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SOME ASPECTS OF POWERS OF APPOINTMENT IN MARYLAND†
By M. Peter Moser*

I. INTRODUCTION

A. Scope Note

The Maryland law of powers of appointment has developed generally in the same pattern as has the law in other states. But in this state the formal theories which grew up in the early development of powers of appointment have not been treated in the same manner as in most other jurisdictions. The purpose of this study is to search for reasons underlying some of the Maryland rules, to analyze these reasons, and through analysis attempt a prophecy of future development in these areas of power of appointment law. The tax aspects of powers of appointment in estate planning will then be considered, with emphasis placed upon the effect of the unique Maryland rules.

B. Development of Powers of Appointment

Powers of appointment were originally used to circumvent the restriction which existed prior to the passage of the Statute of Wills1 in 1540 against devising real property. One might avoid these restrictions by transferring the property inter vivos to another to the use of such persons as he should appoint by will, and until or in default of appointment to the use of the transferor and his heirs.2

The continued popularity of powers of appointment after the passage of the Statute of Wills was caused primarily by the results of the "relation-back" doctrine.

† This was originally prepared as a term paper for Professor A. James Casner's Property III course at Harvard Law School. The author, while taking full responsibility for views set forth herein, wishes to express his sincere appreciation to Professor Casner for his advice and help in the preparation of the original paper.


1 32 Hen. VIII c. 1 (1540).

2 For more complete treatment of the development of powers see 1 SIMES, FUTURE INTERESTS 430-438 (1936); KALES, FUTURE INTERESTS IN ILLINOIS 706-748 (2d ed. 1920); FARWELL, POWERS (3rd ed. 1916); SUGDEN, POWERS (8th ed. 1861); CHANCE, POWERS (1831).
Simply stated, this is the doctrine saying that the donee acts as the agent of the donor in exercising a power of appointment. The gift by the donee takes effect as if it were incorporated in the instrument creating the power.\(^9\) It follows that creditors of a donee could not reach appointive assets and that the spouse of a donee had no marital interest in them.

Gradually, courts came to realize that although the donee had no formal property interest in appointive assets, in substance he could derive the same benefit from the exercise of certain types of powers as he could if he owned the property outright. Exceptions then were made to the formal iron-bound rule of relation-back.

C. Modern Significance

In recent years the power of appointment has become increasingly important as a convenient type of testamentary disposition. A testator, by giving a life estate with a power of appointment over the remainder, projects the final distribution of the assets to the time his donee exercises the power. In this way he can create a future interest, yet preserve flexibility so that, for example, the donee can give a larger proportionate share of the appointive assets to the neediest members of a class.

An additional incentive to use powers of appointment in testamentary dispositions is that tax savings may thereby result. Thus if a donor creates by will a life estate with a power of appointment over the remainder, although the appointive assets will be taxed in his estate, they will escape a second tax in the donee's estate, provided that the power is one excepted by the Internal Revenue Code from taxation in the donee's estate.\(^4\) A testator may secure the mari-

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\(^9\) See Pope v. Safe Deposit and Trust Co., 163 Md. 239, 247, 161 Atl. 404, 407 (1932); Miller, Construction of Wills in Maryland 728 (1927) (hereinafter referred to as Miller, Wills).

\(^4\) Int. Rev. Code, sec. 811(f) (2); U. S. Treas. Reg. 105, sec. 81.24. Prior to the 1942 amendments to the Code, a donor could create a power of appointment exercisable by the donee in favor of himself, his estate, or his creditors, and the appointive assets would not be taxed in the donee's estate unless he exercised the power and the assets passed under the power. Revenue Act of 1926, sec. 302(f). See infra, Section VD 1, p. 56.
tal deduction given by the Revenue Act of 1948\(^6\) by giving his surviving spouse an equitable life estate in certain types of assets with a broad power of appointment over these assets.\(^6\)

II. **NATURE OF POWERS OF APPOINTMENT**

A. **Definition**

The conception of what types of powers are powers of appointment has been enlarged in recent years by developments in the taxation of powers. Before these developments there was a tendency towards narrowing the definition of "power of appointment", excluding such powers as a power of sale, a power of revocation, and a power to invade the corpus of a trust.\(^7\) But the Revenue Acts and the Treasury Regulations have included in the definition types of powers which are in substance powers of appointment, whether or not called such in conveyances or by state law.\(^8\)

It appears better to adopt the substantial meaning of "power of appointment" rather than to restrict the definition to a narrow property-law concept, because of the increasing importance of the taxation of powers. A power of appointment, then, is any right, given by someone (the donor) to another (the donee) or reserved by the donor to himself, to dispose of property (which the donor owns or has control over) in such manner and to such persons as the donor may prescribe, except for powers which are

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\(^6\) Section 361(a) and (b).

\(^7\) The power of appointment must be one under which the surviving spouse may appoint to her estate or herself. INT. REV. CODE, sec. 812(e) (1) (F); U. S. Treas. Reg. 105, sec. 81.47a (c). The interest in the assets given a surviving spouse must not be a "terminable interest". INT. REV. CODE, sec. 812(e) (1) (B); U. S. Treas. Reg. 105, sec. 81.47b (e). See infra, Section VB, p. 41.

\(^8\) For example, the definition of "power of appointment" in the RESTATEMENT, PROPERTY sec. 318(2) (1940), specifically excludes a power of revocation, a power to cause a gift of income to be augmented from principal, a power to designate charities, a power of sale, a power of attorney, a charitable trust, or an honorary trust.

\(^9\) See INT. REV. CODE, secs. 811(f), 1000(c); U. S. Treas. Reg. 105, sec. 81.24(b) (1); U. S. Treas. Reg. 108, sec. 86.2(b). Reserved powers of appointment might be taxed in the settlor's estate by sec. 811(f), but the broader language of sec. 811(c) and (d) is normally applied to tax any reservation of control by a settlor, including the reservation of a power to appoint. Cf. U. S. Treas. Reg. 105, sec. 81.19.
ministerial or managerial in nature, powers of attorney, charitable or honorary trusts, and powers of sale.\textsuperscript{9}

This definition will include a power to invade the corpus of a trust, whether given to the life beneficiary or to a trustee who has no beneficial interest in the appointive assets.\textsuperscript{10} A power to alter, amend, revoke, or terminate a trust reserved by the settlor or given to the trustee is included.\textsuperscript{11} A power to designate charities also is a power of appointment within the definition adopted for purposes of this study. Power to determine whether funds are corpus or income is on the borderline between a power of appointment and a managerial power. Logically it is a power of appointment, because the donee, by designating whether the assets are income or corpus, in effect appoints to the life beneficiary or to the remainderman. But for tax purposes this type of power has thus far been held to be merely managerial.\textsuperscript{12}

B. Classification

The classification of powers of appointment has created much confusion, but the following simplification should lend itself adequately to a consideration of the modern cases.

\textsuperscript{9} Cf. Maryland Mutual Benevolent Society v. Clendinen, 44 Md. 420, 433, 22 Am. Rep. 52, 55 (1876), where it is stated: "A power is defined to be a "liberty" or "authority" reserved by, or limited to, a party to dispose of real or personal property for his own benefit, or for the benefit of others, and operating upon an estate or interest, vested either in himself or in some other person; the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either wholly or partially." Butler, note 1, to Co. Lit., 342b; 1 Chance on Powers, see. 1."

Quoted with approval in Pope v. Safe Deposit & Trust Co., 163 Md. 239, 245, 161 Atl. 404, 406 (1932) and in Miller, Wills 701 (1927).

\textsuperscript{10} Logically, whether a power to invade corpus is given to the life beneficiary without beneficial interest should make no difference. But such a power given to a person without beneficial interest in the appointive assets is not within the definition of "power of appointment" in the Internal Revenue Code, secs. 811(f) (2) (B), 1000(c). The Code defines "power of appointment" to include only those powers which are taxed in the donee's estate. See Paul, Federal Estate and Gift Taxation 254, n. 1 (Supp. 1946).

\textsuperscript{11} The reservation of a power to alter, amend, revoke or terminate by the settlor would cause assets subject to the power to be taxed in his estate by sec. 811(d) of the Internal Revenue Code. A similar power given a trustee without beneficial interest would be excepted from taxation in the trustee's estate by sec. 811(f) (2) (B). If the trustee had a beneficial interest in the appointive assets, they would be taxed in his estate unless the power was excepted by sec. 811(f) (2) (A).

\textsuperscript{12} E.g., Estate of Fiske, 5 T. C. M. 42, Dec. 14964 (M) (1946); Contra (in effect); Estate of Hager, 5 T. C. M. 972, Dec. 15480 (M) (1946).
All powers of appointment have four common features by which they may be classified. First, a power is *in gross* if the donee has an estate in the appointive assets which is not affected by the exercise of the power; *appendant*, if the donee has an estate in the appointive assets which is divested by the exercise of the power;\(^{13}\) or *collateral* if the donee has no estate at all in the appointive assets.\(^{14}\)

Second, a power is *reserved* when the donor retains the exercise of the power in himself; or *not reserved* when the donor creates the power exercisable by another.

Third, a power is *testamentary* if the donee may appoint only by will; *presently exercisable* if the donee may exercise the power at any time during his life or by will; or *contingent* if the donee may exercise the power only after a condition precedent has been satisfied.

Fourth, a power is *general* when the donee may appoint to anyone including himself, his estate, or his creditors; *special* when the donee may appoint among a limited class not unreasonably large; or *hybrid* if the group of appointees is limited somewhere between these two classes.

Special powers are *exclusive* if the donor's intent is construed to permit the donee to appoint to certain members of the limited class, yet exclude others; or *non-exclusive*, if the donor's intent is construed to require the donee to give a portion of the appointive assets to each member of the class.

\(^{13}\) *Restatement, Property,* sec. 325 (1940), suggests that a modern court should treat a power appendant as if it were no power at all, since the donor of such a power gives the donee a fee simple, then adds a power to appoint to anyone but the donee. The right to dispose of property is one the donee already has by reason of his ownership. *Contra:* Legget v. Doremus, 25 N. J. Eq. 122 (1874), (which held that creditors who had attached a debtor's assets subject to an appendant power of sale could not enjoin the exercise of the power). No Maryland case has upheld the exercise of a power appendant, but powers appendant were present in the following cases: Cook v. Councilman, 109 Md. 622, 72 Atl. 404 (1909); Worthington v. Rich, 77 Md. 265, 26 Atl. 403 (1893); Brown v. Renshaw, 57 Md. 67 (1881); Nevin v. Gillespie, 56 Md. 320 (1881).

\(^{14}\) *Cf.* Reid v. Gordon, 33 Md. 174, 184 (1872), (a case involving a power of sale):

"Powers, it is said, are either appendant, or in gross, or altogether collateral; appendant, when the exercise of them is in the first instance to interfere with, and to a certain extent, to supersede the estate of the donee of such power; in gross, when they do not commence until the determination of the estate of the donee; and collateral, when the donee has no estate at all in the property which is the subject of the power."
A type of hybrid power which merits special definition is a power given the donee by another, unlimited as to whom he may appoint. Maryland courts imply a limitation that the donee may not appoint assets subject to such a power to himself, his estate, or his creditors. For purposes of this study the power unlimited as to appointees, created for the donee by another, will be called a Maryland general power.

C. General Characteristics

Before considering characteristics of special and general powers, some rules which apply to all powers or which depend on whether a power is presently exercisable or is testamentary must be discussed.

1. Scope of the donee's discretion

A basic characteristic which is a corollary of the "relation-back" doctrine and applies in every area of the law of powers is that the donee must exercise a power within the limits set by the donor. Thus the donor can require that two or more named individuals must act together in exercising a power and an appointment by only one is invalid. The donor may create a power operating only after the occurrence of a condition precedent.

The donor who creates a testamentary power of any kind desires the donee to remain free to exercise his discretion until he dies. Therefore an inter vivos contract to appoint

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10 Balls v. Dampman, 69 Md. 390, 16 Atl. 16 (1888).
11 This is the doctrine that the donee's appointment is read as if it were incorporated in the instrument creating the power. See supra, Section 1B, p. 13.
12 This characteristic is the primary difference between a power over, and ownership of, property. Ordinarily, the owner of property is not restricted as to the manner in which he may dispose of it. However, the donee of a power cannot exceed the limits set by the donor. This rule applies to general powers, as well as to the more limited types, although most of the cases concern special powers. See, e.g., Price v. Cherbonnier, 103 Md. 107, 63 Atl. 209 (1906), (involving a fraudulent appointment under a special power); Myers v. Safe Deposit and Trust Co., 73 Md. 413, 21 Atl. 58 (1891), (as to the type of estate a donee may appoint); Balls v. Dampman, 69 Md. 390, 16 Atl. 16 (1888), (on the limits of appointment of property subject to a Maryland general power).
13 Powles v. Jordan, 62 Md. 490 (1884), (concerning a power of sale). Cf. Schley v. McCeney, 36 Md. 266 (1872), (as to the application of this rule to powers of appointment).
assets subject to such a power to someone by will is unenforceable. However, the release of a power would probably be permitted in Maryland.

