upon fulfillment of church doctrine rather than furthering the secular welfare of the child. The established principle of separation of church and state should lead to rejection of any purely doctrinal religious considerations which may be advanced in support of a religious clause.[43] In individual cases, not less than in general enactments, the states should be precluded from supporting the cause of any religion for its own sake.[44] States with a religion clause should repeal it. If the clause does remain in the statute, it should be interpreted, as its permissive wording suggests, as a discretionary rather than a mandatory measure. Where the problem of religion enters an adoption case, courts should treat the religious restriction as did the majority in the *Gally* case.[45] Unless faced with definite opposition to a mixed-religion placement, in the form of equally qualified adopters of the same religious faith as that of the child, the court should be at its liberty to negotiate a placement with suitable persons of a different religion.

ADVANTAGES AND LIMITATIONS OF A POWER OF CONSUMPTION IN TESTAMENTARY TRANSFERS OF PROPERTY

A recent amendment to the Internal Revenue Code,[1] clarifying the status and definition of powers of consumption for tax purposes, focuses attention on this testamentary device. Utilization of the legal life estate plus a power to consume the remainder with a gift over of whatever is unconsumed frequently is attempted where a testator desires to allot to his surviving spouse more than a life estate or her intestate share,[2] al-

43. Illinois *ex rel.* McCollum v. Bd. of Education, 333 U.S. 203 (1948); Everson v. Bd. of Education, 330 U.S. 1 (1946); Reynolds v. U.S., 98 U.S. 145 (1879); Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918).

44. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1947).

45. For writings in agreement with the dissenting opinion in the *Gally* case, see 32 B.U.L. REV. 448 (1952) and 27 ST. JOHN'S L. REV. 141 (1952). For further discussion of the case, see 27 N.Y.U.L.Q. REV. 848 (1952).

1. 53 STAT. 122 (1939), as amended, 26 U.S.C.A. § 811(f) (Supp. 1951) (Estate Tax—Powers of Appointment). Discussion is reserved to the Tax Section, *infra*.

2. "He [testator] is anxious that his widow have proper support during her lifetime, but at the same time he also desires that his children have the residue of the estate upon her death. He is somewhat reluctant to give the wife a fee and disinherit his children; he fears a life estate with a remainder in fee will not meet all exegencies [sic] of the widow's needs, so he attempts to strike between the two by giving the widow a life estate with power to dispose of such of the property as may be necessary for her maintenance, with a gift of the residue to his children." Summers, *Power of a Life Tenant to Dispose of a Fee*, 6 IND. L.J. 137 (1930). See also, Watkins v. Dean, 52 N.W.2d 498 (Iowa 1952).

though other reasons may motivate the testator's choice.[3] Despite extensive recognition of the legal validity of this method of transfer,[4] the advisability of using this device necessitates consideration of many factors, including possible new tax implications.[5]

An extra measure of flexibility is perhaps the most obvious benefit sought in this manner of testamentary transfer.[6] Conferring a sufficiently broad power will usually protect the life tenant against most contingencies.[7] Even the grant of a limited power, *e.g.*, for support and main-

3. *E.g., In re* Barne's Estate, 108 N.E.2d 88 (Ohio 1952), where a husband and wife divided their property equally between them and made an oral agreement (embodied in mutual wills) that property of the first spouse to die would pass to the surviving spouse, with full power to consume, remainder to heirs of both, in order to assure that any property remaining after the death of the surviving spouse would be equally divided between the heirs of both husband and wife. The couple were elderly and childless and did not want their property to go to one's brothers and sisters to the exclusion of the other's brothers and sisters.

4. Commissioner of Int. Rev. v. Child's Estate, 147 F.2d 368 (3d Cir. 1945); Reeves v. Tatum, 233 Ala. 455, 172 So. 247 (1937); Luscomb v. Fintzelberg, 162 Cal. 433, 123 Pac. 247 (1912); Mansfield v. Shelton, 67 Conn. 390, 35 Atl. 271 (1896); Melton v. Camp, 121 Ga. 693, 49 S.E. 690 (1905); Wiley v. Gregory, 135 Ind. 647, 35 N.E. 507 (1893); Pirtle v. Kirkpatrick, 297 Ky. 785, 181 S.W.2d 425 (1944); Takacs v. Doerfler, 187 Md. 62, 48 A.2d 328 (1947); Langlois v. Langlois, 326 Mass. 85, 93 N.E.2d 264 (1950); Quarton v. Barton, 249 Mich. 474, 229 N.W. 465 (1930); Keller v. Keller, 343 Mo. 815, 123 S.W.2d 113 (1939); *In re* Koorbusch's Will, 103 N.Y.S. 2d 462 (Surr. Ct. 1951); Crum v. Crum, 65 Ohio App. 431, 30 N.E.2d 448 (1941); Redman v. Evans, 184 Tenn. 404, 199 S.W.2d 115 (1947); Edds v. Mitchell, 143 Tex. 307, 184 S.W.2d 823 (1945).

The sole holdout appears to be Colorado which purportedly adopted the minority view in McLaughlin v. Collins, 109 Colo. 377, 125 P.2d 633 (1942), although the will clearly specified that any *real estate* which the life tenant should die possessed of should go to one of the testator's sons. The life tenant properly exercised her power to dispose of the realty, and at her death only a portion of the *proceeds* of the sale was unconsumed by her. By her own will she made a disposition of the unconsumed proceeds differing from that the testator attempted to make, which the court upheld. Note, 19 ROCKY MT. L. REV. 411, 413 (1947), contends that this case must be accepted as establishing a new rule of law in Colorado.

5. It should be remembered in a discussion such as this that the validity of any consideration is dependent upon the nature of the relationships involved. Common sense observation discloses that these vary interminably among individuals and are always subject to the vicissitudes of human relations, necessitating a reflection precedent to the adoption of any plan upon the nature, character, personality and circumstances of the parties implicated.

6. See Norvell, *The Power to Consume: Estate Plan or Estate Confusion,* 28 MICH. STATE B.J. 5, 11 (1949), which considers the flexibility to meet unforeseen contingencies to be a dubious advantage which should be subjected to critical scrutiny. The contention is made that the device is so likely to lead to confusion and wasteful litigation that it may be inadvisable except in the case of an estate so small that more elaborate plans are not feasible.

7. Board of Nat. Missions of the Presbyterian Church v. Smith, 182 F.2d 362 (7th Cir. 1950); Rinkenberger v. Meyer, 155 Ind. 152, 56 N.E. 913 (1900); Rowley v. Sanns, 141 Ind. 179, 40 N.E. 674 (1895); Downie v. Buennagle, 94 Ind. 228 (1884); Volz v. Kaemmerle, 211 Iowa 995, 234 N.W. 805 (1931); *In re* Cooksey's Estate, 203 Iowa 754, 208 N.W. 337 (1926); Stevens v. Stevens, 82 A.2d 418 (N.H. 1951); *In re* Raplee's Will, 160 Misc. 615, 290 N.Y. Supp. 517 (Surr. Ct. 1936).

tenance, will enable the life tenant, restricted only by a standard of reasonableness in the exercise of discretion, to invade the principal to meet whatever need may arise.[8] The addition of a power of consumption to a legal life estate gives the life tenant enormous freedom in handling the property, yet the testator retains the power to control the subsequent devolution of the estate, should any remain on the death of the life tenant. If so much latitude in the life tenancy is neither necessary nor desired, consideration should be given to devices which, though more rigid, will be effectuated with greater certainty.

