

January 1973

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Recommended Citation

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FEDERAL ESTATE TAXATION OF WRONGFUL DEATH PROCEEDS

Connecticut Bank and Trust Co. v. United States 465 F.2d 760 (2d Cir. 1972)

Pursuant to a Connecticut statute,¹ the executor of decedents' estate commenced a wrongful death action, but a monetary settlement was reached before trial. The executor did not include the proceeds of the settlement in decedents' gross estate when filing the estate tax return. The Commissioner, relying upon section 2033,² assessed a defi-

1. Although the decedents were killed in Virginia, the court held that Connecticut law controlled because New York, where the wrongful death action was commenced, applies the law of the state that has the strongest interest in the resolution of the case. Since the decedents were domiciled in Connecticut at the time of their death, Connecticut's concern with the administration of the estates was the strongest state interest involved. *See Connecticut Bank & Trust Co. v. United States*, 330 F. Supp. 997 (D. Conn. 1971). CONN. GEN. STAT. REV. § 52-555 (Supp. 1969) states:

In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of.

Recoveries under the Connecticut wrongful death statute are distributed "as personal estate in accordance with the last will and testament of the deceased if there is one or, if not, in accordance with the law concerning the distribution of intestate personal estate . . ." CONN. GEN. STAT. REV. § 45-280 (Supp. 1969).

2. The Commissioner also attempted to tax the proceeds under § 2041 (power of appointment), but the court of appeals summarily rejected the argument, because, among other reasons, "property subject to a § 2041 power of appointment must be in existence prior to the time of the decedent's death." *Connecticut Bank & Trust Co. v. United States*, 465 F.2d 760, 764 (2d Cir. 1972).

Death benefits may be includible under sections of the Code other than § 2033. Death benefits may come in various forms: as an insurance plan, *see, e.g.*, *Estate of Clew v. Commissioner*, 148 F.2d 76 (5th Cir. 1945); *Commissioner v. Estate of Keller*, 113 F.2d 833 (3d Cir. 1940); *Anthracite Trust Co. v. Phillips*, 49 F.2d 910 (M.D. Pa. 1931); as an employer program, *see, e.g.*, *Treas. Reg. § 20.2039-1(b)(2)* (1972); or as statutory provisions such as workmen's compensation, *see, e.g.*, *ALA. CODE tit. 26, § 253 et seq.* (1958); *ILL. ANN. STAT. ch. 48, § 138.1 et seq.* (Smith-Hurd Supp. 1972); *MO. REV. STAT. § 287.010 et seq.* (1969); and social security, *see 42 U.S.C. § 401 et seq.* (1970). The Estate Tax Code has been specifically expanded to include some of these items within the gross estate of the decedent. *See,*

ciency. After payment, a refund suit was initiated in the district court, which held that the settlement was taxable.³ The court of appeals reversed and *held*: The pre-trial settlement proceeds of a wrongful death action are not includible in the decedents' gross estate under section 2033 of the Internal Revenue Code of 1954.⁴

Section 2033 includes in decedent's estate all interests in property held at the time of decedent's death.⁵ "Property" includes realty,⁶ chattels,⁷ goodwill,⁸ stocks,⁹ and choses in action,¹⁰ including tort and

e.g., INT. REV. CODE OF 1954, § 2039 (employer death benefit plans); INT. REV. CODE OF 1954, § 2049 (insurance plans).

3. The decision below is reported as Connecticut Bank & Trust Co. v. United States, 330 F. Supp. 977 (D. Conn. 1971).

4. INT. REV. CODE OF 1954, § 2033:

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of death.

Treas. Reg. § 20.2033-1(a), T.D. 6684, 1963-2 CUM. BULL. 411 states in part:

The gross estate of a decedent who was a citizen or resident of the United States at the time of his death includes under section 2033 the value of all property, whether real or personal, tangible or intangible, and wherever situated beneficially owned by the decedent at the time of his death

For a discussion of amendments to § 202(a) of the original 1916 Act, *see* H.R. REP. No. 704, 73d Cong., 2d Sess. 36 (1950); S. REP. No. 558, 73d Cong., 2d Sess. 46 (1950); H.R. REP. No. 1385 (Conf.), 73d Cong., 2d Sess. 25 (1950) (discussions of the exception for real estate situated outside the United States). *See also* H.R. REP. No. 1, 69th Cong., 1st Sess. (1946), for a discussion of the elimination of the restrictive clause that appeared after "at the time of his death" which read, "which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate."

