

AMENDED IN ASSEMBLY MAY 9, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 2846

Introduced by Assembly Member Maienschein

February 19, 2016

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

LEGISLATIVE COUNSEL'S DIGEST

AB 2846, as amended, Maienschein. ~~Power of appointments.~~ *Powers of appointment.*

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

This bill would revise and recast those provisions. *The bill would impose additional requirements on the creation of a power of appointment, including the existence of a legally valid creating instrument that manifests the donor's intent to create a power of appointment and that transfers the appointive property, except as specified.* The bill would define the term "power of appointment" for those purposes. *The bill would instead define a person to whom a power of appointment is given or in whose favor a power of appointment is*

reserved as a “powerholder.” The bill would require, if a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property to be allocated in the permissible manner *in accordance with the terms of the creating instrument and* to carry out the intent of the powerholder. The bill would require, if a powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment to share fully in unappointed property. The bill would make property subject to a special power of appointment subject to the claims of creditors of the powerholder or of the powerholder’s estate or the expenses of administration of the powerholder’s estate under specified circumstances. The bill would make conforming changes to related provisions, and would make changes to provisions related to an unexercised general power of appointment, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no.
 State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 610 of the Probate Code is amended to
- 2 read:
- 3 610. As used in this part:
- 4 (a) “Appointee” means the person in whose favor a power of
- 5 appointment is exercised.
- 6 (b) “Appointive property” means the property or interest in
- 7 property that is the subject of the power of appointment.
- 8 (c) “Creating instrument” means the deed, will, trust, or other
- 9 writing or document that creates or reserves the power of
- 10 appointment.
- 11 ~~(d) “Donee” or “powerholder” means the person to whom a~~
- 12 ~~power of appointment is given or in whose favor a power of~~
- 13 ~~appointment is reserved.~~
- 14 (e)
- 15 (d) “Donor” means the person who creates or reserves a power
- 16 of appointment.
- 17 (f)
- 18 (e) “Permissible appointee” means a person in whose favor a
- 19 power of appointment can be exercised.
- 20 (g)

1 (f) “Power of appointment” means a power that enables a
2 powerholder acting in a nonfiduciary capacity to designate a
3 recipient of an ownership interest in or another power of
4 appointment over the appointive property. The term does not
5 include a power of attorney.

6 (g) “Powerholder” means the person to whom a power of
7 appointment is given or in whose favor a power of appointment is
8 reserved.

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

10 611. (a) A power of appointment is “general” only to the extent
11 that it is exercisable in favor of the ~~donee, powerholder, the donee’s~~
12 ~~powerholder’s estate, the donee’s powerholder’s~~ creditors, or
13 creditors of the ~~donee’s powerholder’s~~ estate, whether or not it is
14 exercisable in favor of others.

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

20 (c) A power exercisable by the ~~donee powerholder~~ only in
21 conjunction with a person having a substantial interest in the
22 appointive property that is adverse to the exercise of the power in
23 favor of the ~~donee, powerholder, the donee’s powerholder’s~~ estate,
24 the ~~donee’s powerholder’s~~ creditors, or creditors of the ~~donee’s~~
25 ~~powerholder’s~~ estate is not a general power of appointment.

26 (d) A power of appointment that is not “general” is “special.”

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

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

31 613. A power of appointment is “imperative” where the creating
32 instrument manifests an intent that the permissible appointees be
33 benefited even if the ~~donee powerholder~~ fails to exercise the power.
34 An imperative power can exist even though the ~~donee powerholder~~
35 has the privilege of selecting some and excluding others of the
36 designated permissible appointees. All other powers of appointment
37 are “discretionary.” The ~~donee powerholder~~ of a discretionary
38 power is privileged to exercise, or not to exercise, the power as
39 the ~~donee powerholder~~ chooses.

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

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

- 3 (1) There is a creating instrument.
4 (2) The creating instrument is valid under applicable law.
5 (3) Except as provided in subdivision (b), the creating instrument
6 transfers the appointive property.
7 (4) The terms of the creating instrument manifest the donor's
8 intent to create in a powerholder a power of appointment over the
9 appointive property exercisable in favor of a permissible appointee.
10 (b) Paragraph (3) of subdivision (a) does not apply to the
11 creation of a power of appointment by the exercise of a power of
12 appointment.

