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AB-2846 Powers of appointment. (2015-2016)

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Assembly Bill No. 2846

CHAPTER 81

An act to amend Sections 610, 611, 613, 625, 633, 634, 640, 641, 642, 650, 651, 652, 660, 661, 662, 671, 672, 673, 674, 680, 681, 682, 683, and 684 of, and to add Sections 621, 675 and 676 to, the Probate Code, relating to powers of appointment.

[Approved by Governor July 22, 2016. Filed with Secretary of State July 22, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2846, Maienschein. Powers of appointment.

Existing law provides a statutory body of law relating to powers of appointment, including the creation and exercise of, and the revocability of the creation, exercise, or release of, a power of appointment. Existing law provides that a power of appointment can be created only by a donor having the capacity to transfer the interest in property to which the power relates. Existing law for these purposes defines a person to whom a power of appointment is given or in whose favor a power of appointment is reserved as a "donee."

This bill would revise and recast those provisions. The bill would impose additional requirements on the creation of a power of appointment, including the existence of a legally valid creating instrument that manifests the donor's intent to create a power of appointment and that transfers the appointive property, except as specified. The bill would define the term "power of appointment" for those purposes. The bill would instead define a person to whom a power of appointment is given or in whose favor a power of appointment is reserved as a "powerholder." The bill would require, if a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property to be allocated in the permissible manner in accordance with the terms of the creating instrument and to carry out the intent of the powerholder. The bill would require, if a powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment to share fully in unappointed property. The bill would make property subject to a special power of appointment subject to the claims of creditors of the powerholder or of the powerholder's estate or the expenses of administration of the powerholder's estate under specified circumstances. The bill would make conforming changes to related provisions, and would make changes to provisions related to an unexercised general power of appointment, as specified.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 610 of the Probate Code is amended to read:

610. As used in this part:

- (a) "Appointee" means the person in whose favor a power of appointment is exercised.
- (b) "Appointive property" means the property or interest in property that is the subject of the power of appointment.
- (c) "Creating instrument" means the deed, will, trust, or other writing or document that creates or reserves the power of appointment.
- (d) "Donor" means the person who creates or reserves a power of appointment.
- (e) "Permissible appointee" means a person in whose favor a power of appointment can be exercised.
- (f) "Power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. The term does not include a power of attorney.
- (g) "Powerholder" means the person to whom a power of appointment is given or in whose favor a power of appointment is reserved.

SEC. 2. Section 611 of the Probate Code is amended to read:

611. (a) A power of appointment is "general" only to the extent that it is exercisable in favor of the powerholder, the powerholder's estate, the powerholder's creditors, or creditors of the powerholder's estate, whether or not it is exercisable in favor of others.

(b) A power to consume, invade, or appropriate property for the benefit of a person in discharge of the powerholder's obligation of support that is limited by an ascertainable standard relating to the person's health, education, support, or maintenance is not a general power of appointment.

(c) A power exercisable by the powerholder only in conjunction with a person having a substantial interest in the appointive property that is adverse to the exercise of the power in favor of the powerholder, the powerholder's estate, the powerholder's creditors, or creditors of the powerholder's estate is not a general power of appointment.

(d) A power of appointment that is not "general" is "special."

(e) A power of appointment may be general as to some appointive property, or an interest in or a specific portion of appointive property, and be special as to other appointive property.

SEC. 3. Section 613 of the Probate Code is amended to read:

613. A power of appointment is "imperative" where the creating instrument manifests an intent that the permissible appointees be benefited even if the powerholder fails to exercise the power. An imperative power can exist even though the powerholder has the privilege of selecting some and excluding others of the designated permissible appointees. All other powers of appointment are "discretionary." The powerholder of a discretionary power is privileged to exercise, or not to exercise, the power as the powerholder chooses.

SEC. 4. Section 621 is added to the Probate Code, to read:

621. (a) A power of appointment is created only if all of the following are satisfied:

- (1) There is a creating instrument.
- (2) The creating instrument is valid under applicable law.
- (3) Except as provided in subdivision (b), the creating instrument transfers the appointive property.
- (4) The terms of the creating instrument manifest the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee.

(b) Paragraph (3) of subdivision (a) does not apply to the creation of a power of appointment by the exercise of a power of appointment.

