

SENATE BILL NO. 253

INTRODUCED BY M. MCNALLY

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A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO POWERS OF APPOINTMENT; ADOPTING THE UNIFORM POWERS OF APPOINTMENT ACT; AND REPEALING SECTIONS 70-1-704, 72-2-618, AND 72-2-714, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 38] may be cited as the "Uniform Powers of Appointment Act".

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 38], the following definitions apply:

- (1) "Appointee" means a person to which a powerholder makes an appointment of appointive property.
- (2) "Appointive property" means the property or property interest subject to a power of appointment.
- (3) "Blanket-exercise clause" means a clause in an instrument that exercises a power of appointment and is not a specific-exercise clause. The term includes a clause that:
  - (a) expressly uses the words "any power" in exercising any power of appointment the powerholder has;
  - (b) expressly uses the words "any property" in appointing any property over which the powerholder has a power of appointment; or
  - (c) disposes of all property subject to disposition by the powerholder.
- (4) "Donor" means a person who creates a power of appointment.
- (5) "Exclusionary power of appointment" means a power of appointment exercisable in favor of any one or more of the permissible appointees to the exclusion of the other permissible appointees.
- (6) "General power of appointment" means a power of appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.
- (7) "Gift-in-default clause" means a clause identifying a taker in default of appointment.
- (8) "Impermissible appointee" means a person who is not a permissible appointee.
- (9) "Instrument" means a writing.

1 (10) "Nongeneral power of appointment" means a power of appointment that is not a general power of  
2 appointment.

3 (11) "Permissible appointee" means a person in whose favor a powerholder may exercise a power of  
4 appointment.

5 (12) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation,  
6 government or governmental subdivision, agency, or instrumentality, or other legal entity.

7 (13) "Power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity  
8 to designate a recipient of an ownership interest in or another power of appointment over the appointive property.  
9 The term does not include a power of attorney.

10 (14) "Powerholder" means a person in whom a donor creates a power of appointment.

11 (15) "Presently exercisable power of appointment" means a power of appointment exercisable by the  
12 powerholder at the relevant time. The term:

13 (a) includes a power of appointment not exercisable until the occurrence of a specified event, the  
14 satisfaction of an ascertainable standard, or the passage of a specified time only after:

15 (i) the occurrence of the specified event;

16 (ii) the satisfaction of the ascertainable standard; or

17 (iii) the passage of the specified time; and

18 (b) does not include a power exercisable only at the powerholder's death.

19 (16) "Specific-exercise clause" means a clause in an instrument that specifically refers to and exercises  
20 a particular power of appointment.

21 (17) "Taker in default of appointment" means a person who takes all or part of the appointive property  
22 to the extent the powerholder does not effectively exercise the power of appointment.

23 (18) "Terms of the instrument" means the manifestation of the intent of the maker of the instrument  
24 regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence  
25 that would be admissible in a legal proceeding.

26  
27 **NEW SECTION. Section 3. Governing law.** Unless the terms of the instrument creating a power of  
28 appointment manifest a contrary intent:

29 (1) the creation, revocation, or amendment of the power is governed by the law of the donor's domicile  
30 at the relevant time; and

1 (2) the exercise, release, or disclaimer of the power or the revocation or amendment of the exercise,  
2 release, or disclaimer of the power is governed by the law of the powerholder's domicile at the relevant time.

3  
4 NEW SECTION. Section 4. Common law and principles of equity. The common law and principles  
5 of equity supplement this act, except to the extent modified by this act or a law of this state other than this act.

6  
7 NEW SECTION. Section 5. Creation of power of appointment. (1) A power of appointment is created  
8 only if:

- 9 (a) the instrument creating the power:
  - 10 (i) is valid under applicable law; and
  - 11 (ii) except as otherwise provided in subsection (2), transfers the appointive property; and
- 12 (b) the terms of the instrument creating the power manifest the donor's intent to create in a powerholder  
13 a power of appointment over the appointive property exercisable in favor of a permissible appointee.

14 (2) Subsection (1)(a)(ii) does not apply to the creation of a power of appointment by the exercise of a  
15 power of appointment.

16 (3) A power of appointment may not be created in a deceased individual.

17 (4) Subject to an applicable rule against perpetuities, a power of appointment may be created in an  
18 unborn or unascertained powerholder.

