CHAPTER 16

Miscellaneous

1. OBLIGATIONS OF THE DONOR PAYABLE AT HIS DEATH

Transfers of this sort, unless supported by consideration, are usually unenforceable *per se,* entirely aside from the question of "evasion" of the widow's rights.[1] Suppose that a husband, wishing to disinherit his wife, executes a sealed note for $1,000. The note is payable at his death, and he delivers it to the named payee. It would appear that no enforceable inter vivos right or "interest" passes to the donee unless (a) there is consideration, or (b) the state concerned is one of the relatively few jurisdictions that considers a seal to be conclusive evidence of consideration,[2] or that has adopted the Model Written Obligations Act, which sanctifies a mere intention to be bound.[3] Lacking consideration, no contract right or enforceable chose in action is created. The law of

[1] Reinhart v. Echave, 43 Nev. 323, 185 Pac. 1070, 187 Pac. 1006 (1920); Tissue's Estate, 64 Pa. Super. 141 (1916) (notes given a "short time" before death); *cf.* Jones v. Westcott, 150 Atl. 50 (N.J. 1930); Snayberger's Estate, 62 Pa. Super. 390 (1916) (payable six months after death); BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW, 548 (7th ed. 1948); Atkinson, WILLS, 198 (2d ed. 1953); Note, 25 CORNELL L. Q. 119 (1939).

[2] *E.g.,* Krell v. Codman, 154 Mass. 454, 28 N.E. 578, (1891) (covenant to pay a certain sum six months after death); *cf.* Patterson v. Chapman, 179 Cal. 203, 176 P. 37, 2 A.L.R. 1467 (1918) (instrument acknowledging a debt); Uniform Commercial Code, §3-113 (1952). §28 of the Negotiable Instruments Law might prevent enforcement of the sealed note even in jurisdictions in which the seal is conclusive on the matter of consideration. See BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW, 298 (7th ed. 1948).

[3] "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." Model Written Obligations Act, §1. This act was proposed in 1925 but to date has been adopted only by Pennsylvania, in 1927. 9A Uniform Laws Annotated, 419 (1951); *cf.* Uniform Commercial Code, §§1-107, 2-209 (1952).

gifts is no help; the chose being a nullity, of what effect is physical delivery? Nor could the note be considered an informal deed of gift of a future interest in the money, unless a definite amount was set aside or earmarked.[4] It is possible, of course, to create a future interest in money; [5] but the common practice is to use a trust, and here also segregation of the funds would be required.[6]

A note or obligation that is valid between the parties concerned may nevertheless be invalid as to the widow.[7] Litigation on the latter point would be decided in accordance with the governing "evasion" rationale.[8] As far as jurisdictions using a "control" or "intent" test are concerned, the obligation payable at death may be a risky device for the husband

[4] Smith v. Peacock, 114 Ga. 691, 40 S.E. 757 (1901); 38 C.J.S. *Gifts* (1943); *cf.* Woodward v. Woodward, 222 Iowa 145, 268 N.W. 540 (sundry "papers"); Ferry v. Bryant, 19 Tenn. App. 612, 93 S.W.2d 344 (1935) (attempted trust). A gift of the decedent's own check would also be unenforceable against his estate.

[5] In future interests parlance, if not in workaday experience, money is not a "consumable." *Cf.* Simes and Smith, LAW OF FUTURE INTERESTS, §369, note 89 (2d ed. 1956).

[6] *Cf.* Brégy, INTESTATE, WILLS AND ESTATES ACTS OF 1947, 5857 (1949).

[7] The principles that govern the substantive law validity of a note payable at death, as well as its vulnerability to the widow, would also appear to be applicable to a note payable at a certain time, executed by the decedent spouse in anticipation of death. *Cf.* Note, 25 CORNELL L. Q. 119 (1939).

