

# USING EQUITY TO AID THE EXERCISE OF A POWER OF APPOINTMENT THAT FAILS TO SPECIFICALLY REFER TO THE POWER

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*Author's Synopsis: An estate plan today often grants a power of appointment that contains a specific reference requirement, which requires the donee of the power to specifically refer to the power when exercising it. Sometimes a dispute arises over whether an attempted exercise of a power of appointment satisfied a specific reference requirement. Such disputes often involve a blanket exercise clause in the donee's estate plan that attempts to exercise all of the donee's powers of appointment. This Article examines the common law equitable rule that aids an attempted exercise of a power of appointment by not requiring rigid compliance with a specific reference requirement. This Article also examines how three Restatements of Property and the Uniform Powers of Appointment Act have summarized and applied the equitable rule.*

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## I. INTRODUCTION

Estate plans today frequently contain a power of appointment under which the person granting the power (the donor) requires the person to whom the power is granted (the donee) to specifically refer to the power when exercising it (a specific-reference requirement). A specific-reference requirement is often used even though the original purpose for the requirement no longer exists.

Federal estate tax law prior to October 21, 1942, provided that the value of property subject to a general power of appointment was included in the donee’s gross estate for federal estate tax purposes only if the general power was exercised.<sup>1</sup> Thus, to prevent inadvertent exercise

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<sup>1</sup> See I.R.C. § 2041(a)(1). All statutory citations in this Article refer to the current statute unless otherwise indicated. See also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 19.10 cmt. d (AM. LAW INST. 2011) [hereinafter RESTATEMENT (THIRD) OF PROP.].

of the general power and inclusion of the appointive property in the donee's gross estate, a specific-reference clause was usually added to the provision granting the general power.<sup>2</sup>

Concern over inadvertent exercise of a general power of appointment for estate tax purposes disappeared for general powers of appointment created after October 21, 1942. Section 2041 of the Internal Revenue Code of 1986, as amended (Code), provides that the value of property subject to a general power created after October 21, 1942, is included in the donee's gross estate irrespective of whether the power is exercised.<sup>3</sup> Thus, "inadvertent exercise of a general power created after October 21, 1942, no longer has adverse estate tax consequences."<sup>4</sup>

Nevertheless, the practice of inserting a specific-reference requirement in a provision granting a power of appointment has continued since the revision to section 2041 of the Code. However, when a will or trust contains a "blanket-exercise clause,"<sup>5</sup> a construction problem often arises as to whether the clause effectively exercises a power of appointment with a specific-reference requirement. For example, a blanket-exercise clause might read as follows: "I hereby exercise any power of appointment I may have by appointing such property to my children."<sup>6</sup> Furthermore, the blanket-exercise clause might stand alone or be part of a "blending clause" that pertains to the donee's own property and to the appointive property.<sup>7</sup> A blending clause combined with a blanket-exercise clause could read as follows: "I leave my residuary estate and any property over which I have a power of appointment to my children."<sup>8</sup>

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<sup>2</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10 cmt. d.

<sup>3</sup> See I.R.C. § 2041(a)(2).

<sup>4</sup> RESTATEMENT (THIRD) OF PROP. § 19.10 cmt. d.

<sup>5</sup> Restatement (Third) of Property section 19.2 comment d states that the term "blanket-exercise clause" is a clause that "purports to exercise any power of appointment the donee may have," but while the clause manifests the donee's intent to exercise any power of appointment the donee may have, the clause raises the often-litigated question of whether it satisfies a specific-reference requirement imposed by the donor in the instrument creating the power.

<sup>6</sup> RESTATEMENT (THIRD) OF PROP. § 19.2 cmt. d.

<sup>7</sup> RESTATEMENT (THIRD) OF PROP. § 19.2 cmt. e; Jonathan G. Blattmachr, Kim Kamin & Jeffrey M. Bergman, *Estate Planning's Most Powerful Tool: Powers of Appointment Refreshed, Redefined, and Reexamined*, 47 REAL PROP. TR. & EST. L.J. 529, 540 (2013).

<sup>8</sup> A blending clause in a will that was filed in a will contest proceeding, which the author was involved with, read as follows:

If the blanket-exercise clause stands alone or is part of a blending clause, it raises the issue of whether it has effectively exercised a power of appointment with a specific-reference requirement.

Case law on this subject varies.<sup>9</sup> Generally speaking, some cases hold that the donor's intent controls and therefore an attempted exercise of a power with a specific-reference requirement by a blanket-exercise clause is ineffective.<sup>10</sup> Other cases, applying the rule that "equity will aid the defective exercise of a power," will look at the intent of the donor and the donee to determine whether a blanket-exercise clause "approximates" or "substantially complies" with a specific-reference requirement (the equitable rule).<sup>11</sup>

The equitable rule has become a mainstay of common law. It was adopted by the Restatement of Property (First) (1940) ("Restatement of Property"), the Restatement (Second) of Property: Donative Transfers (1986) ("Restatement (Second) of Property"), and the Restatement (Third) of Property.<sup>12</sup> The equitable rule adopted by the Restatement (Third) of Property was also codified in the Uniform Powers of Appointment Act (2013) (UPOA Act), which six states have enacted.<sup>13</sup>

This Article discusses the equitable rule and how it has been applied to determine whether a blanket-exercise clause constitutes an effective exercise of a power of appointment with a specific-reference requirement. However, except for Uniform Probate Code sections 2-610, 2-704 and the UPOA Act, this Article does not discuss any statutes that might affect the application of the equitable rule.<sup>14</sup> Moreover, this Article does not analyze cases dealing with whether a will exercising a power of

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All of the rest, residue and remainder of my property, wheresoever situated, and including any and all property over which I may have any testamentary control or power of appointment whatsoever at the time of my death . . . I give, devise and bequeath to the Trustees of my Revocable Living Trust . . . .

<sup>9</sup> See generally Wanda E. Wakefield, Annotation, *Sufficiency of Exercise of Power Specifying that it can be Exercised only by Specific or Direct Reference Thereto*, 15 A.L.R.4th 810 (1982 & Supp.).

<sup>10</sup> See *id.* at 810–13.

<sup>11</sup> See *id.* at 813–15.

<sup>12</sup> See *supra* note 1 for the full name of the Restatement (Third) of Property.

<sup>13</sup> The UPOA Act has been enacted in Colorado, Missouri, Montana, New Mexico, North Carolina, and Virginia. See <http://www.uniformlaws.org/Act.aspx?title=Powers%20of%20Appointment>.

<sup>14</sup> See, e.g., RESTATEMENT (SECOND) OF PROP. § 17.2 stat. n. (AM. LAW INST. 1986).

appointment is effective if the will is not probated,<sup>15</sup> whether a power exercisable by will can be exercised by the donee's revocable trust,<sup>16</sup> whether a power exercisable by an *inter vivos* instrument can be exercised by a will,<sup>17</sup> or what law should govern the construction and exercise of a power.<sup>18</sup>

## II. EQUITABLE RULE IN RESTATEMENT OF PROPERTY § 347

Restatement of Property section 347 summarized the equitable rule as follows:

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

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<sup>15</sup> Compare *Lumbard v. Farmers State Bank*, 812 N.E.2d 196 (Ind. Ct. App. 2004) and *In re Meyer*, 987 P.2d 822 (Ariz. Ct. App. 1999) (treating the exercise of a power by a will that is not probated as effective), with *In re Estate of Scott*, 77 P.3d 906 (Colo. App. 2003) (treating the exercise of a power by a will that is not probated as ineffective). See also RESTATEMENT OF PROP. § 346 cmt. B; RESTATEMENT (SECOND) OF PROP. § 18.2 cmt. b; RESTATEMENT (THIRD) OF PROP. § 19.6 cmt. b; UPOA Act § 304 (providing that an instrument formally sufficient to be admitted to probate under applicable law can effectively exercise a power of appointment). Restatement (Third) of Property section 19.6 comment b provides that the exercise of a power of appointment by a will is ineffective if the will is submitted for admission to probate but probate is denied.

<sup>16</sup> As to this question, Restatement (Third) of Property section 19.6 comment b states that a power exercisable "by will" can be exercised by the donee's revocable trust as long as the revocable trust remains revocable at the donee's death because the trust operates in substance as a will.

<sup>17</sup> As to this question, Restatement (Third) of Property section 19.10 comment c, illustration 4 provides that the donee's use of a will to exercise the power substantially complies with the requirement of an *inter vivos* instrument.

<sup>18</sup> See, e.g., *Roberts v. N. Tr. Co.*, 550 F. Supp. 729 (N.D. Ill. 1982). The donor and donee of the power of appointment were domiciled in Hawaii, but the donor's *inter vivos* trust agreement that created the power of appointment contained a governing law provision that applied Illinois law to all questions related to the management and administration of trusts created under the trust agreement. The court ruled that questions regarding the exercise of the power were controlled by Illinois law because it was the law selected by the governing law provision. See *id.* at 731–32.

(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.<sup>19</sup>

### III. EQUITABLE RULE IN RESTATEMENT (SECOND) OF PROPERTY § 18.3

The equitable rule adopted by the Restatement (Second) of Property is similar to the equitable rule adopted by the Restatement (First) of Property, but the favored class of appointees was expanded.<sup>20</sup> Restatement (Second) of Property section 18.3 summarized the equitable rule as follows:

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.<sup>21</sup>

Before relief will be granted under the equitable rule, the donor's intent or purpose in imposing a specific-reference requirement must be determined.<sup>22</sup> If the failure to satisfy the specific-reference requirement "will not undermine the accomplishment of a significant purpose, the court in applying equitable principles will save the appointment when it

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<sup>19</sup> RESTATEMENT (FIRST) OF PROP. § 347 (AM. LAW INST. 1940).

<sup>20</sup> See RESTATEMENT (SECOND) OF PROP. § 18.3 Reporter's Note 1 (AM. LAW INST. 1986).

<sup>21</sup> RESTATEMENT (SECOND) OF PROP. § 18.3.

<sup>22</sup> See RESTATEMENT (SECOND) OF PROP. § 18.3 cmt. c (referring to donor-imposed requirements that are not imposed by law).

is in favor of the objects of the power described in [Restatement (Second) of Property § 18.3].”<sup>23</sup> In other words, “[u]nless some significant purpose is accomplished by an additional formal requisite imposed by the donor, equitable relief from the rigid enforcement of such additional formality is available.”<sup>24</sup>

Similarly, before relief will be granted under the equitable rule, “it is a requisite that the [donee’s] intent to appoint be found. If, for whatever reason, the donee did not intend to exercise the power, the rule stated in this section does not apply.”<sup>25</sup>

#### IV. EQUITABLE RULE IN RESTATEMENT (THIRD) OF PROPERTY § 19.10

The Restatement (Third) of Property section 19.10 continued and restated the equitable rule, but also revised the rule in certain respects. The equitable rule now reads as follows:

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.<sup>26</sup>

The Restatement (Third) of Property section 19.10 revised the equitable rule by (1) eliminating the favored class of appointees, (2) requiring the donee to know of a power when exercising it, and (3) changing terminology previously used in the prior Restatements.<sup>27</sup> These revisions are discussed below.

##### A. Elimination of Favored Class of Appointees

The equitable rule in Restatement (Third) of Property section 19.10 differs from the equitable rule in the prior two Restatements by eliminating the favored class of appointees. The drafters determined that the

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<sup>23</sup> RESTATEMENT (SECOND) OF PROP. § 18.3 cmt. c.

<sup>24</sup> RESTATEMENT (SECOND) OF PROP. § 18.3 cmt. a.

<sup>25</sup> RESTATEMENT (SECOND) OF PROP. § 18.3 cmt. d.

