penalties for the physically more burdensome role of women in procreation must be removed. The incipient sensitivity to the plight of the pregnant worker should therefore be welcomed.

SUZAN CHASTAIN

AVOIDING THE "INCIDENTS OF OWNERSHIP" UNDER SECTION 2042, WHILE CONTROLLING THE DISTRIBUTION OF LIFE INSURANCE PROCEEDS

I. Introduction

Every estate plan includes the twofold criteria to (1) establish a plan that will carry out the client's wishes with respect to distribution of his property and (2) accomplish it in the most economical method. Since nearly all estates have some amount of life insurance to provide for the care of surviving dependents, caution must be used so as to avoid inclusion of the proceeds of life insurance policies in the gross estate for federal estate tax purposes.[1]

Whether the life insurance is a substantial asset of the estate or not, careful estate planning can avoid inclusion of the proceeds in the gross estate for tax purposes. Prior to the *Internal Revenue Code of 1954*, when an insured died, the insurance proceeds were subject to federal estate tax if either (1) the money was payable to the executor or to the decendent's estate, (2) the decendent died owning any incident of ownership, or (3) he had paid the premiums on the policy.[2] With the adoption of section 2042 of the *Internal Revenue Code of 1954*[3] the "premium payment test" was deleted, and inclusion in the gross estate now depends upon whether the payments are made for the benefit of the estate[4] or the decedent had indirect or partial control of the policy.[5]

Not only does the planner have to be aware of what may constitute life

1. Smalley, *Federal Estate Taxation of Life Insurance: You Can't Take it With You and It's Often Hard to Leave it Behind*, 21 Drake L. Rev. 682 (1972) [hereinafter referred to as Smalley, *Federal Taxation of Life Insurance*].
2. Int. Rev. Code of 1939, § 811(g).
3. Int. Rev. Code of 1954, § 2042 provides: Proceeds of life insurance.

The value of the gross estate shall include the value of all property—

(1) RECEIVABLE BY THE EXECUTOR.—To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

(2) RECEIVABLE BY OTHER BENEFICIARIES.—To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term "incident of ownership" includes a reversionary interest . . . only if the value of such reversionary interest exceeded 5 percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "reversionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Secretary or his delegate. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate.

4. Int. Rev. Code of 1954, § 2042(1).
5. *Id.* § 2042(2).

insurance[6] under the *Internal Revenue Code,* but he must also determine "how much" control or ownership possessed by the decedent will cause inclusion.[7] Additionally, the transfer of ownership of life insurance policies to trusts can raise problems regarding transfers in contemplation of death,[8] or transfers in which the decedent retained a life estate,[9] or in which the decedent had the power of revocation.[10] However, the scope of this Note is limited to the problems which arise when the decedent has reacquired the incidents of ownership in a fiduciary capacity and will discuss some alternatives on how to avoid adverse tax consequences through proper planning.

II. Incidents of Ownership

A. *Economic Benefit Test*

Estate of Fruehauf v. Commissioner[11] was the first case to hold that a decedent's possession of incidents of ownership in a fiduciary capacity was sufficient to cause inclusion of the proceeds of policies in his gross estate. In this case, decedent's wife owned several insurance policies which she purchased on the life of her husband. In her will, she provided that the policies were to go to a trust of which decedent was a co-trustee and income beneficiary. As trustee, decedent was given broad powers over the policies, including the power to assign, pledge, change beneficiaries, sell or surrender.[12] The Tax Court held "that the fact the powers over the policies were held by decedent in a ficudiary capacity is no bar to their constituting incidents of ownership un-

---

6. Although the *Code* does not define life insurance, section 20.2042-1 of the regulations states that "insurance refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system." In *Helvering v. Le Gierse,* 312 U.S. 531, 539 (1941) the Supreme Court defined life insurance as something that involves risk-shifting and risk-distributing. Similar cases and revenue rulings have defined the term equally as broad as *Le Gierse. E.g.,* Commissioner v. Estate of Noel, 380 U.S. 678 (1965) (double indemnity policies); United States Trust Co. v. Helvering, 307 U.S. 57 (1939) (National Service Life Insurance); Ackerman v. Commissioner, 15 B.T.A. 635 (1929) (accident insurance); Rev. Rul. 68-334, 1968-1 Cum. Bull. 403 (group policies and term insurance).