SEC. 5. Section 625 of the Probate Code is amended to read:

625. (a) A power of appointment can be exercised only by a powerholder having the capacity to transfer the interest in property to which the power relates.

(b) Unless the creating instrument otherwise provides, a powerholder who is a minor may not exercise a power of appointment during minority.

SEC. 6. Section 633 of the Probate Code is amended to read:

633. (a) If the creating instrument requires the consent of the donor or other person to exercise a power of appointment, the power can only be exercised when the required consent is contained in the instrument of exercise or in a separate written instrument, signed in each case by the person whose consent is required.

(b) Unless expressly prohibited by the creating instrument:

- (1) If a person whose consent is required dies, the power may be exercised by the powerholder without the consent of that person.
- (2) If a person whose consent is required becomes legally incapable of consenting, the person's guardian or conservator may consent to an exercise of the power.
- (3) A consent may be given before or after the exercise of the power by the powerholder.

SEC. 7. Section 634 of the Probate Code is amended to read:

634. A power of appointment created in favor of two or more powerholders can only be exercised when all of the powerholders unite in its exercise. If one or more of the powerholders dies, becomes legally incapable of exercising the power, or releases the power, the power may be exercised by the others, unless expressly prohibited by the creating instrument.

SEC. 8. Section 640 of the Probate Code is amended to read:

640. (a) The exercise of a power of appointment requires a manifestation of the powerholder's intent to exercise the power.

(b) A manifestation of the powerholder's intent to exercise a power of appointment exists in any of the following circumstances:

- (1) The powerholder declares, in substance, that the powerholder exercises specific powers or all the powers the powerholder has.
- (2) The powerholder purports to transfer an interest in the appointive property that the powerholder would have no power to transfer except by virtue of the power.
- (3) The powerholder makes a disposition that, when considered with reference to the property owned and the circumstances existing at the time of the disposition, manifests the powerholder's understanding that the powerholder was disposing of the appointive property.

(c) The circumstances described in subdivision (b) are illustrative, not exclusive.

SEC. 9. Section 641 of the Probate Code is amended to read:

641. (a) 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 exercise the power.

(b) This section applies in a case where the powerholder dies on or after July 1, 1982.

SEC. 10. Section 642 of the Probate Code is amended to read:

642. If a power of appointment existing at the powerholder's death, but created after the execution of the powerholder's will, is exercised by the will, the appointment is effective except in either of the following cases:

- (a) The creating instrument manifests an intent that the power may not be exercised by a will previously executed.
- (b) The will manifests an intent not to exercise a power subsequently acquired.

SEC. 11. Section 650 of the Probate Code is amended to read:

650. (a) The powerholder of a general power of appointment may make an appointment:

(1) Of all of the appointive property at one time, or several partial appointments at different times, where the power is exercisable inter vivos.

(2) Of present or future interests or both.

(3) Subject to conditions or charges.

(4) Subject to otherwise lawful restraints on the alienation of the appointed interest.

(5) In trust.

(6) Creating a new power of appointment.

(b) The listing in subdivision (a) is illustrative, not exclusive.

SEC. 12. Section 651 of the Probate Code is amended to read:

651. Subject to the limitations imposed by the creating instrument, the powerholder of a special power may make any of the types of appointment permissible for the powerholder of a general power under Section 650.

SEC. 13. Section 652 of the Probate Code is amended to read:

652. (a) Except as provided in subdivision (b), the powerholder of a special power of appointment may appoint the whole or any part of the appointive property to any one or more of the permissible appointees and exclude others.

(b) If the donor specifies either a minimum or maximum share or amount to be appointed to one or more of the permissible appointees, the exercise of the power must conform to the specification.

SEC. 14. Section 660 of the Probate Code is amended to read:

660. (a) The powerholder of a power of appointment that is presently exercisable, whether general or special, can contract to make an appointment to the same extent that the powerholder could make an effective appointment.

(b) The powerholder of a power of appointment cannot contract to make an appointment while the power of appointment is not presently exercisable. If a promise to make an appointment under such a power is not performed, the promisee cannot obtain either specific performance or damages, but the promisee is not prevented from obtaining restitution of the value given by the promisee for the promise.

