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A General Power of Appointment Created after 1942 by the Will of the Donor Is Taxable to the Estate of the Donee without Regard to Probate of Donor's Will Where the Donor and Donee Were Killed Simultaneously under Circumstances Where the Survivor Could Not Be Determined.

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plinary proceedings and fail to notify others. The equal protection clause contemplates uniform treatment of all prisoners."[53]

The ruling of the instant case is a major step towards prison reform in California. The significance lies in the fact that the court has ruled unconstitutional an entire set of rules that were constructed by prison officials to punish and control their inmates. It represents a definite, if not drastic change from the adamant refusal of the courts to rule upon any internal prison matters. This decision, along with *Sostre v. Rockefeller*, may start a trend which would eliminate the great inconsistency that has prevailed since *Price v. Johnston* and *Coffin v. Reichard*. The deficiencies in present correctional facilities and programs have been adequately identified by a considerable amount of inquiry but inconsistency remains in that only a few courts have taken it upon themselves to order a change in these correctional programs. If *Clutchette* sets a precedent that will be followed by the courts when receiving due process complaints from prisoners, then there should be a great deal of needed prison reform across the nation.[54]

Arthur R. Thormann, Jr.

ESTATE TAX—SIMULTANEOUS DEATH—INT. REV. CODE OF 1954, § 2041—A GENERAL POWER OF APPOINTMENT CREATED AFTER 1942 BY THE WILL OF THE DONOR IS TAXABLE TO THE ESTATE OF THE DONEE WITHOUT REGARD TO PROBATE OF DONOR'S WILL WHERE THE DONOR AND DONEE WERE KILLED SIMULTANEOUSLY UNDER CIRCUMSTANCES WHERE THE SURVIVOR COULD NOT BE DETERMINED. *Bagley v. United States*, 443 F.2d 1266 (5th Cir. 1971).

Raymond E. Bagley and his wife, Kristine, were killed in an automobile accident in Florida, on December 23, 1962. Under the circumstances of the accident, it could not be determined which of the two died first. Both parties had wills, dated December 21, 1962. Mr. Bagley in his will created a testamentary trust[1] for the benefit of his wife

53 Clutchette v. Procunier, 328 F. Supp. 781, 784 (N.D. Cal. 1971).

54 *See* Landman v. Royster, 10 Cr. L. Rep. 2081 (Nov. 10, 1971). This was a class action brought under 42 U.S.C. 1983 by several prisoners to seek relief from the deprivation of their due process rights arising out of disciplinary practices employed in the Virginia prison system. The allegations were essentially the same as those presented in *Clutchette*, including the deprivation of the right to obtain counsel at disciplinary hearings and the arbitrary punishments handed out by prison officials for prison regulation violations. The Eastern District Court of Virginia came to the conclusion in this case that inmates are entitled to basic due process rights whenever major disciplinary infractions are punished. Their reasoning is that "certain due process rights both are necessary and will not unduly impede legitimate prison functions." *Id.* at 2082.

1 Appendix to Record, Exhibit No. 2, *Last Will and Testament of Raymond E. Bagley,*

during her lifetime, with a general testamentary power of appointment in her.[2] It was designated in the husband's will that Mrs. Bagley could exercise the power of appointment in her will by specific reference.[3] The language of his will was sufficient to create a general power of appointment.[4] The will also contained a provision that in event of simultaneous death, Mrs. Bagley would be deemed the survivor. The wife's will contained a similar clause which presumed her survivorship in event of simultaneous death. The value of the portion of Mr. Bagley's estate which came under the testamentary power was $300,462.38. His estate claimed a marital deduction[5] for that amount and Mrs. Bagley's Estate Tax Return therefore included the value of that portion as the amount taxable under the power of appointment.[6] Mrs. Bagley paid $42,711.77 estate tax[7] as a result of the inclusion of the power of ap-

Bagley v. United States, 443 F.2d 1266 (5th Cir. 1971). Excerpt from Mr. Bagley's will which creates a testamentary trust for his wife:

> Article VI. If my wife, Kristine, survives me all the rest, residue and remainder of my property of which I may die seized or possessed or to which I am in any manner entitled at the time of my death, including all lapsed gifts, devises and bequests, I give, devise and bequeath to my *trustee* hereinafter named, *in trust* nevertheless, for the following uses and purposes:
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> 1. To take, hold, manage, invest and reinvest the same, to collect the income and proceeds therefrom, and to pay to my wife, Kristine, or apply for her benefit, the net income thereof not less often than quarter-annually so long as she shall live. (Emphasis added.)

