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Estate Planning -- Life Estate with Power of Disposal

Edward S. Mraz

NOTES

Estate Planning

LIFE ESTATE WITH POWER OF DISPOSAL

What is a Power of Disposal?

A power of disposal is a power given a life tenant to sell or dispose of the corpus and use the proceeds whenever income is insufficient to meet some standard set by the donor, such as support and maintenance, or comfort, or enjoyment and satisfaction. A gift over is made of whatever part of the corpus or its proceeds remains in the life tenant's estate at his death. It is also called a power of consumption or a power of invasion, but without apparent material difference in legal effect.

Because it is a power it is not property, and the life tenant is far from an absolute owner of corpus or proceeds since he cannot dispose of them by an outright gift inter vivos,[1] by a transfer for only nominal consideration,[2] by will,[3] or by any transfer in the nature of a testamentary disposition.[4]

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[1] United States v. Moore, 197 Ark. 664, 124 S.W.2d 807 (1939) (though the life tenant was given the property "to be owned, controlled, and disposed of by him as he may desire"); Birge v. Westport Bank & Trust Co., 101 Conn. 39, 124 Atl. 846 (1924); Merchants' Trust Co. v. Russell, 260 Mass. 162, 157 N.E. 338 (1927); Rippel v. Rippel, 82 N.E.2d 140 (Ohio App. 1948); *In re* Johnson's Estate, 359 Pa. 645, 59 A.2d 877 (1948).
But see Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139 (1933), where testator gave his wife ". . . full authority to use and dispose of so much of the same as may in her judgment be necessary for her comfort and satisfaction in life." This was held to include religious and charitable donations. In Dana v. Dana, 185 Mass. 156, 70 N.E. 49 (1904), where the testator's widow had power to dispose of any or all of the corpus at her pleasure and discretion as she thought necessary for her own comfort and happiness without accountability to any one, the court also found authority for charitable gifts.

[2] Cook v. Higgins, 290 Mo. 402, 235 S.W. 807 (1921) ($1.00 and other valuable consideration). *But see* Kilpatrick v. Cassel, 19 S.W.2d 805 (Tex. Civ. App. 1929), where the life tenant conveyed the homestead for $10, friendship and affection, and other valuable consideration, reserving possession and a life estate in rents and profits. It was held that this exercise of the power was valid, since the property was given to the life tenant "to have as his own, to use and enjoy, to sell and dispose of as he may think proper," and there was no proof that he did not think this disposition was proper.

What Are Its Advantages?

The chief advantage of the power of disposal is that it enables the life tenant to meet needs and emergencies that might cause extreme hardship to the ordinary life tenant who is entirely dependent upon the rents, income and profits produced by the corpus of the estate. These powers are most frequently used to benefit a surviving spouse. Typical emergencies would be illness or loss of the family home. A testator, for instance, by placing the power of disposal directly in the hands of his widow as the life tenant, can be reasonably certain that her needs will be met fully and as rapidly as they arise. A properly drafted power of disposal plan can cut red tape and administrative difficulty to a minimum, and avoid the danger that may occur in a trust plan if hard feelings spring up between trustee and beneficiary. Obviously his wife will be happier if she can avoid the necessity of asking a third party for money to meet needs she considers personal.

This advantage is naturally offset by a corresponding decreased certainty that the remaindermen will be sufficiently provided for. However, because the plan finds by far its most frequent use in situations where the life tenant is the testator's widow and the primary object of his concern, particularly where his children are comfortably established, the risk is one he is likely to assume.

Another advantage lies in the fluctuating source of revenue that can readily adjust to changes in the cost of living with a minimum of discomfort to the life tenant. An ordinary life tenant dependent upon a fixed income might be reduced to actual need.

