

# Creditor Protection for Assets Subject to Presently Exercisable General Powers of Appointment (Including *Crummey*, "Five and Five" or Other Withdrawal Powers) Pre and Post Lapse in Trust

[Companion Chart to Article/Presentation "IRC §678 and the Beneficiary Deemed Owner Trust \(BDOT\)" by Ed Morrow. Available on www.ssrn.com](#)

"5/5" refers to the greater of five percent or \$5,000 referred to in IRC Sections 2514(e) and 2041(b), a.k.a. "five and five power"

"+Ann" refers to the annual exclusion under IRC Section 2503(b), \$15,000 as of 2018-2020, adjusted annually for inflation

"x2" refers to twice the annual exclusion if the donor is married (or in some states, if election to split gift)

In many states that have debtor-friendly self-settled domestic asset protection trust (DAPT) statutes, there is even greater protection for such power holders than below. Those statutes often require a qualifying trustee/administration in that state. This chart assumes non-DAPT trust.

For comparison of DAPT statutes, see <http://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf>

(See responses to Q40 regarding DAPT specific statutory protection of beneficiary withdrawal powers and lapses in AK, CT, DE, NV, NH, SD, TN, WY)

Note that most statutes refer to "power to withdraw" or "power of withdrawal" rather than "presently exercisable power of appointment" (a.k.a. "PEG Power"). All powers of withdrawal are PEG powers. However, not all PEG powers are powers of withdrawal: e.g., a power only exercisable with consent of a non-adverse party trustee is NOT considered a power of withdrawal under the UTC, but would be a PEG power. Often, however, the two terms are equivalent. Additionally, a PEG power is *not* always the same for state law creditor or rule against perpetuity issues as it is for IRC § 2514/2041 gift and estate tax purposes. For example, a presently exercisable power to appoint with consent of an adverse party may be "general" for state law, but not federal gift/estate tax law. See cites to Restatement 2nd and 3d of Property below.

State	State Statute or Case w/ Hyperlink	Level of Protection			<u>Loopholes, Exceptions or Unique Features in Statute</u>  (and where applicable, excerpt from statute)
		Current Power Protected	5/5 + Ann Protected	Unlimited Lapse Protected	
Alabama	<a href="#">Ala Code §19-3B-505(c)(2)</a>	No	Yes	No	Follows UTC §505(b): "(c) For purposes of this section: (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2), 2503(b), or 2514(e) of the Internal Revenue Code of 1986, in each case as in effect on January 1, 2007, or as later amended.

<b>Alaska</b>	<a href="#">AS §34.40.115</a>	Yes, unless exercised	Yes	Yes	Not a UTC state: "The property that a donee of a power of appointment is authorized to appoint is <i>not subject</i> to the claims of the creditors of the donee <i>except</i> to the extent that a donee of an inter vivos or testamentary power of appointment (1) is permitted by the donor of the power to appoint the property to the donee, the creditors of the donee, the donee's estate, or the creditors of the donee's estate; and (2) <i>effectively exercises the power</i> of appointment in favor of the donee, the creditors of the donee, the donee's estate, or the creditors of the donee's estate."
<b>Arizona</b>	<a href="#">ARS §14-10505(B)(2)</a>	No	Yes	Yes	Protects lapsed withdrawal rights without limitation and substantially modifies its version of UTC 505(b): "B. For the purposes of this section: 1. During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power. 2. On the lapse, release or waiver of a power of withdrawal, the holder is not, by reason of any such power of withdrawal, treated as the settlor of the trust."
<b>Arkansas</b>	<a href="#">AR Code § 28-73-505(b)(2)</a>	No		Yes	Substantially modifies UTC 505(b): "(b) For purposes of this section: (1) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power. (2) On the lapse, release, or waiver of a power of withdrawal, the holder of a power of withdrawal is not, by reason of any such power of withdrawal, treated as the settlor of the trust."
<b>California</b>	<a href="#">Cal Prob Code § 15309</a>	No	Probably	Probably	Not a UTC state. See substantial discussion of California law in the accompanying article. "Probably" indicates that while the statute and common law may lead one to conclude a lapse does not make the beneficiary a settlor under California law, California courts are notoriously pro-creditor and may create new law. Regardless, even third party spendthrift trusts that are not deemed self-settled may be subject to attachment of up to 25% of distributions under California law, plus any overdue distributions. Might a court extrapolate from and extend this rule to permit attachment of 25% of any amounts that could have been withdrawn? See <i>Carmack v. Fealy</i> discussion in material, where a court permitted a creditor to attach overdue distributions.

One recent appellate decision, *CARNE v. WORTHINGTON*, 246 Cal.App.4th 548 (2016), noted on a different issue that: "California trust law is essentially derived from the Restatement Second of Trusts. Over a number of years, the Restatement Second of Trusts has been superseded by the Restatement Third of Trusts. As a result, we may look to the Restatement Third of Trusts for guidance." citing *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 379 [135 Cal.Rptr.3d 69]. The Second and Third Restatements differ considerably on these points, see appendix.

