OFFICES OF

FRANCIS B. BURCH
ATTORNEY GENERAL

JON F. OSTER
GEORGE A. NILSON
DEPUTY ATTORNEYS GENERAL

THE ATTORNEY GENERAL
ONE SOUTH CALVERT STREET
14TH FLOOR
BALTIMORE, MARYLAND 21202
301-383-3737

March 2, 1978

Mr. Patrick J. Duffy
Register of Wills for
Baltimore City
Court House
Baltimore, Maryland 21202

Dear Mr. Duffy:

You have requested our opinion of the appropriate rate of Maryland inheritance tax payable as a consequence of the death of a resident of Baltimore City, who died on August 18, 1977. You advise that decedent was the donee of a testamentary power of appointment under the terms of a trust created under the provisions of the Last Will and Testament of her husband, who died domiciled in Baltimore City on January 23, 1931.[1] By will dated June 22, 1977, which was duly admitted to probate before the Orphans' Court of Baltimore City on September 1, 1977, decedent specifically executed the aforesaid power of appointment, appointing the trust corpus to the trustees of decedent's own inter vivos trust created under the provisions of an "Indenture and Declaration of Trust" made by her, as Grantor, on October 25, 1974, as amended and restated in a "First Amendment to and Restatement of Indenture and Declaration of Trust", dated June 22, 1977. You advise that by the relevant provisions of decedent's inter vivos trust, as amended and restated, the assets thereof, including the corpus of the testamentary trust created by the will of decedent's husband, is now distributable by reason of decedent's death and her valid execution of the power of appointment, to specifically named and designated remaindermen, all of whom stand in a collateral relationship to decedent's husband, the donor

[1]Item 4 of the Last Will and Testament of decedent's husband bequeathed the sum of $100,000.00 to designated private and corporate trustees directing that the net income therefrom be paid to decedent for life, remainder "... to those persons, natural or artificial, whom my said wife shall, by her Last Will and Testament, legally executed, appoint to receive the same." On default of appointment, the assets of the trust are to be paid to the heirs at law of decedent's husband.

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of the testamentary power of appointment. As we understand it, your inquiry is limited to the rate of inheritance tax applicable upon distribution of the corpus of the trust over which decedent possessed the testamentary power of appointment; your having established that no inheritance tax was paid on the assets of the testamentary trust incident to the administration of the donor (husband's) estate.[2]

In 60 Opinions of the Attorney General 710 (1975), we had occasion to consider the nature and incident of the Maryland inheritance tax statutes, according particular attention to the application of the increased rate of collateral inheritance tax (Chapter 1 of the Laws of Maryland 1975, Special Session) to distributions made after 1 June 1975 from estates of decedents dying prior to that date or pursuant to instruments in effect prior thereto. We set out in some detail the progression of the inheritance tax statute from 1908 to 1975 and considered the manner in which the Court of Appeals has applied the successive changes in rate of tax to factual situations substantially similar to the circumstances you present. Without restating the view of this office as contained in that opinion, we shall, in due course, highlight certain aspects thereof which are relevant to your inquiry.

The nature of the Maryland inheritance tax is well established. A legacy or succession tax, it is imposed upon the right to receive property in possession. Coursey v. Hanover Bank, 206 Md. 180 (1955); Good Samaritan Hospital v. Dugan, 146 Md. 374 (1924). It is a death tax, as distinguished from an estate tax, an excise tax upon the privilege accorded by the State of receiving property upon the death of its former owner; a tax on receipt by the beneficiary. See Bouse v. Hutzler, 180 Md. 682 (1942); Safe Deposit & Trust Co. v. Bouse, 181 Md. 351 (1943); Connor v. O'Hara, 188 Md. 527 (1947). The event which gives rise to the imposition of the inheritance tax is not the death of a decedent but rather the time when the estate or interest vests in the beneficiary. As the Court of Appeals stated in Safe Deposit & Trust Co. v. Bouse, supra, "The vesting in interest constitutes the succession." While it is apparent that present interests established under a will necessarily vest as of decedent's death, though distribution may be postponed, the occasion upon which future interests vest is sometimes deemed problematic.

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[2]We note that no lineal inheritance tax was due on the interest in the testamentary trust passing to decedent for her life in view of the fact that the decedent's husband died prior to 1935, the year in which the inheritance tax on lineal descendants was first imposed. See Chapter 90 of the Acts of 1935. As to the option of a remainderman to prepay the inheritance tax attributable to his interest, see Annotated Code of Maryland, Article 81, § 161(a) and (e), 42 Opinions of the Attorney General 358 (1957).

necessitating closer scrutiny. We believe it manifest that the answer to your inquiry lies in a determination of the rate of collateral inheritance tax[3] applicable when the corpus of the trust over which decedent possessed a testamentary power of appointment vested in the appointees.

It is our opinion that the assets of the testamentary trust appointed under the provisions of decedent's will clearly vested in interest in the appointees, as well as possession and enjoyment, upon decedent's death on August 18, 1977. Prior thereto, the appointees had no estate in the appointed property other than a bare expectancy or a mere possibility of an interest. An expectancy or possibility of this nature has been favorably compared with that of an heir apparent or prospective devisee and has been characterized as not constituting an interest in property at all. Simes and Smith, The Law of Future Interests, 2nd ed., sections 224 and 421. We perceive that Maryland law views the expectancy of a prospective appointee as substantially similar to the interest of a contingent remainderman. Connor v. O'Hara, 188 Md. 527, 532 (1940) and cases therein cited, considering property passing by virtue of appointment like other contingent remainders.[4] Unquestionably, the uncertainty or unascertainability which are elements of a contingent remainder are characteristics of powers of appointment for an appointee is neither certain nor ascertained until the death of the donee of a testamentary power having validly executed it by will. See Mercantile-Safe Deposit & Trust Co. v. State, 264 Md. 455, 465 (1971).

