Notre Dame Law Review

Volume 55 | Issue 1 Article 4

10-1-1979

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I. Introduction

Elective share statutes, enacted in most common law jurisdictions, protect the financial interests of the surviving spouse by creating a right to a forced share of the decedent's estate. In effectuating the protective purpose, the states must determine what property is reachable by the spouse. It is the thesis of this article that all property subject to a general power of appointment in the decedent at the time of death should be includable in the elective estate.

Traditionally, the doctrine of relation back has defined the relationship of the donee of a power to the appointive property as a nonproprietary agency relationship. As applied by the courts to spousal claims, relation back has had the effect of disallowing an elective share in appointive assets. An historical analysis of the doctrine indicates that it was not a logical development in the evolution of our system of property law. A reevaluation of the nature of a general power easily leads to the conclusion that the donee is more than an agent, and has an authority with regard to the property that is distinctly proprietary. Indeed, in other contexts, like the areas of taxation and creditors' rights, the courts and legislatures have set aside the doctrine of relation back when confronted with policy reasons for treating appointive assets like the property of the donee.

The protective policy of the election statutes is clear, and outweighs any interest in the continued application of relation back in the forced share context. Property subject to a general power at death should be treated like owned property for the purpose of determining the size of the elective share. This result could be reached in many jurisdictions without statutory reform.

II. The Elective Share Statutes

Freedom of testation is an important and protected right in our system of private property ownership.[1] It is not, however, absolute. The states impose restrictions upon the right to dispose of one's property freely at death in order to protect the surviving spouse from disinheritance. Various means of providing the desired financial protection have been employed. In an age when

* Assistant Professor of Law, University of Pittsburgh. This article was completed in part with support from the West Virginia University Foundation.

The author expresses her special appreciation to Barbara Fleisher, of the West Virginia Bar, and Daniel Kennedy, a graduate of the University of Pittsburgh School of Law, class of 1979, for their assistance in the preparation of this article.

1 "[A] summary of views of philosophers and experts" on the subject of freedom of testation appears in L. SIMES, PUBLIC POLICY AND THE DEAD HAND 4-5 (1955).

realty was the major form of wealth, the institutions of dower and curtesy performed the function by creating in the survivor an interest in the real property owned by the decedent during the marriage.[2] More recently, the community property system and elective share legislation have become the major tools[3] for guaranteeing the economic independence of the surviving spouse. In the eight community property states,[4] the protection is built into the system of property ownership, since each spouse is the owner of one half of the marital assets.[5] Among the forty-two common law property states and the District of Columbia, all but five jurisdictions have elective share statutes.[6]

Various policy considerations, centering around the state interest in marriage and families, and the state power to regulate the economic relationships among family members, justify the restriction imposed upon freedom of testation by elective share legislation.[7] The obligation imposed upon the decedent's estate by the statute can be viewed as an extension of the duty imposed *inter vivos* upon the decedent to support the spouse, thereby maintaining the economic independence of the family and relieving the state of a potential duty to support. Forced share legislation involves a limited recognition of marriage as an economic partnership. Disinheritance of the spouse is deemed an unfair

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2 *See, e.g.,* 1 AMERICAN LAW OF PROPERTY §§ 5.5, 5.60 (A.J. Casner ed. 1952 & Supp. 1977).

3 Other protections for the surviving family, often available in conjunction with those mentioned in the text, are homestead rights, *see, e.g., id.* §§ 5.75-.120; the family allowance, *see, e.g.,* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 128-34 (2d ed. 1953); and mortmain statutes, *see, e.g., id.* at 135-38.

The doctrines of testamentary fraud, undue influence, and mental capacity, in their application to cases where testators disinherit natural objects of bounty, have the effect of protecting surviving family members, by invalidating the will.

4 Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

5 *See, e.g.,* 2 AMERICAN LAW OF PROPERTY, *supra* note 2, § 7.1.

6 The five common law property jurisdictions that have no forced share legislation are Georgia, New Jersey, Rhode Island, South Carolina, and South Dakota.

New Jersey, Rhode Island, and South Carolina provide a statutory dower right. N.J. STAT. ANN. § 3A:35-1 (West 1953); R.I. GEN. LAWS § 33-4-1 (1969); S.C. CODE § 21-5-110 (1976).

In 1974 South Dakota enacted elective share legislation as part of the South Dakota Uniform Probate Code. 1974 S.D. Sess. Laws, ch. 196, § 2-201. The effective date of the Code, however, was postponed to January 1, 1976. 1975 S.D. Sess. Laws, ch. 189. The South Dakota Uniform Probate Code was subsequently repealed, as of July 1, 1976. S.D. CODIFIED LAWS ANN. § 29A (1977).

The other thirty-seven common law property states and the District of Columbia have enacted elective share statutes. ALA. CODE tit. 43, § 43-1-15 (1975); ALASKA STAT. § 13.11.070 (1972) (effective 1973); ARK. STAT. ANN. § 60-501 (1971); COLO. REV. STAT. § 15-11-201 (1973 and Supp. 1978); CONN. GEN. STAT. ANN. § 45-273a (West Supp. 1979); DEL. CODE ANN. tit. 12, § 901 (Supp. 1978); D.C. CODE § 19-113 (1973); FLA. STAT. ANN. § 732.201 (West 1976); HAW. REV. STAT. § 560:2-201 (1976 and Supp. 1978); ILL. ANN. STAT. ch. 3, § 2-8 (Smith-Hurd Supp. 1978); IND. CODE § 29-1-3-1 (1976); IOWA CODE ANN. § 633.236 (West 1964); KAN. STAT. ANN. § 59-603 (1976); KY. REV. STAT. ANN. § 392.080 (Baldwin 1978); ME. REV. STAT. ANN. tit. 18, § 1056 (West 1964); MD. EST. & TRUSTS CODE ANN. § 3-203 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 191, § 15 (West 1969); MICH. COMP. LAWS ANN. § 700.282 (West 1979); MINN. STAT. ANN. § 525.212 (West 1975); MISS. CODE ANN. § 91-5-25 (Supp. 1978); MO. REV. STAT. § 474.160 (Supp. 1978); MONT. REV. CODES ANN. § 91A-2-201 (1977); N.H. REV. STAT. ANN. § 560:10 (1974); NEB. REV. STAT. § 30-2313 (1975); N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967 and Supp. 1978-1979); N.C. GEN. STAT. § 30-1 (1976); N.D. CENT. CODE § 30.1-05-01 (1976); OHIO REV. CODE ANN. § 2107.39 (Page 1976); OKLA. STAT. ANN. tit. 84, § 44 (West 1970); OR. REV. STAT. § 114.105 (1977); 20 PA. CONS. STAT. ANN. §§ 2202-2203 (Purdon Supp. 1979-1980); TENN. CODE ANN. § 31-601 (Supp. 1978); UTAH CODE ANN. § 75-2-201 (1978); VT. STAT. ANN. tit. 14, § 402 (1974); VA. CODE § 64.1-13 (1973); W. VA. CODE § 42-3-1 (1966); WIS. STAT. ANN. § 861.05 (West 1971 and Supp. 1979-1980); WYO. STAT. ANN. § 2-4-101 (1977).