[8] (a) *Favoring spouse:* Wilson v. Wilson, 23 Ky. L. Rep. 1229, 64 S.W. 981 (1901) (actual misrepresentation with reference to related antenuptial transfers); Feeser Estate (No. 2), 88 D.&C. 241 (1954); *cf.* Hummel's Estate, 161 Pa. 215, 28 Atl. 1113 (1894) (widow cannot recover against donees since they were not "privies to the fraud," but widow can be compensated out of the estate); Norris v. Barbour, *infra,* note 9. Also see Dillard v. Dillard, 269 S.W.2d 769 (Mo. 1954) (nonevasive). (b) *Favoring donee:* In re Sides' Estate, 119 Neb. 314, 228 N.W. 619 (1930) (money transferred, donees give back notes to be cancelled at death); Mornes Estate, 79 D.&C. 356 (Pa. 1951); In re Rynier's Estate, 48 Lanc. Rev. 475, *aff'd,* 347 Pa. 471, 32 A.2d 736 (1943); *cf.* In re Fritz's Estate, 135 Pa. Super. 463, 5 A.2d 601 (1939), 25 CORNELL L. Q. 119 (1939) (antenuptial transfer; payable in seven years).

Notes or other obligations entered into with a view to defeating inchoate dower are in a special category. Perhaps transfers of this sort would not be viewed as seriously in a state in which inchoate dower can be defeated by other means. The Pennsylvania cases on notes payable at death are discussed, *supra,* pp. 141–143.

to use. For example, consider *Norris* v. *Barbour*.[9] Here the husband delivered to a trustee a bond in the sum of twenty thousand dollars, payable one year after his (the husband's) death. The proceeds were to be applied according to the provisions of the trust, which had been executed the same day as the bond. The husband died eleven years later; and the payment of the bond would exhaust available personalty. The court was willing to concede the validity of the obligation as between the parties, the seal affording a conclusive presumption of consideration. "But," said the court, "the present suit is not one between the parties to the contract." Equity, it declared, may enquire into the substance of a transaction in order to prevent a fraud:

> "We hold that the right given by our statutes to a widow to share in the surplus of her deceased husband's personal estate cannot be defeated by so simple a device as this, where he retains up until the time of his death full ownership and enjoyment of his personal property, and merely executes and transfers to a trustee his bare promise under seal, unsupported by an actual consideration, to pay to the trustee after his (the husband's) death . . . a sum of money equivalent to the corpus of his personal estate, or the major portion thereof. In substance, such a device is but a legacy in disguise. . . . It operates as a fraud upon and is void as to the rights of the widow, and in equity will be set aside at her instance." [10]

It is unlikely that the Virginia court was purporting to rule that *all* voluntary "transfers" may be defeated by the widow; probably the court was more concerned with retention of excessive "control" than with lack of consideration.[11] Earlier

[9] 188 Va. 723, 51 S.E.2d 334 (1949).

[10] *Id.* at 740, 741, 51 S.E.2d at 341.

[11] The court stated that the husband retained full *ownership* of his personalty, *id.* at 740, 51 S.E.2d at 341. This is inaccurate, since the donee of the bond received an inter vivos gift of a chose in action, enforceable at death; and under the "reality" rationale this would suffice to defeat the widow. Notice that the decision in the Norris case is consistent with the equities.

in the opinion there was specific mention of a line of Virginia decisions that condone an irrevocable trust, with retention of income for life, as an "evasive" device.[12] It is hornbook law that no consideration is needed to establish a valid trust — hence emphasis on irrevocability points to a "control" rationale. Viewed in this light, a sealed note, although valid as between the payor and payee, is objectionable because of retention of practical economic control. In a trust device the money passes to the trustee; but merely to sign a note leaves the principal in the undisturbed possession of the donor, subject to the normal attrition of everyday living, even of insolvency. Lacking the earmarking process that is involved in a declaration of trust or that accompanies a deed of gift, it is probably the extreme example of a valid "evasive" device. True, it has "reality"; but what could be thinner? [13]

Under the maintenance and contribution formula the widow would prevail against otherwise valid obligations payable at death only when she can prove need. Likewise, under either that formula or the usual "control" test, the widow has no ground for complaint if the obligation is supported by fair consideration.[14]

2. Purchase by Decedent, Title in Name of Another

In these transactions, when the decedent supplied all the consideration, the "transfer" is in substance a gift by the decedent to the person in whose name the title was placed. The amount represented by the purchase price, instead of being given directly to the donee, has been converted into a different form of wealth, and given to the donee in its new form.[15]

[12] *E.g.*, Hall v. Hall, 109 Va. 117, 63 S.E. 420 (1909).

[13] See discussion of contracts to make a will, Appendix D, *infra*.

