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THE FEDERAL ESTATE TAX MARITAL DEDUCTION IN MONTANA: A WARNING AND SUGGESTIONS

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Considerations relating to the marital deduction are central to estate planning. Articles and speeches devote much time and space to the problem of how best to use the deduction. Little is written or said, however, about the possibility that state law may bar successful use of some of the most commonly attempted forms of bequests. No difficulty arises if a testator devises or bequeaths property outright to his spouse. Often, however, he wishes to avoid such a devise and instead leaves the property in trust. The trust may be an "estate trust" with an interest for life in the surviving spouse and a remainder to her estate. It may be a "power of appointment trust" with an interest for life in the surviving spouse, an inter vivos or testamentary general power of appointment in her, and a remainder, in default of exercise of the power, in someone else, typically issue of the testator. Arguably, however, neither an estate trust nor a power of appointment trust with a testamentary power can be created in Montana, under *In re Doyle's Estate.*[1] If this argument prevails, it interferes seriously with estate planning in Montana.

The purpose of this article is to bring the problems raised by *Doyle's Estate* to the attention of lawyers in Montana and to suggest possible ways to meet those problems. It is not useful, at this point, to attempt a definitive statement of the law in *Doyle's Estate.* More complete surveys of authority appear elsewhere.[2]

THE PROBLEMS RAISED BY DOYLE'S ESTATE

The problems arise under §2056(b)(1) of the Internal Revenue Code.[3] That section provides that no deduction is allowed for an interest passing to a surviving spouse if:

(1) the interest will end on the occurence or failure of an event or contingency;

(2) an interest in the property passes or has passed, for less than full consideration in money or money's worth, from the decedent to any person other than the surviving spouse; and,

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[1]In re Doyle's Estate, 107 Mont. 64, 80 P.2d 373 (1938).

[2]Annot., 10 A.L.R. 3d 483 (1966); Annot., 90 A.L.R. 2d 414 (1963); Fox, *Estate: A Word to be Used Cautiously, If at All,* 81 HARV. L. REV. 992 (1968); Huston, *Transfers to the "estate" of a Named Person,* 15 SYRACUSE L. REV. 463 (1964).

[3]INTERNAL REVENUE CODE OF 1954, § 2056(b)(1). [hereinafter cited as INT. REV. CODE OF 1954.]

(3) because of the passing of the interest to such other person, he may possess or enjoy any part of the property after the end of the interest passing to the surviving spouse.

This is the "terminable interest" rule. It causes no trouble for the client who wants to leave the qualifying gift outright to the surviving spouse, but it creates a problem for the client who wants the surviving spouse to have, as nearly as possible, only a life estate. If the survivor has only a life estate, the three conditions of § 2056(b)(1) are not met, and the decedent's estate does not get the marital deduction.

THE ESTATE TRUST

One device for avoiding the terminable interest rule is the estate trust. A will creating such a trust typically gives the surviving spouse an interest for life, with a remainder to her estate. The will may give the trustee discretion to accumulate income or to pay it to the surviving spouse. It may empower the trustee to hold unproductive assets.[4] Although these features limit enjoyment by the surviving spouse, they do not result in denial of the deduction, because, presumably, no interest passes to any person other than the surviving spouse.

Unfortunately, in Montana a bequest to an estate trust may not qualify for the marital deduction. The difficulty arises from *Doyle's Estate*.[5] Under this case, the remainder in the estate of the surviving spouse may be invalid. The remainder in the trust may then pass, in whole or in part, to persons other than the surviving spouse, and the marital deduction may be denied.

The bequest to an estate, in *Doyle's Estate*, was in itself unimportant, but arguably the court's treatment of it seriously affected the distribution of the residue.

The testatrix, Miss Doyle, left legacies of $5,000 to $10,000 to her four living brothers and sisters. She also made specific legacies to friends and to descendants of her living brothers and sisters. She left five dollars to the estate of a deceased sister and five dollars to the estate of a deceased brother. She left fifty dollars to the estate of another deceased brother, John, "as his share of my estate as heir or otherwise." Children of John survived him. Her residuary clause stated "all the rest and remainder shall be divided between my lawful heirs herein mentioned to share and share alike."

The issue in *Doyle's Estate* was whether the children of John, the deceased brother, should share in the residue. The court cited several cases as holding that a legacy to the estate of a deceased person is void because an estate is not an entity capable of taking by will. It also cited several cases upholding bequests to estates of deceased persons.

