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Estate Tax--The Marital Deduction and Power of Appointment

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arguendo. "[S]he left the place where she and her husband were living . . . and again became a resident of Lincoln County . . . ." No basis for this assumption was expressed.

*Lynne Ward Rexroad*

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**Estate Tax—The Marital Deduction and Powers of Appointment**

The decedent devised property in trust to pay the income to his wife and son for their lives with a power in the wife to consume the corpus if necessary for their combined support and maintenance. The will provided for a remainder over after the death of the wife and son. The estate took the devised property as a marital deduction. The Commissioner of Internal Revenue ruled that the wife's interest was not a life estate with a power of appointment that would qualify for the marital deduction. *Held*, ruling affirmed.

The court held that the interest passing under the will did not qualify for the marital deduction because the wife did not have a power of appointment over a specific portion of the property and the wife's power was not exercisable by her in all events. Even if the wife had a life estate with a power of disposal as allowed by West Virginia statute, her interest was something less than a life estate with a power to appoint to herself or to her estate and thus would not qualify for the marital deduction. *Flesher v. United States*, 238 F.Supp. 119 (N.D. W. Va. 1965).

The marital deduction of the Federal Estate Tax law allows a testator to devise up to 50% of his adjusted gross estate to a surviving spouse without incurring estate tax liability on that amount. *Int. Rev. Code of 1954*, § 2056. One type of devise which will qualify for the marital deduction is a gift of a life estate with a general power of appointment to the surviving spouse. *Int. Rev. Code of 1954*, § 2056(b) (5). A marital deduction is allowed if the surviving spouse's life estate contains the following features: the surviving spouse must be entitled to the entire income from her interest in the corpus for life; the income must be payable annually or at more frequent intervals; the power must be exercised by the surviving spouse alone and in all events; the interest cannot be subject to a power of appointment in anyone else but the surviving spouse; and the surviving spouse must have the power.
to appoint the remainder to herself or to her estate. **Int. Rev. Code** of 1954, § 2056(b) (5).

**W. Va. Code** ch. 36, art. 1, § 16 (Michie 1961) authorizes the creation of life interests in property coupled with powers of disposal. By the operation of this statute, the fee is prevented from vesting in the life tenant and the remainder over is saved when the life tenant is given the power in her lifetime or by will to use or to dispose absolutely of the corpus of the estate. **Price v. Talkington**, 126 W. Va. 263, 27 S.E.2d 705 (1943); **Swan v. Pople**, 118 W. Va. 538, 190 S.E. 902 (1937); 37 W. Va. L. Q. 422 (1930-31). In the **Price** case, a wife was given a life estate in property with a power to consume the corpus as necessity might require. There was a remainder over to others of any unconsumed property remaining at the death of the life tenant. The court construed the interest passing under the statute as a life estate with an appendant power which, if exercised, would enlarge the interest of the life tenant to a fee and destroy the vested interest of the remaindermen. Prior to the enactment of this statute, a life estate coupled with a power to consume or dispose of the corpus vested a fee simple absolute in the life tenant, and the remainder over was destroyed. **Ogden v. Maxwell**, 104 W. Va. 553, 140 S.E. 554 (1927); **National Sur. Co. v. Jarrett**, 95 W. Va. 420, 121 S.E. 291 (1924); **Morgan v. Morgan**, 60 W. Va. 327, 55 S.E. 389 (1906); 36 W. Va. L. Q. 288 (1929-30).

The court in the principal case, by dictum, adopted the **Price** case interpretation of **W. Va. Code** ch. 36, art. 1, § 16 (Michie 1961) and indicated that, where a surviving spouse has only a simple power to invade corpus, the interest passing to her under this statute will not qualify for the marital deduction. The court said that at most the wife received a life estate that could be elevated to a fee simple at some future time by an act on her part. The interest passing under this statute, the court stated, was not sufficiently broad to encompass the requirement that the surviving spouse have the power to appoint to herself or to her estate.

Interpretations of the requirement of a power in the surviving spouse to appoint to herself or to her estate have not been uniform in instances where the surviving spouse has the unlimited power to invade the corpus. According to the regulations, if all
other requirements Int. Rev. Code of 1954, § 2056(b) (5) are met, the interest of the surviving spouse will qualify for the marital deduction if the surviving spouse has an unlimited power to appoint to herself. Tres. Reg. § 20.2056(b)-5(g) (1) (1965). If she has this power, it is not necessary that she also have the power to appoint to her estate. Tres. Reg. § 20.2056(b)-5(g) (3) (1965). A substantial number of cases are in according with these regulations. United States v. Spicer, 332 F.2d 750 (10th Cir. 1964); Nettz v. Phillips, 202 F.Supp. 270 (S.D. Iowa 1962); Carlson v. Patterson, 190 F.Supp. 452 (N.D. Ala. 1961); Hoffman v. McGinnis, 277 F.2d 598 (3d Cir. 1960); Boyd v. Gray, 175 F.Supp. 452 (W.D. Ky. 1959). Because Int. Rev. Code of 1954, § 2056(b) (5) uses the disjunctive "or," it is not necessary that the surviving spouse have the power to appoint to herself and to her estate. Nettz v. Phillips, supra. Other cases, however, are contra to the regulations and require that the surviving spouse have both the power to appoint to herself and the power to appoint to her estate before her interest will qualify for the marital deduction. Field v. Commissioner, 40 T.C. 802 (1963); Pipe v. Commissioner, 241 F.2d 210 (2d Cir.), cert. denied, 355 U.S. 814 (1957). A federal court in West Virginia would probably follow the rule of the Nettz case, supra, and allow the marital deduction if it found that the interest passing under W. Va. Code ch. 36, art. 1, § 16 (Michie 1961) allows the surviving spouse to appoint to herself absolutely or to her estate.