7 *See* W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 24-25 (1960); Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem,* 33 U. CHI. L. REV. 681, 681 (1966); Note, *The Protection of the Surviving Spouse Against Disinheritance: A Search for Georgia Reform,* 9 GA. L. REV. 946, 958 (1975).

For a view that the need for protection is not as compelling today as it might once have been, see Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms,* 2 CONN. L. REV. 513, 544-45 (1970).

and unacceptable testamentary disposition in light of the importance of the marital relationship in the societal structure.[8]

Elective share statutes generally give the surviving spouse the option of accepting the provisions of the decedent's will in favor of the spouse, or taking instead a forced share of the decedent's real and personal estate. Within this basic pattern there are many variations.[9] For example, the method of determining the size of the elective share may be by reference to the state's intestacy statute[10] or through use of a formula which is often a fixed percentage of the estate and set by statute.[11]

Whatever the variations among statutes, the size of the elective share will depend upon the size of decedent's estate. Thus, "estate" for this purpose must be defined in terms of includable property. The statutes, however, are generally silent regarding such a definition.[12] Clearly, the elective estate includes property owned by the decedent at death and subject to probate. Beyond the probate estate, what property should be subject to the spouse's election? Most attempts to bring nonprobate assets into the elective estate have involved property that the decedent owned and conveyed *inter vivos* although retaining certain incidents of ownership.[13] In cases where the retained interest and control following the transfer have been great, the courts have concluded that the transfer was illusory and the decedent was properly treated as the owner of the property at death, for the purpose of allowing the spouse's claim.[14] A similar analysis of the proprietary interest of the decedent in property subject to a general power at death would result in allowance of spousal claims against such appointive property.

III. Includability of Appointive Property in the Elective Estate: The Case Law

Assets subject to a power of appointment at death are generally not in-

8 The elective share approach to providing protection for the surviving spouse has not been free of criticism. The inflexibility of the system has led to proposals for reform involving a consideration of the facts of each case (such as the actual need of the survivor) and some judicial discretion in the final determination of the share. *See* W. MACDONALD, *supra* note 7, at 44-46, 271-73; Cahn, *Restraints on Disinheritance,* 85 U. PA. L. REV. 139, 147-49 (1936); Plager, *supra* note 7, at 714-15.

The failure of existing legislation to recognize the problem of *inter vivos* transfers in derogation of the elective share at death has also stimulated criticism. *See, e.g.,* W. MACDONALD, *supra* note 7, at 271-73; Haskell, *The Power of Disinheritance: Proposal for Reform,* 52 GEO. L.J. 499, 503-06 (1964).

9 *See,* W. MACDONALD, *supra* note 7, at 21-24.

10 *E.g.,* KAN. STAT. ANN. § 59-603 (1976).

11 *E.g.,* FLA. STAT. ANN. § 732.201 (West 1976).

The percentage of the estate may be less if the spouse is not decedent's first spouse and there are children of a prior marriage. *E.g.,* IND. CODE § 29-1-3-1 (1976).

12 For a discussion of the language of the statutes and the extent to which they limit the definition of "estate" for this purpose, see text accompanying notes 86-95 *infra.*

13 An in-depth discussion of the case law in this area appears in W. MACDONALD, *supra* note 7, at 67-270.

14 *E.g.,* in Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937), the court allowed the spouse to reach assets conveyed by the decedent into trust just before death, on the ground that,

> decedent . . . retained not only the income for life and power to revoke the trust, but also the right to control the trustees . . . .
>
> Judged by the substance, not by the form, the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed.

Id. at 380-81, 9 N.E.2d at 969.

Elective share statutes in a number of jurisdictions expressly include within the elective estate property transferred by the decedent *inter vivos,* if certain incidents of ownership have been retained. *E.g.,* UNIFORM PROBATE CODE § 2-202 (section amended 1975).

cludable in the probate estate of the donee, unless the donee exercises the power in favor of the estate. Such assets, like property subject to illusory transfers, are nonprobate assets that surviving spouses have sought to include in the decedent's elective estate for purposes of determining the size of the forced share. The attempts to include appointive assets have been uniformly unsuccessful.

A power of appointment is "a power created or reserved by a person (the donor) having property subject to his disposition enabling the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received."[15] By virtue of the device of the power, one important incident of ownership, the right to dispose of property, can be separated out from the bundle of rights that constitute full ownership and given to the donee. In order to understand the nature of the power of appointment, it must be determined whether, by virtue of having this incident of ownership regarding certain assets, the donee has a property interest in them, with attendant rights and responsibilities. The surviving spouse, who proceeds under a statute that provides generally for a share of the decedent's property, can reach appointive assets only if the donee-decedent has such a proprietary interest.

In analyzing the proprietary nature of the power of appointment, the distinction must be made between general powers and special powers. A general power of appointment is one which "being exercisable before the death of the donee, . . . can be exercised wholly in favor of the donee, or, being testamentary, . . . can be exercised wholly in favor of the estate of the donee."[16] A special power, on the other hand, by definition, is one that cannot be exercised in favor of the donee or the donee's estate.[17] It is generally assumed that a special power does not constitute an ownership interest in property.[18] There will be no attempt here to discuss the rights of the surviving spouse in property over which decedent held a nongeneral power of appointment.

Historically, the question of the nature of the donee's interest in appointive property has been answered by the doctrine of relation back. The doctrine addresses the manner in which title to property passes at the time of appointment, and declares that the appointee becomes the successor in interest to the donor, by the act of the donor in creating the power. The act of appointment is viewed as an event causing title to shift from the donor to the appointee and not as a juristic act. A corollary to the notion that the act of appointment relates back to the creation of the power is the view that the power itself is not an interest in the property that it affects, and that the donee is a mere agent with regard to the property.[19]

In determining the spouse's interest in appointive assets, the automatic application of the doctrine of relation back by the courts has resulted in a rule disallowing such claims.[20] In *Kates's Estate,*[21] for example, the decedent hus-

15 RESTATEMENT OF PROPERTY § 318(1) (1940).
16 *Id.* § 320(1).
17 *Id.* § 320(2).
18 *See, e.g., id.* § 326, Comment a.
19 2 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 911-913 (2d ed. 1956).
20 W. MACDONALD, *supra* note 7, at 253; 2 L. SIMES & A. SMITH, *supra* note 19, § 947.
21 282 Pa. 417, 128 A. 97 (1925).

band was the life beneficiary of, and donee of a general testamentary power of appointment over, one half of the residuary estate of his father. He exercised the power in a general blending clause, which provided for distribution of the combined owned and appointive assets, after payment of debts and expenses, to his widow and other legatees. The widow elected to take her statutory share (one third of the estate), and argued that she was entitled to one third of both the owned and appointive assets. The court limited her claim under the statute to one third of the owned property of the decedent because, *inter alia,*[22] to hold otherwise would produce the following unacceptable result:

