DEEMED PROPERTY OF THE ESTATE IN TERMS OF SECTION 3(3)(d) OF THE ESTATE DUTY ACT 45 OF 1955

by

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SUMMARY

In section 3(3)(d) of the Estate Duty Act 45 of 1955 (the Act) the legislature introduced the concept "competent to dispose", described in section 3(5) of The Act as a "power". If the deceased was "competent to dispose" property for his own benefit or that of his estate, section 3(3)(d) deems that property to be property of the estate. In order to determine when property may be deemed property of the deceased estate it is necessary to analyse the meaning of section 3(3)(d) as read with section 3(5) of the Act. An analysis of section 3(3)(d) of the Act indicates that it may be applied to those with a legal right to dispose of property for their own benefit or for the benefit of their estates. This interpretation is based on the meaning of "competent to dispose", and "power" as derived form the analysis.

1. Introduction

The purpose of section 3(3)(d) of the Estate Duty Act 45 of 1955[1] is to ensure that no property that the deceased was potentially competent to dispose of for his benefit escapes estate duty. The legislature effectively ignores certain dispositions by the deceased by deeming otherwise excluded property over which the deceased had certain specific powers to be property in the deceased estate.

The concept described by the deeming provisions of section 3(3)(d) of the Act is the competency of the deceased to dispose of property immediately prior to death. The objective of the legislature is to eliminate estate duty avoidance by those who, by making use of various methods of estate planning, manage to enjoy some of the benefits of certain property, yet ensure that it will not form part of their estate upon death.

It is the meaning and extent of this "competency to dispose", described in section 3(5) of the Act as a "power", that needs to be clarified to determine when property may be deemed property of the deceased estate in terms of section 3(3)(d).

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[1] Hereinafter referred to as the Act. References to sections are to this Act, unless otherwise indicated.

2. An overview of section 3(3)(d) read with section 3(5) of the Estate Duty Act 45 of 1955

Section 3(3)(d) of the Estate Duty Act 45 of 1955 introduces property that the deceased was competent to dispose of as a category of property deemed to form part of the property of the deceased at the date of death.

Section 3(3)(a) of the Death Duties Act 29 of 1922, which deemed property in the "control, order or disposition" of the deceased "directly or indirectly, immediately prior to death, for his own benefit" to be property of the deceased, was the predecessor of section 3(3)(d).

Section 3(3)(d) states the following:

> "Property which is deemed to be property of the deceased includes- ...
>
> (d) property (being property not otherwise chargeable under this Act or the full value of which is not otherwise required to be taken into account in the determination of the dutiable amount of the estate) of which the deceased was immediately prior to his death competent to dispose for his own benefit or for the benefit of his estate."

Section 3(5) states:

"(5) For purposes of paragraph (d) of subsection (3) –

(a)the term "property" shall be deemed to include the profits of any property;

(b)a person shall be deemed to have been competent to dispose of any property -

(i) if he had such power as would have enabled him, if he were *sui juris*, to appropriate or dispose of such property as he saw fit whether exercisable by will, power of appointment or in any other manner;

(ii) if under any deed of donation, settlement, trust or other disposition made by him he retained the power to revoke or vary the provisions thereof relating to such property;

(c) the power to appropriate, dispose, revoke or vary contemplated in paragraph (b) shall be deemed to exist if the deceased could have obtained such power directly or indirectly by the exercise, either with or without notice, of power exercisable by him or with his consent;

(d) the expression "property of which the deceased was immediately prior to his death competent to dispose" shall not include the share of a spouse of a deceased in any property held in community of property between the deceased and such spouse immediately prior to his death."

To be deemed property in terms of section 3(3)(d) the following requirements must thus be met:

(a) The property must not otherwise be taken into account

Section 3(3)(d) read with section 3(5) of the Estate Duty Act 55 of 1945 only applies to property "not otherwise required to be taken into account in the determination of the dutiable estate". It is therefore limited to any property not included or fully included elsewhere under the Estate Duty Act.[2] The result is that any property under the control of the deceased immediately prior to death that would have fallen out of the dutiable estate is brought within the dutiable estate of the deceased.

