

# Trust Grantor Fails to Exercise His Retained Power Properly

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A recent Rhode Island case illustrates the need to carefully exercise any power of appointment retained by a grantor over a trust. *Jaffe v. Pournaras*, 178 A.3d 978 (2/23/18).

In this case, the Grantor had created an irrevocable trust in 2003, naming his son as the Trustee. Under the terms of the Trust, the Grantor retained a power to appoint its assets to or for the benefit of his descendants, in any shares and amounts he would direct.

The Trust allowed the Grantor to exercise this power either by written instrument during his lifetime, or by Will or Codicil at his death. The Trust terms did limit the power of appointment, so that it could not be exercised in favor of the Grantor's creditors or his estate. This limitation is widely used to avoid the power of appointment being deemed a "general" power of appointment for estate tax purposes. A general power causes estate tax inclusion of the trust in the estate of the power holder.

The Grantor executed his Will in 2008. The Will did not expressly refer to the power of appointment over the 2003 Irrevocable Trust. However, there was a residuary clause leaving the residuary estate, including any property over which the Grantor may have a power of appointment, to his Living Trust.

The question addressed by the Supreme Court of Rhode Island was whether this residuary clause in the Grantor's Will was sufficient to exercise his power of appointment over his 2003 Irrevocable Trust. The Court found that the appointment to the Grantor's Living Trust did not comply with the restrictions contained in his power of appointment. The Court found that the terms of the Will would place the assets of the 2003 Irrevocable Trust into the Grantor's residuary estate. The Court expressly rejected the argument that Trust property which was transferred by the Grantor in the exercise of the power of appointment was not a part of the Testator's own estate. As a result, the Court found that the Trust assets, if appointed to the Grantor's residuary estate, would be subject to the demands of the Grantor's creditors. This disposition of the 2003 Irrevocable Trust was not permissible, since the limitation in the Trust prevented the Grantor from appointing Trust assets to himself or to his creditors.

The son, who was the Trustee of the 2003 Irrevocable Trust and also the Executor of the Grantor's estate, argued that extrinsic evidence of the Grantor's intent should be considered. The terms of the Grantor's Living Trust limited the share of the decedent's daughter to \$50,000. If the 2003 Irrevocable Trust were not effectively appointed to the Living Trust, then apparently the daughter would receive more than that. The Court rejected this attempt to consider extrinsic evidence to interpret the intention of the decedent, since the Court found that the language of the 2003 Irrevocable Trust was clear and unambiguous in its limitation.

The moral of the story is clear. The exercise of a power of appointment must be carefully considered, and must be worded so as to fall within the permitted scope of its exercise. In this case, the Will failed to address the power of appointment expressly, and that was its downfall. As the Court noted, had the Will included a clause to specifically exercise the power of appointment and to appoint the assets to the Living Trust, then the exercise would have been

valid and the assets would have passed as the Grantor apparently intended.

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