> [T]he widow will receive much more from the estate of the father than her husband directed she should have under the power of appointment vested in him. The effect of this is to defeat pro tanto the will of the father, ... The appointed estate was the father's; his dominion over it was supreme; any attempt "to appropriate [such] a gift to a purpose or person not intended, would be an evasion of the donor's private dominion" and hence must necessarily fail.[23]

The court's assumption, that the donor of appointive property retains supreme dominion over it, is a statement of the doctrine of relation back. If the father has complete dominion, it follows that the donee has no property interest; and those claiming through the donee can assert no interest.[24]

In *City Bank Farmers Trust Co. v. Green,*[25] the terms of the *inter vivos* trust created by the decedent husband provided for payment of a fixed income to his ex-wife until her death or remarriage; payment of the excess income to the settlor during this period; and a retained testamentary power to appoint the remainder. The settlor subsequently remarried. His will exercised the power in a general blending clause; gave the appointive assets, combined with his owned assets, to his sisters in equal shares, and expressly excluded the second wife. She elected to take a statutory share against the will and sought to include the appointive assets in the estate of her husband for purposes of determining the amount of this share. In denying her claim to the appointive assets the court stated:

> The law is settled that the persons named in the execution of a power of appointment take under the authority of the instrument by which the power was created and with the same effect as if such persons had been named in such in-

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22 *See* text accompanying note 81 *infra* for other bases of the court's decision in *Kates's Estate.*

The exercise of a general power by means of a blending clause, as was undertaken by the donee in *Kates's Estate,* has been held in other contexts to be an indication of donee's intent to be treated as owner of the appointive assets. For example, the doctrine of capture applies in situations where the donee's exercise, although ineffective, manifests an intent to remove the property from the estate of the donor for all purposes and not just for the purpose of the intended appointment. The use of a blending clause is commonly regarded as evidence of the necessary intent to capture the property for the donee's estate. *E.g.,* 2 L. SIMES & A. SMITH, *supra* note 19, § 974, at 433-34. In the creditors' rights and state inheritance tax areas, the Supreme Court of Pennsylvania has viewed a general blending clause as a gift of the fund to donor's own estate. Anderson Estate, 373 Pa. 294, 95 A.2d 674 (1953) (creditors' rights) (dictum); Twitchell's Estate, 284 Pa. 135, 130 A. 324 (1925) (inheritance tax). If the same court had similarly treated the blending clause in *Kates's Estate,* the spouse might have succeeded in his claim.

23 282 Pa. at 420, 128 A. at 97-98 (citations omitted).

24 In Myers' Trust, 35 Pa. D. & C. 492 (1939), the Pennsylvania Orphan's Court stated in dictum that *Kates's Estate* is "authority for the principle that a widow electing to take against a will which exercises a power of appointment takes no part of the appointed estate." *Id.* at 498.

25 160 Misc. 370, 289 N.Y.S. 473 (1936).

> strument. [Decedent] in exercising the power of appointment in his will was a mere conduit. Such exercise of the power gives no testamentary character to the disposition of the trust fund at issue, as it is not the property of the decedent. The source of title of the appointees of the power, the defendant sisters, is the trust agreement which raised the power and not the will of decedent.[26]

The idea that the terms of the exercise should be "read back" into the instrument of the donor creating the power is a formulation of the doctrine of relation back which arose relatively late in the history of the doctrine.[27] As applied in *Green* it simply reinforces the conclusion that the donee lacks any legal interest in the appointive property when the concept of relation back is used to analyze the nature of the power of appointment.

In *In re Burchell's Trust,*[28] the court held that the surviving husband could not reach assets, appointed by the decedent wife to others under a general testamentary power, because "such power does not constitute 'estate' possessed by the donee within [the elective share statute]."[29] The court cited as authority for this conclusion another New York case, *In re Rogers' Will.*[30] In *Rogers' Will,* the court held that property appointed under a general power at death "does not constitute [part of] an estate possessed by the donee of the power within the provisions of the Decedent Estate Law."[31] This holding was premised upon the court's belief that "[t]he exercise of such a power by a donee does not relate to an estate vesting in the donee. The donor merely utilizes the donee as an instrument for the devolution of the title of his, the donor's, property."[32] Since the court accepted relation back as a threshold premise, the assets could not logically be treated as property of the donee for the purpose of determining the size of the elective share.

In *Harlan National Bank v. Brown,*[33] the surviving husband sought an elective share in property over which the decedent wife had a general testamentary power of appointment which she exercised in favor of her estate. The court decided the issue against the husband in a summary fashion.[34]

In the situation where the appointment is in favor of donee's estate, as in *Harlan National Bank,* application of relation back does not end the inquiry into the nature of the donee's interest in the property at death. The assets may be properly treated like the property of the donee, not because donee held a general power, but rather, because the assets are part of the probate estate.[35] The probate estate generally is subject to the statutory claim of the surviving spouse.

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26 *Id.* at 377, 289 N.Y.S. at 481.

27 2 L. SIMES & A. SMITH, *supra* note 19, § 912. While the basic doctrine was "clearly recognized long before the Statute of Uses," *id.* at 371, the reading back variation first appeared in the mid-eighteenth century.

28 278 App. Div. 450, 105 N.Y.S.2d 431 (1951).

29 *Id.* at 455, 105 N.Y.S.2d at 436.

30 250 App. Div. 26, 293 N.Y.S. 626 (1937).

31 *Id.* at 30, 293 N.Y.S. at 632.

32 *Id.*

33 317 S.W.2d 903 (Ky. 1958).

34 *Id.* at 905.

35 *See* W. MACDONALD, *supra* note 7, at 253; Zack, *Administrative Aspects of Powers of Appointment,* 98 TRUSTS & ESTS. 1090, 1091 (1959). *Contra,* RESTATEMENT OF PROPERTY § 332(2), Comment b (1940) (on the theory that the election statutes generally require renunciation of the provisions of the will, and the spouse should not be allowed to take advantage of the testamentary exercise).

Finally, in *City Bank Farmers Trust Co. v. Miller,*[36] the decedent wife had created an *inter vivos* trust which reserved a life estate and general testamentary power of appointment in herself and named as takers in default of appointment her distributees under the state law of intestacy. Decedent's will exercised the power in favor of persons other than the husband, who elected to take his statutory share of the estate. In determining whether his claim could reach the trust corpus as well as decedent's general estate, the court cited *Kates's Estate*[37] for the proposition that "property subject to a power in the deceased spouse to appoint by will is not part of the estate of such spouse and the surviving spouse electing to take in derogation of the will receives no part of such property."[38] Moreover, the court held that "[n]o distinction . . . is to be drawn because here the power was reserved in an inter vivos trust set up by the testatrix herself. The exercise of the power is read into, and becomes part of, the trust instrument."[39] Like the courts that had earlier considered the issue, the *Miller* court accepted and applied the doctrine of relation back without question, thus foreclosing the claim of the electing spouse.

