Life Estate with Power of Appointment: An Exception to the Terminable Interest Rule

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Under the law of community property states, a one-half interest in the property held by a husband and wife is not part of the decedent's gross estate and, therefore, is not subject to federal estate tax until the death of the surviving spouse, provided that she retained ownership of the same until her demise. Approximately the same beneficial federal estate tax treatment can now be obtained in every state by utilizing the congressionally created marital deduction which was designed to equalize the impact of federal estate taxation upon residents of community property states and residents of states that apply the common law of property. Nevertheless, a property interest which is "terminable" will not qualify for the marital deduction. The interest of the surviving spouse is considered to be "terminable" when all of the following factors are present: (1) The interest may fail upon the lapse of time or upon the occurrence or nonoccurrence of a particular event or contingency; (2) The interest has or may pass to a person other than the surviving spouse for less than full consideration; and (3) Such other person may possess or enjoy any part of the property after the failure of the estate vested in the surviving spouse.

1 Stein, How to Provide for the Marital Deduction by Will, in 1 Lasser, Estate Tax Techniques 101 (1964). As a matter of convenience, the feminine pronoun "she" will be used in the text; the discussion to follow will be equally applicable to a male surviving spouse.

2 This deduction was created by the Revenue Act of 1948, ch. 168, §§ 351, 361, 62 Stat. 110, 116-17, through the repeal of the 1942 Community Property Amendments to the Internal Revenue Code of 1939 and through the splitting of estate and gift taxes. The repealed amendments had failed to achieve equalization in community property states because of the rigid requirement that the portion of the community contributed by each spouse must be identified. This tracing problem was remedied by the implementation of the income-splitting joint return and the extensions of the benefits of community property law to common law property states. See Bittker, Federal Income, Estate and Gift Taxation 1110-13 (3d ed. 1964).


4 Int. Rev. Code of 1954, § 2056(b) (1) [hereinafter cited as Code §].

5 Ibid.

6 Code § 2056(b) (1) (A).

7 Code § 2056(b) (1) (B). Even if the interest passing to the surviving spouse is not disallowed under subparagraphs A and B, the interest will be declared terminable...
This Note will address itself to a valuable exception to the "terminable" interest rule. Section 2056(b)(5) of the Internal Revenue Code grants the tax-saving marital deduction to the decedent's gross estate when the surviving spouse has been given a life estate (even though the estate will of its very nature terminate on the lapse of time, namely, upon the demise of the life beneficiary) coupled with a power to appoint the corpus. In essence, the estate tax regulations declare that the surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion thereof, and that this income must be payable to the surviving spouse annually or at more frequent intervals. Moreover, the surviving spouse must have the power to appoint the entire interest or a specific portion thereof to either herself or to her estate; this power must be exercisable by her alone, either during life or by will, and in all events.

An analysis of the decided cases reveals that with respect to the income requirements, the statutory phrase "entitled for life to all the income from the entire interest, or all the income from a specific portion thereof" has proved the most troublesome to apply. The statutory phrase "alone and in all events" governing the power of appointment has been even more cumbersome. It is the purpose here to explore those phrases in depth.

Both the life estate and the power of appointment are creatures of state law. It follows, then, that any determination regarding the nature of the interest passing from the decedent to his spouse will depend upon applicable local law. The United States Supreme Court has phrased the proposition in this way: "State law creates legal interests and rights. The federal revenue acts designate what

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8 CODE § 2056(b)(5).
13 CODE § 2056(b)(5).
14 Ibid.
15 Reg. § 20.2056(b)-5(e) (1958) asserts that regard must be had to the provisions of the law of the jurisdiction under which the interest passes in determining whether the conditions set forth in Reg. § 20.2056(b)-5(a) (1958) are satisfied by the instrument of transfer.
interests or rights, so created, shall be taxed." A number of cases have applied this principle without question.

I. NATURE OF THE PROPERTY INTEREST PASSING TO SURVIVING SPOUSE

A. Survivor Vested With a Life Estate

Section 2056(b)(5) requires that the surviving spouse be entitled to the income of the trust or property "for life." If a trust is involved, it is immaterial that the wife may terminate the trust either by demanding corpus or by exercise of her power of appointment. It is important that no other person will have this power. The words "for life" have upset the estate planning of at least one testator. In Starrett v. Commissioner, it was provided by will that the wife should have the power at any time to demand payments of either the income or corpus of a trust left for her, except in the event of her incapacity or the appointment of a guardian, conservator, or other custodian. Should this occur, the rights of the wife were to cease. The petitioner contended that if a guardian were to be ap-

