

RELEASE OF POWERS OF APPOINTMENT IN CALIFORNIA

In 1945 when there were tax advantages in the release of certain powers of appointment,¹ section 1060 of the California Civil Code was enacted making all powers, with the exception of those in trust that are imperative, releasable unless otherwise provided.² The term "power in trust" is familiar to the law, but unfortunately denotes a nebulous concept that has eluded precise definition.³ To appraise the difficulties inherent in the provisions of section 1060 it may be helpful to review the various classifications of powers of appointment in relation to release.

BACKGROUND

Although probably no longer relevant in determining releasability of powers, certain historical differentiations between powers still appear in the cases.⁴ Whether a power could be released in England prior to 1881⁵ depended upon the particular classic category into which the power fell: appendant (or appurtenant), in gross (or collateral), or simply collateral.⁶ A power appendant which, if exercised, would destroy an existing estate in the donee was extinguished by a conveyance by the donee inconsistent with the later exercise of the power.⁷ The result was based on an estoppel in the donee to derogate from his grant.⁸ The fact that powers appendant could be released in England seems to have influenced the earlier American decisions reaching the same result.⁹ That American courts would now recognize

¹ The Revenue Act of 1942 extended the incidence of federal estate taxation on powers of appointment by providing that certain special powers as well as all general powers, whether exercised or not, were includable in the estate of the donee. Special powers exercisable exclusively in favor of a close family group or charities, however, were made non-taxable. The release of a power also became the equivalent of an exercise for gift tax purposes. However, to ease the retroactive effect upon theretofore non-taxable powers created prior to 1942 the act provided that such powers could be released tax free (or partially released so that the resulting power was reduced to the tax exempt type). INT. REV. CODE OF 1939, § 811, as amended, 56 STAT. 942 (1942). For a more complete discussion see 5 AMERICAN LAW OF PROPERTY § 23.25 (Casner ed. 1952); PAUL, FEDERAL ESTATE AND GIFT TAXATION § 9.44 n.2 (Supp. 1946).

² "Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the donee and delivered as hereinafter provided unless the instrument creating the power provides otherwise. . . ." CAL. CIV. CODE § 1060.

³ See Alexander, *Taxation of Powers of Appointment under the Revenue Act of 1942*, 56 HARV. L. REV. 742, 750 (1943); Simes, *Powers in Trust*, 37 YALE L.J. 211 (1928). In the *Restatement of Property* the use of the term was carefully avoided. RESTATEMENT, PROPERTY § 320 special note (1940).

⁴ See RESTATEMENT, PROPERTY § 318, comment c (1940).

⁵ The Conveyancing Act, 1881, 44 & 45 VICT. c. 41, § 52, reenacted in Law of Property Act, 1925, 15 GEO. V, c. 20, § 155, provided: "A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power."

⁶ The distinctions apparently were first expounded by Hale, J. in *Edwards v. Sleater*, Hard. 410, 415-16, 145 Eng. Rep. 522, 525 (Ex. 1678). See SIMES & SMITH, FUTURE INTERESTS § 876 (2d ed. 1956); Gray, *Release and Discharge of Powers*, 24 HARV. L. REV. 511 (1911).

⁷ *Uxbridge v. Bayly*, 1 Ves. Jr. 499, 30 Eng. Rep. 457 (Ch. 1792); *Barton v. Briscoe*, Jacob 603, 37 Eng. Rep. 978 (Ch. 1822); *Noel v. Henley*, M'Clel. & Y. 302, 148 Eng. Rep. 427 (Ex. 1825); *Smith v. Houlton*, 26 Beav. 482, 53 Eng. Rep. 984 (Rolls 1859).

⁸ FARWELL, POWERS 12 (3d ed. 1916); 5 AMERICAN LAW OF PROPERTY § 23.25 (Casner ed. 1952); SIMES & SMITH, FUTURE INTERESTS 1052 (2d ed. 1956).