[2] *Id.* Excerpt from Mr. Bagley's will which creates general power of appointment in his wife:

> 3. Upon the death of my wife, Kristine, the principal of the trust fund then remaining shall be paid over free and discharged of all trusts as my wife *in her last will may appoint* by a provision specifically referring to this power; and I hereby confer upon my wife the right by a provision in her last will containing such a specific reference to this power to exercise said power of appointment in her sole and uncontrolled discretion and as she may wish including without limiting the generality of the foregoing, the right to exercise it in favor of her own estate. (Emphasis added.)

[3] *Id.*

[4] INT. REV. CODE of 1954, § 2041(b)(1) provides in part as follows:

> . . . .
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> (b) Definitions. For purposes of subsection (a)—
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> (1) General power of appointment—The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; . . . .

[5] INT. REV. CODE of 1954, § 2056.

[6] INT. REV. CODE of 1954, § 2041 provides in part as follows:

> (a) In General.—The value of the gross estate shall include the value of all property—
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> . . . .
>
> (2) Powers created after October 21, 1942.—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includable in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

[7] The federal estate tax is a tax on the exercise of the privilege of directing the course

pointment.[8] The power of appointment was determined to have never been exercised,[9] thus causing the assets to pass to certain alternative beneficiaries in accordance with a provision of the husband's will.[10] The wife's estate brought suit for refund of the taxes paid, alleging that she did not possess a power of appointment over the trust assets at the time of her death. This allegation is based on the contention that the power of appointment was not effective until Mr. Bagley's will had been duly probated. The trial court refused the refund.[11] Held—*Affirmed.* A general power of appointment created after 1942 by the will of the donor is taxable to the estate of the donee without regard to probate of donor's will where the donor and donee were killed simultaneously under circumstances where the survivor could not be determined.

To most people the word "estate" is associated with death and the passing of one's property at that time.[12] However, this is not necessarily true because almost everyone has an estate while he is still alive.[13] A person's estate is simply the sum, at any given time, of one's assets plus one's present and probable future earning power.[14] The phrase "estate planning" is an arrangement of a person's property during life with certain purposes in mind.[15] In estate planning, trusts and powers of appointment are important tools.[16] A power of appointment is defined

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of property at one's death. *See* Roger's Estate v. Helvering, 320 U.S. 410, 413, 64 S. Ct. 172, 174, 88 L. Ed. 134, 137 (1943); Whipple v. United States, 419 F.2d 494, 496 (6th Cir. 1969); Jandorf's Estate v. Commissioner, 171 F.2d 464, 465 (2d Cir. 1948).

8 The rationale for including in the gross estate of a decedent property subject to unexercised powers of appointments vested in one is apparent: One who has a power of appointment, and has a reasonable opportunity to exercise it, controls the disposition of the property whether he exercises the power or not. *See* Minority Report, H.R. Rep. No. 237 (part 2), 82nd Cong., 1st Sess. 2, quoted in MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION § 19.05, at 497 (1959); Chase Nat'l Bank v. United States, 278 U.S. 327, 338, 49 S. Ct. 126, 129, 73 L. Ed. 405, 409 (1929).