2. Rule against Perpetuities

The effect of the Rule against Perpetuities on powers of appointment is important today as preventive medicine: if one knows what the courts have held, he should not create a disposition which may violate the Rule. Discussion in this study will be limited to the manner in which the period for the Rule is computed and the basic mechanics of its application to powers of appointment.

In Maryland, the period for the Rule is computed from the donor’s death, if the power is created by will, or from the time the donor executes the deed, if the power is created inter vivos. However, because of the similarity to actual ownership, courts in other states have held that where the donor creates a general power which the donee can exercise at any time in favor of himself or his creditors, the period for the Rule is computed from the time the donee exercises the power. If a power the donee may exercise at any time in favor of himself or his creditors (as dis-
tinguished from the more limited Maryland general power) were before a Maryland court, it is likely that the period for the Rule would be computed from the time the donee exercises the power, as it is in other states.

The mechanics of the Rule as applied to powers of appointment are complex, but operate with the precision of mathematics. A consideration of the basic rules may be divided into validity of the power and validity of the appointment.

If a power might be exercised at a time beyond the period of perpetuities, it is void.7 Thus where the donor creates by will a testamentary power of appointment in his first-born grandchild and he has no grandchildren at his death, the power is void because it might be exercised more than twenty-one years after the death of the donor's child, who is the life in being at the donor's death.

If the donee's disposition may not vest within a life in being and twenty-one years from the creation of the power then the appointment is void.8 For example, where the donee of a testamentary power appoints "to my nephew, C., if he becomes a lawyer", and the nephew was not alive at the donor's death, the appointment is void, because it may not vest within twenty-one years from the death of the donee, who is the life in being.

3. Special powers

A special power of appointment, particularly a non-exclusive special testamentary power, is in many ways like a trust.

An appointment to someone not a member of the named class is a fraud on the power.29 If a special power of appointment is not exercised, or for some reason an attempt to exercise it fails, and there is no gift in default of appointment, a court of equity will dispose of the appointive assets

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as it feels the donor would have wanted them to pass in
the absence of an appointment by the donee. Normally
this results in all members of the class sharing equally in
the appointive property.

4. General powers

The rights of the donee of a general power are similar
to those of the owner of property.

In most states the donee of such a power may use the
appointive assets as he wishes, so long as he complies with
the formalities required by the donor. Anti-lapse statutes
generally are applied to prevent failure of appointments
attempted by the donee of a general power.

In Maryland the donor cannot create a true general
power in another person merely by using in his conveyance
unrestricted terms as to possible appointees. However, if
a power is made expressly exercisable in favor of the donee,
his estate or his creditors, it is probable that the power will
be treated by Maryland courts as are true general powers
in other states.

A settlor who reserves a testamentary power with no
restrictions as to the persons to whom he may appoint, or
as to the amount each person shall receive, may appoint by
will to his creditors. The court reasons that such an

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30 There are no cases in Maryland on this point. Some courts in other
jurisdictions speak of the special power as a "power in trust", which the
donee must exercise. See MILLER, WILLS 733 (1927). Under this theory if
the donee fails to exercise the power, the court itself will assume jurisdic-
tion and "exercise" it. Other courts state that in the absence of an express
default clause they will imply a gift in default of appointment. E.g., Bridgew-
ater v. Turner, 161 Tenn. 111, 29 S. W. 2d 659 (1930); RESTATEMENT
PROPERTY, sec. 367 (1940). Compare the Maryland cases involving general
powers where it is said appointive property passes as property of the donor
on intestacy, if there is no appointment and no gift in default; Worthington
v. Rich, 77 Md. 265, 26 Atl. 403 (1893); Mines v. Gambrill, 71 Md. 30, 18
Atl. 43 (1899); Foos v. Scarf, 55 Md. 301 (1881). Cf. Smith v. Hardesty,
88 Md. 387, 41 Atl. 788 (1908).

31 There are no cases under the Maryland statute. See Thompson v. Pew,
214 Mass. 520, 102 N. E. 122 (1913); Note, 14 N. C. L. Rev. 302 (1936).

32 See Balls v. Dampman, 69 Md. 360, 16 Atl. 16 (1888).

33 Wyeth v. Safe Deposit & Trust Co., 176 Md. 369, 4 A. 2d 753, noted
141, 59 Atl. 702 (1905).
appointment cannot frustrate the donor's intent as to limits on the donee's discretion, since the donor and the donee are the same person. It follows from this reasoning that the settlor-donee of a reserved power such as this could also appoint by will to his estate. Thus a donor in Maryland can reserve a true general power without stating specifically that the power shall be exercisable in favor of the donee, his estate or his creditors.

5. Maryland General Power

The courts in Maryland differ basically from those in a majority of jurisdictions in their treatment of a power of appointment created by the donor for another without limit as to possible appointees. It is stated that:

"A power of appointment is said to be general when there is no limitation as to its exercise (except as to the manner), nor as to the persons in whose favor it is to be exercised, nor as to the amounts to be given to such persons."36

But Maryland courts imply a limitation on such a power that the donee may not appoint to himself, his estate, or his creditors, even though they call it a "general" power.

III. RIGHTS OF A DONEE'S CREDITORS IN APPOINTEE PROPERTY

To evaluate the cases concerning the rights of creditors of a donee in property over which he has a power of appointment, one should understand that the decisions represent attempts by the courts to resolve an underlying conflict of policies. On one side is the policy operating in favor of creditors, that a donee who has virtually complete enjoyment of wealth should be required to pay his debts with this wealth, if his owned assets are insufficient for the purpose. On the other side is the policy in favor of allowing a donor to impose conditions on the transfer of property. The latter policy is defeated if a donee's creditors are permitted

to reach appointive assets, unless by the terms of the power the donee could appoint to his creditors.

If the donee has a special power of appointment, the balance is in favor of the policy for allowing a donor to impose conditions on the transfer of property. But if the donee has a general power which he could exercise in favor of his creditors, the balance should be in favor of such creditors, since the restrictions the donor has imposed on the exercise of the power will not be violated.

In the treatment of special and general powers of appointment where the donee is also the donor or settlor, analysis is directed towards the rights of creditors based on an assumption that the original conveyance by the settlor-donee was not a fraud on his creditors.

A. Special Powers of Appointment

Creditors of the donee of any type of special power of appointment would probably not be permitted by the Maryland courts to reach the appointive assets. Discussion of this subject may be divided into consideration of powers created by someone not the donee and powers reserved by the donee.

1. Powers created by someone not the donee

The right of creditors to reach appointive property where the donee was given a life estate with a power to appoint by will among a limited class has been at issue, and only indirectly, in one Maryland case. It was held that the donee of a testamentary power to appoint to his children

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[37] Courts in a majority of the jurisdictions require that the donee exercise some dominion over the appointive property before they will allow creditors to reach it, even where the donee could have exercised the power in favor of his creditors. See, e.g., Clapp v. Ingraham, 126 Mass. 200 (1879). This requirement is based on the theory that unless the donee exercises or attempts to exercise the power, the property passes by the will of the donor, or by other instrument of creation.

[38] Statutes 13 ELiz. c. 5 (1570) and 27 ELiz. c. 4 (1585), are part of the Maryland law of fraudulent conveyances. Md. Code Art. 39B (1939), contains the Maryland version of the Uniform Fraudulent Conveyances Act. See Brinton v. Hook, 3 Md. Ch. 477 (1850), (in which the reservation of a general power exercisable by deed or will by the donee was held to be in fraud of creditors, although the donee did not exercise the power). See Note 33 Mich. L. Rev. 1291, 1293 (1935).
could not exercise the power in favor of his creditors. A fortiori, where a donee made no attempt to appoint to his creditors they could not reach assets subject to a power to appoint to a limited class.

2. Powers reserved by the donee

Although there are no cases involving attempts by creditors to reach appointive property where the donee has reserved a power to appoint to a limited class, in the absence of a fraud on creditors in the original transaction, the fact that the settlor-donee could appoint only to a small group of persons would be determinative in precluding creditors from reaching the appointive assets.

B. General Powers of Appointment

Three types of powers of appointment will be discussed in this Sub-section: the Maryland general power, the reserved general power, and the power created for the donee by another expressly exercisable in favor of the donee, his estate, or his creditors. The Maryland general power, although actually a form of hybrid power, is considered here because Maryland courts call it a general power. The reserved general power is considered here because Maryland courts will probably treat it, in determining the rights of creditors to appointive assets, as courts in other jurisdictions treat general powers. With the background provided by analysis of the Maryland general power and the reserved general power, the rights of creditors in appointive assets subject to a power created for the donee by another expressly exercisable in favor of the donee, his estate, or his creditors will be considered.

1. The Maryland general power

The leading case on the ability of creditors to reach property subject to a Maryland general power is Balls v. Dampman. The donee's husband gave her a life estate in

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40 Price v. Cherbonnier, 103 Md. 107, 63 Atl. 209 (1906).
46 69 Md. 390, 16 Atl. 16 (1888). See a related case, Balls v. Balls, 69 Md. 388, 16 Atl. 18 (1888).
realty with power "to will and dispose of the same in such manner as she may see fit by any instrument in the nature of a will she may see proper to make", and in default of appointment to her two youngest daughters. The donee left a will which in the first paragraph ordered all her just debts paid, then devised and bequeathed all her real, mixed, and personal property to her two youngest daughters. The donee's owned assets were insufficient to pay her creditors. The court called the question one of construction as to whether the donee exercised the power, and under the rule then existing\(^1\) it was held that the residuary clause exercised the power, but that the direction to pay debts had no effect at all. As a second reason for finding against the creditor the court cited the fact that the donee had only power to name persons to whom the property should go, and

"... 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 on would, if adopted, practically convert her from a mere life tenant into an owner of the fee."\(^2\)

In construing the donor's intent to limit the scope of appointment, the court in the Balls case failed to follow the existing law and, it seems, did not recognize the basic issues. No authorities were cited for the proposition that creditors cannot reach property subject to an unlimited power of appointment where the donee exercises the power. Evidently, no cases involving similar powers were mentioned to the court. In fact, it appears that the creditor conceded that he had no right to reach the appointive property but for the direction to pay debts contained in the donee's will.

\(^1\) The rule applied by the court was that a power is exercised where a provision of the donee's will would be inoperative unless appointive property were included in his dispositions. In the Balls case the donee had no real property except that subject to the power of appointment her husband gave her. Since the residuary clause would otherwise have been inoperative as to reality, the court found that the power was exercised.

\(^2\) 69 Md. 390, 394, 16 Atl. 16, 18 (1888). This dictum has been cited with approval in many of the Maryland power of appointment cases. See, e.g., Wyeth v. Safe Deposit and Trust Co., 176 Md. 369, 375, 4 A. 2d 753, 756, noted 4 Md. L. Rev. 297 (1939); Leser v. Burnett, 46 F. 2d 756, 761 (4th Cir. 1931).
The similarity of an unlimited power to complete ownership was overlooked in the opinion and was not stressed in argument. The creditor did not venture to explain that the gift in default was merely a provision against a failure to appoint to anyone, and was not intended to limit the scope of the donee’s possible appointments. Had counsel raised these points and cited available cases, the creditor should have won.43

There is one ground on which the decision can be sustained: the appointment was to the takers in default of the same shares that they would have taken had the donee made no appointment. It could be argued that there was in reality no appointment, and the creditor should not have been allowed to reach property subject to the power, since it was not exercised.44 However, the court treated the power as having been effectively exercised and did not mention this line of reasoning.

However, if one accepts as correct the construction of the donor’s intent to limit the scope of appointment in the Balls case, the conclusion that creditors could not reach the appointive assets was parallel to existing authority. Under the majority rule the basis for allowing creditors to reach property subject to a general power was first, that by a construction of the donor’s intent the donee could appoint to his creditors if he wished, and second, that the donee had exercised some dominion over the power by at least an attempt to appoint.45 Since the first point is absent if one accepts the Maryland rule of construction of the donor’s intent to limit the scope of appointment, it would be a fraud

43 Creditors of the donee had been permitted to reach property subject to a general testamentary power of appointment if the donee actually exercised the power. SUGDEN, POWERS, (8th ed. 1861), p. 471, and the cases cited in n. (s); Clapp v. Ingraham, 126 Mass. 200 (1879). In some jurisdictions this view had not been followed. Wales v. Bowdish, 61 Vt. 23, 17 Atl. 1000 (1889); Commonwealth v. Duffield, 12 Pa. St. 277 (1849).


on the power to allow a donee to appoint to his creditors. In light of such a construction, in the absence of a direct appointment to creditors, the basis for not allowing their claims in appointive assets is even stronger.

2. The reserved general power

If the donee has created a life estate for himself with a general power reserved, creditors can reach the appointive property if the power is presently exercisable, whether or not the donee exercises the power. This result is reached because in such a case it is extremely difficult to prove actual fraudulent intent at the time of the original transaction and the donee has kept absolute control over the property.