Further, this device provides a far better safeguard to the interest of remaindermen than does fee ownership or a general power

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[3] Reeves v. Tatum, 233 Ala. 455, 172 So. 247 (1937) (despite "full power to use, sell, mortgage or otherwise dispose"); Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139 (1933) (though wife's power was limited only by her own satisfaction); Moore v. Morris, 258 S.W.2d 908 (Ky. 1953), where the life tenant had power to use the proceeds "as she may see fit"; Belford v. Olson, 14 N.H. 278, 51 A.2d 635 (1947); *In re* Hesler's Estate, 160 Misc. 250, 289 N.Y. Supp. 169 (1936), *aff'd per curiam*, 250 App. Div. 803, 294 N.Y Supp. 213, *aff'd mem. and modified as to costs*, 251 App. Div. 752, 297 N.Y. Supp. 1020 (1937). *But see* Reddin v. Cottrell, 178 Ark. 1178, 13 S.W.2d 813 (1929), where the will provided a gift over of any of the testator's property that the life tenant dies seized of. Since the real estate had been sold, the life tenant did not die seized of any of the testator's property, and her will disposing of the proceeds was effective. The court added, however, that if the inter vivos conveyance was "simulated," the transaction would have been void. Andrews v. Brumfield, 32 Miss. 107 (1856) (power of disposal "as she may think proper").

[4] Henderson v. Blackburn, 104 Ill. 227 (1882), where the widow tried to deed the property to *A* retaining a life estate in the income.

of appointment. Once the donee of the latter power exercises it in his own favor, he becomes absolute owner in fee of the property, and nothing can prevent him from disposing of it according to his whims by gift or by will, destroying the remainder interest.

The power of disposal can also provide a means of protecting the life tenant against swindlers. The insertion of the words "for fair and adequate consideration" in a deed or will of record, qualifying the power to convey, provides notice to the world that a marketable title can only be acquired in an honest transaction.[5] Since the life tenant is usually inexperienced in business affairs, this could prove a valuable safeguard.

The plan can serve as an effective device to prevent the remarriage of the testator's wife, should that be his wish. Such provisions are universally recognized, and will withstand attempts to avoid their effects through illusory conveyances prior to the second marriage.[6] Even without a provision against remarriage, a new spouse could acquire no marital rights in the property subject to the power of disposal.[7] In addition, the testator can require the life tenant to provide for the needs of his children, and the duty thus created is enforceable in equity.[8] Absent an authorizing statute, creditors cannot reach the corpus of the estate, for the power of the life tenant is not property and therefore is not subject to claims of creditors.[9] The power can be exercised by the life tenant's guardian should he become unable to manage his own affairs.[10] Finally, the plan is economical. A trust plan which gives the beneficiary power to invade the corpus would present most of the same advantages and disadvantages as the life estate with power of disposal. To offset the increased efficiency in management of investments, however, there would be a marked increase in the cost of administration. The consensus among trust officers is that an estate must amount to at least $25,000 before a trust plan becomes feasible.

What Are Its Drawbacks?

The benefits achieved through the use of the power of disposal are offset by corresponding disadvantages inherent in its nature.

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5 See note 46 *infra.*

6 Cochran v. Groover, 156 Ga. 323, 118 S.E. 865 (1923); Parker v. Travers, 74 N.J.Eq. 812, 71 Atl. 612 (1908); Littler v. Dielmann, 48 Tex. Civ. App. 392, 106 S.W. 1137 (1908).

7 Whitehall v. Theiss, 161 Md. 657, 158 Atl. 347 (1932).

8 Jasper v. Jasper, 256 Ky. 303, 76 S.W.2d 22 (1934).

9 Merchants' Trust Co. v. Russell, 260 Mass. 162, 157 N.E. 338 (1927).

10 Kent v. Morrison, 153 Mass. 137, 26 N.E. 427 (1891).

often the consequences of the very features that make its use desirable. The general lack of knowledge concerning the power leads to doubt, litigation and frustration.