[14] See Suggested Model Decedent's Family Maintenance Act, §1(d), *infra*, Chap. 22.

[15] (a) *Favoring spouse:* Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887); Resch v. Rowland, 257 S.W.2d 621 (Mo. 1953); *cf.* Knights v. Knights, 300 Ill. 618, 133 N.E. 377 (1921) (antenuptial); Stroup v. Stroup, 140 Ind. 179, 39 N.E. 864 (1894); Jaworski v. Wisniewski, 149 Md. 109, 131 Atl. 40 (1925) (deed by wife to X, with reconveyance to wife for life,

When the property purchased is personalty,[16] the transfer will no doubt be sustained, as would any other gift, under the "reality" rationale. In all probability it will also be sustained under both the "control" and the "intent" [17] rationales, unless the equities run strongly with the surviving spouse.

In most cases involving this device a life estate has been retained by the decedent. This factor is immaterial, since a life interest may be reserved with impunity even when the property involved is transferred direct to the donee. But the transfer is of uncertain validity, particularly under the control or the intent rationales, when the decedent also retained the power to dispose of the property. Even so, the equities may dictate its validity. In *Whitehill* v. *Thiess* [18] the husband deserted his family, leaving the wife with five young children to support. The children eventually went to work, turning their earnings over to the mother. Seven years before her death the mother purchased property "for and during the term of her natural life only with full power in the said Mary C. Thiess to lease, mortgage, deed or in any otherwise encumber the property absolutely and after her death and with-

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wife having power to mortgage, lease, sell, or devise, and in default thereof remainder to children); Hays v. Henry, 1 Md. Ch. 337 (1848) (title in name of mistress, reconveyance to husband in trust).

(b) *Favoring donee:* Ford v. Ford, 4 Ala. 142 (1842); Wooton v. Keaton, 168 Ark. 981, 272 S.W. 869 (1925); Osborn v. Osborn, 102 Kan. 890, 172 Pac. 23 (1918); Whitehill v. Thiess, 161 Md. 657, 158 Atl. 347 (1932); Trabbic v. Trabbic, 142 Mich. 387, 105 N.W. 876 (1905) (mortgage); Crecelius v. Horst, 89 Mo. 356, 14 S.W. 510 (1886); *cf.* Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E.2d 684 (1945); Kirkpatrick v. Clark, 132 Ill. 342, 24 N.E. 71 (1890); Beck v. Beck, 64 Iowa 155, 19 N.W. 876 (1884); Charest v. St. Onge, 332 Mass. 628, 127 N.E.2d 175 (1955); Seaman v. Harmon, 192 Mass. 5, 78 N.E. 301 (1906) (bona fide purchaser); Burtt v. Riley, 260 App. Div. 899, 22 N.Y.S.2d 972 (3rd Dep't 1940), *motion for leave to appeal denied,* 260 App. Div. 976, 24 N.Y.S.2d 159 (3rd Dep't 1940); York v. Trigg, 87 Okla. 214, 209 Pac. 417 (1922); Sellers v. Gibney, 51 LANC. L. REV. 383 (Com. Pl. Pa. 1949); Richards v. Richards, 30 Tenn. 294 (1850).

[16] Or realty, where inchoate dower does not exist. *Cf.* Wooton v. Keaton, 168 Ark. 981, 272 S.W. 869 (1925).

[17] *E.g.,* Resch v. Rowland, 257 S.W.2d 621 (1953).

[18] 161 Md. 657, 158 Atl. 347, 79 A.L.R. 373 (1932).

out the exercise of the aforesaid power then . . . [to the children]." After the wife's death it was held that the widower had no right in the land. The court conceded that "perhaps in strict law the money which was turned over by the children to the mother became her money." Nevertheless, it said, "the arrangement of title would seem to have been a reasonable and just one, in view of the source of the purchase money, and the common purpose for which the children's earnings were turned over to the mother. . . . The rightfulness of the arrangement from the point of view of fairness to the children . . . seems to us to save it from being a wrong upon the husband. . . ." [19]

We assign a special category to cases where the asset purchased is realty, in jurisdictions still retaining inchoate dower. Here the widow has a useful talking point: a contingent property right would have been acquired *during* the marriage, but for the transfer in question.[20] Even here the decisions do not uniformly favor the widow. In *Ford* v. *Ford*,[21] for instance, a purchase of realty in the name of a bigamous second wife and the children of the affair was sustained as against the legally named spouse. The equities in this case were against the claimant spouse.

