**To: New Jersey Law Revision Commission**

**From: Erik Topp and Justin Reilly**

**Re: Uniform Powers of Appointment Act – Background, Practice, and Recommendation**

**Date: June 14, 2018**

**M E M O R A N D U M**

**Executive Summary**

Powers of appointment allow “the owner of property to name a third party and give that person the power to direct the distribution of that property among some class of permissible beneficiaries.”[[1]](#footnote-1) This is a long-standing method of estate planning that allows an individual to pass the authority to distribute property without entirely ceding control over it, but it is generally governed by common law. New Jersey is no exception to common law-dominated powers of appointment, and could benefit from a codification of the law on powers of appointment in line with the Uniform Powers of Appointment Act (UPAA), as it would bring the existing standards into a modern and accessible form.

**Background**

1. **Purpose of the Act**

The Uniform Law Commission explained, in the Prefatory Note to the UPAA, that:

Professor W. Barton Leach described the power of appointment as “the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out.” 24 A.B.A. J. 807 (1938). Powers of appointment are routinely included in trusts to add flexibility to the arrangement.

A power of appointment is the authority, acting in a nonfiduciary capacity, to designate recipients of beneficial ownership interests in, or powers of appointment over, the appointive property. An owner, of course, has this authority with respect to the owner’s property. By creating a power of appointment, the owner typically confers this authority on someone else.

The power of appointment is a staple of modern estate-planning practice. However, many jurisdictions within the United States have very little statutory or case law on powers of appointment.[[2]](#footnote-2)

The Uniform Law Commission finalized the Uniform Powers of Appointment Act (UPAA) in 2013 in response to calls for standardization of comparable law across the country.[[3]](#footnote-3) The Act was drafted largely based on the work of the American Law Institute in its powers of appointment section of the Restatement (Third) of Property: Wills and Other Donative Transfers, attempting to codify prevailing standards with little change.[[4]](#footnote-4)

The UPAA contains six articles: Article 1 governs general provisions and definitions regarding powers of appointment; Article 2 establishes rules for the “creation, revocation, and amendment of powers of appointment”; Article 3 governs the exercise of powers of appointment; Article 4 sets standards for revocation and amendment of powers of appointment; Article 5 provides guidelines for third party creditor rights regarding property; Article 6 contains standardized provisions found across Uniform Acts regarding construction of the law.[[5]](#footnote-5)

The Uniform Law Commission advocates adoption of the UPAA largely on the basis that it is merely a codification of common law; the UPAA does little to change the status quo, merely codifying case law and not radically altering what attorneys who practice in this area already know.[[6]](#footnote-6)

The UPAA has been enacted in eight states and was introduced in two more in 2018.[[7]](#footnote-7) To date, there are only two cases on record directly referencing the Uniform Powers of Attorney Act, both in states that have not enacted it.[[8]](#footnote-8) Both use the UPAA as a point of reference for powers of appointment law more generally.[[9]](#footnote-9) This suggests either that the UPAA leaves little open for interpretation, or that the UPAA is so new (as it was only released for states to adopt in 2013, and has been slowly enacted across states since) that opportunities to challenge the law in its various forms have not yet arisen.

**B. The Act in New Jersey**

New Jersey’s legal framework on powers of appointment is, in part, already codified. Provisions governing certain areas related to powers of appointment are as follows:

* The “[e]ffect of divorce or annulment on appointment of property made by will” is found in N.J.S. 3B:3-14.
* The “[e]ffect of general residuary clause on power of appointment” is found in N.J.S. 3B:3-45.
* “Disclaimers of transfers under powers of appointment” are found in N.J.S. 3B:9-1 et seq.
* The “[e]ffect to be given consent to account by holders of general power appointment on beneficiaries” is found in N.J.S. 3B:11-4.
* Standards regarding “[m]inors and incapcitated persons [and the] power of court with respect to powers of appointment” are found in N.J.S. 3B:12-50.
* Standards regarding “[r]elease of and contract not to exercise powers of appointment” are found in N.J.S. 46:2A-1 et seq.[[10]](#footnote-10)

 These areas covered by statute are largely ancillary to common law rules regarding powers of appointment, and do not cover the full scope of the matter. In New Jersey, the basic definition of a power of appointment is left to common law, as are general standards for creation of a power of appointment. In most situations, the leading case law governing powers of appointment comes from the first half of the twentieth century, and is written in archaic language that likely renders it inaccessible to many who might otherwise consider using a power of appointment as an estate planning device.[[11]](#footnote-11)

While New Jersey has engaged in some modernization of estate planning law, for instance with the 2016 adoption of the Uniform Trust Code,[[12]](#footnote-12) powers of appointment are largely unaddressed by statute here. Additionally, the State’s 1999 elimination of the rule against perpetuities[[13]](#footnote-13) may raise some unforeseen consequences to powers of appointment that could be remedied in an enactment of the UPAA.

