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Creditors' Ability to Reach Assets Under a General Power of Appointment

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I. INTRODUCTION

Originally conceived prior to the enactment of the Statute of Uses as a means by which freehold legal interests in land might be devised,[1] the power of appointment has maintained its prominent position in American society because of its utility in minimizing death taxes[2] and injecting into dispositions of property an element of foresight otherwise unobtainable.[3] Due to the immense popularity of powers of appointment as estate planning devices, statutory developments in the law of powers have been confined primarily to the tax field,[4] with a resultant neglect of those areas of the law more tangentially related to powers of appointment. Not the least significant of these neglected areas is the field of creditors' rights or, more specifically, the rights of creditors of the donee of a power of appointment to reach the appointive assets in satisfaction of their claims.[5] Only ten states and the District of Columbia

1. L. SIMES, FUTURE INTERESTS § 55 (1966) [hereinafter cited as SIMES].

2. Powers of appointment "still provide the most important single conveyancing device for the minimizing of death taxes." 3 R. POWELL, REAL PROPERTY ¶ 385, at 337 (1970) [hereinafter cited as POWELL]. For a discussion of powers of appointment in this regard see Allen, *Use of Trusts and Powers of Appointment in Estate Planning*, 21 Ark. L. Rev. 15 (1968); Craven, *Powers of Appointment Act of 1951*, 65 HARV. L. REV. 55 (1952); Fisher & Kohl, *The Present Status of Powers of Appointment, Including Their Utility and Limitations in the Marital Deduction*, 24 N.Y.U. 24TH INST. ON FED. TAX. 381 (1966); Picket, *Powers of Appointment as an Estate Planning Tool*, 26 N.Y.U. 26TH INST. ON FED. TAX. 1435 (1968).

3. Chief Justice Lord Mansfield explained in his will his use of powers of appointment: "Those who are nearest and dearest to me best know how to manage and improve, and ultimately in their turn, to divide and subdivide, the good things of this world which I commit to their care, according to events and contingencies which it is impossible for me to foresee, or trace through all the many labyrinths of time and chance." Powell, *Powers of Appointment in California*, 19 HASTINGS L.J. 1281 (1968).

4. All states, with the exception of Nevada, plus the District of Columbia and Puerto Rico, have inheritance or estate tax statutes. Of these, only Connecticut, Indiana, Wyoming, New Hampshire, Utah, and Louisiana have no specific provision for the taxation of powers of appointment. Louisiana, a civil law state, does not recognize powers of appointment. CCH INH. EST. & GIFT TAX RPTR. [State Compilation] ¶ 1540C, at 80, 164-65 (1968).

5. The "donee" of a power of appointment, sometimes called the "appointor," is the holder of the power; the "donor" is the creator of the power; the "appointee" is the person in whose favor the power is exercised. 3 POWELL ¶ 385, at 335.

have legislation on this subject,[6] and only half of these jurisdictions have dealt effectively with the problems raised. Creditors whose claims are not protected by such statutes fall victim to the grossly inadequate provisions of the common law.[7] It is the design of this Note to trace the common law and statutory development of the rights of creditors of a donee of a "general" power of appointment,[8] and to discuss needed reform in terms of the merits of recent legislation.

II. COMMON LAW

In the absence of a statute, the common law rule provides that the ability of creditors to reach property under a general power of appointment depends upon whether the power has been exercised. When the power has not been exercised, the property is unavailable to the donee's creditors in satisfaction of their claims, notwithstanding the fact that the general power is presently exercisable.[9] The basis for this rule is the doctrine of "relation back," under which the instrument that may be used to exercise the power of appointment is read as part of the instrument that created the power, with a resultant theoretical by-pass of

6. ALA. CODE tit. 47, §§ 76-79, 92 (1958); CAL. CIV. CODE §§ 1390.1-.3 (West Supp. 1971); D.C. CODE ANN. §§ 45-1005, -1006 (1967); MICH. STAT. ANN. §§ 26.155(106), (113) (Supp. 1970); MINN. STAT. ANN. § 502.70 (Supp. 1970); N.Y. EST., POWERS & TRUSTS LAW §§ 10-7.1-.4 (McKinney 1967); N.D. CENT.CODE §§ 59-05-39, -40, -50 (1960); OKLA. STAT. ANN. tit. 60, §§ 262-63, 274 (1963); S.D. COMPILED LAWS ANN. §§ 43-11-18, -19, -33 (1967); TENN. CODE. ANN. § 64-106 (1955); WIS. STAT. ANN. § 702.17 (1970).

7. *See* text accompanying notes 9-43 *infra*. *See also* Comment, *Powers of Appointment—The New York Revision*, 65 COLUM. L. REV. 1289, 1299 (1965); Comment, *State Powers Statutes Protecting Creditors and Requiring Formal Execution*, 58 MICH. L. REV. 753, 755 (1960).

8. The California statute will serve as the terminological basis of the Note. CAL. CIV. CODE § 1381.2 (West Supp. 1970) provides:

"(a) A power of appointment is 'general' only to the extent that it is exercisable in favor of the donee, his estate, his creditors, or creditors of his 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 or persons in discharge of the donee's obligation of support which is limited by an ascertainable standard relating to their health, education, support, or maintenance is not a general power of appointment.

"(c) A power exercisable by the donee only in conjunction with a person having a substantial interest in the appointive property which is adverse to the exercise of the power in favor of the donee, his estate, his creditors, and creditors of his estate is not a general power.

"(d) All powers of appointment which are not 'general' are 'special.'"

Both at common law and by statute, creditors are unable to reach property under a special power of appointment. In these cases, the donee, having no power to appoint for his own benefit, may legitimately be characterized as an agent for the donor, with no quasi-proprietary interest in the appointive assets. *See* note 77 *infra* and accompanying text.

9. RESTATEMENT OF PROPERTY § 327 (1940). For a general discussion of the common law in this area see 3 POWELL ¶ 389; SIMES §§ 61-62.

the donee on the exercise of the power.[10] Under this doctrine, the donee is deemed to have no proprietary interest upon which his creditors can levy.[11] The creation of a power of appointment in the donee is seen as "an offer to him of the estate or fund, that he may receive or reject at will, and like any other offer to donate property to a person, no title can vest until he accepts the offer . . . ."[12]

There are, however, two exceptions to the general common law rule and neither depends upon the exercise of the power. First, if the donee of the power has created the power in himself, his creditors can reach the appointive property to the extent that the transfer creating the power was void or voidable as to them under the rules relating to fraudulent conveyances.[13] Secondly, if the settlor of a trust retains for himself a life estate and a general power to appoint the remainder, his creditors can reach both the beneficial life interest[14] and the appointive remainder assets.[15] Aside from these two instances, the donee's creditors cannot reach the appointive assets in the absence of the donee's exercise of the power.

