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### **Power of Appointment**

**1.1 Welcome.** Hi, and welcome. This video is one in a series discussing various topics my clients have asked me to address. This discussion addresses “Power of Appointments” which is defined as “a power, not as a beneficiary, to *designate who* is to receive a beneficial interest in property.”<sup>1</sup> It has been called “the most efficient dispositive device that the ingenuity ... that lawyers have ever worked out.”<sup>2</sup> This is a “30,000-foot” look at these terms and their implications vary from state to state. Your states’ implications will certainly be different. You must consult a licensed professional in your jurisdiction.

**1.2 No Legal Advice.** *I cannot and do not provide any advice;* only a licensed professional in your jurisdiction can do that. You should assume I am not licensed in any jurisdiction and am not addressing any of your specific concerns. You must consult a licensed professional in your jurisdiction.

### **ARTICLE 1For Flexibility**

**2.1 In General.** In every Last Will and Testament, Trust or other instrument, the principal (hereinafter, the “**Grantor**”) plans future disposition of their assets, decades into the future. Their foresight is unable to anticipate the broad range of unforeseen circumstances that arise and the proper disposition, based on future events. Powers of Appointment can add flexibility to such plans for these unforeseen circumstances.

**2.2 Power of Disposition.** To effect a better disposition for an unforeseen event, a power is given to a third party (hereinafter, the “**Powerholder**”) to decide what the proper asset disposition should be, based on events that occur in the future and not what the principal had planned for in the past.

**2.3 No Assets to Powerholder.** The Powerholder may not appoint assets to himself, his estate or to his creditors. There are other numerous restrictions depending on the circumstances.

### **Provision Examples**

**3.1 In General.** If the provision is too broad, then the provision may cause the property to be included in the estate of the Powerholder. This would be a broad power of appointments and is

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<sup>1</sup> Restatement 2<sup>nd</sup> of Property §11.1

<sup>2</sup> Leach, Powers of Appointment, 24 ABA J 807 (1938).

generally to be avoided. This and the following examples come from West's Legal Forms, Estate Planning, Vol 17A, Page 916-917, 2005.

**3.2 Broad Power of Appointment.** All or any part of the then remaining principal or undistributed income to or for the benefit of any one or more persons, corporations, trusts or estates in such proportions as the Primary Beneficiary may appoint by specific reference hereto in the *Primary Beneficiary's Will* admitted to probate; provided, however, that the Primary Beneficiary shall have **NO POWER** to appoint any principal or any undistributed income of the Primary Beneficiary's GST Exempt Trust to the Primary Beneficiary, to the Primary Beneficiary's estate, to the Primary Beneficiary's creditors, or to the creditors of the Primary Beneficiary's estate.

Because the power is so broad there is a danger that the assets subject to such a broad power may be included in the taxable estate of the Powerholder.

**3.3 Limited Power of Appointment to Descendants Only.** All or any part of the then remaining principal or undistributed income to or for the benefit of any one or more of Grantors' descendants, outright, in trust, or otherwise, and in such proportions as the Primary Beneficiary may appoint by specific reference hereto in the *Primary Beneficiary's Will* admitted to probate; provided, however, in the Primary Beneficiary shall have **NO POWER** to appoint any principal or any undistributed income to the Primary Beneficiary's GST Exempt Trust to the Primary Beneficiary, to the Primary Beneficiary's estate, to the Primary Beneficiary's creditors, or to the creditors of the Primary Beneficiary's estate; provided further, however, that the Primary Beneficiary also shall have the power to appoint any principal or any undistributed income of the Primary Beneficiary's GST Non-Exempt Trust to the creditors of the Primary Beneficiary's estate.

**3.4 Limited Power of Appointment to Descendants and Others.** All or any part of the then remaining principal or undistributed income to or for the benefit of any one or more of (1) Grantors' descendants, (2) the widows or widowers of Grantors' descendants (3) a charitable lead trust of which the primary non-charitable beneficiaries are Grantors' descendants or widows or widowers of Grantors' descendants, (4) charitable remainder trust within the meaning of IRC §664, the primary non-charitable beneficiaries of which are Grantors' descendants or widows or widowers of Grantors' descendants and (5) organizations described in IRC §§170(c) and 2055(a) of the Code, outright, in trust, or otherwise, and in such proportions as the Primary Beneficiary may appoint by specific reference hereto in the *Primary Beneficiary's Will* admitted to probate; provided, however, that the Primary Beneficiary shall not have **NO POWER** to appoint any principal or any undistributed income of the Primary Beneficiary's GST Exempt Trust to the Primary Beneficiary's estate, to the Primary Beneficiary's creditors, or to the creditors of the Primary Beneficiary's estate; provided further, however, that the Primary Beneficiary also shall have the power to appoint any principal or any undistributed income of the Primary Beneficiary's GST Non-Exempt Trust to the creditors of the Primary Beneficiary's estate.