The widow has a better case if she can prove that the purchase price was obtained from the sale of other realty owned by the husband, and that she joined in the sale in order

[19] *Id.* at 661, 158 Atl. at 348. Whenever an abandoned wife purchases property, fairness to the children might dictate the same holding as in the Whitehill case even when the children, being infants, made no contribution to the purchase price.

[20] See *e.g.*, Rowe v. Ratiff, 268 Ky. 217, 104 S.W.2d 437 (1937); *cf.* Redmond's Adm'x v. Redmond, 112 Ky. 760, 66 S.W. 745 (1902); Brégy, INTESTATE, WILLS AND ESTATES ACTS OF 1947, 5860-1 (1949). The suit may be brought in the lifetime of the husband. Beck v. Beck, 64 Iowa 155, 19 N.W. 876 (1884).

[21] 4 Ala. 142 (1842); *cf.* Patterson v. Patterson's Ex'r, 15 Ky. L. Rep. 755, 24 S.W. 880 (1894); Spears v. James, 319 Mich. 341, 29 N.W.2d 829 (1947). In Kirkpatrick v. Clark, 132 Ill. 342, 24 N.E. 71 (1890) the court stated that "dower in lands which the wife does not yet own is an interest to which the husband has neither a legal, equitable or moral right, and the wife is entirely at liberty to so manage her purchases made with her own means, if she can, as to prevent his acquiring such right."

to bar her dower.[22] And, of course, her chances are excellent if the release of dower was obtained by actual misrepresentations on the part of her husband.[23]

3. Powers of Appointment

The genius of the power of appointment is that it imparts flexibility to voluntary property transmission. A property owner is said to create a power of appointment when he gives another person the power to determine the recipients of the property, or the shares that they are to take.[24] A typical example is a family settlement in which the husband bequeaths property to his widow for life and also gives her the power, in her will, to determine the remaindermen. The husband here is said to be the donor of the power, and the widow is the donee. The husband may also create a power in himself — as where he transfers property in trust, reserving a life estate and the power to appoint the remainder. Powers are classified as general or special. A power is general, for our purposes, when the donee has the power to appoint to himself or to his estate. The power is called special when the donee's appointment is limited to a group not unreasonably large, which does not include himself or his estate. The manner in which the general power may be exercised determines the extent of the donee's interest in the property. If the power is to be exercised by will, the donee of course may not appoint during his lifetime; but if it may be exercised inter vivos or by will the

[22] *E.g.*, Stroup v. Stroup, 140 Ind. 179, 39 N.E. 864 (1894); Resch v. Rowland, 257 S.W.2d 621 (Mo. 1953); *but see* Beck v. Beck, 64 Iowa 155, 19 N.W. 876 (1884); Osborn v. Osborn, 102 Kan. 890, 172 Pac. 23 (1918).

[23] Kober v. Kober, 324 Mo. 379, 23 S.W.2d 149 (1929) (misrepresentations by husband in procuring release of wife's dower, followed by purchase of realty in name of children with life estate in husband); also see 1 American Law of Property, §§5.32-37 (1952).

[24] *Cf.* 3 Restatement, Property, §318 (1940); Simes and Smith, Law of Future Interests, §871, (2d ed. 1956). This description excludes a power of sale, power of attorney, power of revocation, power to cause a gift of income to be augmented out of principal, the honorary trust, and the discretionary trust.

donee may appoint to himself at any time: his interest approaches virtual ownership.[25]

The flexibility afforded by the power of appointment is desirable. Wealth does the most good when the recipients are deserving; the power of appointment serves both the community and the donor by giving the donor a longer time in which to gauge the merit and the need of potential donees. Moreover, under the present federal estate tax regulations, it is more profitable to *give* the widow a power of appointment than to use it against her. When employed in the "marital deduction trust" [26] the power of appointment results in substantial tax savings, and in this respect it operates as a mild deterrent to disinheritance of the widow. But if the husband is more concerned with defeating the widow's share than with tax savings the power of appointment will suit his purpose quite well indeed.