9 Under INT. REV. CODE of 1954, § 2041(a)(2), a post 1942 power need only be exercisable to be subject to taxation.

10 Appendix to Record, Exhibit No. 2, *Last Will and Testament of Raymond E. Bagley*, Bagley v. United States, 443 F.2d 1266 (5th Cir. 1971). Excerpt from Mr. Bagley's will directing disposition of assets in case of failure on wife's part to exercise the power of appointment:

> 4. If or to the extent that, my wife does not exercise the power of appointment given her in paragraph 3 of this Article VI, the trustee shall continue the trust with respect to the remaining principal and shall pay the net income for the period between the last income distribution date and the date of my wife's death and all net income thereafter (to certain named beneficiaries).

11 318 F. Supp. 765 (D. Fla. 1970).

12 P-H 1970 FED. TAXES, ESTATES & GIFT TAXES ¶ 110,102.

13 *Id.*

14 *Id.*

15 *Id.* These purposes are generally twofold. (1) Most effectively to take care of the estate owner and his dependents, particularly after the owner's death, and (2) to do this most economically.

16 Allen, *Use of Trusts and Powers of Appointment in Estate Planning*, 21 ARK. L. REV. 15 n.1 (1967-1968). Trusts and powers of appointment constitute two of the most useful tools of an estate planner. Their proper use materially assists in minimizing estate taxes, and whether used separately, together, or in conjunction with other planning devices, they

in property law as, "A power . . . created by a donor (one having property subject to his disposition as owner or otherwise) and conferred on a donee enabling such donee either to appoint persons to take the property or to appoint the proportionate shares which designatd persons shall take in the property."[17] Now that estate and gift taxation have become so important as considerations in estate planning, powers of appointment have gained greater usage.[18]

When using powers of appointment in estate planning, it is often necessary to consider other factors. In a power of appointment between a husband and wife, the marital deduction[19] is a very important element.[20] This deduction is a tax advantage which has revolutionized estate planning in many respects.[21] The marital deduction is an income splitting device used to distribute the tax burden on the right to pass property at death between spouses.[22] By coupling the use of a power of appointment with the requirements necessary to qualify the estate for the maximum marital deduction,[23] the testator has gained a tax advantage and also allowed flexibility in the future disposition of his estate.[24]

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allow a high degree of flexibility to be incorporated into the construction of an estate plan. Although a trust used alone provides a great degree of flexibility, the power of appointment is the most efficient device yet created from the standpoint of allowing a person to have a flexible disposition of his property, since it allows the donor to look into the future through the eyes of the donee. Today's decision may seem perfect; ten or twenty years from now it may seem ridiculous.

17 C. SMITH, REAL PROPERTY SURVEY 174 (1956). *See also* C. MOYNIHAN, LAW OF REAL PROPERTY 120 (1962).

18 P-H 1970 FED. TAXES, ESTATE & GIFT TAXES ¶ 110,207. ". . . the tax law has engrafted upon the law of property a new definition, or, rather, classification, of powers of appointment. It doesn't displace the traditional one, for that is still the law that settles property rights. But it does clamor for attention because it concerns the pocketbook."

19 INT. REV. CODE of 1954, § 2056.

20 2 H. WREN, CREATIVE ESTATE PLANNING § 12.01, at 945 (1970).

> The marital deduction is one of the most important considerations in drafting donative instruments. In both common-law and community property jurisdictions, a draftsman must have a thorough grasp of this complex deduction. For example, in a community property jurisdiction the deduction affects the client's separate property, which may be substantial.

21 P-H 1970 FED. TAXES, ESTATE & GIFT TAXES ¶ 110,301. Income splitting tax advantages which were granted to married couples in 1948 and later expanded in the 1954 Code were the estate tax marital deduction and the gift tax marital deduction. Through judicious use of the advantages, it is possible to effect tremendous tax savings, often amounting to a major part of what the tax would have been without applying the marital deduction.

22 LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 17.1, at 368 (2d ed. 1962); Jackson v. United States, 376 U.S. 503, 510, 84 S. Ct. 869, 873, 11 L. Ed.2d 871, 876 (1964); United States v. Stapf, 375 U.S. 118, 128, 84 S. Ct. 248, 255, 11 L. Ed.2d 195, 203 (1963).