19  
20 NEW SECTION. Section 6. Nontransferability. A powerholder may not transfer a power of  
21 appointment. If a powerholder dies without exercising or releasing a power, the power lapses.

22  
23 NEW SECTION. Section 7. Presumption of unlimited authority. Subject to [section 8] and unless  
24 the terms of the instrument creating a power of appointment manifest a contrary intent, the power is:

- 25 (1) presently exercisable;
- 26 (2) exclusionary; and
- 27 (3) except as otherwise provided in [section 8], general.

28  
29 NEW SECTION. Section 8. Exception to presumption of unlimited authority. Unless the terms of  
30 the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if:

- 1 (1) the power is exercisable only at the powerholder's death; and  
2 (2) the permissible appointees of the power are a defined and limited class that does not include the  
3 powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate.

4  
5 **NEW SECTION. Section 9. Rules of classification.** (1) In this section, "adverse party" means a person  
6 with a substantial beneficial interest in property that would be affected adversely by a powerholder's exercise or  
7 nonexercise of a power of appointment in favor of the powerholder, the powerholder's estate, a creditor of the  
8 powerholder, or a creditor of the powerholder's estate.

9 (2) If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse  
10 party, the power is nongeneral.

11 (3) If the permissible appointees of a power of appointment are not defined and limited, the power is  
12 exclusionary.

13  
14 **NEW SECTION. Section 10. Power to revoke or amend.** A donor may revoke or amend a power of  
15 appointment only to the extent that:

- 16 (1) the instrument creating the power is revocable by the donor; or  
17 (2) the donor reserves a power of revocation or amendment in the instrument creating the power of  
18 appointment.

19  
20 **NEW SECTION. Section 11. Requisites for exercise of power of appointment.** (1) A power of  
21 appointment is exercised only:

- 22 (a) if the instrument exercising the power is valid under applicable law;  
23 (b) if the terms of the instrument exercising the power:  
24 (i) manifest the powerholder's intent to exercise the power; and  
25 (ii) subject to [section 14], satisfy the requirements of exercise, if any, imposed by the donor; and  
26 (c) to the extent the appointment is a permissible exercise of the power.

27 (2) Notwithstanding any other provision of this act, the property subject to a power of appointment may  
28 not pass to and may not be administered as a part of the powerholder's probate estate unless:

- 29 (a) the power of appointment is a general one that expressly authorizes the powerholder to appoint the  
30 appointive property to his or her own estate; and

1 (b) the powerholder utilizes clear and unequivocal language demonstrating a specific intent to exercise  
2 the power in favor of his or her own estate.

3  
4 **NEW SECTION. Section 12. Intent to exercise -- determining intent from residuary clause.** (1) In  
5 this section:

6 (a) "Residuary clause" does not include a residuary clause containing a blanket-exercise clause or a  
7 specific-exercise clause.

8 (b) "Will" includes a codicil and a testamentary instrument that revises another will.

9 (2) A residuary clause in a powerholder's will or a comparable clause in the powerholder's revocable trust  
10 manifests the powerholder's intent to exercise a power of appointment only if:

11 (a) the terms of the instrument containing the residuary clause do not manifest a contrary intent;

12 (b) the power is a general power exercisable in favor of the powerholder's estate;

13 (c) there is no gift-in-default clause or the clause is ineffective; and

14 (d) the powerholder did not release the power.

15  
16 **NEW SECTION. Section 13. Intent to exercise -- after-acquired power.** Unless the terms of the  
17 instrument exercising a power of appointment manifest a contrary intent:

18 (1) except as otherwise provided in subsection (2), a blanket-exercise clause extends to a power acquired  
19 by the powerholder after executing the instrument containing the clause; and

20 (2) if the powerholder is also the donor of the power, the clause does not extend to the power unless  
21 there is no gift-in-default clause or the gift-in-default clause is ineffective.

22  
23 **NEW SECTION. Section 14. Substantial compliance with donor-imposed formal requirement.** A  
24 powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including  
25 a requirement that the instrument exercising the power of appointment make reference or specific reference to  
26 the power, is sufficient if:

27 (1) the powerholder knows of and intends to exercise the power; and

28 (2) the powerholder's manner of attempted exercise of the power does not impair a material purpose of  
29 the donor in imposing the requirement.

