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### Recommended Citation

*Rights of Creditors Under a Testamentary General Power of Appointment - Wyeth v. Safe Deposit & Trust Co. of Baltimore*, 4 Md. L. Rev. 297 (1940)

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## RIGHTS OF CREDITORS UNDER A TESTAMENTARY GENERAL POWER OF APPOINTMENT

### *Wyeth v. Safe Deposit & Trust Co. of Baltimore*<sup>1</sup>

B executed a deed of trust of all her property to the Defendant as trustee, directing that the income be paid to her for life and that on her death the residue should go "for such uses as I may by last will and testament appoint." When B died she was indebted to the Plaintiff for more than \$9,000. The corpus of the trust fund was in excess of \$15,000, but apart from this her individual estate was less than \$3,000 and therefore insufficient to pay her debt to the Plaintiff. In her will B specified that it was her intention to exercise therein the power of appointment and one of the succeeding provisions was that her debt to the Plaintiff should be paid with interest.

The Court of Appeals called the power a general power and held that it had been validly exercised for the purpose of paying the debt due the Plaintiff as well as carrying out the other provisions of the will. But the Court in words implied that if the power had been exercised on behalf of appointees other than creditors, the creditors would not have been allowed to reach the property to satisfy their claims.

Major problems suggested by this case may be stated as follows:

(1) What form of words will create a general power in Maryland:<sup>2</sup>

- (a) If the donor and donee are the same person?
- (b) If the donor and donee are different persons?

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<sup>1</sup> 4 A. (2d) 753 (Md. 1939).

<sup>2</sup> The words "general power" are used in this article in their strict sense as denoting a power which the donee is authorized to exercise in favor of any person, including his own creditors. A general power is defined as one which may be exercised in favor of any person whomsoever and thus by the very terms of its definition it may be exercised in favor of a creditor. SIMES, LAW OF FUTURE INTERESTS (1936) Sec. 246; 49 C. J. 1250, Powers, Sec. 6; Gump, *The Meaning of "General" Powers of Appointment Under The Federal Estate Tax* (1937) 1 Md. L. Rev. 300; *Leser v. Burnett*, 46 Fed. (2d) 756 (C. C. A. 4th, 1931), cited and impliedly approved in *Morgan v. Commissioner of Internal Revenue*, 60 S. Ct. 424 (U. S. 1940); *Clapp v. Ingraham*, 126 Mass. 200 (1879); *Johnson v. Cushing*, 15 N. H. 298 (1844); *U. S. v. Field*, 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617, 18 A. L. R. 1461 (1921).

(2) Assuming that a general power has been created and exercised on behalf of appointees other than creditors, will the creditors of the donee be enabled to satisfy their claims from the property subject to the power, in the event the remaining estate is insufficient?

The terminology used to create the power of appointment in the *Wyeth* case would be regarded in most jurisdictions as sufficient to create a general power under which the donee could appoint to his creditors.<sup>3</sup> Also, the effect of such a power outside of Maryland would be that creditors would have a right to reach the property to satisfy their claims in the event it were appointed to a volunteer.<sup>4</sup> Both of the last statements would be true regardless of whether the donee of such power of appointment were the same person as the donor.

In Maryland, however, prior to the *Wyeth* case, it had been considered as the law that a power of appointment created by such language could not be exercised by the donee in favor of his creditors and that the property subject to it could not be reached by them. This conception resulted from a broad interpretation of the earlier case of *Balls v. Dampman*.<sup>5</sup> In the *Dampman* case, the facts were similar to this case except that the donee of the power was not the donor. The language creating the power was "to will and dispose of the same in such manner as she may see fit by any instrument in the nature of a last will and testament." The Court there said that the donee "had . . . only the power to appoint, that is, to name by

<sup>3</sup> This has never been questioned generally. It has been accepted as a natural consequence of such words and assumed as a basis for reasoning in the cases which allow the creditors to reach the property when appointed to a volunteer. See cases *supra* n. 2.

<sup>4</sup> *Supra* n. 2. See also *Freeman's Adm'r v. Butter*, 94 Va. 406, 26 S. E. 845 (1897); *Smith v. Garey*, 22 N. C. 40 (1838); *Patterson v. Lawrence*, 83 Ga. 703, 10 S. E. 355 (1880).