Creditors can reach the income from appointive property where the donee has created a life estate in trust reserving a general power exercisable by will only. However, during the donee’s life, creditors cannot reach the principal of property subject to a general testamentary power. Since the donee could not appoint to his creditors during his lifetime, these rules seem logical.

A donee who has reserved a general testamentary power can appoint by will to his creditors. In Wyeth v. Safe Deposit & Trust Co. the donee transferred property to a trustee to pay her the income for life, remainder as she should direct by last will and testament. The court found

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46 The similarity, under the construction in the Balls case, of a general power in Maryland created by one other than the donee to a special power is apparent. Under this construction of the scope of appointment of the donee of a general power, it is as much a fraud on the power for the donee to exercise it in favor of his creditors as it would be for him to exercise a special power in favor of one outside the class prescribed by the donor. Scott v. Keane, 87 Md. 709, 40 Atl. 1070 (1888). Cf. Brinton v. Hook, 3 Md. Ch. 477 (1850).
48 Warner v. Rice, 66 Md. 436, 8 Atl. 84 (1887).
49 Wyeth v. Safe Deposit & Trust Co., 176 Md. 369, 4 A. 2d 753, noted 4 Md. L. Rev. 297 (1939); Mercantile Trust Co. v. Bergdorf & Goodman Co., 167 Md. 168, 173 Atl. 31, 93 A. L. R. 1205, 33 Mich. L. Rev. 1291, 19 Minn. L. Rev. 347 (1934); See Pope v. Safe Deposit & Trust Co., 163 Md. 239, 161 Atl. 404 (1932). Cf. Raffel v. Safe Deposit & Trust Co., 100 Md. 141, 59 Atl. 702 (1905). The note in the Michigan Law Review indicates that the Bergdorf case, holding that creditors cannot reach appointive property subject to a reserved general power to appoint by will even where the donee has also reserved a life estate, is contrary to the majority rule in the United States.
50 176 Md. 369, 4 A. 2d 753, noted 4 Md. L. Rev. 297 (1939).
that she exercised the power in her will and upheld appointments to a creditor.

The problem of violation of the donor's intent was not present as it was in the Balls case, since the donee here was also the donor. In considering prior cases, the court stated that they must be limited to their facts, these being either that the donee and donor were different persons or that the powers were so worded as to exclude creditors.

The court distinguished between the situations where creditors are appointed by the donee of a reserved general testamentary power, and those where they are not so appointed, on the basis of the "relation-back" doctrine. This dictum indicates that the donee of a reserved general testamentary power does not take the appointive property out of the deed creating the power even where he exercises a dominion over the power by appointing to someone. Such a finding would not be in agreement with the majority rule, although it technically is in accord with the Maryland law as enunciated in Pope v. Safe Deposit & Trust Co. But the Pope case did not involve the rights of creditors in appointive assets, so if the direct question arose whether creditors can reach appointive assets under a reserved general testamentary power exercised by will, the Pope case might be distinguished or even overruled. Since property subject to a reserved general testamentary power is practically the same as owned property, a decision that creditors can reach property subject to the power if it is exercised would certainly be the most reasonable result.

The court cited Pope v. Safe Deposit & Trust Co., 163 Md. 239, 161 Atl. 404 (1932), after making this distinction. Since this case held that property subject to a reserved general power of appointment exercised by will was not a part of the donee's estate when he died because the exercise was as though incorporated in the deed creating the power, the court in the Wyeth case seems to cite the Pope case as a direct decision in support of its proposition.

See Note, 4 Md. L. Rev. 297, 302, where it is suggested that the Wyeth case does not expressly approve the Pope case, but merely distinguishes it, and that the court in the Pope case may have assumed that no general testamentary power, no matter by whom it was created, could be exercised in favor of the donee's creditors. These arguments would aid in the finding suggested in the text above. But it appears that the court in the Wyeth case did directly approve the application in the Pope case of the "relation-back" doctrine. See n. 52, supra. Therefore the finding suggested in the text above would necessitate at least a partial overruling of the Pope case.
3. The general power not reserved

If a donor creates a general testamentary power expressly exercisable in favor of the donee's estate or his creditors, the donee could appoint to his creditors. If the donee of such a power, having insufficient owned assets to meet his obligations, exercises the power, the Wyeth dictum would probably be overruled, the Pope case distinguished, and creditors permitted to reach the appointive assets.

A presently exercisable general power with express language permitting the donee to appoint to himself, his estate, or his creditors should receive the same treatment. If the donee exercises the power either by deed or will, his creditors should be allowed to reach the appointive assets.

C. The Federal Bankruptcy Act

The Bankruptcy Act casts aside most of the old common law of powers and bases its results more on substance than on form. The Act provides that the Trustee in Bankruptcy shall be

"... vested by operation of law with the title of the bankrupt, as of the date of the filing of the petition in bankruptcy, ... to all ... (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person."

A question immediately arises as to what types of powers are included in the definition of those that vest in the Trustee. There are no cases under Maryland law and the Bankruptcy Act involving attempts by the Trustee of a donee to reach appointive assets. But the answer is plain if the wording of the statute, the Maryland cases on powers

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55 176 Md. 369, 376, 4 A. 2d 753, 756 (1939).
56 163 Md. 239, 161 Atl. 404 (1932).
57 See Note, 4 Md. L. Rev. 297, 303, where the writer suggests that the Balls case might be overruled.
of appointment, and the rulings of courts in other jurisdictions are followed.59

1. Special powers of appointment

Clearly any type of special power cannot be reached by the Trustee of a donee, since the power is one the bankrupt could exercise only in favor of some other person who is a member of the class limited by the donor.

2. General powers of appointment

Cases hold that the Trustee can reach a general power if the bankrupt may exercise it in favor of himself as of the date of filing the petition in bankruptcy, but cannot reach a testamentary general power.60 Because the bankrupt may not appoint to himself, assets subject to a Maryland general power presently exercisable would not vest in the Trustee. A fortiori, property subject to a testamentary Maryland general power would not vest in the Trustee.

However, a Trustee in Maryland can probably reach a power created by the donor and expressly exercisable by deed or will in favor of the donee, his estate, or his creditors, if the power is exercisable as of the date of filing the petition. The Trustee cannot reach such a power if it is testamentary, since the donee cannot exercise it for his own benefit.

A general power reserved by a donor presents a more difficult problem. Scott v. Keane61 holds that a reserved general power presently exercisable can be reached by creditors even though the donee fails to exercise the power. A fortiori, the donee of this type of power can appoint to his creditors. If it also follows that the donee can appoint to himself, then the Trustee can reach the appointive assets. Because of the similarity of such a power to ownership, a court in bankruptcy proceedings would probably hold that assets subject to a reserved general power presently exerc-

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59 See McLaughlin, Aspects of the Chandler Bill, 4 U. of Chi. L. Rev. 369, 381-384 (1937), for a discussion of the 1938 amendments to sec. 70(a) of the Federal Bankruptcy Act; RESTATEMENT, PROPERTY, sec. 331 (1940).
60 E.g., Montague v. Silsbee, 218 Mass. 107, 105 N. E. 611 (1914).
61 87 Md. 709, 40 Atl. 1070 (1898).
POWERS OF APPOINTMENT

3. Miscellaneous problems

Two other questions concerning powers of appointment and the Bankruptcy Act are: (a) what constitutes a preferential appointment and (b) what value should be allotted a power in determining whether a donee is insolvent within the definition of the Act.\(^6^3\)

It is likely that any deed exercising a power which ordinarily would vest in the Trustee under the Act, executed within four months before the filing of a petition in bankruptcy is a preference.\(^6^4\)

The second question is more difficult to answer. However, it is probable that the full value of the appointive assets would be considered part of the donee’s estate in bankruptcy for purposes of determining whether he is insolvent within the definition of the Act, because the donee can make the appointive property his own merely by executing a deed.

IV. THE RIGHTS OF A SURVIVING SPOUSE IN APPOINITIVE ASSETS OF THE DONEE

The spouse of a donee may have an interest in appointive assets whether or not the donee exercises the power in her favor. The donee may appoint property subject to a power to his spouse only if the exercise is within the limits set by the donor when he created the power.\(^6^5\)

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\(^{6^2}\) Cf. Raffel v. Safe Deposit & Trust Co., 100 Md. 141, 59 Atl. 702 (1905). But see Allen v. Safe Deposit & Trust Co., 177 Md. 26, 7 A. 2d 180 (1939).\(^{6^3}\) A preference is defined in 52 STAT. 869 (1938), 11 U. S. C. sec. 96(a) (1946). The definition of “insolvency” for purpose of the Bankruptcy Act appears in 60 STAT. 323 (1946), 11 U. S. C. sec. 1 (19) (1946).\(^{6^4}\) For other problems created by the 1938 amendments in The Chandler Act as to preferences see Hanna, Preferences in Bankruptcy, 8 U. of Chi. L. Rev. 511 (1948); McLaughlin, Defining a Preference in Bankruptcy, 60 Harv. L. Rev. 233 (1946).\(^{6^5}\) The question is more one of the permissible scope of the donee’s appointment than it is of the rights of his spouse in appointive assets, but is considered in this Section because of its relation to the rights of a surviving spouse.
More complicated problems arise where the donee does not exercise the power in favor of his surviving spouse. The rights of the survivor are then determined by the statutes and constructional case law which prevent a decedent from depriving his spouse of a minimum portion of his property by will.66

A. Where the Donee Appoints to his Spouse

The type of power the donor gives the donee determines whether or not he may appoint to his surviving spouse.

It is clear that the donee of a special power cannot appoint to his surviving spouse unless the spouse is a member of the class the donor has designated.67 An appointment to a spouse who is included in the class must comply with the donor's intent as expressed in the instrument creating the power.68

Can the donee of a Maryland general power appoint to his surviving spouse? There are arguments on both sides of the question. Against permitting such an appointment, one can cite the language of the court in cases involving appointments to creditors of assets subject to a Maryland general power, to the effect that the donee of such a power cannot consume the appointive assets wholly for his own benefit.69 The marital obligation to provide for one's husband or wife70 by will is as important as the obligation to pay debts. It follows that the donee consumes appointive assets for his own benefit when he appoints to his surviving spouse, just as he does when he appoints to his creditors. The same rules should apply in both situations, so the donee

67 Miller, Wills secs. 261, 263 (1927); Cf. Price v. Cherbonnier, 103 Md. 107, 63 Atl. 209 (1906); Smith v. Hardesty, 88 Md. 387, 41 Atl. 788 (1898); Myers v. Safe Deposit & Trust Co., 73 Md. 413, 21 Atl. 58 (1891).
68 For example, if the wife is a member of the class, and the donor indicates that the appointment must be to all members of the class of a substantial part of the appointive assets, then an appointment to the wife alone would be void. Barrett's Executor v. Barrett, 166 Ky. 411, 179 S. W. 396 (1915). Accord, Allder v. Jones, 98 Md. 101, 56 Atl. 487 (1905). Cf. Jones v. Day, 102 Md. 99, 62 Atl. 364 (1905).
69 See Balls v. Dampman, 69 Md. 390, 394, 16 Atl. 18, 18 (1888).
70 This obligation is made the same as to husband and wife by statute in Maryland. See Md. Code, Art. 45, sec. 7 (1939); Md. Code Supp., Art. 93, sec. 314; Art. 45, sec. 6 (1947).
of a Maryland general power would not be permitted to appoint to his surviving spouse.

For permitting the donee of this type of power to appoint to his surviving spouse, one might argue that the donor intended the donee to be permitted to make such an appointment because of close family relationship. The donor could have expressly forbidden the appointment, but did not. Courts should not imply a limitation against an appointment to a spouse, as they do in the case of creditors, because the intent of the donor to prevent such an appointment is less clear than in the creditor situation. In addition one might suggest that the decision in Balls v. Dampman was based on a misinterpretation of the issue before the court, and that although the rule as to creditors is too firmly embedded in our law to be overruled, it should not be extended to prevent the donee of a Maryland general power from appointing to his surviving spouse.

The donee of a reserved general power, whether exercisable by will or not, or of a power expressly exercisable in favor of his estate or his creditors could appoint to his surviving spouse, if these powers are treated as are true general powers in other jurisdictions.

B. Where the Donee Fails to Appoint to His Spouse

If a donee does not exercise a power in favor of his surviving spouse, a question arises whether the surviving spouse can reach the appointive property for dower in “land held or owned” by the decedent during coverture or for her statutory share of his estate at death. The courts in Maryland approach the answer to the question differently in the cases of “granted” and “reserved” powers.