[4]Fox, *supra* note 2 at 1006.
[5]In re Doyle's Estate, *supra* note 1.

It treated as critical in the latter cases the question of whether the court could determine the intention of the testator as to the identity of his intended beneficiaries. The court concluded that it could not decide whom the testatrix intended to receive the fifty dollars she left to the estate of John. It added "If she intended this legacy to be distributed to the children of John Doyle, they are not mentioned in the will, and unless so mentioned they are not among those included as beneficiaries in the residuary clause of the will."[6] Thus, the children of John did not share in the residue.

The decision in *Doyle's Estate* has three possible bases:

(1) A bequest to the estate of a deceased person is void.

(2) A bequest to the estate of a deceased person is void unless the court can determine whom the testator intended to take the bequest.

(3) Regardless of the validity of the bequest of fifty dollars, the children of John Doyle may not share in the residue because the will did not "mention" them.

Thus, *Doyle's Estate* creates a problem for the tax planner who wishes to use an estate trust. If a bequest to an estate is void, perhaps an estate trust cannot be used. Perhaps it can be used only if a draftsman makes clear that he is not providing a bequest to an estate but using "estate" as shorthand for the persons to whom he means the property to pass. If a bequest to an estate is void only in the absence of evidence of the testator's meaning, a draftsman can supply the meaning. Counsel who has to try, in litigation, to uphold a bequest to an estate, without benefit of explanation in the will, has a difficult task, because there may be no other admissible evidence. The problem faced by such counsel is discussed below.

The Power of Appointment Trust

Because of the difficulties raised by *Doyle's Estate* in respect to estate trusts, a tax planner may consider using a power of appointment trust. An estate trust, as indicated above, avoids the terminable interest rule and qualifies, hopefully, for the marital deduction, because it involves no interest in anyone other than the surviving spouse. In an estate trust there is no terminable interest. A typical power of appointment trust, however, does involve a terminable interest but falls within a specific exception to the terminable interest rule. The exception and the necessary features of a power of appointment trust appear in §2056(b)(5).[7] These features, somewhat simplified, are: a right to income for life in the surviving spouse and a power in the surviving spouse to appoint the corpus in her favor, in favor of her estate, or in

[6] *Id.* at 376.

[7] Int. Rev. Code of 1954.

favor of either. Apart from § 2056(b)(5), the interest of a surviving spouse in a trust with these features would be a terminable interest and would not qualify for the marital deduction. The reason is that the interest given the surviving spouse is a life estate and will terminate on the event of the death of the surviving spouse. Section 2056(b)(5), however, provides that if these features exist, no interest shall be considered as passing to any person other than the surviving spouse, for the purpose of § 2056(b)(1)(A). Thus, the trust qualifies for the marital deduction.

For non-tax reasons, the draftsman of a power of appointment trust will commonly provide a bequest in default of appointment by the surviving spouse. The existence of such a bequest is not necessary to qualify the trust for the marital deduction nor does it result in denial of the deduction.[8]

Doyle's Estate may bar the use in Montana not only of an estate trust but also of a power of appointment trust. The draftsman of a power of appointment trust may wish to give the surviving spouse only a testamentary power of appointment. If so, he must, under § 2056(b)(5), give her power to appoint in favor of her estate. *Doyle's Estate* may be taken to hold that a bequest to the estate of another is void. It may also lead to the same conclusion as to a bequest to the estate of the testator and as to an appointment to the estate of the testator. Even a remote possibility of such a result justifies careful planning and drafting.

Assuming the worst about testamentary powers, what about using an inter vivos power? First, a client may not want his widow to have such a power. Second, an inter vivos power must be drafted carefully, to make sure that it is sufficiently broad. The Code requires that the power be exercisable by the surviving spouse "alone and in all events."[9] The regulations interpret this as meaning that exercise of the power must be unrestricted; if the power is one to consume, it must not be only a power to use for the spouse's support. She must be able to use all or any part of the appointive property and be able to dispose of it in any manner, with power to dispose of it by gift.[10] A court may hold that a power to consume, though broadly stated, must be exercised in good faith and that a spouse with such a power cannot appoint to herself.[11] A draftsman, therefore, should provide expressly that the wife may appoint to herself, free of trust, and may make gifts of the appointive property.[12]

There is an even more dismal possibility. A decision by the Second Circuit may be interpreted as indicating that an inter vivos power, with-