IV. A Critical Analysis of the Doctrine of Relation Back

The judicial rule that the electing spouse is not entitled to a share of decedent's appointive assets is based upon the doctrine of relation back.[40] A critical analysis of the doctrine, of the nature of the general power of appointment, and of the policies expressed in elective share legislation, leads to the conclusion that application of relation back in this context is unnecessary and inappropriate.

The doctrine of relation back had its origins early in the development of the power of appointment.[41] The power arose, along with the equitable fiction of the use, as a device for overcoming legal disabilities regarding the devisability of property.[42] Prior to the Statute of Uses,[43] the Chancellor enforced an arrangement whereby O, the owner of Blackacre, at that time legally incapable of devising the property, conveyed the fee "to X, to the use of such persons as O might designate by will, and until and in default of such appointment, to the use of O." After the conveyance, X owned the legal fee simple absolute, and O owned the equitable fee, subject to divestment by the exercise of O's general

36 163 Misc. 459, 297 N.Y.S. 88, *aff'd mem.*, 253 App. Div. 707, 1 N.Y.S.2d 640 (1937), *motion for leave to appeal granted,* 253 App. Div. 880, 2 N.Y.S.2d 798, *rev'd on other grounds,* 278 N.Y. 134, 15 N.E.2d 553 (1938).

37 282 Pa. 417, 128 A. 97 (1925).

38 163 Misc. at 464, 297 N.Y.S. at 94.

39 *Id.*

The widower in *Miller* ultimately succeeded in obtaining an elective share of the trust corpus. The Court of Appeals of New York determined that the interests retained by the wife in the property were a life estate and reversion; no power of appointment had been created. The reversionary interest was includable in the estate at death and subject to the spouse's claim. 278 N.Y. 134, 15 N.E.2d 553.

40 *See* text accompanying notes 15-39 *supra.*

41 *See generally* 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.3; 2 L. SIMES & A. SMITH, *supra* note 19, § 912; Berger, *The General Power of Appointment as an Interest in Property,* 40 NEB. L. REV. 104, 107-10 (1960).

42 *See generally* 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.2; 2 L. SIMES & A. SMITH, *supra* note 19, § 872.

43 27 Hen. VIII, c.10 (1536).

testamentary power. In the event that O exercised the power, the equitable interest (use) would shift to O's appointee. After the enactment of the Statute of Uses, the power of appointment was recognized also in the courts of law; and one could appoint legal as well as equitable interests. The Statute of Uses provided that legal title must follow the equitable use. Thus, O's conveyance created a legal fee simple in O, subject to divestment by O's exercise of the power. Upon exercise, legal title (seisin) would shift from O to O's appointee.

In explaining the manner in which title passed at the time of exercise, an analogy was drawn to the manner in which title passed when a fee simple followed by an executory interest was divested by the occurrence of the event upon which the future interest was conditioned.[44] For example, if O conveyed Blackacre "to X in fee, but if X dies without issue, to Y," the estates created by the conveyance after the Statute of Uses were a fee simple in X and an executory interest in Y. If, in fact, X died without issue, then X's fee would be divested by that event; the future interest in Y would become a possessory present interest. Seisin shifted from X to Y upon the happening of the prescribed event. When O conveyed Blackacre "to A in fee simple, with a general power in O to appoint to others," then the interest in A, like the interest in X, was a fee subject to divestment. Although the two fees were analogous estates, it does not necessarily follow that the two occurrences capable of divesting them were similarly analogous.

The death of X without issue and the exercise of the power by O were two occurrences different in nature and in effect. The former involved no voluntary act on the part of anyone; the latter was a discretionary act by O. In the first hypothetical, the death of X without issue resulted in the vesting of a contingent executory interest in Y, created by O at the time of the initial conveyance. In the second hypothetical, no future interest was created by O's conveyance. The interest of the potential appointees (objects) of a general power of appointment was not considered to be an interest, executory or otherwise, in the property;[45] but rather was regarded as a mere expectancy. The exercise of the power thus caused the title to pass to appointees who took an interest in the property for the first time by virtue of the exercise. The act *created* a property interest.

In the development of the law of powers, however, these differences were ignored. The exercise of a power was viewed, like the death of X without issue, as a mere event that caused title to shift, and not as a legal act. The discretion

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44 1 L. SIMES & A. SMITH, *supra* note 19, § 33.

The executory interest and this type of shifting of legal title were allowable only after the Statute of Uses. Prior to that time, however, the "shifting" of the corresponding equitable estate, the shifting use, was permitted.

45 *See* 1 L. SIMES & A. SMITH, *supra* note 19, § 423, at 436-37 (footnotes omitted):

> It would seem clear that, prior to the exercise of a general power, the object of the power would have no more interest in the property than has the heir apparent in the property of his living ancestor. Otherwise all persons in the world, since they are objects of an unexercised general power, would have an interest in all property subject to such general powers. Thus, it has been held that the object of an unexercised general power is not a necessary party to a proceeding to determine the validity of the instrument creating the power. The trust in which the power is created may be terminated without the consent of its objects. The object does not have a contingent future interest within the meaning of a statute permitting the sale of lands affected with a future interest. That his interest is not devisable or descendible is evidenced from the decisions to the effect that the appointment lapses where the appointee dies before it is made.

involved in the exercise of a general power, the difference between the executory interest and the expectancy, and the fact that an appointment changed an expectancy into a property interest, were ignored in this historical formulation of the doctrine of relation back.

Although evolution of the doctrine thus was not a particularly logical development, it nevertheless became "the underlying dogma of the law of powers of appointment."[46] As variously stated, the doctrine established that the act of exercise relates back to the creation of the power by the donor; the appointee takes from the donor, not the donee; the donee has no interest in property by virtue of having a power to appoint it. Application of the doctrine in the context of the general power[47] constitutes a denial that the authority to name oneself or one's estate as the owner of certain property amounts to anything more significant than an agency relationship with regard to the property. Nevertheless, courts have applied relation back to general powers in numerous situations, including the determination of the claims of electing spouses, simply because relation back was the law.[48]

Scholars in the area of future interests have long been critical of the doctrinal pretense that a general power is not a proprietary interest in property.[49] In the words of Professor Browder, "[o]ne who stands on the threshold of ownership and needs only to lift his finger to enter is, but for a too precious conceptual refinement, a proprietor in fact."[50]

The weakness in the assumptions underlying the agency approach to general powers is also reflected in the growing number of situations where the courts and legislatures refuse to apply relation back. "The current American law of powers is the outgrowth of a fundamental acceptance of the 'relation back' doctrine, with fairly frequent and important departures in situations where the proprietary aspect of the power is most apparent."[51] The most visible areas of departure include the Rule Against Perpetuities, lapse, capacity of the donee, creditors' rights, and the tax laws.