(b) Any profits of the property must be included

The deeming provisions include the profits of such property in terms of section 3(5)(a) of the Act.[3]

(c) The spouse's share of the joint estate must be excluded

The deeming provisions specifically exclude a spouse's share in any property held in community of property between the deceased and such spouse.[4] Prior to the

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2 Meyerowitz D, *The Law and Practice of Administration of Estates and Estate Duty* Sixth Edition (1989), (hereinafter Meyerowitz on Estates) states at 27.49 that he is "unable to conceive of an example of property the full value of which is not otherwise required to be taken into account in the determination of the dutiable amount of the estate". The valuations of limited interests may yield values that do not represent the full value, for example in terms of the second proviso to s 5(2) where the average net receipts of the property concerned are taken to be the yield of the property which is then used in determining the value of the limited interest. The full value of such property may be significantly more than the value of the limited interest.

3 In *CIR v Isaacs* 1960 (1) SA 126 (A), 23 SATC 142 at 151 Steyn CJ remarked that it may be that no case exists where the deceased does not have the control, or disposition of the property, but has the control, order and disposition for his own benefit of the profits of the property. The Act does not specify if the profits are to be limited to realised profits. The fact that estate duty is levied on the value of the deceased's property and deemed property as at the date of death indicates that the profits included are likely to be limited to realised profits as at the date of death of the deceased.

abolition of the marital power[5], where husbands had power over the person and property of their spouses, this exclusion was probably inserted by the legislature to ensure that the entire joint estate would not be regarded as property in the husband's estate.

(d) The deceased must have been competent to dispose of the property

Section 3(5)(b)(i) deems the deceased to be "competent to dispose of property" when the deceased had the power to appropriate or dispose of such property by "will, power of appointment or in any other manner". Section 3(5)(b)(ii) deems the deceased competent to dispose where the deceased under "any deed of donation, settlement, trust or other disposition made by him" retained the power to revoke or vary the provisions thereof relating to such property.

Section 3(5)(c) deems the power in section 3(5)(b) to exist if the deceased could have obtained this power by the direct or indirect exercise of power exercisable by him or with his consent. The implications of this will be investigated in greater depth in 3 and 4 below.

(e) The power or competency to dispose must be for the deceased's own benefit or for that of his estate

The mere power or competency to dispose of property is insufficient to deem such property dutiable. In order to deem the property that of the deceased, the deceased should have been competent to dispose of the property for the benefit of himself or

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[4] s 3(5)(d)
[5] The marital power was abolished by section 11 of the Matrimonial Property Act 88 of 1984.

his estate. If the deceased had the power to exercise control over the property, but to do so would not result in any benefit to himself or his estate, the property concerned will not be deemed property in terms of the deeming provisions. This aspect will enjoy attention in 5 below.

3. An analysis of the meaning of "competent to dispose" in section 3(3)(d) of the Estate Duty Act 45 of 1955

To determine the actual meaning of section 3(3)(d) it is necessary to interpret the relevant sections of the Act. Section 3(3)(d) must be read in conjunction with section 3(5) of the Act. However, I will analyse the words of section 3(3)(d) before investigating the meaning of section 3(5) of the Act. It has been said that:

> "The construction of legislation (which is expressed in general terms) and its subsequent application to a specific factual situation involves a creative element. The courts thus create law by their judicial decisions, thereby giving metaphorical body and flesh to statute law, which by its very nature is skeletal in nature."[6]

As there has thus far been no judicial interpretation of section 3(3)(d) it will be instructive to examine section 3(3)(a) of the Death Duties Act 29 of 1922 and its own predecessor section 3(3) of the Death Duties Act 29 of 1922, which was the subject of some judicial interpretation, in order to determine how the judiciary has interpreted the legislature's intention.

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6 Devenish GE *Interpretation of Statutes* (1992) Juta (hereinafter Devenish) at 7

Section 3(3) of the Death duties Act 29 of 1922 stated that any such property (of the various kinds of property mentioned in sub-section (2)) shall be deemed to be property passing on the death of any person if, though the property was at his death registered in the name of some other person he, directly or indirectly and for his own benefit had the control or disposition of the property, or of the profits derivable therefrom.

In *Estate Phillips v CIR* [7], in which section our courts considered 3(3), it was held that the *dominium* of a farm that Phillips had donated to his wife vested in his wife. It was further held that the donation was voidable *stante matrimonio* and that Phillips therefore retained the right to revoke and claim transfer of the farm he had donated to his wife. This right would cease on his death and it was held that this right did not give him the "control order or disposition" of the property within the meaning of section 3(3) of the Death Duties Act. As per Tindall J:

> "sub-section (3) presupposes a case where the registered owner of such property holds not for himself but for the deceased and where the deceased's right in respect of the property does not cease on his death but forms part of his estate. According to sub-section (3), for the purposes of estate duty it is the property itself which is treated as the property passing. On this view of sub-sec (3) it is plain that it cannot be invoked by the plaintiff in this case."[8]

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7 12 SATC 17
8 supra at 34

Section 3(3)(d) introduced the concept of being "immediately prior to death competent to dispose". Phillips had the power to appropriate or dispose of the property as he wished by virtue of his right of revocation. The question is whether he would have been "competent to dispose" immediately prior to death. Phillips had donated property to his spouse, which was then registered in her name. He had a right of revocation in terms of the common law. [9] Thus it appears likely that had the case been decided in terms of the concept competent to dispose, the court would have held that he had the power to revoke or vary the provisions of his donation as described in section 3(5), thus deeming him competent to dispose in terms of section 3(3)(d).