The common law rule often breeds harsh and unjust results for the donee's creditors because the donee is permitted to retain the control and use of valuable assets while his creditors remain unpaid. The following examples clearly illustrate the injustice produced by this rule. Suppose that *A* deeds or devises property to *B* for life, remainder to whomever *B* may appoint by deed or will, and in default of appointment to *C*.[16]

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10. *See* 3 POWELL ¶ 387; RESTATEMENT OF PROPERTY ch. 25, Introductory Note, at 1811-12 (1940); SIMES § 57.

11. Berger, *The General Power of Appointment as an Interest in Property*, 40 NEB. L. REV. 104, 108 (1960). *See also* RESTATEMENT OF PROPERTY § 327, comment *a* (1940). "[T]he only reason why a creditor cannot reach a power presently exercisable is that, historically, it is personal and inalienable, and that, until the donee chooses to exercise it, the creditor is in the same position as the creditor of an insolvent laborer who refuses employment which would enable him to pay his debts." SIMES § 61, at 135.

12. Gilman v. Bell, 99 Ill. 144, 150-51 (1881).

13. *E.g.*, Nolan v. Nolan, 218 Pa. 135, 67 A. 52 (1907); *cf.* Deposit Guar. Nat'l Bank v. Walter E. Heller & Co., 204 So. 2d 856, 862 (Miss. 1967); Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Kelly, 134 N.J. Eq. 120, 132-33, 34 A.2d 538, 546 (Prerog. Ct. 1943).

14. This is analogous to the well-recognized ability of creditors of the beneficiary of a spendthrift trust to reach the income therefrom in satisfaction of their claims, when the beneficiary was also the settlor. *See* McColgan v. Walter Magee, Inc., 172 Cal. 182, 155 P. 995 (1916).

15. RESTATEMENT OF PROPERTY § 328 (1940). Comment *b* indicates that this provision operates independently of the coneept of fraudulent conveyances. This section is based upon the retention of "all the substantial incidents of ownership" by the settlor-donee. *Id.*, comment *a*.

16. When, as in this example, the donee has, in addition to the power, an interest that will not be affected by exercise of the power, the power is said to be "in gross." This is to be contrasted with a "collateral power," in which the donee has no interest other than the power, and with a "power appendant," in which the donee owns an interest that would be completely divested upon the

Unquestionably, *B* holds the substantial equivalent of ownership,[17] since he has both the present possessory interest and a general, presently exercisable power of disposition over the remainder. Yet the common law denies *B*'s creditors access to the appointive remainder assets.[18] To avoid the claims of his creditors, *B* only needs to refuse to exercise the power, allowing the property to pass to the takers in default. Even when the general power is used for the sole purpose of reaching a legitimate result, the claims of the donee's creditors may be avoided. Suppose that *A* devises property to whomever *C*, *A*'s adult son, shall appoint by deed or will, and until and in default of such appointment, to *B*, *A*'s wife.[19] Although this disposition is not so repugnant as the previous example because of the existence of a genuine dispositive purpose, the common law result in this situation is no less objectionable as far as the donee's creditors are concerned. Under the common law rule, this disposition is effectively the devise of property to *B* "with an elastic string attached."[20] If *B* has attaching creditors, *C* "pulls the string" and leaves *B* with no interest in the property; if *C*'s creditors are pressing, he leaves them helpless by merely refusing to "pull the string."[21]

In both of the foregoing examples, the donee of the general power holds the power to immediately acquire the appointive assets and therefore, as to his creditors, should be regarded as the owner of those assets. Furthermore, as a matter of policy, the intent of the donor of the power, innocent though it may be, should be subordinated to the claims of creditors of the donee. Although scholarly opinion[22] supports the

exercise of the power. 5 AMERICAN LAW OF PROPERTY § 23.12 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY].

17. The donee of a general power of appointment that is presently exercisable is effectively the beneficial owner of the property subject to the power. 5 AMERICAN LAW OF PROPERTY § 23.4. "The general power presently exercisable is the practical equivalent of ownership, since it gives to the donee the power to acquire ownership at any time by appointing to himself." RESTATEMENT OF PROPERTY, ch. 25, Introductory Note at 1813 (1940). It should be noted that the above passages refer to instances in which the donee has no interest other than the power. It is submitted that existence of a life estate makes the conclusion even stronger.

18. *See* text accompanying notes 9-12 *supra*.

19. Suppose that *A* desired that *B* have the entire interest; but *A* might also wish that *C* take the property if *B* should remarry. In such case, *A* could accomplish the objective by devising to *B* a fee simple estate, subject to complete divestment if she should remarry. Suppose, however, that *A* does not want the divestiture to be automatic; that *A* desires that *B* retain the property if she marries a man "worthy" in the judgment of one *A* trusts, to wit, his son *C*. The only means of disposition by which this may be accomplished is the general power of appointment.

20. Berger, *supra* note 11, at 119.

21. Creditors of *B*, like creditors of the owner of a fee subject to complete divestment, would take subject to the exercise of the power. In the event that creditors of *B* and *C* attempted to levy on the property, *C*'s creditor's would take to the exclusion of the creditors of *B*. Berger, *supra* note 11, at 119-20.

22. *See* note 17 *supra*.

recognition of this view, the common law rule persists in those 40 states that have not enacted legislation in this area.[23]

The harshness of the common law rule, however, is ameliorated by the application of the doctrine of equitable assets.[24] Under this doctrine, when the donee chooses to exercise his power of appointment,[25] the appointive property is considered, in equity, as an asset of the donee that can be used for the payment of his creditors to the extent that the donee's property is insufficient for that purpose.[26] This doctrine disregards, to an extent, the legalistic theory that the absence of a true proprietary interest of the donee in the appointive assets sets these assets beyond the reach of creditors. The doctrine is applicable to any appointment, testamentary or *inter vivos*, in favor of a "volunteer,"[27] as well as to testamentary appointments to creditors.[28] When an *inter vivos* exercise has been made in favor of a volunteer, the appointive property is subjected to the claims of the donee's creditors to the extent that the transfer would have been so subjected under the rules relating to fraudulent conveyances if the donee

23. *E.g.*, United States v. Field, 255 U.S. 257 (1921); Supreme Colony United Order of Pilgrim Fathers v. Towne, 87 Conn. 644, 89 A. 264 (1914); Patterson v. Lawrence, 83 Ga. 703, 10 S.E. 355 (1889); Gilman v. Bell, 99 Ill. 144 (1881); Crawford v. Langmaid, 171 Mass. 309, 50 N.E. 606 (1898); Johnson v. Cushing, 15 N.H. 298 (1844); Bentham v. Smith, 15 S.C. Ch. 33 (Ct. App. 1840); Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S.W. 1162 (1909); *see* note 6 *supra* and accompanying text.