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

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

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

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

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

26 (b) Unless expressly prohibited by the creating instrument:

27 (1) If a person whose consent is required dies, the power may
28 be exercised by the ~~donee~~ powerholder without the consent of that
29 person.

30 (2) If a person whose consent is required becomes legally
31 incapable of consenting, the person's guardian or conservator may
32 consent to an exercise of the power.

33 (3) A consent may be given before or after the exercise of the
34 power by the ~~donee~~ powerholder.

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

36 634. A power of appointment created in favor of two or more
37 ~~donees~~ powerholders can only be exercised when all of the ~~donees~~
38 powerholders unite in its exercise. If one or more of the ~~donees~~
39 powerholders dies, becomes legally incapable of exercising the

1 power, or releases the power, the power may be exercised by the
2 others, unless expressly prohibited by the creating instrument.

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

4 640. (a) The exercise of a power of appointment requires a
5 manifestation of the ~~donee's~~ *powerholder's* intent to exercise the
6 power.

7 (b) A manifestation of the ~~donee's~~ *powerholder's* intent to
8 exercise a power of appointment exists in any of the following
9 circumstances:

10 (1) The ~~donee~~ *powerholder* declares, in substance, that the ~~donee~~
11 *powerholder* exercises specific powers or all the powers the ~~donee~~
12 *powerholder* has.

13 (2) The ~~donee~~ *powerholder* purports to transfer an interest in
14 the appointive property that the ~~donee~~ *powerholder* would have
15 no power to transfer except by virtue of the power.

16 (3) The ~~donee~~ *powerholder* makes a disposition that, when
17 considered with reference to the property owned and the
18 circumstances existing at the time of the disposition, manifests the
19 ~~donee's~~ *powerholder's* understanding that the ~~donee~~ *powerholder*
20 was disposing of the appointive property.

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

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

24 641. (a) A general residuary clause in a will, or a will making
25 general disposition of all the testator's property, does not exercise
26 a power of appointment held by the testator unless specific
27 reference is made to the power or there is some other indication
28 of intent to exercise the power.

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

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

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

36 (a) The creating instrument manifests an intent that the power
37 may not be exercised by a will previously executed.

38 (b) The will manifests an intent not to exercise a power
39 subsequently acquired.

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

1 650. (a) The ~~donee~~ *powerholder* of a general power of
 2 appointment may make an appointment:
 3 (1) Of all of the appointive property at one time, or several
 4 partial appointments at different times, where the power is
 5 exercisable *inter vivos*.
 6 (2) Of present or future interests or both.
 7 (3) Subject to conditions or charges.
 8 (4) Subject to otherwise lawful restraints on the alienation of
 9 the appointed interest.
 10 (5) In trust.
 11 (6) Creating a new power of appointment.
 12 (b) The listing in subdivision (a) is illustrative, not exclusive.
 13 *SEC. 12. Section 651 of the Probate Code is amended to read:*
 14 651. Subject to the limitations imposed by the creating
 15 instrument, the ~~donee~~ *powerholder* of a special power may make
 16 any of the types of appointment permissible for the ~~donee~~
 17 *powerholder* of a general power under Section 650.
 18 *SEC. 13. Section 652 of the Probate Code is amended to read:*
 19 652. (a) Except as provided in subdivision (b), the ~~donee~~
 20 *powerholder* of a special power of appointment may appoint the
 21 whole or any part of the appointive property to any one or more
 22 of the permissible appointees and exclude others.
 23 (b) If the donor specifies either a minimum or maximum share
 24 or amount to be appointed to one or more of the permissible
 25 appointees, the exercise of the power must conform to the
 26 specification.
 27 *SEC. 14. Section 660 of the Probate Code is amended to read:*
 28 660. (a) The ~~donee~~ *powerholder* of a power of appointment
 29 that is presently exercisable, whether general or special, can
 30 contract to make an appointment to the same extent that the ~~donee~~
 31 *powerholder* could make an effective appointment.
 32 (b) The ~~donee~~ *powerholder* of a power of appointment cannot
 33 contract to make an appointment while the power of appointment
 34 is not presently exercisable. If a promise to make an appointment
 35 under such a power is not performed, the promisee cannot obtain
 36 either specific performance or damages, but the promisee is not
 37 prevented from obtaining restitution of the value given by the
 38 promisee for the promise.
 39 (c) Unless the creating instrument expressly provides that the
 40 ~~donee~~ *powerholder* may not contract to make an appointment while

