

Creditor Protection for Assets Subject to Presently Exercisable General Powers of Appointment (Including Crummey 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

"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), currently \$14,000, 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 some states, if the trust qualifies under DAPT statute, there may even be greater protection than below. This chart assumes non-DAPT trust.

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

Note that statutes often refer to "power to withdraw" or "power of withdrawal" separately from "presently exercisable power of appointment".

All powers of withdrawal are presently exercisable general powers of appointment. The reverse is *mostly* true, but it's possible to have a presently exercisable GPOA that is not a power of withdrawal (e.g. a presently exercisable power to appoint a remainder interest to one's estate).

Those kinds of powers would be rare, however, so for most intents and purposes the two terms are equivalent.

State	State Statute with Hyperlink	Level of Protection			<u>Loopholes, Exceptions or Unique Features in Statute</u> (and where applicable excerpt from statute)
		Current Power Protected	Lapses 5/5 + Ann Protected	Complete Lapse Protected	
Alabama	Ala Code §19-3B-505(c)(2)	No	Yes		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.

Alaska	AS §34.40.115	Yes, unless exercised	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; <i>and</i> (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."
Arizona	ARS §14-10505(B)(2)	No	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."
Arkansas	AR Code § 28-73-505(b)(2)	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."
California	Cal Prob Code § 15309	No	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-debtor 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. See <i>Carmack v. Fealy</i> discussion in material.

Colorado		Yes, unless exercised	Yes	Not a UTC state, follows common law. <i>Univ. Nat'l Bank v. Rhoadarmer</i> , 827 P.2d 561 (Colo. App. 1991) cert. den. (3/3/1992), appears to still be good law in Colorado, holding that neither an unexercised 5&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)</i> , 2013 COA 166 (Colo. Ct. App. Dec. 5, 2013).
Connecticut			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.
Delaware	12 Del. C. § 3536(c)(1)	Yes, unless exercised	Yes	Not a UTC state. Delaware has strong protection for unexercised powers of appointment in 3536(a)(4) and (c)(1) "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."
District of Columbia	D.C. Code § 19–1305.05	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.
Florida	Fla Stat. Ann. § 736.0505(2)(b)	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, if the donor was married at the time of the transfer to which the power of withdrawal applies, twice the amount specified in s. 2503(b),

Georgia	GA Code § 53-12-83	No	Yes	Not a UTC state, but 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. The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be treated as a settlor of the trust."
Hawaii			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.
Idaho	Idaho Code § 15-7-502(5)	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."
Illinois	760 ILCS 5/16.2	No	Yes	Legislature currently considering the UTC, HB 2526, which includes an unmodified UTC 505(b) as introduced. Until then, the current statute is substantially the same: "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."
Indiana		Yes, unless exercised	Yes	Not a UTC state, follows common law. In <i>Irwin Union Bank & 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	Iowa Code §633A.3105	No	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.3105 clearly allows creditor access to any presently exercisable general power of appointment, 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 regarding lapses: "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 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. "ASSET PROTECTION (FOR THE RICH AND NOT) IN IOWA, by David M. Repp., Drake Law Review.
Kansas	Kan. Stat. Ann. §58a-505(b)	No	Yes	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	Kentucky RS §386B.5-040(2)	No	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) Upon the lapse, release, or waiver of the power, <i>the holder is not treated as the settlor</i> of the trust.” See also <i>St. Matthews Bank v. De Charette</i> , 259 Ky. 802 (Ky. 1935)

Louisiana	LA Rev Stat § 9:2004	No	Yes	<p>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:</p> <p>(1) An interest in income or principal that is subject to voluntary alienation by a beneficiary.</p> <p>(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."</p>
Maine	18-B ME Rev Stat § 505(2)	No	Yes	<p>Follows UTC 505(b): "2. Holder of power. For purposes of this section:</p> <p>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</p> <p>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."</p>
Maryland	MD Est & Trusts Code § 14.5-507	Yes	Yes	<p>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.</p> <p>(a) Not deemed property interest; foreclosure or attachment prohibited. --</p> <p>(1) A power of appointment held by a person other than the settlor of the trust is not a property interest.</p> <p>(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.</p>
Massachusetts	ALM GL ch. 203E, § 505	No	?	<p>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 that is more creditor friendly than common law, one case permits creditors of an estate access to assets subject to a decedent debtor's testamentary general powers of appointment, but I could find no law as to the effect of lapses.</p>

Michigan	Michigan MCL § 700.7506(c)(3)	No	Yes	UTC State with debtor-friendly modifications of UTC 505(b): “(3) A trust beneficiary <i>is not considered a settlor merely because of a lapse</i> , waiver, or release of a power of withdrawal over the trust property.”
Minnesota	Minn. Stat. § 501C.0505 Minn. Stat. § 502.86, §502.87	No	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."
Mississippi		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 http://www.sos.ms.gov/Policy-Research/Documents/1Tentative.pdf
Missouri	RSMo § 456.5-505.6 Mo. Rev. Stat § 456.1105	No	Yes	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.