When the donee of a general testamentary power created by another does not appoint to himself or his estate, his surviving spouse is not permitted to take her forced share in the appointive property.[27] This result flows from automatic application of the "relation back" doctrine: the exercise of the power is attributable to the instrument that created the power – and the appointee takes title from the donor, not from the donee.[28] It is immaterial whether or not the power was exercised. There appear to be no "evasion" cases involving general powers exercisable inter vivos, where, as we have seen, the donee of the power is substantially the owner of the

[25] 5 AMERICAN LAW OF PROPERTY, §23.4 (1952); Scott, "The Effects of a Power to Revoke a Trust," 57 HARV. L. REV. 362, 366 (1944). For further discussion of the various classifications of powers of appointment, see Simes and Smith, LAW OF FUTURE INTERESTS, §§874–79 (2d ed. 1956).

[26] Int. Rev. Code of 1954, §2056.

[27] Kate's Estate, 282 Pa. 417, 128 Atl. 97 (1935); *cf.* Fiske v. Fiske, 173 Mass. 413, 53 N.E. 919 (1899); Krause v. Jeannette Investment Co., 333 Mo. 509, 62 S.W.2d 890 (1933); Matter of Rogers, 250 App. Div. 26, 293 N.Y. Supp. 626 (2d Dep't 1937), *leave to appeal denied,* 274 N.Y. 642 (1937); Huddy's Estate, 236 Pa. 276, 84 Atl. 909 (1912).

[28] Simes, "The Devolution of Title to Appointed Property," 22 ILL. L. REV. 480 (1928).

appointive property. Probably not many powers are exercisable inter vivos; the donee of such a power is subject to pressure from potential appointees.[29] But the Restatement of Property takes the stand that even here the surviving spouse should lose.[30]

Nor is the widow's position materially improved where the husband created a power of appointment in himself. In *City Bank Farmers Trust Co.* v. *Green*,[31] for example, a second wife failed to reach the appointive property, although she had apparently been completely disinherited after nine years of marriage. No mention is made of her financial position. The husband had created an irrevocable trust three years before the second marriage, the income going to his first wife for her life, with the husband retaining a general testamentary power of appointment over the remainder. In rejecting the widow's claim [32] the court utilized the "relation back" doctrine, referring to the decedent as a "mere conduit." Moreover, it said that creation of the power by the husband in himself "is no different than if a third person had created the power and made the testator the donee of it." [33]

[29] On the other hand, a power that is exercised inter vivos may qualify for the lower gift tax rate.

[30] RESTATEMENT, PROPERTY, §332 (2) (1940).

[31] 160 Misc. 370, 289 N.Y. Supp. 473 (1936).

[32] The husband had created a second inter vivos trust; *semble* the widow lost as to this trust also.

[33] 160 Misc. 370, 289 N.Y. Supp. 473 (1936); *cf.* Cameron v. Cameron, 10 Smedes & M. 394 (Miss. 1848); Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850); In re Steck's Estate, 275 Wis. 290, 81 N.W.2d 729 (1957); also see In re Burchell's Trust, 278 App. Div. 450, 105 N.Y.S.2d 431 (1st Dep't 1951). *But cf.* Brownell v. Briggs, 173 Mass. 529, 54 N.E. 251 (1899).

In 1931 Marilyn Miller, who had a few years previously been making approximately $260,000 per year, transferred in trust some $82,000. Her obvious purpose was to guard against her own extravagance. The trustee was to pay her $500 weekly until the principal was reduced to $5000, upon which event the trust was to be terminated and the principal distributed to the settlor. If the settlor died before that event the trustee was to dispose of any remaining principal as she should by will appoint, or, in default of appointment, to the persons who would take under New York intestacy distribution. Her will, made four years before the trust, disposed of her property to named relatives, and, naturally, it mentioned neither the trust nor her husband, whom she had married almost a year before executing the trust. The husband re-

But some support for the widow's claim may be found in Pennsylvania. Recent legislation in that state permits the widow to reach the appointive property when the power was created by the decedent spouse himself.[34] Indeed, there was some authority in the widow's favor even before the legislation was enacted.[35]