In *CIR v Estate Kohler* [10] Kohler had held all the shares in a holding company. In his capacity as a director of the company and acting under the authority of a resolution of the directors, Kohler had granted an option to his brother to purchase shares held by the holding company at their nominal value at any time within three months of Kohler's death. His brother duly exercised this option. These shares were valued in the estate of Kohler by his executors at their nominal value, being the price the shares had been acquired for by Kohler's brother in terms of the option granted to him. The Commissioner sought to include in Kohler's estate the full value of the 449 shares on the basis that they were assets passing on the death of the deceased in terms of section 3(3) of the Death Duties Act 29 of 1922. This was contended because in the case of a one-man company, the control over the company's property and the profits derivable from it exercised by the individual must be exercised for his own benefit. Millin J stated in his judgment that section 3(3) of the Death Duties Act 29 of 1922 did not apply, as

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9 This was amended by section 22 of the Matrimonial Property Act 88 of 1984.
10 11 SATC 139

was contended on behalf of the plaintiff, as to apply the section would give a strained and artificial meaning to section 3(3). Millin J stated that it is necessary to look at substance rather than form, and that, for the purpose of estate duty, property is to be deemed to be that of those for whose benefit nominees or agents hold property, not that of nominees or agents.[11] Millin J indicated that there may well be situations where a one-man company holds the business or property as the agent of the individual controlling it but that this cannot be assumed and would have to be proved.

Section 3(3)(a) of The Death Duties Act 29 of 1922 stated that:

> "Any such property shall be deemed to be property passing on the death of any person if such person notwithstanding that at the date of his death such property may have been held by or registered in the name of some other person (whether in the name of an individual or a body corporate or incorporate), directly or indirectly and for his own benefit had the control, order or disposition of the property, or of the profits derivable therefrom."

In *CIR v Isaacs* [12] it was held that the assets of a one-man company were not under the "control order or disposition" of the controlling shareholder due to the startling results that would follow if it was held otherwise. Counsel for the respondents indicated some of the anomalous situations that would arise if section 3(3)(a) brought the property of a one-man company into a deceased estate. This would result in the inclusion of all the company assets in the deceased estate without the deduction of any of the company

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11 ibid at 143.
12 supra

liabilities. In addition, the value of the shares held by the deceased would be included in the deceased estate, resulting in double taxation. If it was proved that the company is a mere agent for the individual then to avoid inequity the value of the property taken into account would have to be reduced by the associated liabilities of the company. The court accepted this and stated that the legislature, when amending section 3(3)(a) made no attempt to clarify that a one-man company would fall within the ambit of section 3(3)(a). The court held that the control of assets by a single shareholder of a one-man company, where the assets were held by the company as its own property and not as the agent of that shareholder, did not bring those assets within the estate of the shareholder as property under his control, order or disposition.

The application of section 3(3)(a) of the Death Duties Act 29 of 1922 in relation to property disposed into a trust has also been the subject of judicial interpretation.

The control of trust property under section 3(3)(a) of the Death Duties Act 29 of 1922 was specifically considered in *Creighton Trust v CIR* [13] and *CIR v Estate Merensky*[14]. An important issue of section 3(3)(a) of the Death Duties Act 29 of 1922 (and section 3(3)(d)) in relation to trusts is the founder's influence over the trust property potentially for his benefit or for that of his estate. In both *Creighton's* case and *Merensky's* case it was the power of revocation or variation that occupied the courts.

13 1955 (3) SA 498 (T), 20 SATC 177
14 1959 (2) SA 600 (A), 22 SATC 343

The trust deed considered in *Creighton Trust v CIR* contained the following provisions, which are worth stating as an indication of what may constitute the power to revoke or vary:

- Clause 3 gave the trustees wide discretionary powers to effect investments, provided that during the lifetime of the donor investments could only be made on his written approval

- Clause 4 provided that income derived from the trust funds was to be paid to the donor during his lifetime;

- Clause 5 provided that the donor had the right to nominate an additional trustee or trustees or to substitute any trustee or trustees;

- Clause 9 provided that the provisions of the trust deed could be altered, varied or amended or added to by the trustees with the consent of the donor during his lifetime and that any amendment would not have the effect of enabling or entitling the trustees to pay any portion of the capital transferred back to the donor.

