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Avoiding The Hybrid: Creating An Orthodox General Power Of Appointment In Maryland

Guiney v. United States

Maryland is unique in its case law concerning the general power of appointment. A line of decisions beginning in 1888 has "fashioned a rather strange animal." Although the Maryland courts refer to it as a general power, it is, rather, a hybrid power, differing from the orthodox general power of appointment with respect to the possible appointees of the property subject to the power. Language authorizing the donee of a power of appointment to appoint "as he sees fit" or "to whomsoever he wishes" is deemed in every jurisdiction to create a general power of appointment; the effect of such language, in every state but Maryland, is to permit the donee of the power to appoint to anyone he wishes, including himself, his estate, his creditors, or the creditors of his estate. These are the characteristics of an orthodox general power. In Maryland, however, the same language would permit the donee of the power only to appoint to anyone he wishes except himself, his estate, his creditors, or the creditors of his estate; this hybrid is known as the Maryland general power. Although instruments are drafted creating orthodox general powers of appointment in Maryland, the issue of whether such a power can be created

in Maryland has never been litigated. There are no reported Maryland decisions upholding an orthodox general power.

A recent decision by the United States Court of Appeals for the Fourth Circuit, *Guiney v. United States,*\(^3\) may have an important effect on Maryland law. The issue presented to the court was whether the language used in a decedent's will was sufficient to create an orthodox general power of appointment in his widow so as to qualify the decedent's estate for the marital deduction pursuant to sections 2056(a) and (b)(5) of the Internal Revenue Code.\(^4\)

The decedent's will established a trust for the benefit of his wife during her life with a testamentary power of appointment in her favor. The will contained the following relevant language:

> ... and upon her death to transfer, convey and pay over the principal to or for the benefit of such person or persons or corporation, and in such lawful interests or estates, whether absolute or in trust, as my wife by her Last Will and Testament appoint. ... However, I want to make it clear that I am giving my wife a general power of appointment over this trust in order that one-half of my estate may qualify for the marital deduction, and if any sentence or sentences hereinbefore or hereafter written contravene the policy of the Federal Government in granting the marital deduction, such sentence or sentences shall be null and void, as it is fully my intention to take advantage of the marital deduction as provided by the Internal Revenue Code of 1954, or amendments made thereafter.\(^5\)

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4. *Int. Rev. Code* of 1954, §§ 2056(a) and (b)(5), provide:
   
   (a) *Allowance of Marital Deduction.* — For purposes of the tax imposed by section 2001 [rate of estate tax], the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

   (b) (5) *Life estate with power of appointment in surviving spouse.* — In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

   (A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

   (B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

Upon audit, the Commissioner of Internal Revenue denied the marital deduction because, under Maryland law, the language used to create the power did not allow the widow to appoint the corpus to herself or to her estate as required by section 2056(b)(5) of the Internal Revenue Code. As a result, the decedent's estate's federal estate tax liability was increased by $12,467.02. The United States District Court for the District of Maryland sustained the Commissioner's decision that the language created only the Maryland hybrid power, that under the Maryland power the widow could not appoint to herself, her estate, her creditors or the creditors of her estate; and that, therefore, she did not possess the orthodox general power contemplated by section 2056(b)(5) of the Internal Revenue Code. The Fourth Circuit reversed, holding that a general power of appointment in the orthodox sense was created and that the requirements of the Internal Revenue Code were met, so as to qualify the decedent's estate for the marital deduction.

This note will review and discuss the unique Maryland requirements for the creation of an orthodox general power of appointment. The analysis of the Guiney decision will be addressed not only to its impact on existing Maryland law, but also to the problems faced by lawyers attempting to draft trusts and wills in accordance with the decision.

A brief background discussion is in order. Although the use of powers of appointment preceded the enactment of the Statute of Uses in 1536, it was not until the twentieth century that such powers attained significance in the United States. Not until then did the legal scholars begin to analyze and write about powers, or did lawyers frequently use them. The definition of power of appointment now most often cited is that contained in the Restatement of Property:

6. See Int. Rev. Code of 1954, § 2056(b)(5); Treas. Reg. § 20.2056(b)-5(e) (1970). The Treasury Regulation contains the following provision as to the application of local law:

Application of local law. In determining whether or not the conditions set forth in paragraph (a)(1) through (5) of this section are satisfied by the instrument of transfer, regard is to be had to the applicable provisions of the law of the jurisdiction under which the interest passes and, if the transfer is in trust, the applicable provisions of the law governing the administration of the trust. For example, silence of a trust instrument as to the frequency of payment will not be regarded as a failure to satisfy the condition set forth in paragraph (a)(2) of this section that income must be payable to the surviving spouse annually or more frequently unless the applicable law permits payment to be made less frequently than annually. The principles outlined in this paragraph and paragraphs (f) and (g) of this section which are applied in determining whether transfers in trust meet such conditions are equally applicable in ascertaining whether, in the case of interests not in trust, the surviving spouse has the equivalent in rights over income and over the property.