**C. Potential Impact of the UPAA on Existing New Jersey Law**

The enactment of the Uniform Trust Code in 2016 addressed certain aspects of the powers of appointment.[[14]](#footnote-14) Adding the Uniform Trust Code to New Jersey’s existing body of statutory law, however, did not address all of the issues presently covered only by the common law.

The UPAA addresses aspects of powers of appointment that were not included in the Uniform Trust Code using the Restatement (Third) of Property: Wills and other Donative Transfers in order to align state laws across the nation.[[15]](#footnote-15) A preliminary review of the UPAA reveals that, in some instance, it provides greater detail than New Jersey’s existing statutes.

New Jersey provides some statutory guidance regarding powers of appointment in Title 46, at N.J.S. 46:2A-1 – 46:2A-5.

N.J.S. 46:2A-2, for example, states that with regard to the release of a power of appointment, and the manner in which one may do so, that a person may release the power of appointment:

(a) With respect either to the whole, or to any part, of the property subject thereto;

(b) In such manner as to reduce the number of, or to limit, the persons or objects or classes of persons or objects, to whom or for whose benefit an appointment otherwise might be made thereunder.

The UPAA, dealing with the release of a power of appointment, provides a different level of detail, explaining the circumstances under which a powerholder could release the power and the manner in which this could be done in Section 403 as follows:

A powerholder of a releasable power of appointment may release the power in whole or in part:

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

(2) If the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive, by a record manifesting the powerholder’s intent by clear and convincing evidence.

**Conclusion**

While some of what the Act covers is duplicative of existing law, power of appointment is such a nuanced and intricate area of law, with downstream effects on property rights, taxation at the state and federal levels, estate planning, and more that it may merit a cohesive and modernized statutory structure. Enacting the UPAA would afford the opportunity to better organize and frame powers of appointment, making it a more accessible body of law.

Unless the Commission would prefer otherwise, Staff’s next step will be outreach to experienced practitioners for comment regarding the UPAA, including on the issue of whether or not the Act is likely to provide sufficient benefit in New Jersey to justify continued work in this area of the law.

1. *Powers of Appointment*, Unif. Law Comm’n, http://uniformlaws.org/Act.aspx?title=Powers%20of%20Appointment [↑](#footnote-ref-1)
2. *Id.* [↑](#footnote-ref-2)
3. Unif. Powers of Appointment Act prefatory note (Unif. Law Comm’n 2013). [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. *Powers of Appointment Summary*, Unif. Law Comm’n, http://uniformlaws.org/ActSummary.aspx?title=Powers%20of%20Appointment. [↑](#footnote-ref-5)
6. *Why Your State Should Adopt UPOAPPA*, Unif. Law Comm’n, http://www.uniformlaws.org/Narrative.aspx?title=Why%20Your%20State%20Should%20Adopt%20UPOAPPA. [↑](#footnote-ref-6)
7. *Legislative Fact Sheet - Powers of Appointment*, Unif. Law Comm’n, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Powers%20of%20Appointment. Colorado, Missouri, Montana, Nevada, New Mexico, North Carolina, Utah, and Virginia have the UPAA in place; Illinois and Kentucky have introduced legislation to enact it. *Id.* [↑](#footnote-ref-7)
8. A LexisNexis search for “powers of appointment” jurisdiction-limited to the states that have enacted the UPAA and time-limited to 2013 and beyond returns only four results, none of which reference the UPAA. A similar search for “power of appointment” returns fifteen results, none of which reference the UPAA. [↑](#footnote-ref-8)
9. *See In re Tigani*, No. 7339-ML, 2016 Del. Ch. LEXIS \*26, \*49 n.134, \*57 n.150, n.153 (Del. Ch. Feb. 12, 2016); *Hornung v. Stockall*, 296 Neb. 565, 575 (2017). [↑](#footnote-ref-9)
10. 11-203 New Jersey Transaction Guide § 203.01 (2017). [↑](#footnote-ref-10)
11. A guide outlining the law of powers of appointment in New Jersey contains no non-tax case law from a year after 1962. 11-203 New Jersey Transaction Guide CHAPTER 203 (2017). [↑](#footnote-ref-11)
12. N.J.S. 3B:31-1 et. seq. [↑](#footnote-ref-12)
13. N.J.S. 46:2F-9. [↑](#footnote-ref-13)
14. N.J.S. 3B:31-1 et. seq. [↑](#footnote-ref-14)
15. *Powers of Appointment*, Unif. Law Comm’n [↑](#footnote-ref-15)