[8]Treas. Reg. § 20.2056(b)-5(g)(2) (1954).
[9]INT. REV. CODE OF 1954, § 2056(b)(5).
[10]Treas. Reg. § 20.2056(b)-5(g)(3) (1954).
[11]Estate of May v. Commissioner, 283 F.2d 853, 855 (2d Cir. 1960).
[12]For the phrase, "free of trust", *see* Treas. Reg. § 20.2056(b)-5(g)(2) (1954).

out a testamentary power, cannot satisfy § 2056(b)(5).[13] The will considered in that case conferred "absolute right of full disposition and use of the whole or any part of said income or principal . . . except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death."[14] The case in question can be distinguished, and it is difficult to believe that a court would really hold that no solely inter vivos power can be sufficient. Section 2056(b)(5) seems to bar such a holding: it refers to a power "exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either." The regulations, at several points, suggest that either an inter vivos power or a testamentary power may be sufficent.[15] Regulations stating the requirements for an inter vivos power conclude "(whether or not she has power to dispose of it by will)."[16] There is also the statement: "[I]f she has an unlimited power of withdrawal, she may have a limited testamentary power."[17] Another statement indicates that the power in the surviving spouse must fall "within one of the following categories," these categories being a power exercisable in her own favor and a power exercisable in favor of her estate.[18] Thus, the possibility that no inter vivos power alone is sufficient for a qualifying power of appointment trust seems remote.

Other Tax Problems Arising from Doyle's Estate

Section 2056(b)(5) is not the only provision of the Internal Revenue Code which speaks of interests passing or appointable to an estate. Others include §§ 2037(b), 2041(b)(1), 2042(2), 2056(b)(6), 2503(c)(2)(B), 2514(c) and 2523(e).[19] In connection with some of these sections, it is beneficial to the taxpayer for the term "estate" to be operative under state law. See, for example, § 2503(c), which makes the annual gift tax exclusion available for certain gifts to minors, if the property is payable to the estate of the minor if he dies under the age of twenty-one.

One may not argue that, because Congress has spoken of an "estate" in speaking of transferees or appointees, transfers or appointments to estates must be possible. Congress, of course, has the power to state what interests in property are taxable or deductible. State law, however, determines what interests in property a person has.[20] If under state law a bequest to an estate is void, that bequest has no consequences

[13]Estate of Pipe v. Commissioner, 241 F.2d 210, 213 (2d Cir. 1956); J. Huston, Federal Estate and Gift Taxation, 1961 Annual Survey of American Law 201 (1962).

[14]*Id.* at 211.

[15]Treas. Reg. § 20.2056(b)-5(g)(1), (3), (5), (1954).

[16]Treas. Reg. § 20.2056(b)-5(g)(3) (1954).

[17]Treas. Reg. § 20.2056(b)-5(g)(5) (1954).

[18]Treas. Reg. § 20.2056(b)-5(g)(1) (1954).

[19]For discussion of the use of "estate" in the Internal Revenue Code, *see* Huston, *supra* note 2 at 464.

[20]G. Stephens and R Maxfield, The Federal Estate and Gift Taxes, 52 (2d ed. 1967).

for purposes of federal taxes.[21] *Doyle's Estate,* then, raises a number of problems for tax planners in Montana.

POSSIBLE SOLUTIONS TO THE PROBLEMS RAISED BY DOYLE'S ESTATE

The problems raised by *Doyle's Estate* and the legal and practical problems that arise in trying to avoid it by using inter vivos powers seem serious enough to consider all possible ways of meeting them: in litigation, in drafting, and in seeking legislative relief.

LITIGATION

If a case involving a bequest to an estate or a power to appoint to an estate comes before the Supreme Court of Montana in the future, the court may sweep away the difficulties arising from *Doyle's Estate.* It may treat *Doyle's Estate* as based primarily on the ground that the claimants were not "mentioned" in the will. Then the court can consider afresh the effect of a bequest to an estate.

Counsel might argue that an estate is an entity and that therefore a testator can make a bequest to an estate. The United States Tax Court has said "[A]n estate is a separate legal and taxable entity."[22] Although the federal tax law does treat an estate as a taxable entity,[23] general acceptance of this proposition seems doubtful.[24] Moreover, Revised Codes of Montana, §91-104 (1947) [hereinafter cited as R.C.M. 1947], which lists permissible legatees and devisees, includes no category into which an estate, as an entity, can fall. Hence, this approach comes to a dead end.

