

CHAPTER 502

POWERS OF APPOINTMENT

502.01 to 502.61 (repealed).

Repealed by Laws 1943, Chapter 322, Section 1.
Superseded by sections 502.62 to 502.78.

NOTE: The chapter repealed was originally Chapter 45, Revised Statutes of the Territory of Minnesota 1851. That chapter was derived from the New York Revised Statutes of 1830, drafted by a committee on revision created in New York in 1825. The chapter was repealed for several reasons. It purported to be a complete code on the subject of powers, but in terms it applied only to powers in respect to land, and could be applied to powers in respect to things other than land only by analogy. Even in respect to land it was incomplete, and resort to common law rules was necessary to fill in 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. In repealing it, Minnesota followed the lead of the state of California, which also enacted it and later repealed it.

502.62 COMMON LAW OF POWERS.

HISTORY. 1943 c. 322 s. 2.

This section restores the common law as the basic law of powers in Minnesota. The common law is to be found in the usual sources and in the recent Restatement of the Law of Property by the American Law Institute, Volume III, Chapter 25. The sections which follow are not a codification of the law of powers, as the chapter repealed purported to be, but are on the contrary in part declaratory and in part amendatory of the common law. The terminology is that of the common law. Restatement of Property, Sections 318 to 322.

The statute providing for inclusion in gross estate for estate tax purposes of property passing under a general power of appointment recognizes the distinction that under a "general power of appointment" donee may appoint to anyone, including his own estate or creditors, whereas under "special power of appointment" donee may appoint only amongst a restricted class of persons other than himself. In this case the wife, in devising such property to her daughter, was exercising only a "special power of appointment" under husband's will, and the property was not required to be included as part of gross estate of wife for estate tax purposes. *Jaues v Reynolds*, 57 F. Supp. 609.

502.63 CREATION.

HISTORY. 1943 c. 322 s. 3.

This section is merely declaratory of the common law. Restatement of Property, Section 323.

502.64. MANNER OF EXERCISE.

HISTORY. 1943 c. 322 s. 4.

At common law a power of appointment might be exercised by an instrument lacking the formalities necessary to pass title to the property covered by the power, when so authorized by the donor; e. g., by an instrument in the nature of a will, but not legally a will. The first sentence thus changes this common law rule. The second sentence is declaratory of the common law rule. With respect to the third sentence, at common law courts of law required that a power be exercised

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as directed by the donor; if directed to be by will, it could be exercised only by will; if by deed, only by deed. In respect to powers directed to be exercised by will, courts of equity followed the law; but in respect to powers directed to be exercised by deed they enforced an appointment made by will, on the ground that since a power by deed may be exercised by deed up to the last moment of the life of the donee, there is no sound reason for denying the validity of an execution made by will effective at his death. This equitable rule aided only persons in certain relationships to the donee. The third sentence adopts the equitable rule without restriction in respect to persons. Restatement of Property, Sections 346, 347.

502.65 WHEN NOT VOID.

HISTORY. 1943 c. 322 s. 5.

The first sentence of this section gives validity to powers which, in the absence of this section, might be held invalid under section 502.64. The second sentence is self-explanatory.

502.66 WHO MAY EXERCISE.

HISTORY. 1943 c. 322 s. 6.

This section is declaratory of the common law. Restatement of Property, Section 345.

502.67 WHEN VESTED IN TWO OR MORE.

HISTORY. 1943 c. 322 s. 7.

502.68 WRITTEN CONSENTS REQUIRED.

HISTORY. 1943 c. 322 s. 8.

502.69 INTENT.

HISTORY. 1943 c. 322 s. 9.

The first sentence is declaratory of the common law. Restatement of Property, Section 360. The first part of the second sentence changes the common law rule of construction that a direction to appoint "to" or "among" or "between" two or more objects manifests an intention to create a non-exclusive power. With respect to the proviso, by the common law decisions each object of a non-exclusive power must receive a "substantial" share; otherwise, the appointment is "illusory." No definite rule has been formulated to determine what is a "substantial" as distinguished from an "illusory" share. The requirement is thus productive of litigation and later cases have expressed dissatisfaction with it. The proviso is intended to remedy this defect in the common law.

502.70 POWERS OF CREDITOR OF DONEE.

HISTORY. 1943 c. 322 s. 10.

This section states the right of creditors of a donee to reach the property covered by the power. At common law, courts of law never subjected such property to claims of the donee's creditors. Courts of equity followed the same rule so long as the donee did not exercise the power. But when the donee was authorized to appoint the property covered by the power to himself, which is the description of a general power, and the donee made an appointment to a person who was not a purchaser for value including a creditor, courts of equity subjected the appointed property to the claims of the donee's creditors to the extent, and only to the extent, that the donee's other property available for payment of creditors was insufficient for such payment. Restatement of Property, Sections 327 to 331. The first sentence adopts this equitable rule and applies it even though no appointment has been made, following other states in this respect. The second sentence is self-explanatory. The third sentence is merely declaratory of the

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equitable rule at common law, but is inserted to show that the rule of the first sentence applies even if an appointment has been made.