18 Morgan v. Commissioner, 309 U.S. 78, 80 (1939).
17 Estate of Peyton v. Commissioner, 323 F.2d 438 (8th Cir. 1963); Piatt v. Gray, 321 F.2d 79 (6th Cir. 1963); Hoffman v. McGinnes, 277 F.2d 598 (3d Cir. 1960); Commissioner v. Estate of Ellis, 252 F.2d 109 (3d Cir. 1958); Northwest Security Nat'l Bank v. Welsh, 203 F. Supp. 263 (D.S.D.), appeal dismissed, 308 F.2d 87 (8th Cir. 1962); Markoff v. United States, 187 F. Supp. 805 (D.R.I. 1960); Boyd v. Gray, 162 F. Supp. 307 (W.D. Ky. 1957), vacated on other grounds, 261 F.2d 914 (6th Cir. 1958); Estate of Elwood Comer, 31 T.C. 1193 (1959); Estate of William C. Allen, 29 T.C. 465 (1957). One effect of the rule has been to contribute another interesting aspect to the practice of law. Suppose an attorney anticipates that the Commissioner may disallow the marital deduction on the ground that the will places too many restrictions on the rights of the surviving spouse. The attorney is cognizant that judgments of a state court are binding on a federal court in proceedings relating to estate taxes if the decision was rendered in an adversary proceeding and there is no adequate proof of fraud or collusion. Northwest Security Nat'l Bank v. Welsh, supra; Gordon v. United States, 163 F. Supp. 542 (W.D. Mo. 1958). In light of this rule, counsel might deem it advantageous to quickly file in probate court hopefully to obtain a favorable construction of the will. Estate of Peyton v. Commissioner, supra at 441-42. For example, in Estate of Sweet v. Commissioner, 234 F.2d 401 (10th Cir.), cert. denied, 352 U.S. 878 (1956), the attorney for the estate filed such a suit. The surviving spouse and children were named as defendants in the proceedings; neither filed an answer. The decision came down the same day couched in the very language of the attorney's petition. The decision was reversed on the ground that the proceedings were collusive and essentially of a nonadversary nature. Contra, Northwest Security Nat'l Bank v. Welsh, supra, involving an inconsistency in a will where, on essentially the same facts, the court upheld a similar decision because it felt that the court below based its judgment solely on a matter of law.

20 223 F.2d 163 (1st Cir. 1955).
pointed, the laws of Rhode Island were such that the guardian could not have exercised the wife's rights in the trust. Thus, they would cease in any event. The Commissioner argued to the contrary; the court made no decision on the matter. Instead, the court pointed out that the husband's will had provided for the complete cessation of the power whereas, if Rhode Island law did apply in the manner petitioner indicated, the application would result only in a suspension of the power. Thus, the marital deduction was denied because the interest could fail upon the occurrence of a particular event or contingency — the surviving spouse was not "entitled for life."²¹

It is inconsequential that the wife is in no position to demand or receive payments during a period beginning with the date of her husband's death through the date of final distribution.²² Such period becomes significant when it appears that the executor is directed to delay final distribution beyond the time normally required for such procedure.²³

B. All of the Income

The statute requires that the surviving spouse be entitled "for life to all of the income."²⁴ If under state law the spouse has been given the right to income for life with a qualifying power of appointment, the estate tax regulations could present a plethora of problems. If a trust is involved, its primary purpose must not be the accumulation of income.²⁵ No individual other than the surviving spouse may be given the discretion to accumulate income²⁶ unless the surviving spouse is given the right either annually or more frequently to demand distribution of what would otherwise be accumulated.²⁷ Consent of another can never be a condition precedent to the distribution of income.²⁸ A fortiori, no third party may have the power to change the terms of the trust so as to deprive the wife of her right to income.²⁹ Furthermore, it appears that the

²¹ CODE § 2056(b)(5).
²³ Ibid. See Davis, Effect of a Time Delay Clause on the Marital Deduction Where Periodic Payments Must Qualify Under Section 2056(b)(5) or Section 2056(b)(6), 51 ILL. B.J. 752 (1963).
²⁴ CODE § 2056(b)(5). (Emphasis added.)
²⁹ Ibid.
statutory phrase "entitled . . . to all of the income" means that there must be a real possibility that income reasonably consistent with the dollar size of the trust corpus will be produced. A bequest of property not likely to produce income with no power vested in the wife to change the nature of the corpus will not satisfy the statute.

On the other hand, "income" does not require cash payments, nor does it require gross receipts. A life interest in real estate consisting of the wife's use and occupancy of a dwelling is apparently the equivalent of "entitled . . . to all the income." When computing net income and allocating receipts and expenses between income and principal beneficiaries, the trustee need only remember that the statute requires that the survivor have the substantial enjoyment of income during life. The power in the trustee to allocate will not of itself disqualify the interest, nor will reasonable administrative powers vested in the trustee.

A recent pronouncement of the Internal Revenue Service may facilitate estate planning in this area. Under Revenue Ruling 66-39, an interest passing in trust may qualify for the marital deduction, notwithstanding provisions granting trustees the power to allocate or apportion receipts and disbursements between income and corpus if under local law applicable to the administration of the trust, reasonable limitations are placed upon the exercise of the powers. Instrumental in gaining the ruling was the fact that state law obligated the trustees to apply reasonable accounting principles and to invest corpus at reasonable intervals and as reasonable men; in addition, the trustees could be held accountable if they unreasonably retained assets.

This liberal ruling is to be compared with the recent Ohio case of Sherman v. Sherman. In Sherman the trustees were given the

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30 Code § 2056(b) (5).
33 Code § 2056(b) (5); Reg. § 20.2056(b)-5(f) (4) (1958); Thomas v. United States, 317 F.2d 519 (6th Cir. 1963), affirming per curiam 207 F. Supp. 609 (N.D. Ohio 1962).
36 Ibid.
38 Ibid.
39 Ibid.
40 5 Ohio St. 2d 27, 213 N.E.2d 360 (1966).
power "to determine in their discretion how all receipts and disbursements shall be credited, charged, or apportioned between income and principal . . .". It was held that stock dividends and capital gains could be allocated to income as long as there was no bad faith, abuse of discretion, or action inconsistent with the purposes of the trust.