Having determined the event which caused the prospective appointee's expectancy to vest in interest - decedent's death - we now turn to the question of the rate of inheritance tax applicable to the succession you described. As noted, we dealt with a similar inquiry in 1975 and believe the opinion of this office reported in 60 Opinions of the Attorney General 710 substantially responsive to your question. There, we ruled that the applicable rate of inheritance tax is to be determined by looking to the statutory rate of tax in effect at the time the interest vests in the legal sense. We found

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[3]You note in your inquiry that the appointees of the trust over which decedent has a power of appointment stand in a collateral relationship to the donor of the power. In light of the fact that property passing by the exercise of a testamentary power of appointment is deemed to pass to the beneficiaries or appointees from the donor of the power, rather than the donee, Connor v. O'Hara, 188 Md. 527 (1947) the collateral inheritance tax is clearly applicable.

[4]But see Article 81, Section 161, Annotated Code of Maryland, which draws a distinction between contingent remainders and powers of appointment for purposes of prepayment of inheritance tax. See also, 58 Opinions of the Attorney General 743, 746 (1973).

this to be the established rule of law in Maryland as set forth in Safe Deposit & Trust Co. v. Bouse, 181 Md. 351 (1943) and its progeny noting but one exception thereto. That exception arises solely under circumstances where the Legislature clearly expresses the intention that the statute mandating an increased rate of tax is to have limited application. Such an expression of intent was retrospectively engrafted on Chapter 90 of the Acts of 1935 which increased the rate of collateral inheritance tax from five percent to seven and one-half percent and, for the first time, imposed a direct or lineal inheritance tax at the rate of one percent. See Chapter 573 of the Acts of 1943 (enacted as an emergency bill to take effect on May 7, 1943). Chapter 573, Acts of 1943, provided that to the extent Chapter 90, Acts of 1935, and certain subsequent amendments changed or increased liability for inheritance taxes "the said Acts shall apply to and affect, and were intended to apply to and affect, only the estates of persons dying after the effective date of the said Acts". It is apparent that Chapter 573 was enacted in direct response to the Court of Appeals' decision in Bouse, supra, and effectively circumscribed the application of the 1935 enactment. 60 Opinions of the Attorney General 710, 716. See also Page, "Maryland Death Taxes", 25 Md. L. Rev. 89, 91-92, and particularly footnote 13 and authorities therein cited.[5]

Of course, the collateral tax statute now in effect is codified as Section 150 of Article 81 of the Annotated Code of Maryland (1975 Repl. Vol., 1977 Cum. Supp.) and was enacted as Chapter 1 of the Laws of 1975, Special Session. Suffice it to say that the Act had the effect, among others, of changing the rate of tax from seven and one-half percent to ten percent. This statute, like its predecessors, contains merely a statement of its effective date ("... this Act shall take effect June 1, 1975"). The point here is that unlike the legislative pronouncement contained in Chapter 573 of the Acts of 1943, the present statute contains no language clearly suggesting or purporting to suggest that the Legislature intended its application is to be anywise limited. Accordingly, we believe the rule of law established by the cases is controlling and that the rate of collateral inheritance tax applicable to the succession arising out of decedent's valid testamentary appointment is that in effect when the interest vested - i.e., ten percent.

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[5] 31 Opinions of the Attorney General 244 (1946) and 36 Opinions of the Attorney General 261 (1951) rule, in effect, that the rate of inheritance tax is determined by the law in effect at the time of the death of the donor of a power of appointment and the relationship of those who take to the donor. Obviously, these two opinions, each of which was rendered subsequent to the enactment of Chapter 573 of the Acts of 1943, must be viewed in light thereof. This was flatly stated in 36 Opinions of the Attorney General 261 at 262.

We perceive that some confusion may have arisen in applying the views of this office expressed in 60 Opinions of the Attorney General 710 (1975) to the so-called "relation-back" doctrine. That doctrine, of course, expresses the rule that the exercise of a power of appointment relates back to the donor of the power and that accordingly the appointee is deemed to take directly from the donor and not from or through the donee. See footnote 3. A rule of construction, its application is of particular significance in cases involving the rule against perpetuities and the effect of creditors' claims on the donee of the power, Connor v. O'Hara, supra, at 530-531, Price v. Cherbonnier, 103 Md. 107 (1906), but has, in most cases, been denied application under our inheritance tax statutes. See Pope v. Safe Deposit & Trust Co., 163 Md. 239 (1932), citing with tacit approval Darrall v. Connor, 161 Md. 210, 213 (1931); see also Sykes, Probate Law and Practice, Section 61 and Miller, Construction of Wills, Section 260. The limited occasion where the doctrine has been discussed in relation to inheritance tax issues is simply to make it clear that property passing by reason of the exercise of a power of appointment is not deemed property of the donee of the power for purposes of calculating inheritance tax due, if any, in the donee's estate. See Connor v. O'Hara, supra, at 531-532. Prince deBearn v. Winans, 111 Md. 434, 472 (1909). We find the distinction here both apparent and long established.

In short, it is our opinion that the property passing by virtue of decedent's exercise of the testamentary power of appointment conferred upon her by the will of her husband vested in interest in the appointee at decedent's death and that accordingly the rate of collateral inheritance tax then in effect is applicable to the succession. Therefore, we advise you that upon presentation and filing of an appropriate inventory of the assets of the testamentary trust, you should proceed to effect an appraisal and assess collateral inheritance tax at the rate of ten percent upon the clear value thereof. Article 81, Section 169, Annotated Code of Maryland (1975 Repl. Vol.).

Very truly yours,

Frederick S. Koontz

Frederick S. Koontz
Assistant Attorney General

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