8. Id.
A power of appointment is a power created or reserved by a person (the donor) having property subject to his disposition enabling the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or shares in which it shall be received. 13

There are three basic categories of powers: (1) powers exercisable by an inter vivos deed only, which are subdivided into powers presently exercisable and powers of which the exercise is postponed; (2) powers exercisable by will only; and (3) powers exercisable by deed or will. A power of appointment need not be exercisable only over real property, but may also encompass personalty. The granting of a power does not in itself confer any estate upon the donee; while it is often made in conjunction with the granting of some other interest in the property such as a life estate or an interest as trustee, it may be given to one without any related property interest. "A power is not in itself a right of property, but rather a deputation of the donee to act as agent for the donor in relation to the latter's property, so that upon its exercise the property is regarded as passing to the appointee from the donor of the power under the instrument by which it is created rather than from the donee . . ." 17

13. Restatement of Property § 318 (1940). The Restatement definition is restricted by the following language:

(2) the term power of appointment does not include a power of sale, a power of attorney, a power of revocation, a power to cause a gift of income to be augmented out of principal, a power to designate charities, a charitable trust, a discretionary trust, or an honorary trust.

Id. One authority proposes that the Restatement mistakenly restricts the definition to a narrow property-law concept and does not reflect developments in taxation of powers. Moser, Some Aspects of Powers of Appointment in Maryland, 12 Md. L. Rev. 13, 15 (1951). Moser suggested a definition that would take these developments into consideration:

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 ministerial or managerial in nature, powers of attorney, charitable or honorary trusts, and powers of sale.

Id. A New Jersey court stated that at common law the power of appointment was defined as [a] liberty or authority reserved by, or limited to, a person to dispose of real or personal property for his own benefit or for the benefit of others, and operating on 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. Pennsylvania Co. for Ins. on Lives, Etc. v. Kelly, 134 N.J. Eq. 120, 34 A.2d 538, 545 (1943). Cf. Pope v. Safe Deposit & Trust Co., 163 Md. 239, 245, 161 A. 404, 406 (1932); Maryland Mut. Benevolent Soc'y v. Clendenin, 44 Md. 429, 433, 22 Am. Rep. 52, 55 (1876). Simes and Smith conclude that "a power of appointment is the capacity to change the ownership of interests in property by an act called an appointment which operates independent of the ownership of the person in whom the power is vested." L. Simes & A. Smith, The Law of Future Interests § 871 (2d ed. 1956).


15. 5 W. Bowe & D. Parker, Page on the Law of Wills § 45.1 (Revised Treatise 1962).

16. Id.

17. Id. See 5 American Law of Property § 23.3 (1952).
With respect to the scope of the donee’s authority, powers of appointment are classified as general or special. A power is deemed to be special if “(a) it can be exercised only in favor of persons, not including the donee, who constitute a group not unreasonably large, and (b) the donor does not manifest an intent to create or reserve the power primarily for the benefit of the donee.”

18. Restatement of Property § 320 (1940).

A power is said to be general if the donee can appoint to himself. Restatement of Property § 320 (1940). Carried forward, possession of a general power means that the donee can exercise the power “in favor of anyone he chooses.” W. Bowe & D. Parker, Page on the Law of Wills § 45.2 (Revised Treatise 1962). This means that he can appoint to “anyone including himself, his estate, or his creditors.” Moser, Some Aspects of Powers of Appointment in Maryland, 12 Md. L. Rev. 13, 17 (1951). In a testamentary power, since the power is only exercisable by will, the donee can exercise in favor of his estate, his creditors, or the creditors of his estate.

21. Id.
to his estate or to the creditors of his estate. Such a restricted power is nevertheless referred to as a general power of appointment by the Maryland courts. This “strange animal” has also been labelled the Maryland general power, a naked power, the Maryland hybrid and the minority rule. In the interest of clarity, this paper will hereinafter refer to it as the Maryland hybrid power of appointment.

The Maryland hybrid power of appointment originated in Balls v. Dampman, decided in 1888. Certain land was devised to the donee for life coupled with a power “to will and dispose of the same in such manner as she may see fit by any instrument in the nature of a last will and testament she may see proper to make.” The donee’s will contained the following provisions:

First. I order and direct all my just debts and funeral expenses to be paid.

Item. I hereby devise and bequeath to my two youngest daughters all my property.

A creditor of the donee brought the action after her death in order that the property subject to her testamentary power be sold to satisfy a promissory note due him from the donee. The court concluded that the will was a valid exercise of the power of appointment in favor of the daughters. Although the creditor claimed that the first clause purported to appoint the property in his favor so as to satisfy the debt, the court held that the use of such language in the will did not amount to an exercise of a power of appointment. The court reasoned that, since the law automatically gives priority to the payment of debts and funeral expenses from the decedent’s estate, the language was not an attempt