<sup>26</sup> RESTATEMENT (THIRD) OF PROP. § 19.10 (AM. LAW INST. 2011).

<sup>27</sup> *See id.*

list of favored appointees was no longer needed because (1) the favored list of appointees in the Restatement (Second) of Property section 18.3 covered virtually anyone to whom the donee would normally appoint, and (2) the donee can appoint to anyone as long as substantial compliance of donor-imposed requirements is satisfied.<sup>28</sup>

#### B. Donee Must Know of the Power

The equitable rule in Restatement (Third) of Property section 19.10 also differs from the equitable rule in the prior two Restatements by requiring that the donee know of the power when exercising it.<sup>29</sup> The equitable rule in the prior two Restatements required only that the donee intend to exercise the power, and that requirement was carried over to the Restatement (Third) of Property.<sup>30</sup> The donee's intent to exercise a power was enhanced under the prior two Restatements if the donee knew of the power,<sup>31</sup> but knowledge of the power was only one of the factors courts considered in determining whether a donee intended to exercise the power.<sup>32</sup>

Requiring a donee to know about a power at the time of exercise is likely to substantially limit the use of the equitable rule in cases where a court must determine whether a blanket-exercise clause effectively exercises a power of appointment with a specific-reference requirement. This is ironic because the equitable rule was developed in part by cases dealing with blanket-exercises of powers that were subject to a specific-

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<sup>28</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10 cmt. b.

<sup>29</sup> See *id.* (“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.”).

<sup>30</sup> See *id.*

<sup>31</sup> See generally S.R. Shapiro, Annotation, *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.) (Section 9 of this Annotation discusses cases treating a donee’s knowledge of the existence of a power as a factor as to whether the donee intended to exercise the power.) [hereafter Shapiro].

<sup>32</sup> See the list of factors in Restatement (Second) of Property section 17.5 that are set forth in Part VI.C.4 of this Article, which courts consider to determine whether a donee intended to exercise a power of appointment. The donee’s knowledge of a power is only one of those factors. See *infra* Parts VI.D.2 and VI.D.3, which also discuss factors the courts consider to determine whether a donee intended to exercise a power. The facts include knowledge of a power. See also *infra* Part VI.C.2 (discussing how a blanket-exercise clause manifests a donee’s intent to exercise existing and unknown after-acquired powers).



reference requirement. Nevertheless, the apparent goal of the Restatement (Third) of Property is to prevent application of the equitable rule when the donee of a power of appointment does not know of the power when he or she executes an instrument containing a blanket-exercise clause.

Because existing case law does not demand that a donee know of a power before the equitable rule can be applied to aid the exercise of the power, this Article recommends below that courts either adopt the equitable rule in Restatement (Second) of Property section 18.3, or adopt the equitable rule in Restatement (Third) of Property section 19.10 without the knowledge requirement. Furthermore, this Article recommends below that states adopting section 304 of the UPOA Act eliminate the requirement that a donee know of a power when exercising it.

### C. Changes in Terminology

Two changes in terminology were made in the equitable rule adopted in Restatement (Third) of Property section 19.10. One change in terminology was to use a more familiar term, while another change in terminology was made without explanation. Both changes are discussed below.

#### 1. Change From “Approximate” to “Substantial Compliance”

Similar to the equitable rule in the Restatement (Second) of Property section 18.3, the equitable rule in the Restatement (Third) of Property section 19.10 continued the requirement that a donee’s appointment approximate the manner of appointment prescribed by the donor.<sup>33</sup> However, the Restatement (Third) of Property changed the word “approximate” to “substantial compliance” because the latter term was perceived as a more familiar term.<sup>34</sup>

#### 2. Change From “Significant Purpose” to “Material Purpose”

Furthermore, similar to the equitable rule in the Restatement (Second) of Property section 18.3, the Restatement (Third) of Property section 19.10 continued the position that equitable relief from rigid enforcement of a specific-reference requirement is available, unless some significant purpose is accomplished by the donor-imposed requirement.<sup>35</sup>

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<sup>33</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10 (AM. LAW INST. 2011).

<sup>34</sup> RESTATEMENT (THIRD) OF PROP. § 19.10 cmt. b.

<sup>35</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10.

However, the Restatement (Third) of Property section 19.10 changes the phrase “significant purpose” to “material purpose,” but it gives no explanation for the change.<sup>36</sup> The term “material purpose” might have been used because it is more familiar. Nevertheless, comment d of Restatement (Third) of Property section 19.10 provides some insight as to when a significant or material purpose will exist with respect to a specific-reference requirement, which prevents application of the equitable rule.<sup>37</sup>

First, comment d of Restatement (Third) of Property section 19.10 presumes that a donor’s purpose for using a specific-reference requirement today is the same as the original estate tax purpose for the requirement, which is to prevent an inadvertent exercise of a power.<sup>38</sup> Second, comment d states that to overcome the presumed intent to prevent inadvertent exercise of a power, it must be shown that the donor had a “material purpose” to prevent any exercise of the power, whether intentional or inadvertent, that fails to comply with 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.*<sup>39</sup>

The Reporter’s Note to Restatement (Third) of Property section 19.10 cites only one case, *First National Bank of McMinn County v. Walker*,<sup>40</sup> as authority where the donor’s intent in requiring specific-reference to a power was not merely to prevent an inadvertent exercise of

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<sup>36</sup> RESTATEMENT (THIRD) OF PROP. § 19.10.

<sup>37</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10 cmt. d.

<sup>38</sup> See *id.* Even though the original estate tax purpose for the requirement no longer exists, “[n]evertheless, 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.” *Id.* (emphasis added).

<sup>39</sup> RESTATEMENT (THIRD) OF PROP. § 19.10 (emphasis added).

<sup>40</sup> 607 S.W.2d 469 (Tenn. 1980).

the power.<sup>41</sup> In *Walker*, the donor of the power executed a will in 1969 that granted to the donee, his wife, a power exercisable by specific-reference to the power.<sup>42</sup> The donee executed a will in 1969 containing a blanket-exercise clause that did not specifically refer to the power.<sup>43</sup> The donor changed attorneys and executed a new will in 1972.<sup>44</sup> The donor retained the specific-reference provision and was advised by his new attorney that the donee's general reference to any power of appointment in her 1969 will was probably an ineffective exercise of the power.<sup>45</sup> The Tennessee Supreme Court in *Walker* found compelling that the donor retained the specific-reference requirement in his 1972 will and was advised by counsel that the donee's 1969 will with a blanket-exercise clause was ineffective.<sup>46</sup> Based on those facts, *Walker* refused to apply the equitable rule to aid a defective exercise (as set forth in Restatement of Property section 347)<sup>47</sup> and concluded that the donor intended "strict compliance" with the requirement that specific-reference be made when exercising the power.<sup>48</sup>

At the end of its opinion in *Walker*, the Tennessee Supreme Court stated, "[e]ach case of this kind, of course, must be determined upon its own facts respecting the sometimes elusive intent of the testator. We believe our conclusion to be the correct one, but, it is limited to the peculiar facts of this case."<sup>49</sup>

Thus, the *Walker* decision limited its holding regarding strict compliance with a specific-reference requirement to the facts of that case. Similarly, other decisions favoring use of the equitable rule have also limited their holdings to the facts of those cases.<sup>50</sup> By limiting

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<sup>41</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10.

<sup>42</sup> See *Walker*, 607 S.W.2d 469.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 470–71.

<sup>45</sup> See *id.* at 471.

<sup>46</sup> See *id.*

<sup>47</sup> See RESTATEMENT (FIRST) OF PROP. § 347 (AM. LAW INST. 1990).

<sup>48</sup> See *Walker*, 607 S.W.2d 469 at 475.

<sup>49</sup> *Id.*

<sup>50</sup> See *infra* Part VI.D.3; see also, e.g., *Greenwood v. Peterson (In re Strobel)*, 717 P.2d 892, 899 (Ariz. 1986) (holding that "[o]n this record we conclude that the substantial purpose of the specific reference requirement was to ensure a considered appointment rather than to thwart its exercise"). Furthermore, *Cross v. Cross*, 559 S.W.2d 196, 209 (Mo. Ct. App. 1977) provides: "Other factual situations and other language might compel a contrary result, but on all the facts and circumstances of this case, it

decisions to applicable facts, courts should be able to move between strict compliance with a specific-reference requirement and use of the equitable rule when facts and circumstances permit.<sup>51</sup>

Another case where the donor's intent with respect to a specific-reference requirement exceeded the presumptive intent to prevent inadvertent exercise of a power is *Smith v. Brannan (In re C.A. Dillinger Marital Trust)*.<sup>52</sup> The donor and donee of the power were husband and wife, respectively, and they executed wills in 1978.<sup>53</sup> The donor's will established marital and residual trusts and gave the donee a general power of appointment over the assets of the marital trust, which had a specific-reference requirement.<sup>54</sup> The donee's will exercised the power by specific-reference to the donor's 1978 will.<sup>55</sup> The donee was diagnosed with Alzheimer's disease before the donor executed a new will in 1988 that revoked the donor's 1978 will.<sup>56</sup> The donor's 1988 will also established marital and residual trusts and gave the donee the same general power of appointment over the assets in the marital trust.<sup>57</sup> Assets not effectively appointed by the donee's will were to be added to the residual fund.<sup>58</sup> The donor's 1988 will differed from his 1978 will by reducing the number of beneficiaries of the residual fund from six to two, who were the petitioner and respondent in this case.<sup>59</sup> The donor died in 1989 and the donee died in 1994 without changing her will.<sup>60</sup> The donee

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seems clear that this court should hold that this language presents only a manifest intention to prevent an inadvertent exercise or to ease the burden of the executors in the distribution of her will if appropriate language had been used." In addition, *Shine v. Monahan*, 241 N.E.2d 854, 856 (Mass. 1968) refused to consider certain cases where a blanket-exercise clause was not treated as complying with a specific exercise requirement because "[s]uch holdings do not suggest the proper construction of the different language before us."

<sup>51</sup> See, for example, cases cited *infra* Part VI.C.1, particularly *Cessac v. Stevens*, 127 So. 3d 675 (Fla. Dist. Ct. App. 2013) and *In re Passmore*, 416 A.2d 991 (Pa. 1980).

<sup>52</sup> 954 P.2d 1259 (Or. Ct. App. 1998).

<sup>53</sup> *See id.* at 1260.

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

exercised the power in her will by appointing the marital trust assets to the respondent.<sup>61</sup>

The court in *In re C.A. Dillinger Marital Trust* determined that the donee was incompetent when the donor executed his 1988 will. Therefore, an inadvertent exercise of the power of appointment in the 1988 will could not occur.<sup>62</sup> Nevertheless, the donor still required specific-reference to the power in his 1988 will. Based on those facts, the court concluded that “[t]he presumptive intent that the provision was included to avoid an inadvertent exercise of the power cannot apply to these facts.”<sup>63</sup>

The court in *In re C.A. Dillinger Marital Trust* also observed that the 1998 will showed the donor’s specific intent to have the petitioner and respondent share equally in the combined estates of the donor and donee.<sup>64</sup> A provision in the donor’s 1998 will expressing this specific intent read as follows:

I specifically direct that the above distribution of the residuary fund to [petitioner] and [respondent] shall be accomplished in a manner which most closely equalizes among the two of them the total distribution that each receives from my estate and my wife’s estate and further, taking into account, gifts which each received of which we have made specific record prior to our deaths. It is my specific intention that the total distribution (meaning *inter vivos* gifts from myself and my wife and testamentary distributions from myself and my wife to [petitioner] and [respondent]) shall be as nearly equal as possible when taken as a whole, and it is my intention that the final distribution from the residuary fund herein shall be made in a manner which most closely achieves such equal distribution.<sup>65</sup>

After considering the provision expressing specific intent to equally benefit the petitioner and respondent, as well as the provision granting the power of appointment in the marital trust with a specific-reference

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<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 1262.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 1261.