⁹ See *Hill v. Sangamon Loan & Trust Co.*, 302 Ill. 33, 134 N.E. 112 (1922); *Biwer v. Martin*, 294 Ill. 488, 128 N.E. 518 (1920); *Baker v. Wilmert*, 288 Ill. 434, 123 N.E. 627 (1919); *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N.E. 139 (1908); *Mountjoy v. Kasselman*, 225 Ky. 55, 7 S.W.2d 512 (1928); *Columbia Trust Co. v. Christopher*, 133 Ky. 335, 117 S.W. 943 (1909); *Brown v. Renshaw*, 57 Md. 67 (1881). And see *Atkinson v. Dowling*, 33 S.C. 414, 12 S.E. 93 (1890) (where an apparent power appendant was considered a power in gross).

powers appendant, however, has been doubted on the ground that the doctrine of merger would automatically extinguish the power when an estate and a power over it were united in the same person.¹⁰

A power is in gross if the donee holds an estate in the property subject to the power which would not be affected by the exercise of the power, such as a life estate with a power to appoint the remainder. As the tortious conveyance doctrine enabled a holder of a freehold interest to convey a fee that could only be defeated by the remainderman, a power in gross was held to be extinguished when the donee made such a conveyance.¹¹ The alienation of the property, however, upon which the rationale of extinguishment originally rested was later dispensed with where the donee executed a deed of release or a covenant not to exercise the power.¹²

A power simply collateral is one in which the donee is otherwise a stranger to the property. Although the existence of direct holdings on the point has been questioned,¹³ it is clear that prior to 1882 powers simply collateral were considered non-releasable.¹⁴ The reasoning supporting the conclusion was that the donee had no estate from which he could derogate by a tortious conveyance.¹⁵ Professor Gray aptly pointed out that the distinction as to release between powers in gross and powers simply collateral was unwarranted.¹⁶ In view of the fact that a tortious conveyance is no longer possible in the United States the position seems unanswerable.¹⁷

It was not uncommon in England for a grantor, usually in a marriage settlement, to convey property to himself or another for life and reserve to himself the power to appoint the remainder. The power created was called a reserved power and, independently of the fact it might be appendant or in gross, was considered releasable.¹⁸ Some reasons supporting release are: (1) the grantor by release is merely completing a conveyance that was originally within his power; (2) the grantor in creating the power would normally not have intended that he would be without power to extinguish it; and (3) the holder of a reserved power being both

¹⁰ See 5 AMERICAN LAW OF PROPERTY § 23.13 (Casner ed. 1952); 3 TIFFANY, REAL PROPERTY 10 (3d ed. 1939); RESTATEMENT, PROPERTY § 325, comment *a* (1940).

¹¹ *West v. Berney*, 1 Russ. & M. 431, 39 Eng. Rep. 167 (Ch. 1819); *Smith v. Death*, 5 Madd. Ch. 371, 56 Eng. Rep. 937 (V.C. 1820).

¹² *Horne v. Swann*, Turn. & R. 430, 37 Eng. Rep. 1166 (Ch. 1823); *Bickley v. Guest*, 1 Russ. & M. 440, 39 Eng. Rep. 170 (Ch. 1831); *Coffin v. Cooper*, 2 Drew. & S. 365, 62 Eng. Rep. 660 (V.C. 1865); *Palmer v. Locke* L.R. 15 Ch. Div. (Eng.) 294 (1880).

¹³ See SIMES & SMITH, FUTURE INTERESTS § 1056.

¹⁴ See *West v. Berney*, 1 Russ. & M. 431, 39 Eng. Rep. 167 (Ch. 1819); FARWELL, POWERS 16 (3d ed. 1916); SUGEN, POWERS 49 (8th ed. 1861).

¹⁵ See 3 POWELL, REAL PROPERTY § 393 (1952); SIMES & SMITH, FUTURE INTERESTS § 1052 (2d ed. 1956); Gray, *Release and Discharge of Powers*, 24 HARV. L. REV. 511, 519 (1911).

¹⁶ "In both cases there is a life estate and a remainder. In neither case does the exercise of the power affect the life estate. In both cases its exercise derogates from the remainder in precisely the same way." Gray, *Release and Discharge of Powers*, 24 HARV. L. REV. 511, 518 (1911). See also CAREY & SCHUYLER, ILL. FUTURE INTERESTS § 377 (1941).

¹⁷ RESTATEMENT, PROPERTY § 325 (1940); 4 TIFFANY, REAL PROPERTY § 950 (3d ed. 1939).