5. INT. REV. CODE OF 1954, § 2033.

6. *See* Treas. Reg. § 20.2033(1), T.D. 6684, 1963-2 CUM. BULL. 411: "The gross estate of a decedent . . . includes under section 2033 the value of all property, whether real or personal . . ." The holder of title to realty is considered the owner of the land, even if it is mortgaged. Estate of Henry Adams Ashforth, 30 B.T.A. 1306 (1934). *See also* 2 J. MERTENS, LAW OF FEDERAL GIFT AND ESTATE TAXATION § 14.11 (Supp. 1959) [hereinafter cited as MERTENS].

7. *See* Treas. Reg. § 20.2033(1), T.D. 6684, 1963-2 CUM. BULL. 411. All household and personal effects of a decedent are includible in the gross estate. Estate of Leonard S. Waldman, 46 B.T.A. 291 (1942). *See also* C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES § 4.7 (2d ed. 1962) [hereinafter cited as LOWNDES & KRAMER]; 2 MERTENS § 14.10.

8. *See* Treas. Reg. § 20.2031-3 (1958), which lists good will as a factor to be considered in valuing an interest in a business. *See also* 2 MERTENS § 14.30.

9. *See, e.g.*, Crocker v. Helvering, 76 F.2d 974 (D.C. Cir. 1935). *See also* LOWNDES & KRAMER § 4.7; 2 MERTENS § 14.15.

10. Examples of choses in action in which the decedent was held to have a property right under § 2033 or its predecessor include: Commissioner v. Wrag, 141 F.2d 638 (1st Cir. 1944) (right of reimbursement against a primary obligor); Millard v. Maloney, 121 F.2d 257 (3d Cir. 1941) (claims arising out of a will controversy);

contract actions.¹¹ Property, therefore, encompasses both survival and wrongful death actions.¹² Survival statutes provide that causes of action for personal injury arising prior to death survive the decedent, and may be enlarged to include damages for death itself.¹³ The theory behind wrongful death recovery under a survival statute is to compensate the estate for the loss of decedent's future earnings due to decedent's death.¹⁴ Wrongful death statutes compensate certain statutorily designated beneficiaries for the loss of future support and create a new cause of action after the decedent has died.¹⁵ Some statutes combine the elements of both wrongful death and survival statutes. Although

Estate of Jones, 1961 P-H Tax Ct. Mem. 617 (right to commission); Estate of Eleanor Hughes Beggs, 13 T.C. 131 (1949) (claims arising out of loans); Estate of Elizabeth Harper, 11 T.C. 717 (1948) (notes, secured and unsecured); Estate of Leonard B. McKitterick, 42 B.T.A. 130 (1940) (right to a bonus); Estate of G. Percy McGlue, 41 B.T.A. 1199 (1940) (right to a commission); Farmers Bank & Trust Co. v. Commissioner, 10 B.T.A. 43 (1928) (contract claim for money). In all cases such claims must be enforceable, *see* Rev. Rul. 57-54, 1957-1 CUM. BULL. 298, and not so speculative that they have no value, *see, e.g.*, Estate of Isabella N. Skinker, 13 B.T.A. 846 (1928); Estate of Joseph Nemerov, 1956 P-H Tax Ct. Mem. 64. *See also* LOWNDES & KRAMER § 4.7; 2 MERTENS § 14.18.

11. Contract actions are treated as property and are included in decedent's gross estate. Estate of Rainger v. Commissioner, 183 F.2d 587 (9th Cir. 1950); Farmers Bank & Trust Co., 10 B.T.A. 43 (1928). *See also* 2 MERTENS § 14.18.

For tort actions treated as property under § 2033 and its predecessor, *see* Rev. Rul. 69-8, 1969-1 CUM. BULL. 219; Estate of Frederick Rodiek, 33 B.T.A. 1020 (1936) (tort treated as property, but only includible if actual or potential). *Cf.* United States v. Safety Car Heating & Lighting Co., 297 U.S. 88 (1936) (tort action is property for income tax purposes only if the cause of action is actually existing); Old Colony Trust Co. v. United States, 15 F. Supp. 417 (D. Mass. 1936) (claim for refund of income tax).