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71 See Safe Deposit & Trust Co. v. Robertson, 65 A. 2d 292 (Md. 1949), (holding that the spouse of the beneficiary of a spendthrift trust can reach the income from such trust for alimony, although creditors cannot satisfy their claims from either the income or the corpus of a spendthrift trust in Maryland).
72 69 Md. 390, 16 Atl. 16 (1888).
74 Md. Code, Art. 93, secs. 313-330 (1939) ; Md. Code Supp., Art. 93, sec. 314, (which provides what shares the surviving husband or wife shall take upon election to “waive” the will or upon intestacy of the decedent), and 315 (1947).
1. **Powers created by someone not the donee — “Granted” Powers**

The issue is whether the statutes which give a surviving spouse dower in land or a share in land and personalty include powers of appointment created for the donee by someone else.

For a spouse to have dower in lands, the decedent must have been seized during coverture of an estate of inheritance which the issue of the marriage might have taken as heirs. The donee has no estate in lands subject to a power of appointment, hence his surviving spouse has no dower right in such lands.

The spouse of a donee probably would not be permitted to take a statutory share of property subject to any type of power of appointment, because appointive assets are not a part of the decedent’s estate. However, if the donee has a general power expressly exercisable in favor of his estate or creditors, one might argue that his surviving spouse should be permitted to take a statutory share in the appointive assets, because of the similarity of such a power to ownership. Even in this situation it is likely that the power would be held not to be a part of the decedent’s estate within the meaning of the statute.

2. **Powers reserved by the donee**

The surviving spouse may take dower in, or a statutory share of, property subject to a reserved power if the reser-
vation was a "fraud" on her marital rights, even though she could not have reached the appointive property had such a power been created by another. Although Maryland courts have not consistently applied any single test for "fraud" on marital rights, the one most often used is that if the transferor either directly or indirectly retains possession of, receives the benefit from, or maintains control over property he purports to transfer, then his conveyance is merely colorable and constitutes a "fraud" on his spouse's marital rights.

In determining whether a "fraud" on marital rights has been committed, an important element is the time the contested reservation took place with reference to the marriage. A case may receive different treatment if the transaction occurred before, but not in contemplation of the marriage; in contemplation of marriage; or during the marriage.

a. Reservations before marriage

Where the donee reserves a power before, but not in contemplation of marriage, there can be no "fraud" on a future spouse's marital rights, and a surviving spouse could not reach the appointive assets for dower or a statutory share.

b. Reservations in contemplation of marriage

Except in extreme cases, it is unlikely that the reservation of any power in contemplation of marriage would be held to violate the marital rights of a surviving spouse. In determining the rights of a surviving spouse, such a power

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80 See Sykes, Inter Vivos Transfers in Violation of the Rights of Surviving Spouses, 10 Md. L. Rev. 1 (1949); Cahn, Restraints on Disinheritance, 55 U. of Pa. L. Rev. 139 (1936), for more complete discussions of defeating the marital rights of surviving spouses. Sykes, supra, p. 11, suggests the use of the phrase "violation of marital rights", rather than "fraud on marital rights" and enumerates the factors a court may deem relevant in each case.

81 See Rabbitt v. Gaither, 67 Md. 94, 105, 8 Atl. 744, 748 (1887).

82 See, e.g., Collins v. Collins, 98 Md. 473, 57 Atl. 597 (1904), (a voluntary conveyance of all of a spouse's property on the eve of marriage with intent to defeat his widow's marital rights held a violation of those rights); Kavanaugh v. Kavanaugh, 279 Mass. 237, 181 N. E. 181 (1932). A secret ante-nuptial conveyance made to avoid the attaching of marital rights may be set aside as a fraud upon such rights. See Moody v. Hall, 61 Md. 517, 523 (1884).
would ordinarily be treated as though created by another for the donee.\textsuperscript{83}

If the power was over realty, a court would more readily hold the reservation a fraud on the surviving spouse’s marital rights than if it were over personalty or leasehold property, because inchoate dower vests at marriage but the right to a statutory share of personalty arises only at the decedent’s death.\textsuperscript{84} A life estate and a general power of appointment reserved by the donee would more likely be held a conveyance in fraud of his surviving spouse’s marital rights than would the reservation of a life estate and a special power. But the decision in each case would rest on the merit of the claims of the surviving spouse in that particular fact situation.\textsuperscript{85}

c. Reservations after marriage

Even an absolute conveyance of all interest in an estate of inheritance in land held after marriage will not defeat the dower rights of a surviving spouse if she does not join in the conveyance.\textsuperscript{86} A fortiori where any type of power or other control is retained by a settlor over land, his wife may still take dower in that land.

An absolute conveyance of personal or leasehold property after marriage will defeat a surviving spouse’s claims to a statutory share of the assets conveyed.\textsuperscript{87} But the reservation of a power is not an absolute conveyance. In Jaworski v. Wisniewski,\textsuperscript{88} H. and W., incident to a separation, assigned

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  \item \textsuperscript{83} See supra, Section IV B 1, p. 34.
  \item \textsuperscript{84} For an example of different treatments by the same jurisdiction of conveyances of land and of personalty where the transferring spouse retained effective control, compare Kavanaugh v. Kavanaugh, 279 Mass. 238, 181 N. E. 181 (1932), (involving a pre-marital conveyance of land which was held fraudulent), with Redman v. Churchill, 230 Mass. 415, 119 N. E. 953 (1918), (involving a transfer of personalty during marriage by a husband a year before his death, which was held not to be fraudulent).
  \item \textsuperscript{85} See Collins v. Collins, 98 Md. 473, 484, 57 Atl. 597, 599 (1904). For factors which in a given case may tend to show a fraud on the surviving spouse’s marital rights, see Sykes, \textit{Inter Vivos Transfers in Violation of the Rights of Surviving Spouses}, 10 Md. L. Rev. 1, 11-15 (1949).
  \item \textsuperscript{86} See Spangler v. Stanler, 1 Md. Ch. 36, 57 (1847).
  \item \textsuperscript{87} Poole v. Poole, 129 Md. 387, 39 Atl. 551 (1916). There is much confusion as to when a transfer is “complete”. See, e.g., Bullen v. Safe Deposit & Trust Co., 177 Md. 271, 9 A. 2d 581 (1939). See Sykes, \textit{Inter Vivos Transfers in Violation of the Rights of Surviving Spouses}, 10 Md. L. Rev. 1, n. 35 (1949).
  \item \textsuperscript{88} 149 Md. 109, 131 Atl. 40 (1925).
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leasehold property which they owned as tenants by the
entireties to X., who reassigned the leasehold to W. alone.
Nine years later, W. conveyed the leasehold to Y., who
immediately conveyed to her a life estate with full power
to dispose of the property during her life, a testamentary
power over the "life estate and remainder", and in default
of both powers to her sons. It was found as a fact that this
deed was made with the express purpose of defeating H.'s
marital interest. The Court of Appeals pointed out that W.
retained after the last conveyance all the powers she had
before it, and applying the control test\(^9\) concluded that the
transfer was a fraud on H.'s right to a statutory share in the
estate of his decedent spouse.

There is a qualification to the control test as applied in
the Jaworski case. It was later held that a retention of
control would not cause the reservation of a power to
violate the surviving spouse's marital rights, if the arrange-
ment was reasonable in the circumstances of the particular
case.\(^9\) Thus a court can balance the equities of the claim-
ants in each case and grant a tailor-made decree to fit the
circumstances.\(^9\) Although this qualification tends to make
every conveyance of personalty during the marriage subject
to contest if the transferor does not relinquish full control
over the property conveyed, it appears to be the best judi-
cicial solution to the problem of \textit{inter vivos} conveyances in
fraud of marital rights.\(^2\)

\(^9\) As stated in Rabbitt v. Galther, 67 Md. 94, 105, 8 Atl. 744, 747 (1887).
\(^9\) But cf. Bestry v. Dorn, 180 Md. 42, 22 A. 2d 552 (1941). In the Whitehill
case the court assumed that there was intent to defeat the marital rights
of the surviving spouse, although there was no testimony on this point
(Md. at 660, Atl. at 348).
\(^9\) Factors a court will consider in determining the equities of the claim-
ants are: (1) Who supplied the consideration for the original purchase of
the property. See, \textit{e.g.}, Whitehill v. Thiess, 161 Md. 657, 158 Atl. 347, 79
A. L. R. 373 (1932). (2) Intent to defeat the surviving spouse's marital
rights. See, \textit{e.g.}, Bullen v. Safe Deposit & Trust Co., 177 Md. 271, 9 A. 2d
581 (1939). (3) Other property given the surviving spouse. See, \textit{e.g.},
surviving spouse and the decedent were happily married. See, \textit{e.g.}, Sturgis
v. Citizen's National Bank, 152 Md. 654, 137 Atl. 378 (1927). See Sykes,
\textit{Inter Vivos Transfers in Violation of the Rights of Surviving Spouses}, 10
\(^2\) See Niles, \textit{Model Probate Code and Monographs in Probate Law: A
Review}, 45 Mich. L. Rev. 321, 331 (1947), where the author suggests that
the proper solution to \textit{inter vivos} conveyances in fraud of marital rights is
a statute specifically describing what transactions are conveyances in fraud
of such rights.
V. Taxation of Powers of Appointment

Taxation of powers has become the most important segment of the law of powers of appointment in the United States, because of the continued usefulness of this type of disposition, the increasingly complex provisions in the Revenue Acts relating to powers, and higher tax rates. A useful method of discussing coherently the taxation of powers, maintaining the unity of treatment which adequate consideration of the field requires, is the construction of a simple estate plan. Through detailed analysis of the problems arising in the plan used in this Section, a thumb-nail sketch of the more important aspects of the taxation of powers of appointment will be presented for the benefit of the Maryland estate planner.

Primary attention is given to the problems encountered in drafting a provision for a surviving spouse which it is desired will achieve the full benefit of the marital deduction provisions of the Internal Revenue Code. Next, the tax effects of certain types of powers reserved in inter vivos conveyances will be discussed. Finally, the taxation in the donee's estate of powers of appointment given the donee by another will be considered.

A. Pertinent Facts about Mr. H.

Assume that Mr. H. steps into your office and says that he wants you to draw a new will for him. In response to your questions, he gives you the following information:1

1. Members of his family

H. is fifty-eight years old, and was in good health two months ago when he last was examined by a physician. He is happily married to his first wife, W., who is fifty-six years old and in good health. H. is W.'s first husband.

The three children born of the marriage are living and are happily married. The eldest child, A., is thirty years

1 The facts recited here may be far from typical. They have been chosen merely to make possible a detailed analysis of the tax aspects of powers. Of course, more information would be essential if a will were actually being drafted for Mr. H.; ordinarily, estate plans should be made for the other members of his family.
old, and his wife is twenty-four. They have one child, but will probably have several more. The second child B., is twenty-seven. He and his wife, who is twenty-four, have one child, and they expect to have more children. B. has a slight nervous condition, the result of war experiences, but it is not serious, and doctors believe he has many years of useful life ahead of him if he does not overwork. The youngest child, C. (a daughter), is twenty-five and has two children. Her husband is thirty-two years old. C. and her husband expect another child shortly.

H.'s only other relative is a widowed sister forty-five years of age, whose husband died one year ago after a protracted illness. H. has been giving her financial aid for the past several years.

2. **Domicil**

All members of the family live in and around Baltimore, Maryland, where H.'s business is located, except for C. and her husband, who live in New York City.

3. **Family income and property**

H. is president of a furniture manufacturing corporation which he and his present business associate founded in 1935. His salary as president of the company is $35,000 per year. H. also owns 5,000 shares of $10.00 par common stock in the company which has paid a dollar per share for the last five years. H.'s associate owns 5,000 shares of the common, and the remaining 1,000 shares are distributed among employees of the company. The book value of this stock is now $40.00 per share. H. owns $200,000 worth of stocks and bonds listed on the New York Exchange with an average yearly income therefrom of $10,000 per year. H. owns a home in Baltimore County which is valued at $60,000, for which H. furnished all of the consideration. The furnishings of the home and other miscellaneous assets belonging to H. total $20,000. In addition, H. has taken out life-insurance to the amount of $100,000, payable at his death to W., with an option in W. to leave the money with the company and take interest
or interest plus parts of the principal. Finally, H. is the life tenant and donee of a power of appointment in realty worth $90,000 which his father left him when he died in 1939. The power provides that H. may appoint as he sees fit by will, and in default of appointment to A., B., and C. as tenants in common. The rent from this property, at present used as a parking lot, is $5,000 per year.

W. owns $25,000 worth of stock sold on the New York Stock Exchange, the average income from which is $1,500 per year.

C.'s husband, A. and B. all have good jobs. C.'s husband works for a large New York chemical company with promise for future advancement. His salary is $15,000, and he expects to inherit about $200,000 worth of property from his parents. A. and B. work in the furniture company and intend to continue in the business when H. retires. H.'s business associate has only one son, who is studying law, and expects to practice in California. It is therefore likely that after the older men retire A. and B. will be running the furniture business. They have both been working in the company since they were discharged from the Navy in 1945, and last year each drew a salary of $7,000.