<p><b>Colorado</b></p>	<p><a href="#">Univ. Nat'l Bank v. Rhoadarmer , 827 P.2d 561 (Colo. App. 1991) cert. den. (3/3/1992)</a></p> <p><a href="#">Colorado's Trust Code, SB 18-180</a></p>	<p>Yes, unless exercised</p>	<p>Yes</p>	<p>Follows common law. <i>Univ. Nat'l Bank v. Rhoadarmer , 827 P.2d 561 (Colo. App. 1991) cert. den. (3/3/1992)</i>, appears to still be good law in Colorado, holding that neither an unexercised 5&amp;5 withdrawal right nor trust property with respect to which the withdrawal power had lapsed could be attached. Paradoxically, a mandatory distribution that has not yet been distributed may be attached: <i>Beren v. Beren (In re Estate of Beren) , 2013 COA 166 (Colo. Ct. App. Dec. 5, 2013)</i>.</p> <p>Although Colorado passed a version of the Uniform Trust Code on April 26, 2018 (effective Jan 1, 2019), it omitted Article 5 (including UTC Section 505) altogether, similar to its omission of a similar section in its passage of the Uniform Power of Appointment Act.</p>
<p><b>Connecticut</b></p>	<p><a href="#">Ferri v. Powell-Ferri (SC 19432, SC 19433, Aug 8, 2017)</a></p>	<p>probably, unless exercised</p>	<p>Probably</p>	<p>The closest case to address this may be the Connecticut Supreme Court case of <i>Ferri v. Powell-Ferri</i> , which found that a trust which granted a presently exercisable general power of appointment that was later decanted to remove it should not be considered self settled because: "a beneficiary can only be deemed to be a settlor of a trust if he or she has some affirmative involvement with the creation or funding of the trust. In the present case, the trial court determined that, although Ferri may have been entitled to withdraw the funds, he was still required to request the moneys from the plaintiffs, which was never done."</p>

HB 7104, Public Act No 19-137  
(Connecticut's version of Uniform Trust  
code), generally effective January 1,  
2020.

Yes, up to  
5/5 Yes

On July 12, 2019, CT's governor signed into law a version of the UTC along with other substantial trust legislation (HB 7104, Public Act No. 19-137): "Sec. 40. (NEW) (Effective January 1, 2020) (a) For all purposes under this section and section 39 of this act, a creditor of a beneficiary, other than a creditor of the settlor if the settlor is a beneficiary of the trust, may not attach or compel a distribution of property that is subject to:  
(1) A power of withdrawal held by the beneficiary if the value of the property subject to the power does not exceed the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, and the regulations thereunder, or Section 2503(b) of said Internal Revenue Code and the regulations thereunder, in each case as in effect on January 1, 2020;\*\*\*(b) A beneficiary holding a power set forth in subsection (a) of this section shall not, during the period the power may be exercised or upon the lapse, release or waiver of the power, be treated as a settlor of the trust."

<b>Delaware</b>	<a href="#">12 Del. C. § 3536(c)(1)</a>	Yes, unless exercised	Yes	Not a UTC state. Delaware has strong protection for unexercised powers of appointment in 3536(a)(4) "Further, a beneficiary of a trust shall not be considered a trustor of the trust merely because of a lapse, waiver, or release of the beneficiary's right to withdraw all or a part of the trust property." and 3536(d)(2)
<b>District of Columbia</b>	<a href="#">D.C. Code § 19–1305.05</a>	No	Yes	Follows UTC §505(b): "(b) For the purposes of this section: (1) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on the effective date of this chapter [March 10, 2004], or as later amended.

<b>Florida</b>	<a href="#">Fla Stat. Ann. § 736.0505(2)(b)</a>	No	Yes, Ann Excl x2	Follows UTC 505(b), but increases protection: "(2) For purposes of this section: (a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power. (b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in: 1. Section 2041(b)(2) or s. 2514(e); or 2. Section 2503(b) and, <b>if the donor was married at the time of the transfer to which the power of withdrawal applies, twice the amount</b> specified in s. 2503(b),	
<b>Georgia</b>	<a href="#">GA Code § 53-12-83</a>	No	Yes	Not a UTC state, but borrows some provisions and has substantial protection nonetheless: "The holder of a power of withdrawal, during the period that the power may be exercised, shall be treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power. <b>The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be treated as a settlor of the trust.</b> "	
<b>Hawaii</b>	<a href="#">In 2021, Hawai'i is considering SB385, its version of the UTC that includes Section 505, but as of June 2021 it is not yet law.</a>	Probably	Probably	Not a UTC state. Could find no clear law on point, so this chart assumes it would probably follow common law rather than 3d rest. Its <b>proposed</b> version of UTC 505 carves out an exception for trusts qualifying under its self-settled DAPT statute (Permitted Transfers in Trust Act).	
<b>Idaho</b>	<a href="#">Idaho Code § 15-7-502(5)</a>	No	Yes	Not a UTC state, but has adopted substantially similar protection to UTC 505(b): "(5) A beneficiary of a trust shall not be considered a settlor of a trust merely because of a lapse, waiver or release of: (a) A power described in subsection (6) of this section; or (b) The beneficiary's right to withdraw a part of the trust property to the extent that the value of the property affected by the lapse, waiver or release in any calendar year does not exceed the greater of the amount specified in: (i) Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, as amended; or (ii) Section 2503(b) of the Internal Revenue Code of 1986, as amended."	
<b>Illinois</b>	<a href="#">760 ILCS 5/16.2</a>	No	Yes	No	"Lapse of power to withdraw. A beneficiary of a trust may not be considered to be a settlor or to have made a transfer to the trust merely because of a lapse, release, or waiver of his or her power of withdrawal to the extent that the value of the affected property does not exceed the greatest of the amounts specified in Sections 2041(b)(2), 2514(e), and 2503(b) of the Internal Revenue Code."