1 the power of appointment is not presently exercisable, subdivision
2 (b) does not apply to the case where the donor and the ~~donee~~
3 *powerholder* are the same person. In this case, the ~~donee~~
4 *powerholder* can contract to make an appointment to the same
5 extent that the ~~donee~~ *powerholder* could make an effective
6 appointment if the power of appointment were presently
7 exercisable.

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

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

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

25 (c) A release shall be delivered as follows:

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

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

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

34 (A) A person, other than the ~~donee~~, *powerholder*, who could
35 be adversely affected by the exercise of the power.

36 (B) The county recorder of the county in which the ~~donee~~
37 *powerholder* resides or in which the deed, will, or other instrument
38 creating the power is filed.

39 (d) A release of a power of appointment that affects real property
40 or obligations secured by real property shall be acknowledged and

1 proved, and may be certified and recorded, in like manner and
2 with like effect as grants of real property, and all statutory
3 provisions relating to the recordation or nonrecordation of
4 conveyances of real property and to the effect thereof apply to a
5 release with like effect, without regard to the date when the release
6 was delivered, if at all, pursuant to subdivision (c). Failure to
7 deliver, pursuant to subdivision (c), a release that is recorded
8 pursuant to this subdivision does not affect the validity of any
9 transaction with respect to the real property or obligation secured
10 thereby, and the general laws of this state on recording and its
11 effect govern the transaction.

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

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

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

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

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

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

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

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

32 (4) Other persons as ordered by the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

18 674. (a) Unless the creating instrument expressly provides
19 otherwise, if a permissible appointee dies before the exercise of a
20 special power of appointment, the ~~donee~~ *powerholder* has the
21 power to appoint to the issue of the deceased permissible appointee,
22 whether or not the issue was included within the description of the
23 permissible appointees, if the deceased permissible appointee was
24 alive at the time of the execution of the creating instrument or was
25 born thereafter.

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

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

33 ~~SEC. 2.~~

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

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

1 ~~SEC. 3.~~

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

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

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

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

13 ~~SEC. 4.~~

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

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

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

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

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

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

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

38 (b) Upon the death of the ~~donee~~ powerholder, to the extent that
39 the ~~donee's~~ powerholder's estate is inadequate to satisfy the claims
40 of creditors of the estate and the expenses of administration of the

1 estate, property subject to a general testamentary power of
 2 appointment or to a general power of appointment that was
 3 presently exercisable at the time of the ~~donee's~~ *powerholder's*
 4 death is subject to the claims and expenses to the same extent that
 5 it would be subject to the claims and expenses if the property had
 6 been owned by the ~~donee~~. *powerholder*.

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

9 ~~SEC. 5.~~

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

11 683. Property subject to a general power of appointment created
 12 by the ~~powerholder donor~~ in the ~~powerholder's~~ *donor's* favor,
 13 whether or not presently exercisable, is subject to the claims of
 14 the ~~powerholder's~~ *donor's* creditors or the ~~powerholder's~~ *donor's*
 15 estate and to the expenses of the administration of the
 16 ~~powerholder's~~ *donor's* estate, except to the extent the ~~powerholder~~
 17 *donor* effectively irrevocably appointed the property subject to the
 18 general power of appointment in favor of a person other than the
 19 ~~powerholder donor~~ or the ~~powerholder's~~ *donor's* estate.

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

21 684. For the purposes of Sections 682 and 683, a person to
 22 whom the ~~donee~~ *powerholder* owes an obligation of support shall
 23 be considered a creditor of the ~~donee~~ *powerholder* to the extent
 24 that a legal obligation exists for the ~~donee~~ *powerholder* to provide
 25 the support.