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23. 161 A. 404 (1932); Prince de Bearn v. Winans, 111 Md. 434, 74 A. 626 (1909); Price v. Cherbonnier, 103 Md. 107, 63 A. 209 (1906); Balls v. Dampman, 69 Md. 390, 16 A. 16 (1888).
24. L. Simes & A. Smith, The Law of Future Interests § 875 (2d ed. 1956): “It should be pointed out that a line of Maryland cases is to the effect that a testamentary power ‘to appoint by will as the donee sees fit’ does not include a power to appoint to the donee’s creditors or to his estate as such.” See Balls v. Dampman, 69 Md. 390, 16 A. 16 (1888).
31. 69 Md. 390, 16 A. 16 (1888).
32. Id. at 391, 16 A. at 17.
33. Id. at 392, 16 A. at 17. The court concluded that the residuary clause was a valid exercise of the power of appointment in favor of the daughters. It should be noted, however, that Md. Ann. Code art. 93, § 4-407 (1957) now limits the situations in which a residuary clause will exercise a power of appointment to only the following: if, and only if, (i) an intent to exercise the power is expressly indicated in the will or (ii) the instrument creating such power of appointment fails to provide for disposition of the subject matter of the power upon its nonexercise.
by the donee to appoint the property to her estate for the satisfaction of her debts, but was mere surplusage. In an important dictum the court stated that in any event the donee had no authority to exercise the power in favor of her estate for the payment of her debts. The court implied that such a construction would convert the donee “from a mere life tenant into an owner of the fee.” She could not “consume it for her own use” since the donor, according to the court, only gave her the testamentary power to name other persons who should receive the property. The court simply presumed that the donor intended that the donee name only third person appointees and that any exercise of the power in favor of the donee’s estate or the creditors of her estate would defeat the donor’s intent. The fact that creditors of the donee were attempting to get at the property subject to the power was most probably a factor in this decision.

Thus the Maryland hybrid power of appointment originated not from a holding of law, but from mere dictum. More importantly, the Balls court cited no authority for the proposition that the donee could not exercise the power in favor of her estate or for the payment of her debts. Subsequent decisions kept this rule of interpretation alive, although the issues of these cases did not require such an affirmation of the Balls dictum; most of these early cases did not in fact involve questions of the creation of an orthodox general power and the exercise of such a power by the donee in favor of himself, his estate, his creditors or the creditors of his estate.

Repetition of the Balls rule as mere dictum resulted in an intrenchment without careful analysis or proper application to the facts of the particular case. In one instance, the court was concerned with a special power of appointment and the Balls dictum was clearly not applicable.

36. 69 Md. at 394, 16 A. at 18.
37. Id. at 395, 16 A. at 18. In its discussion of Balls v. Dampman, the Fourth Circuit observed that, considering “the last sentence quoted above from Balls, the Maryland Court of Appeals was primarily concerned that the creation of a life tenancy with an unrestricted power of appointment would merge the estates into a fee simple absolute, thus defeating the testator’s intention.” Guiney v. United States, 425 F.2d 145, 148 (4th Cir. 1970). It is interesting to note that an 1895 Virginia case held that “the devise of an estate for life coupled with power of alienation, either express or implied comprehends everything and the devisee takes the fee.” Farish v. Wayman, 91 Va. 430, 21 S.E. 810 (1895). This doctrine has been reaffirmed in subsequent Virginia cases. See Virginia Nat’l Bank v. United States, 307 F. Supp. 1146 (D. Va. 1969); Mowery v. Coffman, 185 Va. 491, 39 S.E.2d 285 (1946); Hansbrough v. Trustees of the Presbyterian Church, 110 Va. 15, 65 S.E. 467 (1909).
38. 69 Md. 390, 394, 16 A. 16, 18 (1888).
39. Price v. Cherbonnier, 103 Md. 107, 63 A. 209 (1906). The donee could only exercise the power by will in favor of a limited group, his children. Because of this limitation, the donee had only a special power of appointment. Despite this limitation, the donee entered into an agreement with his creditors which enabled him to borrow money in consideration for which he agreed to devise to the creditors a portion of the property subject to the power. The court held that a “diversion to creditors . . . would be in contravention of the testator’s intent as expressed in her will” and cited Balls in support of the statement. Id. at 110, 63 A. at 210. Since the court in Price was dealing with a special power of appointment defining a limited class of appointees, as opposed to the power created by the broader language of Balls, there was no need for it to resort to the Balls rationale in concluding that the donee could not appoint to one outside the limited class of appointees in favor of whom the special power could be exercised.
In another situation the court dealt with the issue of whether the grantor-donee exercised his power of appointment by will or whether he attempted to make a mere testamentary disposition of the property as his own. In yet another case repeating the Balls dictum, the question was whether, for the purposes of the Maryland inheritance tax, property passing by testamentary exercise of a power was to be regarded as passing from the donee of the power and being subject to the tax, or from the donor.

40. Pope v. Safe Deposit & Trust Co., 163 Md. 239, 161 A. 404 (1932). The grantor conveyed his interest in a vested remainder to a trustee, retaining an equitable life interest as well as a testamentary power of appointment over the trust estate. See note 68 infra for the terms of the power. He exercised the power by will in favor of the trust company, as trustee, to assure his wife an annual income until her death or marriage and thereafter to pay the income to his living children; the trust was to terminate upon the youngest child reaching twenty-one years of age. The grantor’s executor contended that the corpus of the trust created by the deeds from the grantor-donee to the trustee reverted to the donee and passed under his will. The issue was whether the grantor-donee exercised his power by will or whether he attempted to make a mere testamentary disposition of the property as his own; an exercise of the power would result in the property passing from the donor of the trust property by the instrument creating the power, whereas a testamentary disposition would cause the property to pass through the decedent’s estate (so as to be subject to debts, dower rights, etc.). 163 Md. at 246, 161 A. at 407. The court held that the property passed from the donor of the power by the deeds of trust and was, therefore, not part of his estate even though the power was held by him as donee and was exercised by him by will. The court pointed out that a “power retained is, however, not an estate in the subject-matter of the power.” Id. at 245, 161 A. at 406. The court cited Balls for the proposition that the property, by an exercise of the power, could not be made subject to the claims of creditors. Id. at 246, 161 A. at 407.