	<a href="#">Illinois Trust Code §505(b) (effective January 1, 2020)</a>	No	Yes	No	Illinois' version of the UTC, effective January 1, 2020, does not change this provision in any substantive way. Section 505 provides that: "(b) For purposes of this Section: (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code."
	<a href="#">Illinois Uniform Power of Appointment Act, §502/503, 760 ILCS 105/503 (effective January 1, 2019), note the significant deviation from UPOAA §503(b), but query whether the new IL trust code above overrides this section.</a>	No		Yes	Sec. 502. Creditor claim: general power not created by powerholder. (a) Except as otherwise provided in subsection (b), appointive property subject to a general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of: (1) the powerholder, to the extent the powerholder's property is insufficient, if the power is presently exercisable; and (2) the powerholder's estate if the power is exercised at the powerholder's death, to the extent the estate is insufficient, subject to the right of the deceased powerholder to direct the source from which liabilities are paid. *** Sec. 503. Power to withdraw. (a) For purposes of this Article, and except as otherwise provided in subsection (b), a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw. (b) A power to withdraw property from a trust ceases to be treated as a presently exercisable general power of appointment upon its lapse, release, or waiver.
<b>Indiana</b>	<a href="#">Irwin Union Bank &amp; Trust Co. v. Long, 312 N.E.2d 908 (1974)</a>	Yes, unless exercised	Yes	Yes	Not a UTC state, follows common law. In <i>Irwin Union Bank &amp; Trust Co. v. Long</i> , 160 Ind.App. 509, 312 N.E.2d 908 (1974), a beneficiary let his right to withdraw 4% of the corpus (a presently exercisable power of appointment) of a trust lapse. There was no statute on point equivalent to UTC. The court, citing II Scott on Trusts, § 147.3 and 62 Am. Jur. 2d, Powers, § 107, which parallels the second restatement above, held the assets of the trust (not even 4%, much less a higher percentage due to prior years' lapses) were not available to creditors.

Iowa	<a href="#">Iowa Code §633A.3105</a>	No	Yes	Yes	Not a UTC state, but has many parallel provisions in its trust code. There seems to be no analogy, however, to UTC 505(b). Iowa Code § 633A.3 clearly allows creditor access to any presently exercisable GPOA, but is silent as to lapses. One law review article analyzing Iowa common law citing cases <i>Ober v. Seegmiller</i> , 160 N.W. 21, 23–24 (Iowa 1916), <i>Darling v. Dodge</i> , 206 N.W. 266 (Iowa 1925) and <i>Ober v. Dodge</i> , 231 N.W. 444, 447 (Iowa 1930) concluded thus: "Iowa Code section 633A.3105 states that property of a trust is chargeable to the creditors of a “presently exercisable” general power of appointment holder. Thus, to the extent that a Crummey-type right of withdrawal is the same as a general power of appointment*** then Iowa Code section 633A.3105 overrules these cases, but <b>only during the withdrawal period. When a beneficiary’s right of withdrawal period passes, section 633A.3105 is no longer determinative, and the Ober and Darling cases could be expected to provide residual protection to the beneficiaries.</b> " ASSET PROTECTION (FOR THE RICH AND NOT) IN IOWA, by David M. Repp., Drake Law Review.
Kansas	<a href="#">Kan. Stat. Ann. §58a-505(b)</a>	No	Yes	No	Follows UTC 505(b) with an extra provision for spouses: "(b) For purposes of this section: (1) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; (2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in section 2041(b)(2) or 2514(e) of the federal internal revenue code of 1986, as in effect on December 31, 2002; or section 2503(b) of the federal internal revenue code of 1986, as in effect on December 31, 2002; and (3) this subsection shall not apply to the lapse of powers held by the spouse of a person occurring upon the death of such person."
Kentucky	<a href="#">Kentucky RS §386B.5-040(2)</a>	No	Yes	Yes	UTC state but with substantial debtor/trust friendly modification of UTC 505(b):“(a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (b) <b>Upon the lapse, release, or waiver of the power, the holder is not treated as the settlor of the trust.</b> ” See also <i>St. Matthews Bank v. De Charette</i> , 299 Ky. 802 (Ky. 1935)
	<a href="#">KRS §390.330(1)</a>	yes	yes	yes	Kentucky recently passed the UPOAA in March of 2020, effective July 15, 2020. It modified the UPOAA on this point, however, consistent with the above statute as to lapses, but more protective as to currently held powers: "(1) Appointive property subject to a general power of appointment created by a person other than the powerholder is not subject to a claim of a creditor of the powerholder or the powerholder's estate." As to current powers, the two statutes conflict.