<sup>5</sup> 69 Md. 390, 16 A. 16, 1 L. R. A. 545 (1888). While the doctrines discussed in this note may be contained in statements made in other Maryland cases from time to time, this note confines itself to a discussion of those cases in which the wording of the power involved was sufficiently broad to have been construed elsewhere as a general power (see *supra* n. 2). It is submitted that other cases are not directly relevant because on their facts the powers involved were "limited" or "special" under generally accepted doctrines (see, for example, *Price v. Cherbonnier*, 103 Md. 107, 63 A. 209 (1906)); or, because they were decided on grounds which made their statements with reference to the doctrines herein discussed of little real weight (see *Albert, et al. v. Albert, et al.*, 68 Md. 352, 12 A. 11 (1888); *Myers v. Safe Deposit & Tr. Co.*, 73 Md. 413, 414, 21 A. 58, 59 (1891); *Prince De Bearn v. Winans*, 111 Md. 434, 74 A. 626 (1909); *Trust Co. v. Bergdorff etc., Co.*, 167 Md. 158, 173 A. 31, 93 A. L. R. 1205 (1934)).

will, the person or persons to whom the property should go; and she had no authority to devise it for the payment of her debts, that is, to encumber or consume it altogether, for her own use. The construction insisted upon would, if adopted, practically convert her from a mere life tenant into an owner of the fee."

In the instant case the court distinguished the *Dampman* case by pointing out that there the donor and donee were different persons while here they were the same. Therefore the Court said in the *Wyeth* case that there was no question of frustrating the intent of the donor, "the intent of one is of necessity the intent of the other."

In *Leser v. Burnett*,<sup>6</sup> the United States Circuit Court of Appeals for the Fourth Circuit interpreted the *Dampman* case as holding that a *limited* rather than *general* power existed and that some extraordinary terminology was necessary to create a general power in Maryland. The facts in the *Leser* case were of the same character as in the *Dampman* case and the question before the Court was whether or not the property which had been appointed to relatives should be included in the gross estate of the donee for purposes of applying the Federal Estate Tax, which by statute was to be applied to all property passing under a general power of appointment. The Court said that the Revenue Act covered general but not special powers and, in discussing the difference between the two, stated that in neither case did the donee have an estate in the property. Rather it was said that in the case of a general power the donee had a right to exercise the same in favor of his creditors whereas in the case of the special power he did not have such right, and it was this right which made the property subject to the tax. It was further held that to determine if this was a general power the Court would look to the law of Maryland, where it was well settled that the donee under the language used does not have the right to appoint his creditors (citing the *Dampman* case). The Court said that a general power could doubtless be created in Maryland by expressing in the language creating it what would be implied in most jurisdictions—i. e. that the donee might exercise the power in favor of his creditors—but unless this were expressed the power under Maryland law would not be general but

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<sup>6</sup> 46 Fed. (2d) 756 (C. C. A. 4th, 1931), cited and impliedly approved in *Morgan v. Commissioner of Internal Revenue*, 60 S. Ct. 424 (1940).

limited and being limited it would not be taxable under the Revenue Act.<sup>7</sup>

The *Wyeth* case may be regarded as the first instance where the Court has found a general power of appointment to exist in the sense that the donee was permitted to appoint to anyone, including his creditors.<sup>8</sup> As a result the Maryland law may now be expressed as holding that a true general power of appointment may be created without any special language being required if the donor and donee are the same person; but, if they are different persons, special language is required under the doctrine of the *Dampman* case.

The question next arises as to the effect of the *Wyeth* case on the broader problem involved where a general power exists under which creditors may be appointed but the donee instead exercises the power in his will in favor of others. May the creditors reach the property in equity and subject it to their claims if the ordinary assets of the donee's estate be insufficient? The determination of this question was not necessary to the decision in the instant case for the Court was only concerned with the eligibility of the creditors as appointees. However, the Court said:

"Apart from the distinctions above mentioned, it must be recognized that the position of creditors holding claims against the estate of one who has the power to appoint under a deed of trust, but fails to exercise it in their favor, is vastly different from that of creditors and other persons who are appointed by the donee, for while they take under the deed, this is because the power of appointment having once been exercised is read into that instrument."<sup>9</sup>

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<sup>7</sup> The property in the *Wyeth* case would undoubtedly be subject to the Federal Estate Tax for the court expressly stated that a general power existed and the donee was given the right to appoint to his creditors, thus meeting all the requirements laid down by the *Leser* case. See *Morgan v. Commissioner of Internal Revenue*, 60 S. Ct. 424 (U. S. 1940).

<sup>8</sup> There have been instances where the Maryland courts have referred to the existence of a general power in the sense that the creating instrument did not specify any particular persons to whom the property could or could not be appointed but in those cases the rights of creditors were not considered. It is to be presumed that the courts did not intend to change the law relating to creditors as set forth in the *Dampman* case and therefore such reference is questionable in view of the strict definition of a general power. See *supra* n. 2; *Preston v. Willett*, 105 Md. 388, 66 A. 257 (1907); *Merwin v. Carroll*, 171 Md. 346, 188 A. 803 (1937).

<sup>9</sup> The Court referring at this point to *Pope v. Safe Dep. & Tr. Co.*, 163 Md. 239, 161 A. 404 (1932).

