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Future Interests-Powers of Disposition-Some Practical Considerations in Using Powers of Disposition for Testamentary Purpose

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FUTURE INTERESTS—POWERS OF DISPOSITION[1]—SOME PRACTICAL CONSIDERATIONS IN USING POWERS OF DISPOSITION FOR TESTAMENTARY PURPOSES—Testators, in an effort to retain control of their property from beyond the grave, have often developed schemes by which they attempt to alter the normal devolution of title to, and the utilization of, that property by their beneficiaries.[2] One of the primary motives giving rise to such schemes is the desire to give the immediate object of a testator's bounty a great deal of flexibility and control in the use of the testamentary property, while reserving to the testator the possibility of controlling its further disposition upon the death of such person.[3] The most theoretically suitable device by which testators have yet implemented this desire is the gift of a life estate with a power of disposition to the first taker and a gift over in the event that the property so given is not entirely consumed during his lifetime.[4] A number of practical and theoretical problems are involved in the use of such an arrangement, problems which have been the cause of extensive litigation resulting in little uniformity of decision.[5] The practitioner, faced with a choice of using this or some other method of fulfilling a testator's desires, should not be unaware of these problems.

1 Also called powers of consumption and powers of invasion. These powers allow a donee to encroach upon and use the principal of a testamentary estate within limits defined by the donor.

2 Norvell, *The Power To Consume: Estate Plan or Estate Confusion?*, Mich. S.B.J., March 1949, p. 5. See also Schuyler, *Some Problems With Powers*, 45 ILL. L. REV. 57 (1950).

3 Summers, *Power of a Life Tenant To Dispose of a Fee*, 6 IND. L.J. 137 (1930).

4 The testator can so condition the power as to be fairly certain that some property will be left for the remainderman. See text *infra* at 1330. *But cf.* Norvell, *supra* note 2, at 11, regarding this advantage as outweighed by the disadvantages of confusion and wasteful litigation.

5 See Note, 28 IND. L.J. 409-10 (1953).

I. THE NATURE OF A POWER OF DISPOSITION

A power has been defined as an authority enabling one person to dispose of an interest in either realty or personalty which is vested in another.[6] It is not, of itself, an estate or an absolute right in property.[7] It does not vest in the donee of the power any title to or interest in the property which is the subject of the power.[8] Rather, the property is considered to be owned by the donor until the donee performs the legal act of exercising the power.[9]

A power of disposition is usually considered to be a power, qualified or plenary, to consume the principal of a life estate, most frequently in some type of personal property.[10] It differs, however, from other powers in that the only exercise necessary to divest the donor of his ownership is the use or disposition of the property by the donee in accordance with the donor's intent.[11] Thus, where the power is so construed, the donee may sell or consume the property and effectively cut off the donor's interest. Where the power is absolute, the donee has virtually all of the normal incidents of fee ownership.[12] In fact, unless a gift over is provided in such a situation, most courts construe the donee's interest to be a fee.[13] If, however, this absolute power of disposition is coupled with a life estate and a gift over is provided, the courts are divided on the question of the nature of the donee's interest.[14] This divergence in view stems not from a disagreement as to the proper standards of construction to be employed in ascertaining testamentary intent, but rather from a theoretical divergence as to the very nature of a power of disposition. Since a power is considered

6 *In re* Vanatta, 99 N.J. Eq. 339, 131 Atl. 515 (Ch. 1926); Bowerman v. Bowerman, 67 Ohio App. 425, 35 N.E.2d 1012 (1941); Davis v. Kendall, 130 Va. 175, 107 S.E. 751 (1921).

7 See, *e.g.*, Maryland Mut. Benevolent Soc'y v. Clendinen, 44 Md. 429, 434 (1876).

8 *Ibid.*

9 *Ibid.*

10 Summers, *supra* note 3, at 137.

11 A mere alteration of the form of the property by the donee may not constitute a sufficient exercise to cut off a remainderman's rights in the substituted property. See text *infra* at 1331-32. In exercising a power of appointment, the donee is confined to the mode of execution provided for in the instrument creating it. Continental Nat'l Bank v. McCampbell, 184 Ky. 658, 213 S.W. 193 (1919). If no method of execution is provided, the donee must indicate, in some manner, his intent to exercise it. Greenway v. White, 196 Ky. 745, 246 S.W. 137 (1922). He cannot use the property until or unless he has exercised the power. See Maryland Mut. Benevolent Soc'y v. Clendinen, 44 Md. 429, 434 (1876).

12 The sole restrictions on his use are that the power must be exercised during his lifetime and in good faith. Hardy v. Mayhew, 158 Cal. 95, 110 Pac. 113 (1910).