The applicant relied particularly on the content of clause 9 in his contention that the donor had divested himself of the property and retained only a usufructuary interest over the property.

The CIR maintained that the donor had not divested himself of the property, as the trustees held the assets primarily for his benefit and subject to his control. Accordingly the CIR contended that section 3(3)(a) of the Death Duties Act 29 of 1922 was applicable.

In reaching a decision, Hill J relied upon *CIR v Estate Crewe*[15] where it was held that prior to acceptance a beneficiary acquired no vested rights under a contract for his benefit. Prior to acceptance a beneficiary could be deprived of the stipulated benefit by agreement between donor and the trustees, or unilaterally by the donor.[16]

Based on this Hill J stated that it was clear that the trustees had no interest in the property, and if the beneficiaries acquired no vested rights in the property until after the donor's death, the donor retained the property for his own benefit and disposition.[17] This construction is that of *stipulatio alteri*, often the basis of an *inter vivos* trust.

An analysis of the facts in *Creighton Trust v CIR* indicates that the founder clearly retained *de facto* control over the trust property. This control was derived from the various powers retained by the founder, particularly in that the trustees could only make investments with Creighton's written approval during his lifetime. Creighton had a life usufruct over the trust capital; accordingly any investment decision made by him was a direct form of control of the trust property or of the profits on that property for his benefit. On these facts, it seems likely that Creighton would also have fallen foul of the deeming

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15 1943 AD 656
16 Hill J in *Creighton Trust v CIR* quoted Watermeyer CJ in *CIR v Estate Crewe* supra at 674 and 675.
17 The argument that the beneficial interest must reside in the donor because it did not reside in anyone else was also raised in *CIR v Merensky* supra, which is discussed hereafter.

provisions of section 3(3)(d) as Creighton's right of control over all the investments of the trust would have entitled him to appropriate or dispose of property as he saw fit and this would have been for his potential benefit, as he had a usufruct over the trust capital.

Hill J considered the trust deed in the context of the issue whether acceptance by the beneficiaries was possible prior to the death of the donor. It was found that the donor contemplated no such acceptance. After examining the trust deed as a whole, Hill J stated [18]:

> "Considering the trust deed as a whole it seems to me that the donor virtually remained in full control of the property which was formally transferred to the trustees for the purposes of eventually transferring it to such beneficiaries as may be entitled to accept the benefits under the deed at the donor's death."

In *CIR v Merensky* the Commissioner put forward the argument that beneficial interest must always reside in some person, as it did not reside in the trustees, who it was argued were mere, "administrative pegs", nor in the beneficiaries who had no rights until acceptance. Therefore beneficial interest must have continued to reside in the founder. Schreiner JA rejected this reasoning on two grounds, namely that there were sound reasons for rejecting the founder as the holder of the beneficial interest and that the beneficial interest need not always reside in some person.

In both *Creighton's* case and *Merensky's* case the trust deed could be amended, but only by the trustees with the founder's consent. In *CIR v Merensky*, however, the

donation into trust was irrevocable and therefore it was held that the deceased did not have the "control order or disposition of the property. [19]

In terms of section 3(5) if the deceased had the power to revoke or vary the provisions of a deed of donation, settlement, trust or other disposition, he will be deemed competent to dispose. I will examine the meaning of "power" in the context of section 3(3)(d) and section 3(5) below, which may clarify what form of revocation or variation will satisfy the deeming provisions of section 3(3)(d) and section 3(5).

The possible incidence of section 3(3)(a) in relation to the assets of a company was considered in *CIR v Estate Adelson.*[20] Adelson immediately prior to death held shares which in terms of the company's memorandum granted him the sole right to control the company and to participate in the company profits. Steyn CJ, in his majority judgment, referred with approval to the decision in *CIR v Isaacs*[21] and stated that no distinguishing factors existed in this case that would lead him to conclude that the company was simply holding the company assets for Adelson.[22] Section 3(3)(a) was therefore held not to apply. The value of Adelson's shares was held to be their value on "passing"[23] at Adelson's death when they had lost their special rights and had been converted into ordinary shares. Schreiner JA dissented and held that the shares had to be valued as unconverted or at the price that a notional buyer would have been prepared to pay for