23 Treas. Reg. § 20.2056(b)-5 (1970).

24 3 RABKIN & JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS § 8.28 (1970):

> One of the most difficult problems facing a testator who is creating either a legal life estate or a trust is what ultimate disposition to make of the property at the death of the life beneficiary, an event which may not occur for 25 or 30 years after his own death. Where, for example, the testator has young children and has put the bulk of his estate in trust for his wife, how is he to know which of his children will be in comfortable circumstances and which will be in need at the death of the wife? Or, if he has created a trust for a son, how is he to know whether it might be more desirable to make some provision for his son's wife, usually the neglected person in this

The instant problem relates to a power of appointment and the creation of the taxable event. According to property law, the donee of a power of appointment does not own the property subject to the power.[25] For estate tax purposes, however, property over which a decedent possesses a general power of appointment at death is treated as if the decedent actually "owned" the property in the conventional sense.[26] Generally, powers of appointment are created by two means; creation through an inter vivos instrument or creation by will.[27] Since a will is ordinarily held not to speak until the death of the testator,[28] a power created by the will is deemed created at the date of the testator's death.[29]

The court in the instant case was faced with the questions of: When does a power of appointment created through a will become effective and is it effective at the death of the testator or when the will has been duly probated? To answer these queries the court turned to one of its own cases, *Jenkins v. United States*.[30] That case involved an inter vivos power of appointment left by the will of one sister to another sister who died seventeen days later and before the first sister's will could be probated. In *Jenkins* the court stated that under the laws of Georgia,[31] the decedent could have made conveyances of property in which she was given a life estate with an unlimited power of disposition under her sister's will at any time after her sister's death.[32] Based on that reasoning it was held that the substantive powers she received at the time of her sister's death came within the definition of a general power of appointment which were clearly exercisable at the time of her death.[33] The fact that the decedent did not then possess a fully perfected record title was not controlling for federal estate tax purposes. The court then reasoned that the surviving sister was aware of the

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type of situation, at the death of his son, rather than merely to distribute the principal among the son's children? Even if the principal is to be distributed among the son's children, an equal division may not be the most advisable disposition. The improbability of the testator obtaining the answers to these and similar questions during his own life makes the power of appointment a useful device in many estate plans.

25 RESTATEMENT OF PROPERTY § 318, at 1818 (1940). *See also* SIMES, FUTURE INTERESTS § 168 (1951).

26 Jenkins v. United States, 428 F.2d 538, 543 (5th Cir. 1970). *See also* LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 12.1, at 253 (2d ed. 1962).

27 Treas. Reg. § 20.2041-1(e) (1970).

28 LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES § 12.9, at 264 (2d ed. 1962).

29 Treas. Reg. § 20.2041-1(e), § 20.2041-3(b) (1970).

30 428 F.2d 538 (5th Cir. 1970).

31 GA. CODE ANN. §§ 113-105, 113-801, 113-802 (1959).

32 Jenkins v. United States, 428 F.2d 538, 548 (5th Cir. 1970). The court reasoned that under Georgia law, the process of probating a will is essentially a formal validation of the property interest which came into existence upon the death of the testator. In Georgia, as in other jurisdictions, probate is title-accommodating rather than interest-creating. Northrop v. Columbian Lumber, 186 F. 770 (5th Cir. 1911).

33 Jenkins v. United States, 428 F.2d 538 (5th Cir. 1970).

power of appointment and had time in which to exercise the same if she desired.[34]

By way of analogy the majority opinion in the instant case is further strengthened by the case of *Rodgers v. United States*,[35] involving a similar incident with probate in connection with the gift tax.[36] The taxpayer's wife left all of her property to him by will, but the will was never offered for probate. The taxpayer made certain gifts in trust of his wife's former property. He then attempted to resist the levy of the gift tax on the ground that he had no title because the will had never been probated. The court rejected that argument, and held the husband liable for payment of the gift tax.[37] Based on the aforementioned cases, probate does not seem to be a requisite for levy of either the estate or gift tax.