13 Summers, *supra* note 3, at 138.

14 *Compare* Brant v. Virginia Coal & Iron Co., 93 U.S. 326 (1876), *with* Bean v. Myers, 41 Tenn. 226 (1860).

as something separate and distinct from the ownership of the life estate, the majority of courts have given effect to the testator's intent by allowing the creation of this type of an interest in the donee.[15] The minority, however, reasoning that for all practical purposes the donee has been given a fee for life, an estate unknown to the common law, invalidate the restriction on duration as an attempt to derogate from a fee.[16] Although this latter view owes its genesis to a misunderstanding of an early decision of a Virginia court,[17] it serves to illustrate a number of the basic theoretical problems involved in the use of powers of disposition. How far should a testator's intent to dispose of his property in a particular manner be circumscribed by historical considerations? Has a new type of estate been created through the use of this device? What are the differences between powers of disposition and powers of appointment? What are the differences between possession of a power of disposition and ownership of an estate? How much power can a testator give away and still retain ownership of the property?

A power of disposition is more than a mere species of the power of appointment. Perhaps it is called a power to circumvent the traditional notion that one cannot derogate from the normal incidents of ownership once he has parted with what is, for most purposes, a fee interest in property. In any case, the donee of a power of disposition can be given almost any interest short of a fee and can be circumscribed in his use of property, not by the rules governing established estate patterns, but only by the testator's manifested intent.[18] His interest is not, as such, a variation of the power of appointment, because its most significant characteristic is the ability of the holder to use the property himself, not the authority to cause it to be transferred to another.[19] In this way it resembles ownership of an interest in the property. Moreover, although called a power, it can embrace almost all of the attributes

15 *E.g.*, Edds v. Mitchell, 143 Tex. 307, 184 S.W.2d 823 (1945).

16 One jurisdiction has changed this rule by judicial decision. Quarton v. Barton, 249 Mich. 474, 229 N.W. 465 (1930). *Cf.* MICH. COMP. LAWS § 13.003 (1948). In two other states the rule has been specifically abolished and repudiated by statute. VA. CODE ANN. § 55-6 (1950); W. VA. CODE ch. 36, art. 1, § 16 (1931). Only two jurisdictions apparently still follow the rule. Davey v. Weber, 133 Colo. 365, 295 P.2d 688 (1956); Bradley v. Carnes, 94 Tenn. 27, 27 S.W. 1007 (1894).

17 Burwell v. Anderson, 30 Va. (3 Leigh) 376 (1831). See Summers, *supra* note 3, at 140.

18 See Volz v. Kaemmerle, 211 Iowa 995, 234 N.W. 805 (1931); In the Matter of Smith, 126 Misc. 296, 214 N.Y. Supp. 176 (Surr. Ct. 1926); Levenson v. Wolfson, 42 Ohio App. 332, 182 N.E. 116 (1931).

19 See note 11 *supra*.

of an estate, including every right in the property necessary to effect its disposition[20] except an ability on the part of its holder to leave the property in his estate at death.[21] In contrast, a power of appointment is generally much more closely circumscribed and must be exercised in the exact manner prescribed by the testator.[22] Its basic purpose is not specifically to give the first taker something which is of especial immediate value to him, but to postpone distribution of the testator's estate in fee and, at some later time, to effect its distribution.[23] Even if the donee of a power of appointment can appoint to himself, he has no real possessory interest in the property until he does so, and then, and only then, can he exercise those prerogatives which characterize the donee of a power of disposition.[24]

The courts have neither explicitly or implicitly answered most of the questions nor addressed themselves to many of the problems which permeate this area of property law. Instead, they have attempted to pigeonhole powers of disposition, by analogy, into established estate patterns,[25] or have treated them as minor variations of powers of appointment.[26] Since they fit these categories only imperfectly, the results have often been anomalous.[27] Generally, the law governing a particular property scheme is peculiar to that scheme,[28] and is inappropriate as to others. By allowing the use of a power of disposition, the courts are condoning the creation of a new type of estate and should, therefore, develop rules of law to fit the particular arrangement created. They can, of course, be guided by close conceptual analogies, but should not be restrained where the borrowed rules would be clearly inappropriate. Once this is realized, the critical question is not into which category the power of disposition more properly belongs, but what are the cir-

20 See Swarthout v. Ranier, 143 N.Y. 499, 38 N.E. 726 (1894) (life tenant had right to mortgage the property).

21 The donee, however, cannot devise the property. *In re* Raynor, 254 N.Y. 516, 173 N.E. 846 (1930). And the donee must exercise the power in good faith. Endsley v. Hagey, 301 Pa. 158, 151 Atl. 799 (1930).