¹⁸ *Albany's case*, 1 Co. Rep. 110b, 76 Eng. Rep. 250 (K.B. 1586); *Digges's case*, 1 Co. Rep. 173a, 76 Eng. Rep. 373 (K.B. 1600); *West v. Berney*, 1 Russ. & M. 431, 39 Eng. Rep. 167 (Ch. 1819) (where the court indicated that reserved powers even if collateral were releasable). A reserved power is to be distinguished from a power of revocation held by the donor. See 5 AMERICAN LAW OF PROPERTY § 23.31 (Casner ed. 1952).

the donor and the donee can release the power because the donor and donee could extinguish the power by mutual agreement.¹⁹

PRESENT CONSIDERATIONS

More recently the factors considered most important in determining the releasability of powers are whether a power is general or special²⁰ and whether it is exercisable by will or deed or by will only.²¹

There is no objection to the release of a general power exercisable by will or deed. In effect the release is no different than an exercise in favor of those who would take in default of appointment and is fully authorized by the donor.²² Accordingly, in the few cases where the question has been presented general powers exercisable by will or deed have been held releasable.²³

A general testamentary power by the weight of authority may also be released.²⁴ The justification has been that as the power was intended for the benefit of the donee and since he can appoint to his estate or his creditors by will there is no one to complain when he extinguishes the power during his life.²⁵ The opposition to release is based on the fact that a deed of release, if allowed, creates indefeasible interests before the death of the donee in those who would take in default of appointment and cannot be distinguished on principle from an exercise by deed to the same persons—which is clearly prohibited.²⁶ The Maryland Supreme Court alone has taken the latter position.²⁷

The release of special powers exercisable by will or deed is uniformly recognized, at least where the objects of the power include those who would take in default of appointment.²⁸ If, however, a taker in default is not an object of the power or if the power is only to select one of a class, releasability has been ques-

¹⁹ See Annot. 76 A.L.R. 1430, 1437 (1932); Nossaman, *Release of Powers of Appointment*, 56 HARV. L. REV. 757 (1943). Gray, however, was of the opinion that reserved powers were no more releasable than any other. Gray, *Release and Discharge of Powers*, 24 HARV. L. REV. 511 (1911). New York by statute has adopted Gray's view. N.Y. REAL PROP. LAW § 144.

²⁰ The precise demarcation between general and special powers is debatable. See 3 POWELL, REAL PROPERTY § 386 (1952); SIMES & SMITH, FUTURE INTERESTS §875 (2d ed. 1956). For the purposes of this discussion a general power is one that may be exercised in favor of the donee, his estate or his creditors, and a special power is one that may be exercised only in favor of an ascertainable class not unreasonably large and not including the donee. See RESTATEMENT, PROPERTY § 320 (1940).

²¹ A power exercisable by will only is usually referred to as a testamentary power. RESTATEMENT, PROPERTY § 321 (1940).

²² 5 AMERICAN LAW OF PROPERTY § 23.26 (Casner ed. 1952); RESTATEMENT, PROPERTY c. 25, Introductory Note (Supp. 1948).

²³ Hume v. Hord, 5 Gratt. (Va.) 374 (1849); Tillett v. Nixon, 180 N.C. 195, 104 S.E. 352 (1920).

²⁴ Dist. of Columbia v. Lloyd, 160 F.2d 581 (D.C. Cir. 1947); Johnson v. Harris, 202 Ky. 193, 259 S.W. 35 (1924); White v. Roberts, 145 Md. 405, 125 Atl. 733 (1924); Lyon v. Alexander, 304 Pa. 288, 156 Atl. 84 (1931); Merrill v. Lynch, 173 Misc. 39, 13 N.Y.S.2d 514 (Sup. Ct. 1939).

²⁵ See Lyon v. Alexander, 304 Pa. 288, 156 Atl. 84 (1931). KALES, FUTURE INTERESTS § 611 (2d ed. 1920).

²⁶ Gray, *Release and Discharge of Powers*, 24 HARV. L. REV. 511, 516 (1911); Annot., 76 A.L.R. 1430 (1932).

²⁷ O'Hara v. O'Hara, 185 Md. 321, 44 A.2d 813 (1945).