24. The first decisions to support the doctrine were Lord Townshend v. Windham, 28 Eng. Rep. 1 (Ch. 1750) and Lassells v. Cornwallis, 23 Eng. Rep. 898 (Ch. 1704).

25. When an attempt by the donee to exercise the power is for some reason ineffective, the power is considered to remain unexercised. RESTATEMENT OF PROPERTY § 327, comment *b* at 1853 (1940). There is some question concerning the effect of a donee's attempt to exercise the power in favor of a taker in default. The weight of decisional law indicates that such an attempt renders the power "exercised" for the purpose of applying the "equitable assets"doctrine. *E.g.*, Duncanson v. Manson, 3 App. D.C. 260 (Ct. App. 1894), *aff'd*, 166 U.S. 533 (1897); Clapp v. Ingraham, 126 Mass. 200 (1879); Johnson v. Cushing, 15 N.H. 298 (1844). The *Restatement* takes a somewhat contrary view. RESTATEMENT OF PROPERTY § 327, comment *b*, illustration 5, at 1854 (1940).

26. *See* 3 POWELL ¶ 389; SIMES § 62. The requirement that the donee's individual estate be insufficient to satisfy creditors' claims is expressed or assumed in all cases applying the equitable assets doctrine. In Tuell v. Hurley, 206 Mass. 65, 91 N.E. 1013 (1910), it was held that even the part of a donee's estate made the subject of a specific legacy must be exhausted before creditors may claim the appointive assets, notwithstanding the general rule that specific legacies are not to be touched until general legacies are first exhausted.

27. RESTATEMENT OF PROPERTY §§ 329-30 (1940). Where the appointee gives no value for the appointment and has no claim in satisfaction of which the appointment is applied, he is a volunteer. *Id.* § 329, comment *e*, at 1864. *See also* Clapp v. Ingraham, 126 Mass. 200 (1879); Johnson v. Cushing, 15 N.H. 298 (1844).

28. A testamentary appointment to a relative or close friend who also happens to be a creditor of the donee or of his estate does not necessarily fall subject to the doctrine of equitable assets. The doctrine applies only if the donee intended to appoint the friend or relative in his capacity as a creditor. RESTATMENT OF PROPERTY § 329 (1940). *See also* Patterson v. Lawrence, 83 Ga. 703, 10 S.E. 355 (1889); Vinton v. Pratt, 228 Mass. 468, 117 N.E. 919 (1917).

had in fact owned the property.[29] Consistent with this application of the doctrine is the rule that an *inter vivos* exercise in favor of a bona fide purchaser for value is not open to attack by the donee's creditors, since this type of transfer cannot be characterized as fraudulent as to creditors.[30] The rule that a testator may not, by devise of owned property, prefer one of his creditors over another justifies the application of the equitable assets doctrine to testamentary appointments to creditors.[31] The majority of American jurisdictions that have passed upon the applicability of the equitable assets doctrine have adopted it without alteration.[32] A significant group of states, however, has rejected the doctrine,[33] and two states have severely limited it by refusing to apply it to testamentary appointments.[34] In Pennsylvania, though not expressly rejected, the doctrine is applied only when the donee "blends" the appointive assets with his own in such a manner that his action is tantamount to an exercise of the power of self-appointment.

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29. RESTATEMENT OF PROPERTY § 330 (1940). *See also* United States v. Field, 255 U.S. 257 (1921) (dictum); Jackson v. Franklin, 179 Ga. 840, 177 S.E. 731 (1934); Clapp v. Ingraham, 126 Mass. 200 (1879).

30. *See* Patterson v. Lawrence, 83 Ga. 703, 10 S.E. 355 (1889); Freeman's Adm'r v. Butters, 94 Va. 406, 26 S.E. 845 (1897).

31. *See* SIMES § 62, at 137.

32. *See* Security Trust & Safe Deposit Co. v. Ward, 10 Del. Ch. 408 (Ch. 1915); Gilman v. Bell, 99 Ill. 144 (1881); Clapp v. Ingraham, 126 Mass. 200 (1879); Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S.W. 1162 (1909); Freeman's Adm'r v. Butters, 94 Va. 406, 26 S.E. 845 (1897).

33. *See* St. Matthews Bank v. DeCharette, 259 Ky. 802, 83 S.W.2d 471 (1935); *In re* Howald's Trust, 65 Ohio App. 191, 29 N.E.2d 575 (1940); Rhode Island Hosp. Trust Co. v. Anthony, 49 R.I. 339, 142 A. 531 (1928); *cf.* Boyle v. John M. Smyth Co., 248 Ill. App. 57 (1928); Wales' Adm'r v. Bowdish's Ex'r, 61 Vt. 23, 17 A. 1000 (1889). *But see* Gilman v. Bell, 99 Ill. 144 (1881).

34. In Mercantile Trust Co. v. Bergdorf & Goodman Co., 167 Md. 158, 173 A. 31 (1934), it was held that in Maryland a general testamentary power of appointment may not be exercised in favor of a donee's creditors or in favor of his estate. This would seem to require a rejection of the equitable assets doctrine. In Adger v. Kirk, 116 S.C. 298, 108 S.E. 97 (1921), the court suggested, as a general proposition, that the appointee takes appointive assets direetly from the donor. Although there is no decision to date dealing with general powers exercisable inter vivos, this case indicates an inclination to reject the doctrine *in toto*.

35. Creditors of the donee may reach the appointive assets only if the donee makes "such an exercise of the power as virtually to amount to a gift of the fund to his own estate . . . ." *In re* Stannert's Estate, 339 Pa. 439, 442, 15 A.2d 360, 362 (1940), *quoting In re* Hagen's Estate, 85 Pa. Super. 123, 126 (1925). Probably the strongest criticism of the doctrine of equitable assets emanated from Pennsylvania: "There is such flagrant injustiee in applying the bounty of a testator to the benefit of those for whom it was not intended, that the mind revolts from it. An appointee derives title immediately from the donor of the power, by the instrument in which it was created; and consequently not under but paramount to the appointor, by whom it was executed: by reason of which it is impossible to coneeive that the appointor's creditors have an equity." Commonwealth v. Duffield, 12 Pa. 277, 279-80 (1849).