First, the plan may fail in its primary purpose because it tends to cloud the title of the life tenant. Prospective purchasers tend to regard with suspicion the actual authority of the life tenant to convey a marketable title, especially in the case of realty. In order that the property may be advantageously sold for its actual cash market value, the life tenant may have to secure a construction of the will defining his rights and interest and ability to sell the corpus.[11]

Even after the wary buyer enters a contract, he often refuses to perform until the life tenant demonstrates his authority in an action for specific performance, adversary,[12] "friendly"[13] or "amicable"[14] in nature. A "controversy without action,"[15] or an "action to determine title"[16] may be necessary. The life tenant may have to bring an action to recover the purchase money,[17] or defend an action brought by the buyer to have the contract cancelled.[18] The problem is particularly acute when the estate consists primarily of one asset, such as a farm or a small business. Seemingly, these actions are always brought just when need is most pressing and speed is essential. They may continue to harass the life tenant even after the transaction is apparently settled.[19]

Nor is the purchaser safe from the numerous vexatious suits in trespass and ejectment brought by disgruntled remaindermen.[20] He is no more eager to buy a law suit than is the testator to

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

[12] See Heney v. Manion, 14 Del. Ch. 167, 123 Atl. 183 (1924); Prudential Investment & Development Co. v. Hilton, 153 Ga. 415, 112 S.E. 464 (1922); Roby v. Herr, 194 Ky. 622, 240 S.W. 49 (1922); Sutton v. Johnson, 127 S.W. 747 (Ky. 1910); Cadle v. Cadle, 152 Md. 459, 136 Atl. 895 (1927); Marden v. Leimbach, 115 Md. 206, 80 Atl. 958 (1911); Hall v. Wardwell, 228 N.C. 562, 46 S.E.2d 556 (1948); Gildersleeve v. Lee, 100 Ore. 578, 198 Pac. 246 (1921).

[13] See Tillett v. Nixon, 180 N.C. 195, 104 S.E. 352 (1920).

[14] See Gelb v. Weisberger, 247 Pa. 416, 93 Atl. 499 (1915).

[15] See Hardee v. Rivers, 228 N.C. 66, 44 S.E.2d 476 (1947).

[16] See Nelson v. Johnson, 354 Pa. 512, 47 A.2d 650 (1946). However, in this case the court stressed the added fact that the life tenant was the sole heir under the intestate laws and there was no disposition of the remainder.

[17] See Henninger v. Henninger, 202 Pa. 207, 51 Atl. 749 (1902).

[18] See Harlan v. Manington, 152 Iowa 707, 133 N.W. 367 (1911).

[19] See Johnson v. Battelle, 125 Mass. 453 (1878), where the grantee sued for breach of covenant that the life tenant could convey a marketable title.

[20] See Brown v. Harlow, 305 Ky. 285, 203 S.W.2d 60 (1947) (action to recover possession and damages for use of realty); Rinkenberger v. Meyer, 155 Ind. 152, 56 N.E. 913 (1900) (grantee's suit to quiet title).

give one. Even when the purchaser overcomes his doubts as to the power of the life tenant to convey, the fear of costly litigation may prove a sufficient deterrent to deprive the life tenant of a profitable sale.

In addition, the testator must be warned that should the standard he sets for the exercise of the power (support and maintenance, for instance) suggest to the life tenant that too frugal an existence is in store for her or should the testator hedge the power too carefully with restrictions on remarriage, the widow-life tenant may elect to take her statutory share of the decedent's estate against the testator's will.[21] The testator's estate plan will be completely frustrated in a situation where his wife might be able to take half his estate by electing against the will, and the other half as his sole statutory heir.[22]

The words customarily chosen to describe the life tenant's standard of living are inherently vague and subject to such diverse constructions that the testator cannot predict exactly what he is giving. Typical standards in ascending order of liberality are: support and maintenance, comfort, benefit or welfare, enjoyment or satisfaction.[23] But a power to be exercised if it becomes necessary for the life tenant's benefit, use and comfort has been held equivalent to a fee,[24] while the gift of property to the life tenant with the right to do with the corpus as she wishes was held limited to her needs, and to be exercised only with court permission.[25] The apparent confusion is understandable, for all reasonable men can-

21 See Blatt v. Blatt, 79 Colo. 57, 243 Pac. 1099 (1926); *In re* Stieber's Estate, 139 Neb. 36, 296 N.W. 336 (1941).

22 *Blatt v. Blatt, supra* note 21.