Although federal estate tax does not depend on a label that a state places on the transfer,[38] the federal courts must look to relevant state court decisions and law[39] to determine the nature of the power of appointment and the construction of the will.[40] The importance of the relationship of state law to federal taxation is further apparent in the case of *Morgan v. Commissioner*,[41] where the Supreme Court stated:

> State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local [state] law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.[42]

A case in conflict with the majority opinion of the instant case is *Townsend v. United States*.[43] In that case, Texas law provided that when a person dies leaving a will, all his *estate* devised or bequeathed vests immediately in the devisees or legatees.[44] The husband by his will left his wife all his estate for life coupled with a general power of appointment exercisable only during her life. The wife died six days after the husband. The court said that the Texas statute did not apply

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34 *Id.* at 551.
35 218 F.2d 760 (5th Cir. 1955).
36 INT. REV. CODE of 1954, § 2501.
37 Rodgers v. United States, 218 F.2d 760 (5th Cir. 1955).
38 Jenkins v. United States, 428 F.2d 538, 547 (5th Cir. 1970); Grossman v. Campbell, 368 F.2d 206 (5th Cir. 1966).
39 Potter v. United States, 269 F. Supp. 545 (D. W.Va. 1967).
40 *In re* Estate of Jaekel, 227 A.2d 851 (Pa. 1967).
41 Morgan v. Commissioner, 309 U.S. 78, 60 S. Ct. 424, 84 L. Ed. 585 (1940).
42 *Id.* at 80, 60 S. Ct. at 426, 84 L. Ed. at 588.
43 232 F. Supp. 219 (E.D. Tex. 1964).
44 *Id.* at 222. *See also* TEX. PROB. CODE ANN. § 37 (1956), *as amended* TEX. PROBATE CODE ANN. § 37 (Supp. 1971).

because a power of appointment is neither property nor a property right and thus is not an estate. Therefore, the power of appointment does not pass until the will is probated.[45] Texas has subsequently amended its statute to include powers of appointment.[46]

The majority in the *Bagley* case applied the aforementioned reasoning by looking to the state law and holding that under Florida law,[47] probate was title-accommodating rather than interest creating; thereby making probate of the will unnecessary in regard to the levy of the estate tax.[48] In sum, the power of appointment, like a legacy or devise, is inchoate and dates back to the date of death upon probate.[49] It was further indicated by the majority that the length of survival of the donee is without legal significance.[50]

The majority reasoning, as to the effect of probate on the estate, is basically sound. From a practical viewpoint, if possession of a general power of appointment was based on whether the will had been offered for probate or not, many general powers would never be taxed because some wills are never probated and others are neither probated, filed for probate, nor offered for probate for some time.[51] The tying of the taxable event to the probate of the will would lead to arbitrary decisions on when or if the will should be offered for probate. The result would be completely indecisive—a result which is contrary to the intent of Congress.[52] Congress in passing the *Power of Appointment Act of 1951*[53] intended to provide a test of taxability which is simple, clear-cut and easy to apply.[54] The committee on this act believed that the most important consideration was to make the law simple and definite enough to be understood and applied by the average lawyer.[55] The probate of the will therefore does not appear to be a requirement as to the taxability of a power of appointment.

The dissenting opinion in *Bagley* states that the question of probate is not controlling and is superfluous.[56] The dissent's contention is that

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45 Townsend v. United States, 232 F. Supp. 219 (E.D. Tex. 1964).

46 TEX. PROB. CODE ANN. § 37 (Supp. 1971). "When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, *and all powers of appointment granted in such will*, shall vest immediately in the devisees or legatees of such estate *and donees of such powers*; . . . ." (Emphasis added.)

47 FLA. STAT. ANN. §§ 731.05, 731.21 (1964). *See also* Hurt v. Davidson, 178 So. 556 (Fla. 1938); Hamilton v. Florida National Bank, 151 So. 409 (Fla. 1933), for interpretation of Florida law.