41. Connor v. O’Hara, 188 Md. 527, 53 A.2d 33 (1947). The court considered the question of whether, for purposes of the Maryland inheritance tax, property passing by testamentary exercise of a power was to be regarded as passing from the donee of the power and therefore as being subject to the tax, or from the donor. The donor left by will the residue of her estate to the donee for life, with the remainder to such persons as the donee might appoint by will. The donee left his entire estate, including the property subject to his power of appointment, to his three children. The court held that “property passes by exercise of a testamentary power of appointment, not from the donee of the power but from the donor.” Id. at 530, 53 A.2d at 34. See Prince de Bearn v. Winans, 111 Md. 434, 74 A. 626 (1909) (pointing out that, for purposes of the administration of a donee’s estate, the appointee does not take title under the donee’s will but from the donor’s instrument creating the power). The court’s reference to Balls v. Dampman was in support of its proposition that Maryland, by the Balls rule “that the donee has no power (unless expressly conferred) to appoint for payment of his own debts,” had rejected the English rule that equity would regard the property subject to a general power of appointment as an equitable asset of the donee for the payment of creditors in preference to the claims of voluntary appointees. 188 Md. at 530, 53 A.2d at 34. The court also cited Price v. Cheronnier and Wyeth v. Safe Deposit & Trust Co. in support of this statement. Yet the reaffirmation of Balls was mere dictum since the donee in Connor appointed to his children and not to his estate or the creditors of his estate.

See also Lamkin v. Safe Deposit & Trust Co., 192 Md. 472, 64 A.2d 704 (1949), where the court again unnecessarily reaffirmed the Balls rule. The donor created a trust to pay income to the donee (his wife) during her life and provided: “from and after the death of my said wife, I authorize or direct said trustee to transfer and deliver the rest and residue of my estate to such person or persons as she may limit, nominate, and appoint by her last will and testament.” Id. at 475, 64 A.2d at 705. In her will the donee exercised her power with respect to the property by creating a life estate with a new power of appointment in another donee. After deciding that the creation of such a subsequent power was valid and within the intention of the original grantor, the court observed that the property passed by testa-
Only in a limited situation has the Maryland Court of Appeals recognized the creation of an orthodox general power of appointment where the language used would normally result in the Maryland hybrid. In *Wyeth v. Safe Deposit & Trust Co.* the donor executed a deed of trust to the trust company of all her property, reserving to herself an income interest for life and a testamentary power of appointment to the effect that: "The said trustee shall hold the residue of my said property conveyed in trust for such uses as I may by last will and testament appoint . . . ." In her will the decedent-donee, among other provisions, set up a number of separate trusts and called for the payment of a debt to her brother. Although the will stated that the decedent was exercising her power, it was not clear in favor of whom the specific trust property was appointed. The balance of the donee's estate would not have been sufficient to pay the debt if all other provisions of the will were first complied with. The court, despite the *Balls* precedent, construed the will as an exercise of the appointment in favor of the donee's estate and allowed payment of the debt first, with the residue of the estate going into the trusts created by the will.

The decision noted the rule as to the Maryland hybrid power and determined that it was inapplicable to the factual situation presented. In cases where the rule previously had been applied, the donor and donee were different persons; whereas in *Wyeth* the donor and the donee were the same person. Consequently, the donee could not frustrate the donor's intent by an exercise of the power in favor of her estate or the creditors of her estate.

Contrary to the approach taken by the Maryland Court of Appeals in prior cases, the Fourth Circuit has limited its discussion of the *Balls* dictum to those cases demanding a ruling on whether the donee had an orthodox general power. In *Leser v. Burnet* the Fourth Circuit had to determine if certain property passing under a donee's exercise of a testamentary power of appointment should have been included in the gross estate of the donee for the purpose of computing the federal estate tax. The donor conveyed in a deed of trust certain newspaper property with a provision that a portion of the property and of the income therefrom would, "upon the decease of the said Anne E. Agnus . . . [remain] in trust for the use and behoof of such person or persons as she, by her last will and testament . . . shall have named, limited and appointed to take . . . ." The donee exercised the power in favor of her two daughters. The Board of Tax Appeals held that the value of the property should have been included in the gross estate.
of the donee since section 402(e) of the Revenue Act of 1921 provided that property passing under a general power of appointment exercised by the decedent by will be included in the gross estate of the decedent. The court, therefore, was required to determine whether, under Maryland law, the donee had an orthodox general power of appointment.