23 That "requires" means "demands," "benefit" is broader than "support" with good faith being the only limit, *In re* Robinson's Will, 101 Vt. 464, 144 Atl. 457, 459 (1929); "comfort" is more than "maintenance," "welfare" is greater than "comfort." Lord v. Roberts, 84 N.H. 517, 153 Atl. 1, 4 (1931). The case adds that the life tenant can remove a debt on his home (comfort), establish himself in business (welfare), and give his second wife joint ownership in his home (comfort). "Satisfaction" is wider than "comfort;" it means contentment or gratification, which was held to include the power to give to charity in Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139 (1933). Full power of disposal does not empower the life tenant to provide for the comfort of his present wife, even if he may deem it conducive to his comfort, Homans v. Foster, 232 Mass. 4, 121 N.E. 417 (1919). Power to use any or all of the property the widow deems best includes the power to buy jewelry for her personal wear, and it becomes her separate property. *In re* Smith's Will, 231 App. Div. 277, 247 N.Y. Supp. 263 (1931), *aff'd per curiam*, 261 N.Y. 642, 185 N.E. 773 (1933).

24 National Surety Co. v. Jarrett, 95 W. Va. 420, 121 S.E. 291 (1924).

25 Graves v. Jasper, 233 Ky. 388, 25 S.W.2d 1040 (1930). The majority of the court would require the express grant of a completely discretionary power of sale. *Id.* at 1042. See Mosgrove v. Mach, 133 Fla. 459, 182 So. 786 (1938).

not be expected to agree on the meaning of these terms in a given situation.

The meaning of the word "dispose" is also the subject of some disagreement. While the courts generally agree that it does not include power to give the property away or dispose of it by will, the decisions are not unanimous.[26] Similarly, while the courts state as a general rule that power to dispose does not include power to mortgage,[27] the latter power is not infrequently found to be included in the intention of the testator.[28]

How broad is the discretion accorded the life tenant? If he is given power to dispose of the corpus when a sale becomes necessary or expedient in his judgment, or the broader power to do with the corpus and proceeds as he may see fit, his disposition of the property can be attacked only for fraud, waste or improvidence;[29] and the burden of proof rests upon the remaindermen who challenge the exercise of the power.[30] The language used in some opinions suggests that even fraud and waste cannot be prevented,[31] and that the life tenant's judgment is never subject to review.[32] This view is unsound. But the alternative, narrowly restricting the circumstances under which the power can be exercised, tends to frustrate the plan of the testator, for he wants the property to be freely alienable when the need for its sale appears.

How can the remainderman establish his claim to the proceeds?

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[26] See notes 1-4 *supra*.

[27] Rhode Island Hospital Trust Co. v. Commercial Nat'l Bank, 14 R.I. 625 (1909); Morgan v. Meacham, 279 Ky. 526, 130 S.W.2d 992 (1938) (dictum).

[28] *Morgan v. Meacham, supra* note 27; Rose City Co. v. Langloe, 141 Ore. 242, 16 P.2d 22 (1932); Hamrick v. Marion, 176 S.C. 361, 180 S.E. 213 (1935). In Midland Bldg. & Loan Ass'n, Inc. v Hetrick, 166 Md. 244, 170 Atl. 520 (1934), where the life tenant had a power of disposal for her support and that of her children, it was held that this does not include power to mortgage the corpus to establish her new husband in business since this was not necessary for her support. A power of disposal as he may deem necessary for his welfare was held to include an implied power to mortgage in Lord v. Roberts, 84 N.H. 517, 153 Atl. 1 (1931).