22 See Lewis's Estate, 269 Pa. 379, 112 Atl. 454 (1921).

23 See Note, 28 IND. L.J. 409, 413 (1953).

24 Until such time as he appoints to himself, he cannot use, dispose of, or encumber the property. Maryland Mut. Benevolent Soc'y v. Clendinen, 44 Md. 429, 434 (1876).

25 *E.g.*, Brant v. Virginia Coal & Iron Co., 93 U.S. 326 (1876).

26 See Burleigh v. Clough, 52 N.H. 267 (1872), overruled on points not here involved in Emery v. Haven, 67 N.H. 503, 35 Atl. 940 (1893). In *Burleigh*, the court used power of appointment terminology and rested its decision on power of appointment concepts.

27 The testator's intent may be obvious, but the court may not feel free to give complete effect to it because the life tenant will have more power than life tenants "should have." See Mowery v. Coffman, 185 Va. 491, 39 S.E.2d 285 (1946).

28 See generally HOLMES, THE COMMON LAW 206-46 (1881).

cumstances under which its use should be permitted, and what limits, if any, should be placed upon that use. In addition to pointing out some of the problem areas of which the practitioner should be aware, this comment will attempt to show where it is necessary that such lines be drawn and distinctions be made. The exact shape of the law relating to powers of disposition must, of course, ultimately depend upon whether and to what extent the courts are willing to recognize a deviation from normal estate patterns. This is essentially a decision of policy dependent, at least in part, upon the willingness of the courts to relinquish control in what has traditionally been an area subject to extensive judicial supervision and one in which property concepts have become rather firmly established. Each jurisdiction must decide this for itself. It will be of some benefit, however, to describe the problems and illustrate possible solutions in selected areas.

II. ADVANTAGES AND DISADVANTAGES OF A POWER OF DISPOSITION

The chief advantage of a power of disposition lies in the flexibility it allows the testator in disposing of his property. He can provide the first taker with an interest approximating complete ownership or, by the imposition of standards or restrictions on consumption, relegate him to the status of a quasi-trustee.[29] He can give a life tenant more discretion than is permissible under any other property arrangement and thus more adequately prepare him to cope with unanticipated situations. Yet, at the same time, the primary beneficiary need not be burdened with the necessity of obtaining third-party consent to a particular use or disposition of the property, as would be the case were a trust involved. Moreover, the administrative procedure is generally less complex than in the trust setting, and expenses of administration, which are relatively high in even modest-sized trusts, are virtually non-existent.[30] Yet, the very aspects of a power of disposition which make it attractive as a dispositive device are the source of numerous problems. The greater freedom given the life tenant renders less secure the estate of the remainderman.[31] Vagueness in the standards which the testator imposes on the power, though necessary to promote flexibility, provides a frequent source of litigation.[32] Prob-

29 *Compare* Shapleigh v. Shapleigh, 69 N.H. 577, 44 Atl. 107 (1889), *with* Peckham v. Lego, 57 Conn. 553, 19 Atl. 392 (1889).

30 See Note, 32 NOTRE DAME LAW. 141, 143 (1956).

31 See Norvell, *supra* note 2, at 11.

32 See Note, 28 IND. L.J. 409, 411 (1953).

lems inherent in determining the nature and extent of the life tenant's interest create uncertainty as to the title he is able to convey, the rights of creditors with regard to the property, and the tax consequences of the arrangement.[33] While many of these problems become less critical where the testator has, expressly or impliedly, qualified the power as to matters other than its duration, they nevertheless are involved in any determination of whether the advantages of using the power outweigh the disadvantages.

III. EXECUTION OF A POWER OF DISPOSITION

As indicated earlier,[34] some courts do not recognize the validity of an unqualified power of disposition given to a life tenant. Although they concede that testamentary intent should generally govern in the construction of wills, they feel that it should not override settled property law. Hence, new estates should not be created, and a person receiving most of the important ingredients of a particular estate should be held, for most purposes, to have received that estate.[35]

These same considerations, however, are also relevant to an understanding of the approach of some of those courts which do not peremptorily condemn the gift of an absolute power of disposition to a life tenant. They, too, are bound by habitual ways of viewing testamentary gifts and do not feel comfortable about giving a life tenant "too much," although they are still willing to call him a life tenant.[36] In the name of testamentary intent they whittle away what has been given by the language of the will until the donee is left with an interest which is considerably more circumscribed than that which the testator probably intended.[37] The degree to which a court feels insecure in allowing deviations from the normal property patterns determines the extent to which restrictions on the power of the life tenant will be implied.[38] Generally, it is held, as a minimum, that he must exercise the

33 These problems are subsequently discussed in detail.

34 See note 16 *supra*.

35 See Mowery v. Coffman, 185 Va. 491, 39 S.E.2d 285 (1946).

36 See Watson's Estate, 241 Pa. 271, 274, 88 Atl. 433, 436 (1913).

37 See Carpenter v. Lothringer, 224 Iowa 439, 275 N.W. 98 (1937). *But see* Colburn v. Burlingame, 190 Cal. 697, 214 Pac. 226 (1923), where the life tenant was probably given more discretion than the testator would have liked.