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nounced the will and sought to reach the corpus of the trust. The trial court found no fraudulent intent to deprive the husband of his statutory share. Therefore, said the court, in those days before Newman v. Dore, the appointed property was not part of the wife's estate. The husband was in substance disinherited, since there were insufficient assets in the estate to pay creditors. He had been supported by her during coverture, and she had given him, inter vivos, "some $65,000." (278 N.Y. 134, 142, 15 N.E.2d 553, 554 (1938).) The Court of Appeals reversed, but on the ground that the settlor had created a reversion in herself (which would pass as part of her estate, permitting the widower to share) and not a gift in remainder to her distributees. City Bank Farmers Trust Co. v. Miller, 163 Misc. 459, 297 N.Y. Supp. 88 (Sup. Ct. 1937), *aff'd without opinion,* 253 App. Div. 707, 1 N.Y.S.2d 640 (1st Dep't 1937), *motion for leave to appeal granted,* 253 App. Div. 880, 2 N.Y.S.2d 798 (1st Dep't 1938), *rev'd,* 278 N.Y. 134, 15 N.E.2d 553 (1938).

The surviving spouse of the donee of a power of appointment does not get dower or curtesy in the appointive property unless, of course, the donee of a general power appoints the property to his own estate. Hakalau v. De La Nux, 35 Hawaii 59 (1942) (curtesy); Hatfield v. Sohier, 114 Mass. 48 (1873) (curtesy); Matter of Davies, 124 Misc. 541, 209 N.Y. Supp. 296 (Surr. Ct. 1925), *aff'd without opinion,* 215 App. Div. 750, 212 N.Y. Supp. 796, (4th Dep't 1925), *aff'd,* 242 N.Y. 196, 151 N.E. 205 (1926) (widow did not appeal from lower court's denial of her dower); Barr v. Howell, 147 N.Y. Supp. 483 (1914); *cf.* Chinnubee v. Nicks, 3 Porter 362 (Ala. 1836); Ray v. Pung, 5 Madd. 310, 56 Eng. Rep. 914 (1821), *id.,* 5 B. & Ald. 561, 106 Eng. Rep. 1296 (1822). *But cf.* Link v. Edmonson, 19 Mo. 487 (1854); Peay v. Peay, 2 Rich. Eq. 409 (S.C. 1844).

[34] Penn. Stat. Ann. tit. 20, §301.11 (1950) (Estates Act of 1947), discussed, Chap. 9:4. It has been suggested that under this statute "the only case where the reservation of a power to appoint by deed could possibly be attacked by the surviving spouse is where such a power is unlimited and remains unexercised at the settlor's death." Brégy, INTESTATE, WILLS AND ESTATES ACTS OF 1947, 5863 (1949). But the surviving spouse may not reach the appointive property when the power was given by someone other than the testator. Pa. Stat. Ann. tit. 20 §180.8 (1950).

[35] *Cf.* Diedel's Trust, 32 D.&C. 685 (1938) (no gift over in default of appointment); Potter v. Fidelity Insurance Trust and Safe Deposit Co., (No. 2), 199 Pa. 366, 370, 49 Atl. 86, 87 (1901) (opinion below adopted on appeal); also see Boyle v. John M. Smyth Co., 248 Ill. App. 57, 78, 87 (1928).

Our study of the community goals implicit in the claim of the surviving spouse indicates that the maintenance and contribution formula should cover powers of appointment. A device that permits delayed beneficence promotes family welfare — and consequently the welfare of the state — but not when it leaves the deserving widow destitute.[36] The recent upsurge in estate planning has undoubtedly stimulated the use of powers of appointment. As more and more of those powers are exercised, the plight of the surviving spouse may well stand in sharper focus. The tax-collector [37] and the creditor [38] have protection appropriate to their needs; why not the widow? [39] To say that she must lose because the appointed property does not pass through the decedent's estate is to beg the question. Her claim for support should be judged on its merits, and on its *individual* merits.

There is no particular difficulty in applying our statutory formula to powers created by the decedent himself. We simply expand the definition of "transfer" to include the ex-

[36] Compare the spouse's right to invade a spendthrift trust for support. Griswold, SPENDTHRIFT TRUSTS, 390–1, (2nd ed. 1947); see the Socratic machine-gunning by McDougal in "Future Interests Restated: Tradition versus Clarification and Reform," 55 HARV. L. REV. 1077, 1104–15 (1942).