Powers of consumption attached to legal life estates have engendered much litigation.[9] Although precise comparison is not possible, the volume of litigation appears to be greatly out of proportion to the frequency of the use of the device in estate planning. The majority of reported cases involve remaindermen's challenges to the life tenant's attempt to exercise the power. Obviously, effective exercise of the power will seriously reduce, if not totally destroy, the interest which might otherwise ultimately be enjoyed by the remainderman.[10]

Despite the broad authority and control conferred upon the life tenant, limitations exist which may require judicial interpretation. Even where the grant purports to be an absolute power of disposition, the life tenant may not act contrary to the testator's purpose.[11] Should there be limitations on the power, she must act in good faith in adhering to them.[12] A qualified power is more likely to cause controversy than an absolute grant, since the court often must determine the propriety of the life tenant's conduct, in reference to what is best for his comfort and convenience, with only vague criteria to guide its decision.[13] With the exer-

8. Watkins v. Dean, 52 N.W.2d 498 (Iowa 1952); Lovrein v. Fitzgerald, 242 Iowa 1258, 49 N.W.2d 845 (1951); Chamberlain v. Husel, 178 Mich. 1, 144 N.W. 549 (1913); Gent v. Thomas, 252 S.W.2d 345 (Mo. 1952).

9. The Indiana Reports alone indicate that approximately sixty-five cases have reached the appellate courts. It is reasonable to speculate that many times this number of cases were terminated in the circuit and probate courts.

10. The life tenant generally is held to be competent to convey the estate in fee, even in those instances where the power of invasion is not absolute. See Board of Nat. Missions of the Presbyterian Church v. Smith, 182 F.2d 362 (7th Cir. 1950); Lucas v. McNeill, 231 Fed. 672 (8th Cir. 1916); Smith v. Teel, 35 Ariz. 274, 276 Pac. 850 (1929); Rinkenberger v. Meyer, 155 Ind. 152, 56 N.E. 913 (1900); Silvers v. Canary, 109 Ind. 267, 9 N.E. 904 (1886); South v. South, 91 Ind. 221 (1883); Clark v. Middlesworth, 82 Ind. 240 (1882); Chamberlain v. Husel, 178 Mich. 1, 144 N.W. 549 (1913); Gent v. Thomas, 252 S.W.2d 345 (Mo. 1952); Miller v. Irey, 150 Okla. 240, 1 P.2d 654 (1931); Gildersleeve v. Lee, 100 Ore. 578, 198 Pac. 246 (1921); Henninger v. Henninger, 302 Pa. 201, 51 Atl. 749 (1902).

11. John v. Bradbury, 97 Ind. 263 (1884); Booker v. Deane, 88 Ind. App. 72, 163 N.E. 287 (1928).

12. See note 8 *supra*. *Cf.* Graham's Estate, 98 N.E.2d 104 (Ohio 1950).

13. In Colburn v. Burlingame, 190 Cal. 697, 214 Pac. 226 (1923), where the testator's widow was given power to use the property "as may in her judgment seem

cise of the power open to attack by a remainderman having much to gain and little to lose, frequent litigation is understandable.

Litigation, which may result in frustration of the testator's wishes, could be averted to some extent if legal counsel would avoid the use of general and indefinite language.[14] While this is a valid suggestion with reference to the drafting of any legal document, it is especially pertinent to the drawing of a will. The language in the testamentary instrument is often confusing because the testator intermingles evidence of his love and affection for his family with the instructions pertaining to the distribution of his property. He may want to exhibit his confidence in his spouse's fidelity and devotion to his wishes and to the welfare of their children. Although he desires to limit his wife's control, the testator must be delicate and tactful lest the language bluntly portray his cold and business-like approach to the device and thus be interpreted as a lack of faith in his spouse. But, the testator must use words sufficiently explicit to qualify the life tenant's otherwise unrestrained authority under a power to consume—otherwise it would be simpler to devise the fee outright and trust her to care for the children. Thus, to promote flexibility without making frustration of the testator's purpose possible, the drafting problem is one of achieving a proper balance. Since limitations on the life tenant's power must not be so stringent and inflexible as to defeat its primary objective to provide ready access to the corpus in the event of an emergency, a cautious approach to the task of drafting is a prerequisite to successful utilization of this device.

The process of estate planning demands a careful weighing of all relevant factors. Therefore, prior to adoption or rejection of the legal life estate with a power to consume, numerous alternatives merit consideration.

The testator can, of course, devise his estate outright to his wife in fee. Where his children have attained their majority, are currently solvent, and continuance of such a favorable condition is probable, the tes-

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best for her own individual benefit and support without any hindrance on the part of any person or persons," the court upheld an invasion for the purpose of taking her second husband from his job in Chicago to support him in idleness in California. The court said: "Should she leave her husband toiling and moiling in Chicago? Presumably she gave this question full consideration and concluded that it would be to her benefit that he should accompany her West. We can readily perceive that it might be much to her advantage that he should do so; and if in her opinion her life is made pleasanter or more to her liking by the freedom of her husband from the irksome demands of business we perceive no reason why, under the wide discretion she enjoys as to what expenditures are for her benefit, the expense of their common life may not be included under this head." *Id.* at 229.

14. Norvell, *supra* note 6, at 6, suggests that the draftsman should be wary of relying on the liberality of the courts and that the instrument should leave no doubt as to the intent of the donor.

tator's primary purpose may be to provide abundantly for his spouse's welfare through the grant of an absolute fee. This is particularly true if doubt exists as to the adequacy of the income from a mere life estate and if the relationship betwen the testator and his wife inspires full confidence that she will make wise use of the gift.

If, however, a man is fearful of his wife's loyalty or judgment, the grant of a simple legal life estate will assure devolution of the remainder intact upon her death.[15] The threat of attachment and levy by the widow's creditors would be limited solely to her life interest. Restricting her to a life estate does not necessarily indicate a lack of faith in the wife; the estate might be sufficiently large to afford reasonable certainty that the income therefrom will be adequate to care for her in any event.[16] Sizeable income-producing property is usually placed in trust for purposes of enduring sound management, but there may be, and there are, situations where the testator feels that the life tenant is competent to manage the property, or where the testator, for personal reasons, does not desire the intrusion of the impersonal services of a bank's trust department.[17]

More closely akin to the power to consume is a life estate coupled with a general or special power of appointment. The usual distinction between a general and a special power is that under the former, the life tenant may appoint to anyone, including herself, and thus holds full dominion over the property as if she owned it; under a special power a life tenant may appoint only among a restricted or designated class of persons other than herself, such as their children, for example.[18] One prime differentiating quality distinguishes the general power from the power to consume. The basic purpose of a general power of appointment is to delay distribution of the testator's estate in fee,[19] while that of a power of consumption is to provide for the welfare of the life tenant

15. Where there is a total lack of faith, perhaps the testator should give his widow her dower interest and let her fend for herself. To give the balance outright to the children would presently assure their interests and eliminate the possibilities of depletion before the property reaches their hands.

16. This statement covers a multitude of sins, *e.g.*, the type of property making up the estate may be a determinative factor as to whether the income, though large, will prove to be a consistently stable return. Where the bulk of the estate is composed of somewhat speculative investments, the testator's reliance upon a continuing, abundant income may be exceedingly tenuous.

17. The Revenue Act of 1948 with the marital deduction provision, INT. REV. CODE § 812(e)(1) (1948), perhaps has made a straight life estate less desirable from a tax standpoint. See p. 425 *infra.*

18. Morgan v. Collector of Internal Revenue, 309 U.S. 78 (1940); Janes v. Reynolds, 57 F. Supp. 609 (D. Minn. 1944).

19. Powell, *The New Power of Appointment,* 78 TRUSTS & ESTATES 193, 194 (1944).

during the period she survives the testator.[20] When the donee of a general power appoints to herself, she acquires the fee, and the remainder interest specified by the donor, the takers in default of appointment, may be deprived of any possible expectancy in the estate or the proceeds thereof. Unless the donee may partially exercise the power to herself, this method of testamentary transfer lacks the flexibility of an invasion of the principal for use in an emergency or unexpected need, which is possible by using the power of consumption.[21] In addition, a general power of appointment is exercisable by deed or will,[22] while a power to consume must be exercised inter vivos unless the testator expressly gives authority to devise.[23]

The special power of appointment is obviously less flexible since it curtails the area of the donee's discretion in using the principal. Even a power of consumption limited to the necessary support and maintenance of the life tenant offers her broader protection than the special power of appointment since she must exercise the former power in her favor. In the absence of circumstances that advise use of a power of consumption, and where the object is to confer more than a life estate upon the life tenant in order to provide for her primarily in the event of any contingency, a general rather than a special power of appointment would more nearly effectuate this purpose.[24]

Another alternative is for the testator to devise his estate to a trustee for the benefit of the settlor's widow for life and at her death to the

20. This is one of the fundamental hypotheses of the instant discussion. For inferential accord, see Summers, *supra* note 2, at 137; Norvell, *supra* note 6, at 5.