The advent of the doctrine of equitable assets represented a significant deviation from the rigid legalisms that had theretofore totally stifled the efforts of creditors of the donee. The forte of the doctrine is its recognition that upon the exercise of the power the donee should be required to "be just before [being] generous."[36] The common law courts have refused, however, to acknowledge the proprietary nature of the donee's interest by extending the rule to compel the donee to exercise the power in favor of himself or his estate for the benefit of his creditors. This refusal is particularly objectionable because common law courts have long recognized the proprietary interest attendant to a general power of appointment for the purpose of applying the rule against perpetuities.[37] This recognition is the basis for the rule that in determining the validity of an appointment under a general power exercisable *inter vivos,* the period during which alienability may be curtailed is measured from the date of the exercise of the power, as opposed to the date of its creation, which is the measuring point in the case of special powers.[38] The proprietary nature of a general power of appointment has been clearly and succinctly described by Professor W. Barton Leach:

> A general power to appoint by deed or by will is practically equivalent to property, because the donee can at any time appoint to himself. Therefore, an appointment made under such a power is treated as a disposition of the donee's own property for the purpose of the Rule against Perpetuities.[39]

The discussion to this point has focused on the development of the law applicable to a general power of appointment exercisable by deed or by will. A donee, however, may hold a testamentary general power of appointment that is exercisable only by will. Initially, it would seem that the "proprietary interest" argument is inapplicable to testamentary general powers since the donee derives no direct benefit from the power during his lifetime and cannot effectively "sell" his power.[40] Upon analysis, however, this initial impression disappears. At the time the power becomes exercisable—at the donee's death—the donee exercises

36. *In re* Bray's Will, 120 N.Y.S.2d 131, 137 (Sur. Ct. 1953).

37. Appeal of Mifflin, 121 Pa. 205, 15 A. 525 (1888).

38. *In re* Boyd's Estate, 199 Pa. 487, 49 A. 297 (1901). When the donee does not have the power to appoint to himself, his estate, his creditors, or the creditors of his estate, he is obviously no more than the agent of the donor. *See* note 10 *supra* and accompanying text.

39. J. MORRIS & W.B. LEACH, THE RULE AGAINST PERPETUITIES 146 (2d ed. 1962).

40. "The donee of a power not presently exercisable cannot contract to make an appointment." RESTATEMENT OF PROPERTY § 340 (1940). "By giving a testamentary power . . . the donor expresses an intent that the discretion as to the exercise of the power shall be retained until the donee's death . . . ." *Id.* comment *a.*

dominion over the appointive assets in the same manner and to the same extent as if he owned them. At this time the power to appoint assets is closely akin to, if not equivalent to, absolute ownership. Notwithstanding the "substantial ownership" associated with general testamentary powers, most courts have refused to recognize the proprietary nature of such powers and have made the creditors of the donee await the exercise of the power in order to satisfy their claims.[41] In opposition to this facet of the common law, it has been said that "with respect to incidents [of ownership] attaching after his death, [the donee of a general testamentary power] should be treated as effectively the owner of the appointed property,"[42] with such property subject to the payment of expenses of administration as well as the claims of creditors of the estate. When the donee of a general testamentary power also owns a life estate in the appointive property, one commentator has taken an even stronger view: "[s]ince the creditor seeking satisfaction out of the donee's assets also has a right to levy upon the life estate, there is no reason to postpone until the donee's death the levy upon the remainder subject to the power."[43]

III. EARLY STATUTORY MODIFICATIONS

A. The 1830 New York Provision

New York was the first state to attempt to relieve creditors of the burdens of the common law rules by statute. In criticizing the grossly inadequate common law rules, the New York revisers characterized the law of powers as "the most intricate labyrinth in all our jurisprudence."[44] These early reformers recognized that the distinctions found in the common law made mere understanding of the law of powers, not to mention its application, difficult. Of primary import, however, is their acknowledgment of the proprietary nature of the donee's interest in appointive assets under a general power of appointment and their expression of the significance of the interests of bona fide creditors:

> In reason and good sense, there is no distinction between the absolute power of disposition and the absolute ownership; and to make such a distinction, to the injury of creditors, may be very consistent with technical rules, but is a flagrant breach of

41. *See* text accompanying notes 9-12 *supra*.

42. 5 AMERICAN LAW OF PROPERTY § 23.4, at 469 (A.J. Casner ed. 1952).

43. Berger, *supra* note 11, at 126.

44. Whiteside & Edelstein, *Life Estates With Power to Consume: Rights of Creditors, Purchasers and Remaindermen: A Study of New York Real Property Law Sections 149-153*, 16 CORNELL L.Q. 447, 455 (1931).

> the plainest maxims of equity and justice. There is a moral obligation on every man, to apply his property to the payment of his debts; and the law becomes an engine of fraud, when it permits this obligation to be evaded by a verbal distinction. It is an affront to common sense to say, that a man has no property in that which he may sell when he chooses, and dispose of the proceeds at his pleasure.[45]

In 1830, the New York legislature abrogated the common law doctrines with a statutory scheme under which the rights of a donee's creditors were not dependent upon his exercise of the power.[46] The key concept in the statutory pattern was that of "absolute power of disposition." When the donee held such a power, "not accompanied by a trust," creditors of the donee could reach the property under the power to the same extent as if the donee owned the fee therein. This rule was applicable irrespective of whether any future estate was limited thereon, or whether the donee was the owner of a particular estate for life or years in the land.[47] Further, if a remainder was not limited upon the estate, a donee holding an "absolute power of disposition" was given an absolute fee.[48] A donee, who was either a tenant for life or for years, was deemed to possess an "absolute power of disposition" when he held a general and beneficial power to devise the inheritance.[49] A "general power" was defined as one that authorized the transfer of a fee, by conveyance, will, or charge, in favor of any grantee;[50] a "beneficial power" was one under which no person, other than the donee, had an interest in the exercise of the power.[51] Furthermore, every power of disposition by means of which the grantee was enabled, in his lifetime, to dispose of the entire fee for his own benefit, was deemed absolute.[52] *In re Davies' Estate*[53] represents the typical situation in which the donee was deemed to have an absolute power of disposition, thereby subjecting the property under the power to the claims of creditors.[54] In that case, the donee of the power took a life estate with power "to expend the principal, income, interest, rent and profits not consumed." It was held that the donee held an absolute power of disposition so as to raise his interest to a fee for the benefit of his creditors.[55]

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45. *Id.*
46. *See id.* at 453-58.
47. Ch. 547, §§ 129-30, [1896] N.Y. Laws (repealed 1964).
48. *Id.* § 131.
49. *Id.* § 132.
50. *Id.* § 114.
51. *Id.* § 116.
52. *Id.* § 133.
53. 242 N.Y. 196, 151 N.E. 205 (1926).
54. Whiteside & Edelstein, *supra* note 44, at 462.
55. 242 N.Y. 196, 151 N.E. 205 (1926).