<b>Louisiana</b>	<a href="#">LA Rev Stat § 9:2004</a>	No	Yes	Yes	Not a UTC state or even common law state but does have a trust code and an exception regarding lapsed general powers: "§2004. Seizure by creditor; general rule. A creditor may seize only: (1) An interest in income or principal that is subject to voluntary alienation by a beneficiary. (2) A beneficiary's interest in income and principal, to the extent that the beneficiary has donated property to the trust, directly or indirectly. A beneficiary will not be deemed to have donated property to a trust merely because he fails to exercise a right of withdrawal from the trust."
<b>Maine</b>	<a href="#">18-B ME Rev Stat § 505(2)</a>	No	Yes	No	Follows UTC 505(b): "2. Holder of power. For purposes of this section: A. During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and B. Upon the lapse, release or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in the federal Internal Revenue Code of 1986, Section 2041(b)(2) or 2514(e) or the federal Internal Revenue Code of 1986, Section 2503(b), in each case as in effect on July 1, 2005, or as later amended."
<b>Maryland</b>	<a href="#">MD Est &amp; Trusts Code § 14.5-507</a>	Yes	Yes	Yes	Maryland is a UTC state but like many did not pass UTC 505(b) and substantially modified its statutes to be more protective of presently exercisable powers (and, presumably, lapses thereof): "Power of appointment. (a) Not deemed property interest; foreclosure or attachment prohibited. -- (1) A power of appointment held by a person other than the settlor of the trust is not a property interest. (2) A power of appointment described in paragraph (1) of this subsection and property subject to that power of appointment may not be judicially foreclosed or attached by a creditor of the holder of the power.
<b>Massachusetts</b>	<a href="#">ALM GL ch. 203E, § 505</a>	No	Probably	Probably	Massachusetts is a UTC state but only passed a portion of UTC 505 and left the lapse discussion of 505(b) out of its version of the trust code entirely, leaving the answer to common law. MA does have some case law on GPOAs, one case, <i>State Street Bank &amp; Trust Co. v. Reiser</i> permits creditors of an estate access to assets subject to a decedent debtor's testamentary general powers of appointment if the decedent created the power, but others do not allow access if a third party created the power: <i>Shattuck v. Burrage</i> , 229 Mass. 448, 118 N.E. 889 (1918); <i>Crawford v. Langmaid</i> , 171 Mass. 309, 50 N.E. 606 (1898), but I could find no law as to the effect of lapses of a Crummey, 5/5 or other presently exercisable GPOA.

<b>Michigan</b>	<a href="#">Michigan MCL § 700.7506(c)(3)</a>	No	Yes	Yes	UTC State with debtor-friendly modifications of UTC 505(b): "(3) A trust beneficiary is not considered a settlor merely because of a lapse, waiver, or release of a power of withdrawal over the trust property."
<b>Minnesota</b>	<a href="#">Minn. Stat. § 501C.0505</a>  <a href="#">Minn. Stat. § 502.86, §502.87</a>	No	Probably	Probably	Minnesota is a UTC state but omitted 505(b) from its version.  Minnesota has a separate power of appointment act that is not based on UPOAA. Note that Minn. Stat. 502.86, Subd. 2 allows creditor access to a presently exercisable general power but Subd. 3 protects such assets from creditors if a power is subject to a condition, such as consent of a non-adverse party, until such condition is met. Minn. Stat. 502.80 specifically provides that "(a) The common law of powers remains in full force and effect and supplements the provisions of this chapter, unless explicitly modified or displaced by this chapter."
<b>Mississippi</b>		Probably	Probably	Probably	Mississippi is a UTC state but omitted Article 5 dealing with creditor issues and does not have UTC 505(b) equivalent. Various bar study groups have recommended adoption of UPOAA to clarify such points, see <a href="http://www.sos.ms.gov/Policy-Research/Documents/1Tentative.pdf">http://www.sos.ms.gov/Policy-Research/Documents/1Tentative.pdf</a>
<b>Missouri</b>	<a href="#">RSMo § 456.5-505.6</a>  <a href="#">Mo. Rev. Stat § 456.1105</a>	No	Yes	No	UTC state that follows UTC 505(b): "6. For purposes of this section: (1) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Sections 2041(b)(2), 2514(e) or 2503(b) of the Internal Revenue Code."  Missouri has passed the UPOAA but has modified Section 503.
<b>Montana</b>	<a href="#">Mt. Stat. §72-38-505(2)</a>	No	Yes	No	Follows UTC 505(b): "(2) For purposes of this section: (a) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (b) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on the effective date of this chapter or as later amended."

MT Code § 72-7-503

Also passed UPOAA §503, which parallels UTC § 505(b)

<b>Nebraska</b>	<a href="#">Neb. Stat. §30-3850</a>	No	Yes	No	b) For purposes of this section: (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in section 2041(b)(2), 2503(b), or 2514(e) of the Internal Revenue Code as defined in section 49-801.01.
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<b>Nevada</b>	<a href="#">Nevada's NRS § 163.5559(3)</a>	No	Yes	No	Not a UTC state, but Nevada's NRS § 163.5559(3) provides that "a beneficiary of a trust shall be deemed to not be a settlor of a trust because of a lapse, waiver or release of the beneficiary's right to withdraw part or all of the trust property if the value of the property which could have been withdrawn by exercising the right of withdrawal in any calendar year does not, at the time of the lapse, waiver or release, exceed the greater of the amount provided in 26 U.S.C. 2041(b)(2), 26 U.S.C. 2503(b) or 26 U.S.C. 2514(e), as amended, or any successor provision."
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[NV SB 454 - effective Oct 1, 2017](#)

Nevada has passed the UPOAA, keeping language similar to Sections 502-503, which have similar import to above. "Sec. 52. 1. Except as otherwise provided in subsection 2,

appointive property subject to a general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of:

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

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

[NV Rev Stat § 166.015](#)

A trust might potentially come under Nevada's Spendthrift Trust Act (its DAPT statute), in which case additional protections may apply even if the powerholder/beneficiary is deemed a settlor.