38 *Compare In re* Ithaca Trust Co., 220 N.Y. 437, 116 N.E. 102 (1917) (donee could give away the property), *with* Braley v. Spragins, 221 Ala. 150, 128 So. 149 (1930) (donee could not give the property away).

power during his lifetime and in good faith. He cannot devise or bequeath the property,[39] give it away[40] or commit waste,[41] although a few courts have intimated that they are powerless to forestall the latter.[42]

When the testator explicitly imposes standards or restrictions on the life tenant's power, a great many of the conceptual difficulties disappear, though practical problems of construction are still present. Since the standards are usually left sufficiently vague to insure flexibility to the life tenant, there is often considerable doubt as to whether the appropriate circumstances exist under which an exercise of the power is justified.[43] A gift limited to "support and maintenance," for example, is subject to divergent interpretation,[44] depending upon the station in life of the particular donee, thereby permitting the remainderman to contend that the life tenant is exceeding his authority. Limiting a gift to "need" is equally susceptible to varied constructions.[45] In both of these cases, however, unless there is an objection from the remainderman, the life tenant still has considerably greater freedom than he would have in the trust setting, where he must go to a trustee to obtain permission to invade the corpus of the estate.[46]

There is still another doubt-filled area concerning the scope of the power given the life tenant. Generally, he is held to possess that amount of power necessary to effectuate the purposes of the testator.[47] This would seem to include the ability to convey a fee, as well as to exercise all of those powers over the property which are incidental to the execution of such a conveyance. However, courts are in disagreement over this issue also,[48] and it has been held that a life tenant who is given an express power of disposition can convey the fee, but cannot mortgage or charge the prop-

39 Brookover v. Branyan, 185 Ind. 1, 112 N.E. 769 (1916).

40 Braley v. Spragins, 221 Ala. 150, 128 So. 149 (1930).

41 Cross v. Hendry, 39 Ind. App. 246, 79 N.E. 531 (1906).

42 Hanna v. Ladewig, 73 Tex. 37, 11 S.W. 133 (1889); Young v. Campbell, 175 S.W. 1100 (Tex. Civ. App. 1915).

43 See Hull v. Culver, 34 Conn. 403 (1867).

44 *Compare In re* Smith, 231 App. Div. 277, 247 N.Y. Supp. 263 (1931), *with* Hamilton v. Hamilton, 149 Iowa 321, 128 N.W. 380 (1910).

45 *Compare* Stevens v. Flower, 46 N.J. Eq. 340, 19 Atl. 777 (Ch. 1890), *with* Paxton v. Bond, 15 S.W. 875 (Ky. 1891).

46 Smith v. Field, 98 N.J. Eq. 532, 131 Atl. 521 (Ch. 1926), illustrates a situation where the donee of a qualified power of disposition had to obtain the permission of the donor's executor or of the court before he could invade the corpus of the estate.

47 See Volz v. Kaemmerle, 211 Iowa 995, 234 N.W. 805 (1931); Pennebaker Home for Girls v. Board of Directors, 250 Ky. 44, 45, 61 S.W.2d 883, 884 (1933).

48 *Compare* Levenson v. Wolfson, 42 Ohio App. 332, 182 N.E. 116 (1931), *with* Fields v. Kline, 161 Ark. 418, 256 S.W. 355 (1923).

erty, a conclusion which makes little sense in most circumstances.[49] Some courts have held that where the life tenant is given a life estate with full power to dispose of it as he pleases, he can convey only his life interest,[50] although the majority hold that, since he already had the power to convey his life interest, he added words giving him a power are meaningless unless they refer to the disposition of a fee.[51]

The controlling consideration in determining the power and scope of authority of the life tenant is, of course, the testator's intent, but this is difficult to determine unless the testator explicitly spells out the standards. Yet, if he does this, he may be curtailing the ability of the life tenant to adjust to changing circumstances, one of the main advantages of using the power of disposition.