7. Int. Rev. Code of 1954, § 2042(2). The United States Treasury Regulations provide that "the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy" will be sufficient to cause inclusion in the gross estate for federal estate taxation. Treas. Reg. § 20.2042-1(c)(2) (1958).

8. Int. Rev. Code of 1954, § 2035. *Estate of Silverman,* 61 T.C. 37 (1973) and Rev. Rul. 71-497, 1971-2 Cum. Bull. 329 held that if decedent transfers all the incidents of ownership on a policy more than three years before his death, then only the value of the premiums will be included in his estate.

9. Int. Rev. Code of 1954, § 2036. Specifically, section 2036 would reach the proceeds of a life insurance policy on decedent's life if he retained the right to designate the persons who could possess or enjoy the property.

10. Int. Rev. Code of 1954, § 2038. If decedent had died with a power to revoke a trust which contained the life insurance policies or had the power to amend the trust beneficiaries, then the value of his interest therein would be included in his gross estate. *Id.*

11. 427 F.2d 80 (6th Cir. 1970).

12. Estate of Fruehauf v. Commissioner, 427 F.2d 80 (6th Cir. 1970), *aff'g* 50 T.C. 915 (1968). *See generally* Rubaskin, *Fruehauf and Beyond,* 110 Trusts & Estates 632 (1971).

der 2042."[13] However, the Court of Appeals for the Sixth Circuit did not accept such a broad rule. The court concluded that the mere possession by a decedent of any powers in the nature of incidents of ownership in a fiduciary capacity does not inevitably require inclusion of the proceeds on the decedent's life in his gross estate.[14] However, because the decedent Fruehauf had the power to become both trustee and income beneficiary of his wife's testamentary trust through the exercise of his power as executor, the mere existence of these powers, not their exercise, was a sufficient incident of ownership to cause inclusion in his estate.[15]

There have been several cases[16] since *Fruehauf* which have attempted to precisely define incidents of ownership and then determine whether the control of such incidents as a fiduciary is sufficient to cause inclusion in a decedent's estate. In *Estate of Skifter v. Commissioner*,[17] decedent had assigned, more than three years prior to his death, all interest in nine insurance policies on his life to his wife. Upon his wife's death, the policies became part of a trust of which decedent was named trustee. Although decedent was given broad powers over the corpus and income, he could not exercise these powers for his own benefit.[18] The Tax Court and the Court of Appeals for the Second Circuit held that the proceeds should not be included in decedent's estate even though he did hold the incidents of ownership in a fiduciary capacity. In justifying their decisions, both courts placed heavy emphasis on the provisions of the trust instrument which prohibited the decedent from exercising these powers for his own economic benefit.[19]

B. *Mere Possession is Sufficient*

Subsequent to the *Freuhauf* and *Skifter* decisions, it seemed that the possession, as a fiduciary, of the incidents of ownership of policies on the fiduciary's own life would not necessarily cause inclusion in his gross estate, but rather inclusion would depend upon the extent of these powers and to whose benefit they accrued. However, two recent cases[20] have held that the "mere possession" of

---

13. Estate of Fruehauf v. Commissioner, 50 T.C. 915, 926 (1968). Four judges concurred in the opinion but felt that the holding of the case was limited to the facts. They stated that only because the decedent could have exercised these powers for his own benefit as income beneficiary should the proceeds be includible in his estate.

14. Estate of Fruehauf v. Commissioner, 427 F.2d 80, 85 (6th Cir. 1970).

15. *Id.* In *Commissioner v. Estate of Noel*, 380 U.S. 678 (1965), the Supreme Court stated that the material fact is the existence of the powers without regard to decedent's ability to exercise them at a particular time. The insured, who had taken out flight insurance, was killed in a plane crash. The proceeds were included in his estate even though he could not have changed the beneficiary if he had wanted to do so.

16. Estate of Lumpkin v. Commissioner, 474 F.2d 1092 (5th Cir. 1973); Estate of Skifter v. Commissioner, 468 F.2d 699 (2d Cir. 1972); Rose v. United States, 2 CCH 1974 FED. EST. & GIFT TAX REP., U.S. TAX CAS. (74-1, at 8831) ¶ 12,965 (E.D. La. Nov. 21, 1973).

17. 468 F.2d 699 (2d Cir. 1972).