<b>New Hampshire</b>	<a href="#">N.H. Rev. Stat. Ann. §564-B:5-505(b)</a>	No	Yes	Yes	"(b) During only the period that the power may be exercised, the holder of a power of withdrawal is treated in the same manner under this section as the settlor of a revocable trust to the extent of the property subject to the power." By express omission of lapse language that is present in most state's version of 505(b) and insertion of "only", it is highly likely that NH law protects a powerholder from being a settlor post-lapse. If any NH attorneys think otherwise, let me know.
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<b>New Jersey</b>	<a href="#">NJS.3B:31-39.b(2)</a>	No	Yes	No	"b.For purposes of this section: (1)during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2)upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in section 2041(b)(2) or 2514(e) of the federal Internal Revenue Code of 1986 (26 U.S.C. s.2041(b)(2) or 26 U.S.C. s.2514(e)), or section 2503(b) of the federal Internal Revenue Code of 1986 (26 U.S.C. s.2503(b)), in each case as in effect on the effective date of this act, or as later amended."
<b>New Mexico</b>	<a href="#">NM Stat § 46A-5-505(b)</a>	No	Yes	No	Follows UTC 505(b): "B. For purposes of this section: (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2) upon the lapse, release or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release or waiver exceeds the greater of the amount specified in Section 2041(b)(2), 2514(e) or 2503(b) of the Internal Revenue Code of 1986, as amended."
<b>New Mexico</b>	<a href="#">NM Stat § 46-11-503</a>				Also passed UPOAA §503, which parallels UTC § 505(b)
<b>New York</b>	<a href="#">NY CLS EPTL § 10-7.2</a>	No	Yes	Yes	NY is not a UTC state - its statute clearly subjects presently exercisable general powers to creditors, but is silent on lapses. Presumably it would follow common law and not deem the lapsing powerholder to be the settlor and protect such assets. There is a bill introduced to codify this (revising NY EPTL §7-3.1(a) and CPLR §5205(c)) which states that "it is declaratory of existing New York law": 2017 Bill Text NY A.B. 5432.  The section of the proposed AB 7677 that follows UTC 505, which would be Section 7-A-5.6(C), refers to Section 10-7.2 and would keep the same rule on this point: "(C) DURING THE PERIOD THE HOLDER OF A POWER OF WITHDRAWAL MAY EXERCISE SUCH POWER, THE PROPERTY SUBJECT TO THE POWER IS SUBJECT TO THE CLAIMS OF THE POWERHOLDER'S CREDITORS, THE CREDITORS OF THE POWERHOLDER'S ESTATE AND THE EXPENSE OF ADMINISTERING THE POWERHOLDER'S ESTATE TO THE EXTENT PROVIDED PURSUANT TO SECTION 10-7.2 OF THIS CHAPTER."

New York is considering and has introduced AB 7677, its version of the UTC, but as June 2021 it has not yet passed.



Ohio	<a href="#">Ohio R.C. §5805.06(B)(2)</a>	No	Yes, x2	No	<p>"(B) For purposes of this section, all of the following apply:</p> <p>(1) The holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power during the period the power may be exercised.</p> <p>(2) Upon the lapse, release, or waiver of the power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts:</p> <p>(a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code;</p> <p>(b) If the donor of the property subject to the holder's power of withdrawal is not married at the time of the transfer of the property to the trust, the amount specified in section 2503(b) of the Internal Revenue Code;</p> <p>(c) If the donor of the property subject to the holder's power of withdrawal is married at the time of the transfer of the property to the trust, twice the amount specified in section 2503(b) of the Internal Revenue Code."</p>
	<a href="#">HB 7 (passed and signed by Gov. on May 20, 2021, effective 8/17/21 )</a>	No	Yes	Yes	<p>HB 7 will delete all of paragraph (B)(2) above in order to clarify that a lapse, release or waiver does <i>not</i> create a self-settled trust, <i>regardless</i> of the amount. It will not change treatment of a current power.</p>
Oklahoma	<a href="#">Okla. Stat. §60-175.85</a>	Yes, unless exercised	Yes	Yes	<p>"F. A power of appointment in any trust is personal in nature and cannot be attached or forced to be exercised by a creditor or a court regardless of the presence of a spendthrift provision. A power of appointment is not a property interest."</p>
Oregon	<a href="#">Oregon ORS §130.315(3)</a>	No	Yes, x2	No	<p>Follows UTC 505(b) but doubles for annual exclusion gifts by married couples: "(3) Upon the lapse, release or waiver of a power of withdrawal, the property of the trust that is the subject of the lapse, release or waiver becomes subject to claims of creditors of the holder of the power only to the extent the value of the property exceeds the greater of:</p> <p>(a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code, as in effect on December 31, 2012;</p> <p>(b) The amount specified in section 2503(b) of the Internal Revenue Code, as in effect on December 31, 2012; or</p> <p>(c) Twice the amount specified in section 2503(b) of the Internal Revenue Code, as in effect on December 31, 2012, if the donor was married at the time of the transfer to which the power of withdrawal applies.</p>