In light of these state law standards, the troublesome language is as follows: "[U]nder the power to allocate, the trustees may, in their discretion, withhold receipts from income and build corpus, thus preventing a lowering in value of the assets . . . If corpus were invaded the trustees could then replenish it through an allocation to corpus."

The question becomes whether such a trust, when read in conjunction with Revenue Ruling 66-39, evidences an "intention to deprive the surviving spouse of the beneficial enjoyment required by the statute." If such an intention is found, then the marital deduction will be denied because the surviving spouse would not be entitled to all of the income. Otherwise, such a trust would pass muster as being one for which "the local courts will impose reasonable limitations upon the exercise of the powers." The permissive language of the opinion favors the former interpretation; yet the answer may well lie with the use of the word "all" in the clause which was at issue in Sherman. At another point in the opinion, the court alluded to the time-honored axiom that the intent of the testator must govern and then asserted:

Appellant argues that the intent was to give discretion only in cases of bona fide doubt as to the nature of the item to be allocated. So to hold would do violence to the language of . . . [the quoted clause] which uses the term, "all." If the testator had not intended that the trustees should have discretion as to all receipts and disbursements he certainly would not have used the word, "all."

Until clarification is had either from the Internal Revenue Ser-

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41 Id. at 29, 213 N.E.2d at 363. (All italicized in original.)
42 Id. at 27, 213 N.E.2d at 360.
43 Id. at 35-36, 213 N.E.2d at 366. (Emphasis added.)
47 Id. at 35, 213 N.E.2d at 366.
vice or from the Ohio Supreme Court, only one solution recommends itself: cautious drafting. In many instances the decedent was primarily concerned with preventing his surviving spouse from having control over the eventual disposition of his property. Apparently the deceased husband has been quite willing to give his spouse all the income from the entire interest or the specific portion. This is not always the case. In Estate of Allen L. Weisberger, the wife was entitled to all the income in two trusts subject to maintenance and support payments to her son. The trustee was to have uncontrolled discretion as to when such payments were to be made. He was to take into consideration the amount of other income the son was receiving. The son was beneficiary of two additional trusts, one producing 18,000 dollars per year while the other netted 31,000 dollars annually. The circumstances made it appear that there was no possibility of the son's receiving income from either of his mother's trusts. Nevertheless, the contingency was not too remote for this court. The possibility that the wife might be deprived of some income meant that she was not entitled to all the income.

In Thomas v. United States, the surviving spouse was given the right to use and occupy the family residence for the duration of her life. Under certain circumstances the residence could be sold by the trustee, who was given discretion to apply the proceeds for the maintenance and education of the testator's sons. Since the right of the widow to use the residence could be terminated, she was not entitled to all of the income, and therefore the estate was denied the marital deduction.

C. A Specific Portion of the Interest

Section 2056(b) (5) further provides that the surviving spouse may be "entitled for life to all the income . . . from a specific portion thereof." The problem has been to determine what cont-
stitutes a "specific portion." The estate tax regulations speak of a fractional or percentile share of a property interest which over a period of time will reflect "its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate." Thus, it appears that the Service desires the surviving spouse and the government to share equally the risk of change in value of the entire bequest. If at the time of the husband's death, the bequest to the wife was in the ratio of one to two to the entire corpus, it must appear that at the time of the wife's demise, the ratio will remain the same. For this reason a bequest of a life interest with qualifying power of appointment over a named dollar amount, for example, 100,000 dollars where the corpus is 200,000 dollars, will not merit the deduction because the denominator of the resulting fraction is free to vary with the economic circumstances. Consequently, the regulations say that "if the annual income of the spouse is limited to a specific sum, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not a deductible interest." In Gelb v. Commissioner, the regulations mentioned above were disapproved. The wife was the income beneficiary of a trust established by her husband the trustees of which were given discretion to pay a minor daughter up to 5,000 dollars per year for education, support, and maintenance. It could be determined actuarially how much of the corpus would be diverted to the minor daughter during the joint lives of both mother and daughter. This figure was subtracted from total corpus; the wife had the right to all the income from the remainder plus a power of appointment coextensive with it. Thus, her counsel alleged that the resulting named dollar amount satisfied the "specific portion" language of section 2056(b)(5). The Commissioner countered, stressing the "fractional or percentile language" found in the regulations, and denied the deduction. The court, speaking through Judge Friendly, resolved the matter in favor of the taxpayer by force of the following logic: "That Congress gave a fractional interest as an example of a 'specific portion' does not warrant a construction that Congress did

55 Reg. § 20.2056(b)-5(c) (1958).
56 Gelb v. Commissioner, 298 F.2d 544 (2d Cir. 1962).
57 Reg. § 20.2056(b)-5(c) (1958).
59 Reg. § 20.2056(b)-5(c) (1958).
60 298 F.2d 544 (2d Cir. 1962).
61 CODE § 2056(b)(5).
not mean to include other instances fairly within the language and
the underlying policy." To that extent, at least, the regulations met
the court’s disapproval.