Where the life tenant exercises a power to mortgage, his equitable interest at his death passes to the remaindermen, Lord v. Smith, 293 Mass. 555, 200 N.E. 547 (1936).

[29] Long v. Stout, 305 Pa. 310, 157 Atl. 607 (1931) (life tenant's finding that a sale would be advantageous is conclusive without proof of fraud); *In re* Smith's Will, 231 App. Div. 277, 247 N.Y. Supp. 263 (1931), *aff'd per curiam*, 261 N.Y. 642, 185 N.E. 773 (1933); Endsley v. Hagey, 301 Pa. 158, 151 Atl. 799 (1930) (good faith is the only limit to the right to convey for comfort and support).

[30] Kilpatrick v. Cassel, 19 S.W.2d 805 (Tex. Civ. App. 1929).

[31] Hanna v. Ladewig, 73 Tex. 37, 11 S.W. 133 (1889); Young v. Campbell, 175 S.W. 1100 (Tex. Civ. App. 1915) (relying upon *Hanna v. Ladewig, supra*).

[32] Miller v. Miller, 149 Tenn. 463, 261 S.W. 965 (1924).

One of the characteristics of the power of disposal is that the remainderman takes any part of the corpus or its proceeds remaining in the estate of the life tenant.[33] Accordingly, a tracing problem must be met. The decisions are not in accord as to whether, absent a showing of fraud, waste or improvidence on the part of the life tenant, or a transfer in excess of his power, his executor may be called upon for an accounting.[34] The trouble is that at the death of the life tenant, neither side is in a favorable position to show what became of the property. Since it is improbable that the testator intended to charge the life tenant, especially a surviving spouse, with the duty of accounting during her life, and the court would be doing just that indirectly if it requires accounts of the life tenant's representative, the better view seems to place the burden of tracing the proceeds upon the remaindermen.

What is the relationship that obtains between life tenant and remainderman? While it has been held that the life tenant holds the proceeds of the corpus in trust,[35] the sounder solution is that they stand as debtor and creditor.[36] The life tenant's obligations with regard to the investment of proceeds present another unsettled problem. It is clear that a life tenant's discretion should not be so narrowly restricted as a trustee's, but whether he is bound to act as a prudent man would in managing his own affairs,[37] or merely to avoid gross negligence is uncertain. The latter

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33 *In re* Beaty's Estate, 172 Iowa 714, 154 N.W. 1028 (1915).

34 The remainderman is entitled to an accounting of the amount received by the life tenant, but not as to what became of the proceeds, absent an allegation of fraud, waste, or improvidence, Nelson v. Horsford, 201 Iowa 918, 208 N.W. 341 (1926). A life tenant who is given authority to manage investments as she may deem best need not account for profits and losses, but to the extent that she clearly exceeded her power in making transfers, her executor must account. Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139 (1933). See *In re* Pfeiffer's Estate, 163 Misc. 615, 297 N.Y. Supp. 672 (Surr. Ct. 1937). One court held that where neither side could show what the proceeds were used for, there is no duty to account. *In re* Lyon's Estate, 192 Misc. 306, 80 N.Y.S.2d 369 (1948). In Keen v. Rodgers, 203 Ga. 578, 47 S.E.2d 567 (1948), though the life tenant had power to use the proceeds as she might see fit, the burden of tracing was placed upon her representatives.

If the life tenant exceeds her power, her executor must account. See Graham v. Stroh, 342 Mo. 686, 117 S.W.2d 258 (1938), and *Rock Island Bank & Trust Co., v. Rhoads, supra.*

The problem is especially acute where community property is involved. See Wagnon v. Wagnon, 16 S.W.2d 366 (Tex. Civ. App. 1929).