Pennsylvania	<a href="#">20 Pa. C.S.A. §§ 7703</a>	No	Yes	No	Pennsylvania mimics UTC §505(b) in a roundabout way by first defining power of withdrawal to exclude annual exclusion/5&5 powers in 20 Pa. C.S.A. §§ 7703, and then carving out in a different code section at 20 PA Cons Stat § 7748: "Trust property that is subject to a power of withdrawal, during the period the power may be exercised and after its lapse, release or waiver, may be reached by a creditor or an assignee of the holder of the power whether or not the interest of the holder in the trust is subject to a spendthrift provision."
Rhode Island	<a href="#">RI Gen L § 34-22-13</a>	Yes, unless exercised	Yes	Yes	Not a UTC state and statute follows common law; "§ 34-22-13 Powers as subjecting property to creditors. Except to the extent that a donee shall appoint to his or her estate or to his or her creditors, §§ 34-22-11 and 34-22-12 shall not be construed to subject to the claims of creditors of the donee the property which the donee is authorized to appoint."
South Carolina	<a href="#">SC Code § 62-7-505(b)</a>	Yes	Yes	Yes	SC is a UTC state but like many has a more debtor-friendly variation that follows common law. It did not adopt/modify UTC §505(b) but instead modified UTC 103(14) in its definition of a "settlor" .  "(14) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion. <b>Neither the possession of, nor the lapse, release, or waiver of a power of withdrawal shall cause a holder of the power to be deemed to be a settlor of the trust, and property subject to such power is not susceptible to the power holder's creditors."</b>
South Dakota	<a href="#">South Dakota CL §55-1-26</a>	Yes, unless exercised	Yes	Yes	SD is not a UTC state and the law appears to be even more debtor friendly than common law: " <i>Judicial foreclosure of beneficial interests, powers of appointment, and reserved powers prohibited</i> --Creditors may not reach powers of appointment or remainder interests. Regardless of whether or not a trust contains a spendthrift provision: (1) No beneficial interest, power of appointment, or reserved power in a trust may be judicially foreclosed; (2) No creditor may reach a power of appointment or a remainder interest at the trust level. The creditor shall wait until the funds are distributed before the creditor may reach the funds; and (3) No power of appointment is a property interest."

<b>Tennessee</b>	<a href="#">Tenn. Code Ann. §35-15-505(b)</a>	Yes, but limited to 5/5+ann	Yes	Yes	UTC state, but with substantial debtor-friendly modifications to UTC 505(b): "(b) For purposes of this section during the period a power of withdrawal may be exercised or upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in § 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986 (26 U.S.C. § 2041(b)(2) and § 2514(e)), or § 2503(b) of the Internal Revenue Code of 1986 (26 U.S.C. § 2503(b)), in each case as in effect on July 1, 2004, or as later amended." While this appears to foreclose protection beyond 5/5+ann. excl similar to the UTC, also note Tenn. Code Ann. §35-15-505(e): "For purposes of subdivision (a)(2) and subsection (g), a person who is the holder of a power of withdrawal is not considered a settlor of the trust by failing to exercise that power of withdrawal or letting that power of withdrawal lapse." Also see TN's protective debtor-favorable law on powers of appointment at Tenn. Code Ann. § 35-15-509.
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<b>Texas</b>	<a href="#">Texas Property Code § 112.035(e)</a>	No	Yes	No	"(e) A beneficiary of the trust may not be considered a settlor merely because of a lapse, waiver, or release of: (1) a power described by Subsection (f); or (2) the beneficiary's right to withdraw a part of the trust property to the extent that the value of the property affected by the lapse, waiver, or release in any calendar year does not exceed the greater of the amount specified in: (A) Section 2041(b)(2) or 2514(e), Internal Revenue Code of 1986; or (B) Section 2503(b), Internal Revenue Code of 1986."
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<b>Utah</b>	<a href="#">Utah Code § 75-1-502</a>	Yes	Probably*	Possibly*	Utah is a UTC state and followed UTC 505(b) until 5/9/2017 when it was deleted from the code at the same time Utah passed the Uniform Powers of Appointment Act, though it substantially modified that particular section and kept closer to common law. Reading section 503 together with 502 is a bit confusing in trying to determine the effect of a lapse: "75-10-502. Creditor claim -- Power not created by powerholder. (1) The property subject to a general or a nongeneral power of appointment not created by the powerholder, including a presently exercisable general or nongeneral power of appointment, is exempt from a claim of a creditor of the powerholder or the powerholder's estate. The powerholder of such a power may not be compelled to exercise the power and the powerholder's creditors may not acquire the power, any rights thereto, or reach the trust property or beneficial interests by any other means. A court may not exercise or require the powerholder to exercise the power of appointment."
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Utah Code §75-10-503

Utah Code 75-10-503: "Power to withdraw.

(1) For purposes of this part, and except as otherwise provided in Subsection (2), a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw.

(2) On the lapse, release, or waiver of a power to withdraw property from a trust, the power is treated as a presently exercisable general power of appointment only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in 26 U.S.C. Sec. 2041(b)(2) and 26 U.S.C. Sec. 2514(e) or the amount specified in 26 U.S.C. Sec. 2503(b)." Query: if PEGs are protected per section 502 above, then why did they bother adding section 503(2) and what import does it have?