Success may be achieved by arguing that the meaning of "estate" depends on the intent of the testator and that his intent is ascertainable. The Montana court in *Doyle's Estate* appears to have accepted the general proposition that intent governs but it refused to find, from the will or extrinsic evidence, that the intent of Miss Doyle was ascertainable. It seems doubtful that specific evidence of intent will appear in cases like *Doyle's Estate,* unless the draftsman of the will foresaw the problem and included a definition of "estate." Hopefully, if given another opportunity, the court will try to put itself into the shoes of the "average testator" and adopt a presumption that such a testator would mean that the property should go to the persons who take the named party's own property passing by will or intestacy, as the case may be.[25] Specific evidence of intent would then be unnecessary.

[21]Whether, in a given case, state law is determined by a state court or a federal court seems irrelevant, since it is the state law that either court finds. Thus, *Doyle's Estate* must be dealt with, regardless of whether the litigation is in state or federal court.

[22]Bernie C. Clinard, 40 T.C. 878, 881 (1963).

[23]INT. REV. CODE OF 1954. § 641.

[24]L. SIMES AND A. SMITH, THE LAW OF FUTURE INTERESTS, 351 (2d ed. 1956); Huston, *supra* note 2 at 464.

[25]SIMES AND SMITH, *supra* note 24.

There are cases which have upheld bequests to an estate. Several courts have held that "estate" means the persons who would take the property of the named person, under his will or by intestacy.[26] One of these cases[27] stressed the doctrine that a will should be construed to give effect to every word; this doctrine is stated in R.C.M. 1947, §91-209. Other cases have said that "estate," in a provision in favor of the estate of a person, refers to his property but have, nevertheless, let the property pass to those who would take his property by will or intestacy.[28] One weakness in relying on these cases is that the Montana court cited several of them in *Doyle's Estate*[29] but did not follow them. Perhaps a second thought and consideration of a more recent case would lead to a different result.[30]

Assuming that the Montana court is willing to interpret "estate" as referring to the persons who take the testate or intestate property of a named person, the court will next face the problem of identifying them. This problem arises because the testator did not name them in a properly signed and attested will. It seems doubtful that a court will have trouble with this problem if the person to whose estate the bequest is made died intestate and his heirs are to be identified by reference to R.C.M. 1947, §91-403 and such extrinsic evidence as is necessary to identify the takers under that statute. A court may be more hesitant if reference must be made to the will of the named person. Such hesitation should not be fatal. A court should be able to identify the proper persons by using the doctrine of incorporation by reference, the doctrine relating to facts of independent significance, or the doctrine of *Matter of Fowles*.[31] Other possibilities are treating the provision as one creating a power of appointment or, in the case of an estate trust, simply as a bequest or devise to the named person.[32] The doctrine of incorporation by reference does not fit some of the typical situations, because the testator did not intend to incorporate any particular will of the other party or because the other party's will did not exist when the testator made his will.[33] This is likely to be the case with respect to bequests meant to qualify for the marital deduction. That deduction is not available if the legatee dies first. Also, it would be risky not to allow the property to pass under the last will of the surviving spouse, whenever executed.[34]

[26]In re Brunet's Estate, 34 Cal.2d 105, 207 P.2d 567 (1949); Reid v. Neal, 182 N.C. 192, 108 S.E. 769 (1921); Arnett v. Fairmont Trust Co., 70 W.Va. 296, 73 S.E. 930 (1912). In *Arnett*, there was some evidence from the will of the testatrix which tended to support the conclusion, but *Reid* and *Brunet* disclose nothing very specific.

[27]Reid v. Neal, *supra* note 26 at 772.

[28]Downing v. Grigsby, 251 Ill. 568, 96 N.E. 513 (1911); Leary v. Liberty Trust Co., 272 Mass. 1, 171 N.E. 828 (1930).

[29]Doyle's Estate, *supra* note 1 at 67. The cases cited were *Leary, Arnett,* and *Reid, supra* note 26.

[30]*In re Brunet's Estate, supra* note 26, is a more recent case.

[31]Matter of Fowles, 222 N.Y. 222, 118 N.E. 611 (1918); Huston, *supra* note 2 at 469. For help with the various doctrines mentioned in this paragraph, *see* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS, 385-400 (2d ed. 1953).

[32]Fox, *supra* note 2 at 1012.

[33]*E.g.*, Leary v. Liberty Trust Co., 272 Mass. 1, 171 N.E. 828, 830 (1930).

[34]STEPHENS AND MAXFIELD, *supra* note 20 at 213-214.