21. Where a power of appointment is general, the donee of the power may appoint to various persons in varying amounts. Hood v. Francis, 137 N.J. Eq. 200, 44 A.2d 182 (Ch. 1945); *cf.* Brown v. Fidelity Union Trust Co., 126 N.J. Eq. 406, 429, 9 A.2d 311, 324 (Ch. 1939).

22. Wilmington Trust Co. v. Wilmington Trust Co., 25 Del. Ch. 121, 15 A.2d 153 (Ch. 1940); Merrill v. Lynch, 13 N.Y.S.2d 514 (Sup. Ct. 1939); Hooker v. Drayton, 69 R.I. 290, 33 A.2d 206 (1943).

23. Wible v. Hunt, 121 Ind. App. 130, 98 N.E.2d 235 (1951), held that the life tenant, with "full power to mortgage, sell, and convey" during her natural life, could not validly devise the fee. The court said that "she did not die seized of any interest in such real estate which could pass by her will." *Id.* at 135. *Cf.* Rosenberg v. Baum, 153 F.2d 10 (10th Cir. 1946); Funk v. Eggleston, 92 Ill. 515 (1879); Langlois v. Langlois, 326 Mass. 85, 93 N.E.2d 264 (1950); Crew v. Dixon, 129 Ind. 85, 27 N.E. 728 (1891); John v. Bradbury, 97 Ind. 263 (1884); Rapp v. Matthias, 35 Ind. 332 (1871).

24. The special power probably affords greater protection against creditors of the donee, although, as with a power of consumption, the result may depend upon the jurisdiction. Ebersole v. McGrath, 271 Fed. 995 (S.D. Ohio 1920); Prescott v. Wordell, 319 Mass. 118, 65 N.E.2d 19 (1946); *In re* Howald's Trust, 65 Ohio App. 491, 29 N.E.2d 575 (1940); Hooker v. Drayton, 69 R.I. 290, 33 A.2d 206 (1943).

Statutes in several states change the life estate into a fee absolute so far as the rights of creditors, purchasers, and encumbrancers are concerned where the donee has an absolute power of disposition exercisable for her own benefit. See note 40 *infra*.

remaindermen free of the trust. The settlor may protect his surviving spouse against financial emergencies by specifying that she shall have the power to demand that the trustee pay over to her any part or all of the principal whenever she so desires or whenever she deems it necessary for her benefit. The trust instrument may direct the trustee to comply with her requests without question and without court approval, thus freeing the trustee from possible liability to the remaindermen.

The testator may prevent the widow from squandering the corpus by directing the trustee to invade the principal only upon a clear showing of immediate necessity. In case of doubt, the trustee, to protect himself, would seek court approval, which would require that the beneficiary prove necessity. The courts sometimes afford similar protection to remaindermen absent the trust device.[25] Discretion to invade the corpus may be placed solely in the trustee if an extremely reliable and competent one is available.

The trust device offers distinct advantages from the standpoint of obtaining experienced business and financial management and greater certainty of control over the life tenant's conduct; its use might better safeguard the income beneficiary from her creditors if such protection is specifically provided for in the will creating the trust.[26] However, operation of the trust may engender greater expense, which may so affect the size of the life beneficiary's income as to force an otherwise unnecessary invasion of the corpus.[27] With a trust, as with alternative devices, the fundamental criterion is the testator's purpose with reference to his financial and family circumstances. If, in the light of the testator's primary objectives, the use of a trust will provide the fullest assurance of completely satisfying his aims, added expense or other apparent disadvantages may have only a minimal effect on the final decision.

To say one should never utilize a legal life estate with a power to consume the remainder is a contention unwarranted by experience. Obviously circumstances exist in which the use of this device would be the most sensible choice; but that it is advisable only in certain situations is indicated by the threat of litigation attendant upon its use, by the delicate draftsmanship problem and by the availability of other methods which

25. Where the life tenant is required to exhibit good faith, cases cited note 8 *supra*, one of the factors considered by the court is the evidence of necessity or actual benefit to be gained by the widow in exercising the power.

26. *In re* Miller's Trust, 313 Pa. 18, 169 Atl. 362 (1933).

27. The validity of this contention depends upon a number of relative factors, such as the quantum of the estate, the extent of the trustee's duties, and the normal income requirements of the beneficiary. For a brief, interesting discussion, see Stone, *Life Tenant vs. Remainderman*, 84 TRUSTS & ESTATES 530 (1947), which suggests that expenses be paid out of principal rather than income.

would produce a more satisfactory result. The question remains as to when and how the device should be chosen as the proper testamentary transfer to accomplish the desired objectives.

The fundamental guiding principle is the testator's purpose. Application of this device is most appropriate when the testator is primarily concerned with the welfare of his surviving spouse and at the same time wishes to direct the devolution of any part of his estate which remains unconsumed at the time of her death. He is vitally interested in making certain that no persons other than those he specifically designates for the remainder receive any part of his estate on her demise. His concern for remaindermen is secondary, however, to his desire that his spouse be adequately provided for during the balance of her lifetime. Although her welfare is his initial objective, withholding the remainder of the fee is based upon a good reason. Even though he does not want her to suffer privation, he does wish to avoid the possibility that she may fruitlessly dissipate the estate or that someone might unduly influence her to convey the property to them without sufficient consideration—all of which she could do if she were given the fee outright. Possibly the testator has managed the family affairs himself during the greater part of their married life and he reasonably fears undesirable consequences if his widow is given complete control when he can no longer counsel her and exert a stabilizing influence.

The reasons for not using a straight life estate or a special power of appointment are demonstrable. Although the estate may be of sufficient size that the income normally would provide a decent standard of living for the widow, an emergency could deplete several years' income at one stroke and leave the life tenant hopelessly in debt. Moreover, the current period of progressive inflation necessitates arranging for a larger margin of security than would be called for otherwise. Furthermore, while a special power of appointment enables the testator to exert closer control over the ultimate disposition of his estate, it is of small benefit to the donee in an immediate financial crisis.

A power of invasion, as opposed to a general power of appointment, doubtlessly will better serve the purpose of assuring that the unconsumed portion of the testator's estate will pass to certain designated remaindermen when the surviving spouse dies.[28] Again, the testator's aim is not to place control of the ultimate devolution of the estate in fee, a significant characteristic of the general power of appointment, within the potential ability of the life tenant.[29] While a limited power of consumption will

28. See notes 19 and 20 *supra.*
29. See note 18 *supra.*

enable the first taker to dispose of the fee,[30] if she does so, whatever is left of the proceeds on her death will go to the remaindermen, thus completing the effectuation of the testator's expressed intention.[31] On the other hand, under a general power of appointment, if the takers in default specified by the donor are to receive any benefits it must be by virtue of the donee's failure to appoint, upon partial exercise, or where the donee exercises the power in favor of her estate and the remaindermen take under her will.