18. *Id.*

19. Estate of Skifter v. Commissioner, 468 F.2d 699, 703 (2d Cir. 1972), *aff'g* 56 T.C. 1190, 1197 (1971).

20. Estate of Lumpkin v. Commissioner, 474 F.2d 1092, 1097 (5th Cir. 1973); Rose

an incident of ownership will cause the policy proceeds to be taxable to decedent's estate, regardless of the capacity in which the power was held.

In *Estate of Lumpkin v. Commissioner*,[21] the Court of Appeals for the Fifth Circuit held that the proceeds of a group life insurance policy were to be included in decedent's gross estate when, under the terms of the group life policy, decedent had the right to alter the time and manner of distribution of proceeds. To reach this conclusion the Court of Appeals had to decide what powers afford the decedent the kind of control over the proceeds such as to create an "incident of ownership" within the meaning of section 2042(2).[22] Analogizing section 2042 to sections 2036 through 2038, and two Supreme Court decisions,[23] the Court of Appeals found that a right to alter the time of enjoyment by optional modes of settlement is an incident of ownership.[24] Since the decedent Lumpkin could have assigned his right to elect optional settlements, the mere possession[25] of an incident of ownership caused his estate to suffer adverse tax consequences.

Finally, in *Rose v. United States*,[26] the district court adopted the broad rule that the life insurance proceeds on a decedent's life are includible in a decedent's gross estate if he could have exercised the incidents of ownership in a fiduciary capacity. The decedent-insured, as trustee, had broad power over certain life insurance policies on his own life. The policies were included in the assets of three trusts set up by decedent's brother for the benefit of decedent's children. Although the district court noted that the Courts of Appeals for the Second and Sixth Circuits had ruled to the contrary,[27] it adhered to the rule stated in the *Lumpkin* case that "mere possession" is sufficient to cause the proceeds to be taxable.[28]

C. *Which Test Did Congress Intend?*

Although these recent cases[29] have involved slightly different factual pat-

---

v. United States, 2 CCH 1974 FED. EST. & GIFT TAX REP., U.S. TAX CAS. (74-1, at 8831) ¶ 12,965 (E.D. La. Nov. 21, 1973).

21. 474 F.2d 1092 (5th Cir. 1973).

22. The Tax Court, relying on *Billings v. Commissioner*, 35 B.T.A. 1147 (1973), agreed that "[t]he mere right to say when the proceeds of the insurance policies should be paid to the beneficiary does not amount to a control of the proceeds." Estate of Lumpkin v. Commissioner, 56 T.C. 815, 824 (1971).

23. United States v. O'Malley, 383 U.S. 627 (1966); Lober v. United States, 346 U.S. 335 (1953).

24. Estate of Lumpkin v. Commissioner, 474 F.2d 1092, 1097 (5th Cir. 1973).

25. *See* Commissioner v. Noel, 380 U.S. 678 (1965); Karagheusian v. Commissioner, 23 T.C. 806 (1955), *rev'd on other grounds*, 233 F.2d 197 (2d Cir. 1956). *But cf.* Estate of Skifter v. Commissioner, 468 F.2d 699 (2d Cir. 1972); Estate of Fruehauf v. Commissioner, 427 F.2d 80 (6th Cir. 1970).

26. 2 CCH 1974 FED. EST. & GIFT TAX REP., U.S. TAX CAS. (74-1, at 8831) ¶ 12,965 (E.D. La. Nov. 21, 1973).

27. *Id.* at 8833.

28. *Id.* *See* Estate of Lumpkin v. Commissioner, 474 F.2d 1092, 1097 (5th Cir. 1973).

29. Estate of Lumpkin v. Commissioner, 474 F.2d 1092 (5th Cir. 1973); Estate of Skifter v. Commissioner, 468 F.2d 699 (2d Cir. 1972); Estate of Fruehauf v. Commissioner, 427 F.2d 80 (6th Cir. 1970); Rose v. United States, 2 CCH 1974 FED. EST. & GIFT TAX REP., U.S. TAX CAS. (74-1, at 8831) ¶ 12,965 (E.D. La. Nov. 21, 1973).

terns, the primary issue in each has been to define the exact meaning of incidents of ownership.[30] Since Congress never defined incidents of ownership and because section 2042 encompasses provisions similar to the provisions of sections 2035 through 2038,[31] it is easy to see how issues will continue to arise and be litigated under section 2042. This is particularly true since the very nature of insurance, with its contractual obligations, and the multitude of combinations of ownership and powers in a policy make possible an infinite variety of factual situations.[32] Thus, the estate planner in making his own assessment of what constitutes incidents of ownership can be tightroping the fine line between inclusion and exclusion of life insurance proceeds from his client's estate.