35 Belton v. Myers, 87 Ind. App. 35, 154 N.E. 695 (1926).

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

37 *In re* Raplee's Will, 160 Misc. 615, 290 N.Y. Supp. 517 (Surr. Ct. 1936), where the testator expressly provided that the life tenant should have no duty to account. However, the life tenant ". . . owed a duty to the remaindermen to manage the unused principal of the estate prudently." 290 N.Y. Supp. at 524.

alternative seems closer to the testator's intention. He doesn't expect the life tenant to have any high degree of skill in business affairs.

Because a power is not property, the general rule is that creditors cannot reach the corpus.[38] An exception is made where the debt arises out of the exercise of the power.[39] Several states, however, have followed the lead of New York in enacting statutes which enable creditors to reach property over which the debtor has an "absolute" power,[40] but there is some uncertainty as to the nature of an absolute power within the meaning of the statute.[41] Statutes of this sort have a very practical appeal, regardless of their theoretical soundness, and are likely to be adopted in an increasing number of jurisdictions. The interest of the remainderman, because it is a vested one, has always been considered subject to creditors' claims, even in the absence of a statute.[42]

The tax consequences encountered by the power of disposal are also unfavorable. The theoretical difficulty involved in taxing such a power is that the life tenant may be taxed on property he might choose never to accept, or the remainderman will be compelled to pay a duty on the right to inherit property he may never receive.

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38 Merchants' Trust Co. v. Russell, 260 Mass. 162, 157 N.E. 338 (1927).

39 Morehead v. Martin, 123 Kan. 612, 256 Pac. 1010 (1927).

40 "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." N.Y. REAL PROP. LAW § 149.

For similar provisions in other statutes, see ALA. CODE ANN. tit. 47, § 76 (1940); MICH. COMP. LAWS § 556.9 (1948); N.D. REV. CODE § 59-0539 (1943); OKLA. STAT. ANN. tit. 60, § 262 (1941); S.D. CODE § 59.0439 (1939); WIS. STAT. § 232.08 (1953).

41 Watkins v. French, 149 Okla. 205, 299 Pac. 900 (1931), where the will initially gives the wife a power of disposal on such terms as she may think best, and a subsequent clause suggests that the power was intended to be exercised only for support and maintenance. In *In re* Davies' Estate, 242 N.Y. 196, 151 N.E. 205 (1926), full power to expend principal as he may see fit was held an absolute power within the meaning of the statute under N.Y. REAL PROP. LAW § 153 which defines an absolute power as one by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit. The court held that creditors can reach the corpus even after the life tenant's death.

But if the power of disposal is limited to necessity for support, the life tenant does not have an absolute power. *Cf. In re* Brower's Estate, 278 App. Div. 851, 104 N.Y.S.2d 658 (2d Dep't 1951), *aff'd mem.*, 304 N.Y. 661, 107 N.E.2d 589 (1952).

42 Pedigo's Ex'x v. Botts, 28 Ky. L. Rep. 196, 89 S.W. 164 (1905).

Should the testator contemplate its use in a large estate, the power of disposal will not qualify for the marital trust deduction offered by the federal estate and gift tax law. There is a further danger of double taxation, for a surviving spouse does not qualify for the deduction accorded property previously taxed.[43]

It naturally follows from the foregoing problems that the power of disposal is the subject of considerable litigation concerning such matters as the nature of the estate given, the scope of the power, the extent of discretion, ability to convey marketable title, validity of grantee's deed, and the identification of proceeds remaining in the life tenant's estate. Since its use is most advantageous in small estates, this hazard of litigation should be a strong deterrent to its use.

It is the opinion of this writer that the disadvantages attending the use of the power of disposal substantially outweigh its benefits. The client should be encouraged to commit himself to a plan that offers better protection to either the life tenant or the remainderman. In seeking to benefit both he may help neither. Since the testator's wife is generally the primary object of his concern and shares his interest in the welfare of her children, a sound policy is to give her the estate outright with no qualifications. If concern for his children is dominant and the testator has any reason to doubt his wife's intentions, she should be given a life estate only, or the property should be placed in trust, despite the higher cost.