12. At common law, no new right of action arose by way of the decedent's wrongful death. Survival and wrongful death statutes were adopted to mitigate the harshness of this rule. *See* F. HARPER & F. JAMES, *THE LAW OF TORTS* 1285-88, 1329-33 (1956); W. PROSSER, *LAW OF TORTS* 898-914 (4th ed. 1971) [hereinafter cited as PROSSER]; S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* §§ 1:1-1:6 (1966) [hereinafter cited as SPEISER]; Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386 (1942). The first wrongful death act was Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93.

13. The survival statutes that enlarge into wrongful death actions upon death include IOWA CODE ANN. § 611.20 (1950); LA. CIV. CODE ANN. art. 2315 (West 1971); N.H. REV. STAT. ANN. § 556:12 (Supp. 1971).

14. *See* PROSSER 905; SPEISER § 3:2. One statute that does not follow this general approach is N.H. REV. STAT. ANN. § 556:12 (Supp. 1971), which provides the action shall be brought for the benefit of decedent's dependents.

15. *See generally* SPEISER §§ 1:8-1:20; Oppenheim, *supra* note 12, at 386; Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545 (1935).

For the text of all federal and state wrongful death statutes, *see* SPEISER at Appendix A.

these statutes provide only for the recovery of death benefits, not for pain and suffering in a non-instantaneous death situation, they nevertheless incorporate the survival theory that the action is one the decedent possessed.¹⁶

In determining whether a decedent has a taxable interest¹⁷ in wrongful death benefits, revenue rulings concerning analogous death benefits have established three criteria.¹⁸ The primary criterion is whether the decedent had control over the designation of the beneficiaries. The other two criteria are whether the decedent had a property interest in the funds and whether he had control over the amount paid. The rationale behind these three criteria seems to be that decedent lacks the requisite nexus to the benefit proceeds to be considered the owner of the proceeds.¹⁹

As applied to wrongful death recovery, these criteria do not clearly determine whether the decedent has a taxable property interest in the

16. The wrongful death statutes that are written as survival actions are CONN. GEN. STAT. REV. § 52-555 (1968); TENN. CODE ANN. § 20-607 (1956).

17. An "interest" as used in § 2033 connotes an interest by property law rather than a concept created by the tax laws. See *Helvering v. Safe Deposit and Trust Co.*, 316 U.S. 56 (1942). Thus the determination of what is taxable interest is strongly influenced by state law. See generally LOWNDES & KRAMER §§ 4.15-4.18.

18. Rev. Rul. 67-277, 1967-2 CUM. BULL. 322 (recovery granted by the Federal Survivor's Insurance Benefit Law, 42 U.S.C. §§ 401 *et seq.* (1970), not includible under § 2033); Rev. Rul. 60-70, 1960-1 CUM. BULL. 372 (recovery granted by the Railroad Retirement Act, 45 U.S.C. § 228e (1970), not includible).

19. The revenue rulings, see note 18 *supra*, state that such personal direction, which is defined largely by the ability to control the proceeds, was lacking and therefore no "interest" existed. Although the ability to designate the beneficiaries is the primary criterion, the other criteria are taken into account in conjunction with the "designation" standard. See note 20 *infra*.

An analogous situation to these lump sum payments exists in employee death benefits. If the decedent lacks power to designate the recipients of the death benefits and there was no exchange of consideration, the benefits will not be taxed. See, e.g., *Glenn v. Hanner*, 212 F.2d 483 (6th Cir. 1954); *Libbey v. United States*, 147 F. Supp. 383 (N.D. Cal. 1956); *Estate of William S. Miller*, 14 T.C. 657 (1950); *Estate of Eugene F. Saxton*, 12 T.C. 569 (1949). See also LOWNDES & KRAMER § 4.2; Note, *The Generic Estate Taxation of Employee Death Benefits Beyond the Ambit of Section 2039*, 1971 WASH. U.L.Q. 585, 589.