<sup>65</sup> *Id.* at n.6.

requirement, the court in *In re C.A. Dillinger Marital Trust* concluded that the donor's "clear intent" was to take advantage of the marital estate tax deduction while controlling the disposition of his estate among the petitioner and respondent, and that applying the presumptive intent of the equitable rule would be contrary to the donor's clear intent.<sup>66</sup> According to the court, the 1998 will did more than require a general reference to the marital fund; it required specific reference to the power in the 1998 will because the purpose in imposing that requirement went beyond ensuring against an inadvertent exercise of the power.<sup>67</sup> Thus, applying the equitable rule in that situation would have defeated that purpose.<sup>68</sup>

Overall, the *Walker* and *In re C.A. Dillinger Marital Trust* decisions provide guidance, under the Restatement (Third) of Property section 19.10, as to what will constitute a material purpose of the donor for denying relief under the equitable rule. Each of those cases had a material purpose that went beyond ensuring against inadvertent exercise of the power.

#### V. UNIFORM POWERS OF APPOINTMENT ACT § 304

Section 304 of the UPOA Act codifies the version of the equitable rule found in the Restatement (Third) of Property section 19.10. Section 304 reads as follows:

A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if:

- (1) the powerholder knows of and intends to exercise the power, and

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<sup>66</sup> See *id.* at 1262.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* at 1263. The court in *In re C.A. Dillinger Marital Trust* could have simply ruled that the donee's reference in her will to a power revoked by the donor did not satisfy the specific-reference requirement in the donor's subsequently executed will because the exercise did not reflect an intent to exercise any subsequent power created by the donor. See, for example, *In re Estate of Hamilton*, 593 N.Y.S.2d 372, 373-74 (1993), where the court determined that (i) the donee's will exercised a power that had ceased to exist by reason of the donor executing subsequent wills that revoked the power, and (ii) it could not infer from the exercise that the donee also intended to exercise any power existing under the donor's subsequent wills.

- (2) the powerholder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.<sup>69</sup>

The comment in section 304 states the following about the effective exercise of a blanket-exercise clause upon a power with a specific-reference requirement:

A more difficult question is whether a *blanket-exercise clause* satisfies a specific-reference requirement. If it could be shown that the powerholder 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 intent was not merely to prevent an inadvertent exercise of the power but instead that the donor had a material purpose in insisting on the specific-reference requirement. In such a case, the possibility of applying Uniform Probate Code § 2-805 or Restatement Third of Property: Wills and Other Donative Transfers § 12.1 to reform the powerholder's attempted appointment to insert the required specific reference should be explored.<sup>70</sup>

However, the comment does not elaborate further on how it could be shown whether the donor had a material purpose to insist on strict compliance with the specific-reference requirement.<sup>71</sup> Rather, the comment refers the reader to Restatement (Third) of Property section 19.10.<sup>72</sup>

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<sup>69</sup> UNIF. POWERS OF APPOINT. ACT § 304, 3 U.L.A. 7 (2013).

<sup>70</sup> *Id.* § 304 cmt.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* The comment in section 304 also states:

[The] rule of this section is consistent with, but an elaboration of, Uniform Probate Code § 2-704: '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 intent, in requiring that the [powerholder] exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.'

*Id.*

## VI. CASE LAW REGARDING THE EQUITABLE RULE

### A. Intent of the Donor and Donee of the Power Must be Considered

As previously discussed, a court must consider the intent of the donor and donee of a power in determining whether to apply the equitable rule to aid an exercise of the power. That requirement was developed in equity jurisprudence.

For example, in *Cross v. Cross*,<sup>73</sup> after reviewing equity jurisprudence, the court stated that “in order to aid a formally defective exercise, the court must first interpret the donor’s intent in setting forth the manner of exercise and then examine the actual exercise in determining whether there has been a substantial compliance.”<sup>74</sup> To emphasize that point, the Missouri Court of Appeals in *Cross* subsequently stated that “[a]s noted at 5 American Law of Property, . . . the equitable rule requires a construction of the intent of the donor as well as the donee of a power.”<sup>75</sup> Furthermore, *Greenwood v. Peterson (In re Strobel)*<sup>76</sup> also conducted a similar review of equity jurisprudence before concluding that the intent of the donor and donee of a power are both important in determining whether to apply the equitable rule.<sup>77</sup>

### B. Donor’s Intent Regarding the Specific-Reference Requirement

The courts have recognized that the donor’s intent related to a specific-reference requirement will have one of two purposes based on the facts of the case: (1) to prevent an inadvertent exercise of the power, or (2) to demand a strict and literal compliance with the requirement.<sup>78</sup>

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<sup>73</sup> 559 S.W.2d 196 (Mo. Ct. App. 1977).

<sup>74</sup> *Id.* at 206.

<sup>75</sup> *Id.* at 208. The court was referring to the equitable rule in Restatement of Property section 347, a predecessor of Restatement (Third) of Property section 19.10.

<sup>76</sup> 717 P.2d 892 (Ariz. 1986).

<sup>77</sup> *See id.* at 896–97; *see also* *Roberts v. N. Tr. Co.*, 550 F. Supp. 729 (N.D. Ill. 1982) (concluding that under Illinois law, the donee’s intent has to be considered along with the donor’s intent to determine whether the equitable rule applies because “the question whether the donee’s exercise sufficiently complies with the specific reference requirement cannot be divorced from the examination of the donee’s intent”).

<sup>78</sup> *See* *First Nat’l Bank of McMinn Cty. v. Walker*, 607 S.W.2d 469, 471–72 (Tenn. 1980). *See also* *Greenwood v. Peterson (In re Strobel)*, 717 P.2d 892, 898 (Ariz. 1986), which discusses case law adopting both purposes for the specific-reference requirement. However, case law adopting the view that the donor requires strict compliance with the requirement usually focuses only on the intent of the donor. In *Halzbach v. United Virginia Bank*, 219 S.E.2d 868, 872 (Va. 1975), the Supreme Court of Virginia decided



The Restatement (Third) of Property section 19.10 deals with both purposes by initially presuming that the specific-reference requirement reflects an intent to prevent an inadvertent exercise of a power,<sup>79</sup> but if the facts show that the donor intended strict and literal compliance with the requirement—that is, as a means of foiling the donee’s exercise of the power<sup>80</sup>—then the requirement will be upheld.<sup>81</sup>

The position of Restatement (Third) of Property section 19.10 regarding presumed intent is based in part on *In re Strobel*,<sup>82</sup> where the Supreme Court of Arizona stated that “[t]he presumptive purpose of the specific reference requirement is to ensure a considered and intentional, rather than an inadvertent exercise of the power.”<sup>83</sup> The position of the Restatement (Third) of Property section 19.10 regarding presumed intent is also based in part on *Cross v. Cross*,<sup>84</sup> where the Missouri Court of Appeals determined, after reviewing the facts and circumstances of that case and numerous cases dealing with both purposes of the specific-reference requirement, that equitable relief was appropriate because the intent of the donor there “was to prevent an inadvertent exercise of the power of appointment and that she did not intend to create a rigid and unyielding limitation upon the exercise of the power.”<sup>85</sup> In other words, under the facts and circumstances of that case, equity will aid an exercise of a power when the specific-reference requirement “presents only a manifest intention to prevent an inadvertent exercise or to ease the

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not to pit one intent or purpose of the specific-reference requirement against the other; instead, it concluded that a specific-reference requirement is a lawful requirement that the donee must fully satisfy.

It is not necessary to our decision to guess which of these motives prompted donor. Indeed, one is not exclusive of the other. The requirement imposed is not unlawful; it does not offend public policy . . . .

When a donor imposes such a requirement, a donee, who enjoys no title to donor’s property, can make no valid appointment affecting that property unless he complies with donor’s requirement.

219 S.E.2d at 872.

<sup>79</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10 cmt. d (AM. LAW INST. 2011).

<sup>80</sup> The concept of foiling the donee’s exercise through a specific-reference requirement was discussed, but dismissed, in *In re Strobel*, 717 P.2d 892, 898 (Ariz. 1986).

<sup>81</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10 cmt. d.

<sup>82</sup> 717 P.2d 892, 898 (Ariz. 1986).

<sup>83</sup> *Id.* at 898.

<sup>84</sup> 559 S.W.2d 196 (Mo. Ct. App. 1977).

<sup>85</sup> *Id.* at 208–09.

burden of the executors in the distribution of her will if appropriate language had been used.”<sup>86</sup>

### C. Donee’s Intent to Exercise the Power with a Specific-Reference Requirement

As previously noted, the equitable rule under Restatement (Third) of Property section 19.10 and UPOA Act section 304 require that the donee know of and intend to exercise a power with a specific-reference requirement.<sup>87</sup> The discussion below will address first the donee’s intent to exercise a power,<sup>88</sup> then the requirement that the donee know of that power,<sup>89</sup> and finally the factors that courts consider to determine whether the donee intended to exercise a power.<sup>90</sup>

#### 1. *Intent to Exercise and Substantial Compliance*

In order for the equitable rule to apply with respect to a power of appointment with a specific-reference requirement, there must be at least a blanket-exercise clause to show substantial compliance with the specific-reference requirement. A blanket-exercise clause shows the intent to exercise all powers held by the donee, and courts have construed the clause as manifesting an intent to exercise all general and non-general powers held by the donee.<sup>91</sup> However, such intent might produce an ineffective exercise of a power due to donor-imposed requirements

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<sup>86</sup> *Id.* at 208.

<sup>87</sup> *See supra* Part V.

<sup>88</sup> *See infra* Part VI.C.1.

<sup>89</sup> *See infra* Part VI.C.2 and Part VI.C.3.

<sup>90</sup> *See infra* Part VI.C.4.

<sup>91</sup> Restatement (Second) of Property section 17.2 and the cases listed in Reporter’s Note 3 provide that a blanket-exercise clause manifests an intent to exercise all powers held by the donee. Those cases support Restatement (Second) of Property section 17.2 comment a, which states in part as follows: “The donee’s manifested intent to exercise all powers the donee has leaves no room to conclude otherwise as to the donee’s intent.” This assumption with respect to a blanket-exercise clause also existed in Restatement of Property section 341, which stated: “When the donee in a deed or will declares in substance that he exercises all powers that he has, this manifests an intent to exercise all such powers, including special powers.” Restatement of Property section 341 was adopted in *Cross v. Cross*, 559 S.W.2d 196, 210 (Mo. Ct. App. 1977). The *Cross* decision applied that Restatement after taking into account the language in the blanket-exercise clause and the fact that the donee had no other power of appointment other than the one given to her by the donor. *See Cross*, 559 S.W.2d at 210. Restatement (Third) of Property section 19.2 comment d reaches the same conclusion regarding the effect of a blanket-exercise clause as Restatement (Second) of Property section 17.2 comment a.

with respect to the exercise of the power. Consequently, a construction proceeding may be necessary to invoke the equitable rule.