Prior to *Davies,* however, the effectiveness of the statute was limited by the case of *Cutting v. Cutting.*[56] It was there held that when a donee of a general power of appointment exercisable *inter vivos* is also a life beneficiary under a trust, the corpus of which is the appointive assets, the donee does not possess the requisite "absolute power of disposition." Since the donee in *Cutting* could not convey the beneficial life interest, he was unable to dispose of the entire fee, as required under the statute, notwithstanding his plenary power over the remainder.[57] Implicit in the holding is the belief that the trust beneficiary was not a "tenant for life, or for years" under the statute.[58] Further, the *Cutting* court decided that the statute had totally superseded the common law of powers;[59] therefore, even though the power had been exercised, creditors could not reach the property because the situation did not come within the purview of the statute. After *Cutting,* therefore, the effect of the statute was to restrict, rather than expand, the doctrine of equitable assets.

B. Derivatives of the 1830 New York Law

The New York revision of 1830 prompted other states to re-evaluate their common law provisions on the subject. Ten states initially enacted statutes patterned after the 1830 New York law; however, California, Michigan, Minnesota, and Wisconsin, as well as New York, have subsequently repealed their statutes in favor of more concise and effective legislation. At present, Alabama, North Dakota, Oklahoma, South Dakota, Tennessee, and the District of Columbia have operative statutes practically identical to the New York law emasculated by *Cutting.*[60] Although the apparent intent to extend the equity rule to an unexercised general power is meritorious, the effectiveness of these statutes to accomplish the desired result is questionable. A carbon copy of the severely-criticized[61] *Cutting* decision survives in Ala-

56. 86 N.Y. 522 (1881).

57. *Id.* at 538-40.

58. Under this section, one is deemed to have an "absolute power of disposition" if 2 elements are present: (1) a "general and beneficial" power to devise the inheritance, given to (2) a "tenant for life, or for years." The court expressly acknowledged that the donee's power was "general and beneficial." *Id.* at 535. Hence, the second element *must* have been found to be missing, or the power of disposition would have been absolute under § 152.

59. 86 N.Y. at 530.

60. ALA. CODE tit. 47, §§ 76-79 (1958); D.C. CODE ANN. §§ 45-1005 to -1008 (1967); N.D. CENT. CODE §§ 59-05-39 to -43 (1960); OKLA. STAT. ANN. tit. 60, §§ 262-66 (1963); S.D. COMPILED LAWS ANN. §§ 43-11-18 to -22 (1967); TENN. CODE ANN. § 64-106 (1955).

61. "This New York decision did not seem to be required by the statute. The required 'absolute power of disposition' could well be construed to refer only to the quantum of the estate

bama;[62] therefore, under the Alabama statutes creditors of the donee are unable to reach appointive assets when those assets are held in trust with the donee of the power of appointment as life beneficiary of the trust.[63] If this is an indication of the interpretation to be expected from the other states, the inadequacy of these statutes is readily apparent, since generally the estate accompanying a general power is given in trust.[64] Furthermore, the statutes in these states are too vague and susceptible to misinterpretation to be of real value.[65] The major criticisms of these statutes are aptly summarized in Dean Everett Frazer's comments on the repeal of Minnesota's version of the 1830 New York law.

> The 1830 New York revision was incomplete, and resort to common law rules was necessary to fill the gaps. It contained a number of rules now obsolete. Its provisions were in some instances inconsistent and in others arbitrary. Its terminology differed from that of the common law, and made it difficult to use authorities from other jurisdictions.[66]

IV. MODERN LEGISLATION

Five states have repealed the 1830 New York revision. Minnesota, in 1943, became the first state to cast aside its version of the outmoded New York law.[67] In 1964, New York repealed its pioneering legislation

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constituting the appointive assets. If the donee had an absolute power of disposition (within the statutory definition) as to all but the life interest (which was made inalienable by the trust provision) why should not the donee's creditor be able to reach that which his debtor can freely convey?" 3 POWELL, *supra* note 2, at 370-71. "[N]o compelling reason of logic or policy, and no precedent, requires the courts to deny to creditors of the grantee of a power the right to satisfy their judgments by a sale of the remainder where the life beneficiary of a trust has a power to appoint the remainder for his own benefit. The result reached by the court in the *Cutting* case is inconsistent with the avowed object of the Revisers." Whiteside & Edelstein, *supra* note 44, at 466.

62. Nabors v. Woolsey, 174 Ala. 289, 56 So. 533 (1911).

63. *Id.* at 291-92, 56 So. at 534.

64. See 3 POWELL, *supra* note 2, at 370.

65. For example, in Michigan the statutes were interpreted to exclude testamentary powers. *In re* Peck's Estate, 320 Mich. 692, 32 N.W.2d 14 (1948). It has been suggested, however, that in New York, not only were such powers included, but creditors of a donee who held a life estate and general testamentary power could reach the appointive assets before the donee's death. *See* Berger, *supra* note 11, at 126 n.91. *See also* Effland, *Powers of Appointment—The New Wisconsin Law*, 1967 WIS. L. REV. 583, 606.

66. Fraser, *Commentary*, 28 MINN. STAT. ANN. 461 (1947).

67. Ch. 322, § 10, [1943] Minn. Laws (codified at MINN. STAT. ANN. § 502.70 (1947)): "When a donee is authorized to appoint to himself all or part of the property covered by any power of appointment, a creditor of the donee may subject to his claim all property which the donee could then appoint to himself only to the extent that other property available for the payment of his claim is insufficient for such payment. When a donee has exercised such a power by deed, the rules relating to fraudulent conveyances shall apply as if the property transferred had been owned by the donee. When a donee has exercised such a power by will in favor of a taker without value or a creditor, a creditor of the donee, or of his estate, may subject such property to the payment of his claim only to the extent that other property available for the payment of the claim is insufficient for such purpose."

in favor of a comprehensive revision.[68] The New York move has been followed by modifications in Wisconsin in 1969,[69] Michigan in 1967,[70] and California in 1969.[71] Generally, these revisions, which are discussed in detail in the following sections, afford a donee's creditors greater relief to proceed against the assets held under a general power of appointment. These recent enactments, however, have a greater significance because they indicate a growing concern for the rights of creditors that may stimulate legislative action in other states.