Although the United States Treasury Regulations[33] state that the term incidents of ownership includes "the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy,"[34] neither the statute nor the regulations make inclusion depend on the capacity in which the decedent held the incidents of ownership. Thus, incidents of ownership can be thought to connote something partial, minor, or even fractional in scope and actually to be defined in terms of possibility rather than probability.[35]

In attempting to compare the *Rose*, *Skifter*, and *Fruehauf* decisions and to decide what is an incident of ownership under section 2042, it appears that the *Rose* decision is concerned with whether there was mere possession of an incident of ownership by the decedent;[36] whereas, the *Fruehauf* and *Skifter* decisions are more concerned with whether the decedent died in possession of incidents of ownership from which he would have derived some economic benefit.[37]

However, if Congress enacted sections 2036 through 2038 in an attempt to tax property over which a person retained a substantial degree of control until death, then section 2042 should also be treated as part of this scheme since control of the incidents of ownership of life insurance policies is similar to a power

30. *See generally* Annot., 14 L. Ed. 2d 817, 848-67 (1965); Smalley, *Federal Taxation of Life Insurance*, *supra* note 1, at 687-96.

31. INT. REV. CODE OF 1954, §§ 2036-38. Section 2042 includes a reversionary test similar to that of section 2037. Additionally, when Congress enacted section 2042, a Senate Finance Committee Report stated that "[t]o place life-insurance policies in an analagous position to other property, however, it is necessary to make the 5-percent reversionary interest rule, applicable to other property, also applicable to life insurance." S. REP. No. 1622, 83d Cong., 1st Sess. 124 (1954).

32. Smalley, *Federal Taxation of Life Insurance*, *supra* note 1, at 687-96.

33. *See* Treas. Reg. § 20.2042 (1958).

34. Treas. Reg. § 20.2042-1(c)(2) (1958).

35. United States v. Rhode Island Hosp. Trust Co., 355 F.2d 7, 10 (1st Cir. 1966).

36. Rose v. United States, 2 CCH 1974 FED. EST. & GIFT TAX REP., U.S. TAX CAS. (74-1, at 8831) ¶ 12,965 (E.D. La. Nov. 21, 1973). This decision appears to be more in line with the treasury regulation which states that the decedent holds an incident of ownership on policies on his life in a trust if under the terms of the policy he has power to change the beneficial ownership in the policy or proceeds, even though he has no beneficial interest in the trust. Treas. Reg. § 20.2042-1(c)(4) (1958).

37. Estate of Skifter v. Commissioner, 468 F.2d 699, 702 (2d Cir. 1972); Estate of Fruehauf v. Commissioner, 427 F.2d 80 (6th Cir. 1970).

to dispose of property.[38] Even though both *Lumpkin* and *Skifter* differ as to the exact definition of an incident of ownership, the Commissioner has continued to argue that the possession of any incident of ownership, in its broadest connotation, is sufficient to cause inclusion in the gross estate for federal estate tax purposes.[39]

Where the decedent could not have received any economic benefits from the insurance policies,[40] it seems more logical that possession of the incidents of ownership as a fiduciary should not cause the proceeds to be includible in his estate.[41] This is particularly true since either by statute or common law[42] a fiduciary is prevented from self-dealing or acting in a manner to benefit one class of beneficiaries over another class.[43]

With this recent victory in *Rose*, the Commissioner is now unlikely to yield to the contrary holdings in previous decisions[44] and will most assuredly continue to consider the life insurance proceeds includible in the gross estate, regardless of the capacity in which decedent possessed the incidents of ownership. Thus, the more relevant test would now appear to be whether the decedent had possessed any capacity to affect the disposition of the proceeds of the policy.[45] Even if one had held the incidents of ownership in a fiduciary capacity, it did not prevent him from having the power to dispose of the property, and thus be included in his gross estate under section 2042.