This language implies that, although a creditor may be appointed under a general power (in the sense of a power exercisable in favor of creditors), if in fact he is not appointed he has no rights in the property and the courts will not aid him in reaching the property to satisfy his claim against the donee. Such a construction of this language would accord with an earlier similar assumption of the Court of Appeals in the *Dampman* case<sup>10</sup> although that case was not used to support the above quotation. Such construction is likewise supported by an examination of *Pope v. Safe Deposit & Trust Co.*<sup>11</sup> which was cited as authority for the above quotation. In the *Pope* case the Court said that the exercise of a power relates back to the instrument creating it, that the donee has no estate in the property subject to the power and that *the property could not be made subject to the claims of his creditors*. In the *Pope* case the question of creditors' rights was not before the Court and therefore the statement of the rule preventing creditors from reaching the property was dictum. But, it may be important dictum because the *Pope* case was also a case where the donor and donee were the same person. Therefore, in the light of the instant decision, the *Pope* case involved a general power of appointment which the donee could have exercised in favor of his creditors. Consequently, it might be argued that the Court in the *Wyeth* case wished to point out that it was not overruling the dictum in the *Pope* case but was distinguishing it as being applicable only to creditors who were not appointed and were seeking to reach the property.

The rationale of this dictum is undoubtedly the "doctrine of relation back,"<sup>12</sup> according to which the appointee is considered to take title directly from the donor, and the donee is deemed to be merely a conduit through whom the transfer is effected. Future courts may consider this doctrine as a bar to recovery by the creditor, reasoning that the donee's contacts with the property are not sufficient to subject it to claims against his estate.

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<sup>10</sup> It should be observed that in the *Dampman* case, the inability of creditors to reach the property subject to the power in the absence of appointment to them was assumed (as if conceded by counsel) rather than discussed and settled (see the *Dampman* case, 69 Md. 390, 394, where the Court said: "Now, if these words had not been written in the will of Mrs. Balls, it is not pretended, on the part of the appellant, that he could reach this property for the payment of the note in question").

<sup>11</sup> 163 Md. 239, 161 A. 404 (1932).

<sup>12</sup> *SIMES*, *op. cit. supra* n. 2, Sec. 253.

On the other hand in spite of the language in the three cases<sup>13</sup> indicating that the Court would not allow a creditor to reach property which passed under a general power of appointment, the way is still open to reach the opposite result if the issue should be directly presented for determination. First, it could be argued that the Court in the instant case did not directly approve the *Pope* case but merely referred to it to distinguish between creditors who are appointed by the donee and creditors whom the donee fails to appoint, with the inference that they were leaving that question for future solution. Secondly, it could be reasoned that although in the *Pope* case the power of appointment was similar to that involved in the instant case, at the time the *Pope* case was decided, it was felt that there could be no general power in Maryland under which creditors could be appointed unless express authority for doing so was granted. Therefore it might be suggested that the statement was made in the *Pope* case in contemplation of the power as being a limited one under which a creditor could not have been appointed in the first place; and that, had the Court viewed it as being a true general power, different language would have been used.

Allowing the creditors to succeed in reaching the property although it is not appointed to them would be but an adoption of the rule which has long been the majority view elsewhere.<sup>14</sup> The rationale of such position is that, because he can appoint the property to anyone whomever, the donee has substantially the same dominion over the property that a true owner would have, at least a sufficient interest for creditors to reach.

Primarily, the effect of the *Wyeth* case is to establish the rule that a testamentary general power of appointment—under which a creditor of the donee may be appointed—may be created in Maryland if the donor and donee are the same person, without any special language being required. But, to create such a power if donor and donee of the power are different persons, express authority must be given in the creating instrument for creditors to be appointed unless the doctrine of the *Dampman* case is to be modified in the future.

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<sup>13</sup> See the caveat to n. 5 *supra*. It is equally applicable here.

<sup>14</sup> *SIMES*, *op. cit. supra* n. 2, Sec. 246; *Clapp v. Ingraham*, 126 Mass. 200 (1879); *Johnson v. Cushing*, 15 N. H. 298 (1844); *Leser v. Burnett*, 46 Fed. (2d) 756 (C. C. A. 4th, 1931); *U. S. v. Field*, 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617, 18 A. L. R. 1461 (1921).

Secondly, the implication of the case is that even though a general power of appointment exists which the donee could exercise in his will in favor of his creditors, if instead, he appoints the property to volunteers, his creditors will not be allowed to reach the property in satisfaction of their claims. However, since this latter point has never been presented to the Court where it recognized and acknowledged that it was dealing with such a general power, there is a possibility that the Court will in the future overrule its earlier statements on the matter and follow the majority view holding in favor of the creditors.

A quære might be raised as to whether the Court ultimately might not repudiate the *Dampman* case and recognize the possibility of a general power under language such as used in the *Wyeth* and *Dampman* cases regardless of whether donor and donee are the same person, and thus be completely in accord with authority elsewhere. This should depend on whether there is a real distinction in the policy behind the interpretation of such powers according to identity of donor and donee.