However, if decedent designates the beneficiary, the benefit payment will be taxed. See, e.g., *Sample v. United States*, 7 Am. Fed. Tax R. 2d 1782 (W.D. Pa. 1961); *Altshuler v. United States*, 169 F. Supp. 456 (W.D. Mo. 1958); *Kernochnan v. United States*, 29 F. Supp. 860 (Ct. Cl. 1939); *Estate of Adeline F. Davis*, 27 T.C. 378 (1956); *Estate of Raphael A. Casilear*, 1945 P-H Tax Ct. Mem. 1084; *Estate of William J. O'Shea*, 47 B.T.A. 646 (1942); *Estate of Stuart Wilson*, 42 B.T.A. 1196 (1940); G.C.M. 27242, 1952-1 CUM. BULL. 160, *modifying* G.C.M. 17817, 1937-1 CUM. BULL. 281, *revoked by* Rev. Rul. 97, 1967-1 CUM. BULL. 380.

proceeds under section 2033. The first criterion of a property interest in an established benefit fund may be viewed in two possible ways as applied to wrongful death: that the criterion is irrelevant because there is no pre-existing fund in which a person may have an interest; or that the lack of a fund indicates that the decedent had no interest in any possible recovery. The criterion regarding control indicates that wrongful death statutes, unlike other statutory death benefits, may give the decedent some "control," since some wrongful death statutes provide that a sum recovered may pass through his will.²⁰ Therefore it may be argued that since the decedent can "control" who recovers and how much is recovered, he therefore has a property interest.

Applying the same three criteria to employee death benefits, the IRS has ruled that when no right to compensation is "vested in the employee," he has no "interest."²¹ The rationale is that if the employee

20. CONN. GEN. STAT. REV. § 45-280 (Supp. 1969) states that damages for wrongful death "shall be distributed as personal estate in accordance with the last will and testament of the deceased . . ." IOWA CODE ANN. § 635.9 (1950) states that damages recovered for wrongful death "shall be disposed of as personal property belonging to the estate of the deceased . . ."

Many employee death benefit cases lay primary emphasis on the ability of the decedent to designate the beneficiaries in determining if the decedent had an interest in the benefits. See, e.g., *Estate of Garber v. Commissioner*, 271 F.2d 97 (3d Cir. 1959); *Goodman v. Granger*, 243 F.2d 264 (3d Cir. 1957). But see *Second Nat. Bank v. Dallman*, 209 F.2d 321 (7th Cir. 1954). *Garber* and *Granger* would seem to indicate that the ability to designate the beneficiary is sufficient without more to determine that the decedent had an interest in the benefits. However, the Supreme Court in *Helvering v. Safe Deposit & Trust Co.*, 316 U.S. 56 (1942), held that an unexercised power of appointment which in effect controlled the designation of the beneficiaries was not includible within the decedent's gross estate. This result would seemingly contradict these holdings in the employee death benefits cases.

21. Rev. Rul. 56-637, 1956-2 CUM. BULL. 600.

For employee death benefits, that interest is determined by the degree of control that the decedent had over the designation of the recipients of the death benefits and by the degree of certainty that the property would vest in the recipient upon the employee's death. See AMERICAN LAW INSTITUTE, FEDERAL ESTATE AND GIFT TAXATION RECOMMENDATIONS 63 (1969) [hereinafter cited as ALI RECOMMENDATIONS]; LOWNDES & KRAMER § 4.2; Kramer, *Employee Benefits and Federal Estate and Gift Taxes*, 1959 DUKE L.J. 341; McDowell, *Estate and Income Tax Aspects of Employee Death Benefits Including Corporate Payments to Executives' Widows*, N.Y.U. 25TH INST. ON FED. TAX. 985 (1967); Polisher & Kerr, *Employer Death Benefit Payments*, 57 N.J. ST. B.J. 60 (1971); Note, *The Generic Estate Taxation of Employee Death Benefits Beyond the Ambit of Section 2039*, 1971 WASH. U.L.Q. 585.

Employee death benefits were often taxed under INT. REV. CODE OF 1939, ch. 3, § 811(a), 53 Stat. 120 (now INT. REV. CODE OF 1954, § 2033). Even now such benefits may be taxable under § 2033. See S. REP. No. 1622, 83d Cong., 2d Sess. 469, 472 (1954); H.R. REP. No. 8300, 83d Cong., 2d Sess. A 314, A 316 (1954), for a

does not have a right to the funds, then his interest is a "mere expectancy."²² In wrongful death actions recovery is contingent upon the commission of a tort and an award of damages. Since such potential recovery is not "vested,"²³ it represents an expectancy in which the decedent has no property interest.²⁴

Several revenue rulings which directly deal with the "interest" question establish that settlement proceeds recovered under wrongful death acts are not includible in the gross estate.²⁵ The rulings state that, "In his lifetime, decedent never had an interest in the action or the proceeds," and therefore, "nothing passed" from the decedent to his beneficiaries.²⁶ The meaning of this statement is unclear. It may mean

discussion of the relationship between § 2039 and § 2033. *See also* ALI RECOMMENDATION at 67; Covey, *Estate, Gift and Income Taxation: 1970 Developments: Employment Benefits*, 5 INST. ON EST. PLANNING § 71.112 (1971); McDowell, *supra* at 985; Note, *Employee Death Benefits*, 26 TAX L. REV. 329-30 (1971); 10 U.C.L.A.L. REV. 619-20 (1963).