Furthermore, a blanket-exercise clause in a will or trust is a necessary starting point to show substantial compliance in exercising a power with a specific-reference requirement. For example, in *Cessac v. Stevens*,<sup>92</sup> the Florida District Court of Appeals considered a situation where the decedent held testamentary powers to appoint assets in three trusts.<sup>93</sup> Each power had a specific-reference requirement.<sup>94</sup> The decedent's will devised the remainder of her estate to the appellant, Joanne Cessac.<sup>95</sup> The decedent's will included a provision that mentioned one of the three trusts and the location of assets of the other two trusts: "Included in my estate assets are the STANTON P. KETTLER TRUST, FBO, SALLY CHRISTIANSEN, under will dated July 30, 1970, currently held at the Morgan Stanley Trust offices in Scottsdale, Arizona, and two (2) currently being held at Northern Trust of Florida in Miami, Florida."<sup>96</sup>

The will did not contain any other references to the three trusts, nor did it mention any powers of appointment granted to the decedent by those trusts.<sup>97</sup> The appellant urged the court to adopt an equitable construction because the quoted language in the will substantially complied with the specific-reference requirement in the trusts.<sup>98</sup>

The Florida District Court of Appeals in *Cessac* began its analysis by reviewing a prior Florida decision, *Talcott v. Talcott*,<sup>99</sup> and agreed with its holding that compliance with the specific-reference requirement depends not on the intent of the donee, but on whether the power was exercised in the manner prescribed by the donor.<sup>100</sup> In support, the court quoted *In re Estate of Schede*, a Pennsylvania decision that required a "strictly literal and precise performance" of the specific-reference

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<sup>92</sup> 127 So. 3d 675 (Fla. Dist. Ct. App. 2013).

<sup>93</sup> See *id.* at 676–77.

<sup>94</sup> See *id.* at 677.

<sup>95</sup> See *id.* at 676.

<sup>96</sup> *Id.* at 666–67.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 679.

<sup>99</sup> 423 So. 2d 951 (Fla. Dist. Ct. App. 1982), *rev. denied*, 431 So. 2d 990 (Fla. 1983).

<sup>100</sup> See *Cessac*, 127 So. 3d at 678.

requirement.<sup>101</sup> At this point in its opinion, the Florida District Court of Appeals in *Cessac* followed the line of cases that rejected the equitable rule and required strict compliance with a specific-reference requirement.<sup>102</sup>

However, the appellant in *Cessac* urged the Florida District Court of Appeals to adopt an equitable construction, so the court also reviewed various cases that upheld the equitable rule and stated:

Here, unlike the aforementioned cases (and other authorities cited by Appellants), the decedent's will did not include even a general reference to the powers of appointment held by the decedent. Without such, the decedent's will failed to even substantially comply with the 'specific reference' requirements of the trusts. The [*In re Strobel*] court made this precise point when it noted:

'[T]he donee's intent to exercise the power of appointment must be evident from the document itself. Thus, for example, if the donee's will makes 'no reference at all to any power,' and the donor required 'specific reference to the power,' the will cannot exercise the power of appointment, even under the equitable exception. Furthermore, 'no amount of intent by the donee will exercise a power in the face of a contrary intent by the donor.'<sup>103</sup>

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<sup>101</sup> *Id.* at 678–79 (quoting *In re Estate of Schede*, 231 A.2d 135, 137 (Pa. 1967)).

<sup>102</sup> *See, e.g.*, *Thompson v. Smith*, 585 P.2d 319, 321 (Colo. App. 1978); *Hargrove v. Rich*, 604 S.E.2d 475, 477 (Ga. 2004); *In re Estate of Schede*, 231 A.2d 135, 137 (Pa. 1967); *Holzbach v. United Va. Bank*, 291 S.E.2d 868, 871 (Va. 1975).

<sup>103</sup> 127 So. 3d at 680 (footnotes and citations omitted from all quoted language; italics in original). The requirement that a donee's exercise of a power of appointment must be evident from the document itself to qualify as substantial compliance under the equitable rule is solidly entrenched in cases other than *Cessac* and *In re Strobel*. *See, e.g.*, *Yardley v. Yardley*, 484 N.E.2d 873, 881 (Ill. App. Ct. 1985) ("We are aware of no case, however, where the document creating the power required 'specific reference to this power,' and a purported exercise of the power, which did not refer to any power of appointment, was recognized as valid. It seems to us that the failure to mention any power where the instrument creating the power requires 'specific reference to this power' is a defect which is of the essence or substance of the power and which will not, therefore, be aided in equity."); *In re Allen A. Atwood Trust*, 23 P.3d 309, 315 (Okla. Civ. App. 2001) ("[T]his Court finds that no factual basis exists for the application of the leniency in *Cross*. The language of Allen, Jr.'s Last Will is unambiguous and, without dispute, wholly fails to refer to the power of appointment. Second, the law of Virginia

The Florida District Court of Appeals crafted its holding by denying relief under the equitable rule rather than under the *Talcott* decision's holding of strict compliance with a specific-reference requirement:

In sum, we conclude that to properly exercise a power of appointment such as the powers provided for in the trusts at issue in this case, the decedent must at least make reference in his or her will to the powers of appointment held by the decedent. Here, the mere reference to one of the trusts and to the location of the property of the other two trusts was not sufficient to even substantially comply with the 'specific reference' requirements in the trusts. Accordingly, because the decedent failed to comply with the requirements of the trusts when attempting to execute her powers of appointment, the assets in the trusts did not become part of her estate and must pass to the decedent's children, as directed in the original trusts, rather than to Ms. Cessac as provided in the decedent's will.

We recognize the seemingly harsh result of our conclusion that Ms. Cessac will not receive the assets the decedent apparently intended for her to receive. However, this result is a function of the intent of the original donor, who had the right to place whatever restrictions he desired on the disposition of his property. The decedent was obligated to comply with these restrictions, and compliance would not have been difficult here, as all that was necessary was some reference to powers of appointment in the decedent's will.

For the reasons stated above, the trial court correctly determined that the trusts' assets are not the property of

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precludes construction of this unambiguous language in a manner other than it failed to exercise the power, that is, that the language does not approach an 'approximation' of the manner of appointment"); *In re Estate of Burgess*, 836 P.2d 1386, 1393 (Utah Ct. App. 1992) ("Of course, the donee's intent to exercise the power of appointment must be evident from the document itself. Thus for example, if the donee's will makes 'no reference at all to any power,' and the donor required 'specific reference to the power,' the will cannot exercise the power of appointment, even under the equitable exception.").

the decedent's estate. Accordingly, the order on appeal is AFFIRMED.<sup>104</sup>

The holding in *Cessac* reveals that some reference to the decedent's powers of appointment was all that was necessary to substantially comply with the specific-reference requirement.<sup>105</sup> Such reference would appear to include a blanket-exercise clause regarding all powers of appointment held by the decedent at death. If such reference were made, the *Cessac* decision indicates that the court may have applied the equitable rule rather than the strict compliance rule in *Talcott*.

In addition, the *Cessac* court asserted that a statute such as Fla. Stat. section 732.607 (1979), which is Florida's equivalent of Uniform Probate Code section 2-610, will not aid an equitable construction when a specific-reference requirement exists.<sup>106</sup> Section 732.607 states:

A general residuary clause in a will, or a will making general disposition of all the testator's property, does not exercise a power of appointment held by the testator *unless* specific reference is made to the power *or there is some other indication of intent to include the property subject to the power*.<sup>107</sup>

According to *Cessac*, in determining whether a general residuary or dispositive clause in a donee's will exercises a power of appointment, evidence of intent to include property subject to a power may be considered under Uniform Probate Code section 2-610 when there is no specific-reference requirement.<sup>108</sup> On the other hand, when the power contains a specific-reference requirement, Uniform Probate Code section 2-610 is not applicable.<sup>109</sup> The comment to Uniform Probate Code section 2-610 confirms this by providing that the statute "permits a Court to find the manifest intent [of the donee of a power] if the language of the will interpreted in light of all the surrounding circumstances shows that the donee intended an exercise, except, of course, if the donor has

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<sup>104</sup> 127 So. 3d at 680-81.

<sup>105</sup> *See id.*

<sup>106</sup> *See id.* at 680.

<sup>107</sup> *Id.* (emphasis added).

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

conditioned exercise on an express reference to the original creating instrument.”<sup>110</sup>

In summary, the *Cessac* decision is important on three fronts. First, the decision revealed the court’s willingness to move from case precedent requiring strict compliance with a specific-reference requirement to use of the equitable rule when facts and circumstances permit.<sup>111</sup> Second, the decision highlighted the fact that to have substantial compliance under the equitable rule, the donee must execute a document containing at least a blanket-exercise clause.<sup>112</sup> Third, the decision determined that a state statute corresponding to Uniform Probate Code section 2-610 does not apply when a power contains a specific-reference requirement.<sup>113</sup>

The willingness of the Florida District Court of Appeals in *Cessac* to move from case precedent requiring strict compliance with a specific-reference requirement to possible use of the equitable rule appears to have been influenced by three factors. First, the court’s willingness to even consider use of the equitable rule reflects its role as a court of equity as well as a court of law. Second, the court recognized that each decision regarding the effectiveness of an exercise of a power should be limited to the facts and circumstances of each case<sup>114</sup> because the court wanted to apply the equitable rule after recognizing under the facts there that “Ms. Cessac will not receive the assets the decedent [donee]

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<sup>110</sup> *Accord, In re Strobel*, 717 P.2d 913, 917–18 (Ariz. Ct. App. 1985), *vacated on other grounds*, 717 P.2d 892 (Ariz. 1986) (“The official comments to Uniform Probate Code § 2-610, from which A.R.S. § 14-2610 was adopted, state that the statute is inapplicable ‘if the donor had conditioned exercise on an express reference to the original creating instrument.’”); *In re Estate of Burgess*, 836 P.2d 1386, 1391–92 (Utah Ct. App. 1992) (“We conclude that section 75-2-610 may only effect an appointment to the extent the donor has not created limitations in the trust provisions as to how the power is to be executed.”).

<sup>111</sup> *See Cessac*, 127 So. 3d at 680–81.

<sup>112</sup> *See id.* at 680.

<sup>113</sup> *See id.*

<sup>114</sup> *See infra* Part VI.D.3; *see also, e.g.*, *First Nat’l Bank of McMinn. Cty. v. Walker*, 607 S.W.2d 469 (Tenn. 1980); *Greenwood v. Peterson (In re Strobel)*, 717 P.2d 892 (Ariz. Ct. App. 1986); *Cessac v. Stevens*, 127 So. 3d 675 (Fla. Dist. Ct. App. 2013); *Shine v. Monahan*, 241 N.E.2d 854 (Mass. 1968); *Cross v. Cross*, 559 S.W.2d 196 (Mo. Ct. App. 1977); *In re Passmore*, 416 A.2d 991 (Pa. 1980); *First Nat’l Bank of McMinn. Cty. v. Walker*, 607 S.W.2d 469 (Tenn. 1980). The courts in these cases limit their decisions to the facts of each case even though each decision dealt with either the strict compliance rule or the equitable rule in determining if the specific-reference requirement there was satisfied.

apparently intended for her to receive,”<sup>115</sup> but could not apply the rule because the donee’s will failed to even refer to the powers of appointment there.<sup>116</sup> Third, the court cited with approval *In re Passmore*,<sup>117</sup> where the Supreme Court of Pennsylvania was also willing to move from prior Pennsylvania case precedent requiring strict compliance with a specific-reference requirement to use of the equitable rule when facts and circumstances permit.<sup>118</sup>

In *Passmore*, the donor created a revocable *inter vivos* trust that gave his wife a testamentary power to appoint the remaining assets in a marital trust referred to as Trust A.<sup>119</sup> The exercise had to make “specific reference to Trust A under this Revocable Agreement of Trust.”<sup>120</sup> Immediately following the specific-reference requirement was language providing that “[t]he power to make such appointment, the conditions to which it may be subject, and the permissible beneficiaries shall be without restriction or qualification of any kind.”<sup>121</sup> The donee’s will exercised “any power of appointment which I may possess or enjoy under any Will or trust agreement executed by my husband, Charles F. Passmore,”<sup>122</sup> but failed to make “specific reference to Trust A” as required.<sup>123</sup>

The Pennsylvania Supreme Court in *Passmore* began its analysis by discussing its prior decision in *In re Estate of Schede*,<sup>124</sup> which required a strict and literal compliance with a specific-reference requirement<sup>125</sup> and stated that a blanket-exercise of power in the residuary clause of a will does not constitute strict compliance with a specific-reference requirement.<sup>126</sup> However, the Pennsylvania Supreme Court in *Passmore* observed that the donor provided additional intent with respect to the specific-reference requirement, which was derived from language that indicated the power, its conditions, and the permissible beneficiaries

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<sup>115</sup> *Cessac*, 127 So. 3d at 681.