It must be remembered that in considering when to use a power of consumption, not only does the testator desire to provide for his widow in her lifetime but at the same time, should she fail to consume all of the principal before her death, he wishes to be the one to control the subsequent descent of title rather than leave this matter to her. She can not, unless expressly given the power, devise the unconsumed portion in contravention of his wishes.[32] The donee of a general power of appointment, on the other hand, may appoint by will to whomever she chooses, thus cutting off the takers in default.[33]

Although most of the same results could be accomplished through creation of a trust, this fact itself emphasizes the intrinsic worth of a power of invasion appended to a legal life estate. Were the latter device non-existent or its use impeded by extremely limited judicial recognition, availability of the trust device exclusively would present the testator with a forced choice should he desire to attain the foregoing objectives. A trust may be definitely unsuitable where the testator is anxious to repose as much confidence as possible in his widow, and where she would be violently opposed to the intrusion of a trustee into her personal affairs. The legal life estate with a power to consume affords a convenient pre-

30. See note 10 *supra.*

31. Control of the proceeds of a sale by the life tenant would seem to depend upon the extent of the power, *i.e.,* if the power is to be used to support the life tenant, the proceeds are similarly limited to such purpose. Walker, Adm'r v. Pritchard, 121 Ill. 221, 12 N.E. 336 (1887); Olson v. Weber, 194 Iowa 512, 187 N.W. 465 (1922); Keniston v. Mayhew, 169 Mass. 166, 47 N.E. 612 (1897); Henninger v. Henninger, 302 Pa. 201, 51 Atl. 749 (1902).

In some instances the life tenant may be considered as holding the proceeds as a trustee for the benefit of the remaindermen. Hollerich v. Gronbach, 342 Ill. App. 242, 96 N.E.2d 354 (1950); Graham's Estate, 98 N.E.2d 104 (Ohio 1950).

Or where the life tenant gave the property away, the transferee was held to be a constructive trustee for the remaindermen. Parker v. Lloyd, 321 Mass. 126, 71 N.E.2d 889 (1947).

Where a life tenant with a power to consume has commingled the funds she received as donee with her own, the expenditure for her purposes are presumed to be paid, "first, out of the income from the estate," then out of the donee's funds, and then "out of the corpus of the decedent's estate." Hutchinson's Estate v. Arnt, 210 Ind. 509, 1 N.E.2d 585, 591, 4 N.E.2d 202 (1936).

32. See note 23 *supra.*

33. See note 22 *supra.*

rogative and is markedly valuable in that it enables the planner to exercise a free choice between two similarly effective schemes.

When the estate is small a trust may be out of the question. Doubtless the income would be inadequate, and trust expenses would further reduce it. Progressively larger inroads upon the corpus would be a certainty, and, in such a situation, there would be no practical reason for setting up the machinery and going through the motions of invading the principal. With a medium or large estate these considerations become less decisive. Although the trust affords protection against incompetent management of the estate by the testator's wife, similar safeguards might be obtainable without the formalities of a trust by granting an explicitly limited power.[34]

Assuming, therefore, that maximum satisfaction will be achieved through the use of a legal life estate with a power to consume the remainder, the proper manner of employing the device remains to be considered.

Generally a court in ascertaining the testator's intention interprets the language of the will in light of the surrounding circumstances, but the court cannot import into a will an intention differing from that expressed by the language thereof, however clearly such intention appears.[35] Thus, execution of the will requires precise language which expresses the objectives to be effectuated with as great a degree of exactness as is possible. Nevertheless counsel should not overlook the possible psychological impact of technically adequate legal terminology.[36]

It is extremely important that the gift should be an express life estate and not be couched in general terms. Failure to do this may occasion frustration of the testator's otherwise evident intention.[37] Also,

34. Where a trust is utilized, in order to qualify for the federal estate tax marital deduction, the surviving spouse must be given the power to appoint the entire corpus free of the trust. INT. REV. CODE § 812(e)(1)(F) (1948). See p. 425 *infra.*

35. Jackman v. Kasper, 393 Ill. 496, 66 N.E.2d 678 (1946); *cf.* Lange v. Estorge, 242 S.W.2d 50 (Mo. 1951); Guaranty Trust Co. of N.Y. v. First Nat. Iron Bank of Morristown, 8 N.J. 112, 84 A.2d 6 (1951).

36. See discussion at p. 412 *supra.*

37. In Franklin College v. Wolford, 118 Ind. App. 401, 78 N.E.2d 35 (1948), the testator devised his estate to his wife in general terms, giving her extensive powers of disposition, with a remainder over to fifteen named beneficiaries. There was evidence, not reported in the opinion, that the widow understood her interest to be a limited one per her husband's intention. When she died, the widow devised the estate to Franklin College as residuary legatee. The lower court found that the wife took only a life estate. However, the appellate court reversed, holding that the testator clearly conveyed a fee simple estate to his widow, and that the subsequent attempt to limit the estate conveyed was not in words as "clear, distinct, and decisive." Consequently, the devise to the College was held to be valid, even though in contravention to the testator's expressed desire that the fifteen named beneficiaries were to take at her death *Cf.* Phillips v. Currie, 246 S.W.2d 257 (Tex. Civ. App. 1952).

in a few states, unless the surviving spouse is given an interest expressly for life, the addition of an absolute power of consumption will enlarge her interest to a fee.[38]

In order to protect the life tenant against possible financial emergency and to assure passage of the unconsumed estate to specified remaindermen, it is essential that the power of consumption be qualified, *i.e.*, limited to necessary support and maintenance. If the widow is to have unrestrained control, a gift of the fee outright would eliminate the time and effort required to plan and draft a more complicated transfer. Perhaps the only valid reason for resorting to an absolute power is to attempt to obtain the estate tax marital deduction—even then the power must be in trust.[39] Moreover, under the statutory system of powers for the benefit of creditors, purchasers, and encumbrancers, in some states the life estate would become a fee absolute where the grantee of the power has an unlimited power of disposition exercisable for her own benefit.[40] Creditors may not reach assets subject to a qualified power unless the life tenant has exercised the power.[41] Although utilization of a limited power is advisable, the life tenant, to preclude challenging litigation by the remaindermen, should be given express authority to convey the estate in fee.[42]

38. *In re* Hayward's Estate, 57 Ariz. 51, 110 P.2d 956 (1941); Barker v. Eades, 287 Ky. 579, 154 S.W.2d 546 (1941); TENN. CODE § 7603 (1932), Abernathy v. Adams, 31 Tenn. App. 559, 218 S.W.2d 747 (1948); VA. CODE § 5147 (1919), Rule v. First Nat. Bank of Clifton Forge, 182 Va. 227, 28 S.E.2d 709 (1944); W. VA. CODE § 36-1-16 (1931), Swan v. Pople, 118 W. Va. 538, 190 S.E. 902 (1937).

39. INT. REV. CODE § 812(e)(1)(F) (1948).

40. N.Y. REAL PROP. LAW §§ 149-154. Section 149 reads: "Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers, and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts." See also, ALA. CODE tit. 47, §§ 76-79 (1940); D.C. CODE ANN. tit. 45, §§ 45-1005 to 45-1008 (1951); MICH. COMP. LAWS §§ 556.9-556.13 (1948); N.D. REV. CODE §§ 59-0539 to 59-0543 (1943); OKLA. STAT. tit. 60, §§ 262-266 (1951); S.D. CODE §§ 59.0439-59.0443 (1939); WIS. STAT. §§ 232.08-232.12 (1947).

Minnesota also had a statutory system of powers which was repealed in 1943. The legislature then adopted the common-law of powers. MINN. STAT. ANN. § 502.62 (1947).

For a comprehensive discussion of the statutory system of powers, especially in New York, see Whiteside and Edelstein, *Life Estates with Power to Consume: Rights of Creditors, Purchasers, and Remaindermen: A Study of N.Y. Real Property Law Sections 149-153*, 16 CORNELL L.Q. 447 (1931).