Relation back is not applied to general powers presently exercisable in determining the validity of appointed interests under the Rule Against Perpetuities.[52] The Rule limits the period during which the vesting of owner-

46 RESTATEMENT OF PROPERTY, § 318(1), Comment b (1940).

47 With respect to special powers, the doctrine of relation back is not an inappropriate analysis of the manner in which title passes to the appointees at the time of the donee's exercise. The donee "is in a fiduciary position with reference to the power." *Id.* § 326, Comment a. The objects of a special power are a limited group of persons, so that the discretion involved in the act of exercise is not as great as in the case of many general powers. And, of course, the donee of a special power cannot derive personal benefit from its exercise. The absence of proprietary interest in the donee, the donee's limited discretion, and the fiduciary nature of the relationship, all suggest that it is proper to conceptualize the transfer of property subject to a special power as a devolution of title from the donor to the appointee through the conduit of the donee-agent.

48 *See* 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.2; 3 R. POWELL & P. ROHAN, THE LAW OF REAL PROPERTY § 387 (1979); 2 L. SIMES & A. SMITH, *supra* note 19, §§ 916-919.

49 *See* Berger, *supra* note 41; Browder, *Future Interest Reform,* 35 N.Y.U.L. REV. 1255, 1270-73 (1960); McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform,* 55 HARV. L. REV. 1077, 1106-15 (1942); Simes, *The Devolution of Title to Appointed Property,* 22 ILL. L. REV. 480, 486-93 (1928); Simes, *Fifty Years of Future Interests,* 50 HARV. L. REV. 749, 772 (1937).

50 Browder, *supra* note 49, at 1270-71.

51 RESTATEMENT OF PROPERTY, Introductory Note to Chapter 25 (Supp. 1948).

52 *E.g.,* 6 AMERICAN LAW OF PROPERTY, *supra* note 2, § 24.24; RESTATEMENT OF PROPERTY § 392 (1940); 3 L. SIMES & A. SMITH, *supra* note 19, § 1274.

The donee of a general testamentary power is subject to a significant restriction on the right to affect ti-

ship interests in property may be delayed. Since the donee's power to affect title is so broad and unrestrained, it is improper to view the appointed interests as subject to any restraint measured from the time of the creation of the power. Therefore, the period of the Rule is measured from the time of the appointment; and the exercise is treated as the creation of the appointee's interest in the property.

Similarly, the agency theory of powers is abandoned in applying the law of lapse to appointments under a testamentary power.[53] The law of lapse imposes a requirement of survivorship until the death of the testator upon the beneficiaries under the testator's will. In the situation where property is appointed by the donee's will to one who survived the creation of the power, but predeceased the donee, relation back would establish that the appointee takes from the donor, and prevent a lapse. The courts, however, consistently find a lapse of the appointed interest,[54] rejecting the doctrine in this context.[55]

Antilapse statutes in most jurisdictions provide that when a lapse occurs, and the deceased beneficiary leaves certain successors surviving the testator, then the successors shall be substituted in the beneficiary's place and receive the legacy. Relation back would prevent any application of such statutes to appointed interests, since the doctrine provides that the donor, not the donee, is the appointee's testator. Nevertheless, the statutes generally are applied to interests appointed under general powers, and the donee treated as owner of the property for this purpose.[56]

The doctrine of relation back establishes that the exercise of a general power is not a legal act; legal capacity is not required in order to exercise such a power. Thus, married women, under an incapacity to convey property at common law, were nevertheless able to appoint the same property. On the other hand, the incapacity of the donee to convey owned property for reasons of infancy or mental incompetence may prevent that person's valid exercise of a power.[57] "On questions of capacity of the donee, the courts have taken a position which is practical rather than logically consistent,"[58] and have rejected relation back when expedient.

In the area of creditors' rights, both the courts and the legislatures in many jurisdictions have been involved in the process of eroding the doctrine of

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tle to the property, imposed by the creating instrument, in that exercise cannot take place until the donee's death. The weight of authority therefore favors the application of relation back in determining the validity under the Rule Against Perpetuities of interests appointed under a general power that is testamentary only. *E.g.*, 3 L. SIMES & A. SMITH, *supra* note 19, § 1275.

53 *E.g.*, 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.46; RESTATEMENT OF PROPERTY § 349 (1940); 2 L. SIMES & A. SMITH, *supra* note 19, § 917.

54 Cases so holding are collected at 2 L. SIMES & A. SMITH, *supra* note 19, § 917, at 386 n.56.

55 The rule is the same whether the power is general or special, which suggests that the reason for disregarding the doctrine of relation back in this context is not the proprietary nature of general powers. Professors Simes and Smith suggest that the presumed intent of the donor supplies the rationale behind this exception to the doctrine. "[I]t seems reasonable to suppose that a donor who did not permit the donee to make an effective appointment until the donee's death intended the donee to make an appointment only to persons who survived him." 2 L. SIMES & A. SMITH, *supra* note 19, § 917, at 386. *Contra,* 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.46, at 584.

56 *E.g.*, 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.47; 2 L. SIMES & A. SMITH, *supra* note 19, § 984.

57 *See, e.g.*, 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.42; RESTATEMENT OF PROPERTY § 345(2) and Caveat following § 345 (1940); 2 L. SIMES & A. SMITH, *supra* note 19, § 919.

58 2 L. SIMES & A. SMITH, *supra* note 19, § 919, at 388.

relation back. The claims of general creditors to appointive property, like those of the surviving spouse, are based upon a relationship with the donee. If the doctrine of relation back is applied, such claims made through one who is regarded as having no proprietary interest must fail.

Most courts considering the rights of creditors make a crucial distinction between exercised and unexercised powers. As a general rule, creditors cannot reach property subject to an unexercised power, general or special.[59] When the donee exercises a general power by will[60] in favor of volunteers, the weight of authority is that creditors of the donee can reach the property to the extent that the donee's owned assets are insufficient to satisfy the claims against the estate.[61] It is difficult to justify the exercised-unexercised distinction, except as a compromise result reached by courts, desirous of providing relief to creditors, in the face of a rule of law (relation back) stating that such relief must be disallowed.[62]

Legislation in the area generally has expanded the rights of creditors, and contracted the scope of the doctrine of relation back.[63] State statutes in the area selectively disregard relation back, and at times go beyond the case law in eroding the doctrine, by allowing claims against unexercised powers under certain circumstances.[64]

Historically, the taxing authorities have been treated differently from other creditors in determining whether a donee "owns" appointive property for purposes of allowing creditor claims. Courts considering the issue under both the federal estate tax and state inheritance and estate tax statutes, in the absence of specific statutory treatment of powers, have applied the doctrine of relation back strictly, with the result that the passage of the property at the death of the donee is deemed a nontaxable event.[65]

The impact of legislation in this area generally has been to establish yet another exception to the doctrine of relation back. Section 2041 of the Internal Revenue Code now provides for the inclusion in the gross estate of the donee of property subject to certain "general" powers[66] at the donee's death. Similarly,

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59 *E.g.*, 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.17; RESTATEMENT OF PROPERTY § 327 (1940); 2 L. SIMES & A. SMITH, *supra* note 19, § 944.