48 Bagley v. United States, 443 F.2d 1266, 1268 (5th Cir. 1971).

49 *Id.* at 1269.

50 *Id.* at 1269.

51 Note, 3 GA. L. REV. 766 (1969).

52 S. Rep. No. 382, 82nd Cong., 1st Sess. (1951).

53 Power of Appointment Act of 1951, 65 Stat. 91 (1951), *as amended* 26 U.S.C. § 2041 (1964).

54 S. Rep. No. 382, 82nd Cong., 1st Sess. (1951).

55 *Id.*

56 Bagley v. United States, 443 F.2d 1266, 1272 (5th Cir. 1971) (dissenting opinion).

the controlling factors are Mrs. Bagley's lack of knowledge[57] and capacity[58] coupled with a lack of opportunity to exercise the power.[59] In *Townsend*, the court realized that the fact that the deceased wife did not have a *reasonable time* after her husband's death until her own to decide whether to accept or renounce her power of appointment did not mean that she did not have a power of appointment within the meaning of the statute providing for inclusion of the power in her estate.[60] The Supreme Court, in *Commissioner v. Noel Estate*,[61] stated that, "It would stretch the imagination to think that Congress intended to measure estate tax liability by an individual's fluctuating, day-by-day, hour-by-hour capacity to dispose of property which he owns."[62] In *Noel* it was held that estate tax liability depends on a general, legal power to exercise ownership, without regard to the owner's ability to exercise it at a particular moment.[63] Contrary to the dissent in *Bagley*, it would appear that knowledge or time to exercise are not prerequisites for the taxability of powers of appointment.

In the final analysis the decision in the instant case appears just and correct. Mr. and Mrs. Bagley accomplished a portion of what they intended through their wills and the power of appointment. The husband's estate received a marital deduction, thus gaining a tax savings to his estate because of the progressive tax structure of the estate tax. The flexibility in the estate to be gained through the power of appointment was unfortunately lost.

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57 Congress in passing the Power of Appointment Act of 1951 was aware that sometimes a donee would not have knowledge of the power of appointment. This is evident by Congress' discussion of the act which stated, "A donee of a power of appointment, particularly under a living trust agreement, often does not learn that he has the power until long after the trust was created. Living trusts and wills frequently give powers of appointment to persons not born or unascertainable at the time when the trust is created." Pub. L. 82-58 (June 28, 1951), *United States Code Cong. & Ad. News* 1530 (1951).

58 Rev. Rul. 55-518, 1955-2 CUM. BULL. 384, discusses capacity of donee in regard to a power of appointment, citing that there is a distinction between existence of a power and a capacity to exercise it.

59 1 MURPHY'S WILL CLAUSES, Form 8:6c at 362.2 (1970). In citing the *Bagley* case from federal district court, 296 F. Supp. 203 (M.D. Ga. 1968), it was stated, "The fact that simultaneous death of the wife along with the husband precluded her making a new will or changing her will so as to include an exercise of the power of appointment, the doctrine of impossibility of performance, was not considered by the court."

60 Townsend v. United States, 232 F. Supp. 219 (E.D. Tex. 1964).

61 Commissioner v. Noel Estate, 380 U.S. 678, 85 S. Ct. 1238, 14 L. Ed.2d 159 (1965). Just prior to boarding an airplane which later crashed in flight, the decedent applied for flight insurance policies, naming his wife as beneficiary. The policies, which granted the insured the right to assign them or to change the beneficiary, were handed to the wife, who was paid their face value following the decedent's death from the crash. The court held that for estate tax purposes decedent possessed incidents of ownership at the time of his death, without regard to his ability to exercise them at any given moment, as he had the power of assignment of the policy or to change the beneficiary. *See* INT. REV. CODE of 1954, § 2042.

62 Commissioner v. Noel Estate, 380 U.S. 678, 684, 85 S. Ct. 1238, 1242, 14 L. Ed.2d 159, 163 (1965).

63 *Id.*