<sup>116</sup> *See id.* at 678.

<sup>117</sup> 416 A.2d 991, 994 (Pa. 1980).

<sup>118</sup> *See id.*

<sup>119</sup> *See id.* at 992.

<sup>120</sup> *See id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 993.

<sup>124</sup> 231 A.2d 135 (Pa. 1967).

<sup>125</sup> *See Passmore*, 416 A.2d at 993.

<sup>126</sup> *See In re Estate of Schede*, 231 A.2d at 137.



were without restriction or qualification of any kind.<sup>127</sup> The court noted that applying the specific-reference requirement without accounting for the additional language “would frustrate the objectives of the donor in creating the power.”<sup>128</sup> The additional language caused the court to turn from strict compliance with a specific-reference requirement to the equitable rule based on the donor’s presumed intent to avoid an inadvertent exercise:

In our view, by adding [such language], . . . donor revealed that his true objective was not to create barriers hindering attainment of the substantive goals embodied in the power of appointment. Instead, donor intended that the donee identify the power by deliberate act. As Commentary discussing similar language of a donor states, here it is ‘quite reasonable to conclude that . . . his effective intent was merely to require sufficient formality to insure against a hasty act by the donee.’ V American Law of Property, Powers of Appointment § 23.44, p. 578 (Casner ed. 1952).<sup>129</sup>

Thus, the *Passmore* court upheld the donee’s exercise of the power, thereby applying the equitable rule and its presumed intent to avoid inadvertent exercise of a power, despite prior case precedent advocating strict compliance with a specific-reference requirement. Moreover, the dissenting and concurring opinions in *Passmore* provide additional guidance regarding use of the equitable rule in situations where a specific-reference requirement exists.<sup>130</sup>

The dissent in *Passmore* contended that strict compliance with the specific-reference requirement required reference to “Trust A” by reason of 100 years of Pennsylvania precedent.<sup>131</sup> On the other hand, the concurring opinion contended that the law should give way to equity when facts and circumstances permit:

I agree . . . that a strict reading of . . . Schede Estate . . . would force the conclusion that the power was not

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<sup>127</sup> See 416 A.2d at 994.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (quoting A. JAMES CASNER ET AL., AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 578 (Little Brown & Co. 1952)).

<sup>130</sup> See *id.* at 993–95.

<sup>131</sup> See *id.* at 995 (Kauffman, J., dissenting).

effectively exercised. However, I believe the majority has elected the wise course of not being bound by the rigidity of *Schede Estate*, supra. Limitations on the manner of the exercise of a power of appointment should be recognized only where a legitimate purpose is obtained by the insistence upon literal compliance. Such was not the case here.<sup>132</sup>

Similar to the *Cessac* decision, the concurring opinion in *Passmore* advocates against rigid application of a specific-reference requirement and contends that the equitable rule should be applied unless a legitimate purpose exists for literal compliance with the specific-reference requirement.<sup>133</sup> Accordingly, the *Cessac* and *Passmore* decisions reveal that the equitable rule can be considered and applied by a state court even though precedent applicable to that court may advocate strict compliance with a specific-reference requirement.<sup>134</sup>

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<sup>132</sup> *Id.* (Nix, J., concurring).

<sup>133</sup> *See id.* Such purpose has been described as a “significant purpose” in Restatement (Second) of Property section 18.3 and as a “material purpose” in Restatement (Third) of Property section 19.10.

<sup>134</sup> In *In re Estate of Burgess*, 836 P.2d 1386 (Utah Ct. App. 1992), the Utah Court of Appeals also exhibited a similar willingness to apply the equitable rule when prior state law precedent requires strict and literal compliance with a specific-reference requirement. The *Burgess* decision agreed with case law that required strict and literal compliance with a specific-reference requirement and stated that “[e]xpress language directing the manner whereby a donor may execute a power must be strictly complied with by the donee for there to be a valid and effective appointment.” 836 P. 2d at 1391. Nevertheless, the court considered possible application of the equitable rule because the rule was raised by the dissent. *See id.* Addressing the equitable rule, the court stated that “Mrs. Burgess’s codicil does not even contain a general reference. Nor does it contain the terms ‘power of appointment’ or ‘marital trust’ or any other descriptions thereof that might indicate Mrs. Burgess was knowingly attempting to exercise her power.” *Id.* at 1392. Based on those facts, the court noted that the equitable exception will not apply if a donee’s will makes no reference at all to a power of appointment. *See id.* at 1391. After considering the applicable facts, the court concluded that “the patent ambiguity of the codicil precludes an application of the equitable exception urged by the dissent.” *Id.* at 1393. However, unlike the *Cessac* decision above, the *Burgess* decision did not craft its holding that denied relief under the equitable rule. Rather, its holding denied relief under the line of cases that required strict and literal compliance with the specific-reference requirement. *See id.* “Since Mrs. Burgess never *specifically* referred to the power, we hold that she failed to effectively exercise the power of appointment.” *Id.* at 1393 (emphasis added). Thus, the *Burgess* decision followed precedent that required strict and literal compliance with the specific-reference requirement when the donee failed to show substantial compliance with the equitable rule.

2. *Knowledge of a Power Requirement—It Conflicts with Law on After-Acquired Powers*

The equitable rule in Restatement (Third) of Property section 19.10 requires the donee of a power to know of the power when exercising it.<sup>135</sup> This requirement is new and was not part of the equitable rule under prior Restatements. Knowledge of a power was only one of the factors courts used to determine if there was intent to exercise a power.<sup>136</sup>

The requirement that a donee know of a power when exercising the power also conflicts with law regarding a donee's exercise of after-acquired powers. Generally speaking, a blanket-exercise clause is usually construed as exercising after-acquired powers, which are unknown to the donee at the time the blanket-exercise clause is created. Even though a blanket-exercise clause can exercise after-acquired powers, the equitable rule in Restatement (Third) of Property section 19.10 treats the clause as being ineffective if the donee did not know of a power when exercising it.

Rules regarding after-acquired powers are discussed in the Restatement (Second) and (Third) of Property. Restatement (Second) of Property section 17.6 provides as follows: "A manifestation of intent in the donee's will to exercise powers includes powers acquired after the execution of the donee's will, unless the exercise of the after-acquired powers is specifically excluded."<sup>137</sup>

Cases cited in Restatement (Second) of Property section 17.6<sup>138</sup> provide that a blanket appointment such as "all the powers I may have" clearly manifests an intent by the donee to exercise after-acquired powers.<sup>139</sup> Furthermore, Restatement (Second) of Property section 17.6 provides that the law regarding after-acquired powers does not necessarily conflict with donor-imposed conditions:

In the absence of an indication to the contrary, it is inferred that the time of the execution of the donee's will is immaterial to the donor. The fact that the donor declares that the property shall pass to such person as the donee "shall" or "may" appoint is not sufficient

<sup>135</sup> See RESTATEMENT (THIRD) OF PROP. § 19.10 (AM. LAW INST. 2011).

<sup>136</sup> See *supra* notes 31–32 and accompanying text.

<sup>137</sup> RESTATEMENT (SECOND) OF PROP. § 17.6 (AM. LAW INST. 1986).

<sup>138</sup> RESTATEMENT (SECOND) OF PROP. § 17.6 Reporter's Note 3.

<sup>139</sup> Restatement (Second) of Property section 17.6 comment d also notes that a blanket appointment of "all the powers I have" is not in itself sufficient intent to exclude after-acquired powers.

indication of an intent to exclude exercise by a will previously executed since it may be inferred that these words of futurity refer to the time of the donee's death when the will becomes effective. However, the nature of the power of appointment may be such that it imposes on the donee limits or conditions which could not be complied with in advance. Thus, if the power must be specifically identified and referred to in order to exercise the power, this would not be possible if the power had not been created at the time the donee's will is executed.<sup>140</sup>

The last two sentences of the quote above merely recognize that when an instrument with a blanket-exercise clause is created before an after-acquired power with a specific-reference requirement is created, the blanket-exercise clause may need the assistance of the equitable rule to satisfy the specific-reference requirement. Furthermore, contrary to the last two sentences in the quote above, it is possible for a blanket-exercise clause to satisfy a specific-reference requirement in an after-acquired power. For example, a residuary clause in a will could read as follows: "I leave my residuary estate, including any property over which I have a power of appointment under any will or trust instrument executed by my wife, Mary, to my children." Courts have ruled that language similar to this has satisfied a specific reference requirement in a power of appointment even though the language did not refer in more specific terms to the instrument creating the power.<sup>141</sup>

Moreover, the equitable rule in Restatement (Second) of Property section 18.3, which has existed alongside the after-acquired powers rule in Restatement (Second) of Property section 17.6, can aid a blanket-exercise clause when the power it attempts to exercise contains a specific-reference requirement and was created after the blanket-

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<sup>140</sup> RESTATEMENT (SECOND) OF PROP. § 17.6 cmt. c.

<sup>141</sup> See *Shine v. Monahan*, 241 N.E.2d 854 (Mass. 1968) (concluding that the decedent's residuary clause in her will effectively exercised a power of appointment with a specific-reference requirement when it referred to "all property of which I have the power of appointment by virtue (of) any will or testament or *inter vivos* trust executed by my husband, Edward O'Toole"); *In re Passmore*, 416 A.2d 991 (Pa. 1980) (concluding that the decedent's residuary clause in her will effectively exercised a power of appointment with a specific-reference when it referred to "any power of appointment which I may possess or enjoy under any Will of trust agreement executed by my husband, Charles F. Passmore").

exercise.<sup>142</sup> In fact, the equitable rule and the after-acquired powers rule were both applied in *Motes/Henes Trust, Bank of Bentonville v. Motes*<sup>143</sup> in treating a blanket-exercise provision as being an effective exercise of a power with a specific-reference requirement. In *Motes*, the residuary clause of a will that contained a blanket-exercise of the donee's powers was executed approximately three years before the power of appointment there came into existence under an irrevocable trust agreement established by the decedent and her sister.<sup>144</sup> The power of appointment there over the donee's share of the trust property contained a specific-reference requirement.<sup>145</sup> The *Motes* court applied the equitable rule and the after-acquired powers rule in Restatement (Second) of Property section 17.6 that treated the exercise as effective.<sup>146</sup> Although the donor and donee of the power in *Motes* was the same person, the donee did not know about the power of appointment when she signed her will because the trust agreement that established the power was not created until three years later.<sup>147</sup>

The after-acquired powers rule in Restatement (Second) of Property section 17.6 continued in Restatement (Third) of Property section 19.6, except the former rule addressed only testamentary exercise of an after-

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<sup>142</sup> See RESTATEMENT (SECOND) OF PROP. § 18.3 (AM. LAW INST. 1986).

<sup>143</sup> 761 S.W.2d 938 (Ark. 1988).

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See *id.* at 940 (recognizing that Arkansas law allowed after-acquired property to be distributed under a will when the will contains language disposing of all the property the testator may have at death, the *Motes* court determined that the after-acquired powers rule should also apply when a blanket-exercise clause created pertains to all of the powers a donee may have at death).

