

1953

# In the Matter of the Estate of Cora E. Fenner : Brief of Respondents

Utah Supreme Court

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Wade M. Johnson; Attorney for Respondents;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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In the Matter of the Estate of  
CORA E. FENNER,  
*Deceased.*

8086  
Case No. 8474

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**RESPONDENT'S BRIEF**

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**Appeal From the District Court of the**  
**Second Judicial District**

**In and For Weber County, State of Utah**  
**Honorable Charles G. Cowley, Judge**

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**WADE M. JOHNSON,**  
*Attorney for Respondents.*

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# IN THE SUPREME COURT of the STATE OF UTAH

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In the Matter of the Estate of

CORA E. FENNER,

*Deceased.*

Case No. 8474

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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

Cora E. Fenner died testate on the 10th day of February, 1952. Her will was admitted to probate in the District Court of Weber County, State of Utah, and letters testamentary were issued to Fred William Hill and James Edward Willey, the named executors, on the 17th day of March, 1952.

Cora E. Fenner was the surviving wife and widow of Walter E. Fenner who died testate on the 19th day of November, 1951. By his last will and testament, Walter E. Fenner devised and bequeathed all of his property to his wife, Cora E. Fenner. The Estate of Walter E. Fenner, including joint tenancies, amounted to approximately \$250,000.00. The executors in Walter E. Fenner Estate paid a Utah State Inheritance Tax in excess of \$12,500.00.

Walter E. Fenner had life insurance in excess of \$40,000.00, \$35,000.00 of which was with the Equitable Life Assurance Society of the United States, and \$5,000.00 with the New York Life Insurance Company.

Cora E. Fenner converted the New York Life Insurance policy into a certificate of indebtedness and drew down two policies of the Equitable Life Assurance Society in cash in the sum of \$15,786.29, which was deposited in her checking account on the 9th day of January, 1952.

Cora E. Fenner was dying from a malignant cancer, and this large check was the only check that she endorsed after the first day of January, 1952.

The Fenner's had no children. Cora and Walter E. Fenner were distant cousins. They made their money out of ranching, cattle and sheep business in Wyoming.

Walter E. Fenner came to Wyoming when he was a small child many years ago. He had lost track of his family and grew up in Wyoming largely with Mrs. Fenner's relatives as his friends. The persons designated as secondary beneficiaries were in truth and fact Cora E. Fenner's nieces and nephews and not Walter E. Fenner's nieces and nephews.

Walter E. Fenner died suddenly of a heart attack. Prior to his death he had been working on the revamping of his life insurance set up, and upon his death Mrs. Fenner drew her will in the light of the wishes of Mr. Fenner.

The second paragraph of Mrs. Fenner's will is an embodiment of his life insurance program if it had been carried out. The residuary bequests under Mrs. Fenner's

will are substantially the same as the residuary bequest in Walter E. Fenner's will if he had survived Mrs. Fenner. Mrs. Fenner's will and codicil thereto were both executed in December, 1951.

I recite the foregoing facts largely for their human interest.

Upon the death of Walter E. Fenner, Mrs. Fenner filed the conventional proof of the death of Walter E. Fenner. She did not exercise either of the privileges granted to her in the policies in issue.

The Equitable Life Assurance Society received the proof of death upon these policies and set them up as a death claim, as of December 28, 1951.

In the latter part of January, 1952, the Equitable Life Assurance Society mailed to Mrs. Fenner checks covering the interest on these policies from date of death to December 28, 1951, and interest from December 28, 1951, to January 28, 1952. These checks were not cashed by Mrs. Fenner, but subsequently were returned and the amounts were paid to the executors of her estate.

In due time the executors of Cora E. Fenner's Estate made its inheritance tax report to the Court and Tax Commission and included as being subject to inheritance tax the small interest items but did not include the principal fund.

As a death claim policy No. 3569738 was the sum of \$10,531.92 with interest commencing January 28, 1952.

As a death claim Policy No. 3569739 was the sum of \$5,265.93 with interest commencing January 28, 1952.

As a death claim Policy No. 3569740 was the sum of \$5,265.93 with interest commencing January 28, 1952.

Quite naturally there have been discussions between the Tax Commission Attorneys and the writer as to the taxability of these funds held by the insurance company as death claims.

The Tax Commission procured an order for the executors to show cause why these funds so held by the insurance company should not be included in the inheritance tax report as taxable.

The executors filed an answer and attached to the answer pertinent extracts of these aforesaid policies. These are designated as Exhibits A, B, and C, and are specifically concerning the named beneficiaries and the mode of settlement and are in each case entitled "Special Provision".