41. *E.g.*, Rose v. Hatch, 125 N.Y. 427, 26 N.E. 467 (1891), which follows the rules applicable to powers of appointment. United States v. Field, 255 U.S. 257 (1921); Slayden v. Hardin, 257 Ky. 685, 79 S.W.2d 11 (1935); *In re* Scott's Estate, 158 Pa. Super. 138, 44 A.2d 323 (1945), *aff'd*, 353 Pa. 575, 46 A.2d 174 (1946).

42. Many cases involve the question as to whether the life tenant is empowered to convey the fee. *E.g.*, Silvers v. Canary, 109 Ind. 267, 9 N.E. 904 (1886); Downie v. Buennagle, 94 Ind. 228 (1884); South v. South, 91 Ind. 221 (1883). For a thorough

Proceeds or property obtained through such a conveyance are held to take the place of the property sold so that title is in the remaindermen subject to whatever rights of invasion the life tenant possesses.[43] However, inclusion of a provision specifically covering the proceeds of a sale under the power may obviate any recourse to the courts to settle the question.

Disruption of the most carefully laid plans may occur if the possibility is overlooked that the testator's widow may remarry. Notwithstanding that the exercise of the power is limited to necessary requirements, an entirely different construction may be placed upon the limitation with the advent of a second husband.[44] To foreclose this possibility it seems advisable to make the life tenant's interest a determinable one in the event she ceases to be testator's widow, or to specify that remarriage shall not affect the extent of her power with reference to a determination of what is a necessary exercise thereof.[45]

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discussion of this extraordinary power in the life tenant, see Summers, *Power of a Life Tenant to Dispose of a Fee,* 6 IND. L.J. 137 (1930).

43. Smith v. Cain, 187 Ala. 174, 65 So. 367 (1914) (remainderman entitled to any proceeds eventually remaining, and property into which the proceeds were converted, subject to the life tenant's right of user); Hinger v. Hinger, 17 Del. Ch. 62, 149 Atl. 430 (Ch. 1929); Barton v. Barton, 283 Ill. 338, 119 N.E. 320 (1918); Rapp v. Matthias, 35 Ind. 332 (1871); *In re* Eddy's Adm'r, 134 Misc. 511, 236 N.Y. Supp. 275 (Surr. Ct. 1929). *But cf.* McLaughlin v. Collins, 109 Colo. 377, 125 P.2d 633 (1942).

44. See note 13 *supra.*

45. A draft of a testamentary document covering the proposed use of the device in question, as outlined above, might contain language somewhat as follows (Note—this is merely a suggested form for a family consisting of the testator, his wife, and two grown, married children; a smaller or larger family, different circumstances within the family, or other determinative factors undoubtedly will necessitate variations).

(1) I give, devise, and bequeath all of my estate, both real and personal, to my beloved wife (name), to have and to hold for her natural life, or for and during so much of the term of the natural life of the said (wife's name) she shall remain my widow and unmarried, with full power to manage, control, and superintend all of said property during said term of her estate therein, and with full power and authority to mortgage, sell, and convey in fee any and all of said real estate and personal property, or so much thereof as shall be necessary to provide for her support and maintenance during the term of her natural life, or as long as she shall remain my widow and unmarried. It is my purpose in granting the aforementioned power of consumption to provide my wife with a source of additional revenue over and above her life interest in the event a definite need for such additional funds may arise during the term of her estate therein. A determination of the fact that necessity for invasion exists shall be solely within the discretion of my widow, and such determination shall be conclusive except on a showing of bad faith.

(2) Should it become necessary for my wife (name) to mortgage, sell, or convey any or all of said real estate and personal property included within paragraph numbered one, it is my express direction that any proceeds thereof and any other property acquired therewith shall be held under the same terms and limitations as set forth in paragraph numbered one.

(3) Upon the death or remarriage of the said (wife's name), I direct that whatever part of my estate, both real and personal, shall remain unconsumed shall go to my children, (names), in equal shares, and if either or both of them shall at the time

Tax Aspects

Since the measure of satisfaction and efficiency of the testator's distribution will be, at least in part, determined by the effects of estate and inheritance taxes upon the estate, this aspect should be given careful attention before reaching a final decision. As the size of the estate increases, taxes become progressively more determinative, since most death taxes are of the graduated type. The salient problem in regard to state inheritance taxes is whether the life tenant with a power to consume will be subject to taxation on all of the estate. Of key concern under the Federal Estate Tax are the applications of the marital deduction provisions and the possibility of double taxation.

Two principal types of taxes are applicable to testamentary transfers:[46] (1) an inheritance tax, which is levied on the shares of an estate received by the individual beneficiaries and heirs, and (2) an estate tax, which is levied on the entire estate left by the deceased.[47]

The customary evaluation procedure in taxation of life estates and remainder interests by the states is to measure the worth of the limited interest through the use of mortality tables. The present valuation of the remainder interest[48] is calculated by deducting the computed value of

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of my wife's death or remarriage have died leaving children or descendants of deceased children, to such children or descendants of deceased children by right of representation, and if either of my children (names) shall at the time of my wife's death or remarriage have died without leaving children or descendants of deceased children, his or her share to my other child then living, and if not, to that child's descendants, if any, but if both of my children (names) shall at the time of my wife's death or remarriage have died without leaving children or descendants of deceased children, to the Board of Trustees of Indiana University for public educational purposes.

46. "In the estate tax, the tax is measured on the net estate before it is distributed or divided among the beneficiaries. Under the inheritance or succession tax as commonly employed, the beneficiaries are separated into classes according to the degree of relationship and different rates and exemptions applied to the different classes, so that a separate tax is imposed upon each individual share of the estate left by the decedent which may be greater if the relationship differs, even though the exact amount received is the same." CCH STATE TAX GUIDE SERV. ¶ 32-002 (1942).

47. The federal government and ten states have only an estate tax, while thirty-three states, including Indiana, and the District of Columbia have both estate and inheritance taxes; four states have solely an inheritance tax, and Nevada has no death tax of either type. CCH INH., EST. & GIFT TAX REP. ¶ 1100 (1951).

Apparently at one time in most states where a death tax was in force it was of the inheritance variety. The adoption of an additional estate tax evidently came as a result of the Federal Revenue Act of 1926, allowing a sizable (80%) credit to taxed estates to cover state inheritance taxes charged against them. The effect of this credit was to eliminate the burden of state taxes on estates where the rates of the state taxes did not exceed the credit allowed under the federal tax. As a consequence, many states have taken advantage of this opportunity to absorb the federal tax by imposing a supplemental estate tax. IND. ANN. STAT. § 6-2438 (Burns 1933).

48. Sometimes referred to as such; see OHIO GEN. CODE ANN. § 5342-1 (1945).

the life estate from the value of the entire property.[49] Appendage of a power of consumption to the life estate presents an apparently anomalous situation, *i.e.*, what is the "present valuation" of the remainder interest when the life tenant may consume the entire estate, leaving nothing to vest in the possession and enjoyment of the remainderman?