H.'s widowed sister has a position with a store selling women's clothing from which she earns about $4,000 per year. H. gave her $50,000 worth of stocks and bonds in 1946, from which she has an average income of $2,000.

4. Prior gifts and will

The only gifts H. has made other than small sums under $3,000 per year given his sister, wife, and children was the 1946 gift of $50,000 to his sister.

H. made a will in 1943, revoking all prior wills, wherein he left $120,000 worth of property to W. for life (exclusive of life insurance), with a special power of appointment among his three children, and in default of appointment to them equally. The residue was to be used to pay debts, taxes, administration expenses, etc., and what was left should go to H.'s sister.
5. H.'s plans of disposition

Since he made his last will in 1943 H. has become wealthier and his dispositive plans have changed. He states that a further reason for his making a new will is to minimize his estate taxes as much as he can, utilizing the marital deduction provisions of the new tax laws.

H. wishes to leave W. more than she would have been given by his 1943 will and also to provide more generously for his widowed sister. The stock in the furniture company he wants given to A. and B. Because he feels that C. will be taken care of from other sources, she is to receive secondary consideration, but he does wish her to be given some property if it is practical concurrent with his other dispositions.94

B. The Marital Deduction

In considering what provisions H. should make for W., attention is directed towards computing the marital deduction, various mechanical problems which arise when attempting to secure the full marital deduction, and drafting a life estate and a power of appointment which qualify for the marital deduction.

1. Computation of the marital deduction

A testator may give his surviving spouse95 up to one-half of his adjusted gross estate free of estate tax.96 The adjusted gross estate of a decedent is his gross estate97 less deductions for funeral expenses, administration expenses, debts, 

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94 Assumptions will be made to vary or to add to these facts as exposition progresses.
95 For convenience, reference hereafter will be to the surviving spouse as "wife" and to the decedent or testator as "husband", but the estate of either the husband or wife may qualify for the marital deduction. See U. S. Treas. Reg. 105, sec. 81.47a (a).
96 This result is accomplished by permitting a deduction equivalent to one-half of the husband's adjusted gross estate. The general provisions appear in Int. Rev. Code, sec. 812(e); U. S. Treas. Reg. 105, secs. 81.47a-81.47d. For an estate to qualify for the marital deduction, the decedent must die after December 31, 1947; the decedent must have been a citizen or resident of the United States, although his surviving spouse need not be. See U. S. Treas. Reg. 105, sec. 81.47a (a).
97 Property of a decedent which is included in his gross estate is described in Int. Rev. Code, sec. 811; U. S. Treas. Reg. 105, secs. 81.13-81.28.
unpaid mortgages and allowances for dependents permitted by state law.\textsuperscript{98}

Applying these rules to H.'s present estate, the first problem is to determine what would be included in his gross estate if he died immediately. Assume that H. has exercised or released \textit{inter vivos} the power of appointment (item 1) left him by his father.\textsuperscript{99} This eliminates $90,000 from his gross estate. The furniture company stock (item 2), miscellaneous stocks and bonds (item 3), the house and grounds (item 4), and miscellaneous assets (item 5) are owned outright by the decedent at the time of his death, hence are part of his estate for tax purposes.\textsuperscript{100} The life insurance (item 6) is also part of H.'s estate, because by hypothesis he paid the premiums.\textsuperscript{101}

If funeral expenses, administration expenses, debts, and dependents' allowances (H. has no unpaid mortgages) amount to $60,000, the following computation can be made:

\begin{align*}
\text{Gross estate} & \quad \text{\$580,000} \\
\text{Administration expenses, etc.} & \quad 60,000 \\
\text{Adjusted gross estate} & \quad \text{\$520,000}
\end{align*}

\textsuperscript{98} \textit{Int. Rev. Code}, secs. 812(e) (2) (A) and 812(b). This treatment will not consider the marital deduction as operative in estates where the decedent and his spouse own community property. See \textit{Int. Rev. Code}, sec. 812(e) (2) (B); U. S. Treas. Reg. 105, sec. 81.47d (b); Taylor, \textit{Taxation of Community Property Under the Revenue Act of 1948}, ST \textit{Trusts & Estates} 27 (1948); Winstead, \textit{Constitutionality of Federal Estate Taxation of Community Property}, 24 Tex. L. Rev. 34 (1945), (discussing the application of \textit{Int. Rev. Code}, sec. 811(e) 2, since repealed).

\textsuperscript{99} A tabular summary of the assets which would be included in H.'s estate if he died tomorrow and the average yearly income which these assets have produced follows:

\begin{tabular}{|l|c|c|}
\hline
\textbf{Asset} & \textbf{Value} & \textbf{Income} \\
\hline
1. Appointive property & 90,000 & 5,000 \\
2. Family furniture company stock & 200,000 & 5,000 \\
3. Miscellaneous stocks and bonds & 200,000 & 10,000 \\
4. House and grounds & 60,000 & \\
5. Miscellaneous assets & 20,000 & \\
6. Life insurance & 100,000 & \\
\hline
\textbf{Total} & \textbf{\$670,000} & \\
\hline
\end{tabular}

The disposition of the power of appointment is discussed \textit{infra}, Section V D.

\textsuperscript{100} \textit{Int. Rev. Code}, sec. 811 (a), (b); U. S. Treas. Reg. 105, secs. 81.13, 81.14.

\textsuperscript{101} If the decedent paid the premiums on life insurance or possessed at his death any incidents of ownership, the proceeds of the policy are included in his gross estate. \textit{Int. Rev. Code}, sec. 811 (g); U. S. Treas. Reg. 105, secs. 81.25, 81.27. See U. S. Treas. Reg. 105, sec. 81.28 (valuation of insurance).
One-half of H.'s adjusted gross estate is $260,000, which is the maximum sum H. may give W. by will free of any tax on his estate.

Assuming that H. takes the full marital deduction available to him, his tax will be computed as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross estate</td>
<td>$580,000</td>
</tr>
<tr>
<td>Less: Administration expenses</td>
<td>60,000</td>
</tr>
<tr>
<td>Marital Deduction</td>
<td>260,000</td>
</tr>
<tr>
<td>Other Deductions</td>
<td>40,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$360,000</td>
</tr>
</tbody>
</table>

Tax payable... $37,020

If H. does not take any marital deduction, the tax payable on the estate will be $110,740. Thus the marital deduction saves H.'s estate $73,720 in Federal Estate Taxes.

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102 In H.'s case the $40,000 is a charitable gift, deductible by INT. REV. CODE, sec. 812(d); U. S. Treas. Reg. 105, secs. 81.44-81.46. In general, if H. had any property in his estate which formed a part of the gross estate of someone who died within five years prior to H. or property transferred to him by gift, and the estate or gift taxes were paid on such property, then the value of this property may be deducted from H.'s gross estate. INT. REV. CODE, sec. 812(c); U. S. Treas. Reg. 105, sec. 81.41.

103 In H.'s case the $40,000 is a charitable gift, deductible by INT. REV. CODE, secs. 810, 835; U. S. Treas. Reg. 105, secs. 81.6, 81.7. H.'s gross basic tax is computed after deducting the $100,000 exemption. INT. REV. CODE 812(a). The gross basic estate tax on H.'s net estate of $120,000 is $2,100. H.'s total gross tax is computed after deducting the $60,000 exemption. INT. REV. CODE, sec. 835(c). The total gross estate tax on H.'s net estate of $160,000 is $38,700. Subtract the gross basic estate tax from the total gross estate tax to find the gross additional estate tax ($38,700—$2,100=$36,600). The net additional estate tax is computed by deducting from the gross additional estate tax any credits for gift taxes paid on assets included in the decedent's gross estate. INT. REV. CODE, sec. 836(b). Here, there is no gift tax credit, so the gross additional estate tax equals the net additional estate tax. The net basic estate tax is computed by deducting any gift tax credit (INT. REV. CODE, sec. 813(a)) and up to 80% of credit for any state inheritance, legacy, or estate taxes actually paid (INT. REV. CODE, sec. 813(b)) from the gross basic estate tax ($2,100—$1,680=$420). To find the net tax payable, add the net basic estate tax to the net additional estate tax ($36,600+$420=$37,020).

104 See supra, n. 103. Without the marital deduction H.'s net estate before any exemptions is $480,000. After taking the $100,000 exemption permitted in computing the basic estate tax, H.'s gross basic estate tax is $11,700. After taking the $60,000 exemption permitted in computing the additional estate tax, H.'s total gross estate tax is $120,100. His gross additional estate tax is $108,400 ($120,100—$11,700=$108,400), which is also H.'s net additional estate tax because there is no gift tax credit. The net basic tax is found by deducting the 80% credit for state taxes paid ($11,700—$9,360=$2,340). Add the net basic tax to the net additional tax to compute the total tax payable ($2,340+$108,400=$110,740).
2. **Mechanical problems in drafting marital deduction provisions**

There are several important tax problems with which the estate planner is faced when drafting a devise or bequest to a surviving spouse which it is desired will qualify for the marital deduction. The first question he must answer is what property is best suited for such a gift. The estate planner must determine whether some section of the Internal Revenue Code would prevent all or part of the property he has found most suitable for the surviving spouse from qualifying for the marital deduction. Another important problem facing the estate planner is whether he should include a common disaster clause in his provision for the surviving spouse. He should also decide how to draft the gift to the surviving spouse so that she will receive exactly one-half of her husband's estate.¹⁰⁵

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a. **Property best suited for a gift to the surviving spouse**

Normally, a husband wishes his wife to be financially independent after his death.¹⁰⁶ Assuming that the wife does not own a substantial amount of property herself and will not receive property from other sources, then assets which produce a steady yearly income are well suited for the purpose.¹⁰⁷ In Mr. H.'s estate, the stocks and bonds (item 3) earn a steady income at the present time. The

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¹⁰⁶ This section does not consider the case of the husband who wishes to leave his wife as little as possible by will. For effective methods of disinheriting a spouse, see supra, Section IV B, p. 33; Sykes, *Inter Vivos Transfers in Violation of the Rights of Surviving Spouses*, 10 Md. L. Rev. 1 (1949); Cahn, *Restrains on Disinheritance*, 85 U. of Pa. L. Rev. 139 (1936).

¹⁰⁷ If the husband does not have assets which will supply enough income to support his surviving wife, it may be necessary for him to give property outright to his wife to allow her to consume it as she needs the money. This type of disposition has the disadvantage that if the surviving spouse lives long enough after her husband dies she will consume all of the assets and have nothing left when she needs the income most. In a situation, such as that of H., where there is enough income to support W., a trust with a power of appointment is the best type of disposition. Barring catastrophes, most of the corpus will probably pass to H.'s descendants on W.'s death.
insurance proceeds (item 6) may be safely invested to secure a steady yearly income to W. Of course, if there were no assets such as these in his estate, H. could direct that other assets in his estate be sold and the proceeds of the sale invested for his wife by the trustees.

b. **Unidentified assets, liens, and taxes**

If the provision for a surviving spouse is not a specific devise or bequest and might include assets or the proceeds from assets which would not qualify for the marital deduction were they given directly to the surviving spouse, then the marital deduction is reduced by the amount of these assets in the decedent's gross estate.\(^{108}\) For example, suppose H. had a twenty year lease, valued at $60,000 in his gross estate at death and left $260,000, which was one-half of his adjusted gross estate to W. without specifically disposing of the lease to anyone else. The amount of the marital deduction (ordinarily the $260,000) would be reduced by the value of the lease, even though W. did not actually receive the leasehold property.\(^{109}\) The marital deduction allowed for H.'s estate would be $200,000.

But it is surprisingly simple to avoid this result. The leasehold may be specifically devised to someone other than the surviving spouse, or the surviving spouse may be given a specific or demonstrative gift from assets other than the lease. If either of these is done in the example above, the full marital deduction of $260,000 will be allowed. Actually this problem does not arise in planning H.'s estate, because he has no assets to which the rule applies.

The marital deduction will also be reduced by the amount of any liens on the property or by federal estate or Maryland state inheritance taxes which are paid from the

\[^{108}\text{INT. REV. CODE, sec. 812(e) (1) (C):}\]

"Where the assets (included in the decedent's gross estate) out of which, or the proceeds of which, an interest passing to the surviving spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets passed from the decedent to such spouse, then the value of such interest passing to such spouse shall . . . be reduced by the aggregate value of such particular assets."


\[^{109}\text{This rule applies to any "nondeductible interest" or the proceeds therefrom. INT. REV. CODE, sec. 812(e) (1) (B); U. S. Treas. Reg. 105, sec. 81.47b.}\]
assets given to the surviving spouse. Application of this rule can be anticipated or avoided by either directing the executor to pay all liens and taxes on property given the surviving spouse out of general funds of the estate, or by giving the surviving spouse an amount of property which, when reduced by taxes and encumbrances will be of a value equal to the maximum amount of property which would qualify for the marital deduction. This rule must be taken into account when planning the marital deduction provisions for the estate of Mr. H.

c. Common disaster clause

It is normally wise to include some form of common disaster clause in the marital deduction provision for a surviving spouse, particularly if the testator resides in Maryland. The Internal Revenue Code specifically provides that the inclusion of a condition of survivorship for a period of up to six months after the death of the decedent will not prevent the decedent's estate from taking the full marital deduction.