In two situations creditors of the donee can reach the property subject to a power, whether or not it is exercised: 1) If the creation of the power by the donor-donee is fraudulent as to creditors, it may be set aside. 2) If the donee is also the donor, and other incidents of ownership were retained when the power was created, the property may be reachable, but only if donee's other assets are insufficient. *Id.* In neither of these situations, however, is the property reachable by virtue of the donee's power of appointment. Rather, in the first case the assets are reachable because the creditors have been defrauded; in the second because the donee has retained the equivalent of ownership. With regard to exercised powers, on the other hand, the assets are reachable *because of* the power of appointment.

60 There are no American cases deciding creditors' rights when a general power is exercised *inter vivos*. *See generally* RESTATEMENT OF PROPERTY § 330 (1940).

61 *E.g.*, 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.16; RESTATEMENT OF PROPERTY § 329 (1940); 2 L. SIMES & A. SMITH, *supra* note 19, § 945.

62 *See* 2 L. SIMES & A. SMITH, *supra* note 19, § 945, at 401-03.

63 *Id.*

64 *See, e.g.*, 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.17; 3 R. POWELL & P. ROHAN, *supra* note 48, § 390; 2 L. SIMES & A. SMITH, *supra* note 19, § 1082.

65 *See, e.g.*, 5 AMERICAN LAW OF PROPERTY, *supra* note 2, §§ 23.23-.24; 3 R. POWELL & P. ROHAN, *supra* note 48, § 392; 2 L. SIMES & A. SMITH, *supra* note 19, § 948.

66 I.R.C. § 2041(b)(1) includes in the definition of general powers not only powers exercisable in favor of the donee or the donee's estate, as in the *Restatement of Property* definition, *supra* note 16, but also those powers exercisable in favor of the creditors of the donee or the donee's estate. Generally, unexercised powers are taxable only if created after October 21, 1942. I.R.C. § 2041(a).

most of the state legislation[67] dealing with the taxation of appointive property at the death of the donee has had the effect of changing the common law rule of no taxation.[68]

Numerous exceptions have thus been carved out of the doctrine of relation back in situations where there is a perceived policy reason for recognizing the proprietary nature of general powers. Interest in maintaining the public fisc, in protecting creditors' rights, and in limiting dead-hand control over property to a period deemed by the law to be reasonable, have resulted in erosion of the doctrine in the areas of estate and inheritance taxation, creditors' rights, and the Rule Against Perpetuities, respectively. When it is recalled that relation back was a matter of convenience rather than logic in the evolution of the law of powers, and that the doctrine is an inaccurate definition of the relationships and dynamics involved in the exercise of a general power, then it seems likely that future developments in the law will continue to erode the doctrine. As analyzed by Professor Powell:

> [T]he conflict between the agency approach . . . and the demand of modern reality that the law recognize the donee of a power as having a property interest in the appointive assets, whenever the finding of such an interest leads to the presently desirable result . . . marks an important potential growing point in the law.[69]

V. A Proposal That the Electing Spouse Be Allowed to Reach Appointive Assets

In determining the rights of the electing spouse in the donee's appointive property, there is a strong policy reason for waiving the application of the doctrine of relation back. The reason is the interest of the public in affording economic protection to the spouse as expressed by the legislatures in enacting the forced share statutes. The intent of the statutes is to provide protection by allowing the spouse a share of the decedent's property at death. Relation back, of course, disallows treatment of property subject to a general power at death as property of the decedent, notwithstanding the fact that the decedent could by one simple act have been in the same relationship with the appointive property as with the owned assets, at the time of death. As discussed previously,[70] the public concern for the spouse's economic welfare is sufficiently compelling that, as embodied in the statutes, it outweighs another important social value, freedom of testation. Surely an interest so compelling is in a class with the other policies that have produced exceptions in the application of the doctrine of rela-

67 For a compilation of the statutes, see 5 AMERICAN LAW OF PROPERTY, *supra* note 2, § 23.24, at 525; *id.* at 824 n.12 (Supp. 1977).

68 Professor Powell has noted that there are many variations in the scope of the statutes. "Some were designed to catch exercises of powers which had been untaxed at their creation. Some were restricted to exercised powers, leaving a taking by default untaxed. Some were specifically restricted to the exercise of general powers." 3 R. POWELL & P. ROHAN, *supra* note 48, § 392, at 377 n.15.

69 *Id.* § 387, at 352.

70 *See* text accompanying notes 7-8 *supra.*

In other contexts the state interest in the financial protection of a person's dependents results in suspension of general legal principles. For example, while spendthrift trusts are sustained in many jurisdictions to protect the equitable interest of the beneficiary from creditor claims, an exception is often made for the support claims of dependents. *See, e.g.,* 2 A. SCOTT, THE LAW OF TRUSTS § 157.1 (3d ed. 1967).

tion back. An exception to the doctrine, resulting in recognition of the donee's proprietary interest in this context, would be appropriate, realistic and consistent with important public policy.

Assets subject to a general power at death should be includable in the donee's estate, for purposes of determining the size of the elective share, regardless of whether the donee exercised the power at death, whether the creating instrument named a taker in default, whether the power was presently exercisable or testamentary only, and whether the decedent had other interests in the property.

The proposal to include appointive assets in the elective estate is based upon the nature of the relationship between the decedent and the appointive property. The core of this relationship is the decedent's power to name the owner of the property, from among a group of objects including the decedent's estate, at the time of death. It is thus irrelevant whether the donee actually exercised the power at death. It is the control over the property, not the use made of it, that is proprietary. As discussed previously,[71] in the area of creditors' rights, many courts have found the distinction between exercised and unexercised powers to be crucial. Creditors are allowed to reach only those assets that have been appointed in the donee's will. The irreconcilability between this exercised-unexercised distinction, and a theory that general powers are like ownership for this purpose, has been noted by Professor Simes:

> Very likely courts of equity in allowing relief to creditors when the power was exercised did so with a feeling that a general power was just as much a proprietary interest as a number of other things a creditor could get at; and that they would go as far as possible in enabling the creditor to recover. That the statutes already referred to make no distinction between executed and unexecuted powers is strong evidence that the tendency is to allow creditors to reach both; and that only technical difficulties prevented equity from doing both. The fact, however, remains that what equity has done in the interests of the donee's creditors cannot be worked out satisfactorily on the theory that the general power is an interest in property.[72]

If the spouse's claim to appointive property is allowed, it is in derogation of the interest of persons entitled to the property at the donee's death, according to the law of powers. In the event of a proper exercise, that person is the appointee. In the situation where the donee does not exercise the power at death, assets would normally pass to the takers in default named by the donor, if any; or to the successors in interest of the donor, if there are no default takers.

Allowing claims against appointive property operates to defeat the express intent of the donee to benefit appointees in the event of exercise, and the presumed intent of the donee to benefit default takers in the event of nonexercise. The element of defeating decedent's intent, however, is basic to forced share legislation.