[37] The exercise or non-exercise of a general power created after October 21, 1942, is taxed in the donee's estate. For tax purposes a general power is defined, with certain exceptions, as "a power which is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate." Int. Rev. Code of 1954, §2041. For a discussion of the tax aspects see the articles set out in the bibliography in 5 AMERICAN LAW OF PROPERTY, §23.8 (1952).

[38] Creditors of the donee may reach the appointive property when a statute so permits, when the donee exercises a general power, when the transferor retains a life estate and a general power of appointment, when the transfer amounts to a fraud on creditors; and a trustee in bankruptcy may exercise powers that the donee could have exercised for his own benefit. Simes and Smith, LAW OF FUTURE INTERESTS, §§944–46, 1082 (2d ed. 1956), 5 AMERICAN LAW OF PROPERTY, §23.14–19 (1952), 3 RESTATEMENT, PROPERTY, §§328–31 (1940, Supp. 1948); *cf.* McDougal, "Future Interests Restated: Tradition versus Clarification and Reform," 55 HARV. L. REV. 1077, 1106–15 (1942).

[39] *Cf.* Leach, "Powers of Appointment," 24 A. B. A. J. 807 (1938).

ercise, non-exercise (where persons take in default of appointment), release, or lapse of a power of appointment.[40]

Powers created by a person other than the decedent necessitate separate treatment. A person who gives the husband a power of appointment is under no obligation to provide for the husband's widow. Indeed, if such an obligation were to be imposed the donor could evade it by giving the husband merely a life estate with fixed remainders in persons other than the widow, or simply by giving the power to a person other than the husband. Nor do we have a complete analogy in the wife's power to invade her husband's spendthrift trust. There the husband has enjoyment of income; here he may in fact have neither enjoyment of income nor power to appoint to his wife. In brief, the widow's maintenance privileges in this area depend on the donor of the power. She has a legitimate claim only when the donor made it possible for the decedent donee to make provision for his widow out of the appointive property. In these circumstances the maintenance and contribution formula should affect a general power of appointment.

What if the creator of the power stipulates that it may be exercised by the decedent only in conjunction with another person? For example, that other person might be the creator himself, or some other person having an adverse interest in the appointive property. For our purposes, a person would have an adverse interest if he could exercise the power in favor of himself or his estate, whether or not after the decedent's death he "may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor. . . ." [41] The applicant for maintenance should be excluded in these instances because the creator of the power did not give the decedent complete discretion to appoint the property to his

[40] Suggested Model Decedent's Family Maintenance Statute, §1(d), *infra*, Chap. 22.

[41] Int. Rev. Code of 1954, §2041(b)(C)(ii).

own dependents. The dependent should prevail, however, if she happened to be the person with the "adverse interest."

Under the maintenance and contribution formula, as expressed in the Suggested Model Decedent's Family Maintenance Statute,[42] any property received by the widow from her husband, whether by an inter vivos disposition, will, exercise of power of appointment, or otherwise, would be considered in determining her need. Under the existing forced share legislation, however, a diversity of results are reached when a widow renounces a will in which the husband exercised a power of appointment wholly or partially in her favor. It all depends on the wording of the particular statute; but in most cases the widow will not be permitted to retain the benefit conferred by the power of appointment.[43]

[42] *Infra,* Chap. 22.

[43] That the surviving spouse cannot retain the appointed benefit: Fiske v. Fiske, 173 Mass. 413, 53 N.E. 916 (1899); that the benefit can be retained: Huddy's Estate, 236 Pa. 276, 84 Atl. 909 (1912). But a later Pennsylvania case held that the benefit could not be retained when the decedent disposed of the appointed property and his own property as a common "blended" fund. Kates's Estate, 282 Pa. 417, 128 Atl. 97 (1925); and this rule has been clarified and expanded by statute to include cases in which the husband had not blended the property. Pa. Stat. Ann. tit. 20, §180.8(c) (1950). On these and similar problems see Phelps, "The Widow's Right of Election in the Estate of her Husband," 37 MICH. L. REV. 236, 401, 412–20 (1939); Simes and Smith, LAW OF FUTURE INTERESTS, §947 (2d ed. 1956); AMERICAN LAW OF PROPERTY, §§5.41, 23.22 (1952); also see 1 RESTATEMENT, PROPERTY, §332(2) (1940).