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110 INT. REV. CODE, sec. 812(e) (1) (E); U. S. Treas. Reg. 105, sec. 81.47c-(b), (c).
111 "Common disaster" clause, as the term is here used, means any testamentary provision for the passage of property in case both the legatee or devisee and the testator die in the same catastrophe in such a way that proof of one surviving the other is impossible. The provision may require that the legatee or devisee must survive the testator by some period of time, such as thirty days, in order to receive the property; it may state that where both parties die in a common disaster, and proof that one survived the other is unavailable, the devise or legacy shall be void; or the provision may create a presumption that one party survived the other in case both died in a common disaster and proof of survival is impossible. It is particularly important to insert some form of common disaster clause where devises or legacies are to pass between spouses, if the result of a simultaneous death will be disadvantageous to their dispositive plans, because of the fact that the close association of spouses makes death in a common disaster more than a mere possibility. See Watkins, Simultaneous Death and the Marital Deduction, 1949 Ins. L. J. 793 (1949); Wyshak, Common Disaster Clauses in Estate Planning, 34 Mass. L. Q. 22 (1949).
112 INT. REV. CODE, sec. 812(e) (1) (D): "... an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail upon the death of such spouse if — (i) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and (ii) such termination or failure does not in fact occur."

If a surviving spouse had little property of her own, taxes and other expenses would be lower if the marital deduction were allowed and the property passed through both the husband's and the wife's estate. In the absence of some form of common disaster provision, the property would pass through the estates of both the husband and the wife. But there is some question as to whether the marital deduction would be permitted to be taken by the husband's estate. The Internal Revenue Code provides for the marital deduction where the wife survives and the Regulations require the executor of the decedent to prove she did survive. This proof may be supplied by a state

113 If H. and W. die in a common disaster and there is no proof that either survived, H.'s estate tax will be $37,020, if he has the same property he now owns, but exercises or releases the power (item 1, supra, n. 99) during his life so that it is not included in his gross estate for tax purposes. W.'s estate will include the $260,000 her husband gives her plus the $25,000 worth of stock. Both estates could be administered together, thus lowering W.'s administration expenses. Assuming that her administration expenses, debts, charitable gifts and other deductions are $30,000, her net estate before any exemptions will be $255,000. The total federal tax payable is $47,480, if Maryland inheritance and estate taxes are equal to 80% of the federal gross basic estate tax. Both estates will pay an aggregate of $84,500 in federal estate taxes if the marital deduction is taken. The aggregate federal estate tax payable if the property does not pass to W. will be $110,740, all payable by H.'s estate, because W.'s estate of $25,000 is exempt, allowing for state inheritance and estate taxes and administration expenses. But the true picture cannot be seen unless the administration expenses and state taxes are added back into the total payments the estates must pay in each case:

<table>
<thead>
<tr>
<th>Property passes to W.</th>
<th>Property does not pass to W.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Taxes ..........</td>
<td>$84,220</td>
</tr>
<tr>
<td>State taxes ..........</td>
<td>3,400</td>
</tr>
<tr>
<td>Administration expenses ..........</td>
<td>80,000</td>
</tr>
<tr>
<td><strong>Totals</strong> ..........</td>
<td>$167,620</td>
</tr>
</tbody>
</table>

This simple computation will show at what point money will be saved by a provision that property will not pass to the surviving spouse if both the husband and wife die in a common disaster. See Md. Code, Art. 81, Sec. 109 (1939); Md. Code Supp., Art. 81, Secs. 110-111 (1947); Cf. Connor v. O'Hara, 53 A. 2d 33 (Md. 1947), (holding that property passing by the exercise of a power of appointment is not subject to inheritance tax). But see Md. Code, Art. 62A (1939). See supra, n. 103.

114 Md. Code Supp., Art. 35, sec. 89 (1947), superseding Md. Code, Art. 35, sec. 89 (1939), (which provided for a presumption of survivorship) provides: "Where the title to property . . . depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived . . ." (except in the case of joint tenants, tenants by the entireties, etc.).

115 U. S. Treas. Reg. 105, sec. 81.47a(a), provides in part:

"In order to obtain the marital deduction with respect to any property interest the executor must establish the following facts: (1) That the decedent was survived by his spouse; (2) That such property in-
law establishing a presumption of survivorship, if both spouses die in a common disaster. The Maryland statute creates no presumption of survivorship, but speaks in terms of property passing.\textsuperscript{116} A logical decision would of course be that for tax purposes property passing under the Maryland statute is equivalent to a presumption of survivorship supplied by the statutes in other states. But in the absence of cases on this point, it is better to provide in the will that the spouse to whom the property shall pass will be presumed to survive if both spouses die in a common disaster and proof that one survived longer than the other is impossible.

If a spouse has substantial property of her own, yet her husband wishes to leave her part of his estate because he believes her own property will be insufficient to support her adequately, then a clause requiring the spouse to survive up to six months after the decedent's death should be inserted in the marital deduction provision.\textsuperscript{117}

In drafting a common disaster clause for H.'s bequest to W., a substantial tax saving would be insured by a clause implying survivorship in W. in case both die in a common disaster.

d. Drafting

There are two basic ways in which an estate planner can draft a marital deduction provision so that the wife will receive exactly one-half of her husband’s estate. He can provide that the surviving spouse shall receive a given amount of money which is equivalent to the maximum marital deduction which his estate would receive if the testator died at this moment, or he can provide that the

\textsuperscript{116} See U. S. Treas. Reg. 105, sec. 81.47e.

\textsuperscript{117} The costs, including taxes, to both estates would be higher if the property passed to the wife, because her net estate would be greater than the husband's. The optimum position in this case is for both net estates to be equal. See supra, n. 113.
surviving spouse shall receive property equivalent to one-half of the testator's adjusted gross estate.\textsuperscript{118}

If a set amount is given the surviving spouse, she may agree to disclaim that portion of the sum which is in excess of the marital deduction.\textsuperscript{119} Difficulty may be encountered if the surviving spouse is greedy or is not on friendly terms with her husband and refuses to disclaim the excess. But this method is advantageous in that if the assets of a testator diminish between the execution of the will and his death, his surviving spouse still will receive assets sufficient to support her.

A provision for the surviving spouse of one-half of the adjusted gross estate of the testator has the advantage of needing no cooperation from the surviving spouse if the testator is anxious to give her an amount exactly equal to the marital deduction. But such a provision has the disadvantages that it may not provide the surviving spouse with sufficient funds to support her adequately if the testator's assets diminish substantially between the execution of the will and his death, and that it will be difficult to compute if taxes on the gift to the surviving spouse are not paid from general funds of the estate.\textsuperscript{120}

The estate planner should point out to H. the advantages and disadvantages of each type of clause, so that he can choose which to use in his will. The facts that the marriage has been a happy one and that $260,000 properly invested will be sufficient to allow W. to live in the manner to which she has been accustomed indicate that H. would probably wish to give her $260,000 worth of assets without reference to the adjusted gross estate.

\textsuperscript{118} A combination of these methods to incorporate the benefits of each is feasible, but complicated. It may be worthwhile to use such a combination in some circumstances, but it is not necessary in H.'s estate.

\textsuperscript{119} The renunciation by a surviving spouse causes the property renounced to pass for tax purposes directly to those entitled to receive it as a result of such renunciation. INT. REV. CODE, sec. 812(e) (4) (A). But see INT. REV. CODE, sec. 812(e) (4) (B), U. S. Treas. Reg. 105, sec. 81.47a(e). No gift tax is payable on such a disclaimer. INT. REV. CODE, sec. 812(e) (4) (A); U. S. Treas. Reg. 105, sec. 81.47a(e).

\textsuperscript{120} The amount of the bequest to the surviving spouse and taxes which are payable thereon are both unknown quantities. See Casner, Estate Planning Under the Revenue Act of 1948, 62 Harv. L. Rev. 413, 435 (1949).
3. Interests which qualify for the marital deduction

One type of interest which may qualify for the marital deduction is a life estate in trust with a power to appoint the remainder free of the trust.¹²¹

Both the life estate and the power must satisfy certain conditions before the marital deduction will be allowed.

First, the life estate must be in trust. Second, the surviving spouse must be entitled to receive all the income from the corpus during her life. Third, the income must be payable annually or at more frequent intervals. Fourth, the surviving spouse must be permitted to appoint all of the corpus free of trust. Fifth, the power must be exercisable in favor of herself or her estate (both), and may, but need not be exercisable in favor of others. Sixth, although someone other than the spouse may have a power over the corpus, such a power must be exercised only in favor of the surviving spouse. Seventh, the surviving spouse must be permitted to exercise the power by herself. Eighth, the power must be exercisable by the surviving spouse in all events.¹²²

In applying these rules to the estate of Mr. H. to determine what type of life estate and power he should give his wife, assume that he wishes to establish by will a trust of $160,000 of the stocks and bonds he owns at the present time, with his two sons, A. and B., and W. as co-trustees.¹²³ H. wants all of the income to be payable to W. in quarterly installments. He may wish to include a power in the trustees to invade corpus for the benefit of W.¹²⁴ This power would not prevent the property from achieving the full

¹²¹ An absolute bequest or devise to the surviving spouse would also qualify for the marital deduction in the estate of the decedent, so long as the gift is not of a terminable interest. INT. REV. CODE, sec. 812(e) (1) (B) ; U. S. Treas. Reg. 105, sec. 81.47b.
¹²² INT. REV. CODE, sec. 812(e) (1) (F) ; U. S. Treas. Reg. 105, sec. 81.47a (c).
¹²³ The provisions as to a life insurance trust with a power of appointment are substantially the same. INT. REV. CODE, sec. 812(e) (1) (G) ; U. S. Treas. Reg. 105, sec. 81.47a (d).
¹²⁴ Item 3, supra, n. 99.
¹²⁴ This is always a wise provision, because it permits a surviving spouse to secure extra sums if she must have an expensive operation or must make other large outlays.
marital deduction, because it is exercisable solely for the benefit of his surviving spouse.

H. should give W. a power of appointment exercisable by deed or will. If he uses general language in creating the power, the property would probably not qualify for the marital deduction because this type of power has been construed by the Maryland courts to include an implied limitation that the donee may not appoint for her own benefit.\textsuperscript{125} State law would be applied to determine to whom W. could appoint.\textsuperscript{126} Therefore H. must include a clause making the power specifically exercisable in favor of W. or her estate. If such a specific permission is included, there seems to be no reason why a Maryland court will not allow W. to appoint to her own estate if she wishes to do so, and the property will qualify for the marital deduction.

To insure that the property would go to those whom he wanted to receive it in the absence of an appointment by W., H. should include a clause in default of appointment.

H. may change the provisions of the life insurance to have the company pay W. yearly installments of corpus and interest with a power of appointment by deed or will.\textsuperscript{127} Under present law W. will pay no income tax on the payments of corpus and interest, although she will pay income tax on any interest she receives, if the corpus is left invested with the insurance company after H.'s death, and the company pays W. the interest unmixed with portions of the principal.\textsuperscript{128}

\section*{C. Powers Reserved Inter Vivos}

The possibility that H. may desire to minimize his estate taxes by making inter vivos conveyances of some of the property he now owns leads to an exploration of how much control he may retain over assets so conveyed. An absolute transfer of part of the property he owns would, of course,


\textsuperscript{126} \textit{U. S. Treas. Reg.} 105, sec. 81.47a(c).


\textsuperscript{128} See \textit{Int. Rev. Code}, sec. 22(b) (1); \textit{U. S. Treas. Reg.} 111, sec. 29.22(b) (1)—1.
take it out of his estate entirely.\textsuperscript{120} But if H. retains some control over the assets transferred, it is likely that they will be part of his estate for tax purposes. Furthermore, certain gift and income tax effects of reserving powers should be brought to H.'s attention.

Assets subject to a reserved power of appointment are taxed by those sections of the Internal Revenue Code which include property in the settlor's estate because he has retained control after a transfer, as well as by the sections taxing powers of appointment in the donee's estate.\textsuperscript{130}

Suppose that H. wishes to create a trust of his property during his life and at the same time to retain a power over the trust so that he may control it until his death. The variations in types of power he might reserve are limited only by the ingenuity of the draftsman. But the more usual types of powers, to which this discussion will be limited, are subject to generic subdivision into three categories: powers to revoke or terminate, powers to alter or amend, and powers which are merely managerial.

1. **Powers to revoke or terminate**

The law as to the taxation of reserved powers to revoke or terminate is today relatively settled. The reservation of this type of power, either directly or indirectly,\textsuperscript{131} causes

\textsuperscript{120} Unless the transfer was made in contemplation of, or to take effect at, death. \textit{Int. Rev. Code}, sec. 811(c); \textit{U. S. Treas. Reg.} 105, secs. 81.15, 81.21. In general, the transfers discussed in this Section would be treated in the same fashion if the settlor made himself a trustee with the powers here discussed, or if the trustee was vested with the powers here discussed and the settlor retained control of the trustee.