IV. RIGHTS OF CREDITORS

A court's conception of the nature and extent of the interest of the donee of a power of disposition will determine the rights of his creditors.[52] In general, their treatment is similar to that of creditors of the donees of powers of appointment who, under the common law, had rights only when the debtor had a general power of appointment and exercised it during his lifetime.[53] Courts adhering to this view hold that the donee must have an absolute power of disposition and must exercise some control over the principal of the estate before his creditors can reach it.[54] Since the actions of the donee in such case show an exercise of dominion over the property approaching ownership, and since creditors' rights are based on the ownership by the debtor of an interest in property, this appears to be a theoretically justifiable result.[55]

A number of states have altered this common-law approach by statute and have provided that creditors of the donees of both

49 This conclusion is generally justified on the ground that the testator would have indicated his intent to allow the life tenant to mortgage the property if such had actually been his intent. See Rhode Island Hosp. Trust Co. v. Commercial Nat'l Bank, 14 R.I. 625 (1885).

50 Brant v. Virginia Coal & Iron Co., 93 U.S. 326 (1876).

51 Foudray v. Foudray, 44 Ind. App. 444, 89 N.E. 499 (1909). There is, however, some question as to whether a sale of the property will be a sufficient exercise of the power to convey the fee to a purchaser, if the sale was not made in conformity with the testator's intent. See text *infra* at 1329.

52 For a comprehensive discussion of the evolution of rights of creditors in this area, see Whiteside & Edelstein, *Life Estates With Power To Consume*, 16 CORNELL L.Q. 447 (1931).

53 See United States v. Field, 255 U.S. 257 (1921).

54 Whiteside & Edelstein, *supra* note 52, at 449.

55 See Clapp v. Ingraham, 126 Mass. 200 (1879).

general powers of appointment and absolute powers of disposition can look to the property subject to the power if the donee is able, in his lifetime, to appoint or dispose of the entire fee for his own benefit.[56] The subject of the power is treated as the absolute property of the donee whether or not he exercises his power and notwithstanding the presence of a gift over.[57] This approach is consistent with the modern tendency to look to the substance rather than the form of a disposition in determining third-party rights.[58]

Where the donee has received only a qualified power of disposition, limited, for instance, to support, the courts have generally reverted to the traditional argument, used also to protect special powers of appointment, that a power itself is not an interest in property.[59] However, an exception is made where the creditor can show that the debt arose from transactions consummated in circumstances where the testator contemplated that the power would be exercised,[60] as where a grocer-creditor attempts to reach assets which are the subject of a power limited by some standard relating to the donee's support and maintenance.

It is readily apparent, then, that creditors' rights are being determined, not by an analysis of the properties of the power of disposition involved, but by analogy to other types of dispositions. This is unfortunate, since the rights incident to such other dispositions were formulated with specific reference to their particular characteristics and qualities.[61] A given power of disposition, as indicated earlier, has many characteristics which are similar to those possessed by other property arrangements, but also many which are different, depending upon the particular arrangement which the testator created. It often seems anomalous that creditors of the donee cannot reach the property subject to the power, since the donee, in many circumstances, has such great control over it, even where the power is qualified. An accurate evaluation of the rights of creditors can be made only by conducting a detailed

56 ALA. CODE tit. 47, §§ 76-79, 92 (1958); D.C. CODE ANN. §§ 45-1005 to -1010 (1961); MICH. COMP. LAWS §§ 556.9-.13, .21, .32 (1948); N.Y. REAL PROP. LAW §§ 149-53, 159, 164; N.D. CENT. CODE §§ 59-05-39 to -43, -50 (1943); OKLA. STAT. ANN. tit. 60, §§ 262-66, 274 (1941); S.D. CODE §§ 59.0439-.0443, .0451 (1939); TENN. CODE ANN. § 64-106 (1955); WIS. STAT. §§ 232.08-.12, .20, .31 (1959).

57 Whiteside & Edelstein, *supra* note 52, at 461.

58 *In re* Davies' Estate, 242 N.Y. 196, 151 N.E. 205 (1926).

59 Price v. Cherbonnier, 103 Md. 107, 63 Atl. 209 (1906); Prescott v. Wordell, 319 Mass. 118, 65 N.E.2d 19 (1946).

60 Morehead v. Martin, 123 Kan. 612, 256 Pac. 1010 (1927) (will allowing life tenant to sell property in order to purchase home subjected such property to claims of vendor of homesite).

61 See generally 5 AMERICAN LAW OF PROPERTY §§ 23.14-.18 (Casner ed. 1952).

study of the particular properties of each power of disposition in the light of the testator's probable intent to determine the extent to which they give the donee something approaching ownership.