The various states' statutes provide several possible solutions. Under some laws the tax on the whole is suspended until the various interests finally vest in possession and enjoyment, and in such case the law may or may not require the giving of security for the ultimate payment of the tax when due.[50] Still other measures provide for a tax at the minimum rate with the further proviso that, in case the interests vest in persons taxable at a higher rate, the additional payment shall be made upon final vesting and enjoyment.[51] Another attempt at solution of the problem is found in acts providing for taxation on the whole estate in the maximum amount which could possibly become due in any contingency, preserving to the person properly entitled thereto the right to recover any excess with legal interest.[52] Several states afford the remainderman an option

49. See IND. ANN. STAT. § 6-2405 (Burns' 1933); Ind. Dep't. of State Revenue, Inheritance Tax Div. Reg. § 5 (1949).

50. CAL. REVENUE & TAXATION CODE ANN. §§ 14171, 14172 (Deering 1944) (transferee may elect to defer payment of tax until contingency or condition occurs: if he elects deferment, he must post a bond); COLO. STAT. ANN. c. 85, § 20 (1935); D.C. CODE ANN. § 47-1607 (1951) (remainderman may pay tax on the transfer at the time when the interest becomes vested, but must give bond); IDAHO CODE ANN. § 14-412 (1948); IOWA CODE ANN. c. 450, § 450.48 (1949); KAN. GEN. STAT. § 79-1504 (1949); MICH. COMP. LAWS § 205.207 (1948) (may elect within one year not to pay tax until he comes into possession; bond required); MO. ANN. STAT. § 145.200 (Vernon 1951); MONT REV. CODES ANN. § 91-4419 (1947) (may elect within eighteen months not to pay tax until he comes into beneficial enjoyment; must give bond); PA. STAT. ANN. tit. 72, § 2304 (1949); VA. CODE § 58-176 (1950); WIS. STAT. § 72.09 (1947) (election within eighteen months; bond); WYO. COMP. STAT. ANN. § 6-2117 (1945) (beneficiary may elect within six months not to pay tax until he comes into actual possession or enjoyment; must give bond). See also N.Y. TAX LAW § 249-z (remainder interest, at election of executor, may be postponed until six months after termination of the precedent interest(s) in the property and is then payable together with interest at 4% from the date of the decedent's death).

51. MO. ANN. STAT. § 145.240.2 (Vernon 1951); MONT. REV. CODES ANN. § 91-4435 (1947); R.I. GEN. LAWS c. 43, § 13 (1938). See also D.C. CODE ANN. § 47-1607 (1951) (remainderman has option of paying the tax presently equal to the meau between the highest and lowest possible taxes or deferring payment; see note 50 *supra); TENN.* CODE ANN. § 1270 (Williams 1934), McFarland v. Crenshaw, 160 Tenn. 170, 22 S.W.2d 229 (1929) (equity may apportion the tax).

52. CAL. REVENUE & TAXATION CODE ANN. §§ 13411, 14411 (Deering 1944); COLO. STAT. ANN. c. 85, § 19 (1935) (highest rate *probable*); DEL. REV. CODE c. 6. § 138 (1935); IDAHO CODE ANN. § 14-412 (1948); ILL. ANN. STAT. § 119.443 (1940); IND. ANN. STAT. § 6-2405 (Burns 1933); KY. REV. STAT. § 140.110 (1946) (tax at a rate which would be applicable on the happening of the most *probable* contingencies or conditions named in the will; provides for refund of any excess); MINN. STAT. ANN. § 291.11(5) (1947); N.C. GEN. STAT. §105.19 (1950); OHIO GEN CODE ANN. §§ 5342 to 5343-1 (1945); ORE. COMP. LAWS ANN. § 20-123 (1940); S.C. CODE VOL.

of paying the tax presently at the rate prescribed or deferring payment until the interest vests in possession or enjoyment.[53] Based on the premise that the power to consume should not be given to the life tenant unless a real need for its exercise is predictable, the provision for election by the remainderman appeals to one's sense of equity and fairness. Since the remainderman is gambling on the possibility of actually receiving any part of the estate, he should be permitted to choose his own time of payment.

Where the state imposes a graduated death tax, the addition of a power of consumption may occasion no disadvantage tax-wise, since the valuation of the remainder interests, as if there were no possibility of divesting, results in placing the surviving spouse's interest in a lower bracket.[54] Illustrative of this proposition is a recent New York appellate court decision holding that a life tenant with a power did not have an indefeasibly vested interest in the entire estate which was in effect a fee.[55]

2, § 2481 (1942); S.D. CODE § 57.2321 (1939); VT. REV. STAT. c. 49, § 1087 (1947); WASH. REV. CODE § 83.16.030 (1951).

See also CONN. GEN. STAT. tit. 15, c. 100, § 2035 (1949) (if the present value of the remainder cannot be computed then tax may be compromised by agreement, and if no agreement is reached after thirty days, then the tax is levied on the assumption that contingencies will occur which lead to the highest possible tax; provides for refund with interest at 4%); IOWA CODE ANN. c. 450, § 450.96 (1949) (if the transfer is in part contingent and in part vested, it is taxed at the highest rate.)

A concise delineation of the Indiana position is presented in a communication to the INDIANA LAW JOURNAL from the Administrator of the Inheritance Tax Division, Ind. Dep't of State Revenue: "[W]e hold as follows: That any transfer under the Inheritance Tax Law, involving the retention of a life estate regardless of its proviso granting unlimited power to alienate is treated by us, nevertheless, as a life estate.

"Taxes are computed in such case the same as any other life estate by computing the value of such life estate on the basis required by Statute. In other words 5% of the actual value of the corpus is multiplied by the present value factor established in the American Experience table for the attained age of the life tenant. The result produces the present cash value of the life estate which is then deducted from the value of the corpus and leaves the value to be taxed to the remaindermen pro rata.

"Our basis for computing all life estates as aforesaid is by virtue of the common law in the State of Indiana which definitely holds such transfers to be life estates regardless of powers to invade or even where the testator goes so far as to grant the life tenant the powers of appointment."

53. CAL. REVENUE & TAXATION CODE ANN. §§ 13411, 14171 (Deering 1944); D.C. CODE ANN. § 47-1607 (1951); IDAHO CODE ANN. § 14-412 (1948); MO. ANN. STAT. §§ 145.200, 145.240.2 (Vernon 1951); MONT. REV. CODES ANN. §§ 91-4419, 91-4435 (1947); ORE. COMP. LAWS ANN. § 20-123 (1940).

54. For example, under Indiana Inheritance Tax Law, on a net estate of $100,000, if the estate were taxed as an outright gift to the widow she would be required to pay 3% on the value over $50,000; while, if the power was, in effect, taxed to the remainderman, the surviving spouse would be taxed only on her life interest (which at age 60 would be $44,746.50) and she would therefore pay only 2% on the value over $25,000. See IND. ANN. STAT. § 6-2402 (Burns 1933).

55. *In re* Brower's Estate, 304 N.Y. 661, 107 N.E.2d 589 (1952). The widow was not entitled to the state estate tax exemption granted by § 249-q of the Tax Law for the fee (the case does not discuss her life interest).

The lower court had ruled that her interest was valued as an outright gift of the corpus, and the remaindermen were therefore not entitled to an exemption under the New York Inheritance Tax Law.[56] Under the latter ruling the inclusion of such a power would probably invite a tax handicap to the estate unless the remaindermen were not of sufficiently close relationship to bring them within the same class of beneficiaries as the testator's widow.[57] Although the remaindermen are subject to taxation under a decision such as that of the New York appellate court,[58] provisions of various state laws on refund[59] and on deferment[60] assure them that their interests will not be reduced by taxation on that part which does not actually vest in possession and enjoyment.[61]

Introduction of the marital deduction provisions in the Revenue Act of 1948[62] indicates, in so far as tax consequences are concerned, the further inadvisability of utilizing the absolute power of consumption. To qualify as a marital deduction under the Act it is necessary that the interest be in property "which passes or has passed from the decedent to

56. *In re* Brower's Estate, 197 Misc. 726, 97 N.Y.S.2d 116 (Surr. Ct. 1950).

57. To illustrate this point, on the theory of the Surrogate Court, which followed a ruling of the New York State Tax Commission, the entire estate would be taxable to the widow. Based upon Indiana Tax Laws, on a net estate of $100,000 (excluding the exemptions of individual beneficiaries) the surviving spouse (Class A Beneficiary) would be taxed on $85,000 ($100,000 less the $15,000 exemption) resulting in a tax of $2100. If the widow were taxed only on the life interest and the remainderman was also a Class A Beneficiary (child), the widow (at age 60) would be taxed on $29,746.50 ($44,746.50, value of life estate, less the $15,000 exemption), and the remainderman would be taxed on $53,253.50 ($55,253.50, present value of the remainder, less the $2000 exemption for a child over 18 years of age) making the total tax $1382.54. Whereas, if the remainderman was a stranger (Class C Beneficiary), the total tax would be $4355.68. See IND. ANN. STAT. § 6-2402 (Burns 1933); IND. ANN. STAT. § 6-2403 (Burns 1951).