Whether Gelb will be of assistance to the estate planner must re-
main in doubt. The court relied heavily upon actuarial computa-
tion although the mechanics of the calculation are mentioned only
twice in the opinion. An extensive footnote was appended to the
court’s decision stressing that the use of actuarial computation has
long been sanctioned by the Commissioner. In this connection it
now appears that Gelb will be limited to its facts, that is, a situation
in which the will designates a fixed maximum which may be di-
verted to another. This is illustrated by Flesher v. United States
where the wife’s interest in income and corpus was also subject to
the support needs of a minor child. Unlike the will in Gelb, no
specific amount was designated as a maximum which could be ap-
plied for the child’s benefit. Since there was no way to make the
child’s needs certain, the actuarial computation could not be em-
ployed. As a result, there was no deduction as to any “specific
portion.”

II. THE POWER OF APPOINTMENT

The statute declares that the power of appointment shall re-
side “in the surviving spouse . . . with no power in any other person
to appoint.” This power must be “exercisable by such spouse alone
and in all events” and must be coextensive with and sufficient
to “appoint the entire interest, or . . . [a] specific portion” free
of any trust or joint tenancy so as to constitute the appointee an
unqualified owner of the subject property. If the surviving spouse
is not given a sufficient power exercisable during life, the statute
prescribes that there must be a power exercisable “in favor of . . .
the estate of the surviving spouse.” At least one case has held

62 Gelb v. Commissioner, 298 F.2d 544, 551 (2d Cir. 1962).
63 Id. at 549, 551.
64 Id. at 551 n.7.
66 Code § 2056(b) (5).
67 Ibid.
68 Ibid.
69 Reg. § 20.2056(b)-5(g) (2) (1958).
70 Code § 2056(b) (5).
that such a power must be sufficient to render the subject property liable for the debts of the surviving spouse upon her demise.\textsuperscript{71}

If the power is exercisable only during life, the surviving spouse must be able to appoint the property to herself.\textsuperscript{72} A limited power of appointment or withdrawal may be given the surviving spouse exercisable during life provided that she has a sufficient testamentary power.\textsuperscript{73}

While the wife's right to income may await the final distribution of the estate,\textsuperscript{74} the power of appointment should exist immediately after the death of the decedent.\textsuperscript{75} If the power cannot be effectively exercised until final distribution, it is not exercisable "in all events."\textsuperscript{76} The statute is satisfied, however, if the power may be exercised immediately following the death of the testator, even though the appointee must await final distribution before coming into possession and enjoyment of the property.\textsuperscript{77}

As a matter of historical interest, Trachtman makes the following statement: "A trust with a general power of appointment in the surviving spouse may qualify for the marital deduction if, and only if, it meets the special conditions laid down in 2056(b)(5) and Regulations § 20.2056(b)-5."\textsuperscript{78} It once appeared that if the surviving spouse were given a general power of appointment which would result in the property's inclusion in her gross estate under section 2041, the property would qualify for the marital deduction.\textsuperscript{79} It was the following language in the Senate Committee Report which gave that indication: "This provision is designed to allow the marital deduction for such cases where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviv-

\begin{itemize}
\item \textsuperscript{71} Estate of William C. Allen, 29 T.C. 465 (1957).
\item \textsuperscript{72} Reg. § 20.2056(b)-5(g)(1) (1958).
\item \textsuperscript{73} Reg. § 20.2056(b)-5(g)(5) (1958).
\item \textsuperscript{74} Reg. § 20.2056(b)-5(f)(9) (1958).
\item \textsuperscript{75} Reg. § 20.2056(b)-5(g)(4) (1958).
\item \textsuperscript{76} Ibid.
\item \textsuperscript{77} Ibid.
\item \textsuperscript{78} TRACHTMAN, ESTATE PLANNING 119 (1964).
\item \textsuperscript{79} Estate of Pipe v. Commissioner, 241 F.2d 210, 214 (2d Cir. 1957) (dissenting opinion); Estate of Harry A. Ellis, 26 T.C. 694 (1956), rev'd, 252 F.2d 109 (3d Cir. 1958); Ward, The Right to Invade Corpus of a Marital Deduction Trust — What is an Unqualified Right?, N.Y.U. 18TH INST. ON FED. TAX 1205, 1208 (1960); Note, 39 N.Y.U.L. REV. 504 (1964); Note, 46 KY. L.J. 586, 591-93 (1958).
\end{itemize}
Only one decision, *Estate of Harry A. Ellis*, which was later reversed by the Third Circuit, has taken that language at face value. There, the Tax Court equated the power required by section 2056(b)(5) to the power rendering the property taxable under section 2041 and declared that “it was the intent of Congress to permit the deduction sought in just such cases as the one before us. The language of the applicable statute is consistent with such intent.” Neither the Tax Court nor any other court has since taken this position. Judicial sentiment on the matter seems well described by the following language of Judge Tuttle in *May v. Commissioner*:

“We know of no rule of construction that permits the court to resort to legislative history or to other sections not necessarily correlated with the one under scrutiny to determine the meaning of language which is as clear as is that of Section . . . [2056(b)(5)].” Today the well-settled rule is that the power must be “unlimited.” Thus, the great bulk of the decided cases have involved the phrase “alone and in all events.” In this connection it will be seen that the statutory phrase “no power in any other person to appoint” is the logical converse of “alone and in all events.” Litigation involving one phrase necessarily involves the other.