A. New York

The 1964 New York statute provides that property under a general power "presently exercisable" is subject to the claims of the donee's creditors, without regard to whether the power was created in the donee by himself or some other person, or whether or not the donee has purported to exercise the power. When a power vests in the donee the present ability to obtain unfettered control over the appointive assets, such as a power immediately exercisable in favor of the donee, his estate, his creditors, or creditors of his estate,[72] the power is classified as a "general power presently exercisable." The statute treats the property under the "general power presently exercisable" as owned assets of the donee for the purpose of satisfying claims of his creditors.[73] Unlike the 1830 Revised Statutes, the modern New York statute's classifications of powers of appointment are clear. Powers are characterized as "general" or "special," depending upon the potential appointees.[74] It is

68. Ch. 864, [1964] N.Y. Laws (codified at N.Y. EST., POWERS & TRUSTS LAW §§ 10-1.1 to -10.8 (McKinney 1967)).

69. WIS. STAT. ANN. §§ 702.01-.21 (1970).

70. MICH. STAT. ANN. §§ 26.155(101)-(123) (Supp. 1970).

71. CAL. CIV. CODE §§ 1380.1-92.1 (West Supp. 1970).

72. *See* N.Y. EST., POWERS & TRUSTS LAW §§ 10-3.2, -3.3 (McKinney 1967).

73. N.Y. EST., POWERS & TRUSTS LAW § 10-7.2 (McKinney 1967) provides: "Property covered by a general power of appointment which is presently exercisable, or of a postponed power which has become exercisable, is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself or by some other person, or whether the donee has or has not purported to exercise the power." When the donee of a general power has created the power in himself, § 10-7.4 allows creditors to reach the appointive assets without regard to whether the power is presently exercisable.

74. N.Y. EST., POWERS & TRUSTS LAW § 10-3.2 (McKinney 1967) provides:

"(a) A power of appointment is:

(1) general or special.

. . . .

"(b) A power of appointment is general to the extent that it is exercisable wholly in favor of the donee, his estate, his creditors or the creditors of his estate.

"(c) All other powers of appointment are special."

commendable that New York's definition of a general power is the same as that found in the Internal Revenue Code of 1954;[75] a great deal of confusion is avoided by this acceptance of the prevailing professional usage. Powers also are characterized as "presently exercisable," "testamentary," or "postponed," depending upon the time at which the donee becomes empowered to make an irrevocable appointment.[76]

Implicit in New York's definition of the phrase "general power presently exercisable" and its treatment of such powers is its recognition of the proprietary nature of the interest of the donee of the power. Even when, as in *Cutting*, the donee of a general power presently exercisable is a life beneficiary under a trust, the corpus of which is the appointive assets, the statute acknowledges that the donee's interest is tantamount to ownership for the purpose of satisfying creditors' claims. The existence of the equitable life estate no longer bars those claims. New York's concomitant treatment of special powers is also consistent with the "proprietary theory." If the donee is unable to appoint to himself, his estate, his creditors, or creditors of his estate, the appointive assets are placed beyond the reach of the donee's creditors.[77] Since the donee may not appoint for his own direct benefit, he is properly deemed not to possess the substantial incidents of ownership attendant to the general power presently exercisable.

Although the New York statute is an improvement over its predecessor, if for no other reason than its vitiation of the *Cutting* rule, criticism must be levied at the portion of the statute dealing with general testamentary powers. With two exceptions, creditors are now deprived of all rights under the 1964 statute against appointive property under general testamentary powers, even if the power is exercised.[78] Given New

75. INT. REV. CODE of 1954, § 2041(b)(1) provides: "The term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. . . ."

76. N.Y. EST., POWERS & TRUSTS LAW § 10-3.3 (McKinney 1967) provides in part:

"(b) A power of appointment is presently exercisable if it may be exercised by the donee, during his lifetime or by his written will, at any time after its creation, and does not include a postponed power as described in paragraph (d).

"(c) A power of appointment is testamentary if it is exercisable only by a written will of the donee.

"(d) A power of appointment is postponed if it is exercisable by the donee only after the expiration of a stated time or after the occurrence or non-occurrence of a specified event."

77. *See* N.Y. EST., POWERS & TRUSTS LAW §§ 10-7.1, -7.4 (McKinney 1967). Section 10-7.1, providing that property under a special power of appointment is not subject to the claims of creditors, merely codifies the common law rule. *See* RESTATEMENT OF PROPERTY § 326 (1940).

78. *See* Glasser, *Practice Commentary*, N.Y. EST., POWERS & TRUSTS LAW § 10-7.4, at 116 (McKinney Supp. 1970). For a criticism of this provision see Comment, *Powers of Appointment—The New York Revision*, 65 COLUM. L. REV. 1289, 1300-02 (1965). It is ironic that

York's adherence to the "proprietary theory" in dealing with general powers presently exercisable, it is surprising that the statute exempts property under a general testamentary power. The provision, however, has its proponents. The arguments in support of the provision are two-fold. First, it has been said that the utility of the power of appointment as an estate planning device would be destroyed if the provision were otherwise. It is argued that this immunity of the general testamentary power is necessary to facilitate full utilization of the marital deduction while maintaining a high degree of probability that the property will eventually pass to the natural objects of the donor's bounty.[79] Undoubtedly, this statement is true and does not deserve serious criticism. However, the basic premise supporting the argument—that it is more desirable to allow the testator-donor to obtain full benefit of the marital deduction and carry out his dispositive intent than to protect bona fide creditors of the donee—is objectionable. If the donor wants to insure that his donative intent is effectuated, he should be required to sacrifice his marital deduction and make use of the special power of appointment.[80] Secondly, proponents of the new section argue that a donee of a general testamentary power does not have the equivalent of an absolute fee because he cannot appoint the property to himself during his lifetime.[81] The fallacy of this proposition lies in an apparent failure to consider the incidents of ownership that are usually attendant at a donee's death. The general testamentary power is of little direct value to the donee during his lifetime, since he can then exercise no proprietary dominion over the appointive property; therefore, the property should be protected during that period from the claims of creditors. At the time of the donee's death, however, his entire right of ownership of property consists of his power to dispose of it. Consequently, at the time of his death, the donee of a general testamentary power of appointment is practically the owner of the appointive assets because an owner can do no more at the moment of his death to dispose of his property than can

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the 1830 Revised Statutes went further than any provision, before or since, in allowing creditors to reach assets under a testamentary power of appointment. If the donee had a life estate in the appointive assets as well as the testamentary power, creditors could subject the assets to their claims even before the power became exercisable at the donee's death. *See* Berger, *supra* note 11, at 126 n.91. It should be recalled that the common law allowed access to appointive assets when the donee exercised the power. *See* notes 24-28 *supra* and accompanying text. New York has thus again succeeded in enacting legislation in the area that is more stringent than the common law doctrine sought to be avoided.

79. *Cf.* Powell, *The New Powers of Appointment Act*, 103 TRUSTS & ESTATES 807, 810 (1964).