²⁸ Biwer v. Martin, 294 Ill. 488, 128 N.E. 518 (1920); Columbia Trust Co. v. Christopher, 133 Ky. 335, 117 S.W. 943 (1909).

tioned, again on the ground that a release accomplishes an absolute disposition during the donee's lifetime which was not authorized by the donor.²⁹

Most of the controversy as to release is concerned with special testamentary powers.³⁰ Those asserting that such powers are non-releasable emphasize the creator's intent in respect to release and argue that, because the power by its terms can be exercised by will only, the donee may not dispose of the property during his life by any other means.³¹ Other authorities reject the notion that special testamentary powers are ipso facto non-releasable. They also regard the intent of the creator as the crucial factor in determining release, but seem to look only to his intent in respect to whether the donee was to be under a duty to exercise the power. Under this view a "duty" makes the power "in trust" and non-releasable, whereas a mere "discretionary" power is releasable.³²

At this juncture it should be noted that the opponents of release in these disputed situations similarly support their position by considering the power as a trust. The donee, they argue, is under a fiduciary duty imposed by the donor to refrain from releasing such powers.³³ Thus in a sense there is general agreement that "powers in trust" are non-releasable, the disagreement existing only as to the extent to which a fiduciary duty will be found. Concededly the foregoing statement is of little assistance in determining in a particular case if a power can be released, but it is made in an endeavor to demonstrate that section 1060 of the California Civil Code may have been merely an attempt to codify the ill-defined state of existing law in so far as it provides that "powers in trust" are not releasable. The extent to which legislative intent and the word "imperative" cast light on the subject will be considered later.

POWERS IN TRUST

It is generally maintained that a power "in trust" is really not a trust at all but only "in the nature of a trust" as a cestui que trust is lacking who can enforce

²⁹ See RESTATEMENT, PROPERTY, c. 25 Introductory Note (1940). 5 AMERICAN LAW OF PROPERTY § 23.27 (Casner ed. 1952).

³⁰ The most complete exposition of the conflicting views as to release of special powers is contained in RESTATEMENT, PROPERTY, EXPLANATORY NOTES 158-68 (Tent. Draft No. 7, 1937) where Professors Powell and Simes attacked (and Professor Leach defended) the original Restatement position that special testamentary powers are non-releasable. In response to the Revenue Act of 1942 (see note 1 *supra*) many states enacted legislation which, although not uniform, in general liberalized release of powers. See 3 POWELL, REAL PROPERTY § 394, n.93 (1952). In some instances all powers, even powers in trust, were made releasable. *Id.* n.97. Influenced by the measures taken by state legislatures to save their citizens from federal taxes, the Restatement changed its position and incorporated powers in trust concepts. RESTATEMENT, PROPERTY § 335 (Supp. 1948).

³¹ See 5 AMERICAN LAW OF PROPERTY § 23.28 (Casner ed. 1952); RESTATEMENT, PROPERTY § 335, comment a (1940); KALES, FUTURE INTERESTS § 611 (2d ed. 1920); Gray, *Release and Discharge of Powers*, 24 HARV. L. REV. 511, 516 (1911); Leach, *Powers of Appointment and the Federal Estate Tax—A Dissent*, 52 HARV. L. REV. 961 (1939).

³² In *In re Mills*, 1 Ch. 654 (1930), Lawrence, J. stated that the intent of the donor was relevant only as to whether the power conferred was coupled with a duty, and if it appeared there was no duty then it was immaterial whether the donor intended releasability or not. *Id.* at 666. See also *Merrill v. Lynch*, 173 Misc. 39, 13 N.Y.S.2d 514 (Sup. Ct. 1939); Simes, *Powers in Trust*, 37 YALE L.J. 211 (1928); Powell, *Powers of Appointment*, 10 BROOKLYN L. REV. 233, 250 (1941); Nossaman, *Release of Powers of Appointment*, 56 HARV. L. REV. 757, 762 (1943).

³³ See RESTATEMENT, PROPERTY § 335, comment a (1940); 5 AMERICAN LAW OF PROPERTY § 23.5 (Casner ed. 1952); Gray, *Release and Discharge of Powers*, 24 HARV. L. REV. 511, 520 (1911); Leach, *Powers of Appointment and the Federal Estate Tax—A Dissent*, 52 HARV. L. REV. 961 (1939).

the "trust" and the donee has no legal title to the property.³⁴ Whether or not a power can be the subject matter of a trust has even been questioned.³⁵ Several factors combined, however, to lead to usage of the "trust" terminology in dealing with problems of release.