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18 supra at 184
19 Hill J concluded (at 360): "for the above reasons that the trust deed in the present case could not be revoked by the settlor acting alone. And if he could only revoke it with the concurrence of the trustee company he did not have the control order, or disposition over the trust assets after their transfer to the company."
20 1960 (1) SA 418 (A), 23 SATC 166
21 supra
22 supra at 178
23 "Passing" was an important concept under the Death Duties Act 22 of 1929

them while the special rights still existed. The value of the shares, according to Schreiner JA should have been the net asset value of the company. On this basis of valuation, Schreiner JA stated that there was no possibility of an additional estate duty liability based on section 3(3)(a).[24]

Following the judgment in *CIR v Adelson*, the valuation of unquoted shares has been addressed in section 5(1)(f)bis. The value of these unquoted shares is now based on the decision of an impartial valuator who must ensure that no regard is had to any provision in the memorandum and articles of association that at face value may deflate the share value. In addition any power of control exercisable by the deceased and the company empowering the deceased prior to death to vary or cancel any right attaching to any class of shares in the company must be taken into account by the valuator in terms of section 5(1)(f)bis(v).[25]

Section 5(1)(f)bis has a similar purpose to section 3(3)(d) as in both sections the possibility of the deceased benefiting from the exercise of some form of control is to be accounted for purposes of estate duty.

Section 5(1)(f)bis(v) has ensured that section 3(3)(d) has become largely unnecessary with regard to unlisted companies in which the deceased held shares. As a shareholder, the full value of the deceased's interest in the company should be dutiable if valued correctly in terms of section 5(1)(f)bis, leaving no other value to be included in

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24 Supra at 185

25 "there shall be taken into account any power or control exercisable by the deceased and the company whereunder he was entitled or empowered to vary or cancel any rights attaching to any class of shares therein, including by way of redemption of preference shares, if by the exercise of such power he could have conferred upon himself any benefit or advantage in respect of the assets of profits of the company".

terms of section 3(3)(d), which specifically excludes property otherwise taken into account in the valuation of the dutiable estate. Therefore, unlisted shares should not fall within the ambit of section 3(3)(d).

An analysis of the case law on section 3(3)(a) indicates that the legislature was concerned with including certain property not otherwise dutiable in terms of the Death Duties Act 29 of 1922 Act in the deceased's estate, that the deceased controlled in some way. The legislature was not really successful in ensuring that such property was included in the deceased's estate. *Creighton's* case is the only case where the Commissioner succeeded. The cases of *Phillips, Kohler, Isaacs, Merensky* and *Adelson* may indicate that section 3(3)(a) was largely ineffective if the deceased could have enjoyed the benefits of property that was in effect his, but managed to ensure that this property did not form part of his estate.

The agency or nominee argument focused on in cases such as *Kohler*, *Phillips* and *Isaacs* arose because of the wording of section 3(3)(a). As Millin J said *in CIR v Estate Kohler* :

> "For the purpose of estate duty property is to be deemed to reside not in nominees or agents for the holding of the property but in those for whose benefit they hold and whose orders they have to take in dealing with the property and its profits." [26]

The different formulation of section 3(3)(a), specifically stating:

"notwithstanding that at the date of his death such property may have been held by or registered in the name of some other person (whether in the name of an individual or a body corporate or incorporate)"

resulted in a particular reliance on the agent or nominee argument. This argument usually did not ensure that the property was deemed property of the estate in terms of section 3(3)(a) of the Death Duties Act 29 of 1922 as, for instance, property held by a nominee would be included as property under the general principles[27] or the control order or disposition of the property was not deemed to be property "passing" as such control order or disposition ceased upon death.[28]

I submit that the inclusion of property held by a third party for the benefit of the deceased under the general principles is correct. Substance should be looked at rather than form.[29] If it can be proved that property held in or by some other individual or entity was in fact held for the benefit of the deceased, then that property should fall within the dutiable estate.

In section 3(3)(d) the legislature deliberately chose to depart from the wording used in section 3(3)(a) of The Death Duties Act 29 of 1922. The legislature did away with the phrase " notwithstanding that at the date of his death such property may have been held by or registered in the name of some other person", thus ending any possible reliance

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26 Supra at 143
27 *CIR v Estate Kohler* supra at 142
28 *Estate Phillips v CIR* supra at 33
29 Millin J in *CIR v Estate Kohler* supra at 143

on the agency or nominee argument. To replace "the control order or disposition of the property or the profits derivable therefrom" the legislature introduced the concept "competent to dispose". "Competent to dispose" was then deemed to exist in circumstances specifically described in section 3(5) if the Act.