**A. Exercisable by Surviving Spouse Alone**

When it is found that a power is not exercisable “alone,” there is generally a power in the trustee or trustees to determine the ultimate disposition of corpus or to withhold corpus from the surviving spouse. For example, in *Dexter v. United States* the testator authorized his trustees “to make from time to time from the principal of said trust fund such payments to or for the benefit of my wife . . .

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80 S. REP. NO. 1013, 80th Cong., 2d Sess. 16 (1958); 1948-1 CUM. BULL. 331, 342.
82 Id. at 699.
83 See Ward, supra note 79.
84 283 F.2d 853 (2d Cir. 1960).
85 May v. Commissioner, 283 F.2d 853, 855 (2d Cir. 1960).
86 Ward, supra note 79, at 1208.
87 CODE § 2056(b)(5).
88 Ibid.
89 Ibid. Gelb v. Commissioner, 298 F.2d 544, 547 (2d Cir. 1962).
as she may request in writing." The will went on to caution the trustees that "it is my chief wish to protect my wife against privation rather than to maintain a maximum fund for final distribution." The court found that "to protect my wife against privation" implied that the trustees had a discretion to refuse a payment which the wife might earnestly desire. Thus there was no power exercisable by the wife "alone and in all events." Similarly, in *Estate of Spero,* where joint trustees, one of whom was the surviving spouse, were given a discretion to apply corpus to meet the "reasonable needs" of such surviving spouse or any of the testator's children, the court held that the surviving spouse had no power exercisable alone because she did not have an unlimited power to appropriate the property of the trust "as if she were the virtual owner thereof." The same objectionable characteristics resulted in a denial of the marital deduction in *Estate of Wheeler,* wherein it was provided that there may be paid "to or for the benefit of . . . [his] wife or . . . children [such amounts of corpus] as the trustee in its absolute discretion may deem necessary or proper . . . ." The surviving spouse was given power to take monies from corpus from time to time but she was never to take more than one half of its then-existing balance. The court denied the deduction since the power in the trustee constituted a power "in any other person to appoint."

B. **Power Exercisable in All Events**

The statute requires that the power be exercisable "in all events." That is, the exercise of the power must be "unlimited" as to time and surrounding circumstances. It is axiomatic that no particular words are required for the creation of a power of appointment and that under state law certain related powers may be equiva-

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81 Id. at 444.
82 Ibid.
83 Code § 2056(b) (5).
84 34 T.C. 1116 (1960).
85 Ibid.
86 26 T.C. 466 (1956).
87 Id. at 467-68.
89 Code § 2056(b) (5).
lent to a power of appointment, for example, the power to invade corpus, the power to use and consume, and possibly the power to sell and convey.\footnote{Note, 39 N.Y.U.L. REV. 504 (1964); Note, 33 Miss. L.J. 232 (1962).} The usual case involves one of the related powers where remainders over are provided. As will be seen, the power is not exercisable in all events if applicable state law protects the interest of the remainderman by requiring the surviving spouse to exercise the power in good faith, thus preventing a gift of the subject property or preventing an amount unconsumed at the death of the surviving spouse from passing under her will.\footnote{Estate of May v. Commissioner, 283 F.2d 853, 854 (2d Cir. 1960), cert. denied, 366 U.S. 903 (1961).}

The baseline case is Estate of May v. Commissioner\footnote{283 F.2d 853 (2d Cir. 1960), cert. denied, 366 U.S. 903 (1961).} which affirmed dictum found in the earlier case of Estate of Pipe v. Commissioner.\footnote{241 F.2d 210 (2d Cir.), cert. denied, 355 U.S. 814 (1957). The Second Circuit held that the surviving spouse was given a legal life estate and not a fee simple interest. Since a legal life estate could not qualify under the 1948 amendment which required that a life interest be held in trust, the deduction was denied. The court went on to assume that a legal life estate would qualify and then answered the precise question subsequently presented in May.} In May the surviving spouse was given a life interest in the residue of her husband's estate with "the right in the sole discretion of my said wife to invade and use the principal not only for necessities but generally for her comfort, happiness and well-being."\footnote{Estate of May v. Commissioner, 283 F.2d 853, 854 (2d Cir. 1960), cert. denied, 366 U.S. 903 (1961).} In this situation the law of New York was clear. Even given the broad power found in the will, the wife was still required by New York case law to use good faith when exercising it. Thus, her power was not exercisable in all events.