30

1            **NEW SECTION. Section 15. Permissible appointment.** (1) A powerholder of a general power of  
2 appointment that permits appointment to the powerholder or the powerholder's estate may make any  
3 appointment, including an appointment in trust or creating a new power of appointment, that the powerholder  
4 could make in disposing of the powerholder's own property.

5            (2) A powerholder of a general power of appointment that permits appointment only to the creditors of  
6 the powerholder or of the powerholder's estate may appoint only to those creditors.

7            (3) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the  
8 powerholder of a nongeneral power may:

9            (a) make an appointment in any form, including an appointment in trust, in favor of a permissible  
10 appointee;

11           (b) create a general power in a permissible appointee; or

12           (c) create a nongeneral power in any person to appoint to one or more of the permissible appointees of  
13 the original nongeneral power.

14  
15           **NEW SECTION. Section 16. Appointment to deceased appointee or permissible appointee's**  
16 **descendant.** (1) Subject to the antilapse provisions of 72-2-613, an appointment to a deceased appointee is  
17 ineffective.

18           (2) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, a  
19 powerholder of a nongeneral power may exercise the power in favor of or create a new power of appointment  
20 in a descendant of a deceased permissible appointee whether or not the descendant is described by the donor  
21 as a permissible appointee.

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23           **NEW SECTION. Section 17. Impermissible appointment.** (1) Except as otherwise provided in [section  
24 16], an exercise of a power of appointment in favor of an impermissible appointee is ineffective.

25           (2) An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent  
26 the appointment is a fraud on the power.

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28           **NEW SECTION. Section 18. Selective allocation doctrine.** If a powerholder exercises a power of  
29 appointment in a disposition that also disposes of property the powerholder owns, the owned property and the  
30 appointive property must be allocated in the permissible manner that best carries out the powerholder's intent.

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2           **NEW SECTION. Section 19. Capture doctrine -- disposition of ineffectively appointed property**  
3 **under general power.** To the extent a powerholder of a general power of appointment, other than a power to  
4 withdraw property from, revoke, or amend a trust, makes an ineffective appointment:

5           (1) the gift-in-default clause controls the disposition of the ineffectively appointed property; or  
6           (2) if there is no gift-in-default clause or to the extent the clause is ineffective, the ineffectively appointed  
7 property:

8           (a) passes to:  
9           (i) the powerholder if the powerholder is a permissible appointee and living; or  
10           (ii) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate  
11 is a permissible appointee; or  
12           (b) if there is no taker under subsection (2)(a), passes under a reversionary interest to the donor or the  
13 donor's transferee or successor in interest.

14

15           **NEW SECTION. Section 20. Disposition of unappointed property under released or unexercised**  
16 **general power.** To the extent a powerholder releases or fails to exercise a general power of appointment, other  
17 than a power to withdraw property from, revoke, or amend a trust:

18           (1) the gift-in-default clause controls the disposition of the unappointed property; or  
19           (2) if there is no gift-in-default clause or to the extent the clause is ineffective:  
20           (a) except as otherwise provided in subsection (2)(b), the unappointed property passes to:  
21           (i) the powerholder if the powerholder is a permissible appointee and living; or  
22           (ii) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate  
23 is a permissible appointee; or  
24           (b) to the extent the powerholder released the power or if there is no taker under subsection (2)(a), the  
25 unappointed property passes under a reversionary interest to the donor or the donor's transferee or successor  
26 in interest.

27

28           **NEW SECTION. Section 21. Disposition of unappointed property under released or unexercised**  
29 **nongeneral power.** To the extent a powerholder releases, ineffectively exercises, or fails to exercise a  
30 nongeneral power of appointment:

- 1 (1) the gift-in-default clause controls the disposition of the unappointed property; or
- 2 (2) if there is no gift-in-default clause or to the extent the clause is ineffective, the unappointed property:
- 3 (a) passes to the permissible appointees if:
- 4 (i) the permissible appointees are defined and limited; and
- 5 (ii) the terms of the instrument creating the power do not manifest a contrary intent; or
- 6 (b) if there is no taker under subsection (2)(a), passes under a reversionary interest to the donor or the
- 7 donor's transferee or successor in interest.

8

9 **NEW SECTION. Section 22. Disposition of unappointed property if partial appointment to taker**

10 **in default.** Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary

11 intent, if the powerholder makes a valid partial appointment to a taker in default of appointment, the taker in

12 default of appointment may share fully in unappointed property.