80. Comment, *supra* note 78, at 1301.

81. *See id.* at 1300.

be accomplished by the donee of a general power to appoint by will.[82] New York's failure to adopt this analysis not only injects an inconsistency into the statutory pattern—accepting the "proprietary theory" as to presently exercisable powers, yet rejecting it as to testamentary powers—but also renders inadequate the whole statutory scheme since most powers of appointment are testamentary.[83]

B. California, Michigan, and Minnesota

The provisions of the California, Michigan, and Minnesota statutes concerning powers exercisable by deed or will are in essence identical to those of the New York law.[84] Under these statutes property held under a general, presently exercisable power of appointment is subject to the claims of the donee's creditors without regard to whether the power has been exercised. As is the case in New York and Wisconsin, appointive assets in California, Michigan, and Minnesota are subjected to creditors' claims only to the extent that the donee's other property is insufficient for that purpose.[85] Powers are again classified as "general" or "special" and as "presently exercisable" or "testamentary," expressly so in California and Michigan,[86] by implication in Minnesota.[87] The central theme of these statutes is that when a donee has the power to exercise a general power of appointment, the power constitutes a substantial asset in the donee's estate that should not be protected from the claims of his creditors.

In direct contrast to New York's handling of appointive assets under a general testamentary power of appointment, California, Michigan, and Minnesota recognize that at the time of his death the donee's interest in such assets is of a proprietary nature. The statutes provide, in effect if not in terms, that at the death of the donee the testamentary power becomes "presently exercisable."[88] Thus, where the instrument creating the power specifies that the appointment may be

82. Kales, *General Powers and the Rule Against Perpetuities,* 26 HARV. L. REV. 64, 67 (1912).

83. *See* Comment, *supra* note 78, at 1301.

84. *See* notes 67, 70, 71 *supra* and accompanying text.

85. This common law rule is expressly codified in all of the modern-statute states except New York. There the rule is applied under the common law, in the absence of statutory provision to the contrary.

86. CAL. CIV. CODE §§ 1381.2, .3 (West Supp. 1970); MICH. STAT. ANN. § 26.155(102) (Supp. 1970).

87. *See* note 67 *supra.* The original Minnesota provision did not apply to testamentary powers. *See* MINN. STAT. ANN. § 502.70 (1945).

88. *See* CAL. CIV. CODE § 1390.3, Comment (West Supp. 1970). This is also the essence of MICH. STAT. ANN. § 26.155(113)(3) (Supp. 1970) and MINN. STAT. ANN. § 502.70 (Supp. 1970).

made only by will, the donee's creditors have no rights in the appointive property until the death of the donee; at the donee's death, however, when an effective appointment first could be made, the donee's creditors may reach the appointive assets as if they were owned by the donee, irrespective of whether the power has actually been exercised by will.[89]

Although these statutes are comprehensive in scope and carefully drafted, there exists a method for avoiding their application.[90] Suppose that the donee of a general testamentary power of appointment, while insolvent, executes *inter vivos* a partial release of the power so that it becomes exercisable at his death only in favor of a limited class. In this case the donee does not have at the time of his death a general power of appointment but rather he possesses a special power of appointment. Such a literal reading of the statutes would prohibit the donee's creditors from subjecting the appointive assets to the satisfaction of their claims. Hopefully, the courts will not tolerate such subterfuge. Creditors should be allowed to reach the assets on the theory that the statute applies to a power that the donee "has released in contemplation of death" as well as to one that the donee "has at the time of his death." Indeed, the spirit of the statute requires this interpretation.

C. Wisconsin

Since the bulk of this Note has been devoted to the proposition that the rights of creditors as related to powers are in dire need of expansion, it is paradoxical that the discussion should now turn to the criticism of a statute because its provisions are too broad. Nevertheless, the Wisconsin statute merits such criticism. When the potential appointees include the donee, his estate, his creditors, or creditors of his estate, the Wisconsin statute operates in favor of the donee's creditors in the same manner as the statutes in California, Michigan, and Minnesota.[91] The Wisconsin law provides, however, that a donee holding a power to appoint to anyone except himself, his estate, his creditors, or creditors of his estate is deemed to be the owner of the appointive property for the purpose of satisfying claims of the donee's creditors. This power, which is a special power under common terminology, is denoted an "unclassified" power because it is exercisable in favor of a class, as opposed to particular, named individuals, and because the class is not "so limited in size by

89. CAL. CIV. CODE §§ 1390.3(b), (c) (West Supp. 1970); MICH. STAT. ANN. § 26.155(113)(3) (Supp. 1970); MINN. STAT. ANN. § 502.70 (Supp. 1970).

90. The following exceptions and the suggested remedies are discussed in Effland, *supra* note 65, at 608.

91. *See* text accompanying notes 84-89 *supra*.

description of the class that in the event of nonexercise of the power a court could make distribution to persons within the class."[92] In support of the Wisconsin statute, it has been said that the holder of an unclassified power is "so close to ownership that it is fair to treat him as the owner."[93] Taking the term "ownership" to mean "[t]he entirety of the powers of use and disposal allowed by law,"[94] it may be concluded that one expressly prohibited from appointing himself, his estate, his creditors, or creditors of his estate is nonetheless "so close to [the entirety of the powers of use and disposal allowed by law] that it is fair to treat him as the owner." Yet the owner in question has only limited dispositive powers over the appointive assets, and he can in no way obtain even limited use of the assets. It is submitted that the relationship between the donee of such a power and the appointive assets is so far removed from the relationship embodied in the concept of "property" that this Wisconsin provision can only be characterized as an absurdity.

V. THE "PROPRIETARY THEORY" UNDER FEDERAL STATUTES

A. The Federal Bankruptcy Act

Section 70(a) of the Bankruptcy Act empowers a trustee in bankruptcy to exercise, for the benefit of the bankrupt's creditors, any power that the bankrupt could have exercised for his own benefit on the date of bankruptey.[95] If a bankrupt is the donee of a general, prcsently exercisable power of appointment, therefore, the appointive assets could

92. WIS. STAT. ANN. § 702.01 (1970) provides:

"As used in this chapter, unless the context indicates otherwise:

. . . .

(4) 'General power' means a power exercisable in favor of the donee, his estate, his creditors or the creditors of his estate, whether or not it is exercisable in favor of others. . . .

(5) 'Special power' means a power exercisable only in favor of one or more persons not including the donee, his estate, his creditors or the creditors of his estate *and,* when exercisable in favor of a class, so limited in size by description of the class that in the event of nonexercise of the power a court can make distribution to persons within the class if the donor has failed to provide for this contingency.

(6) 'Unclassified power' means a power which is neither a general power nor a special power as defined in this section."