22. If the employment benefits are revocable or modifiable by the employer or if the employer's obligation to pay is not absolute, the benefits will not be taxed because they are not considered a property interest, but an "expectancy." *See, e.g.*, *Worthen v. United States*, 192 F. Supp. 727 (D. Mass. 1961); *Libbey v. United States*, 147 F. Supp. 383 (N.D. Cal. 1956); *Molter v. United States*, 146 F. Supp. 497 (E.D.N.Y. 1956); *Hanner v. Glenn*, 111 F. Supp. 52 (W.D. Ky. 1953); *Dimock v. Corwin*, 19 F. Supp. 56 (E.D.N.Y. 1937); *Kramer v. United States*, 406 F.2d 1363 (Ct. Cl. 1969); *Estate of Albert L. Salt*, 17 T.C. 92 (1951); *Estate of William S. Miller*, 14 T.C. 657 (1950); *Estate of Eugene F. Saxton*, 12 T.C. 569 (1949); *Estate of Emil L. Stake*, 11 T.C. 817 (1948). *See also* LOWNDES & KRAMER § 4.2; Beck, *Family Benefits and Family Security: Employee Death Benefit Payments*, N.Y.U. 13TH INST. ON FED. TAX. 471, 490-94 (1955); *Kramer, supra* note 21, at 348-50; *Polisher & Kerr, supra* note 21, at 11-14. *Cf. Estate of John Morrow*, 19 T.C. 1068 (1953).

23. It might be argued, in desperation, that every wrongful death recovery is vested, if one is willing to assume that the possibility of such a right of action has been granted to the citizens of the state upon passage of the wrongful death act.

24. *But see* note 20 *supra* and accompanying text.

25. *E.g.*, Rev. Rul. 69-8, 1969-1 CUM. BULL. 219 (recovery for wrongful death created by the Death on the High Seas Act not taxable because the Act created a new cause of action brought on behalf of statutorily designated beneficiaries); Rev. Rul. 68-88, 1968-1 CUM. BULL. 397 (recovery for wrongful death created by the Virginia wrongful death act not taxable); Rev. Rul. 54-19, 1954-1 CUM. BULL. 179 (cause of action created by the New Jersey wrongful death act not taxable because the act created a new cause of action in the administrator, acting for the benefit of those entitled to recover under the state's intestate statute).

26. In Rev. Rul. 69-8, 1969-1 CUM. BULL. 219, for example, the service ruled that: This right of action arose with the decedent's death by virtue of the statute, which also governs the distribution of the proceeds. The decedent in his lifetime never had an interest in either the right of action or the proceeds. Therefore, with respect to damages recoverable under the Act, nothing passed from the decedent to the beneficiaries which would be includible in his gross

that: (1) a decedent can not have an interest in recovery under any type of wrongful death statute; (2) a decedent could not have an interest under the specific statutes involved in each ruling, namely, those not based on a survival theory;²⁷ or (3) although the decedent can have an interest in wrongful death actions, it is not an interest he can hold *in his lifetime*. If the first is correct, these rulings conflict with the federal estate tax doctrine that property interests should be determined according to state law.²⁸ More specifically, the rulings would conflict with survival-type wrongful death statutes²⁹ under which the decedent might be deemed to possess a property interest.³⁰ If the second interpretation is correct, these rulings are not conclusive as to a decedent's interest in actions brought under survival statutes or survival-type wrongful death statutes, because the theory of these statutes is that the decedent originally possessed the cause of action.³¹ If the third interpretation is correct, however, the crucial language becomes "in his lifetime."

Normally, the interpretation of the temporal requirement "at the time of his death" has involved the valuation of pre-existing interests³²

estate for Federal estate tax purposes. . . ."