V. RIGHTS OF PURCHASERS

The difficulties inherent in ascertaining the interest of the donee of a power of disposition render the purchase of such an interest relatively undesirable. The purchaser is always faced with the possibility of a lawsuit by a disappointed remainderman claiming that the exercise of the power was unwarranted. The remainderman can argue that the sale was not an effective exercise of the power because such sale was not one of the permissible modes by which the testator intended that the power be exercised, and was, therefore, not effective to transfer title. For this reason, unless the donee can in some way guarantee his title, a price far below the market value of the fee will be all that he can obtain. Perhaps the most satisfactory solution, if it is economically feasible, is to have the remainderman join in the conveyance. If this is not possible, the donee can institute some form of declaratory proceeding,[62] or arrange with the buyer for a post-purchase action which will try title and allow rescission if full title is not found in the donee.[63]

The necessity for, and the cumbersome nature of, these devices are a sad commentary on both the state of the law and the ability of draftsmen in this area. Not only does their use result in an increase in cost to the purchaser, but the intent of the testator is often frustrated by the imposition of an additional burden on the life tenant when he attempts to dispose of the property.[64] Since, however, the draftsman must live with the law, he could alleviate some of the difficulties by providing, in the instrument granting the power, a clear exposition of both the scope of the

[62] See Paxton v. Paxton, 141 Iowa 96, 119 N.W. 284 (1909). But the life tenant cannot have his title quieted as to his right to convey a fee. Foudray v. Foudray, 44 Ind. App. 444, 89 N.E. 499 (1909).

[63] This is generally accomplished by an action for specific performance. Hall v. Wardwell, 228 N.C. 562, 46 S.E.2d 556 (1948); Tillett v. Nixon, 180 N.C. 195, 104 S.E. 352 (1920); Gelb v. Weisberger, 247 Pa. 416, 93 Atl. 499 (1915). A type of declaratory proceeding, not involving a legal action as such, may sometimes be used. Hardee v. Rivers, 228 N.C. 66, 44 S.E.2d 476 (1947). Also, an action to have the contract cancelled may be resorted to; in such case, the purchaser brings an action for cancellation of the contract, claiming that the vendor cannot convey the fee. Harlan v. Manington, 152 Iowa 707, 133 N.W. 367 (1911). And the life tenant may bring an action to recover the purchase money. Henninger v. Henninger, 202 Pa. 207, 51 Atl. 749 (1902).

[64] See Fields v. Kline, 161 Ark. 418, 256 S.W. 355 (1923).

title the donee may convey and the circumstances under which such a conveyance is permissible. This, of course, would restrict the flexibility which the testator is able to give the donee, but would, nevertheless, serve to render the gift more secure. Perhaps the most effective way to resolve this difficulty is to give the donee an absolute power to sell, and impose any restriction which may be deemed desirable only upon his application of the proceeds of the sale.

VI. RIGHTS OF REMAINDERMEN

The position of a remainderman succeeding the donee of a power of disposition is, at most, precarious. The very nature of the power removes most of the safeguards inherent in the normal life tenant-remainderman relationship.[65] Also, since the testator's primary motive is generally construed to be to benefit the life tenant, courts have been more solicitous of his welfare than that of the remainderman.[66] They have been most unwilling, except in extreme circumstances, to substitute their judgment for that of the life tenant in determining whether the power was exercised in proper circumstances.[67] To do so would be to take the flexibility out of the power and place the court in the position of a quasi-trustee.[68]

Although some decisions have indicated that a power of disposition may be expressed so broadly as to preclude the court from preventing even fraud and waste on the part of the donee,[69] most courts impose a requirement of "good faith" on his exercise of the power.[70] The ingredients of the required "good faith" are determined by reference to the testator's probable intent.[71] Thus, where it can be shown that the donee has acted in bad faith, as where he is attempting to deprive the remainderman of his interest, or has exceeded, or is about to exceed, his authority, the remainderman is generally entitled to relief.[72] In justification of

65 Norvell, *The Power To Consume: Estate Plan or Estate Confusion?*, Mich. S.B.J., March 1949, pp. 5, 11.

66 See Note, 28 N.Y.U.L. REV. 1162, 1163 (1953).

67 See Reddin v. Cottrell, 178 Ark. 1178, 13 S.W.2d 813 (1929); Miller v. Miller, 149 Tenn. 463, 261 S.W. 965 (1923).

68 See, *e.g.*, Garriott v. Garriott, 208 Ky. 94, 270 S.W. 484 (1925), where it was held that the life tenant must apply for permission from the court before a sale of any of the corpus could be made. See also Graves v. Jasper, 233 Ky. 388, 25 S.W.2d 1040 (1930).

69 Hanna v. Ladewig, 73 Tex. 37, 11 S.W. 133 (1889).

70 See Matthews v. Capshaw, 109 Tenn. 480, 72 S.W. 964 (1902), for an excellent statement of the "good faith" rule in a slightly different context.

