donee of a trust was given a testamentary power of appointment over a portion of the corpus. The balance of the corpus was to become a part of another trust which benefited the appellants. The donee executed a document purportedly as a will, naming her husband and sons as beneficiaries, but lacking the requisite number of witnesses. The probate court admitted the will as a valid exercise of the donee's power of appointment. This court affirmed, holding that the will was covered by an equitable exception to the rule that a power must be exercised in the manner prescribed by the donor. Assuming, arguendo, that the appointment of beneficiaries under the will did not meet the formalities prescribed by the donor, this court found that the appointment nonetheless approximated the manner of appointment prescribed, and the beneficiaries of the appointment were the natural objects of the donee's affection. Estate of McNeill, 463 A.2d 782, 784.

Mass.

Mass.1968. Cit. in sup. The testator gave a life estate in an inter vivos marital deduction trust to his wife, with a remainder according to a power of appointment to be exercised by the wife "by specific reference in her will to the full power hereby created." The wife, in the residuary clause of her will, bequeathed "all property of which [she had] the power of appointment by virtue [of] any will or testament or inter vivos trust executed" by her husband. The court held that the wife's disposition was in the manner prescribed by the testator-donor or sufficiently proximate to that manner to constitute a valid exercise of that power, and it affirmed a judgment that the power had been effectively exercised. Shine v. Monahan, 354 Mass. 680, 241 N.E.2d 854, 855.

Mass.1944. Cit. in sup. Principal and income of trust fund are distributed to statutory next of kin as provided under voluntary trust which failed to exercise power of appointment reserved therein and is independent of disposition of estate to friends by will. National Shawmut Bank of Boston v. Joy, 315 Mass. 457, 462, 53 N.E.2d 113, 117.

Mass.App.

Mass.App.1983. Com. (a) cit. in ftn. The executor of an estate brought an action for declaratory judgment that the residuary clause in his decedent's will had served to exercise a power of appointment over a trust. The donor of the power had stipulated that the power be exercised by specific reference in the donee's will. The probate court concluded that the power had not been exercised. On appeal, this court stated that effective appointment would depend upon compliance with the formalities required by the donor of the power, or by a reasonable approximation of such compliance. Finding that the decedent's will made no attempt at compliance, the court held that the decedent's power of appointment was not exercised in her will. Schwartz v. Baybank Merrimack Valley, N.A., 17 Mass.App.Ct. 169, 456 N.E.2d 1141, 1144, review denied 391 Mass. 1102, 459 N.E.2d 825 (1984).

Mo.App.

Mo.App.1977. Cit. in sup., cit. in ftn. in sup., quot. in sup. and fol., com. (b) cit. in sup., cit. and quot. in diss. op., cit. in ftn. in diss. op., and com. (a) quot. in ftn. in diss. op. Trustees named in decedent's will brought an action for construction of the will. The basic issue sought to be resolved was the effectiveness of a purported exercise of a power of appointment by decedent in his will creating a trust of which the plaintiffs are the administrators and trustees. The court affirmed a lower court's decision for the plaintiffs, and held that where the will of the donor of the testamentary power of appointment provided that the power of appointment would not be deemed to have been exercised effectively unless the donee's will specifically referred to such power and to the donor's will, and the donor's intent in setting forth the manner of exercise of the power was to prevent its inadvertent exercise, the residuary clause of the donee's will devising

to the trustees the remainder of the donee's estate, "including all property over which I have power of appointment, which power I hereby exercise," established the donee's intent to exercise the power of appointment. The court therefore concluded that, since the beneficiaries of the trust to which the property was appointed were within a class of persons favored by courts of equity, the donee's exercise of the power of appointment was effective, notwithstanding the donee's failure to specifically refer to the donor's will or the power of appointment created therein. In reaching its decision, the court adopted § 347 of the Restatement of Property, which enunciates the common law principle of aiding the defective execution of a power in equity when consistent with the state's statutes and case law. The dissent believed that § 347 of the Restatement of Property and the equity rule on which it is based had no application to the facts of this case. Cross v. Cross, 559 S.W.2d 196, 200, 202, 205, 206, 209, 210, 213, 214, 215.

N.Y.Surr.Ct.

N.Y.Surr.Ct.1976. Cit. and com. (b) cit. in disc. The question before the court was whether a widow validly exercised the power to appoint the corpus of a marital deduction trust. The court held in the affirmative. Although the deceased directed that the power of appointment be executed by deed, and the widow executed no such deed, the court found, in light of a New York statute effective prior to the testator's death though after the will was executed, that the widow could validly exercise the power by written will. Exercise by will was not expressly excluded in the will of deceased. Estate of Beckwith, 87 Misc.2d 649, 386 N.Y.S.2d 615, 617, 618, mod., 57 A.D.2d 415, 395 N.Y.S.2d 499 (1977).

Okl.App.

Okl.App.2001. Quot. in disc., coms. and illus. cit. generally in disc. Trustee brought a declaratory-judgment action against the sons of deceased trust beneficiary and against trust beneficiary who was alive, seeking interpretation of decedent's will and the trust instrument, which contained a power of appointment exercisable by decedent in his will to appoint his share of the trust to his sons. The trial court granted trust beneficiary's motion for summary judgment, and denied deceased trust beneficiary's sons' summary-judgment motion. Affirming, this court held, inter alia, that the will did not exercise the trust's power of appointment, because it failed to follow the trust's directions and did not refer to the appointment power. In re Allen A. Atwood Trust, 23 P.3d 309, 314.

Tenn.

Tenn.1980. Cit. in disc. The plaintiff brought an action to determine whether a clause in a wife's will was sufficient to comply with stipulations in her husband's will. The husband's will specified that his estate was to be divided into two trusts, a marital deduction trust and a residuary trust. His wife was made the life beneficiary of the marital trust and was given a power of appointment. However, the husband's will limited her power of appointment by specifying that the power could only be exercised by specific reference to that power in her last will and testament. The wife's will devised half of her estate to the defendant and half to her adopted son. The adopted son was also named as the remainderman of the husband's estate. At issue was whether the phrase "including all property over which I shall have any power of appointment at my death," satisfied the requirements in the husband's will. The lower court held that the power of appointment had been effectively exercised, but the intermediate court reversed that decision. In ascertaining the husband's intent, this court referred to two theories, one holding that the donor's intent in requiring a specific reference to the power donated was merely to prevent an inadvertent exercise thereof, and the other holding that the donor intended strict compliance with his requirement that the donee exercise the donated power by specific reference. This court concluded that the husband intended strict compliance with his requirement that the wife make specific reference to the power of appointment that he had assigned her. Thus, the court affirmed the decision of the intermediate court. First Nat. Bank of McMinn County v. Walker, 607 S.W.2d 469, 472.

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