Should the client still want to employ a power of disposal, it is the author's opinion that the following suggestions may serve to cut its disadvantages to a minimum.

Drafting Suggestions

Always state expressly that the legatee is given a life estate only, not a fee. A devise in general terms to *A* with whatever remains to *B*, or other inept wording is almost certain to result in a lawsuit, and the life tenant may even be held to own the estate absolutely.[44]

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[43] For an excellent discussion of the tax consequences of a power of disposal see Note, 28 IND. L.J. 409 (1953).

[44] 4 KENT, COMMENTARIES ON AMERICAN LAW, *535-36 (13th ed. 1884):

> "So if an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee; unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee."

Cited as authority in Woodlief v. Clay, 71 S.W.2d 600 (Tex. Civ. App. 1934)

To avoid creating a cloud on the life tenant's title, it is advisable to make the life tenant's power to dispose of the corpus absolute and unconditional. Expressly state that he shall have the same complete authority to convey a marketable title as the testator himself had, and that buyers are under no obligation to look to the application of the purchase money.[45] The appropriate place for restrictions on the life tenant's power is on his right to use the proceeds. Making his authority to convey a marketable title conditional upon receipt of fair and adequate consideration,[46] however, may be worth its cost in salability of the property, particularly where the life tenant is inexperienced in business affairs.

To prevent the widow-life tenant from electing to take her statutory share of the estate against the will, discuss the plan with her; show her that both she and the children will be adequately provided for. The best safeguard would be a binding contract to take under the will with a generous power of disposal for consideration. In any event, never fail to provide for an alternative disposition of the estate should the life tenant somehow elect to take against the will.[47]

A vague standard for exercise of the power should be avoided. For example, provide that the life tenant shall have power to use the proceeds of the corpus to such an extent that when added to income from the corpus, he will have a set amount per year. Tying this standard to the cost of living index would insure the life tenant's future security. Decide whether the power to use the proceeds should be cumulative. If the life tenant has separate property, must he use that before he can exercise the power? If he is employed, are wages to be considered part of income? Other questions of similar nature should be considered in this connection.[48]

It is wise to give the life tenant unlimited power to use the proceeds, should this be necessary to meet an emergency which he in his sole judgment, exercised bona fide, finds to exist.

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[45] *But see* Prudential Investment & Development Co. v. Hilton, 153 Ga. 415, 112 S.E. 464 (1922), where the life tenant had to sue for specific performance even though the will expressly gave her ". . . full power and right to sell and dispose of, use and appropriate the same, or any part thereof, to her own use and benefit, as fully as she could do if she were the sole and unconditional owner thereof, excepting only the right of disposal . . ." by will. 112 S.E. 466.

[46] See Rayl v. Golfinopulos, 264 S.W. 911 (Mo. 1924). In that case, however, the property subject to the power was held in trust by a third person. McLaughlin v. Collins, 109 Colo. 377, 125 P.2d 633 (1942) (but the clause was not construed in regard to its affect on purchasers).

[47] See clause in will in Hamner v. Edmonds, 327 Mo. 281, 36 S.W.2d 929, 931 (1931).

[48] See Lord v. Roberts, 84 N.H. 517, 153 Atl. 1 (1931).

The testator must decide whether the life tenant should be required to put up a bond when he exceeds his normal allowance.