502.71 EFFECT OF DEED OR WILL.

HISTORY. 1943 c. 322 s. 11.

At common law the intention to exercise a power of appointment might be manifested by specific reference to the power or to the property covered by the power or by purporting to make a disposition of property which could have no meaning other than as an exercise of the power. A will purporting to devise all the donee's property, or a residuary devise, did not manifest such an intention if the donee had property of his own. Restatement of Property, Sections 341 to 343. By this section such a general disposition creates a presumption that the donee intended to exercise the power, but it may be rebutted by competent evidence to the contrary.

502.72 CONVEYANCE.

HISTORY. 1943 c. 322 s. 12.

502.73 RIGHT OF ALIENATION SUSPENDED.

HISTORY. 1943 c. 322 s. 13.

This section follows the rule of the common law as to the time from which the permitted period of suspension is to be computed. Restatement of Property, Tentative Draft No. 14, Sections 390, 391.

502.74 ADVANCEMENTS.

HISTORY. 1943 c. 322 s. 14.

502.75 POWER PASSES TO ASSIGNEE.

HISTORY. 1943 c. 322 s. 15.

502.76 REVOCATION.

HISTORY. 1943 c. 322 s. 16.

502.77 IF PART OF SECURITY.

HISTORY. 1943 c. 322 s. 17.

502.78 ABSOLUTE POWER OF DISPOSITION.

HISTORY. 1943 c. 322 s. 18.

This section is designed to give effect to home-made wills in accordance with the probable intent of testators. Laymen often think that a devise by A to B for life, with power to dispose of the property at his death, is a complete disposition of the property. A strict construction would find a reversion in A's heirs or residuary devisee, subject to the power in B, and if B died without disposing of the property it would be in A's heirs, or residuary devisee. By force of this section, B would have the complete property from the start. This result can be avoided in drafting by a limitation disposing of the property in case B does not dispose of it. Such a limitation clearly manifests an intent that B is to have a power and not complete property.

The following annotations relate to the repealed sections:

502.01 ABOLISHED IN PART.

The power to devise the fee, annexed to a prior life estate, vests in the grantee the absolute power of disposition of the res. *Hershey v Bank*, 71 M 255, 73 NW 967.

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Devise by husband to wife, with power in her discretion to dispose of real estate. During her life she conveyed certain lands to a railway company. Held, in an action by the executors of her estate, that she had absolute power during her lifetime to convey the real estate, notwithstanding a proviso in the husband's will leaving the reversion after her death to certain persons. *Ashton v Railway Co.* 78 M 201, 80 NW 963.

502.02 POWER DEFINED.

The court, in construing the provisions of a trust set up to finance and implement a townsite enterprise, held that if the creating instrument did not create a valid trust, it was valid as a power in trust. *Carson v Cochran*, 52 M 67, 53 NW 1130.

Powers set forth in a power of attorney held irrevocable, and did not terminate at death of principal. *Rogers v Clark*, 104 M 198, 116 NW 739.

502.05 GENERAL POWER DEFINED.

See *Hershey v Bank*, 71 M 255, 73 NW 967.

502.06 SPECIAL POWER DEFINED.

Termination and release of powers of appointment. 20 MLR 448, 24 MLR 887.

502.07 POWER IS BENEFICIAL, WHEN.

Where a will devised all testator's real estate and gave the executors power of sale, it was held that the instrument contained a valid power in trust. *Ness v Davidson*, 45 M 424, 48 NW 10.

Devise for life with power to devise the remainder in fee, with reversion to stated persons, was in fact an absolute conveyance to the devisee. *Hershey v Bank*, 71 M 255, 73 NW 967.

Powers set forth in a power of attorney held irrevocable, and not to terminate at death of principal. *Rogers v Clark*, 104 M 198, 116 NW 739.

502.09 LIFE ESTATE, WHEN CHANGED TO FEE.

See *Hershey v Bank*, 71 M 255, 73 NW 967; *Ashton v Railway Co.* 78 M 201, 8 NW 963.

Testator devised his property to his wife with power of alienation, and upon her death the property remaining to go to his children. Held, the life estate is changed to a fee absolute subject to the future estate of the children in case the power of alienation is not exercised. *Larson v Mardaus*, 172 M 48, 215 NW 196.

Testator provided for his wife by giving her the right to one-third of the crop each year, or if she preferred she could sell the farm and take one-third of the proceeds. Wife accepted one-third of the crop over a term of years, and was deemed to have made her election by so doing. *Stucky v Buckholtz*, 198 M 445, 270 NW 141.

Absolute power of disposition in first taker. 4 MLR 546.

Power of disposition by implication. 5 MLR 320.

Life estate with a power to dispose of the fee. 7 MLR 66.

Liability of remainder estate for fraud of life tenant. 8 MLR 351.