<sup>147</sup> See *id.* at 938. Additional issues can arise when the donor and donee of a power are the same person. See, for example, *In re Estate of Cox*, 87 Cal. Rptr. 55 (Cal. Ct. App. 1970), where the settlor of a revocable trust reserved a power to appoint the trust assets to anyone, which the court determined was exercised by the residuary clause of the settlor's will even though the trust contained provisions disposing of any unappointed assets. According to the Reporter's Note to Restatement (Third) of Property section 19.6, comment d to Restatement (Third) of Property section 19.6 and illustration 2 were drafted to avoid the result in *Estate of Cox*:

If the donor and donee are the same person, a blanket-exercise clause in the donor-donee's preexisting will is rebuttably presumed not to manifest an intent to exercise a power that the donor later reserved to himself or herself in another donative transfer, unless the donor did not provide for takers in default or the gift-in-default clause is ineffective.

No case law is cited in support of that comment and illustration.

acquired power of appointment.<sup>148</sup> Under the Restatement (Third) of Property section 19.6, the after-acquired powers rule applies to any document executed by the donee that contains an exercise clause, such as a will, a testamentary trust, a revocable trust, an irrevocable trust, or any other document that might contain an exercise clause.<sup>149</sup>

Furthermore, the rule that a blanket-exercise clause extends to an after-acquired power, unless the language or circumstances indicate a different intent, is continued in Restatement (Third) of Property section 19.6.<sup>150</sup>

Finally, Restatement (Third) of Property section 19.6 provides that “[a] specific-reference requirement does *not* necessarily preclude exercise of an after-acquired power.”<sup>151</sup> Despite this assertion, there is an inherent conflict between the after-acquired powers rule in Restatement (Third) of Property section 19.6 and the equitable rule in Restatement (Third) of Property section 19.10 because the former applies without knowledge of a future power while the latter applies only if there is knowledge of a power. Nevertheless, there is no cross-reference in Restatement (Third) of Property section 19.6 to Restatement (Third) of Property section 19.10 or *vice versa*. Moreover, neither Restatement section contains any discussion about why the after-acquired powers rule should not apply under the equitable rule when a donee of a power does not know of the power when exercising it.<sup>152</sup>

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<sup>148</sup> See RESTATEMENT (THIRD) OF PROP. § 19.6 Reporter’s Note 1 (AM. LAW INST. 2011).

<sup>149</sup> See RESTATEMENT (THIRD) OF PROP. § 19.6 cmt. b. See also *In re Gaines Family Living Trust*, 2009 WL 1830721 (Ariz. Ct. App. June 25, 2009) (unreported decision), where a trust created by the donee and another person required the donee to exercise a power of appointment either by a valid will or by a valid living trust agreement, and the court applied the equitable rule to aid the donee’s exercise by a separate document that referred to the power but did not constitute a will or trust agreement.

<sup>150</sup> See RESTATEMENT (THIRD) OF PROP. § 19.6 cmt. a. For example, comment e of Restatement (Third) of Property section 19.6 provides that language that indicates a different intent exists when “the document creating the power precludes exercise in a document that was executed before the power was created.” Furthermore, in the Restatement (Third) of Property section 19.6 comment a, the position that a blanket appointment of “all the powers I *have*” or similar expressions is not a sufficient indication of an intent to exclude after-acquired powers remains.

<sup>151</sup> RESTATEMENT (THIRD) OF PROP. § 19.6 cmt. e (emphasis added).

<sup>152</sup> See RESTATEMENT (THIRD) OF PROP. § 19.6; see also RESTATEMENT (THIRD) OF PROP. § 19.10 (AM. LAW INST. 2010).

3. *Knowledge of a Power Requirement—It Conflicts with Cases Where the Equitable Rule’s Presumptive Intent was Applied and the Specific Reference Requirement was Actually Satisfied Without Knowledge of the Power*

The requirement in Restatement (Third) of Property section 19.10 that the donee of a power know of a power should substantially limit the use of the equitable rule. Furthermore, the knowledge of a power requirement in Restatement (Third) of Property section 19.10 conflicts with case law such as *Shine v. Monahan*<sup>153</sup> and *In re Passmore*,<sup>154</sup> where the equitable rule’s presumptive intent was applied and the specific reference requirement was actually satisfied without knowledge of the power.

In *Shine v. Monahan*, a husband gave his wife a power of appointment over a marital trust.<sup>155</sup> The power required exercise “by specific reference in her will to the full power hereby created.”<sup>156</sup> The wife’s will stated:

All the rest, residue and remainder of my property, including all property of which I have the power of appointment by virtue (of) any will or testament or *inter vivos* trust executed by my husband, Edward O’Toole, after payment of the aforesaid legacies, I give, devise and bequeath to Margaret A. O’Toole of said Westwood.<sup>157</sup>

After concluding that the husband intended to prevent an inadvertent exercise of the power by inserting the specific-reference requirement, the court stated:

Plainly Mary O’Toole did not act inadvertently. She intended to exercise a power created by her husband in an *inter vivos* trust. She referred in terms to ‘the power of appointment by virtue (of) any . . . *inter vivos* trust executed by my husband.’ Having in mind the testator’s purpose, this *was* the required specific reference.<sup>158</sup>

The court in *Shine* determined that the specific reference requirement there was satisfied by applying the equitable rule’s presumptive intent

<sup>153</sup> 241 N.E.2d 854 (Mass. 1968).

<sup>154</sup> 416 A.2d 991 (Pa. 1980).

<sup>155</sup> See 241 N.E.2d at 855.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (emphasis added).

and by determining that the wife's will sufficiently referenced powers of appointment created by her husband. Nowhere in its opinion did the court state that the wife actually knew that the power existed. Thus, the specific reference requirement was satisfied without a determination whether the wife actually knew that the power existed.

Similarly, in *In re Passmore*, a husband's revocable trust created a marital trust (Trust A) for his wife and gave her a power of appointment over that trust.<sup>159</sup> Trust A provided that, upon her death:

[A]ll the property then held in Trust A shall be distributed as she may by her will appoint, making specific reference to Trust A under this Revocable Agreement of Trust. The power to make such appointment, the conditions to which it may be made subject, and the permissible beneficiaries shall be without restriction or qualification of any kind.<sup>160</sup>

The wife's will stated:

I give, bequeath and devise all of my property, of whatever nature and wherever situated, and expressly intend this act to constitute the exercise of any power of appointment which I may possess or enjoy under any Will or trust agreement executed by husband, Charles F. Passmore . . . in trust, to be administered in a manner and for purposes hereinafter stated: . . .<sup>161</sup>

The court in *Passmore* applied the equitable rule's presumptive intent to the specific reference requirement there and determined that the husband intended merely to prevent an inadvertent exercise of the power because the husband added language providing that the wife's "power to make such appointment" and "the conditions to which it may be made subject" "shall be without restriction or qualification of any kind."<sup>162</sup> Such language required only a "reasonable substantive compliance" with the specific reference requirement.<sup>163</sup>

Relying upon the equitable rule's presumptive intent, the court stated:

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<sup>159</sup> See 416 A.2d 991, 992 (Pa. 1980).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> 416 A.2d at 994.

<sup>163</sup> *Id.*



Here, . . . donee in her will not only expressed her intention to exercise the power her husband conferred upon her but also made specific and express reference to the power her husband created. . . .

The specific and express reference donee made here to the power her husband donor created was in full compliance with donor's expressed objective. . . .

. . .

Consistent with the donor's intent, donee not only fulfilled donor's substantive limitations but also fulfilled donor's formal requirement of identifying and executing the power conferred.<sup>164</sup>

The court in *Passmore* determined that the wife satisfied the specific reference requirement there without mentioning anywhere in its opinion that the wife actually knew that the power existed when she exercised her will. To the contrary, the court noted that the power of appointment that Trust A granted to the wife was the only power her husband conferred upon her.<sup>165</sup>

Because the *Shine* and *Passmore* decisions did not state that the donee in each case actually knew of the power of appointment when exercising it, the equitable rule as adopted in Restatement (Third) of Property section 19.10 conflicts with those decisions because it requires knowledge of a power before the rule will be applied to aid the exercise of the power. The equitable rule as adopted in Restatement (Third) of Property section 19.10 may overturn those decisions even though (1) each decision applied the equitable rule's presumptive intent, and (2) the donee in each decision actually satisfied the specific reference requirement by generally referring to wills and trusts created by the donor.

#### 4. Evidence of Intent to Exercise a Power

In determining whether a donee has manifested an intent to exercise a power, Restatement (Second) of Property section 17.5 lists various factors that a court can consider:

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<sup>164</sup> *Id.* at 993–94.

<sup>165</sup> *See id.* at 994.

The search for the meaning of dispositive provisions contained in the donee's deed or will must be conducted subject to the restrictions imposed by law. For instance, direct declarations by the donee as to whether the donee intended a will to exercise the power may not be considered. But any circumstance of the formulation of the will, including the donee's knowledge and state of affections, are relevant. It is permissible to show, among other things, that the donee's owned property was small in comparison with the bequests; that the donee knew of the existence of the power; that the donee had been advised that he should make a will in order to dispose of the property covered by the power; that the donee expected to die within a few days and therefore did not expect to acquire any more property; that the residuary beneficiary was the natural object of the donee's affection and that the taker in default was not; that the donee had contracted to exercise the power.<sup>166</sup>

While the quote above lists various factors that a court can consider in determining the donee's intent, it also highlights that direct declarations by the donee of an intent to exercise a power may not be considered by the court. In this regard, one treatise provides the following general guidance as to what evidence can be admitted without violating policies under the statute of wills and the parol evidence rule:

On the basis of such policies as those underlying the statute of wills and the parol evidence rule, the courts have generally held that evidence of the testator's declarations other than those contained in his will is not admissible to vary, contradict, or add to the terms of the will, or to show a different intention on the part of the testator from that disclosed by the language of the will. Accordingly, evidence of direct declarations by the donee of a power of appointment as to whether he intended in his will to exercise his power has been held inadmissible. However, evidence of statements by the

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<sup>166</sup> RESTATEMENT (SECOND) OF PROP. § 17.5 cmt. a (AM. LAW INST. 1986). Reporter's Note 1 to Restatement (Second) of Property section 17.5 provides that the rule of section 17.5 is, in substance, identical to the rule of Restatement of Property section 343(2), except that the Restatement (First) of Property did not include transfers by deed.

donee other than direct declarations of what he intended in his will have sometimes been held admissible. For example, it has been held that if the provisions of a will are ambiguous, and evidence of statements by the donee is offered for the purpose of resolving the ambiguity by showing what the testator meant by what he said, rather than for the purpose of showing that the testator meant to say something other than what he did say, such evidence is admissible where it does not directly contradict any provisions of the will. Similarly, it has been held that if evidence of statements by the donee is offered merely for such purposes as showing the donee's state of mind, or the extent of his knowledge, or his feelings toward certain persons, where such state of mind or knowledge or feelings may have an indirect bearing upon whether he intended to exercise his power, such evidence may properly be admitted.<sup>167</sup>

Similar to Restatement (Second) of Property section 17.5, the Restatement (Third) of Property section 19.5 sets forth the various factors a court might consider to determine whether the donee has manifested an intent to exercise a power of appointment:

Any relevant evidence of intent may be considered. Factors that may be considered include but are not limited to the donee's knowledge and relationships; the donee's knowledge of the value of the appointive property in comparison with the donee's own property; the donee's knowledge of the existence of the power; advice given to the donee that he or she should make a will in order to dispose of the property covered by the power; the donee's expectation that death was imminent and therefore he or she did not expect to acquire significant additional property; whether the residuary beneficiary was the natural object of the donee's affection and the taker in default was not; and whether the donee had contracted to exercise the power.<sup>168</sup>

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<sup>167</sup> Shapiro, *supra* note 31 (omitting quotations, footnotes, and citations).