The holding of May and the impact of state law in this area, drawn into the picture by the existence of remainder interests, can best be understood by comparing Ellis\footnote{Commissioner v. Estate of Ellis, 252 F.2d 109 (3d Cir. 1958).} with Hoffman.\footnote{Hoffman v. McGinnes, 277 F.2d 598 (3d Cir. 1960).} Both cases were handed down by the Third Circuit, both involved Pennsylvania law, both involved broad powers given the surviving spouse, and both contained remainder interests. In the Ellis case the bequest was worded: "[T]here [shall be] paid to my wife not
less than Five Thousand Dollars . . . . [S]he, and she alone, shall be the judge of how much shall be required and the same shall be paid."¹⁰⁸ In Hoffman, on the other hand, the bequest stipulated that the trustees should pay to the surviving spouse "any part of the principal of my estate she may desire and said trust shall cease as to that part of the principal so paid to her. It is my intention that my said wife . . . shall have the whole income . . . and spend any part or all of the principal that she may desire during her lifetime."¹⁰⁹ The difference in connotation between require and desire evoked the rule of an 1899 Pennsylvania case.¹¹⁰ Estate of Tyson¹¹¹ held that the intention of the testator should be examined to determine if it was his desire that the property be preserved for the remainderman. If such an intent were found, then an attempt by the holder of the life interest to change the beneficiaries would work a fraud on the testator.¹¹² In Ellis the court interpreted the word "require" in this fashion while in Hoffman the court found that "desire" empowered the life beneficiary to defeat the remainder interest. Thus, in Ellis the surviving spouse could invade corpus only if she acted in good faith; therefore, she was not vested with a power exercisable in all events. The Hoffman bequest imposed no similar restriction upon the surviving spouse, and hence the statute was satisfied.¹¹³

A comparison of the two cases reveals why the life beneficiary must not be prevented from making a gift of the subject property or from passing the property under her own will.

Several courts have paid particular attention to the wife's ability to make a gift of the subject property. In Geyer v. Bookwalter,¹¹⁴ the surviving spouse was given the "home place" for life with "good and full right to sell and convey fee simple title thereto . . . and not account for the proceeds thereof."¹¹⁵ The interest qualified for the

¹⁰⁸ Commissioner v. Estate of Ellis, 252 F.2d 109, 110 (3d Cir. 1958).
¹⁰⁹ Hoffman v. McGinnes, 277 F.2d 598, 600 (3d Cir. 1960).
¹¹⁰ Estate of Tyson, 191 Pa. 218, 43 Ad. 131 (1899).
¹¹¹ Ibid.
¹¹³ See also Robertson v. United States, 310 F.2d 199 (5th Cir. 1962).
¹¹⁵ Id. at 59.
marital deduction because the court found that the wife could make a gift of the property by passing it for nominal consideration without having to account for the same. Thus, she had an absolute power of disposal in all events. In *Betts v. United States*,116 where the wife was given rents and profits for life from certain property with the power “in her sole discretion, to use such part of the principal of my said estate as she shall desire for her support, maintenance and enjoyment,”117 the good faith standard applied to protect the remaindermen. Thus, the court said that the wife had “no power to dispose of any portion not consumed, by gift or appointment to herself or others, by instrument inter vivos or will, disposition of any portion not so consumed being governed by testator’s will.”118

In Ohio, relations between the life tenant and the remainderman are governed by *Johnson v. Johnson*.119 Like the Hoffman and Ellis cases discussed above, *Johnson* involved a broadly worded power to use and consume. In *Johnson*, the testator devised all of his property to his wife “with full power to bargain, sell, convey, exchange or dispose of the same as she may think proper, but, if at the time of her decease, any of my said property shall remain un consumed, my will is that the same be equally divided between my brothers and sisters . . . .”120 The Supreme Court of Ohio rejected the petitioner’s contention that the surviving spouse took a fee simple interest and held her to be merely a life tenant. The court went on to establish new law in Ohio by ruling that the surviving spouse held the property as a quasi-trustee for those in remainder. Thus, a duty rested upon the surviving spouse “in the nature of a trust, to have due regard for the rights of those in remainder . . . .”121 While she could use and consume the entire estate if that became necessary for her support, “she could not go beyond what would be regarded as good faith toward the remaindermen.”122 The intentions of the testator were found to be consistent with the restric-

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117 *Id.* at 445.
118 *Id.* at 446. This portion of the opinion was quoted from United States v. Lincoln Rochester Trust Co., 297 F.2d 891, 893 (2d Cir.), cert. denied, 369 U.S. 887 (1962). See also United States v. First Nat’l Trust & Sav. Bank, 335 F.2d 107 (9th Cir. 1964); Estate of Sommes v. Commissioner, 288 F.2d 664 (6th Cir. 1961).
119 51 Ohio St. 446, 38 N.E. 61 (1894).
120 *Id.* at 448, 38 N.E. at 61-62.
121 *Id.* at 460-61, 38 N.E. at 64.
122 *Id.* at 461, 38 N.E. at 64. (Emphasis added.)
tions incident to the life tenant's status as quasi-trustee. Thus, the surviving spouse had no authority "to recklessly squander or give away . . . the estate."\textsuperscript{123}

The landmark decision of \textit{Johnson v. Johnson}\textsuperscript{124} is deeply engrained in Ohio jurisprudence.\textsuperscript{125} Furthermore, it is well settled that an ambiguous devise with an accompanying power and limitation over creates a life estate in the first taker.\textsuperscript{126} In order to preclude the danger of having the surviving spouse declared a quasi-trustee, the following type of devise is suggested:

\begin{quote}
I authorize and direct my trustees to pay over all of the trust principal and thus to terminate the trust, or to pay over any part of the principal from time to time, to my wife or to any other persons or appointees, as my wife may direct by an instrument signed and acknowledged by her and delivered to my Trustees . . . . \textit{The power herein given to my wife shall be exercisable by her alone, at any time and in all events, and shall be subject to no restrictions or limitations}.\textsuperscript{127}
\end{quote}