(c) Unless the creating instrument expressly provides that the powerholder may not contract to make an appointment while the power of appointment is not presently exercisable, subdivision (b) does not apply to the case where the donor and the powerholder are the same person. In this case, the powerholder can contract to make an appointment to the same extent that the powerholder could make an effective appointment if the power of appointment were presently exercisable.

SEC. 15. Section 661 of the Probate Code is amended to read:

661. (a) Unless the creating instrument otherwise provides, a general or special power of appointment that is a discretionary power, whether testamentary or otherwise, may be released, either with or without consideration, by a written instrument signed by the powerholder and delivered as provided in subdivision (c).

(b) A releasable power may be released with respect to the whole or any part of the appointive property and may also be released in such manner as to reduce or limit the permissible appointees. No partial release of a power shall be deemed to make imperative the remaining power that was not imperative before the release unless the instrument of release expressly so provides. No release of a power that is not presently exercisable is permissible where the donor designated persons or a class to take in default of the powerholder's exercise of the power unless the release serves to benefit all persons designated as provided by the donor.

(c) A release shall be delivered as follows:

(1) If the creating instrument specifies a person to whom a release is to be delivered, the release shall be delivered to that person, but delivery need not be made as provided in this paragraph if the person cannot with due diligence be found.

(2) In a case where the property to which the power relates is held by a trustee, the release shall be delivered to the trustee.

(3) In a case not covered by paragraph (1) or (2), the release may be delivered to any of the following:

(A) A person, other than the powerholder, who could be adversely affected by the exercise of the power.

(B) The county recorder of the county in which the powerholder resides or in which the deed, will, or other instrument creating the power is filed.

(d) A release of a power of appointment that affects real property or obligations secured by real property shall be acknowledged and proved, and may be certified and recorded, in like manner and with like effect as grants of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof apply to a release with like effect, without regard to the date when the release was delivered, if at all, pursuant to subdivision (c). Failure to deliver, pursuant to subdivision (c), a release that is recorded pursuant to this subdivision does not affect the validity of any transaction with respect to the real property or obligation secured thereby, and the general laws of this state on recording and its effect govern the transaction.

(e) This section does not impair the validity of a release made before July 1, 1970.

SEC. 16. Section 662 of the Probate Code is amended to read:

662. (a) A release on behalf of a minor powerholder shall be made by the guardian of the estate of the minor pursuant to an order of court obtained under this section.

(b) The guardian or other interested person may file a petition with the court in which the guardianship of the estate proceeding is pending for an order of the court authorizing or requiring the guardian to release the ward's powers as a powerholder or a power of appointment in whole or in part.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1 of Division 4 to all of the following (other than the petitioner or persons joining in the petition):

(1) The persons required to be given notice under Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

(2) The donor of the power, if alive.

(3) The trustee, if the property to which the power relates is held by a trustee.

(4) Other persons as ordered by the court.

(d) After hearing, the court in its discretion may make an order authorizing or requiring the guardian to release on behalf of the ward a general or special power of appointment as permitted under Section 661, if the court determines, taking into consideration all the relevant circumstances, that the ward as a prudent person would make the release of the power of appointment if the ward had the capacity to do so.

(e) Nothing in this section imposes any duty on the guardian to file a petition under this section, and the guardian is not liable for failure to file a petition under this section.

SEC. 17. Section 671 of the Probate Code is amended to read:

671. (a) Unless the creating instrument or the powerholder, in writing, manifests a contrary intent, where the powerholder dies without having exercised an imperative power of appointment either in whole or in part, the persons designated as permissible appointees take equally of the property not already appointed. Where the creating instrument establishes a minimum distribution requirement that is not satisfied by an equal division of the property not already appointed, the appointees who have received a partial appointment are required to return a pro rata portion of the property they would otherwise be entitled to receive in an amount sufficient to meet the minimum distribution requirement.

(b) Where an imperative power of appointment has been exercised defectively, either in whole or in part, its proper execution may be adjudged in favor of the person intended to be benefited by the defective exercise.

(c) Where an imperative power of appointment has been created so that it confers on a person a right to have the power exercised in the person's favor, the proper exercise of the power can be compelled in favor of the person, or the person's assigns, creditors, guardian, or conservator.

SEC. 18. Section 672 of the Probate Code is amended to read:

672. (a) Except as provided in subdivision (b), if the powerholder of a discretionary power of appointment fails to appoint the property, releases the entire power, or makes an ineffective appointment, in whole or in part, the appointive property not effectively appointed passes to the person named by the donor as taker in default or, if there is none, reverts to the donor.