58. See note 55 *supra.*

59. See note 52 *supra.*

60. See note 50 *supra.*

61. Remaindermen, as such, are not separately taxed under federal tax laws, but a gift in remainder may play an important role as a deductible interest if it is a transfer for public, charitable, and/or religious uses. INT. REV. CODE § 812(d) (Supp. 1951). In some instances it may be possible to obtain the deduction even though the trustee is given the power to invade the corpus for the benefit of the life tenant, provided the discretion of the trustee or the beneficiary is guided by an "ascertainable standard." The classic case is Ithaca Trust Co. v. U.S., 279 U.S. 151 (1929), wherein Justice Holmes, speaking for the Court said: "The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs." *Id.* at 154. But *cf.* Blodget v. Delaney, 105 F. Supp. 469 (D. Mass. 1952).

62. Section 361 of the Statute is embodied in § 812(e) of the Internal Revenue Code. For a sophisticated analysis and discussion, see Casner, *Estate Planning Under the Revenue Act of 1948,* 62 HARV. L. REV. 413 (1949), 63 HARV. L. REV. 9 (1949).

his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate."[63] The aggregate amount of such deductions is limited to 50 per cent of the value of the adjusted gross estate.[64] A life estate generally will not qualify.[65] An interest for life plus a power of appointment will be eligible for the marital deduction only if it is in trust and the desiderata of the statute are satisfied by the terms of the trust.[66]

Since the legal life estate with a power of consumption does not qualify for the marital deduction, the question raised is whether any part of the testator's estate would be includible in the life tenant's estate for tax purposes upon her death.[67] Federal estate tax provisions reveal a somewhat perplexing differentiation in their treatment of powers in the life tenant. Only general powers of appointment in trust specifically qualify for the marital deduction;[68] powers of consumption presumably

63. INT. REV. CODE § 812(e)(1)(A) (1948). The deduction is not allowed in computing the net estate of a non-resident not a citizen of the United States. For a definition of what is considered as the "passing of an interest in property," see § 812(e)(3) (1948).

64. INT. REV. CODE § 812(e)(1)(H) (1948).

65. Under INT. REV. CODE § 812(e)(1)(B) (1948), a life estate is a terminable interest for which no deduction will be allowed, unless under clause (i) the remainder passes to the estate of the surviving spouse. ". . . [B]ut an interest which passes from the decedent to the heirs of such spouse by purchase, where the State law does not give effect to the rule in *Shelley's* case, is an interest passing to persons other than the surviving spouse for the purposes of clauses (i) and (ii)." U.S. CODE CONG. SERV. 1230 (1948). In other words, a remainder to the testator's children would not qualify the widow's life estate unless the rule in *Shelley's* case applies. It is doubtful whether the rule is in effect in Indiana, although it may he as a rule of construction. McMahan v. Newcomer, 82 Ind. 565 (1882).

66. INT. REV. CODE § 812(e)(1)(F) (1948). "The five conditions which must be satisfied by the terms of the trusts are as follows: (1) The surviving spouse must be entitled for life to all the income from the corpus of the trust. (2) Such income must be payable annually or at more frequent intervals. (3) The surviving spouse must have the power, exercisable in favor of herself or of her estate, to appoint the entire corpus free of the trust. (4) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events. (5) The corpus of the trust must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse. In determining whether the above stated conditions, (1) to (5) inclusive, are satisfied by the terms of the trust, regard is to be had to the applicable provisions of the law of the jurisdiction governing the administration of the trust." U.S. Treas. Reg. 105, § 81.47a(c) (as amended by T.D. 5857, Sept. 14, 1951).

67. *I.e.,* the life estate, being a terminable interest, does not obtain the benefits of marital deduction, and of course, such interest is not taxable in the life tenant's gross estate, since it terminates at her death and nothing passes thereby to subsequent beneficiaries (the remainder interest has alrcady been taxed as part of the original testator's estate). This is one obvious tax advantage in giving the widow less than the fee. But, if the added power is taxable as part of her gross estate, such advantage may be largely eliminated.

68. INT. REV. CODE §812(e)(1)(F) (1948); see note 66 *supra.* See DEWIND AND LIDSTONE, FEDERAL ESTATE TAX 65 (1951), where it is stated that a marital deduction would be allowed in a jurisdiction in which a life estate coupled with a power

are taxable in the testator's gross estate. Therefore, it would be reasonable to assume that such powers would not be includible as part of the life tenant's gross estate for tax purposes upon her death, particularly since the power is intended solely for her benefit and does not devolve, in itself, upon subsequent beneficiaries.[69] However, even under the recent, more liberal amendment[70] to Section 811 (f), which relates to items in a decedent's gross estate, property subject to a "general" power of consumption[71] created after October 21, 1942, is included in the donee's gross estate for tax purposes whether she exercises it or not.[72] Thus the testator, if his paramount objective is tax savings, would be compelled to make an outright gift to his wife, or, if he insists on utilizing a limited estate with an absolute power added, to devise the interest in trust under the requisite terms.[73]

The Federal Estate Tax provides a deduction for property previously taxed,[74] as do several states,[75] but, oddly enough, the Revenue Act of

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of appointment amounts to an absolute fee. The authors cite N.Y. Real Property Law § 151 as an example. Section 151, however, is applicable only where "no remainder is limited on the estate of the grantee of the power."

69. *I.e.*, a power of consumption is not considered a sufficient interest "passing from the decedent to his surviving spouse" to qualify for the marital deduction. Therefore, how can it be contended that the same power is a sufficient interest to be included in her estate for tax purposes?

70. 53 STAT. 122 (1939), as amended, 26 U.S.C.A. § 811(b) (Supp. 1951) (Estate Tax—Powers of Appointment).

71. "The bill defines a general power of appointment as a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. This includes a general beneficial power to appoint by will. It also includes certain rights to consume principal." Senate Finance Committee Report on Pub. L. No. 58, 3 P-H 1952 FED. TAX SERV. ¶ 23,771-A (1952). See also U.S. Treas. Reg. 105, § 81.24 (1950): "The term 'power of appointment' includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and local property law connotations."

72. INT. REV. CODE § 811(f)(2), as amended by Act, June 28, 1951. Subparagraph (3)(C) under § 811(f) excepts powers created after October 21, 1942, which are exercisable by the decedent only in conjunction with the creator of the power or "with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent."

73. Seghers, *Powers of Appointment in Testamentary Trusts*, 30 TAXES 679, 686 (1952), suggests the use of a non-marital-deduction trust to avoid the second tax. The proposal is meritorious except in those situations, noted above, where a trust device is undesirable.

74. INT. REV. CODE § 812(c) (1948) exempts from the tax basis the value of specific property upon which an estate or gift tax was paid within five years prior to the decedent's death.