Although this devise has been labelled "giving up the ghost"\textsuperscript{128} to the powers that be, it is at least a clear solution in an otherwise murky area. The clause is unquestionably effective in Ohio to cre-

\begin{footnotes}
\textsuperscript{123} \textit{Id.} at 462, 38 N.E. at 65.
\textsuperscript{124} 51 Ohio St. 446, 38 N.E. 61 (1894).
\textsuperscript{125} See Tax Comm'n v. Oswald, 109 Ohio St. 36, 141 N.E. 678 (1923); Windnagel v. Windnagel, 104 Ohio App. 23, 146 N.E.2d 457 (1957) (testator cannot convey property to some of the remaindermen for a nominal consideration and omit others); Gould v. Porter, 103 Ohio App. 156, 144 N.E.2d 555 (1956) (co-remainderman entitled to partition of property conveyed by quasi-trustee life tenant to another remainderman without adequate consideration); Rippel v. Rippel, 82 N.E.2d 140 (Ohio Ct. App. 1948), \textit{aff'd}, 154 Ohio St. 83, 93 N.E.2d 285 (1950) (if quasi-trustee life tenant sells property subject to the trust, he holds the proceeds as trustee for the benefit of himself and the remainderman); Wilson v. Wilson, 21 Ohio L. Abs. 137 (Ct. App. 1953); Smaltz v. Prindle, 15 Ohio L. Abs. 145 (Ct. App. 1933); Hobson v. Lower, 10 Ohio C.C.R. (n.s.) 323 (Cir. Ct. 1907); Moore v. Idler, 6 Ohio C.C.R. (n.s.) 19 (Cir. Ct. 1904); \textit{In re} Graham's Estate, 98 N.E.2d 104 (Ohio P. Ct. 1950) (proceeds from sale held in trust for remainderman); \textit{In re} Barnes' Estate, 108 N.E.2d 88 (Ohio C.P. 1950), \textit{aff'd}, 108 N.E.2d 101 (Ohio Ct. App. 1952); Allen v. Globe Ins. Co., 10 Ohio Dec. Reprint 204 (Super. Ct. 1888), \textit{aff'd}, 52 Ohio St. 622, 44 N.E. 1129 (1894). \textit{Cf.} OHIO REV. CODE § 2113.58, which section affords protection of the remainderman's interest in personal property. It has been held under this section that the Probate Court may require the life tenant holding personal property to post bond at any time prior to the termination of the life estate. \textit{In re} Estate of Kyle, 106 Ohio App. 502, 155 N.E.2d 498 (1958). Furthermore, the Probate Court has discretion to refuse distribution to the life tenant and may direct distribution to a trustee who would then distribute the income from the property to the life tenant. \textit{In re} Estate of Miller, 160 Ohio St. 529, 117 N.E.2d 598 (1954).
\textsuperscript{126} See, \textit{e.g.}, Tax Comm'n v. Oswald, 109 Ohio St. 36, 141 N.E. 678 (1923); Johnson v. Johnson, 51 Ohio St. 441, 38 N.E. 61 (1894); Baxter v. Bowyer, 19 Ohio St. 490 (1866).
\textsuperscript{127} Esterces, \textit{supra} note 102, at 163. (Emphasis added.)
\textsuperscript{128} \textit{Ibid.}
\end{footnotes}
A general and unlimited power of appointment as required by section 2056(b) (5).\footnote{129}

When any unconsumed portion must pass under the will of the first spouse to die — because the surviving spouse's power to invade or consume is limited by the standard of good faith — the interest passing to the surviving spouse is terminable.\footnote{130} That is, the interest will pass from the decedent to one other than the surviving spouse, and after the estate in such surviving spouse has ended, the interest may ripen into possession or enjoyment. The case of \textit{Commissioner v. Estate of Ellis},\footnote{131} serves as a suitable example. It will be recalled that the law of Pennsylvania was such that the power in the surviving spouse was not sufficient to gain the benefits of the statute.\footnote{132} Elsewhere in the testator's will it was said that "I give . . . one-half the principal, absolutely, unto the estate of my beloved wife . . . and the other half unto my dear children."\footnote{133} The case held that one half of the corpus was deductible; one half was nondeductible because it was terminable. Since one half passed to the estate of the surviving spouse, no third party would share possession and enjoyment of an interest passing from the first spouse to die. This, of course, was not true of the amount of corpus passing to "my dear children."\footnote{134}

The disposition in \textit{Ellis} suggests an estate planning technique which may well be more advantageous than the "power of appointment" trust which has been the subject of this Note. It would seem