The statement was originally made in Rev. Rul. 54-19, 1954-1 CUM. BULL. 179, and thereafter cited in Rev. Rul. 68-88, 1968-1 CUM. BULL. 397 and Rev. Rul. 69-8, 1969-1 CUM. BULL. 219.

27. See note 15 *supra*.

28. The principle that state law is determinative in ascertaining the quantum and quality of a decedent's property interest for estate tax purpose is well established. See *e.g.*, Commissioner v. Estate of Bosch, 387 U.S. 456 (1967); Magruder v. Supplee, 316 U.S. 394 (1942); Morgan v. Commissioner, 309 U.S. 78 (1940); Doll v. Commissioner, 149 F.2d 239 (8th Cir. 1945); Brown v. Commissioner, 119 F.2d 983 (7th Cir. 1941); INT. REV. CODE OF 1954, § 2053(a). See generally LOWNDES & KRAMER §§ 4.15-4.18. However, this principle is based on the federal estate tax point of view. From the state's point of view, it is doubtful that the state passes wrongful death statutes with the federal estate tax consequences in mind.

29. See, *e.g.*, CONN. GEN. STAT. REV. § 52-555 (Supp. 1969).

30. See, *e.g.*, Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Kling v. Torello, 87 Conn. 301, 87 A. 987 (1913), which interpret the predecessor of CONN. GEN. STAT. REV. § 52-555 (Supp. 1969) as meaning that the decedent possessed the cause of action.

31. See notes 13, 16 *supra*.

32. *E.g.*, The regulations rule that "included" property is income that has accrued at the decedent's death, while "excluded" property includes income accruing after the decedent's death. Treas. Reg. § 20.2032-1(d) (1971).

In such a valuation case, a court held that "at the time of death" meant "after the time of death," because that is when contingencies in transferring the benefits stop operating. See Goodman v. Granger, 243 F.2d 264 (3d Cir. 1957), in which em-

or complete divestment of an interest before death,³³ rather than a determination of when a legal interest begins. The principal case deals with this last-named issue.

The Connecticut wrongful death act operates on the survival theory of wrongful death.³⁴ The key issue in *Connecticut Bank* is whether the decedent held the property³⁵ interest³⁶ "at the time of his death." Stressing the time of death language, the government argued that the cause of action arose simultaneously with death, thereby vesting a property interest in the decedent.³⁷ The court rejected this argument on the basis of "simple logic,"³⁸ citing a recent Connecticut Supreme Court

ployee "contingent benefits" were valued from just after death, at which time they first possessed a value.

33. *Compare Sizer v. United States*, 65 Ct. Cl. 450 (1928), and *Henry F. Jaeger*, 33 B.T.A. 989, *aff'd*, 88 F.2d 1011 (7th Cir. 1935), holding that there was not a complete divestment of property before death, *with United States v. Union Trust Co.*, 90 F.2d 702 (7th Cir. 1937), and *Estate of J. Fred Lohman*, 1947 P-H Tax Ct. Mem. 925, holding that there was complete divestment before death. *See generally* LOWNDES & KRAMER § 4.12.

34. *See* notes 1, 16 *supra*.

35. The action for wrongful death was accepted as "property" by the court of appeals. *See* notes 5-16 *supra*.

36. The court of appeals apparently accepted the lower court finding that this action was a "legal interest." For a discussion of "interest," *see* notes 17-31 *supra*. The lower court, 330 F. Supp. at 1001, made the conclusion "that the plaintiff's decedents thus held a *property interest* disposable by Will which must be included in their respective gross estates." (Emphasis added.) The court of appeals, 465 F.2d at 762, stated that "the district court . . . held that the wrongful death recoveries, and therefore the *legal interests* which the Commissioner sought to tax . . . were ascertained and determined under Connecticut law, a conclusion, the correctness of which, is not questioned on these appeals. . . ." (Emphasis added.) This statement may have meant that the determination of the district court that the decedents held a property interest was correct, or merely that the choice of laws decision at the district court level was correct.