For some purposes, the interest of the taker in default is given greater pro-

71 *See* text accompanying notes 59-64 *supra.*
72 Simes, *supra* note 49, at 507 (footnotes omitted).

tection than the interests of other distributees under a power. The added safeguard probably arises out of consideration for the express intent of the donor in creating such an interest.[73]

The primary intent of the donor in every case is to create an authority in the donee. To the extent that the general power is viewed as ownership, the allowance of spousal claims is not inconsistent with the intent of the donor in creating the donee's interest. Once a policy determination is made to include appointive assets in the elective estate, then it should be irrelevant who would have taken, but for the spouse's claim.[74]

A general power should be reachable by the surviving spouse whether it was presently exercisable or testamentary only. It is undeniable that during the lifetime of the donee a presently exercisable power is a greater incident of ownership with regard to the property than is the testamentary power. The determination to include property in the elective estate, however, is based upon the relationship existing between the donee and the property at the time of death, the key to which is the donee's power to pass the property to the estate. That relationship is the same regardless of whether the donee could have exercised the power *inter vivos*.[75]

Since the reason for including the appointive assets in the elective estate is the perceived proprietary nature of the general power, it is likewise irrelevant whether the donee held other incidents of ownership with regard to the property.

VI. Property Appointed to the Surviving Spouse

In the situation where the donee exercises a general power by will in favor of the electing spouse, the result under the analysis suggested in this article is the same as in the situations where the appointment is made in favor of others or no appointment is made. In every case, the appointive property is included in the elective estate for purposes of determining the size of the spouse's share. The cases involving a testamentary exercise in favor of the electing spouse have been analyzed by the courts differently from those, discussed previously,[76] where the exercise was in favor of others.

In *Fiske v. Fiske,*[77] testator exercised a general testamentary power over certain real estate in favor of his executor and trustee. The will provided for the payment of income from the property to his wife for life, and the distribution of the principal to others after her death. The widow proceeded under the Massachusetts election statute, which permitted a widow to waive "any provisions the husband may have made for her in his will," and to claim instead "such portion of his estate as she would have been entitled to if he had died intestate."[78] In holding that the spouse was entitled to no share of the real estate,

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73 *See* Note, *Remainders Over in Default of Exercise of Powers of Appointment and Revocation,* 106 U. PA. L. REV. 420 (1958).

74 *See* Berger, *supra* note 41, at 127. *Contra,* Browder, *supra* note 49, at 1272.

75 Berger, *supra* note 41, at 123; Browder, *supra* note 49, at 1272.

76 *See* text accompanying notes 20-39 *supra.*

77 173 Mass. 413, 53 N.E. 916 (1899).

78 Pub. Stat. ch. 127, § 18 (current version at MASS. GEN. LAWS ANN. ch. 191, § 15 (West 1969)), *quoted at* 173 Mass. at 418, 53 N.E. at 918.

the court relied upon two statutory grounds. First, since the statute required the widow to waive all provision made for her under the will, and the exercise was testamentary, the appointment was void. The court reconciled this position with the doctrine of relation back, stating, "[i]t is none the less [*sic*] a provision made for her in the will that it includes an appointment of property which does not belong to the testator, and which, in theory of law, when the appointment takes effect, passes under the original instrument of conveyance."[79] The court focused also upon the language of the statute granting the electing spouse a share of the estate as in intestacy. Since appointive assets do not generally pass through the estate of an intestate donee, the court found that the statutory language expressly excluded such property from the elective estate. The court ordered the appointive property distributed to the takers in default named in the donor's deed of trust. The surviving spouse was allowed a share only in decedent's owned assets.[80]

In *Huddy's Estate,*[81] another court considering the claim of an electing spouse-appointee concluded that the spouse was entitled to keep the property appointed to him under the decedent's general testamentary power, while taking a forced share of the owned assets. The court relied upon language in the statute allowing the electing widower to take against his deceased wife's will a share in her "real and personal estate" as if there were no will. According to the court, the statute on its face dealt only with owned assets but "in no wise affects the distribution of property . . . disposed of in the exercise of a power of appointment, for such property is not and never was the 'real and personal estate' of the wife."[82]

Both the *Fiske* court and the *Huddy* court accepted the doctrine of relation back in reaching the divergent results in those cases. In each case the resolution of the spouse's claim turned, not upon any consideration of the decedent's interest in the appointive property, but rather, upon a construction of the election statute, and its effect upon the provision in the will exercising the power.

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79 173 Mass. at 418, 53 N.E. at 918.

In Chase Nat'l Bank v. Frazier, 243 App. Div. 623, 276 N.Y.S. 524 (1935), the court cited the *Fiske* case in support of its holding that the electing spouse-appointee lost all interest in the appointive estate because her "rejection applied to every provision of the will that was beneficial to her, whether those provisions related to property the title to which vested in her husband, or merely to property over which he had the power of appointment." 243 App. Div. 623, 276 N.Y.S. at 526.

80 In Kates's Estate, 282 Pa. 417, 128 A. 97 (1925), the court undertook a similar statutory analysis in ruling against the spouse's claim to a forced share of property appointed in part to others by the decedent's will.

An alternative construction of the statutory language providing for an elective share of the estate as in intestacy is that the language does not limit the elective estate to property that would have passed by intestacy if decedent had died without a will, but rather is intended to indicate the *share* of the elective estate to which the spouse is intitled. *See In re* Estate of Ellis, 30 Misc. 2d 225, 139 N.Y.S.2d 640 (1954), *discussed at* note 92 *infra.* Other aspects of *Kates's Estate* are discussed at the text accompanying notes 21-24 *supra.*

81 236 Pa. 276, 84 A. 909 (1912).

82 *Id.* at 282, 84 A. at 911 (construing Act of May 4, 1855, Pub. L. No. 430, § 1).

The Supreme Court of Pennsylvania discussed its holding in *Huddy's Estate* in Shoch's Estate, 271 Pa. 158, 114 A. 502 (1921), a case dealing with the effect of a statute, revoking the will of a decedent by operation of law in the event of a change in family circumstances, upon the testamentary exercise of a power. The court stated that the election statute in *Huddy's Estate* "in terms, confines its operation to the individual estate of the testator, and we said that the taking against the will is not viewed in law as necessarily rendering the decedent intestate." 271 Pa. at 164, 114 A. at 504.

The rule established in *Huddy's Estate* was subsequently changed in Pennsylvania by statute. Wills Act, Pub. L. No. 89, § 8(c) (1947) (current version at 20 PA. CONS. STAT. ANN. §§ 2202-2203 (Purdon Supp. 1979-1980)) (construed in Austin Estate, 38 Pa. D. & C.2d 79 (1965)).

The *Fiske* court concluded that the statute voided the exercise, so the spouse lost the appointive assets. The *Huddy* court construed the statute as not affecting the exercise, and so the spouse received the entire appointive estate.[83]

Under the analysis suggested by this article, that a general power should be treated like ownership for purposes of determining the rights of the electing spouse, the spouse-appointee would be required to relinquish claims through the will in appointive assets, as in the other assets of the decedent. The appointive assets would be included in the elective estate from which the spouse's share is determined, whether or not the spouse was the named appointee.