13

14 **NEW SECTION. Section 23. Appointment to taker in default.** If a powerholder makes an appointment

15 to a taker in default of appointment and the appointee would have taken the property under a gift-in-default clause

16 had the property not been appointed, the power of appointment is deemed not to have been exercised and the

17 appointee takes under the default clause.

18

19 **NEW SECTION. Section 24. Powerholder's authority to revoke or amend exercise.** A powerholder

20 may revoke or amend an exercise of a power of appointment only to the extent that:

- 21 (1) the powerholder reserves a power of revocation or amendment in the instrument exercising the power
- 22 of appointment and, if the power is nongeneral, the terms of the instrument creating the power of appointment
- 23 do not prohibit the reservation; or
- 24 (2) the terms of the instrument creating the power of appointment provide that the exercise is revocable
- 25 or amendable.

26

27 **NEW SECTION. Section 25. Disclaimer.** As provided by 72-2-811:

- 28 (1) a powerholder may disclaim all or part of a power of appointment; and
- 29 (2) a permissible appointee, appointee, or taker in default of appointment may disclaim all or part of an
- 30 interest in appointive property.

1

2           **NEW SECTION. Section 26. Authority to release.** A powerholder may release a power of appointment  
3 in whole or in part, except to the extent the terms of the instrument creating the power prevent the release.

4

5           **NEW SECTION. Section 27. Method of release.** A powerholder of a releasable power of appointment  
6 may release the power in whole or in part:

7           (1) by substantial compliance with a method provided in the terms of the instrument creating the power;

8 or

9           (2) if the terms of the instrument creating the power do not provide a method or the method provided in  
10 the terms of the instrument is not expressly made exclusive, by a writing manifesting the powerholder's intent by  
11 clear and convincing evidence.

12

13           **NEW SECTION. Section 28. Revocation or amendment of release.** A powerholder may revoke or  
14 amend a release of a power of appointment only to the extent that:

15           (1) the instrument of release is revocable by the powerholder; or

16           (2) the powerholder reserves a power of revocation or amendment in the instrument of release.

17

18           **NEW SECTION. Section 29. Power to contract -- presently exercisable power of appointment.** A  
19 powerholder of a presently exercisable power of appointment may contract:

20           (1) not to exercise the power; or

21           (2) to exercise the power if the contract when made does not confer a benefit on an impermissible  
22 appointee.

23

24           **NEW SECTION. Section 30. Power to contract -- power of appointment not presently exercisable.**  
25 A powerholder of a power of appointment that is not presently exercisable may contract to exercise or not to  
26 exercise the power only if the powerholder:

27           (1) is also the donor of the power; and

28           (2) has reserved the power in a revocable trust.

29

30           **NEW SECTION. Section 31. Remedy for breach of contract to appoint or not to appoint.** The

1 remedy for a powerholder's breach of a contract to appoint or not to appoint appointive property is limited to  
 2 damages payable out of the appointive property or, if appropriate, specific performance of the contract.

3  
 4 **NEW SECTION. Section 32. Creditor claim -- general power created by powerholder.** (1) In this  
 5 section, "power of appointment created by the powerholder" includes a power of appointment created in a transfer  
 6 by another person to the extent the powerholder contributed value to the transfer.

7 (2) Appointive property subject to a general power of appointment created by the powerholder is subject  
 8 to a claim of a creditor of the powerholder or of the powerholder's estate to the extent provided in the Uniform  
 9 Fraudulent Transfer Act, 31-2-326 through 31-2-342, and in 70-20-401, 70-20-402, and 70-20-405.

10 (3) Subject to subsection (2), appointive property subject to a general power of appointment created by  
 11 the powerholder is not subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent  
 12 the powerholder irrevocably appointed the property in favor of a person other than the powerholder or the  
 13 powerholder's estate.

14 (4) Subject to subsections (2) and (3) and notwithstanding the presence of a spendthrift provision or  
 15 whether the claim arose before or after the creation of the power of appointment, appointive property subject to  
 16 a general power of appointment created by the powerholder is subject to a claim of a creditor of:

17 (a) the powerholder, to the same extent as if the powerholder owned the appointive property, if the power  
 18 is presently exercisable; and

19 (b) the powerholder's estate, to the extent the estate is insufficient to satisfy the claim and subject to the  
 20 right of a decedent to direct the source from which liabilities are paid, if the power is exercisable at the  
 21 powerholder's death.