The leading English decisions passing on release in which the concept of powers in trust was expounded seem to have involved donees of the power who were trustees as well.³⁶ Other considerations determined the result in those instances, but it is not unlikely that the presence of donee-trustees influenced the phraseology employed in holding the powers non-releasable.³⁷ The fiduciary duty of a trustee, although similar to, should be distinguished from what is commonly considered a power of appointment. For example, a settlement may require a trustee (whom-ever he may then be) to appoint property at a specified future time such as the attainment of a certain age or the death of a beneficiary. The trustee may have absolute discretion in distributing the property, but he can be compelled to make *some* disposition when the time arrives. In contrast, a power of appointment is personal to the donee. During the donee's lifetime he cannot be compelled to appoint.³⁸ When he dies the power is terminated.³⁹ Yet in a leading English case a trustee's attempt to avoid his duty to appoint property at a certain date was prevented, not on the ground that a trustee is unable to abandon a fiduciary obligation, but on the ground that a "power in trust" cannot be released.⁴⁰

The trust terminology became especially important in view of the Conveyancing Act of 1881, making all powers releasable.⁴¹ Although no powers were expressly excepted, English courts continued to hold some powers not subject to release on the ground that they were in trust, and, as involving fiduciary duties, not capable of being extinguished.⁴² Only on the theory that the Conveyancing Act did not preempt the established law of trusts could there be non-releasable powers in England.

The use of the elusive term "powers in trust" in the release of powers context must also be carefully distinguished from its use in what may be called the "implied gift" context. When a donee of a special power of appointment dies without having exercised the power and there is no express limitation over in default, litigation often arises as to whether the property passes to the objects of the power or reverts to the heirs at law or residuary legatees of the donor.⁴³ If the property passes to the objects of the power, the power is said to be "in trust." The use of the term in this context may again be ill-chosen as it is not settled whether in such a case equity exercises the power for the donee in favor of the objects, whether the property is impressed with a constructive trust in their favor, or whether there is

³⁴ See KALES, *FUTURE INTERESTS* § 611 (2d ed. 1920); Gray, *Powers in Trust*, 25 HARV. L. REV. 1 (1912).

³⁵ See 1 BOGERT, *TRUSTS* § 116 (1951); 1 SCOTT, *TRUSTS* § 27 (2d ed. 1956).

³⁶ *Saul v. Pattinson*, 55 L.J. Ch. 831 (1886); *In re Eyte*, 49 L.T.R. 259 (1883); *Weller v. Ker*, L.R. 1 H.L. Sc. 11 (1886).

³⁷ See *In re Somes*, 1 Ch. 250 (1896), where a power was held releasable and *Weller v. Ker* distinguished as involving a fiduciary duty in a trustee.

³⁸ RESTATEMENT, *PROPERTY* § 320 special note (1940); SIMES, *FUTURE INTERESTS* § 52 (2d ed. 1951).

³⁹ SIMES & SMITH, *FUTURE INTERESTS* § 1051 (2d ed. 1956).

⁴⁰ See *Weller v. Ker*, L.R. 1 H.L. Sc. 11 (1886); cf. *In re Matthew's Will*, 255 App. Div. 80, 5 N.Y.S.2d 707 (1938) (dissenting opinion).

⁴¹ See note 5 *supra*.

⁴² *In re Eyte*, 49 L.T.R. 259 (1883); and see *In re Mills*, 1 Ch. 654 (1930).

⁴³ See cases collected in 80 A.L.R. 503 (1936).

an implied gift over to them.⁴⁴ Analytically, it would seem that the latter is the better view, as the property passes in equal shares and the relative needs of the objects are disregarded.

In order that a power qualify as "in trust" so as to bring the doctrine of implied gift into operation, a duty rather than a mere discretion in the donee to exercise the power is required. It was in this context that the term "imperative" achieved significance, for when the duty is present, the power is said to be "imperative" and classed as one "in trust." And in order that the problem should even arise, of course, the instrument creating the power must be one which does not contain an express limitation in default, and yet some courts have felt it necessary to emphasize this very fact to support the holding that the power is one "in trust."⁴⁵ This would be of no consequence if implied gift cases were considered separately from those dealing with the release of powers. But unfortunately many judges and commentators fail to distinguish between the two relatively unrelated contexts in which the term "power in trust" is employed, and cases dealing with an implied gift situation are cited to support conclusions as to release of powers.⁴⁶ The fallacy has even been enacted into the New York Real Property statutes.⁴⁷