A change in wording by the legislature in a subsequent act must have some significance.[30] In section 3(3)(d) the intention of the legislature is still to capture property excluded from estate duty due to various tax avoidance techniques. The change in wording was therefore effected by the legislature to make the provisions of the section more effective by actually identifying this form of avoidance as being "competent to dispose" and then deeming the deceased to have been "competent to dispose" in instances defined in section 3(5) of the Act, which is discussed below.

4. An analysis of the meaning of power in section 3(5) of the Estate Duty Act 45 of 1955

The deceased will be deemed to have been "competent to dispose" in certain instances defined in section 3(5) of the Act. It thus appears that the legislature wished to clarify the meaning of "competent to dispose". As section 3(5) is "for purposes of" section 3(3)(d), section 3(3)(d) must be interpreted in terms of section 3(5).[31] It could be that section 3(5) is not an exhaustive definition of "competent to dispose", merely including

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30 Devenish at 136

31 "Section 3(3)(d) must always be seen in conjunction with section 3(5)." Swart JN et al *The Planning and Administration of Estates – An Introduction* (1985) Butterworths (hereinafter Swart) at 122. See also Geach WD *Handbook for Executors, Trustees and Curators* (1993) Juta & Co Ltd (hereinafter Geach) at 186.

defined competencies within the scope of section 3(3)(d).[32] Even if this is the case, the circumstances in which a deceased is deemed competent to dispose of property are so widely framed it is unlikely that if the deceased was in effect competent to dispose of property as he saw fit, they would not be covered by these deeming provisions.[33]

As the sections are intended to be read together and as the competencies in section 3(5) are so widely framed, I believe that section 3(5) may be treated as an exhaustive definition of the concept competent to dispose.

It is necessary to determine whether the deeming provisions of section 3(5)(b) provide an exhaustive meaning of "competent to dispose", excluding what might otherwise have been associated with "competent to dispose" but for the deeming provisions. It is possible that the deeming provisions of section 3(5)(b) supplement the other possible meanings of "competent to dispose."[34] The precise meaning of "shall be deemed" and its effect must be ascertained form its context and the ordinary canons of construction.[35]

According to Meyerowitz some of the usual meanings and effects it can have are the following:

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32 A provision that deals with inclusivity may operate to exclude everything or it may operate to add unusual or less usual meanings – Meyerowitz D *Meyerowitz on Income Tax* (1998) The Taxpayer (hereinafter Meyerowitz on Tax) at 3.64.

33 Meyerowitz on Estates supra at 27.50

34 Meyerowitz on Estates at 27.50 states that "probably no case can be conceived where the deceased in substance was competent to dispose of property as he saw fit but is not covered by these deeming provisions". If the deceased had such competency, but such competency could not benefit him, then property over which such competency was enjoyed would be excluded from these deeming provisions. In addition, in terms of the exclusion of the spouse's share of the community estate, even if the deceased enjoyed such competency over the spouse's share and this competency would be for his potential benefit, it appears that this property which the deceased was competent to dispose of would be excluded.

35 D Meyerowitz *Meyerowitz on Income Tax* (1998) The Taxpayer (hereinafter Meyerowitz on Tax) at 3.63

"That which is deemed shall be regarded as accepted:

i) as being exhaustive of the subject matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or

ii) in contradistinction thereto, as being merely supplementary, that is extending and not curtailing what the subject matter includes, or

iii) as being conclusive or irrebuttable, or

iv) contrarily thereto, as being merely *prima facie* or rebuttable."[36]

I submit that the deeming provisions of section 3(5) are conclusive and irrebuttable as they deem when an individual was competent to dispose in terms that are general enough to be considered exhaustive. Once an individual is deemed competent to dispose of any property, the individual would then clearly fall into the deeming provisions of section 3(3)(d), provided that he was competent to dispose of such property for his own benefit or for the benefit of his estate.

In terms of section 3(5)(b) these powers are:

- the power to appropriate or dispose of such property as the person saw fit whether exercisable by will, power of appointment or in any other manner

- power to revoke or vary the provisions of any deed of donation, settlement, trust or other disposition made by him.

In both of these forms of power the actual exercise of this power is not the issue. If this power could potentially be exercised, the deceased was competent to dispose. The power and competency of the deceased, as described in the deeming provisions, need never have been exercised.

It makes sense that a power to dispose or appropriate would be the target of the legislature in section 3(3)(d). An actual appropriation or disposition (an exercised power) would result in property either being included as ordinary property in the estate, for instance if the property was appropriated by the deceased, or in property being excluded from the estate if the deceased had disposed of it.