The most generally applicable doctrine that can be used to identify the beneficiaries of another's estate seems to be that relating to facts of independent significance. The other's will disposes of his own property and appoints his own executor, typically, so it does have significance independent of its function of completing the will of the testator. The time he executed his will and whether the testator's will refers to it are immaterial under this doctrine.

LEGISLATION

Depending on litigation to solve the problems raised by *Doyle's Estate* seems undesirable. We don't know when, if ever, a case dealing with those problems will be litigated through the Supreme Court of Montana. Nor can we predict whether the court will settle those problems in a manner conducive to obtaining the marital deduction. Even if there is litigation and it has a favorable outcome, the draftsman, in the meantime, faces uncertainty as to what devices he should use and as to how he should draft them.

Therefore, the bar may be wise to seek a legislative solution. Two approaches are possible. A new and separate section may be added to the Codes, or an existing section can be amended. If a new section is added, it may state a rebuttable presumption that, if an inter vivos instrument or a will purports to create a gift, bequest, or devise to the estate of a named person, the donor or testator intends the property to be used or to pass as does the property owned by the named person, and thus to go to persons with enforceable claims against the estate of the named person, to pass to his devisees and legatees if he dies intestate, or to pass to his successors under R.C.M. 1947, § 91-403 if he dies intestate. The section should also state a rebuttable presumption that, if an inter vivos instrument or a will purports to create a power in a named person to appoint to his estate, the donor or testator intends the named person to be able to exercise the power in favor of any persons, including persons with enforceable claims against his estate, persons to whom he might devise or bequeath his own property and his intestate successors. Perhaps the provision dealing with powers of appointment needs only to refer to persons to whom the donee of the power can devise or bequeath his own property, since he can devise or bequeath his own property to his creditors or to his heirs.[35] Caution suggests, however, that the provision refer expressly to creditors and heirs, to make as clear as possible that the donee of the power may exercise the power in favor of anyone to whom his own property might pass.

[35]This assumes that there is no testamentary branch of the doctrine of worthier title to interfere with a devise or bequest to an heir. For short discussions of that doctrine, *see*, W. SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING 113-117 (1965) and L. SIMES, LAW OF FUTURE INTERESTS 57 (1966). There appear to be no Montana cases dealing with the doctrine of worthier title, and R.C.M. 1947, § 67-520 probably abolishes only the rule in Shelly's case.

Instead of adding a new section to the Codes, the bar may seek to amend one or more existing sections. This approach may be more difficult than drafting an entirely new section. Also, it carries the possibility that the amended section, perhaps because of some aspect of it that is overlooked in the revision, will not make sense or will lead to an undesirable result. For example, R.C.M. 1947, § 91-218 might be chosen to carry the new explanation of "estate." That section now defines a number of terms, including "heirs," "relations," and "issue." It states that they refer to the intestate successors of a named person. Thus, R.C.M. 1947, § 91-218 already fails to make sense; taken literally, it says that "issue" means intestate successors. If applied literally, it would pass a bequest to a person's issue to his brothers and sisters if they were in fact his intestate successors. The legislative draftsman probably meant that, if there is a gift to "issue," the gift goes to those of the named person's issue, if any, who would be his intestate successors. Thus, his children, if all survive, would take to the exclusion of his grandchildren. The point is that R.C.M. 1947, § 91-218 already covers too much to do it well.

Use of R.C.M. 1947, § 91-218 would create another problem. It defines the listed terms by reference to the chapter on succession. That evidently means Chapter 4 of Title 91 and, more specifically, R.C.M. 1947, §91-403, which identifies takers by intestate succession. If "estate" were so defined, an attempted estate trust probably would not qualify for the marital deduction, because the remainder would be in the surviving spouse's heirs as purchasers. It would not be part of her estate subject to claims and to distribution under her will. Similarly, in the case of a power of appointment trust with power to appoint by will to the surviving spouse's estate, the power would be only a power to appoint among heirs, not a power to appoint to the estate of the surviving spouse, as the term "estate" is used in the Internal Revenue Code, and the trust would not qualify for the marital deduction.[36] Thus, if R.C.M. 1947, § 91-218 were used as the vehicle for change, the amendment would have to do more than add "estate" to the list of terms defined. It would have to add language indicating that the property could be used to pay claims against the estate or to satisfy bequests and devises. Thus, amending R.C.M. 1947, § 91-218 seems clearly inferior to drafting a new provision.