<b>Vermont</b>	<a href="#">14A V.S.A. § 505(b)</a>	No	Yes		UTC state that follows UTC 505(b): "(b) For purposes of this section: (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on the effective date of this title."
<b>Virginia</b>	<a href="#">Va. Code § 64.2-747(B)</a>	No	Yes, x2	No	UTC state that follows 505(b) but doubles annual exclusion amount for married donor: "B. For purposes of this section: 1. During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and 2. Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of (i) the amount specified in § 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, (ii) the amount specified in § 2503(b) of the Internal Revenue Code of 1986, or (iii) two times the amount specified in § 2503(b) of the Internal Revenue Code of 1986 if the donor was married at the time of the transfer to which the power of withdrawal applies."

[Va. Code §§ 64.2-2736, 64.2-2737](#)

Virginia's UPOAA mirrors its UTC provision noted above.

<b>Washington</b>	<a href="#">RCW § 11.95.160</a>	No	Yes	Yes	<p>Not a UTC state. "Lapse of a power—Intent not to exercise a power—Treatment.</p> <p>A person shall not be treated as having made a disposition in trust for the use of that individual by reason of a lapse of a power of withdrawal over the income or corpus of a trust created by another person. For this purpose, notification to the trustee of the trust of an intent not to exercise the power of withdrawal shall not be treated as a release of the power of withdrawal, but shall be treated as a lapse of the power."</p>
<b>West Virginia</b>	<a href="#">W.V. Code § 44D-5-505(b)</a>	No	Yes	No	<p>UTC state which follows UTC 505(b): "(b) For purposes of this section:</p> <p>(1) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the grantor of a revocable trust to the extent of the property subject to the power; and</p> <p>(2) Upon the lapse, release or waiver of the power, the holder is treated as the grantor of the trust only to the extent the value of the property affected by the lapse, release or waiver exceeds the greater of the amount specified in Section 2041(b)(2), Section 2503(b) or Section 2514(e) of the Internal Revenue Code."</p>
<b>Wisconsin</b>	<a href="#">Wisc. Stat. §701.0505(2)(b)</a>	No	Yes, x2	No	<p>Follows UTC 505(b) but doubles for annual exclusion if election made to split gifts: "(b) A beneficiary of a trust may not be considered a settlor solely because of a lapse, waiver, or release of any of the following:</p> <ol style="list-style-type: none"> <li>1. A power described under par. (c).</li> <li>2. The beneficiary's right to withdraw part of the trust property, to the extent that the value of the property affected by the lapse, waiver, or release in any year does not exceed the greater of the following: <ol style="list-style-type: none"> <li>a. The amount referenced in section 2041 (b) (2) or 2514 (e) of the Internal Revenue Code.</li> <li>b. The amount referenced in section 2503 (b) of the Internal Revenue Code for each individual other than the beneficiary who makes a transfer to the trust or who is deemed to make a transfer to the trust pursuant to an election to split gifts under section 2513 (a) of the Internal Revenue Code."</li> </ol> </li> </ol>

Wyoming	<a href="#">WY Stat § 4-10-505.1</a>	Yes, unless exercised	Yes	Yes	<p>UTC state but completely replaced UTC 505(b) with codification of common law: "4-10-505.1. Power of appointment or withdrawal; claims of power holder's creditors.</p> <p>(a) Property of a trust that the holder of a power of appointment is authorized to appoint may not be reached or attached by creditors or assignees of the power holder except to the extent that the power holder:</p> <p>(i) Is authorized under the power to appoint the property to himself, his creditors, his estate or the creditors of his estate; and</p> <p>(ii) Exercises the power of appointment in favor of himself, his creditors, his estate or the creditors of his estate.</p> <p>(b) Property of a trust that may be withdrawn by a person holding a power to withdraw from the trust may not be reached or attached by creditors or assignees of the power holder unless and until the power holder withdraws the property from the trust."</p>
N/A	<a href="#">Uniform Trust Code §505(b) (while 32 jurisdictions have passed the UTC, many have modified this section, see above)</a>	No	Yes	No	<p>(b) For purposes of this section: (1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and (2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].</p>
N/A	<a href="#">Uniform Trust Code §103(11) (definitions section that defines "power of withdrawal" used in §505(b) above)</a>				<p>UTC §103(11): "Power of withdrawal" means a presently exercisable general power of appointment <i>other than</i> a power: <b>*** (B) exercisable by another person only upon consent of the trustee</b> or a person holding an adverse interest." [thus, not all general powers are susceptible to creditors even under UTC states, enabling "hanging powers" that require trustee consent to avoid a gift taxable lapse yet remain protected from creditors]</p> <p>Generally, the UTC does not further define "presently exercisable general power of appointment", leaving it to common law (see below) although some states' UTC versions might, e.g. Illinois Trust Code Section 103(27), but even that leaves issues to common law.</p>

Restatement 2d Property: Donative Transfers, § 11.4

*“a. General power of appointment . A general power of appointment gives the donee of the power the authority to confer on himself or herself the full benefit of the appointive assets to the exclusion of others. If this authority must be exercised jointly with another, even though the joint donee may have an interest in the appointive assets adverse to the exercise of the power in favor of the donee who can be benefited by the exercise of the power, that fact does not prevent the power from being a general one .”*  
[contrast with below]

Restatement 3d Property: Wills and Other Donative Transfers, § 17.3

*“e. Joint power with nonadverse party or with adverse party . If a power of appointment can be exercised in favor of the donee, the donee's estate, or the creditors of either, the power is a general power even if the donee can only exercise the power with the joinder of a nonadverse party. If the power can only be exercised with the joinder of an adverse party, however, the power is not a general power . An adverse party is a person who has a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power in favor of the donee, the donee's estate, or the creditors of either; a nonadverse party is a person who does not have such an interest.”*

Uniform Power of Appointment Act, §205(b) [follows Restat. 3d of Prop. above]

“If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral”.