Life estate with absolute power of disposal. 18 MLR 489.

502.10 POWER CREATES A FEE, WHEN.

See *Hershey v Bank*, 71 M 255, 73 NW 967; *Stucky v Buckholtz*, 198 M 445, 270 NW 141.

Life estate with absolute power of disposal. 18 MLR 489.

502.11 ABSOLUTE FEE, WHEN.

See *Hershey v Bank*, 71 M 255, 73 NW 967; *Stucky v Buckholtz*, 198 M 445, 270 NW 141.

Life estate with absolute power of disposal. 18 MLR 489.

Disposition of property upon ineffective appointment. 19 MLR 129.

502.12 POWER TO DEVISE INHERITANCE.

See *Hershey v Bank*, 71 M 255, 73 NW 967; *Ashton v Railway*, 78 M 201, 80 NW 963.

502.13 WHAT POWERS ARE ABSOLUTE.

Hershey v Bank, 71 M 255, 73 NW 967; *Ashton v Railway*, 78 M 201, 80 NW 963; *Larson v Mardaus*, 172 M 48, 215 NW 196; *Stucky v Buckholtz*, 198 M 445, 270 NW 141.

502.14 RESERVING POWER TO REVOKE CREATES OWNERSHIP IN GRANTOR.

Right of subsequent creditors in corpus of trust fund set up by debtor reserving life estate and general power of appointment. 19 MLR 334.

502.16 POWER OF TENANT FOR LIFE TO LEASE.

Rogers v Clark, 104 M 198, 116 NW 739.

502.22 GENERAL POWER, WHEN IN TRUST.

A will which devised all his real estate and gave the executors the power of sale was held to be a valid power in trust. *Ness v Davidson*, 45 M 424, 48 NW 10. Obligation of holder of general power in trust not to use it for his own benefit. 23 MLR 390.

502.23 SPECIAL POWER IN TRUST.

Powers of appointment; termination; release. 20 MLR 449.

502.25 EFFECT OF RIGHT OF SELECTION.

The declaration of a trust or power in trust must be certain in its material terms. In this case the instrument was sufficiently definite and certain. *Atwater v Russell*, 49 M 57, 51 NW 629.

502.26 CONSTRUCTION; BENEFICIARIES TO SHARE ALIKE.

Estate of life tenant chargeable with unpaid charges against the property that should have been paid by the life tenant under the terms of the trust. *Trust Co. v Mintzer*, 65 M 124, 67 NW 657.

502.32 EFFECT OF GENERAL ASSIGNMENT.

Where a debtor by trust deed, assented to by all his creditors, conveyed his property to trustees to be converted into money and the proceeds thereof to be distributed to his creditors, the creditors took a vested and not a contingent interest in the trust estate. *Surety Co. v Hurley*, 130 M 392, 153 NW 740.

502.36 WHEN POWER IRREVOCABLE.

A power of attorney executed by the trustor empowering the trustee to convey property and pay proceeds to a named beneficiary, a creditor of the trustor, cannot be revoked by the trustor, and such an instrument creates a lien on the

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property which the courts may enforce. *Trust Co. v Billings*, 58 M 187, 59 NW 998.
Power to revoke a trust without express provisions therefor. 17 MLR 231.

502.47 WHEN DIRECTIONS OF GRANTOR MUST BE OBERVED.

Obligation of the holder of a general power in trust, not to use it for its own benefit. 23 MLR 391.

502.50 OMISSION TO RECITE POWER.

Curing defective deed by probation of a foreign will. *Babcock v Collins*, 60 M 73 (81), 61 NW 1020.

Where life estate with power of sale is granted to the widow, and remainder over to the children, a sale of any part of the corpus by the widow conveys a legal fee, even though the children are remaindermen as to the remaining property. *Ashton v Railway*, 78 M 201, 80 NW 963.

502.51 FRAUD.

Obligation of the holder of a general power in trust not to use it for its own benefit. 23 MLR 391.

502.54 SUSPENSION OF PERIOD OF ALIENATION.

General power of appointment by will. 3 MLR 135.

502.55 WHO MAY NOT TAKE UNDER POWER.

Rule against perpetuities. 3 MLR 135.

502.56 MARRIED WOMEN MAY CREATE ESTATE.

Action by administrator of estate of a decedent who while riding in her father's (the defendant's) auto was killed. The wife of the defendant was the sole beneficiary. Held, that action will lie. *Albrecht v Potthoff*, 192 M 557, 257 NW 377.

502.57 DEFECTIVE EXECUTION REMEDIED IN EQUITY.

See *Babcock v Collins*, 60 M 73 (81), 61 NW 1020.

502.59 POWER OF SALE IN MORTGAGE DEEMED A PART OF SECURITY.

A mortgage is no longer a conveyance. The common-law effect has been cut down until now, while in form a conveyance, a mortgage creates a mere lien or security. *Hattestad v Insurance Co.* 197 M 643, 268 NW 666.