In discussing the Maryland hybrid power the court observed that "under the law of Maryland, language such as that used in [the donor's] conveyance, which would ordinarily create a general power with right in the donee to appoint for the benefit of his own creditors, does not have such effect in Maryland, but creates a naked power from which neither the estate of the donee nor his creditors can possibly benefit." The court concluded, therefore, that the power in question was not general but limited and that the property subject to the power was not includible in the donee's gross estate.

Aside from the court's crystallization of the Balls dictum into a rule of law, Leser is significant in that for the first time a court indicated that the possibility existed that an orthodox general power could be created in Maryland and set out the manner in which it could be done:

This does not mean that a general power cannot be created in Maryland. . . . A general power could doubtless be created in Maryland by expressing in the language creating it what is held to be implied in most other jurisdictions, viz., that the donee may exercise same for his own benefit or for the benefit of his creditors; but unless this is expressed, the power under the Maryland decisions is not general, but limited. . . .

That the Fourth Circuit would follow its dictum in Leser became apparent in Pierpont v. Commissioner. Like Guiney, Pierpont dealt with the issue of whether a general power of appointment was created under Maryland law so as to qualify the decedent donor's estate for a marital deduction in the computation of federal estate taxes. The donor, in discussing the preparation of his will with a trust company, expressed the desire to adequately provide for his wife while minimizing his estate taxes by qualifying for the marital deduction. The donor's attorney attempted to accomplish this by creating a testamentary trust, giving the wife a life estate in the income with a power to appoint the corpus at her death. The provision creating the power of appointment stated: "the entire remaining principal . . . shall be paid over free of this Trust in such manner and proportions as my said wife may designate and appoint in her Last Will and Testament."

47. Revenue Act of 1921, ch. 136, § 402(e), 42 Stat. 279. The statute does not provide for the inclusion of property passing under any power of appointment other than an orthodox general power of appointment.
48. 46 F.2d at 761.
49. Id.
50. 336 F.2d 277 (4th Cir. 1964).
51. Id. at 279.
In considering the Maryland law on general powers of appointment, the court conceded that "the crucial question of whether an unlimited testamentary power of appointment gives the holder power to appoint to his estate has never been directly passed on by the Maryland Court of Appeals in a factual setting similar to this case."\textsuperscript{52} The executors argued that the donor clearly intended to take advantage of the marital deduction and consequently intended to create the general power of appointment necessary to qualify for that deduction. The court rejected this argument by stating: "That he had an intention to take advantage of the marital deduction is doubtlessly clear; that he entertained the intention to give his widow the power to appoint to her estate is, at best disputable. But even if Pierpont intended that Lallah might appoint to her estate, he failed to employ the necessary language which would have enabled her to do so under Maryland law."\textsuperscript{58}

Although it denied the marital deduction, the court again indicated that it might be possible to create a true general power of appointment in Maryland if the proper language were employed. Since the only pronouncements to this effect had been by the Fourth Circuit, and since the Maryland Court of Appeals had not taken a position on the subject, technically the issue remained open.

The recent Maryland case of \textit{Frank v. Frank},\textsuperscript{54} while reaffirming the \textit{Balls} rule, indicates approval of the dicta in the federal cases recognizing the possibility of creating an orthodox general power in Maryland. In \textit{Frank} the donee of the power sought a declaration as to the nature and scope of the power granted her by her husband-donor. As in \textit{Pierpont}, there was evidence that the donor intended to take advantage of the marital deduction allowed by the Internal Revenue Code.\textsuperscript{55}

In order to so qualify, the power of appointment must have been such as to have allowed the donee to exercise it in favor of her estate or the creditors of her estate.\textsuperscript{56} The donor's will provided: "I hereby confer upon my said wife full and complete testamentary power of disposition over fifty per cent (50\%) of the rest, residue and remainder of my estate [which had been left in trust for the wife for life], free and clear of all trusts."\textsuperscript{57}

The donee argued that the issue of a donee's power to appoint to herself or her estate had never before been presented to a Maryland court in the context of the federal marital deduction; since the donor intended to take advantage of the tax savings, the power created should be construed as an orthodox general power so as to qualify the donor's estate for the deduction.\textsuperscript{58} Appellant further argued correctly that the prior cases never directly decided the issue, but only referred to it in dicta; therefore, these cases were not binding authority on the sub-

\textsuperscript{52} Id. at 282.
\textsuperscript{53} Id. at 283.
\textsuperscript{54} 253 Md. 413, 253 A.2d 377 (1969).
\textsuperscript{55} \textit{Int. Rev. Code} of 1954, § 2056(a) and (b) (5).
\textsuperscript{56} Id. See note 4 \textit{supra} and accompanying text.
\textsuperscript{58} Brief for Appellant at 7, Frank v. Frank, 253 Md. 413, 253 A.2d 377 (1969).
The court disregarded these arguments, holding that the donee could not appoint to herself or her estate. The power was not an orthodox general power because the will did not contain specific words authorizing such an appointment. For the first time, however, the Maryland Court of Appeals implied approval of the *Leser v. Burnet* pronouncement that an orthodox general power could be created in Maryland if express enabling language was used, but the mere fact that the decedent intended to and believed that his estate should qualify for the marital deduction was not controlling.