**N/A**

Uniform Powers of Appointment Act §§502-503 (as of August 2017, 8 states have passed the UPOAA: CO, MO, MT, NV, NM, NC, UT, VA with bills introduced in KY, IL). IL passed it in 2018, effective January 1, 2019.

**No**

**Yes**

**No**

Caution: First, if your state is considering this uniform act, there are several reasons beyond the scope of this article/chart to avoid or substantially modify it. If your state has already passed it, your state may have omitted (e.g. CO) or substantially changed this section (e.g. UT, NC), so be careful to check your state's version specifically. "SECTION 503. POWER TO WITHDRAW. (a) For purposes of this [article], and except as otherwise provided in subsection (b), a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw. (b) On the lapse, release, or waiver of a power to withdraw property from a trust, the power is treated as a presently exercisable general power of appointment only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in 26 U.S.C. Section 2041(b)(2) and 26 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]][as amended]."

Note, when I leave a conclusion blank or speak about "common law" above, applicable where the state has no specific statute on point, the Second Restatement below is the most accurate depiction of the common law, the later Restatements often attempt to aspirationally rewrite the law rather than "restate" on these points. However, a state supreme court could always decide to chart its own course in the absence of statute.

<u>N/A</u>	<a href="#">Restat 2d of Prop: Donative Transfers, § 13.2</a>	<b>Yes, unless statute overrides</b>	<b>Yes</b>	<b>Yes</b>	"§ 13.2 <i>Creditors of the Donee -- Unexercised General Power Not Created by Donee</i> . Appointive assets covered by an unexercised general power of appointment, created by a person other than the donee, can be subjected to payment of claims of creditors of the donee, or claims against the donee's estate, but <i>only to the extent provided by statute</i> ." See also 3 Scott & Ascher §14.11.3.
<u>N/A</u>	<a href="#">Restat 3d of Trusts, § 56</a>	<b>No</b>	<b>No</b>	<b>No</b>	"b. ***Trust property subject to a presently exercisable general power of appointment (a power by which the property may be appointed to the donee, including one in the form of a power of withdrawal), because of the power's equivalence to ownership, is treated as property of the donee of the power. It can therefore be subjected to the satisfaction of the claims of the donee's creditors."

The newest restatement clearly considers a Crummey or other powerholder of a withdrawal power or presently exercisable general power of appointment to be a settlor upon lapse, release or renunciation (regardless of 5/5, annual exclusion), but does not if the powerholder disclaims, but can cite no case or state statute for this proposition. It makes no difference or distinction between a qualified disclaimer pursuant to IRC 2518 (gift/estate tax rule), and a disclaimer pursuant to state law, which is often much easier to comply with (e.g. there is often no 9 month rule, often no pre-acceptance taint). This section of the "restatement" does not appear to be the law in ANY state, but the UTC incorporated parts of it. If ever followed by a state, Section 58 opens up opportunity (or abuse), because it would allow one to be a beneficiary of their own Crummey trust without being considered self-settled under state law (if all contributions are covered by the power), since all the powerholders would be considered the settlors. A contributor to a trust is *not* a settlor (under restatement 3d and also UTC 103(15)) if other parties have a power of withdrawal/PEG power/GPOA, meaning it is not self-settled as to the *contributor* even if he/she is beneficiary, a conclusion that many readers likely doubt but has been followed by bankruptcy court in *In re Reuter*, 499 B.R. 655, 671 (Bankr. W.D. Mo. Sept. 12, 2013). In the context of *upstream* optimal basis increase trusts, wherein a settlor grants a testamentary GPOA to an older parent or relative - if the Restatement 3d is followed, the original settlor is disregarded/removed as settlor at the power holder's death and the powerholder becomes the settlor, this would enable the original settlor to be a beneficiary without being considered self-settled. See discussion in Part V.j. of *The Optimal Basis Increase Trust*, available at <https://ssrn.com/abstract=2436964>.

© 2017-2021 Edwin P. Morrow III, constructive criticism or updates welcome and appreciated, especially from attorneys licensed in state in question: [edwin.morrow@huntington.com](mailto:edwin.morrow@huntington.com) or [edwin.morrow3@gmail.com](mailto:edwin.morrow3@gmail.com). Updates in July 2019 revised Connecticut case law and added citations to three states enacting versions of the Uniform Trust Code since the first draft of this chart in 2017: Connecticut (effective January 1, 2020), Illinois (effective January 1, 2020), Colorado (effective January 1, 2019, but omitting UTC Section 505). Also, IL recently enacted the Uniform Power of Appointment Act (effective January 1, 2019), as well as Kentucky (effective July 15, 2020, with substantial modification to UPAA 503). 2021 update includes Ohio revisions signed into law in May and effective in August 2021, and proposed UTC introductions in NY and HI. Thanks to S.C. ACTEC attorney David C. Sojourner, Jr., for apprising me of South Carolina's unique UTC version noted above.