\begin{itemize}
  \item[129] See \textit{Ohio Rev. Code} § 1339.15, which reads in part as follows: "'[P]ower of appointment' means any power which is in effect a power to appoint, however created, regardless of the nomenclature used in creating the power and regardless of connotations under the law of property, trusts, or wills. Such power includes but is not limited to powers which are special, general, limited, absolute." See \textit{First-Central Trust Co. v. Claflin}, 73 N.E.2d 388 (Ohio C.P. 1947), in which the court held that a trust indenture which provided that on the death of the life beneficiary the property shall be paid over to such persons or corporations as the life tenant specified in his will created a general testamentary power of appointment. See also \textit{Cleveland Trust Co. v. McQuade}, 133 N.E.2d 664, 670 (Ohio P. Ct. 1955); \textit{43 Ohio JUR. 2D Powers} § 5 (1960).
  \item[131] 252 F.2d 109 (3d Cir. 1958).
  \item[132] \textit{Esterces}, \textit{supra} note 102. See text accompanying notes 110-13 \textit{supra}.
  \item[134] \textit{Id.} at 111.
\end{itemize}
that as long as income is paid either to the spouse or to her estate, the trustee of an "estate trust" could be vested with vast discretionary powers.\textsuperscript{135} Furthermore, since the interest passing to the surviving spouse is not terminable, non-productive property could form the corpus of the trust,\textsuperscript{136} and the trustee could freely accumulate income throughout the life of the surviving spouse.\textsuperscript{137} Moreover, since the estate planner is interested not only in saving death taxes for the estate of the first spouse to die but also for the estate of the surviving spouse, the "estate trust" rather than the "power of appointment" trust seems the tool for the task. By giving the surviving spouse an income interest for life with a remainder to her estate, the surviving spouse by her will could create life estates coupled with special powers in the takers thereunder, and thus federal estate tax would not be payable upon their demise.\textsuperscript{138} Any attempt to do so under a "power of appointment" trust would run afoul of section 2041 (a) (3) which proscribes the exercise of a "power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate . . . ."\textsuperscript{139}

However, the compelling advantages of the "power of appointment" trust probably account for its more frequent use. The "power of appointment" trust affords greater protection against the creditors of the surviving spouse in the event that she failed to exercise the power.\textsuperscript{140} Furthermore, since appointive property is not considered to be "an inheritable estate" for purposes of dower and curtesy, nor property of the donee for purposes of the surviving spouse's forced share, appointive property is insulated against the subsequent remarriage of the surviving spouse.\textsuperscript{141} If the first spouse to die, in creating the power, expressly so stipulates, the property subject to the power may be distributed directly to the appointees, thereby saving probate and administration expenses.\textsuperscript{142} Perhaps of greater importance is the fact that the first to die can retain under

\textsuperscript{136} Ibid.
\textsuperscript{137} Ibid.
\textsuperscript{138} Ibid.
\textsuperscript{139} Code § 2041 (a) (3).
\textsuperscript{140} Schwartz, op. cit. supra note 135.
\textsuperscript{141} Ibid. See also Restatement, Property § 332(2) (1940).
\textsuperscript{142} Schwartz, op. cit. supra note 135.
a "power of appointment" trust greater control over the ultimate disposition of the property by use of default of appointment provisions coupled with formal restrictions on the power's exercise or with the requirement that the power be exercised by will. By limiting a remainder to the estate of the surviving spouse, all of these vital controls are forfeited.

Moreover, there is a real question as to whether a remainder may be validly limited to an estate. In cases holding against such a bequest or devise, it is generally decreed that the term "estate" is too uncertain to be given testamentary effect, or that an estate is not a person or legal entity capable of taking property, so that partial intestacy results.

Where the remainder to the estate fails, the interest passing to the surviving spouse at once becomes terminable so that the marital deduction is lost. A California decision, In re Brunet's Estate, may form the basis for validating devises to the estate of the surviving spouse. Justice Traynor, writing for the court, asserted that the provisions of a will should, if possible, be construed to give their intended effect and to avoid intestacy. In this light, he held that when the word "estate" was used with reference to a deceased person, it was evident that the testator intended that the takers under the will of such named deceased should benefit, and thus the devise was sufficiently certain to be given effect. Unfortunately, it will be difficult for the estate planner to rely upon In re Brunet's Estate. The case involved a holographic will written by a layman. An integral part of Justice Traynor's construction of the will was a California statute which provided that "technical words in a will are to be

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143 Ibid.
144 TRACHTMAN, ESTATE PLANNING 120 (1964). There is a paucity of cases in this area. Some of them are collected in Casner, Comment: Estate Planning Under the Revenue Act of 1948 — The Regulations, 63 HARV. L. REV. 99, 102 (1949). For a discussion of a bequest or devise to one's estate or, in the alternative, to one or his estate, see Annot., 69 A.L.R. 1243 (1930). See also In re Brunet's Estate, 34 Cal. 2d 105, 109, 207 P.2d 567, 569 (1949).
147 TRACHTMAN, op. cit. supra note 144.
149 Ibid.
150 Ibid.
151 CAL. PROB. CODE § 106.
taken in their technical sense, . . . unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.”

The statute enabled Justice Traynor to avoid the technical meaning of "estate," that is, "degree, quantity, nature, and extent of interest which a person has in real property" and reach the desired decision.

III. CONCLUSION

Section 2056(b)(5) states an important exception to the terminable interest rule of the Internal Revenue Code. The purpose of this exception was to equalize the tax consequences upon the decedent's gross estate regardless of whether the couple lived in a community property or common law state. Unfortunately, the Internal Revenue Code, the regulations, and the applicable case law have caused this area to become unreasonably technical thereby impeding the already difficult process of estate planning and disregarding the intent of Congress.

WALLACE W. WALKER, JR.

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152 Ibid.
153 In re Brunet's Estate, 34 Cal. 2d 105, 107, 207 P.2d 567, 568 (1949).