71 See Watson's Estate, 241 Pa. 271, 274, 88 Atl. 433, 436 (1913).

72 See In the Matter of Niles, 122 Misc. 17, 202 N.Y. Supp. 475 (Surr. Ct. 1923), *aff'd*, 211 App. Div. 826, 206 N.Y. Supp. 940 (1924).

this position, and to give the remainderman the necessary standing, it is often said that the life tenant and remainderman stand in a debtor-creditor relationship,[73] or that the life tenant holds the corpus in trust for the remainderman.[74] However, neither of these characterizations is accurate; they are merely vehicles used to reach judicially desired results. It would perhaps be better if the courts explicitly recognized this and gave the remainderman standing based on the probable intent of the testator that he have it in such circumstances. There is too great a chance, otherwise, that trust law or debtor-creditor law will be applied inappropriately to situations for which they were not designed.

Where the property has been disposed of before the remainderman discovers an abuse of discretion or seeks relief, he should be able to recover his proven losses from the property or estate of the donee.[75] The difficulty, however, lies in determining whether there has been an abuse of power. Courts have been reluctant to require the donee to account for his use of the property in the absence of a strong showing of fraud, waste or improvidence, frequently a heavy burden of proof for the remainderman to bear.[76] Moreover, it becomes doubly heavy where the donee is dead and the remainderman seeks to trace the assets through a series of transactions which took place a considerable time ago. Also, even if the remainderman attempts to recover by the use of a conversion theory, tracing may still be necessary, since it is probable that only the value of those assets disposed of in breach of the power can be recovered, and the remainderman must identify them.

Difficulty in tracing may be encountered in yet another context. At the donee's death he is very likely to have not only partially unconsumed property of the testator, but assets of his own estate as well. Although it is reasonably clear that he could not, with impunity, have simply transferred the assets of the testator's estate to his own,[77] he might conceivably have changed their form through sale and the purchase of other goods, and left them as assets of his own estate; or he might have used assets of the

73 *In re* Powell's Estate, 340 Pa. 404, 17 A.2d 391 (1941).

74 Belton v. Myers, 87 Ind. App. 35, 154 N.E. 695 (1927); Hunt v. Smith, 58 N.J. Eq. 25, 43 Atl. 428 (Ch. 1899).

75 See Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139 (1933); Graham v. Stroh, 342 Mo. 686, 117 S.W.2d 258 (1938).

76 See Nelson v. Horsford, 201 Iowa 918, 208 N.W. 341 (1926).

77 This would allow him to take a fee in the specific property, which is contrary to the testator's intent as evidenced by the way he set up the testamentary gift.

testamentary estate during his lifetime and conserved his own. Assuming that this is contrary to the testator's intent, it is unclear what proof the courts would require of a complaining remainderman. At a minimum, he would probably have to show that the life tenant engaged in such transactions and be able to trace the assets to the life tenant's estate.[78] This would often be virtually impossible. Moreover, there is some judicial indication that, through such schemes, the life tenant has the power to defeat the rights of the remainderman and that the assets become part of the life tenant's estate.[79]

Perhaps the answer to the remainderman's troubles lies in the establishment of a trust, but again this places duties and restrictions upon the donee which may frustrate the overall intent of the testator. Also, if the donee is made the trustee, a question of the validity of the trust may arise, since some courts do not permit the trustee to be his own, and only, beneficiary.[80]

VII. TAX CONSIDERATIONS

A draftsman considering the use of a power of disposition should pay careful attention to the tax consequences of his decision. Testamentary transfers, of which the transfer of property subject to a power of disposition is one, may be taxed by both state and federal governments, although a federal estate tax credit is generally given for state succession taxes previously paid on the property.[81] The taxes are usually of two types: an inheritance tax, which is levied on the interest which each beneficiary receives, and an estate tax, which is levied on the estate left by the testator. The majority of states have inheritance tax statutes, while the federal government and a few states levy estate taxes.[82]

Under the federal estate tax provisions, as contained in Internal Revenue Code of 1954, the estate of the donee of a power of disposition may also be taxed unless the exercise of the power is limited by an "ascertainable standard" relating to the health, education, support, or maintenance of the donee.[83] Where the power is limited or restricted, however, a donee spouse cannot qualify

78 See Edds v. Mitchell, 143 Tex. 307, 184 S.W.2d 823 (1945).
79 See Archer v. Palmer, 112 Ark. 527, 167 S.W. 99 (1914).
80 Rose v. Hatch, 125 N.Y. 427, 26 N.E. 467 (1891).
81 INT. REV. CODE OF 1954, § 2011.
82 Arizona, Mississippi, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, and Vermont have estate tax statutes, The remainder, except Nevada, have inheritance tax statutes.
83 INT. REV. CODE OF 1954, § 2041(b)(1)(A).