I will use the provisions of Policy No. 3569738 as being an example. It reads as follows:

**"SPECIAL PROVISION:**

In compliance with the written request of the Insured, the beneficiary and mode of settlement are changed as follows:

1. It is hereby specially provided that the settlement of the amount becoming due by reason of the death of the Insured shall be made with the Insured's wife, CORA E. FENNER, if living, as provided in paragraph 2, if not living, such amount shall be divided into the number of equal shares that will provide:

One share for each of the Insured's nieces, Stella Wright Willey, Flora Wright Streight, Melvina Wright Downs and Jessica Wright, who may then be surviving, and each such share shall be paid in a single sum to such respective niece, and

One share for the then surviving children of each said niece of the Insured who may not then be surviving, and each such share shall be paid in a single sum in equal shares to such children of said deceased niece, and

One share for each of the Insured's nephews, Robert G. Wright and Meral E. Wright, who may then be surviving, and each such share shall be paid in a single sum to such respective nephew, and

One share for the then surviving children of each said nephew of the Insured who may not then be surviving, and each such share shall be paid in a single sum in equal shares to such children of said deceased nephew.

2. The amount becoming due to the Insured's said wife under paragraph 1 shall be left on deposit with the Society in accordance with Option 1 of the Modes of Settlement at Maturity of Policy during her lifetime, interest payable monthly, except that said wife shall have the following privileges:

- (a) On an interest due date of withdrawing the amount held on deposit, or
- (b) At any time of having the amount held on deposit paid as a life income in accordance with Option 3 of the said Modes of Settlement.



In the event of the death of the Insured's said wife, subsequent to the death of the Insured but before the amount shall have been paid, the amount held under said Option 1, together with any interest accrued thereon, or the commuted value of any unpaid CERTAIN installments under Option 3, as the case may be, shall be divided into the number of equal shares that will provide:

One share for each of the Insured's said nieces who may then be surviving, and each such share shall be paid in a single sum to such respective niece, and

One share for the then surviving children of each said niece of the Insured who may not then be surviving, and each such share shall be paid in a single sum in equal shares to such children of said deceased niece, and

One share for each of the Insured's said nephews who may then be surviving, and each such share shall be paid in a single sum to such respective nephew, and

One share for the then surviving children of each said nephew of the Insured who may not then be surviving, and each such share shall be paid in a single sum in equal shares to such children of said deceased nephew.

Should none of the Insured's said nieces, no children of the Insured's said nieces, neither of the Insured's said nephews and no children of the Insured's said nephews be surviving at the death of the Insured's said wife, as aforesaid, the amount held under said Option 1, together with any interest accrued thereon, or the commuted value of any unpaid CERTAIN installments under said Option 3, as the case may be, shall be paid in a single sum to said wife's executors or administrators.

3. Payment of any sum withdrawable hereunder at the option of a beneficiary may be deferred by the Society for a period not exceeding ninety days after receipt of application therefor.

New York, June 20, 1933.”

Said policy also contains a paragraph which reads as follows:

“Modes of Settlement at Maturity of Policy.

The Insured may elect to have the net sum due under said policy upon its maturity applied under one or more of the following optional modes of settlement in lieu of the lump sum provided for on the first page thereof, and in the absence of such an election by the Insured, the beneficiary, after the Insured's death, may so elect. The beneficiary, after the Insured's death, may designate (with the right to change such designation) the person to whom any amount remaining unpaid at the death of the beneficiary shall be paid if there be no such person designated by the Insured and surviving. Such election, designation or request for change shall be in writing and shall not take effect until filed with the Society at its Home Office and endorsed upon the policy or the Supplementary Contract, if any.”

Option 1 of the policy provided that the fund should be left at interest payable monthly.

The interest as set out were the amounts under said policies received by her executors.

Upon the death of Cora E. Fenner the insurance company paid the principal fund to the residuary beneficiaries

—that is to say, under this particular policy—one-sixth to Stella Wright Willey, one-sixth to the children of Flora Wright Streight, deceased, one-sixth to Melvina Wright Downs, one-sixth to Jessica Wright Kinikin, one-sixth to Robert G. Wright, and one-sixth to the children of Meral E. Wright, deceased.

Upon the hearing upon the order to show cause and upon the answer of the executors, the Court found that these principal funds under these policies were not subject to inheritance tax in the matter of the estate of Cora E. Fenner, deceased.

The correctness of that decision is before the Court upon this appeal.