III. Alternatives to Avoid Inclusion

A. *Status Quo*

With the Commissioner's successful argument of inclusion in *Rose*, the estate planner can no longer be assured that other courts will follow the previous

38. Both *Lumpkin* and *Skifter* indicated that Congress was attempting to tax the value of life insurance proceeds over which the insured at the time of his death possessed substantial controls, and that this was in effect the same treatment that was intended for sections 2036 through 2038. Estate of Lumpkin v. Commissioner, 474 F.2d 1092, 1095 (5th Cir. 1973); Estate of Skifter v. Commissioner, 468 F.2d 699, 702 (2d Cir. 1972). Therefore, though an incident of ownership may be possessed in a fiduciary capacity, it can still be just as effective in controlling the disposition of property.

39. Rose v. United States, 2 CCH 1974 Fed. Est. & Gift Tax Rep., U.S. Tax Cas. (74-1, at 8831) ¶ 12,965 (E.D. La. Nov. 21, 1973).

40. Treas. Reg. 20.2042-1(c)(2) provides that "[g]enerally speaking, the term [incident of ownership] has reference to the right of the insured or his estate to the economic benefits of the policy."

41. Estate of Fruehauf v. Commissioner, 427 F.2d 80 (6th Cir. 1970).

42. Generally, most states provide guidelines which a fiduciary must follow in managing and investing trust funds. However, if there is no statutory provision a trustee is still held to a duty of exercising such care and skill as a man of ordinary prudence would exercise in dealing with his own property. 2 A. Scott, The Law of Trusts §§ 164, 174 (3d ed. 1967).

43. However, there is an equally well-established countervailing rule of law that a trustee may be authorized by the terms of the instrument to do that which, in the absence of such a provision, would be a violation of his fiduciary duty of loyalty. 2 A. Scott, The Law of Trusts § 170.9 (3d ed. 1967).

44. Estate of Skifter v. Commissioner, 468 F.2d 699 (2d Cir. 1972); Estate of Fruehauf v. Commissioner, 427 F.2d 80 (6th Cir. 1970).

45. United States v. Rhode Island Hosp. Trust Co., 355 F.2d 7, 11 (1st Cir. 1966).

cases[46] which held the proceeds were not to be included when the decedent held no beneficial interest as trustee. In light of these conflicting decisions, planning which allows an insured to reacquire incidents of ownership as a fiduciary will invariably raise tax problems. This would violate the elementary planning strategy that one should avoid doubtful areas if possible and should not sow the seeds of future litigation in his client's estate plan.[47]

Therefore, the planner must seek alternate methods to avoid inclusion of the life insurance proceeds while at the same time satisfying the client's wishes regarding distribution and control of the property. In addition to the "status quo" position[48] which will most assuredly raise tax problems, the planner has at least two other alternatives. One is to eliminate all control in the hands of his client[49] while another is to disburse the controls between a trustee and a special trustee.[50]

B. *Independent Trustee*

One method of eliminating control can be accomplished through the appointment of an independent trustee to administer the entire trust. This can be accomplished through the use of an individual[51] or a corporate[52] trustee. However, careful draftsmanship must be used to insure that the trust instrument is specific enough to provide for the insured's wishes. However, it must be noted that if the trust instrument allows the decedent-insured any control over the distribution of property in the trust, regardless of his control of the incidents of ownership, there will be serious tax problems.[53] The use of an independent trustee could eliminate the possibility that the decedent-insured would ever become a successor trustee; however, this alternative would also cut off all strings between the client and his property. Depending upon the client's age and family situation, a complete release of control over the property may or may not be appropriate.

---

46. Estate of Skifter v. Commissioner, 468 F.2d 699 (2d Cir. 1972); Estate of Fruehauf v. Commissioner, 427 F.2d 80 (6th Cir. 1970).

47. P-H 1974 FED. TAXES, EST. & GIFT ¶ 110,101.

48. The "status quo" position would rely on favorable court decisions similar to *Skifter* and *Fruehauf* and hope that other courts would follow the "economic benefit test".

49. This can be accomplished through the irrevocable trust utilizing a corporate fiduciary.

50. A special trustee for purposes of this article is not a co-trustee, but rather a trustee who has limited duties as delineated in the trust instrument; whereas the trustee will have all other powers except those vested in the special trustee by the instrument. Thus, the special trustee would be bound by the same fiduciary standards as the principal trustee. *See generally* Cohan, *Splitting Powers Between Fiduciaries*, 8 REAL PROP., PROB. & TRUST J. 588, 588-90 (1973).

51. Using another person to serve as trustee may not be satisfactory since it will be difficult to find another individual who has the time or experience to manage the trust. In addition, an individual will always be subject to personal obligations in his own business and life which might detract from his duties as a fiduciary.