the property for the marital deduction allowed by section 2056.[84] Moreover, even if a spouse is given an absolute power of disposition, which would appear to qualify for the deduction under the broad definition of a general power of appointment contained in section 2041(b),[85] at least one court[86] has indicated that it does not qualify where, under state law, such power must be exercised in "good faith," for the reason that it is not then a power "exercisable in all events."[87] If other courts, including state courts which have statutes similar to the federal provisions, follow this holding, the use of an absolute power of disposition in making gifts or bequests to donee-spouses would be seriously curtailed.[88]

Application of state inheritance tax statutes to a power of disposition necessitates the computation of the present value of the interests received by the life tenant and remainderman.[89] The tentative nature of the remainderman's interest renders this determination extremely difficult, for the life tenant may either consume the entire estate during his lifetime or die leaving it substantially intact. Solutions to the taxing problem differ, but generally statutory provision is made for deferring payment of the tax on the remainderman's interest until the property vests in him,[90] or for giving him a refund for any overpayment which he makes by paying tax on the present remainder value of the property.[91] The life tenant is usually taxed only on the value of a life estate in the whole property,[92] as if there were no possibility

84 INT. REV. CODE OF 1954, § 2056(b)(5).

85 "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 . . . ."

86 United States v. Lincoln Rochester Trust Co., 297 F.2d 891 (2d Cir. 1962), *reversing* 188 F. Supp. 839 (W.D.N.Y. 1960).

87 INT. REV. CODE OF 1954, § 2056(b)(5).

88 Many of the state statutes are patterned after the federal statute. See generally 1-4 CCH INH., EST. & GIFT TAX REP. (State) (1962).

89 See IND. ANN. STAT. § 6-2405 (1953); Ind. Dep't of State Revenue, Inheritance Tax Div. Reg. § 5 (1949).

90 Alaska, California, Colorado, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, and Wyoming have statutes of this type.

91 California, Colorado, Delaware, Idaho, Illinois, Indiana, Kentucky, Minnesota, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Vermont, and Washington have statutes of this type. Several states afford the remainderman an option of paying the tax presently at the rate prescribed or deferring payment until the interest vests in possession or enjoyment: California, District of Columbia, Idaho, Missouri, Montana, and Oregon.

92 4 CCH INH., EST. & GIFT TAX REP. ¶ 1845, at 80317 (1962), indicates that there is no general agreement among the various jurisdictions as to whether the life tenant with a power of disposition should be taxed only on the life estate or upon the full value of the property.

that he could get the benefit of more or divest the remainderman's interest. This serves to place him in a lower tax bracket than he would be in were he deemed to have the fee, and would seem, in most cases, to accord with the testator's primary purpose.

Whether or not the use of a power of disposition will involve unfavorable tax consequences will generally depend on the size of the testamentary estate. If it substantially exceeds the 60,000 dollar federal estate tax exemption, the probabilities are that it will, since the property subject to the power may either fail to qualify for the marital deduction or be taxed again in the donee's estate, should any of it remain unconsumed at his death.[93] In such case, therefore, all of the other desires of the testator must be considered and this aspect balanced negatively. If, however, the estate is small, tax considerations should not be a controlling factor in any final decision.

VIII. CONCLUSION

The use of a power of disposition may enable a testator to effectuate more closely his desires with regard to the use and disposition of his property than any other accepted form of testamentary transfer. Its utility, however, will depend upon a number of factors and uncertainties which he must first take into account. The courts have not been consistent in their approach in balancing the intent of the testator with the formalisms of established testamentary disposition. Only when they become aware that analogies to powers of appointment or other established estate patterns are insufficient to resolve the special difficulties presented by powers of disposition will a satisfactory solution to this problem be formulated. Until then, practical considerations must determine the course to be taken. Where an estate is large, the necessity for flexible control by the life tenant is diminished, and a trust is probably the better solution for a testator who wishes to control the further devolution of his property. The trustee can be given wide discretion as to the invasion of the corpus and the interest of the life tenant can be adequately protected. The small estate presents a rather different basic question. There the advantages of the power of disposition must be weighed against the

93 Regardless of the size of the estate, so long as the amount is above the basic $60,000 exemption provided by § 2052 of the 1954 Internal Revenue Code, the initial tax cost will be greater when a life estate with a power of disposition or consumption is given to the donee than where he is given an outright fee or a general power of appointment in trust. See Note, 28 IND. L.J. 409, 428 n.82 (1953).

uncertainties of its effectiveness. As a less expensive and more flexible dispositive device, it often presents an attractive alternative to other methods of testamentary transfer.

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