The dicta in the three cases last discussed suggests that a general testamentary power of appointment can be created in Maryland. To accomplish this, however, it is necessary to use express language to the effect that the donee can exercise the power in favor of himself, his creditors, his estate or the creditors of his estate. An unlimited power to appoint in the absence of the express language creates only the Maryland hybrid power, except for the unusual situation where the donor and the donee are the same person. Taking this summation as the Maryland position with respect to the general powers, the inquiry must then turn to the effect of *Guiney v. United States* upon the Maryland law.

Of initial importance is the manner in which the Fourth Circuit held that the language of the decedent's will satisfied the "specific enabling language" requirement necessary to create an orthodox general power of appointment. If the Internal Revenue Code definition of general power of appointment was incorporated by reference into the donor's will, the case does not depart from the established rule because that definition is sufficiently precise to create an orthodox testamentary general power in the donee. If, on the other hand, this definition was not incorporated, the language creating the power would not appear to satisfy the specific language required by the Maryland Court of Appeals. If the latter is the correct interpretation, it would mean that the Fourth Circuit has significantly liberalized its interpretation of Maryland law, for it would indicate that the testator's mere use of the words "general power of appointment" with a specific reference to "the marital deduction as provided by the Internal Revenue Code of 1954, § 2041(b) (1) : "the term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. . . . ""

59. *See* notes 33–41 *supra* and accompanying text.
62. 253 Md. 413, 420, 253 A.2d 377, 382.
63. *See* note 5 *supra* and accompanying text.
64. *Int. Rev. Code of 1954, § 2041(b) (1) : "the term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. . . . ""
65. *See* notes 63–71 *supra* and accompanying text.
Revenue Code of 1954"\textsuperscript{67} would now satisfy the requirement of express language. Although the court did point out that in no previous Maryland case did a testator use these two references in combination,\textsuperscript{68} it is unlikely that the court would have rested upon this distinction in order to reach its holding without incorporating by reference the Code definition. \textit{Frank v. Frank}\textsuperscript{69} stressed the requirement for specific language, citing \textit{Leser v. Burnet}\textsuperscript{70} and an article by M. Peter Moser which stated: "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."\textsuperscript{71} Anything less than these express words presumably would not have been acceptable to the Maryland Court of Appeals at the time of \textit{Frank}. It would seem, therefore, that without incorporating the Code definition of general power of appointment, the language used by the testator in \textit{Guiney} fails to satisfy the specific language test required by the Maryland Court of Appeals.

The next step is to consider whether the Internal Revenue Code definition of general power of appointment was, in fact, incorporated by reference into the donor's will. The doctrine of incorporation by reference is part of the testamentary law of Maryland;\textsuperscript{72} under it, the incorporated document becomes part of the will, as if it had been written

\textsuperscript{67} Id.

\textsuperscript{68} The early cases, of course, make no mention of the marital deduction since it was not available before 1948; nor do they use the words "general power." The language creating the power in \textit{Balls v. Dampman} was merely:

\textit{... to will and dispose of the same in such manner as she may see fit by any instrument in the nature of a last will and testament she may see proper to make.\textsuperscript{69}}

\textit{Md. 390, 391, 16 A. 16, 17 (1888).}

In \textit{Pope v. Safe Deposit & Trust Co.} the testator used the following language:

\textit{... and, from and after the death of the said Henry May Gittings, to hold said trust property ... to the use of such person or persons, as the said Henry May Gittings shall by his last will and testament, duly executed in accordance with the laws of the State of Maryland, have appointed to take the same. ...\textsuperscript{163}}

\textit{Md. 239, 243, 161 A. 404, 405 (1932).}

The testator in \textit{Lamkin v. Safe Deposit & Trust Co.} used the words:

\textit{... from and after the death of my said wife, I authorize or direct said Trustee to transfer and deliver the rest and residue to [sic] my estate to such person or persons as she may limit, nominate, and appoint by her last will and testament.\textsuperscript{192}}

\textit{Md. 472, 475, 64 A.2d 704, 705 (1949).}

The donee in \textit{Leser v. Burnet} said:

\textit{... in trust for the use and behoof of such person or persons as she, by her last will and testament ... appropriately executed, shall have named, limited and appointed to take and have the same. ...\textsuperscript{46}}

\textit{F.2d 756, 757-58 (4th Cir. 1931).}

In the next two cases the testator intended to take advantage of the marital deduction but did not use the words "general power" nor expressly refer to the marital deduction. In \textit{Pierpont v. Commissioner} the language was "shall be paid over free of this Trust in such manner and proportions as my said wife may designate and appoint in her Last Will and Testament." 336 F.2d 277, 279 (4th Cir. 1964). The donor in \textit{Frank v. Frank} said: "I hereby confer upon my said wife full and complete testamentary power of disposition. ..." 253 Md. 413, 415, 253 A.2d 377, 378 (1969).