Montana

[Mt. Stat. §72-38-505\(2\)](#)

No

Yes

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)

Nebraska

[Neb. Stat. §30-3850](#)

No

Yes

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.

Nevada

[Nevada's NRS § 163.5559\(3\)](#)

No

Yes

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 Nevada has passed the UPOAA, keeping language similar to Sections 502-503, which have similar import to above.

[NV SB 454](#)

New Hampshire

[N.H. Rev. Stat. Ann. §564-B:5-505\(b\)](#)

No

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."

New Jersey	NJS.3B:31-39.b(2)	No	Yes	<p>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 settlor 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 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.</p>
New Mexico	NM Stat § 46A-5-505(b)	No	Yes	<p>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 settlor 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 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.</p>
New Mexico	NM Stat § 46-11-503			Also passed UPOAA §503, which parallels UTC § 505(b)
New York	NY CLS EPTL § 10-7.2	No	Yes	<p>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 afoot to codify this which states that it is "it is declaratory of existing New York law": 2017 Bill Text NY A.B. 5432.</p>
North Carolina	N.C. Gen Stat. § 36C-5-505	No	Yes	<p>“(b) For purposes of this section, with respect to a power of withdrawal over property of a trust exercisable by a holder of the power other than the settlor of the trust, both of the following shall apply:</p> <p>(1) The property subject to the exercise of the power shall be subject to the claims of the creditors of the holder only when and to the extent that the holder exercises the power.</p> <p>(2) The lapse, release, or waiver of a power shall <i>not</i> be deemed to be an exercise of the power and shall not cause the holder to be treated as a settlor of the trust.”</p>

	N.C. Gen. Stat. § 31D-5-503			<p>N.C.'s version of the UPOAA Section 503 mirrors the above: "Power to withdraw.</p> <p>(a) For purposes of this Article, a power to withdraw property from a trust is treated as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw.</p> <p>(b) The lapse, release, or waiver of a power to withdraw property from a trust shall not be deemed to be an exercise of the power."</p>
North Dakota	N.D. Code §59-13-05	No	Yes	<p>"2. For purposes of this section 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, 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, or corresponding future provisions of federal tax law."</p>
Ohio	Ohio R.C. §5805.06(B)(2)	No	Yes, x2	<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>
Oklahoma	Okla. Stat. §60-175.85	Yes, unless exercised	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	Oregon ORS §130.315(3)	No	Yes, x2	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: (a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code, as in effect on December 31, 2012; (b) The amount specified in section 2503(b) of the Internal Revenue Code, as in effect on December 31, 2012; or (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.
Pennsylvania	20 Pa. C.S.A. §§ 7703	No	Yes	Pennsylvania mimics the UTC 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	RI Gen L § 34-22-13	Yes, unless exercised	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	SC Code § 62-7-505(b)		Probably	SC is a UTC state but did not include UTC 505(b) but replaced it with something else and left open whether a lapse is protected or not. I could find no reported case but would presume it would follow common law and not consider a lapse to create a self-settled trust and/or be attached.

South Dakota	South Dakota CL §55-1-26	Yes, unless exercised	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.”
Tennessee	Tenn. Code Ann. §35-15-505(b)	Yes, but limited to 5/5+ann	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." Also note §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.”
Texas	Texas Property Code § 112.035(e)	No	Yes	(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.

Utah

[Utah Code § 75-1-502](#)

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."

[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?

Vermont	14A V.S.A. § 505(b)	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."
Virginia	Va. Code § 64.2-747(B)	No	Yes, x2	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.
Washington	RCW § 11.95.160	No	Yes	Not a UTC state. "Lapse of a power—Intent not to exercise a power—Treatment. 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."

West Virginia	W.V. Code § 44D-5-505(b)	No	Yes	<p>UTC state 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>
Wisconsin	Wisc. Stat. §701.0505(2)(b))		Yes, x2	<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"> 1. A power described under par. (c). 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"> a. The amount referenced in section 2041 (b) (2) or 2514 (e) of the Internal Revenue Code. 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."
Wyoming	WY Stat § 4-10-505.1	Yes, unless exercised	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> <ol style="list-style-type: none"> (i) Is authorized under the power to appoint the property to himself, his creditors, his estate or the creditors of his estate; and (ii) Exercises the power of appointment in favor of himself, his creditors, his estate or the creditors of his estate. <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>

<u>N/A</u>	<u>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)</u>	No	Yes	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]."
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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>	<u>Restat 2d of Prop: Donative Transfers, § 13.2</u>	Yes	Yes	"§ 13.2 Creditors of the Donee -- Unexercised General Power Not Created by Donee. 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 only to the extent provided by statute." See also 3 Scott & Ascher §14.11.3.
<u>N/A</u>	<u>Restat 3d of Trusts, § 56</u>	No	No	No "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 may not 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/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 one 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>.