## ARGUMENT

The Tax Commission is contending that the principal funds under these life insurance policies are taxable under the provisions of Section 59-12-3 of the Utah Code Annotated, 1953. The provisions of said section are the same as in Section 80-12-3 of the Utah Code Annotated, 1943.

This section taxes the property of a deceased when it shall pass to another.

- (a) by testamentary disposition;
- (b) by law of inheritance or succession of this or any other State or Country;
- (c) by deed, grant, bargain, sale or gift made in contemplation of death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death.

These funds did not go to the residuary beneficiaries by any of the foregoing means. It did not go to them by will, by the laws of succession or by any deed or document executed by Cora E. Fenner. It went to them under the insurance contract entered into between the insurance company and Walter E. Fenner.

The insurance policies gave Cora E. Fenner the legal right to the interest on these funds during her lifetime. These interest items were ultimately paid to the executors of her estate and returned by the executors as being subject to tax.

The writer is of the opinion that the property rights of Cora E. Fenner to the principal fund was the right in law designated as a "Power of Appointment."

In support of that conclusion the writer desires to call to the attention of the Court that under the Federal Law the power of appointment is subject to taxation as provided by Federal Law.

I have before me Treasury Decisions from February 24, 1942, to June 1, 1949, issued by the Treasury Department in 1949. On page 8 of that pamphlet the regulations recites:

"The term 'Power of Appointment' includes all powers which are in substance and effect power of appointment regardless of the nomenclature used in creating the power and local property law connotations. For example, if a settlor transfers property in trust for the life of his wife, with a power in the wife to appropriate or consume the principal of the trust, the wife has a power of appointment."

I quote from *Corpus Juris Secundum*, Volume 72, from article entitled "Powers", Page 400. The first section reads as follows:

*"Definition and Nature in General*

A power is an authority whereby a person is empowered to dispose of property for his own benefit or for the benefit of others and operating on an estate or interest vested either in himself or another, such authority not being derived out of such estate of interest.

A 'power', in the sense in which the term is used with respect to property, in contradiction to its general or unrestricted meaning is defined under the common law, and under statutes substantially embodying the common-law definition as a liberty or authority reserved by, or limited to, a person to dispose of real or personal property for his own benefit, or for the benefit of others, and operating on an estate or interest, vested either in himself or some other person, the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either wholly or partially. A power is not property or a property right or interest; nor is it an estate; it is a personal privilege or capacity, a mere authority akin to an agency of limited scope or power, under which the donee acts for the donor. It is not technically a form of ownership; nor, as discussed *infra* paragraph 31, does it of itself imply ownership; but it is clearly a right affecting ownership."

I quote from Volume 41, *American Jurisprudence*, from the article on "Powers" being Section 2 at page 806:

## *“2. Definition and General Nature; Distinctions.*

A power over property is defined as a liberty or authority reserved by, or limited to a person to dispose of real or personal property for his own benefit, or for the benefit of others, and operation on an estate or interest, vested either in himself or in some other person; the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either wholly or partially. Such a power has also been defined as an authority enabling one person to dispose of the interest which is vested in another. It has been defined by statute as an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself lawfully perform. Both real and personal property may be subjected to a power of appointment.

A power of appointment is not an absolute right of property nor is it an estate, for it has none of the elements of an estate. The authority given to the donee of a power of appointment does not vest in him any estate, interest, or title in the property which is the subject of the power. A general power of disposition existing as a power does not imply ownership; in fact, the existence of such a power, as a technical power, excludes the idea of an absolute fee simple in the person who possesses the power, although where the power is for his own benefit, he has the means of acquiring such interest, right, title; and in all cases, by the execution of the power, the possession, right,



title, or interest is altered or divested. A power to convey land creates in the donee thereof no right, title, or interest in the property to be conveyed. Property that passes by power of appointment belongs to the donor of the power and not to the donee. Whether a power of appointment is or is not exercised, the property that was subject to the appointment is not subject to distribution as part of the estate of the donee.

The right to appoint the proceeds of a mutual benefit certificate has sometimes been treated as in the nature of a power of appointment.”

Now let us analyze this contract and special provisions together.

Paragraph 1 of this special provisions are in the nature of an arrow, reading as follows:

“It is hereby specially provided that settlement of the amount becoming due by reason of the death of the Insured shall be made with the Insured’s wife, Cora E. Fenner, if living, as provided in paragraph 2.”