\textsuperscript{130} See \textit{U. S. Treas. Reg.} 105, sec. 81.19, which provides in part: "(sec. 811(e)(1)(B)) of the Internal Revenue Code covers, in the main, transfers to which also apply the provisions of certain other subsections of section 811." A reserved power to alter, amend, revoke, or terminate by the decedent alone or in conjunction with another person will be subject to taxation in the settlor's estate by operation of section 811(d) and \textit{U. S. Treas. Reg.} 105, sec. 81.20; A reserved power of appointment, with certain exceptions, will be subject to taxation in the settlor's estate by operation of section 811(f) and \textit{U. S. Treas. Reg.} 105, sec. 81.24.

\textsuperscript{131} \textit{Int. Rev. Code}, sec. 811(d); \textit{U. S. Treas. Reg.} 105, sec. 81.20. The additional language in sec. 811(d)(1) is considered merely to express the law as it existed prior to the enactment of this provision, except for the statement, "without regard to when or from what source the decedent acquired such power" in the situation where the settlor did not receive the power at the time he made the transfer. See \textit{U. S. Treas. Reg.} 105, sec. 81.20(a). The change in language was prompted by the decision in \textit{White v. Poor}, 296 U. S. 98, 56 S. Ct. 66 (1935), (Settlor reappointed Trustee held not to have reserved a power, even though she had originally made herself a trustee at the time of the transfer to the trust). Note that section 811(d) does not
so much of the property as is subject to the power to be taxed in the settlor's estate,\textsuperscript{132} whether or not the power is exercised.\textsuperscript{133} Even a power to revoke or terminate implied by state law may cause appointive assets to be taxed in the settlor's estate.\textsuperscript{134}

If the settlor reserves a power to revoke or terminate when making a transfer in trust, then no gift tax is payable on that transfer. But the settlor must pay a gift tax on the corpus when he releases the power to revoke.\textsuperscript{135} He must pay a gift tax on the income given to the beneficiary each year, in spite of the fact that it does not pass through the settlor's hands.\textsuperscript{136}

If the transferor reserves the power to revoke or terminate exercisable by himself or in conjunction with another who has no adverse interest\textsuperscript{137} in the assets, then the transferor must also pay the income tax on the earnings of the trust.\textsuperscript{138}

2. Power to alter or amend

Where the settlor reserves a power to alter or amend the trust, the value of as much of the assets as are subject to the power is included in his gross estate for tax pur-

\textsuperscript{132} E.g., Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123 (1929), (decided under the Revenue Act of 1921, c. 136, 42 STAT. 227, the applicable provisions of which are now part of INT. REV. CODE, sec. 811(d)(2)); U. S. v. Stark, 32 F. 2d 453 (6th Cir 1929), (only those assets subject to a power of revocation are included in the settlor's gross estate for tax purposes). A power of revocation causes appointive assets to be taxed in the settlor's gross estate even where the only result of the revocation is acceleration of the remainders. Commissioner v. Holmes' Estate, 326 U. S. 480, 66 S. Ct. 257 (1946). See supra, n. 130.

\textsuperscript{133} McCaughn v. Fidelity Trust Co., 34 F. 2d 443 (3rd Cir. 1929).

\textsuperscript{134} Vaccaro v. U. S., 149 F. 2d 1014 (5th Cir. 1945); Howard v. U. S., 125 F. 2d 986 (5th Cir. 1942); Estate of Keiffer, 44 P. T. A. 1265, Dec. 12045 (1941), petition for review dismissed on motion (5th Cir. 1942). Contra: Newhall v. Casey, 18 F. 2d 447 (D. C. Mass 1927); Estate of May, 8 T. C. 1099, Dec. 15792 (1947).

\textsuperscript{135} E.g., Burnet v. Gugenheim, 288 U. S. 280, 53 S. Ct. 309 (1933), (decided under the 1924 gift tax statute, which was repealed the next year). INT. REV. CODE, sec. 1000; U. S. Treas. Reg. 108, sec. 66.3. Cf. Commissioner v. Warner, 127 F. 2d 913 (9th Cir. 1942).

\textsuperscript{136} The bare legal interest of a trustee by itself is not a substantial adverse interest. Reinecke v. Smith, 289 U. S. 172, 53 S. Ct. 570 (1933); U. S. Treas. Reg. 111, secs. 29.166-1, 29.166-2(b).

\textsuperscript{137} INT. REV. CODE, sec. 166; U. S. Treas. Reg. 111, secs. 29.166-1, 29.166-2.
poses. A power to alter or amend has been described as any power which permits the settlor to make a substantial change in the enjoyment of the property.

This rule has been inconsistently applied by the courts, so it is wise in drafting inter vivos transfers for H. to leave out any power which resembles a power to change the beneficial enjoyment of the trust. For example, a power to change the portions of trust income several beneficiaries shall receive has been held to be a power to make a substantial change in enjoyment, but a power to determine whether assets received by a trust are income or principal has been held to be a managerial power.

As in the situation where the settlor reserves a power to revoke the trust, no gift tax is payable upon the creation of a trust if a power to alter or amend is reserved to the settlor. A gift tax on the corpus is payable upon the release of such a reserved power. Each installment of income to the beneficiary is considered a gift to him from the settlor, so the settlor must pay a gift tax on such installments as they are paid.

If a power to alter or amend is exercisable by the settlor alone or by the settlor in conjunction with another who does not have a substantial adverse interest, the settlor must pay the income tax on the trust income.

3. Powers which are managerial

The line drawn between the ordinary power to alter or amend and the managerial power is far from clear. But

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140 Estate of Storer, 41 B. T. A. 1156, Dec. 11101 (1940).
144 The settlor is taxed under INT. REV. CODE, sec. 22(a); Commissioner v. Buck, 120 F. 2d 775 (2nd Cir. 1941). Cf. Richardson v. Commissioner, 121 F. 2d 1 (2nd Cir. 1941).
there are certain types of powers which are clearly managerial in nature and therefore are not subject to taxation in the settlor's estate.

A right reserved by the settlor to supervise the trustee in making investments is a managerial power, hence does not cause the corpus of the trust to be taxed in the settlor's estate.\textsuperscript{145} The same is true where the settlor reserves a power to modify, alter, or amend, specifically excluding the power to change any beneficial interest.\textsuperscript{146}

Conflicting decisions make it difficult to determine whether a power to designate that assets received by a trust shall be income or corpus is a managerial power or a power to alter or amend.\textsuperscript{147} The better rule appears to be that this is a power to alter or amend and that the assets subject to such a power are part of the settlor's estate for tax purposes. Under the power to allocate to income or corpus, if the settlor has the power to allocate all increment not clearly income to principal, or to designate all assets received by the trust as income, then in effect he increases the beneficial interest of the remainderman or of the life beneficiary when he exercises the power.

Where a settlor makes a transfer reserving a managerial power, he must pay a gift tax on the corpus when the transfer is made, because the gift is complete at that time. Reservation of such a power would not cause the income from the trust to be taxable to the settlor.\textsuperscript{148}

H. probably would not wish to transfer subject to a reserved power any of the property he now owns. However, he would be perfectly safe in giving some of his property to members of his family, because of the probability that they would handle the property as H. suggested in the


\textsuperscript{146} Estate of Neal, 8 T. C. 237 Dec. 15577 (1947). (The court held that an attempted revocation of powers of appointment given certain remaindermen in the original deed was ineffective as an attempt to change enjoyment, and other changes were as to administrative details).

\textsuperscript{147} See supra, n. 141.

absence of a binding agreement. He could give, tax-free, $6,000 in total gifts per year to W. and $6,000 worth of furniture company stock per year each to A. and B. It is likely that H. would desire to make these gifts, because in this way he could minimize the total taxes payable from his assets and at the same time advance his dispositive wishes.

D. Powers Created for the Donee By Another

H. has a Maryland general power of appointment over realty, which his father left him by will in 1939. In considering what provision for the power should be made in H.'s estate plan to comply with his dispositive wishes and at the same time minimize taxes, two questions are presented. First, if H. does not exercise or release the power, will it be included in H.'s gross estate for tax purposes? Second, if the power is one which will be taxed in his estate, is it possible to avoid this result by an inter vivos conveyance? To present a comprehensive study of the taxation of powers which are created for the donee by someone else, other types than the Maryland general power will be discussed with reference to these questions.

1. Powers in the donee's estate that are subject to taxation

The provisions of the Internal Revenue Code taxing powers of appointment in a donee's estate can best be

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149 The Code provisions and Regulations permitting the marital deduction in gifts from one spouse to another are similar to the marital deduction provisions in the estate tax Sections. See supra, Section V B, p. 41. If H. gave W. total gifts of $6,000 in one year, one-half would receive the marital deduction, and the other half would not be included in H.'s net gifts for the year because of the annual exclusion. H. used up his $30,000 exemption when he made the 1946 gift to his sister, so any amount he gives W. over $6,000 will be subject to gift taxation. See generally Int. Rev. Code, sec. 1004(a) (3); U. S. Treas. Reg. 108, sec. 81.16a—81.16d. In order to give $6,000 free of gift tax to A. and B., H. must have W. join him in making the gift, which will then be considered as having been made one-half by each of them. Int. Rev. Code, sec. 1000(f) ; U. S. Treas. Reg. 108, sec. 86.3a. See Casner, Estate Planning Under the Revenue Act of 1948, 62 Harv. L. Rev. 413, 443 (1949) ; Waldron, The Marital Deduction and Split Gift Under the Revenue Act of 1948, 28 Trust Bull. 10 (Jan., 1949).

150 If H. feels he must control the property until his death, then he should not make inter vivos conveyances such as these. However, assuming that H. wants to make these gifts, and that he lives for ten years, then his gross estate at death will be reduced by about $180,000. See supra, n. 99, item 1.

understood if a brief summary of the history of these provisions is first presented.

The various types of powers created for the donee by another which will today be included in his gross estate by the Internal Revenue Code will then be discussed, with particular reference to the power of appointment which H.'s father gave him by will in 1939.

a. Historical summary

The Revenue Act of 1916 did not specifically tax powers of appointment, and regulations attempting to tax property passing under a general power of appointment given the donee by a prior decedent were held invalid under that Act.

In 1918 Congress passed an act with provisions which remained substantially unchanged until 1942 to the effect that all property passing under a general power of appointment exercised by the donee would be considered part of the donee's estate for tax purposes.

It soon became apparent that the provisions of the Act of 1918 taxing powers given the donee by another were riddled with loopholes through which the discerning estate planner could slip to tax immunity. If a power was exercised in favor of the takers in default of appointment to give them the same shares that the donor gave them by the default clause, the appointive assets were not taxed as part of the donee's estate, because they did not pass under the power but by operation of the clause in default of appoint-

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153 Section 202(a), 39 STAT. 777 (1916).
156 Revenue Act of 1918, sec. 402(e), 40 STAT. 1097 (1918), provided:
"To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after, his death, except in the case of a bona fide sale for a fair consideration in money or money's worth."
The meaning of "general" power was construed by the courts, with little help from the Regulations, to be the old property-law definition, with the result that whether or not a power was subject to taxation in the donee's estate depended largely upon form rather than substance. Finally, under the Revenue Act of 1918 a power must have been exercised by the donee, or appointive assets would not be taxed in his estate. The donor could provide as takers in default of appointment those in whose favor the donee would most likely exercise the power. The donee could then avoid a tax in his estate on the appointive assets simply by failing to exercise the power.

In order to close these gaps, Congress passed the 1942 amendments to the Internal Revenue Code with the provisions now in force taxing assets subject to powers of appointment as part of the donee's estate.

b. Present law

The new provisions substantially changed the tax law as it stood prior to 1942 in the following respects:

(1) The class of powers taxable in the donee's estate was increased to include all but certain specifically excepted special powers of appointment;

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159 The law of the state where the conveyance took place was determinative of the effect of a transfer, but state law was not controlling in defining the meaning of "general power" as it was used in the Revenue Acts and Regulations. Leser v. Burnet, 46 F. 2d 756 (4th Cir. 1931), (holding that a Maryland general power—called by the court a special power—was not part of the donee's gross estate for purposes of taxation. See Gump, The Meaning of "General" Powers of Appointment under the Federal Estate Tax, 1 Md. L. Rev. 300, 303 (1937); Griswold, Powers of Appointment and the Federal Estate Tax, 52 Harv. L. Rev. 929, 938 (1939).

160 Whether or not a power was exercised was determined by state law. E.g., Johnstone v. Commissioner, 76 F. 2d 55 (9th Cir. 1935), cert. den. 296 U. S. 578 (1935); Old Colony Trust Co. v. Commissioner, 73 F. 2d 970 (1st Cir. 1934); Blackburne v. Brown, 43 F. 2d 320 (3rd Cir. 1930). Cf. U. S. Treas. Reg. 105, sec. 81.24.