22  
 23 **NEW SECTION. Section 33. Creditor claim -- general power not created by powerholder.** (1)  
 24 Except as otherwise provided in subsection (2), appointive property subject to a general power of appointment  
 25 created by a person other than the powerholder is subject to a claim of a creditor of:

26 (a) the powerholder, to the extent the powerholder's property is insufficient, if the power is presently  
 27 exercisable; and

28 (b) the powerholder's estate, to the extent the estate is insufficient, subject to the right of a decedent to  
 29 direct the source from which liabilities are paid.

30 (2) Subject to [section 35(3)], a power of appointment created by a person other than the powerholder

1 that is subject to an ascertainable standard relating to an individual's health, education, support, or maintenance  
2 within the meaning of 26 U.S.C. Section 2041(b)(1)(A) or 26 U.S.C. Section 2514(c)(1), on [the effective date of  
3 this act], is treated for purposes of this act as a nongeneral power.

4  
5 **NEW SECTION. Section 34. Power to withdraw.** (1) For purposes of this section and except as  
6 otherwise provided in subsection (2), a power to withdraw property from a trust is treated, during the time the  
7 power may be exercised, as a presently exercisable general power of appointment to the extent of the property  
8 subject to the power to withdraw.

9 (2) On the lapse, release, or waiver of a power to withdraw property from a trust, the power is treated as  
10 a presently exercisable general power of appointment only to the extent the value of the property affected by the  
11 lapse, release, or waiver exceeds the greater of the amount specified in 26 U.S.C. Section 2041(b)(2) and 26  
12 U.S.C. Section 2514(e) or the amount specified in 26 U.S.C. Section 2503(b) on [the effective date of this act].

13  
14 **NEW SECTION. Section 35. Creditor claim -- nongeneral power.** (1) Except as otherwise provided  
15 in subsections (2) and (3), appointive property subject to a nongeneral power of appointment is exempt from a  
16 claim of a creditor of the powerholder or the powerholder's estate.

17 (2) Appointive property subject to a nongeneral power of appointment is subject to a claim of a creditor  
18 of the powerholder or the powerholder's estate to the extent that the powerholder owned the property and,  
19 reserving the nongeneral power, transferred the property in violation of the Uniform Fraudulent Transfer Act,  
20 31-2-326 through 31-2-342.

21 (3) If the initial gift in default of appointment is to the powerholder or the powerholder's estate, a  
22 nongeneral power of appointment is treated for purposes of this act as a general power.

23  
24 **NEW SECTION. Section 36. Uniformity of application and construction.** In applying and construing  
25 this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its  
26 subject matter among states that enact it.

27  
28 **NEW SECTION. Section 37. Relation to electronic signatures in global and national commerce.**  
29 This act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15  
30 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section

1 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
2 Section 7003(b).

3  
4 **NEW SECTION. Section 38. Application to existing relationships.** (1) Except as otherwise provided  
5 in this act, on and after [the effective date of this act]:

6 (a) this act applies to a power of appointment created before, on, or after [the effective date of this act];

7 (b) this act applies to a judicial proceeding concerning a power of appointment commenced on or after  
8 [the effective date of this act];

9 (c) this act applies to a judicial proceeding concerning a power of appointment commenced before [the  
10 effective date of this act] unless the court finds that application of a particular provision of this act would interfere  
11 substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the  
12 particular provision of this act does not apply and the superseded law applies;

13 (d) a rule of construction or presumption provided in this act applies to an instrument executed before  
14 [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the instrument;  
15 and

16 (e) except as otherwise provided in subsections (1)(a) through (1)(d), an action done before [the effective  
17 date of this act] is not affected by this act.

18 (2) If a right is acquired, extinguished, or barred on the expiration of a prescribed period that commenced  
19 under law of this state other than this act before [the effective date of this act], the law continues to apply to the  
20 right.

21  
22 **NEW SECTION. Section 39. Codification instruction.** [Sections 1 through 38] are intended to be  
23 codified as an integral part of Title 72, and the provisions of Title 72 apply to [sections 1 through 38].

24  
25 **NEW SECTION. Section 40. Repealer.** The following sections of the Montana Code Annotated are  
26 repealed:

- 27 70-1-704. Creation or exercise of power to appoint to estate.
- 28 72-2-618. Exercise of power of appointment.
- 29 72-2-714. Power of appointment -- meaning of specific reference requirement.

30 - END -