In all of these instances legal rights are involved. An important issue for purposes of understanding section 3(3)(d) is whether *de facto* influence by the deceased may escape the deeming provisions of section 3(5). *De facto* influence may well exist and fall beyond the realms of section 3(5) if the power in section 3(5) is concerned with legal rights rather than *de facto* ability. It is therefore necessary to determine the meaning of power in section 3(5).

"Power" is not defined in the Act. Power can be defined as "control and influence exercised over others, strength, vigour, force or effectiveness, the physical ability, skill, opportunity or authority to do something" [37].

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36 Ibid

[37] M Robinson and G Davidson *Chambers 21st Century Dictionary* (1996) Chambers (hereinafter Chambers) at 1088

The ordinary meaning of power is concerned with ability, strength or authority. Given the ordinary meaning of power, therefore, power in section 3(5) could mean *de facto* ability or a right. To further extract the meaning of power from section 3(5), the intention of the legislature needs to be examined.

Section 3(5)(b)(i) refers to a power exercisable by will, power of appointment or "in any other manner".

As this is a fiscal provision intended to defeat tax avoidance schemes, a wider interpretation may be required. In interpreting such a provision, the following approach has been suggested:

> "It should in my view therefore, not be construed as a taxing measure but rather in such a way that it will advance the remedy provided by the section and suppress the mischief against which the section is directed."[38]

If the general words are given a wider interpretation, this may stretch the ambit of section 3(3)(d) beyond what the legislature was intending to circumvent. For instance, where spouses are married out of community of property and each spouse deals with the other's property as and when he or she pleases, it would be untenable to tax both estates in the hands of the first dying spouse. Taxpayers are free to order their affairs so as to minimise the tax consequences. [39] It therefore seems appropriate that the legislature intended to refer to a legal right rather than *de facto* ability.

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38 per Watermeyer CJ *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715 A at 171
39 ibid.

The phrase "will, power of appointment or in any other manner" suggests the existence of a legal right, as "any other manner" should be interpreted *eiusdem generis* with the preceding word. It is possible to envisage a situation where an individual without this power could appropriate or dispose of property, such as an individual married out of community of property who registers shares in his spouse's name and then proceeds to utilise the dividends as he pleases. He would certainly have *de facto* power over the shares in his spouse's name. He would not, however, have any legal right over the shares. The ability to appropriate or dispose may always be present, but it does not follow that a legal right or "power" to appropriate or dispose will be present.

Here, the intention of the legislature is to ensure that individuals who have endeavoured to limit the incidence of estate duty on certain property, yet still enjoy the property are taxed on this property after death. Restricting the meaning of power to a legal right will give effect to this intention of the legislature in circumstances where the deceased entered into an arrangement to ensure that certain property disposed of by him would remain the subject of his influence and potential benefit, yet would fall outside of his dutiable estate.

The formulation of section (3)(5)(b)(ii), which provides further instances where the deceased is deemed "competent to dispose", also infers the presence of a legal right, in this instance to revoke or vary "under any deed of donation, settlement, trust or other disposition made by him".

Without a legal right it is unlikely that the power as envisaged in the section would exist.

The legislature, intending to ensure that property which is the object of schemes implemented to avoid estate duty is captured within section 3(3)(d), may well allow those without a legal right over certain property, but with *de facto* influence over such property, to escape the deeming provisions of the section because of the untenable results that could otherwise follow. It therefore may be possible for the estate planner who wishes to minimise estate duty to retain some benefit or potential benefit over property, but to avoid the deeming provisions by ensuring that he has no legal right to appropriate or dispose of property and that he has no legal right to revoke or vary the provisions of any deed of disposition of property.

In terms of section 3(5)(c) the power contemplated in section 3(5)(b) is deemed to exist if the deceased could have obtained such a power by the exercise of another power by him, or by the exercise of a power by someone else with his consent. [40] Consent alone will not give rise to the power as contemplated in section 3(5)(b).[41] The wording of section 3(5)(c) distinguishes the power in that section from the power in section 3(5)(b). In section 3(5)(c) the form of power is not qualified as it is in section 3(5)(b), discussed above, it is simply " directly or indirectly by the exercise, either with or without notice, of power exercisable by him or with his consent".

Once again, given the ordinary meaning of power, power in section 3(5)(c) could mean *de facto* ability or a right. An example is the following clause in a trust deed:

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40 Stein *Estate Duty, Principles and Planning* 2nd ed (1997) Butterworths (hereinafter Stein) at p129

"During his lifetime the donor shall have the sole right to appoint trustees of his choice."