WIS. STAT. ANN. § 702.17 (1970) provides:

"(1) If the donee has either a general power *or an unclassified power which is unlimited as to permissible appointees except for the exclusion of the donee, his estate, his creditors and the creditors of his estate,* or a substantially similar exclusion, any interest which the donee has power to appoint or has appointed is to be *treated as property of the donee* for purposes of satisfying claims of his creditors, as provided in this section." (emphasis added).

93. Effland, *supra* note 65, at 608.

94. BLACK'S LAW DICTIONARY 1260-61 (4th ed. 1968).

95. 11 U.S.C. § 110(a)(3) (1964).

be taken over by the trustee, along with the bankrupt-donee's other assets for ultimate distribution to the creditors in bankruptcy. If the bankrupt, however, holds only a general testamentary power, the trustee cannot exercise the power in order to reach the appointive assets.[96] The trustee's ability to exercise a presently exercisable general power of appointment illustrates clearly the principle that an insolvent donee with the present ability to make himself the absolute owner of assets possesses a substantial proprietary interest that should be available for the satisfaction of bona fide claims of his creditors.

B. The Internal Revenue Code

While the Bankruptcy Act deals with a living donee of a general power exercisable *inter vivos*, the Internal Revenue Code's estate tax provisions apply the "proprietary theory" to both *inter vivos* and testamentary powers in the context of a deceased donee. The Code provides that assets held under a general power at the time of the donee's death are included in the donee's gross estate.[97] The Code makes no distinction concerning whether the power was or was not testamentary. The sole requirement is that the donee hold at the time of his death the power to immediately appoint to himself, his estate, his creditors, or creditors of his estate.[98] This treatment constitutes at least tacit acceptance of the proposition that dispositive control is the only incident of ownership attendant at one's death, and that a decedent who holds absolute dispositive control over assets should be regarded as the owner of those assets.[99] It is interesting to note that the Code's treatment of testamentary powers is, in theory, the same as the treatment in California, Michigan, and Minnesota, and is diametrically opposed to the appropriate section of the 1964 New York statute.[100]

VI. CONCLUSION

It has been stated repeatedly throughout this Note that the relationship between the donee of a general power of appointment and the appointive assets is so closely akin to the relationship embodied in the concept of property that the donee should be treated as the owner of the appointive assets for the purpose of satisfying claims of creditors.

96. *See* Montague v. Silsbee, 218 Mass. 107, 105 N.E. 611 (1914); *In re* Peck's Estate, 320 Mich. 692, 32 N.W.2d 14 (1948).

97. INT. REV. CODE of 1954, § 2041(a).

98. *See id.* § 2041(b).

99. *See* text accompanying notes 81, 82 *supra.*

100. *See* note 83 *supra* and accompanying text.

This principle is embodied in each of the five modern statutes on the subject. The legislators of these states have, consciously or otherwise, balanced the interests of the donor of the power against the interests of the donee's creditors, with the obvious conclusion that, as a matter of policy, the obligation of a debtor to satisfy the bona fide claims of his creditors must generally be considered of greater import than the preservation of the donor's dispositive intentions.[101] Given this basic value judgment, the issue becomes the degree to which a donee's interest in appointive assets must approximate absolute ownership before satisfaction of the donee's personal obligations will be allowed out of those assets. It is submitted that when one who is insolvent can immediately "execute the proper document"[102] and thereby obtain a proprietary interest in assets, the spirit of the law is not supported if his creditors are prohibited from reaching those assets. The holder of a power to presently appoint to himself, his estate, his creditors, or creditors of his estate can obtain the beneficial use of the appointive property by merely executing the proper document. Such a donee should be treated as the owner of the property for the purpose of satisfying creditors' claims, and is in fact so treated by each of the modern statutes. In contrast, if the donee may appoint only to someone other than himself, his estate, his creditors, or creditors of his estate, then he may by no means—immediate execution of the power or otherwise—invest in himself a proprietary, or even a quasi-proprietary interest. In this case, therefore, the interest of the donee in the appointive assets should not be deemed sufficiently akin to property to warrant subjecting the appointive assets to claims of the donee's creditors.

The existence of a limitation on the donee's power, such as an exclusion of the donee from the class of potential appointees or a limitation on the time when a valid exercise may be made, should remove appointive assets from the reach of creditors. In the case of a general testamentary power of appointment, however, the "disability" of the donee is not permanent. At the time of his death, he holds the same degree of dominion and control over the appointive assets as if he were in fact the owner. Analogically, then, the donee of a general testamentary power does not even need to "execute the proper document" in order to invest in himself all of the incidents of ownership. At the only relevant

101. *See* Berger, *supra* note 11, at 119.

102. The donee of a general power, "like the 'owner' of a checking account, may secure the beneficial use of the property merely by executing the proper document. No policy which would permit creditors to reach the property in one situation but not in the other has been articulated." 5 AMERICAN LAW OF PROPERTY § 23.17, at 504.

point in time—the donee's death—the very nature of the power makes him the substantial owner of the appointive assets, and his creditors should therefore have access to the assets at that time.

In summary, it must be recognized that although a donee of a general power of appointment will never have a truly proprietary interest in the appointive assets, his possession of the power to acquire immediately the appointive assets requires the treatment of those assets as if they were owned by the donee. The Federal Bankruptcy Act, the Internal Revenue Code, and the modern state statutes heretofore discussed are persuasive authority for the propriety of such recognition. In light of the fact that extension of credit is now an economic mainstay, and that powers of appointment have become fundamental tools in the ever-expanding field of estate planning, it is essential that the law of every state deal effectively with the interrelation of creditors' rights and powers of appointment. For those states with no statute in this area, the need for legislation is particularly acute because the inequitable provisions of the common law remain as controlling authority. Although new legislative ventures in these states will probably meet substantial resistance in the initial stages, as do most moves away from the common law, the compelling need for a new policy commands that the moves be made. As for the states in which existing statutes are merely insufficient to deal with the subject, the task of modernization is not nearly so great. The policy decision has already been made; the problem is merely one of more efficiently effectuating that decision through remedial legislation.

The statutes of California and Michigan provide excellent models upon which statutory revision might be based. Those statutes properly look to the incidents of ownership held by a donee, at any point in time, in assaying the donee's interest with regard to his creditors' claims;[103] furthermore, they provide results consistent in all respects with the views expressed in this Note. Hopefully, the statutory developments in these states mark the beginning of a nationwide movement away from the rigid common law legalisms and toward a practical, realistic treatment of creditors' rights in assets held under a general power of appointment.

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103. The Minnesota statute also adopts the "proprietary theory." It is not listed here because it is a less desirable model than the California and Michigan statutes; its paragraph form does not yield the clarity that results from the sectionalized format in California and Michigan. *See* note 67 *supra*.