VII. Distribution of the Appointive Assets

Assets subject to a general power at death should be included in the elective estate in every case for purposes of determining the size of the elective share. The actual distribution of the property will depend upon the method employed in the jurisdiction for determining what assets are to be used to satisfy the forced share.

Consider first the situation where the property has been appointed to others than the spouse. In a jurisdiction where the statutory share is satisfied proportionately from all of the decedent's property,[84] a pro rata share of the appointive property (along with a similar share of the owned assets) will pass to the spouse. The remainder will pass to decedent's appointees. If the statute provides that the property given by will to the spouse is to be first used to satisfy the forced share,[85] and other property was bequeathed to the spouse, then the appointive assets will be reached (along with other assets not bequeathed to the spouse) only to the extent necessary to satisfy the difference between the amount of the claim and the amount bequeathed to the spouse. The remainder of appointive property will pass to the named appointees.

When the property is appointed to the electing spouse, under a statute providing for satisfaction of the forced share first from property designated by the decedent for distribution to the spouse, the appointive assets will be so used. In a jurisdiction providing for pro rata satisfaction out of all assets, the result will be distribution of only a pro rata share of the appointive property to the spouse-appointee. As to the rest of the appointive assets, the attempted exercise will be ineffective; the property will pass to the takers in default.

VIII. Implementing the Proposal Under Existing Statutes

The thesis of this article is that, based upon the nature of the general

83 A discussion of some policy reasons for and against allowing the spouse to retain the appointive assets while electing against the will, appears in Phelps, *The Widow's Right of Election in the Estate of Her Husband,* 37 MICH. L. REV. 401, 410-20 (1939). The author, like the courts that have considered the issue, does not entertain the possibility of including the property in the elective estate.

84 *E.g.,* MD. EST. & TRUSTS CODE ANN. § 3-208(b) (1974), provides: "If there is an election to take an intestate share, contribution to the payment of it shall be prorated among all legatees."

85 *E.g.,* UNIFORM PROBATE CODE § 2-207(a) (section amended 1975) provides:

> In the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate.

power of appointment and the policy concerns reflected in elective share legislation, the electing spouse should be able to reach appointive assets of the decedent. Could a court, concurring with this conclusion, accomplish the desired result under the terms of existing statutes? Most of the elective share statutes provide for a share of the decedent's "estate" or "property." In the absence of any effort on the part of the legislature to define this elective estate, there is no apparent reason why courts cannot define the term to include appointive property.

In Pennsylvania, the elective share statute expressly provides that property passing at decedent's death, by the decedent's exercise or nonexercise of a power created by someone other than the decedent, is not includable in the elective estate.[86] The statutes of Florida[87] and Wisconsin[88] define the elective estate to be property of the decedent subject to administration. Appointive property is not subject to administration as part of the decedent's probate estate, unless appointed to the estate. Although no express reference is made by these statutes to powers, appointive property is probably excluded from the reach of the suviving spouse by implication. Absent such a reference to probate property on the face of the statute, however, there is no need to equate the elective estate with the probate estate.[89] In the face of nonprobate interests that are fairly treated as property of the decedent at death, the courts have rejected such a narrow construction of the word "estate" in the election statutes in other contexts.[90]

Some elective share statutes refer to the state intestacy statute,[91] providing for a share of the estate to the electing spouse, "as in intestacy." The reference to the intestacy statute need not be construed as limiting the elective estate to property that would have passed by intestacy had the decedent died without a will. Such a construction would exclude appointive assets from the elective estate. The reference to the intestacy statute can more properly be viewed as an indication of the portion of the estate to which the spouse is entitled.[92]

There is some statutory authority for allowing the spouse to reach appointive assets. A statute in Michigan provides that property subject to a general

86 20 PA. CONS. STAT. ANN. §§ 2202-2203 (Purdon Supp. 1979-1980).

87 FLA. STAT. ANN. § 732.201 (West 1976).

88 WIS. STAT. ANN. § 861.05 (West 1971 and Supp. 1979-1980).

89 It has been recognized that the distinction between decedent estate property in the strict sense and joint bank accounts, Totten trusts, life insurance, transfers with retained powers, *and general powers of appointment,* is an artificial one for the purpose of estate taxation; the same principle is applicable to family protection.

Haskell, *supra* note 8, at 522 (emphasis added).

The Uniform Probate Code provides for "an elective share of one-third of the augmented estate." UNIFORM PROBATE CODE § 2-201. The comments following section 2-202 use the term "probate estate" interchangeably with "estate" in describing the property of the decedent to which other assets must be added in order to produce the augmented estate. The editorial language thus conveys an intent that the basic "estate" not include nonprobate assets. Under the Code scheme, not all assets subject to a general power at death are required to be added to the basic estate in arriving at the augmented estate. *Id.*

90 In the illusory transfer cases, the courts have included nonprobate assets in the elective estate. *See* text accompanying notes 13-14 *supra.*

91 *E.g.,* KAN. STAT. § 59-603 (1976).

92 *See In re* Estate of Ellis, 30 Misc. 2d 225, 139 N.Y.S.2d 640 (1954), where the court held that the New York election statute allowing for an elective share as in intestacy gave the spouse a claim against real estate located in another jurisdiction that would not have passed under the New York intestacy statute in the event of death without a will. The court stated that the reference to the intestacy statute "was merely designed to fix the distributive share of the surviving spouse, depending upon whether the decedent was or was not survived by children." *Id.* at 227, 139 N.Y.S.2d at 643. *But see* text accompanying notes 77-80 *supra.*

power, that the decedent exercised or manifested an intent to exercise by will, is regarded as part of the decedent's estate for, *inter alia,* the purpose of determining the elective share.[93] The forced share statutes of Delaware[94] and Maryland[95] define elective estate by reference to the federal estate tax definition of gross estate. Section 2041 of the Internal Revenue Code includes in the gross estate many general powers created in the decedent by another.

Absent such express statutory authority, the courts in all but a few jurisdictions could accomplish the result of allowing spousal claims against appointive assets under the general provisions of the elective share statutes. The judicial task would, of course, be facilitated by legislation expressly providing that property subject to any general power at the time of death is considered to be part of the elective estate.

IX. Conclusion

There is a trend in the American law of general powers of appointment away from the rigid, unquestioning application of the doctrine of relation back. In a number of contexts, for reasons of public policy, the courts and legislatures have carved exceptions to the doctrine and recognized the proprietary nature of the general power. The state interest expressed in elective share legislation is the concern for provision of economic security to the surviving spouse in common law property jurisdictions. In recognition of this state interest, it would be appropriate to suspend the agency theory of powers in determining the right of the electing spouse to a forced share of decedent's appointive assets.

93 MICH. COMP. LAWS ANN. § 556.116 (Supp. 1979-1980).
94 DEL. CODE ANN. tit. 12, § 901 (Supp. 1978).
95 MD. EST. & TRUSTS CODE ANN. § 3-203 (1978).