<sup>168</sup> RESTATEMENT (THIRD) OF PROP. § 19.5 cmt. a (AM. LAW INST. 2011).

Overall, the Restatements (Second) and (Third) of Property list various factors that can be introduced into evidence to determine the intent of a donee at the time of an attempted exercise of a power. Furthermore, Restatement (Third) of Property section 19.5 provides that events occurring after the donee's execution of an instrument exercising a power might be admitted into evidence to determine a donee's intent to exercise a power:

Although the process of construction primarily focuses on the donee's intention when the donee executed the dispositive provision, post-execution events can sometimes be relevant in determining the donee's intention. See § 10.2, Comment g. Post-execution evidence of intention may properly be considered in resolving an ambiguity, if it sheds light on the donee's intention at the time of execution or on what the donee's intention would probably then have been had the ambiguity been recognized or had the subsequent event been anticipated. As with any other evidence bearing on the donee's intention, the probative force of post-execution evidence of intention is for the trier of fact to evaluate.<sup>169</sup>

D. Cases Regarding Use of Parol or Extrinsic Evidence to Determine Intent of the Donor and Donee under the Equitable Rule

The equitable rule permits the introduction and examination of parol or extrinsic evidence to determine the intent of the donor and donee.<sup>170</sup> Such evidence is considered in addition to evidence that can be gleaned from the four corners of the estate plan documents of the donor and donee.<sup>171</sup>

1. *Case Law Regarding the Introduction of Parol or Extrinsic Evidence*

Cases discussing when the introduction of parol or extrinsic evidence is appropriate include the following:

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<sup>169</sup> *Id.*

<sup>170</sup> *See* RESTATEMENT (THIRD) OF PROP. § 10.2 (AM. LAW INST. 2003).

<sup>171</sup> *See id.*

*Cross v. Cross*<sup>172</sup>

The *Cross* court determined that a blanket-exercise clause attempting to exercise a power with a specific-reference requirement causes a “latent ambiguity.”<sup>173</sup> The latent ambiguity enabled the introduction of extrinsic evidence so that the court could review “attendant circumstances” surrounding the alleged exercise.<sup>174</sup>

*First Union National Bank of North Carolina v. Moss*<sup>175</sup>

In *Moss*, the donor’s will granted a power of appointment to the donee that required the donee to “appoint and direct in an effective will or codicil specifically referring to the power of appointment.”<sup>176</sup>

The donee’s will contained a blanket-exercise clause that devised the remainder of the donee’s estate “including any property or estate over which I have or may have any power of appointment.”<sup>177</sup>

In construing the specific-exercise requirement and the blanket-exercise clause, the *Moss* court concluded that the term “specifically” in the specific-reference requirement and the term “any” in the blanket-exercise clause were both ambiguous, thereby allowing an examination of parol or extrinsic evidence surrounding the execution of the wills.<sup>178</sup>

The term “specifically” was ambiguous because it usually means explicitly or definitely, but it does not always mean that an item must be individually named.<sup>179</sup> The term “any” was ambiguous because it has diverse meanings, and its meaning in a particular case depends on the context or subject matter of the statute or document in which it is used.<sup>180</sup> The court also stated that the term “any” might have one of several

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<sup>172</sup> 559 S.W.2d 196 (Mo. Ct. App. 1977).

<sup>173</sup> *See id.* at 209 (noting that “the language used by Matthew is latently ambiguous in the use of the ‘all powers’ language when construed against the proof of the existing power in Mary’s will”).

<sup>174</sup> *See id.*

<sup>175</sup> 233 S.E.2d 88 (N.C. Ct. App. 1977).

<sup>176</sup> *Id.* at 91.

<sup>177</sup> *Id.*

<sup>178</sup> *See id.* at 92 (stating “[w]e conclude that the terms ‘specifically’ and ‘any’ as used in this context are sufficiently ambiguous to allow an examination of the circumstances surrounding the execution of the wills in addition to the four corners of the instruments”).

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

meanings and must be construed in context with other words used in the will.<sup>181</sup>

*Roberts v. Northern Trust Company*<sup>182</sup>

The *Roberts* court discussed when parol evidence should be considered to determine whether a donee has effectively exercised a power of appointment with a specific-reference requirement.<sup>183</sup> The donor in *Roberts* granted a testamentary power of appointment to the donee, which had a specific-reference requirement.<sup>184</sup> The donee's will contained two provisions with language exercising a power of appointment.<sup>185</sup> One provision made a specific bequest by partially exercising and specifically referring to the power.<sup>186</sup> The other provision disposed of the residue, by including "any property over which I may possess any power of appointment by Will or otherwise."<sup>187</sup> The donee's daughter was the appointee of the residue, but she was not the appointee of the specific bequest.<sup>188</sup> The daughter argued that the appointment of the residue to her was effective, either alone or when considered along with the appointment of the specific bequest.<sup>189</sup>

In regard to the introduction of extrinsic evidence to determine the donee's intent under the blanket-exercise clause, the court stated:

Obviously, an exercise in precise conformity to the manner specified by the donor requires no other evidence of the donee's intention. Conversely, the failure of the donee to comply in any substantial respect with the donor's direction provides no assurance, as the donor intended, that the exercise of the power be a deliberate, considerate act. But where there is an exercise of the power in a manner that does not precisely comply with the donor's requirements, while that exercise may provide little guidance to the donee's intention, other

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<sup>181</sup> *Id.*

<sup>182</sup> 550 F. Supp. 729 (N.D. Ill. 1982).

<sup>183</sup> *See id.* at 735.

<sup>184</sup> *See id.* at 731.

<sup>185</sup> *See id.*

<sup>186</sup> *See id.*

<sup>187</sup> *Id.* at 731–32.

<sup>188</sup> *See id.*

<sup>189</sup> *See id.*

evidence may clearly do so. That intent may be determined from other language in the will or by extrinsic evidence, or both.<sup>190</sup>

Thus, *Roberts* allowed extrinsic evidence to determine whether the donee intended to exercise a power with a specific-reference requirement via a blanket-exercise clause. Essentially, the court allowed extrinsic evidence to address an ambiguity related to the donee's intent.

*In re Estate of Burgess*<sup>191</sup>

As previously discussed, *In re Estate of Burgess* and other decisions<sup>192</sup> assert that, when a power contains a specific-reference requirement, the donee's purported exercise document must contain at least a general reference to any powers of appointment held by the donee (for example, reference to powers through a blanket-exercise clause) in order for there to be substantial compliance under the equitable rule.<sup>193</sup> Failure to make a general reference to the donee's powers of appointment prevents substantial compliance under the equitable rule.<sup>194</sup>

The *Burgess* decision further provides that parol evidence of the donee's intent to exercise a power with a specific-reference requirement is ineffective and cannot cure a donee's failure to make even a general reference to any power of appointment granted to the donee.<sup>195</sup>

2. *Case Law Regarding Conclusions Reached from Parol or Extrinsic Evidence*

The following cases contain conclusions that were reached because parol evidence or extrinsic evidence was introduced:

*Shine v. Monahan*<sup>196</sup>

The donor created a will and an *inter vivos* trust.<sup>197</sup> The will bequeathed some assets to the trust that was calculated by an estate tax

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<sup>190</sup> *Id.* at 735.

<sup>191</sup> 836 P.2d 1386 (Utah Ct. App. 1992).

<sup>192</sup> *See supra* note 103.

<sup>193</sup> *See* 836 P.2d at 1392–93.

<sup>194</sup> *See id.*

<sup>195</sup> *See id.* at 1391 (citing *First Nat'l Bank of McMinn Cty. v. Walker*, 607 S.W.2d 469 (Tenn. 1980)). However, the dissent argued that parol evidence regarding a term in the donee's will could show that the donee intended to exercise a power of appointment. *Id.* at 1396 (Billings, J., dissenting).

<sup>196</sup> 241 N.E.2d 854 (Mass. 1968).

marital deduction formula.<sup>198</sup> The trust gave the donee an income interest for life and a testamentary general power of appointment that had a specific-reference requirement.<sup>199</sup> The residuary clause in the donee's will devised the remainder of her estate, "including all property of which I have the power of appointment by virtue [of] any will or testament or *inter vivos* trust executed by my husband."<sup>200</sup> The court treated the specific-reference requirement as the donor's intent to prevent an inadvertent exercise of the power and concluded that the donee's exercise was not inadvertent. Therefore, the residuary clause in the donee's will satisfied the specific-reference requirement because it referred to the power in the donor's *inter vivos* trust.<sup>201</sup>

However, the appellants argued that strict compliance with the specific-reference requirement was necessary based on the following extrinsic evidence: (1) the power was given solely for federal estate tax reasons, (2) the donee, who was the donor's second wife, was not the mother of the donor's children, and trust property not effectively appointed by the donee would pass to the donor's grandchildren per stirpes, and (3) the donor gave the donee the most restricted interest possible consistent with Federal estate tax requirements.<sup>202</sup> The Supreme Judicial Court of Massachusetts dismissed the argument in a single sentence: "We see no basis for so concluding from the donor's manifest intent to obtain the benefit of the marital deduction."<sup>203</sup>

*Cross v. Cross*<sup>204</sup>

In *Cross*, the extrinsic evidence indicated that no other power of appointment existed for the donee, which was a factor to determine whether the donee intended to exercise the power that the donor granted to the donee.<sup>205</sup>

Further, the extrinsic evidence related to the value of the donee's personal estate and of the property subject to the power of appointment revealed that it was unlikely that the donee would have provided monthly

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<sup>197</sup> See *id.* at 855.

<sup>198</sup> See *id.*

<sup>199</sup> See *id.*

<sup>200</sup> *Id.*

<sup>201</sup> 241 N.E.2d at 855.

<sup>202</sup> See *id.* at 855-56.

<sup>203</sup> *Id.* at 856.

<sup>204</sup> 559 S.W.2d 196 (Mo. Ct. App. 1977).

<sup>205</sup> See *id.* at 209.



income bequests to his two sons if he did not anticipate that his estate would be augmented by the property subject to the power.<sup>206</sup>

Finally, the extrinsic evidence related to the latent ambiguity clearly proved that the donee intended to exercise the power.<sup>207</sup>

*First Union National Bank of North Carolina v. Moss*<sup>208</sup>

The donor's will created a marital deduction trust for the donee that granted the donee a life income interest, a power to invade, and a general power of appointment at death with a specific-reference requirement.<sup>209</sup>

Extrinsic evidence revealed that the size of the marital trust created for the donee and the size of the donee's personal estate supported the conclusion that the donor intended to require only that the donee distinguish between her personal estate and the trust estate to prevent an inadvertent exercise of the power.<sup>210</sup>

Extrinsic evidence included a stipulation by the executor/trustee under the wills of the donor and donee that there was no knowledge of any power of appointment held by the donee other than the one contained in the marital trust, which was a factor to determine whether the donee intended to exercise the power that the donor granted to the donee.<sup>211</sup>

*Motes/Henes Trust, Bank of Bentonville v. Motes*<sup>212</sup>

Extrinsic evidence, supplied by the drafting attorney, illustrated that:

1. The attorney drafted the donee's 1979 will that appointed "property to which I may have a power of appointment at the time of my death" to the trustee of a testamentary trust under the donee's will, which gave the donee's sister a life estate and the remainder to the donee's nieces and nephews.<sup>213</sup>
2. The attorney drafted the 1982 irrevocable trust entered into by the donee and her sister, which gave each of them a separate share terminable at death and a testamentary power of

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<sup>206</sup> *See id.*

<sup>207</sup> *See id.*

<sup>208</sup> 233 S.E.2d 88 (N.C. Ct. App. 1977).

<sup>209</sup> *See id.* at 92.