(b) If the powerholder of a general power of appointment makes an ineffective appointment, an implied alternative appointment to the powerholder's estate may be found if the powerholder has manifested an intent that the appointive property be disposed of as property of the powerholder rather than as in default of appointment.

SEC. 19. Section 673 of the Probate Code is amended to read:

673. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the powerholder is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the powerholder, the surviving issue of the appointee take the appointed property in the same manner as the appointee would have taken had the appointee survived the powerholder, except that the property passes only to persons who are permissible appointees, including appointees permitted under Section 674. If the surviving issue are all of the same degree of kinship to the deceased appointee, they take equally, but if of unequal degree, then those of more remote degree take in the manner provided in Section 240.

(b) This section does not apply if either the donor or powerholder manifests an intent that some other disposition of the appointive property shall be made.

SEC. 20. Section 674 of the Probate Code is amended to read:

674. (a) Unless the creating instrument expressly provides otherwise, if a permissible appointee dies before the exercise of a special power of appointment, the powerholder has the power to appoint to the issue of the deceased permissible appointee, whether or not the issue was included within the description of the permissible appointees, if the deceased permissible appointee was alive at the time of the execution of the creating instrument or was born thereafter.

(b) This section applies whether the special power of appointment is exercisable by inter vivos instrument, by will, or otherwise.

(c) This section applies to a case where the power of appointment is exercised on or after July 1, 1982, but does not affect the validity of any exercise of a power of appointment made before July 1, 1982.

SEC. 21. Section 675 is added to the Probate Code, to read:

675. If a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property shall be allocated in the permissible manner in accordance with the terms of the creating instrument and that best carries out the powerholder's intent.

SEC. 22. Section 676 is added to the Probate Code, to read:

676. Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment may share fully in unappointed property.

SEC. 23. Section 680 of the Probate Code is amended to read:

680. The donor of a power of appointment cannot nullify or alter the rights given creditors of the powerholder by Sections 682, 683, and 684 by any language in the instrument creating the power.

SEC. 24. Section 681 of the Probate Code is amended to read:

681. (a) Except as provided in subdivision (b), property covered by a special power of appointment is not subject to the claims of creditors of the powerholder or of the powerholder's estate or to the expenses of the administration of the powerholder's estate.

(b) Property subject to a special power of appointment shall be subject to the claims of creditors of the powerholder or of the powerholder's estate or the expenses of administration of the powerholder's estate under either of the following circumstances:

(1) To the extent that the powerholder owned the property and, reserving the special power, transferred the property in violation of the Uniform Voidable Transactions Act (Chapter 1 (commencing with Section 3439) of Title 2 of Part 2 of Division 4 of the Civil Code).

(2) If the initial gift in default of the exercise of the power is to the powerholder or the powerholder's estate.

SEC. 25. Section 682 of the Probate Code is amended to read:

682. (a) To the extent that the property owned by the powerholder is inadequate to satisfy the claims of the powerholder's creditors, property subject to a general power of appointment that is presently exercisable is subject to the claims to the same extent that it would be subject to the claims if the property were owned by the powerholder.

(b) Upon the death of the powerholder, to the extent that the powerholder's estate is inadequate to satisfy the claims of creditors of the estate and the expenses of administration of the estate, property subject to a general testamentary power of appointment or to a general power of appointment that was presently exercisable at the time of the powerholder's death is subject to the claims and expenses to the same extent that it would be subject to the claims and expenses if the property had been owned by the powerholder.

(c) This section applies whether or not the power of appointment has been exercised.

SEC. 26. Section 683 of the Probate Code is amended to read:

683. Property subject to a general power of appointment created by the donor in the donor's favor, whether or not presently exercisable, is subject to the claims of the donor's creditors or the donor's estate and to the expenses of the administration of the donor's estate, except to the extent the donor effectively irrevocably appointed the property subject to the general power of appointment in favor of a person other than the donor or the donor's estate.

SEC. 27. Section 684 of the Probate Code is amended to read:

684. For the purposes of Sections 682 and 683, a person to whom the powerholder owes an obligation of support shall be considered a creditor of the powerholder to the extent that a legal obligation exists for the powerholder to provide the support.