\textit{Md. 391, 253 A.2d 377 (1969).\textsuperscript{69}}

\textit{F.2d 756 (4th Cir. 1931).\textsuperscript{70}}

\textit{Mosher, Some Aspects of Powers of Appointment in Maryland, 12 Md. L. Rev. 13, 21 (1951).\textsuperscript{71}}

\textit{See, e.g., Hull's Estate, 164 Md. 39, 163 A. 819 (1933). The prior case law is now a part of the statutory law of Maryland. Md. Ann. Code art. 93, § 4-107 (1969).\textsuperscript{72}}
In order for the doctrine to operate, however, there are certain requirements which must be met. It is essential that the will itself distinctly refer to a written instrument74 with sufficient certainty that it may be identified and distinguished from other similar writings.75 The paper referred to must also be in existence at the time the will is executed,76 and the will must refer to the document as one already in existence.77 The reference, furthermore, must show an intention to incorporate the document.78

Did the testator's will in Guiney incorporate by reference the definition of general power of appointment contained in section 2041(b)(1) of the Internal Revenue Code? The provision of the will did not expressly refer to section 2041(b)(1) nor did it indicate a general power of appointment as defined in section 2041(b)(1). The exact words were "a general power of appointment over this trust in order that one-half of my estate may qualify for the marital deduction . . . as it is fully my intention to take advantage of the marital deduction as provided by the Internal Revenue Code of 1954, or amendments made thereafter."79 The court stated that "[b]y his use of the words 'general power of appointment,' coupled with his expressed 'intention to take advantage of the marital deduction as provided by the Internal Revenue Code of 1954,' the testator was clearly referring to the general power of appointment provisions of section 2041 of the Code, which empower the donee to appoint to herself or her estate."80 The court reasoned that the will did not refer to the Maryland general or hybrid power, but it was the section 2041(b)(1) "definition the testator embraced by his explicit reference to the provisions of the Internal Revenue Code."81 Thus the court found the necessary intent of the testator to incorporate this definition. With respect to the other requirements, the reference in the will is to a document, the Internal Revenue Code, existing at the time the will was executed, and the reference to "amendments made thereafter" would not incorporate such changes unless made before execution of the will.

It is interesting to note that neither the district court nor the circuit court in Guiney referred specifically to the doctrine of incorporation by reference or cited any Maryland cases to support the in-

73. 164 Md. at 44-45, 163 A. at 821.
74. Id. at 46, 163 A. at 822.
75. See Buchwald v. Buchwald, 175 Md. 103, 114, 199 A. 795, 800 (1938); 2 W. Bowe & D. Parker, PAGE ON THE LAW OF WILLS § 19.23 (Revised Treatise 1962).
76. Hull's Estate, 164 Md. 39, 46, 163 A. 819, 822 (1933).
77. See 2 W. Bowe & D. Parker, PAGE ON THE LAW OF WILLS § 19.24 (Revised Treatise 1962).
79. 425 F.2d at 147.
80. Id. at 150 (emphasis added).
81. Id. at 149 (emphasis added). The court pointed out that a reference to the marital deduction provisions of the Code necessarily includes both sections 2056(b)(5) and 2041 since these sections complement each other. If the donor's estate qualifies for the marital deduction under section 2056(b)(5), the estate of the donee having a general testamentary power must include the property under section 2041 for federal estate tax purposes. Therefore, the section 2041(b)(1) definition of general power of appointment is also read into section 2056(b)(5).
corporation of the section 2041(b)(1) definition into the testator's will. However, since the circuit court stressed that its decision was "fully consonant with the Maryland law,"\(^8^2\) it must be presumed that the court held that the definition had been incorporated by reference, rather than merely that the definition could be inferred from the testator's use of the term "general power of appointment."

Assuming the correctness of this conclusion, the inquiry becomes what the effect of this opinion will be and should be on the development of Maryland law. The decision clearly does not bind the Court of Appeals of Maryland; it is for the highest state court to determine what the state law will be.\(^8^3\) The Maryland Court of Appeals could negate this decision by a contrary ruling or by a simple declaration that it is not the law in Maryland. Yet in view of the Frank dictum that an orthodox general power of appointment can be created in Maryland, the Maryland Court of Appeals should not object to Guiney merely because it was the first decision (except for Wyeth) to recognize, in fact, such a creation. However, there is no reason why a Maryland attorney should have to rely on the doctrine of incorporation by reference when he can draft the instrument to provide that the donee is given a general power of appointment such that he can appoint to himself, his estate, his creditors, or the creditors of his estate. The use of this specific enabling language certainly should satisfy the Maryland courts as evidencing the donor's intent to create an orthodox general power and not merely the Maryland hybrid.

Perhaps the most important question arising from Guiney is that of the effect of creating an orthodox general testamentary power of appointment coupled with a life estate in the donee. One of the reasons behind the Balls v. Dampman rule was the court's fear that such an arrangement would "convert . . . a mere life tenant into an owner of the fee."\(^8^4\) If this is in fact the effect of such an arrangement, the donee in Guiney had a fee simple. Such a construction would certainly have far-reaching consequences. Whereas the life tenant with a general testamentary power has a limited property interest and must appoint by will, the owner of the fee has legal and equitable title to the property and can convey it during his life. Whereas a creditor of the donee, in the absence of statute, cannot attach property subject to an unexercised general power of appointment,\(^8^5\) he could reach the property if the "donee" is deemed an owner in fee simple.\(^8^6\) Whereas a

\(^8^2\) See 425 F.2d at 150.