52. Although the corporate trustee eliminates some of the problems connected with an individual trustee, it presents other problems of conservatism, expensive costs, and turnover that will not allow continuous attention in the management of the trust. Cohan, *Splitting Powers Between Fiduciaries*, 8 REAL PROP., PROB. & TRUST J. 588 (1973).

53. Lober v. United States, 346 U.S. 335 (1953).

C. *Splitting Duties Between Fiduciaries*

The trust instrument may provide for splitting of the duties between two or more fiduciaries.[54] This would give added flexibility to the plan because it would allow the decedent-insured to control certain property, while another person or corporation with more expertise or time could manage the more complicated, as well as the everyday operations of the trust. This type of trust arrangement could also be drafted so as to prevent the proceeds of the insurance policies on the client's life from being included in his gross estate. By inserting a clause[55] in the trust instrument that a special trustee shall control the incidents of ownership of all life insurance policies on the life of the decedent, the insured would not be able to reacquire the incidents of ownership in a fiduciary capacity.

Although the splitting of fiduciary powers may solve problems with regard to includibility under section 2042, it may also raise other potential problems regarding the scope of each trustee's powers and his respective liabilities.[56] In addition, the Commissioner might contend that the special trustee is not really an independent trustee if he is a relative or a person under the control of the decedent-insured.[57]

IV. Conclusion

The Commissioner has now obtained at least one decision in support of his position that it will make no difference in what capacity the decedent held the incidents of ownership, but rather mere possession will cause inclusion even if decedent can derive no beneficial enjoyment.[58] Thus, he has procured another method for including life insurance proceeds in a decedent's estate.[59] Therefore, the estate planner must either be prepared to regularly litigate the issue of whether holding incidents of ownership as a fiduciary per se will cause inclusion under section 2042, or he must circumvent the *Rose* decision with alternate plans. Although almost any device proposed to avoid inclusion is vulnerable to attack by the Commissioner,[60] the estate planner must be prepared

---

54. Cohan, *Splitting Powers Between Fiduciaries*, 8 Real Prop., Prob. & Trust J. 588, 590 (1973).

55. *Id.* at 600-02 (illustrating examples of clauses that could be used to properly split powers between fiduciaries).

56. *Id.* at 591-96.

57. The Commissioner might attempt to classify the arrangement as a sham and contend that the decedent-insured was actually the person controlling the incidents of ownership. Similarly, the Commissioner had attempted to hold that the proceeds of insurance owned by a closely held corporation on its president's life are included in his gross estate since, as majority stockholder, he could exercise the incidents of ownership. But this assertion was later withdrawn. Rev. Rul. 72-167, 1972-1 Cum. Bull. 307.

58. Rose v. United States, 2 CCH 1974 Fed. Est. & Gift Tax Rep., U.S. Tax Cas. (74-1, at 8831) ¶ 12,965 (E.D. La. Nov. 21, 1973).

59. Congress has provided the Commissioner with many arrows to put in his quiver in the form of sections 2033, 2035-38, and 2041-43 to cause inclusion of property in the gross estate. Thus, it is an inept government estate tax attorney who cannot include the proceeds of a life insurance policy on a decedent's life in his gross estate for federal estate tax purposes. Smalley, *Federal Taxation of Life Insurance, supra* note 1, at 696.

60. *Id.* at 697.

to offer the best possible results for his client with a minimum of tax litigation.

Nevertheless, if either the use of an independent trustee and/or the splitting of powers between fiduciaries can be implemented to meet the client's primary wishes regarding the distribution and control of his property, each is at least a plausible alternative to avoiding the gray area in the *Rose* and *Skifter* decisions. It must be cautioned that although the use of an independent trustee[61] and splitting powers between fiduciaries[62] can solve one tax problem, either can raise serious practical problems.

Until the conflict in the *Rose* and *Skifter* decisions is resolved, the estate planner will have to carefully review his client's estate to make certain that his client will not reacquire any powers over life insurance policies on his life as a fiduciary or otherwise. Even though it has been stated that death and taxes are the only two things which are certain in this world, the estate planner can continue to minimize the tax aspects of death through a little imaginative planning.

PATRICK E. OBERLE

61. *See* text accompanying notes 51-53 *supra.*
62. *See* text accompanying notes 54-57 *supra.*