Given a wide interpretation of power the following situations could trigger the deeming provisions of section 3(5)(c):

- if the deceased was the donor, he could have appointed himself as sole trustee. In terms of the deeming provisions of section 3(5)(c) he could have had the power contemplated in section 3(5)(b)

- if the deceased was the donor's wife, she could have used her influence over him to ensure that he appointed her as sole trustee. In terms of the deeming provisions of section 3(5)(c) she could have the power contemplated in section 3(5)(b).

Thus the exercise of a *de facto* power could deem the power contemplated in section 3(5)(b) to exist. In the second situation, the influence of the donor's wife would have to be proved, which may be difficult. In addition, anyone with some influence over the donor may be at risk. Given the intention of the legislature, the legislature may well allow those without a legal right to exercise another power that would ensure that the deceased obtained the power in section 3(5)(b) to escape the deeming provisions of the section because of the untenable results that could follow. In terms of section 3(5)(c) therefore, I submit that the power exercisable must be a legal right.

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41 "If it is clear, however, that the deceased was merely one of a number of trustees and administrators, the provision may not be invoked," Stein p130

5. An analysis of the meaning of benefit in section 3(3)(d) of the Estate Duty Act 45 of 1955

The potential benefit to the deceased or his estate immediately prior to his death is clearly an important issue. With no potential benefit to the deceased or to his estate, there would be little point for the individual who is concerned about reducing estate duty yet anxious to still benefit from the property to enter into an arrangement where he retains power over such property. If reducing estate duty is an issue, such an estate planner should rather attempt to retain some potential benefit and forfeit the power he has over such property.

Competency to dispose of property is not sufficient to ensure that property falls within section 3(3)(d). The deceased must have been competent to dispose of the property "for his own benefit or the benefit of his estate".[42] It is said that even if a deceased retained wide powers over property and exercised these powers, thereby disposing of property, it holds no estate planning dangers as long as the dispositions are not for the benefit of the deceased or his estate.[43]

"Benefit" is not defined in the Act. Benefit can be defined as "something good gained or received, advantage or sake" [44].

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[42] Meyerowitz on Estates at 27.50 states "for example, even where the deceased had a power of appointment or retained under a deed of trust the power to revoke or vary the provisions thereof relating to such property, if neither he nor his estate could obtain the benefit by the exercise of the power of appointment or the revocation or variation of the rights under the trust deed, s 3(3)(d) is not applicable."
[43] Swart et al *The Planning and Administration of Estates – An Introduction* (1985) Butterworths at 123

The Act is concerned with the imposition of estate duty on the estates of deceased persons. Property and deemed property are defined for this purpose. In addition it is the disposition of property for the benefit of the deceased or his estate that section 3(3)(d) is aimed at. It follows that the potential benefit must flow from this disposition and "benefit" can therefore only be something pecuniary in nature gained or received, for purposes of section 3(3)(d). "Benefit" in section 3(3)(d) is therefore patrimonial in nature.

An estate planning technique that is frequently used is for the estate planner to transfer assets that display potential growth into a trust or company to ensure that the future growth on those assets accrues to another entity. This is done to ensure that the dutiable estate of the estate planner is reduced by that future growth and that the designated beneficiaries of the trust or the shareholders of the company benefit from the future growth rather than the estate planner or his estate. Provided that the estate planner or his estate may not benefit, even if the estate planner is competent to dispose of such property, section 3(3)(d) is unlikely to be a risk.

It is worth noting once again that the intention of the legislature is to capture property which is in effect that of the deceased, but has been dealt with in such a way that it would not fall into the dutiable estate but for the deeming provisions of section 3(3)(d).

6. Conclusion

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[44] Chambers at 122

The preceding analysis indicates that section 3(3)(d) may be applied to those with a legal right, in existence or potentially in existence, to dispose of property for their own benefit or for the benefit of their estates. It is worth ensuring that any estate planning is done bearing section 3(3)(d) in mind. As discussed, *de facto* power over property is unlikely to be sufficient to invoke section 3(3)(d).

The lack of reported case law on section 3(3)(d) is an indication that the legislature has not been entirely successful in its efforts to counter the avoidance of estate duty. As a "vague and unfortunate provision"[45] section 3(3)(d) will always be difficult to invoke. At the same time it remains a threat to any estate planner.

[45] Wiechers NJ and Vorster I *Administration of Estates* (1996) Butterworths at 9.4.4

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