The fact that a donor includes a limitation in default of appointment demonstrates his awareness of the reality that, because the donee can never be forced to exercise the power, he might die without having done so. By expressly providing for the contingency the donor to be sure executes a more complete instrument. Where, on the other hand, a gift in default is not included it is reasonable to assume: (1) that the donor was more confident that the donee would exercise the power, and (2) that the donee is under a greater moral compulsion to do so, than if provision was made for the chance of failure to exercise. But any consequences as to releasability that follow as a result of describing a power as "in trust" or "discretionary" due to the absence of a gift in default seem unsound. This may be illustrated by contrasting two common situations: (1) T leaves property to his wife for life, remainder to their children in such shares as A by her will shall appoint; and (2) Same, with a gift in default of appointment to their children equally. On default of appointment in the first example, assuming all the children survive the wife, the property would be distributed as provided for explicitly in the second example, because, unless otherwise indicated, on default of appointment where there is no limitation over the property is distributed in equal shares to the objects of the power, under the implied gift rationale.⁴⁸ Hence, the practical result in both situations is identical in all respects, except, perhaps, release. If authorities failing to distinguish between the two uses of the term "powers in trust" were followed, a release of the power would be allowed in (2), but not in (1), since it would be only in the latter case that the "in trust" language would be necessary to effect a gift in default to the children.

POLICY

Two cogent policy considerations have emerged from the inconsistencies and anomalies that envelop release of powers doctrines. One is the disfavor with which

⁴⁴ 1 BOCERT, TRUSTS § 116 (1951); FARWELL, POWERS 527 (3d ed. 1916); SUGEN, POWERS 591 (8th ed. 1861).

⁴⁵ See, e.g., *Henderson v. Western Carolina Power Co.*, 200 N.C. 443, 450, 157 S.E. 425, 429 (1931).

⁴⁶ See, e.g., SIMES & SMITH, FUTURE INTERESTS § 1056 (2d ed. 1956).

⁴⁷ N.Y. REAL PROP. LAW §§ 157, 160, 183.

⁴⁸ RESTATEMENT OF PROPERTY § 367 (1940).

the law regards restraints on alienation and the other is the policy of the law to give effect the intent of the grantor whenever possible. To the extent powers are held releasable freer alienability of property is clearly promoted. It is also clear that allowing release in many instances defeats the intent of the donor. Disregarding for the moment some dicta and treatises, perhaps existing case law may be reconciled and a guide for future decisions provided by weighing these sometimes conflicting policy arguments in each type of power. In so doing the particular intentions of the donor that are said to be frustrated by release should also be viewed from a policy standpoint.

Powers appendant, if recognized, offer no objection to release on the grounds of donor's intent. Such powers could not be made non-extinguishable even if the donor expressly so provided because of the over-riding conveyancing principle that a grantor of a fee is unable to derogate from his grant. As seen powers appendant are universally held releasable.

It seems to be agreed that the intent of the creator of a reserved power normally is that the power should be extinguishable. Here the policies of freer alienation and recognition of the donor's intent are not in conflict, and, accordingly, most authorities consider reserved powers releasable.⁴⁹

Because powers exercisable by deed as well as by will, with certain exceptions in the case of special powers,⁵⁰ may be released without frustrating the intent of the donor, the policy against restraints on alienation has no persuasive countervailing considerations and thus dictates that such powers be subject to release.

By creating a general testamentary power the donor in effect substitutes for his own discretion as to the ultimate disposition of the property that of the donee at the donee's death. Presumably the donor does not wish the donee to be precluded from exercising any matured judgment he might gain in the course of his lifetime. But as no particular group is preferred by the donor to benefit from this advantage, a release, in the donor's contemplation, would only impair the wise disposition of property in general. Thus it does not seem unreasonable to conclude that free alienability outweighs the donor's intent. Allowing the release of such powers seems preferable even assuming the donor by express provision could have made the power non-releasable.⁵¹

Special testamentary powers, however, present additional and more compelling arguments in favor of giving effect to the donor's intent. The primary purpose of creating a special testamentary power is usually not to postpone a beneficial interest but is to achieve flexibility in an estate plan.⁵² When a testator leaves property to his wife for life with the power to appoint by will to their children he does so to provide for possible changes of circumstances that the children may experience after his death. He hopes to keep the disposition of his estate adjustable for such contingencies during the period that his wife's lifetime exceeds his own. He may consider it desirable that his wife be free from possible pressures by the children to receive indefeasible shares and want to preclude her impropriety in yielding to such requests. Perhaps he deems it important for the wife's welfare that the children be continually aware of the mother's power to alter their shares

⁴⁹ See note 19 *supra*.

⁵⁰ See text at note 29 *supra*.

