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Effect of General and Special Powers of Appointment In Estate Taxation

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A Power of Appointment is a right to designate who is to receive certain specific property or an interest in it at some future time. In essence, it's a right to decide who shall be its owner. The power is created by will, trust or other instrument by one person and given to another. It does not include a power over property reserved by a decedent for himself. The decedent must sufficiently divest himself of control over the property to exclude property from his gross estate.

If the Power of Appointment is exercisable in favor of the decedent personally, his estate, his creditors, or the creditors of his estate, it is includible in his estate. A general power includes a power exercisable to pay the donee's estate tax or other taxes and charges against his estate. **However**, a direction that upon the life tenant's death, the trustee was to pay the life tenant's debts & claims against his estate was held NOT to create a general power of appointment over both halves of the corpus of a trust which consisted only of community property. In this case, the provisions of the trust LIMITED the life tenant's powers to ½ of the corpus; therefore, the trustee's powers to pay those debts extended only to ½ the corpus.

Unless property was in existence before a decedent's death, there is no taxable power. An example would be a life insurance policy owned by the decedent's spouse on the decedent's life with the decedent's revocable trust named as beneficiary. Even though the decedent could revoke the trust, he only had a power over the expectancy of life insurance proceeds, not over the policy itself.

A Special Power of Appointment (nongeneral or limited) is one that is either:

- 1) exercisable only in favor of one or more designated persons other than the decedent, his creditors, the decedent's estate, or the creditors of his estate, or
- 2) expressly not exercisable in favor of the decedent or his creditors, estate or creditors of the estate.

Ordinarily, only a general power of appointment will cause inclusion in the donee's estate. A power that is not general (ie. nongeneral, special or limited power) will not cause inclusion in the donee's estate. Thus the estate tax effects depend first upon whether or not the donee had a general power of appointment.

For more information on Powers of Appointment, you may wish to check with your attorney and/or give us a call for further assistance with your estate planning.

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