\(^8^3\) See Morgan v. Commissioner, 309 U.S. 78, 80 (1940); Pierpont v. Commissioner, 336 F.2d 277 (4th Cir. 1964).

\(^8^4\) See L. Simes & A. Smith, The Law of Future Interests § 944 (2d ed. 1956). This rule does not apply if the power is exercised by will in favor of the donee or his estate or third person and the donee's estate is insufficient to meet his creditor's claim. Id. at § 945. This exception would not apply to aid creditors in respect to property subject to the Maryland hybrid power since this power is not truly general but more akin to a limited or special power. See also Frank v. Frank, 253 Md. 413, 416, 253 A.2d 377, 379 (1969); Connor v. O'Hara, 188 Md. 527, 530, 53 A.2d 33, 34 (1947).

surviving spouse does not have dower or a statutory distributive share in property subject to a general power, such property would be subject to these claims if her husband-donnee is viewed as an owner in fee simple. Whereas a person may be designated by the donor to take the property in default of the donee's failure to exercise his power, the contingent rights of such a taker in default would be eliminated if the donee is deemed to be an owner in fee simple. While the aforementioned consequences of such an interpretation are not exhaustive, they do illustrate the total abrogation of a careful estate plan if the donee of a general power of appointment is viewed instead as an owner in fee simple.

Of course, the Balls statement concerning the conversion of the life tenant possessing a general testamentary power of appointment into an owner in fee simple is mere dictum. But in view of the Maryland Court of Appeals' repetition of this dictum in subsequent cases, one cannot disregard the possibility that it will be transformed into a rule of law. To do so would not make Maryland the only jurisdiction to view such a donee as an owner in fee simple; Virginia has made this determination.

On the other hand, the Balls case was decided in 1888, a time when the use of powers of appointment was quite limited and judicial understanding of the principles involved was not great. There was no established American law of powers of appointment, and the few cases "tended to reach conclusions upon uncritical citation of English authorities." In Guiney the Fourth Circuit acknowledged the Maryland Court of Appeals' primary concern in Balls that the creation of a life estate coupled with an unrestricted power of appointment would merge the interests into a fee simple absolute. The circuit court, however, implied that this Maryland view is outdated by noting that "with developments in the law of trusts and estates, the courts interpreting Maryland law have come to reflect a more modern view, viz., that while it would be an impermissible frustration of the donor's desire if creditors of the donee were allowed to benefit from the donor's property in the absence of a clear statement that the donor so intended, yet, where he sufficiently expresses his desire to give the donee the power to appoint to herself or her estate, this intent must likewise not be frustrated." If the donor intended the donee to have a fee

87. See L. Simes & A. Smith, The Law of Future Interests § 947 (2d ed. 1956). This rule applies regardless of whether or not the donee-spouse has exercised the power of appointment.
91. Restatement of Property, Introductory Note, Ch. 25 (1940).
92. 425 F.2d at 148–49.
simple, the donor would not have given the latter a mere life estate with a general power. The use of powers also allows the donor a certain degree of flexibility in the final distribution of his assets. 93

Besides the policy argument that adherence to the Balls dictum would bring results clearly contrary to the donor’s intent, perhaps the strongest argument in favor of the Maryland courts’ not converting the donee into an owner in fee is the result reached by the Maryland Court of Appeals in the Wyeth case, where the donor and donee were the same person. 94 Instead of ruling that the donor kept or gave to himself a fee simple, the court recognized an exception to the Balls rule and held that an orthodox general power was created under the specific circumstances. The case can, therefore, be viewed as overruling the mere dictum in Balls. And in Frank, the court, recognizing in dictum the possibility of creating an orthodox general power in Maryland, did not express a fear of converting the life tenant into an owner in fee simple. Thus, while the possibility exists that the Maryland courts would negate the donor’s estate plan by converting the donee into an owner in fee, it is unlikely that they would do so.

CONCLUSION

Although the issue has never been actually decided by the Maryland Court of Appeals, it seems clear that a true general power of appointment can be created in Maryland. Guiney v. United States strongly reinforces this proposition. The only way that such a power of appointment can be created is by use of language expressing an intent that the donee is authorized to exercise the power in favor of himself, his creditors, his estate or the creditors of his estate. In the absence of such explicit authorization, an unlimited power of appointment creates only the Maryland hybrid power in the donee. Certainly the Guiney opinion accepted this interpretation of the Maryland law on general powers of appointment in reaching its decision.

While Guiney relied on the doctrine of incorporation by reference to reach its decision, the draftsman should instead use the specific enabling language set out in section 2041(b)(1) of the Internal Revenue Code in creating an orthodox general power of appointment. If such language is used in the instrument itself, there is no possibility that a Maryland court would apply the restrictive Balls rule. Also, while the answer to the question raised by the Balls dictum with respect to a conversion to a fee simple is not entirely certain, a reasonable interpretation of the case law and a consideration of the usefulness of powers of appointment should result in the court’s upholding the donor’s intent by not converting the donee of an orthodox general power who also owns a life estate in the property subject to the power into an owner in fee simple of the property subject to the power.

94. See notes 47-49 supra and accompanying text.