Another existing section that could be used to make a statutory definition of "estate" is R.C.M. 1947, § 91-104, which lists permissible devisees and legatees. It would be possible to add an item "(i)" to that section to read "(i) To an estate of a named person." Then it would probably be necessary to add a definition of "estate." Because R.C.M. 1947, § 91-104 is all one sentence except for the last two lines, the defini-

[36] *See, Bernie C. Clinard, supra* note 22, dealing with INT. REV. CODE OF 1954, § 2503(c).

tion of "estate" probably would not be made part of item "(i)" but would be a separate sentence and paragraph inserted just before the last two lines.

If the choice is to prepare an entirely new section to define "estate" instead of relying solely on an amendment to an existing section, it may still be desirable to amend R.C.M. 1947, § 91-104 to list, as item "(i)" "To an estate of a named or otherwise designated person, as defined in section 91-....." This should not be necessary, since the definition of "estate" in the proposed new section would not really be indicating that an "estate" is an entity but merely indicating to what persons it refers. Those persons should already qualify as acceptable legatees under R.C.M. 1947, § 91-104. Making the addition to R.C.M. 1947, § 91-104 may, however, be a desirable precaution, to forestall any argument based on a supposed conflict between the proposed new section and R.C.M. 1947, § 91-104.

DRAFTING

Pending a solution by litigation or legislation, counsel face the problem of drafting wills with bequests and devises intended to qualify for the marital deduction. The safest and simplest provision would leave the qualifying property outright to the surviving spouse. A slightly less simple provision, suggested by Professor Huston, would place the property in trust for the surviving spouse for life, with a remainder to her rather than to her estate.[37] Deliberately creating a remainder in a person who will be dead when the remainder vests in possession seems odd, but it ought to work. Presumably, a bequest does not fail if the legatee survives the testator but dies before the time for distribution. There also may be some precedent in the cases dealing with devises to a named person for life, with a remainder to the heirs of the testator. The life tenant sometimes is the sole heir or one of the heirs of the testator. If the court decides that the testator used "heirs" in its technical sense as referring to his intestate successors as of the time of his death, the life tenant takes or shares in the remainder, even though she is dead when it vests in possession.[38]

Another possibility is defining "estate" so as to make the remainder in an estate trust or the power in a power of appointment trust sufficiently broad. In the case of an estate trust, the testator may state, after providing for the life estate in the surviving spouse, that: "At her death, the trustee shall transfer the corpus, including any accumulated income, to her executor or administrator to be administered as part of

[37]Huston, *supra* note 2 at 485-486.

[38]Gilman v. Congregational Home Missionary Society, 276 Mass. 580, 177 N.E. 621 (1931). The fact that in such cases the courts do not always give "heirs" its technical meaning is irrelevant.

the property which she may leave at her death."[39] In the case of a power of appointment trust, the testator may state that on the death of the income beneficiary,

> the trustee shall transfer the corpus to such person or persons as (the income beneficiary) shall appoint by will. (The income beneficiary) may exercise this power in favor of any person or persons, natural or otherwise, to whom a valid bequest or devise may be made. Although I do not intend to exclude other possibilities, I do intend that (the income beneficiary) may appoint the corpus to her executor or administrator to be administered as part of the property which she may leave at her death.

A leading article dealing with the word "estate" suggests another form for use with an estate trust.[40] That form explains a provision for payment to the estate of the income beneficiary as meaning that, if she dies testate, the property shall be paid to her executors subject to the claims of creditors, debts and expenses of administration, and taxes; and that the balance shall be distributed to the persons to whom she shall bequeath it and, in the absence of specific bequests, to her residuary legatees; and that, if she dies intestate, the property shall go to her administrators subject to the claims of her creditors, etc. and the balance shall pass to her intestate successors. This form seems workable, except that, instead of providing that "in the absence of a specific bequest" the property shall pass to residuary legatees, it might be better to provide that, if she does not devise or bequeath the property specifically and if it is not needed to satisfy her general bequests, it shall pass to her residuary legatees. Probably the writer did not intend to use the words "specific bequest" technically, but other language may be better, to make clear that the income beneficiary may use the property to satisfy specific, general or residuary bequests, just as if it were her own.

CONCLUSION

It appears, then, that *Doyle's Estate* creates a serious problem for estate planners in Montana but that the problem may be solved, with careful attention to litigation, legislation, and drafting.

[39]This language is suggested by the opinion in *Coghlan v. Supreme Conclave Improved Order Heptasophs*, 86 N.J.L. 41, 91 A. 132-133 (1914).

[40]Fox, *supra* note 2 at 1013-1014.