Both of these federal courts are subject to the state court's interpretation of who has a property interest in wrongful death actions. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). *See* note 28 *supra*. The Connecticut law is unclear on this point. *Compare Shaker v. Shaker*, 129 Conn. 518, 29 A.2d 765 (1942); and *Kling v. Torello*, 87 Conn. 301, 87 A. 987 (1913), which indicate the decedent owns the property interest in wrongful death actions, *with Harris v. Barone*, 147 Conn. 233, 158 A.2d 855 (1960); *State v. Cambria*, 137 Conn. 604, 80 A.2d 516 (1951); *State v. Cosenzo*, 4 Conn. Cir. Ct. 484, 236 A.2d 107 (1967), which state that the administrator brings the action, but holds the proceeds as a trustee for the benefit of the beneficiaries. In any event, Connecticut law gives the decedent the ability to designate the beneficiaries through his will, pursuant to CONN. GEN. STAT. REV. § 45-280 (Supp. 1969). This indicates the decedent had an "interest." *See* note 20 *supra*.

37. 465 F.2d at 763.

38. *Id.* "Simple logic mandates the conclusion that an action for wrongful death

decision³⁹ which stated that a cause of action for wrongful death does not arise until *after* the decedent is dead.⁴⁰ Since section 2033 requires that property be owned *at* the time of death, the court's decision is technically in accord with the statutory language.⁴¹

Extending the court's logic, recoveries for instantaneous wrongful death would never be includible because the cause of action for survival or wrongful death would not arise until *after* the time of death.⁴²

cannot exist until a decedent has died, at which point, he is no longer a person capable of owning any property interests." The court also held that "where, as here, there was no property interest in the decedent which passed by virtue of his death, but rather one which arose after his death, such an interest is not property owned at death and not part of the gross estate under § 2033."

39. The court relies on *Foran v. Carangelo*, 153 Conn. 356, 360 n.2, 216 A.2d 638, 641 n.2 (1966):

Death or its direct consequences could not survive as recoverable elements of damage except by virtue of the wrongful death statute, General Statutes § 52-555. . . . Our survival statute (§ 52-599) does prevent an action or right of action from being lost, under the common-law rule, by the death of the possessor. . . . But no person, during his lifetime, can possess an action or right of action embracing, as elements of damage, his own death or any of its direct consequences

40. The statement in note 38 *supra* would seem to apply to all wrongful death statutes, whether based on survival theory or whether the statute creates a new cause of action. The statement is sound as to the latter type of wrongful death action, *see* note 15 *supra*, but seems at least theoretically inconsistent as applied to survival-based actions. Both survival statutes that are enlarged to include damages for death, *see* note 13 *supra*, and wrongful death statutes written as survival actions, *see* note 16 *supra*, proceed on the theory that the decedent possessed the right of action *before* he died.

41. *But see* *Goodman v. Granger*, 243 F.2d 264 (3d Cir. 1957), which held employee death benefits were to be valued at a moment just *after* death. The argument that the moment just after death is crucial applies by analogy to wrongful death recoveries using the same "at the time of death" statutory language. It is more difficult to predict the non-includability of noninstantaneous wrongful death actions because under survival statutes that are enlarged to include wrongful death actions, the damages are consolidated in one cause of action, which clearly arose before the death occurred (at least as far as antemortem pain and suffering is concerned). *Cf.* Rev. Rul. 69-8, 1969-1 CUM. BULL. 219, in which the damages for pain and suffering were held includible in decedent's gross estate, but because the wrongful death statute under which the action for death was brought created a new cause of action, the recoveries for death were held not includible in decedent's gross estate.

42. If the argument made by the government had been accepted, the impact on future includability of wrongful death proceeds would be far different. If the cause of action for wrongful death arises simultaneously with the instance of death, the question of "at the time of death" would be answered in the affirmative, and the only question would be the ownership of the cause of action. Thus, under survival statutes the proceeds would probably be includible in the decedent's gross estate because the theory of such statutes is to compensate the estate. *See* note 14 *supra*. This statement

A uniform rule of exclusion regardless of the outcome of a strained interest-based analysis is desirable.⁴³ It is illogical that recovery for the same type of tort should depend on the slightly different language of the various wrongful death statutes.

is complicated by another factor in finding a decedent's "interest," control. *See* note 20 *supra*.

As applied to wrongful death statutes that create a new cause of action, the proceeds would not be includible because the theory of these statutes is to compensate the survivors. *See* note 15 *supra*. Thus, the survivors own the property interest.

43. Uniformity would be difficult using an interest-based analysis, since the IRS has decided that recoveries under non-survival wrongful death statutes are not includible. *See* note 25 *supra*.