As previously indicated, the basic problem raised by the principal case, is this: if a life tenant is given the power to dispose or to consume the corpus absolutely, then under W. Va. Code ch. 36, art. 1, § 16 (Michie 1961), does this life tenant also have the power to appoint the corpus to herself free from all other limitations? The language of the principal case indicates a negative answer. In denying the marital deduction, the court implied that the surviving spouse did not have the power to appoint to herself absolutely. One authority maintains, contra to the principal case, that a power to consume in the life tenant should enable the life tenant to appoint to herself absolutely. Sims, Future Interests § 55 (1951). Admittedly, the distinction between the power to appoint to one's self and the power to consume is quite fine, but finer distinctions have been drawn in the technical field of future interests.
There is another reason, not discussed by the principal case, which might distinguish an interest passing under the West Virginia statute from other interests passing under like circumstances. After first preserving the limitation over after the creation of any interest in the first taker for life, W. Va. Code ch. 36, art. 1, § 16 (Michie 1961) further provides that:

The proceeds of a disposal under such power shall be held subject to the same limitations and the same power of use or disposal as the original property, unless a contrary intent shall appear from the conveyance or will.

Such a proviso may well be interpreted as a limitation which will deny the marital deduction. What is a contrary intent is open to question. This proviso of the statute has been criticised. 37 W. Va. L. Q. 422 (1930-31).

In Semmens v. Commissioner, 32 T.C. 1218 (1959), a case involving a similar Tennessee statute, a surviving spouse was devised a life estate with a power to consume the corpus with a remainder over of any corpus unconsumed at the death of the life tenant. Tenn. Code Ann. tit. 64, § 106 (Bobbs-Merrill 1955) authorized this type of devise much the same as W. Va. Code ch. 36, art. 1, § 16 (Michie 1961). The effect of the Tennessee statute, as in West Virginia, was to save the limitation over. The Tennessee statute, however, made no provision for subjecting the proceeds of any disposal to the same limitations that encumbered the original property. In construing the Tennessee statute, the Tax Court decided that a simple power to invade corpus did not permit the surviving spouse to appoint the corpus to herself, her estate or to others by gift. Therefore, the interest passing under this statute did not qualify for the marital deduction. The Tennessee court, in the Semmens case, stated that to qualify the surviving spouse's interest for the marital deduction, she must have an express power to appoint to herself or to her estate.

Thus, the question arises as to what language can be used in a will to insure the marital deduction where a testator desires to devise or to bequeath a gift of a life estate, coupled with powers to dispose or to appoint, with a remainder over. It must be remembered that the surviving spouse must have, according to Treas. Reg. § 20.2056(b)-5(g) (3) (1965), a power to appoint to herself or to her estate. A devise to A for life, with a power to consume...
the corpus absolutely, remainder to B is dangerous because it appears that A does not have the power to appoint to herself. To save the marital deduction, it appears that a greater estate in A must be created, and it must be specifically stated that any proceeds from the disposal of the corpus are not to be subject to the same limitations as the original property. Because W. VA. Code ch. 36, art. 1, § 16 (Michie 1961) saves the remainder over after any interest in property is created, it is possible to create a qualified interest in A for life with a remainder over of any unconsumed property after the death of A. 37 W. VA. L. Q., supra. The following devise should, therefore, qualify an interest passing under W. VA. Code ch. 36, art. 1, § 16 (Michie 1961) for the marital deduction: to A for life with the general power to appoint to herself or to others by deed for any purpose, remainder to others. All proceeds from the disposal of any property by A shall be hers absolutely and not subject to any of the limitations imposed on the original property.

Edward Garfield Atkins

Medical Practice—The Line Between Malpractice and Negligence

Plaintiff, P, instituted an action against D, a private hospital, in connection with the alleged wrongful death of P's minor daughter. The child was admitted to the hospital with a serious heart condition. Before leaving, the doctor advised the mother that if the child should go into heart failure, she should have immediate medical treatment. According to the mother, the child's condition began to worsen shortly after the doctor left, at approximately 8:00 P.M., and the indication was she was suffering from progressive symptoms of heart failure. Between that time and midnight, the child's mother pleaded frantically for aid from the nurses on duty, but they virtually refused to even examine the child. As a result, the doctor was not advised of the situation until approximately 12:30 A.M. He came quickly and administered emergency treatment, but the child died the following evening. The trial court refused to admit testimony of a New York physician concerning usual standards of care employed by nurses because he neither lived in nor was familiar with the standards of care in the immediate area. At the conclusion of P's testimony, the trial court directed a verdict for D. Held, reversed, new trial granted.