162 Int. Rev. Code, sec. 811(f) (2), provides that all powers of appointment shall be taxed. It then excepts from the definition of "power of appointment":

"(A) a power to appoint within a class which does not include any others than the spouse of the decedent, spouse of the creator of the power, descendants of the decedent or his spouse, descendants (other
A power not specifically excepted was made subject to taxation if it remained unexercised in the donee's estate at his death, if the donee exercised or released it during his life in contemplation of or intended to take effect at or after his death, or if the donee exercised or released the power during his life but reserved a life estate or the right to designate future beneficiaries.\(^{163}\)

(3) If a power specifically excepted was exercised by creating another power of appointment, it was no longer excepted, but the value of the appointive assets were made part of the donee's estate for tax purposes.\(^{164}\)

The Federal courts will refer to state law to determine the incidents of a power to find if it is subject to taxation in the donee's estate or is specifically excepted from such taxation.\(^{165}\)

A general power specifically exercisable in favor of the donee, or his estate, or the creditors of either, is taxed as part of the donee's estate, whether or not the donee has any beneficial interest in the appointive assets.\(^{166}\)

A Maryland general power, such as the one H.'s father gave him, in which the donee has a beneficial interest, is taxed as part of the donee's estate, because the members of the class to whom the donee may appoint include others than those among whom appointment must be limited to cause a power to be excepted from taxation.\(^{167}\)

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\(^{163}\) See Int. Rev. Code, sec. 811(f) (A), supra, n. 162.

\(^{164}\) The power is not one of those excepted by Int. Rev. Code, sec. 811(f) (A) or (B), supra, n. 162. See U. S. Treas. Reg. 105, sec. 81.24(b).

donee of a Maryland general power has no beneficial interest in the appointive property, the property would be part of the donee's estate for tax purposes, because appointment is not limited "within a restricted class". 168

Where the donor gives the donee a beneficial interest in appointive assets subject to a special power of appointment, such assets would be taxed in the donee's estate, unless the class within which the donor has limited appointment includes no others than spouses of the donee or donor, descendants (except the donee) of the donee or donor or their spouses, certain charities and Federal, state or local governments for public purposes. 169 If the donor gave the donee a special power but no beneficial interest in the appointive property, then the donee would pay no estate tax on the property, if the beneficiaries are a class not unreasonably large. 170

Although state law is used to determine the incidents of a given power, it is unlikely that either the nomenclature in a conveyance or the terminology used by state courts in describing a power is determinative of taxability. 171 Therefore a power not considered a power of appointment in Maryland may be taxed as such under the Internal Revenue Code. Two examples are the power annexed to a life estate to invade principal and the power given an equitable life tenant to alter, amend, revoke, or terminate the trust. 172

If the donor gives his son (or other descendant) a life estate with power to invade principal, and a remainder to others, then the value of the remainder is part of the son's

168 The donee of a Maryland general power can appoint to anyone except himself, his estate, or his creditors. See, e.g., Balls v. Dampman, 69 Md. 390, 394, 16 Atl. 16, 18 (1888). See discussion, supra, Section III A. p. 22. Therefore, the exception in sec. 811(f) (2) (B) of the Internal Revenue Code, supra, n. 162, is not applicable.


170 Int. Rev. Code, sec. 811(f) (2) (B), supra, n. 162. See U. S. Treas. Reg. 105, sec. 81.24(b) (2).

171 See U. S. Treas. Reg. 105, sec. 81.24(b) (1), which provides in part: "The term 'power of appointment' includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and local property law connotations." Cf. Leser v. Burnet, 46 F. 2d 756 (4th Cir. 1931) and the cases cited supra, n. 165.

172 The Regulations suggest that assets subject to either of these powers are taxed as part of the donee's estate. See U. S. Treas. Reg. 81.24(b) (1).
estate for tax purposes. But if the life estate and power to invade principal are given to the donor's spouse, the appointive assets are not taxed in the donee's estate, unless the courts construe the Code so as to give effect to the overall objective which its draftsmen seem to have had in mind. There seems to be no reason for this anomalous result, except a mistake in drafting the statute. The power to invade principal for the donee's benefit would probably be considered a general power under the law in effect before the Act of 1942, and the evident intent to close loopholes in the taxation of powers of appointment suggests that a parenthetical exclusion of the donee from the class of appointees in the excepted powers, when the donee is the spouse of the donor, was inadvertently left out of the statute.

A power to invade principal for the benefit of members of a restricted class not including the donee, if given to him by someone else, would not cause assets subject to the power to be included in the donee's estate.

A power annexed to a life estate to alter, amend, revoke, or terminate the remainder would cause assets subject to the power to be taxed in the donee's estate, unless the

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173 INT. REV. CODE, sec. 811(f) (2) (A), supra, n. 162. The son or other descendant is the decedent. A power to appoint to the decedent is expressly excluded from the powers excepted from taxation. See U. S. Treas. Reg. 105, sec. 81.24(b) (1).

174 INT. REV. CODE, sec. 811(f) (2) (A), supra, n. 162. The parenthetical expression, "other than the decedent", is left out after the phrase, "spouse of the decedent". Schwab v. Allen, 78 F. Supp. 234 (D. C., M. D. Ga. 1948), noted 22 So. Calif. L. Rev. 513 (1949). The court stated a conclusion without giving any reasons for its decision. See U. S. Treas. Reg. 105, sec. 81.24(b) (1), where the following example appears: "... if a settlor transfers property in trust for the life of his wife, with a power in the wife to appropriate or consume the principal of the trust, the wife has a power of appointment" (which is included in her gross estate for tax purposes).

175 INT. REV. CODE, sec. 811(f), (as originally enacted). See U. S. Treas. Reg. 105, sec. 81.24(a), which still applies to estates where the donee died before October 21, 1942.

176 See PAUL, FEDERAL ESTATE AND GIFT TAXATION 255 (1946 Supp.), where the author suggests that a court should construe sec. 811(f) (2) (A) of the Code substantially so as to exclude from the powers excepted from taxation in the donee's estate a power in a spouse to invade corpus. There is also an argument to the effect that a life estate with a power to invade corpus is akin to owned property, hence is subject to taxation under INT. REV. CODE, sec. 811(a). But see Helvering v. Safe Deposit & Trust Co., 316 U. S. 56, 62 S. Ct. 925 (1942), (sec. 811(f) operated to exclude any power of appointment from the general language in 811(a)); Estate of Schwartz v. Commissioner, 6 T. C. M. 139, Dec. 15621(M) (1947).

177 INT. REV. CODE, sec. 811(f) (2) (B), supra, n. 162.
exercise of the power was limited to an appointment (in effect) among the class of appointees excepted in Section 811 f(2)A of the Code.\textsuperscript{178}

If the donor gives the donee only a power to invade principal or power to alter, amend, revoke, or terminate, but no beneficial interest in the appointive assets, then the assets will not be included in the donee's estate for tax purposes, if the power can be exercised only within a class not unreasonably large.\textsuperscript{179}

2. \textit{Escape Provisions}

Because of the changes made by the Revenue Act of 1942, provisions were included in the Act to allow the release free of gift tax prior to July 1, 1951,\textsuperscript{180} of powers, which otherwise would be taxed in the donee's estate, created on or before October 21, 1942.\textsuperscript{181} But in most jurisdictions a change in the property law was necessary to permit the release of testamentary powers of appointment.\textsuperscript{182}

In 1943 the Maryland Legislature passed a statute permitting a donee to release any type of power of appointment by deed, will, or otherwise.\textsuperscript{183} But in \textit{O'Hara v. O'Hara},\textsuperscript{184}
the Court of Appeals by way of dictum set forth the rule that a general and beneficial power of appointment exer-
cisable by will may be released, so long as the donor's in-
tent is not thereby frustrated. The court does not refer to
the statute permitting the release of any type of power of
appointment, nor is there a clear statement that there was
no clause in default of appointment included in the instru-
cement creating the power.

Assuming that there was no clause in default of appoint-
ment, the decision in the *O'Hara* case is correct. However,
the dictum stating that only a general and beneficial power
may be released is clearly in conflict with the statutory
provisions permitting the release of any type of power.

The donee of a true general power of appointment may
release the power under both the *O'Hara* dictum and the
statutory provisions.\(^{186}\)

H., who is the donee of a Maryland general power,
probably may release it even if the *O'Hara* dictum is fol-
lowed, because the courts of Maryland call this type of
power a "general" power.\(^{187}\) But it is not likely that the
*O'Hara* dictum will be followed, in a case involving the
release of either a Maryland general or a special power,
since it was not a considered interpretation of the statutory
provisions permitting the release of any type of power.

\(^{186}\) The release of a power of appointment occurs when the donee ex-
tinguishes it by relinquishing his right to exercise the power, and in effect,
appoints to the takers in default of appointment. See Gray, *Release and
185 Md. 321, 44 A. 2d 813 (1945), if there was no clause in default, the
agreement to devise a part of the appointive assets was a contract to
appoint, and therefore was unenforceable. *Restatement, Property*, sec.
334 (1940). See *supra*, n. 20.

\(^{187}\) By definition a general power may be exercised In favor of the donee,
his estate, or his creditors. See *supra*, Section II A, p. 15. Therefore, it is
also a beneficial power and fits the requirement of *O'Hara v. O'Hara*, 185
Md. 321, 126, 44 A. 2d 813, 816 (1945). The further requirement of the
*O'Hara* dictum that the release of a general power must not violate the
donor's intent in order to be valid, is nebulous. It would most likely be
operative only where the donor expressly states that a power he creates
shall not be released. In such a situation this result would follow without
the dictum.

\(^{187}\) The release of a Maryland general power was held valid in *White v.
Roberts*, 145 Md. 405, 125 Atl. 733 (1924). In *O'Hara v. O'Hara*, 183 Md.
321, 44 A. 2d 813 (1945), involving a Maryland general power, the court
seems to imply that were the contract there involved a release rather than
an attempt to exercise the power, it would have been enforceable.
In planning H.'s estate it is safe to advise him to release the power to A., B., and C., who are the takers in default of appointment; but to avoid payment of the gift tax, he must execute the release before July 1, 1951. The estate planner should also apprise H. of the confusing state of the law and leave the ultimate decision whether or not to release the power in his discretion.

VI. Conclusion

Rules of property law should be sufficiently certain to permit a lawyer to predict with reasonable accuracy the effect of provisions in an instrument he is drawing for a client. Yet rules of property law should also reflect current social attitudes. The present emphasis in all areas of the law on recognizing substance rather than form in reaching a given result is somewhat inconsistent with the predictability desirable in the property law. The minority Maryland rule initiated in Balls v. Dampman, although based upon form rather than upon substance, is too firmly embedded in the law of powers of appointment of this state to be overruled by the Court of Appeals. But with this rule in existence it is still possible to attain a sound structure of the law of powers of appointment in Maryland.

The Balls rule should be limited in application to the situation where the donor creates a power of appointment without including specific language permitting the donee to appoint to himself, his estate, or his creditors. Creditors of the donee of a true general power should be permitted to reach the appointive assets to satisfy their claims, if the donee's owned assets are insufficient to meet his obligations. It would be best to cast aside the rule that the donee must attempt to exercise the power for creditors to reach appointive assets. Maryland courts should follow the lead set by the federal government in the Bankruptcy Act and the Internal Revenue Code, which use as a test the type of power, not whether an attempt has been made to exercise it.

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188 See U. S. Treas. Reg. 105, sec. 81.24(h); U. S. Treas. Reg. 108, sec. 86.3.
189 H. will probably wish to release the power, because he would not thereby lose the income from the life estate.
190 69 Md. 390, 394, 16 Atl. 16, 18 (1888).
The *Balls* rule should not be extended to prevent the donee of a Maryland general power from appointing to his spouse, if he wishes to do so. But in the absence of an appointment to her, a court should not permit the spouse of the donee of this type of power to reach the appointive assets for dower or a statutory share at his death. The many decisions on dower and the words of the statute giving a surviving spouse a share in the estate of the decedent both indicate that she has an interest only in his owned assets. However, if legal results are to be based upon substance rather than upon form, the Maryland Legislature should change the present law of dower and statutory shares to permit a surviving spouse to reach assets subject to a true general power.

When planning the estate of a Maryland testator, the draftsman must consider the interplay of the Maryland law and the Internal Revenue Code. The results are predictable with reasonable accuracy in most areas of the taxation of powers of appointment, but the complicated provisions of the Code and Regulations are full of pitfalls for the unwary estate planner. Therefore, a draftsman should study these provisions carefully before he drafts any instrument containing a power.

The law of powers of appointment is a relatively undeveloped area of the property law of the United States. It is to be hoped that as this field becomes more developed, results will be based more upon substance than upon form, yet that the predictability essential to efficient draftsman-ship will be preserved.