So that paragraph 2 now becomes the standard of settlement and the important and vital clause of this insurance policy. The first contracting provision under paragraph 2 is:

“The amount becoming due to the Insured’s said wife under paragraph 1, shall be left on deposit with the Society in accordance with Option 1 of the Modes of Settlement at Maturity of Policy during her lifetime.”

So that the first contract under this policy is that these principal funds shall be left with the insurance company during the lifetime of Cora E. Fenner.

The next provision is that the interest upon these funds shall be paid to Cora E. Fenner monthly.

The next provision reads as follows:

“except that said wife shall have the following privileges:

- (a) On an interest due date of withdrawing the amount held on deposit, or
- (b) At any time of having the amount held on deposit paid as a life income in accordance with Option 3 of the said Modes of Settlement.”

The next provisions reads as follows:

“In the event of the death of the Insured’s said wife, subsequent to the death of the Insured but before the amount due shall have been paid, the amount held under said Option 1, together with any interest accrued thereon—shall be divided into the number of equal shares as shall provide:”

One share for each of Insured’s said nieces, etc.

Or said provision reads as follows:

“In the event of the death of the Insured’s said wife, subsequent to the death of the Insured but before the amount due shall have been paid—the commuted value of any unpaid certain installments under Option 3, shall be divided into the number of equal shares that will provide:”

One share for each of the residuary beneficiaries. Except as to the monthly interest, Cora E. Fenner had



no rights under said policy unless and until she exercised one of the privileges.

These policies must be construed as a whole to determine the legal rights created under them.

The writer therefore restates that it is his opinion that Cora E. Fenner had a "Power of Appointment".

We now come to the final phase of the argument and that is that these principal funds are not taxable in the Estate of Cora E. Fenner.

She had no interest in these funds at the time of her death or prior thereto that are taxable under the tax law of the State of Utah as that law exists at the present time.

May I present my thoughts and conclusions from analogy.

The State of Utah has had the basic inheritance tax law quoted by appellants for a long time. Until the passing of the provision of the statute making joint tenancies taxable they were not taxable under the prior existing law and to make joint tenancies taxable the Legislature had to act.

In re Cowan's Estate;  
98 Utah 393,  
99 Pac. 2nd 605.

The writer is somewhat familiar with the Federal Estate Tax Law.

The present original act was passed in September, 1916. The original act provided that there should be included in the gross estate of the decedent property, which at the time of his death is subject to the payment

of the charges against his estate and property transferred in contemplation of death and joint tenancies.

In 1919 there was added a provision requiring inclusion in the gross estate of a deceased also property "to the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

One Kate Field had a general power of appointment of a trust created by her husband. Kate Field died April 29, 1917, and by her will exercised a general power of appointment. The Treasury Department contended that property passing under a general power of appointment should be included as a portion of the gross estate of a decedent appointer.

The Supreme Court of the United States held that a tax on this general power of appointment was unsupported by the taxing act.

This case U. S. vs. Stanley Field, Exr. Etc. of Kate Field, Deceased.

255 U. S. 257

65 Law Ed. 617

41 Sup. Ct. Rep. 256

18 A. L. R. 1461

In the foregoing case property passed under a general power of appointment duly exercised.

In our case we have privileges in Cora E. Fenner that were not exercised, and her death terminated such privileges, in other words, she could not dispose of these funds by will.

With respect to powers of appointment the Federal Law remained substantially the same, that is to say that it contained a provision taxing the value of the property passing under an exercised appointment, until October 21, 1942.

By the amendment of 1942, there became includable in the gross estate of decedent the value of property subject to the power of appointment by decedent under certain conditions, the details of which are very complicated.

In other words, under the Federal Law prior to 1942 the standard fixed was that property passing under the exercised power of appointment. After 1942, under certain circumstances an unexercised power of appointment became taxable.

In preparing this brief I have investigated the inheritance tax law of several states and I have found that in one way or another various states have provisions taxing the powers of appointment, some when exercised, some when not, some tax a power of appointment to the estate of the donor, some to the donee. I have found that the taxing of a power of appointment depends upon specific legislative enactment and the construction of the enactment.

In California, the inheritance tax law is levied against property going by will or succession, or the passing by deed in contemplation of death, etc. — property held in joint tenancies — life insurance money with a very large exemption — property going by power of appointment — property to an executor under a will in excess of a reasonable compensation.

The same is the general program in many other states.

I have concluded that the provisions of such laws would not help the Court at this matter.

The executors therefore submit that the death claims of these policies were properly omitted from the inheritance tax report by the executors and that the ruling of the District Court should be sustained.

Respectfully submitted,

WADE M. JOHNSON,  
*Attorney for Respondents.*