⁵¹ In view of the wording of CAL. CIV. CODE § 1060, note 2 *supra*, it would seem that a general testamentary power could be made non-releasable by express provision. The *Restatement* is contra. RESTATEMENT, OF PROPERTY § 334, comment *b* (1940).

⁵² See Leach, *Powers of Appointment*, 24 A.B.A.J. 807 (1938).

during her lifetime. There has been no suggestion that these intentions could not be effectively secured by express provision. The fact that the donor did not so provide specifically cannot be taken to mean that he intended releasability, as it is entirely reasonable to expect that when a power is made exercisable only by will inter vivos release is precluded. Unlike general powers, a special power cannot be considered as beneficial to the donee, and it is easier to condone someone's unauthorized use of interests potentially his own than the unauthorized use of interests held for the benefit of others. It would seem dubious to support a distinction as to release between special "powers in trust" and "mere" special powers on the ground of freer alienability, because although such a distinction may allow release in more instances the criteria by which the distinction is made is often irrelevant to the problem of release.⁵³

Additional support for the conclusions outlined above is the practice of courts, including those in California, to give effect to the testator's intent whenever possible.⁵⁴ Moreover, California is not restricted by illogical decisions resulting from the complicated development of release theories. Section 1060 is the only obstacle. As seen, "powers in trust" in section 1060 can legitimately be interpreted as powers which, because of their analogy to non-beneficial fiduciary duties, cannot be released. At the time section 1060 was enacted it was not absolutely certain that any powers were releasable, and it was therefore desirable to assure that powers as such would not be held to be non-releasable. Thus the conclusion that 1060 be taken as rejecting the original Restatement view (non-releasability of special testamentary powers) is not compelled.⁵⁵

Because of the identical wording of the New York release statute⁵⁶ the use of "imperative" in section 1060 supports the position that implied gift concepts were likewise incorporated into release of powers in California. This result, however, could be avoided by construing "imperative" as an additional adjective adding little if anything to the phrase "power in trust." The term has been so used,⁵⁷ and

⁵³ Professor Simes propounded the view in America that all powers are releasable except "powers in trust." Simes, *Powers in Trust*, 37 YALE L.J. 211 (1928). In his most recent text Simes concedes that as yet there are no American cases allowing release of special testamentary powers, which he explains by stating that most special testamentary powers are in trust. SIMES & SMITH, *FUTURE INTERESTS* § 1056 (2d ed. 1956). To illustrate his contention that "powers in trust" (which are by his definition non-releasable) do not include all special testamentary powers, Simes cites *In re Combe*, 1 Ch. 210 (1925), an implied gift case, wherein releasability was not considered and a special testamentary power was held not to be "in trust."

⁵⁴ For opinions consistent in principle with the views here expressed see *Chickering v. Comm. of Int. Rev.*, 118 F.2d 254, 260 (1st Cir. 1941); *Thompson's Ex'rs v. Norris*, 20 N.J. Eq. 489, 525 (1869); *Learned v. Tallmadge*, 26 Barb. (N.Y.) 443 (1856); *Farmers Loan & Trust Co. v. Mortimer*, 219 N.Y. 290, 114 N.E. 389 (1916); *Chase Nat'l Bank v. Chicago Title & Trust Co.*, 155 Misc. 61, 279 N.Y.S. 327 (Sup. Ct. 1935); *Lyon v. Alexander*, 304 Pa. 288, 156 Atl. 84 (1931).

⁵⁵ See note 30 *supra*.

⁵⁶ N.Y. REAL PROP. LAW § 183.

⁵⁷ "If a testator confers a power by simply authorizing the donee to dispose of definite property among a definite class of persons, as the donee may think proper, such a power will be held to be imperative, unless the testator by his will shows satisfactorily, that he had no wish, that such a class, or any member of it, should be the objects of his bounty, unless the donee of the power desired." *Milhollen v. Rice*, 13 W.Va. 510, 565 (1878). Although ruling on an implied gift question, the court indicates that imperative powers in trust are not limited to such cases. An express gift over to the objects of a special power would *a fortiori* constitute an imperative power in trust under the court's analysis.

if the construction seems tenuous, it should be recalled that the avowed reason for which section 1060 was enacted no longer exists.⁵⁸

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⁵⁸ Since The Powers of Appointment Act of 1951 only "general" powers are taxable. See 5 AMER. LAW OF PROP. § 23.25 (Casner ed. 1952).

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