Expressly provide that the proceeds of the corpus remain part of the testator's estate until they are actually used.[49] Require the life tenant to keep any proceeds not required for current use invested in government bonds,[50] and provide that he is to be held liable only for wilful or wanton negligence, fraud, or waste, in their management. If the life tenant is reasonably capable of keeping simple records, require some sort of accounting for his disposition of the proceeds. This need is especially urgent when the life tenant has separate property,[51] or community property.[52]

While modern courts recognize the rule that a life estate may be created in personal property, and that for the most part the same language may be used in creating a power of disposal over either real or personal property, it is nonetheless wise to use appropriate language to deal with each, particularly where the personalty is perishable or consumable in nature.[53] The testator's intention should be clearly stated. Referring to the portion of the corpus or its proceeds remaining in the life tenant's estate as the "remainder" can lead to litigation.[54] In states where the rule in *Shelley's* case is still of significance, it would be fatal to refer to the remaindermen as the heirs of the life tenant.

If the life tenant is to have power to give part of the proceeds away, or to provide for dependents in time of need or emergency, the power should be made express.[55] If charitable donations are contemplated, state what kind. Expressly negative the power of

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49 See Van Every v. McKay, 331 Mo. 355, 53 S.W.2d 873 (1932).

50 The advantages of the stability of government securities would avoid problems such as those in Jasper v. Jasper, 256 Ky. 303, 76 S.W.2d 22 (1934); and Hinger v. Hinger, 17 Del. Ch. 62, 149 Atl. 430 (1929) (required re-investment in safe securities or in real estate).

51 See Kilpatrick v. Cassel, 19 S.W.2d 805 (Tex. Civ. App. 1929).

52 See Wagnon v. Wagnon, 16 S.W.2d 366 (Tex. Civ. App. 1929).

53 Applied to realty, remainder means future title to the whole property; applied to personal property, it means that which is left. Lanciscus v. Louisville Trust Co., 201 Ky. 222, 256 S.W. 424, 425 (1923).

But see Myers v. Moorestown Trust Co., 104 N.J.Eq. 308, 145 Atl. 540 (1929), where the same rules of construction were held applicable whether the property is real or personal.

54 Woodbridge v. Jones, 183 Mass. 549, 67 N.E. 878 (1903). "If the writer of this will had studied the decisions made in this state and elsewhere, with a view to frame a clause which in that respect should be as ambiguous and obscure as possible, it is doubtful if he could have selected language more appropriate for his purpose than that which he actually used." *Ibid.*

55 See Park's Adm'r v. American Home Missionary Soc'y, 62 Vt. 19, 20 Atl. 107 (1890) (widow held not authorized to make private gift).

disposition of corpus or proceeds by will.

Does the testator who intends to make his wife a life tenant with a power of disposal want to prevent her remarriage? If so, provide an immediate gift over to the remaindermen to occur upon that event. If he merely wants to prevent a second spouse from enjoying the fruits of his estate, provide that the proceeds are to be used for the benefit of the widow and named persons only.[56]

To protect his family from the claims of creditors, it is possible that a provision accelerating the interest of the remaindermen should the life tenant's creditors attempt to reach the property under a statute giving them this right, might be effective.[57]

Conclusion

While these ideas may solve some of the problems incident to the use of the power of disposal plan, it is earnestly suggested that danger cannot be completely overcome unless the draftsman can tie his plan directly to the decided cases in his jurisdiction. Only when cases supporting the desired construction are cited in the will can the client's interests be fully protected.

Edward S. Mraz

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56 This will prevent a gift prior to remarriage. If used without a gift over in case of remarriage, this last clause will prevent the life tenant's taking her new mate on a pleasure outing to California as in Colburn v. Burlingame, 190 Cal. 697, 214 Pac. 226 (1923).

57 Lynch v. Lynch, 161 S.C. 170, 159 S.E. 26 (1931), where the life tenant held the property in trust for his own benefit as well as that of the remainderman. Since the trust would be executed at least as far as his interest in the property is concerned, he would have a legal life estate. The accelerating clause was sustained.

It is questionable that a power of disposal with enjoyment of proceeds limited to a fixed annual sum would constitute an "absolute" power within the meaning of the typical statute, for it cannot be shown that the life tenant will necessarily have power to dispose of the entire estate *for her benefit* in her lifetime.