75. CAL. REVENUE & TAXATION CODE ANN. § 13821 (Deering 1944) (5 years, and only in cases of Class A transferees); COLO. STAT. ANN. c. 85, § 17 (1935) (3 years); IDAHO CODE ANN. § 14-408(2b) (1948) (4 years, and only property passing between husband, wife, lineal ancestors, or lineal issue is exempt); IOWA CODE ANN. c. 450, § 450.12.3 (1949) (2 years); KY. REV. STAT. § 140.090(i) (1946) (2 years); MINN. STAT. ANN. § 291.06 (1947) (5 years, limited exemption); MISS. CODE ANN. tit. 36, § 9267(a)(2) (1942) (2 years); N.Y. TAX LAW § 249-s (5 years); N.C. GEN. STAT. § 105-14 (1950) (2 years); N.D. REV. CODE § 57-3709 (1943) (5 years);

1948 denied the deduction to the estate of the decedent's surviving spouse.[76] And the denial applies even though the prior decedent's estate did not receive a marital deduction.[77] In view of this somewhat radical change, in those situations where the prognosis does not favor the widow's surviving long enough to reduce the estate appreciably, the testator may be wise to secure the maximum marital deduction so as to minimize the effects of double taxation on the same property.[78]

In contrast to the general power of consumption, the lawmakers have gazed more benignly upon "special" or restricted powers. This is a recent innovation since powers of consumption are mentioned directly for the first time in the 1951 Powers of Appointment Act.[79] It is true that such powers do not qualify as interests subject to the marital deduction; nevertheless, it is expressly provided that a power in the life tenant to consume the principal for her own use subject to limiting objective standards is not a general power, and, as a result is not includible in *her* gross estate whether or not she exercises the power.[80] Moreover, the new law permits the inter vivos release of non-general powers free of tax consequences under the gift tax provisions.[81]

OKLA. STAT. tit. 68, c. 22, § 989f (1951) (5 years); ORE. COMP. LAWS ANN. § 20-108 (1940) (one year); TENN. CODE ANN. § 1269 (Williams 1934) (5 years); TEX. STAT. § 7125 (Vernon 1948) (5 years); WASH. REV. CODE § 83.16.070 (1951) (5 years).

76. Section 362 of the Revenue Act of 1948 amended § 812(c), so as to disallow the deduction for property previously taxed with respect to property passing between spouses. U.S. Treas. Reg. 105, § 81.41(a)(6) states: "The property (or property given in exchange therefor) must not have been received (by gift or otherwise) from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse, and must not have been received by gift after April 2, 1948, from a donor who at the time of the gift was the decedent's spouse. This rule, added by section 362 of the Revenue Act of 1948 is effective even though the decedent (surviving spouse) died after December 31, 1947, and on or before April 2, 1948 [the date of enactment of the Revenue Act of 1948]; but the estate tax payable by the estate of such spouse is, nevertheless, not to exceed the estate tax which would have been imposed if the Revenue Act of 1948 had not been enacted."

77. "The marital deduction provided by section 812(e) of the Internal Revenue Code as added by section 361 of the Revenue Act of 1948, is not optional and, irrespective of whether a marital deduction is claimed or allowed in the estate of the prior decedent who died after December 31, 1947, no deduction for property previously taxed may be allowed under the existing laws and regulations on the estate of the surviving spouse who died within the five year period." *Letter Ruling,* dated September 14, 1949, CCH EST. & GIFT TAX REP. ¶ 8008.

78. However, unless the estate amounts to more than $60,000 (the basic exemption), the marital deduction is of no benefit tax-wise. INT. REV. CODE § 935(c) (1948).

79. See note 70 *supra.* For information on other facets of the Act plus some valuable suggestions on draftsmanship, see Lauritzen, *Drafting Powers of Appointment Under the 1951 Act,* 47 NORTHWESTERN UNIV. L. REV. 314 (1952).

80. INT. REV. CODE § 811(f)(3)(A) (Supp. 1951).

81. INT. REV. CODE § 1000(c) (Supp. 1951).

Practical application of the various tax provisions must, of necessity, be left to the emergence of specific circumstances. It is evident from simple computations, though, that the use of the legal life estate with a limited power to consume in the surviving spouse and a gift over of whatever is left unconsumed to the testator's children, will more than likely result in greater tax costs, particularly with respect to the Federal Estate Tax, than would be incurred through an outright devise in fee or a general power of appointment in trust.[82] Partially off-setting this is the fact that the life tenant will have the potential benefit of the principal free of trust machinations during the balance of her life, and upon her death, under present laws no additional taxes, either state or federal, will be imposed. Although the tax burden on the testator's estate will be the same with the use of general powers of consumption, the taxability of such powers in the life tenant's gross estate renders them doubly disadvantageous.[83]

If, in the final analysis, a choice of the device in controversy will occasion a greater overall tax burden, such disadvantage must be weighed along with all of the other factors to be considered in determining the ultimate estate plan.[84]

Conclusion

Manifestly a power of invasion or consumption may, under certain circumstances, play a significant role in the often complex and troublesome effectuation of the donor's testamentary objectives. Appropriately, the courts have acknowledged this function by increasingly greater support of the power. A review of litigation attendant upon the use of this

82. *E.g.*, assume an estate of $250,000 [following deductions for expenses, losses, indebtedness, and income taxes, allowable under INT. REV. CODE § 812(b) (Supp. 1951) and IND. ANN. STAT. § 6-2404 (Burns 1951), and no property entitled to any deductions for property previously taxed or for gift taxes previously paid], where the testator leaves a surviving spouse aged 60 and two children above 18 years of age. The estimated tax would be: (1) in case of an outright gift in fee from the testator to his wife, $25,600; (2) in case of a devise to the testator's widow in trust for life, etc., per INT. REV. CODE § 812(e)(1)(F) (1948), *supra* note 66, $23,560.01; (3) life estate to the surviving spouse with a power of consumption (limited *or* absolute), remainder over to the testator's children, $50,360.01.

By way of comparison, the estimated taxes on a net estate of $80,000 (same facts as above), in the three categories, would be: (1) $1500; (2) $717.96; (3) $2317.96. This gives some indication that regardless of the size of the estate (so long as the amount is above the basic exemptions), the initial tax cost will be greater when a legal estate for life with an added power of consumption is used.

83. *Ibid.*, category (3).

84. See Wormser, *When Not to Save Taxes in Estate Planning*, 87 J. ACCOUNTANCY 132 (1949), suggesting five important steps in estate planning, which are categorized as Who, Why, When, What, and How. The article offers a refreshing contrast to the numerous writings emphasizing the tax aspect of the picture.

device discloses that the trend has been toward a recognition of the testator's evident purpose and away from arbitrary and technical rules of law.[85] In addition, Congress' new enactment concerning the taxability of limited powers should stimulate the utilization of this type of testamentary transfer by furnishing a convenient hegira from further tax depletions upon the death of the life tenant.

CONFLICTING INTERPRETATIONS OF "OTHER INSURANCE" CLAUSES

An individual who suffers a loss occasioned by harm to his property or person has frequently contracted with more than one insurance company for reimbursement in an amount dependent upon the policy limits and the type and extent of loss. The frequency of such double coverage is attested by the numerous commonplace situations which may occasion it.[1] The existence of concurrent insurance is in most instances either an unavoidable coincidence or a result of an insured's response to a real need for additional protection.

From the insurance companies' viewpoint, double coverage presents a twofold problem. First, there is an increased possiblity of over-insurance; that is, the insured is in a position to recoup more than the actual amount of his injury. This situation—the capability of a claimant to realize a profit upon occurrence of the insured contingency—may intensify the moral hazard to the insurer. Second, the insured, by seeking reimbursement from one company rather than the others, may place the entire burden upon that company. Insurance carriers early realized that

85. An example of an extreme case is Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948), where the testator made a general devise to his widow with an absolute power of disposition added, remainder over to certain named persons. The court, in holding that the widow took only a life estate, asserted the "Pole Star" rule that the intent of the maker of an instrument shall prevail and be enforced "unless it antagonizes a statute or is against public policy." The devise involved was declared not to be against public policy or Kentucky statutes. But see Franklin College v. Wolford, 118 Ind. App. 401, 78 N.E.2d 35 (1948); see note 37 *supra*.

1. Generally, concurrent liability results from overlapping coverage of various companies' policies; the alternative would be negotiations between a single insurer and an applicant to draft one insurance contract for all of the applicant's needs. While this process might solve many problems, it does not appear to be economically or administratively feasible. Concurrent insurance may also result from any of the following situations: rising values may induce a property owner to obtain more fire insurance; acquisition of hazardous instruments or assumption of hazardous activities may entice the insured to buy more liability insurance; use of others' insured cars and trucks by an already insured driver results in concurrent insurance upon the driver.