<sup>210</sup> *See id.* at 93.

<sup>211</sup> *See id.* at 91, 93.

<sup>212</sup> 761 S.W.2d 938 (Ark. 1988).

<sup>213</sup> *Id.* at 940 (emphasis omitted).

appointment over that share that could be exercised “by specific reference hereto.”<sup>214</sup>

3. The attorney reviewed the donee’s 1969 will when he drafted the 1982 irrevocable trust and decided there was no need to make changes to the will because the blanket-exercise clause in it would exercise the power of the irrevocable trust, which was in accordance with the donee’s intent.<sup>215</sup>

The irrevocable trust did not have final dispositive provisions in it because the attorney wanted the donee to have the ability to change her mind as to the disposition of her share of the irrevocable trust.<sup>216</sup>

Other extrinsic evidence revealed that, if the exercise of the power was ineffective, then there would be double taxation, which the donee would presumably want to avoid.<sup>217</sup>

*First National Bank of McMinn County v. Walker*<sup>218</sup>

Extrinsic evidence included the following testimony:

1. One attorney testified that (i) he drafted the donor’s 1969 will that gave the donee a power of appointment over a testamentary marital deduction trust having a specific-reference requirement, and (ii) the donee’s 1969 will having a blanket-exercise clause with the intent to exercise that power.<sup>219</sup>
2. The donor’s subsequent attorney testified that (i) he drafted the donor’s 1972 will that gave the donee the same power of appointment over the marital trust that was in the donor’s 1969 will, and (ii) that he advised the donor that the donee’s 1969 will would not exercise the power because it did not specifically refer to the power.<sup>220</sup>

The court accepted the trial court’s determination, which was based on extrinsic evidence, that the donee intended to exercise the power, but it concluded that the exercise was ineffective because the applicable law

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<sup>214</sup> *Id.* at 938.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> 607 S.W.2d 469 (Tenn. 1988).

<sup>219</sup> *See id.* at 471.

<sup>220</sup> *See id.*

required strict and literal compliance with the specific-reference requirement.<sup>221</sup>

*Smith v. Brannan (In re C.A. Dillinger Marital Trust)*<sup>222</sup>

Extrinsic evidence illustrated that the donee of a power of appointment with a specific-reference requirement was incompetent from Alzheimer's before the donor executed a will that created the power.<sup>223</sup> The court determined that, based on such evidence, the presumptive intent in the equitable rule to prevent inadvertent exercise did not apply because of the donee's inability to exercise the power.<sup>224</sup>

3. *Case Law Regarding the Construction of Documents Creating and Purportedly Exercising a Power*

In addition to using parol or extrinsic evidence, courts review the four corners of the documents that grant and purportedly exercise a power of appointment to glean the intent of the donor and donee. Cases such as *Walker* and *In re C.A. Dillinger Marital Trust* show how courts construe the documents to determine the donor's purpose for creating a specific-reference requirement that exceeds its presumptive purpose to avoid inadvertent exercise of the power.<sup>225</sup> Furthermore, cases such as *Cassac v. Stevens* and *In re Passmore* show how courts construe documents at issue to determine if the donor of a power of appointment did not intend for rigid adherence to a specific-reference requirement, despite precedent requiring strict compliance with that requirement.<sup>226</sup>

Other cases related to the construction of documents that grant and purportedly exercise a power of appointment are:

*Cross v. Cross*<sup>227</sup>

The court observed that the donor's trust, which granted a power of appointment to the donee with a specific-reference requirement, listed the donee as a trustee and beneficiary of the trust and, therefore, the donee must have been aware of the power.<sup>228</sup>

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<sup>221</sup> See *id.* at 475.

<sup>222</sup> 954 P.2d 1259 (1998).

<sup>223</sup> See *id.* at 1260–61.

<sup>224</sup> See *id.* at 1263.

<sup>225</sup> See *supra* Part IV.C.2 (discussion of these cases).

<sup>226</sup> See *supra* Part VI.C.1 (discussion of these cases).

<sup>227</sup> 559 S.W.2d 196 (Mo. Ct. App. 1977).

<sup>228</sup> See *id.* at 209.

The court observed that appointees under the donee's blanket-exercise clause were included within the favored class under the Restatement (First) of Property.<sup>229</sup>

*First Union National Bank of North Carolina v. Moss*<sup>230</sup>

The donor's will granted the donee a marital trust interest, a residuary trust interest, an unfettered power to invade the marital trust during life, and a power to appoint the marital trust at death subject to a specific-reference requirement.<sup>231</sup> The court concluded that those provisions did not give the donee minimum power over the marital trust to obtain the maximum tax benefit. Instead, the donor gave the donee broad powers over the disposition of the marital trust, limited only by the specific-reference requirement with respect to the power of appointment, indicating confidence in the donee's judgment to manage her property.<sup>232</sup>

Further, the court observed that the residuary trust made "generous provision" for the donor's children, who were the other objects of his bounty, which supported the conclusion that the donor had no intent to unduly restrict the donee in the disposition of marital trust property through exercise of the power.<sup>233</sup>

The donee's will left all to the donor if the donor survived the donee.<sup>234</sup> If the donor predeceased the donee, then the donee's will provided that the residue, "including any property or estate over which I have or may have any power of appointment," would pass in perpetual trusts for two charities.<sup>235</sup> The court stated that the "single most significant feature" of the donee's will was that the blanket-exercise clause existed only in the dispositive provision that was effective when the donor predeceased the donee.<sup>236</sup> This revealed that the blanket-exercise clause was not simply boilerplate because it was evidence that the donee was concerned only with the power created in the donor's will and was thereby making special reference to it.<sup>237</sup>

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<sup>229</sup> *See id.* at 210.

<sup>230</sup> 233 S.E.2d 88 (N.C. Ct. App. 1977).

<sup>231</sup> *See id.* at 90-91.

<sup>232</sup> *See id.* at 92.

<sup>233</sup> *See id.* at 92-93.

<sup>234</sup> *See id.* at 93.

<sup>235</sup> *Id.* at 91.

<sup>236</sup> *Id.* at 93.

<sup>237</sup> *See id.*

The court noted that the wills of the donor and donee “were executed on the same date, were witnessed by the same people, and contained substantially identical provisions, except for the dispositive provisions.”<sup>238</sup> The court inferred from the evidence that the same person drafted the two wills to reflect the common interests and concerns of the donor and donee, and the donor and donee were each aware of the contents of the other’s will.<sup>239</sup>

The court determined, probably based on the stipulation discussed above,<sup>240</sup> that the blanket-exercise provision had no meaning unless it operated to exercise the power.<sup>241</sup>

The court concluded, based on surrounding circumstances and the language in both wills, that the donor intended, via the specific-reference requirement, to prevent inadvertent exercise of the power and to make a distinction between the disposition of her own property and the appointive property, and that the donee intended to exercise that power through the blanket-exercise clause.<sup>242</sup>

*Greenwood v. Peterson (In re Strobel)*<sup>243</sup>

Evidence derived from the donor’s *inter vivos* trust agreement revealed the following:

1. The agreement established two trusts for the donee, Trust A and Trust B.<sup>244</sup>
2. The donee was the income beneficiary of both trusts.<sup>245</sup>
3. The donee had a power to invade and deplete Trust A.<sup>246</sup>
4. The donee was trustee of Trust A.<sup>247</sup>
5. The donor’s son was “generously” provided for as the remainder beneficiary of Trust B.<sup>248</sup>

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<sup>238</sup> *Id.*

<sup>239</sup> *See id.*

<sup>240</sup> *See id.* at 91.

<sup>241</sup> *See id.* at 93.

<sup>242</sup> *See id.*

<sup>243</sup> 717 P.2d 892 (Ariz. 1986) (en banc).

<sup>244</sup> *See id.* at 893.

<sup>245</sup> *See id.*

<sup>246</sup> *See id.*

<sup>247</sup> *See id.*

Based on that evidence, and noting that the facts were unlike those in *First National Bank of McMinn County v. Walker*, a strict compliance case where the wife had only an income interest in the marital trust and the remaindermen were not otherwise provided for, the court in *In re Strobel* determined that “the substantial purpose of the specific reference requirement was to ensure a considered appointment rather than to thwart its exercise.”<sup>249</sup>

## VII. CONCLUSION

In summary, the equitable rule can be used to aid the exercise of a power of appointment with a specific-reference requirement, especially in cases involving a blanket-exercise clause. Courts willing to consider or apply the equitable rule in those situations usually look at the intent of the donor and donee of a power of appointment to determine whether (1) the donor inserted the specific-reference requirement to prevent inadvertent exercise of the power or to thwart its exercise, and (2) the donee intended to exercise the power via the blanket-exercise clause.

When considering whether to apply the equitable rule when a blanket-exercise clause attempts to exercise a power of appointment containing a specific-reference requirement, courts review the four corners of relevant documents, as well as parol evidence or extrinsic evidence of donor and donee’s intent with respect to the power and its exercise. This Article analyzed specific cases to show (1) when parol or extrinsic evidence can be introduced, (2) the conclusions based on such evidence, and (3) the conclusions drawn from a construction of documents that grant or allegedly exercise a power of appointment with a specific-reference requirement.

The Restatement (Third) of Property adds a new element to the equitable rule that requires the donee of a power of appointment to know of a power when exercising it. The new element conflicts with the existing law on after-acquired powers because it requires knowledge of a power before the equitable rule can be applied, while a blanket-exercise clause exercises after-acquired powers that are not known to the donee when the donee executes a blanket-exercise clause. The new element also conflicts with cases where the equitable rule’s presumptive intent was applied and the specific reference requirement was actually satisfied without knowledge of the power.

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<sup>248</sup> *See id.*

<sup>249</sup> *Id.* at 899.

Because the Restatement (Third) of Property adds a new element to the equitable rule that requires the donee of a power of appointment to know of a power when exercising it, a proponent of the equitable rule in a proceeding where a blanket-exercise clause is alleged to have exercised a power with a specific-reference requirement might want to ask the court to adopt the equitable rule under Restatement (Second) of Property section 18.3, or adopt the equitable rule under the Restatement (Third) of Property section 19.10, but without the requirement that the donee know of a power when exercising it, because:

1. Case law to date has not required a donee to know of a power before the equitable rule can be applied and has treated knowledge of a power as one factor in determining if a donee intended to exercise a power;
2. Requiring a donee to know of a power when exercising it is likely to substantially limit the use of the equitable rule and may overturn cases where the equitable rule was applied and the specific-reference requirement was actually satisfied without knowledge of the power;
3. The equitable rule was developed in part by cases that dealt with whether a blanket-exercise clause exercised a power of appointment with a specific-reference requirement;
4. The equitable rule under the Restatement (Second) of Property does not conflict with the after-acquired powers rule, while the equitable rule under the Restatement (Third) of Property conflicts with the after-acquired powers rule; and
5. A specific-reference requirement does not necessarily preclude the exercise of an after-acquired power because the equitable rule is available to aid the exercise of the power.

The equitable rule in the UPOA Act follows the Restatement (Third) of Property and contains the new element requiring the donees have knowledge of a power when exercising that power. For reasons previously stated, states enacting the UPOA Act should consider eliminating that element.

Some states have decisions that adopt the equitable rule to aid the exercise of a power of appointment, while other states have decisions that require strict compliance with the specific-reference requirement. Cases such as *Cessac v. Stevens* and *In re Passmore* show the court's willingness to consider application of the equitable rule in states with

prior precedent requiring strict compliance with a specific-reference requirement.<sup>250</sup> The courts in *Cessac* and *In re Passmore* acknowledge that rigid adherence to such precedent should give way to the equitable rule when facts and circumstances permit.

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<sup>250</sup> See *supra* Part VI.C.1 (discussion of these cases).