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POWERS OF APPOINTMENT:

SOME ESTATE DUTY IMPLICATIONS

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INTRODUCTION

A general power of appointment is a useful device where a settlor or testator wishes to provide for persons such as members of his family, in such a manner as will relate to their respective needs.

The plan which is formulated by the donor of the power, and which is expressed in either a deed of trust in an inter vivos settlement, or in his will in a testamentary settlement, may be adapted by the holder of the power to distribute the property subject to the power long after the donor's death. Thus, the donor of the power may confer upon its holder an ability to meet various needs which may arise as the result of changes in the marital status of the objects of the power, their death or the death of their spouses, sickness or accident, and financial success or failure.

However, the use of a general power of appointment may have a substantial disadvantage in terms of the liability to estate duty of the property which is subject to the power. If the power is conferred by will, that property will have formed part of the donor's dutiable estate and accordingly duty will have been assessed in respect of it. If the power has been conferred by a settlement made during the donor's lifetime, duty may nevertheless have been paid, or may be payable on the settlor's death under the provisions of the Estate and Gift Duties Act 1968.

This does not exonerate the property from further liability to duty. Under section 8 of the Estate and Gift Duties Act, property over or in respect of which the deceased had at the time of his death a general power of appointment forms part of the dutiable estate of that person. Therefore, to the extent that a general power of appointment may remain unexercised at the donee's death, the property subject to that power may again be subject to estate duty, this time as part of the dutiable estate of the donee of the power.

In addition, the effect of the Estate and Gift Duties Act is that although a power of appointment may not be classified as a general power of appointment at common law, nevertheless, for the purposes of the Act it may be so classified.

The effectiveness of a general power of appointment must therefore depend upon the extent to which the property subject to the power will not be caught for estate duty by the Estate and Gift Duties Act 1968. In this paper it is intended to consider how a general power of appointment may be effectively used in estate planning, placing particular emphasis on keeping the property which is subject to the power out of the dutiable estate of the holder of the power. The paper is divided into two parts:

Part I is concerned with general powers of appointment at common law; a consideration of some of the advantages that may be obtained by using a general power of appointment; the question of why estate duty legislation should be concerned with property subject to a general power of appointment; the provisions of the Estate and Gift Duties Act 1968 insofar as they relate to general powers of appointment and the effects of legislative changes which have occurred; and the provisions of English and Australian estate duty legislation which correspond with the provisions in the New Zealand Act relating to general powers of appointment. This part of the paper is also concerned with how the effect of the Act may be avoided insofar as it is concerned with bringing into a deceased person's dutiable estate property which is subject to a general power of appointment: the donee of a general power of appointment may exercise or disclaim that power, thereby placing the property beyond the scope of the Act. The use of various drafting practices is also discussed in relation to joint and discretionary powers, and to powers which may only be exercised during the donee's lifetime.

Part II considers in detail whether a general power of appointment which may be exercised only during the donee's liftime, and is not exercisable by will, may be said to exist "at the time his death" so as to bring property subject to that power within the scope of the Act. This requires a consideration of a number of cases which touch upon the question of whether it is possible, in an estate duty context, to place in sequential order the series of events which take place at death and if so, what consequences follow. It also requires a consideration of a number of cases which are relevant in determining the meaning of the expression

"at the time of ... death", particularly the recent decision of the High Court of Australia in Re Silk. It will be submitted that a general power of appointment which may be exercised by the donee of the power during his lifetime only is not a general power of appointment which the donee has "at the time of his death" and that the property subject to the power is not caught by section 8 of the Estate and Gift Duties Act.

PART I

POWERS OF APPOINTMENT AT COMMON LAW

A power of appointment may be described as "a term of art, denoting an authority vested in a person (called 'the donee') to deal with or dispose of property not his own.". (1)

Farwell is more specific:

> "A power is an authority reserved by, or limited to, a person to dispose, either wholly or partially, of real or personal property either for his own benefit or that of others ... The donee of a power has a right of disposition over the property subject to the power, which may be either limited or unlimited, according to the terms upon which it is granted." (2)

Powers of appointment are generally classified as being "general" or "special":

> "A power which imposes no restrictions upon the holder's choice and which would permit him to appoint to anyone is the clearest example of a general power. A power to appoint among a defined class which would not permit the holder to appoint himself or his personal representative is the clearest example of a special power." (3)

It is not necessary that the donee of a general power of appointment should expressly be included as an object of the power, as the right of a donee to appoint to himself is a consequence of the generality of the power. (4)

Numerous variations of these two clear examples of a general and special power of appointment may give rise to problems of classifying a power as "general" or "special": for example, how should a power be classified if the power is to appoint to a class which includes the holder, or the power is to appoint to any person except a named or specified person (5)

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(1) 30 Halsbury's Laws (3 ed) 206
(2) Farwell on Powers (3 ed) 1
(3) H.A.J. Ford Principles of the Law of Death Duty (1971) 245
(4) Orbell v. C.S.D. [1923] N.Z.L.R. 1342
(5) eg, In re Byron's Settlement [1891] 3 Ch. 474 where the donee could appoint to any person "not being her ... present husband or any friend or relative of his".

or the power is to appoint to any person except the donee of the power? (6)

Powers of appointment which apparently do not come within the classification of "general" or "special" powers may be regarded as coming within a third category known as "hybrid" powers. (7) Judicial recognition of this third category in which the donee may appoint to anyone subject to certain specified exceptions, but may appoint to himself, may be found in the decision of Clauson J. in re Park. (8)

(6) eg, In re Park [1932] 1 Ch. 580 where the donee of the power could appoint to any person "other than herself".

(7) Various means of classifying powers other than as general or special are discussed by Fleming (1949) 13 Conv. (N.S.) 20; Crane (1954) 18 Conv. (N.S.) 565; Hughes (1962) 26 Conv. (N.S.) 25.

(8) Supra n.6; at 584. See also In re Triffitt's Settlement [1958] 2 W.L.R. 927 at 931, where Upjohn J. stated "the validity of a hybrid power is not in dispute". Although there appear to be no New Zealand cases recognising such a power, in In re McEwen [1955] N.Z.L.R. 575 at 577 Gresson J. accepted that the division of powers into general and special is not exhaustive.

THE ADVANTAGES OF USING A GENERAL POWER OF APPOINTMENT (9)

The last will of Lord Mansfield is sometimes referred to in order to succinctly express some of the advantages that may accrue in estate planning as the result of using a general power of appointment:

> "Those who are nearest and dearest to me best know how to manage and improve, and ultimately in their turn to divide or subdivide the good things of this world which I commit to their care, according to events and contingencies which it is impossible for me to forsee, or trace through all the mazy labyrinths of time and chance".

A simple example will serve to illustrate the element of flexibility afforded by the use of a general power of appointment. Suppose A has a daughter B who is married to C, a not altogether successful businessman. There are three children of the marriage. A wishes to make financial provision for his daughter and his grandchildren after his death, but is anxious to prevent the money from falling into the hands of C. A's general intention is that B should have a life interest in the income from his residuary estate, the children receiving the remainder interest in equal shares upon her death. It will be apparent that A's wishes could be met by a simple provision in A's will whereby his residuary estate is settled on trust, B having a life interest in the income therefrom and on her death the children each receiving a one-third share in that estate. However, circumstances may arise after A's death which would make such a distribution undesirable: C may pre-decease B leaving her in financial difficulties, their marriage may break up leaving B to support herself and her children, or the failure of C's business may leave the family in need of money; one or more of the children may pre-decease B leaving a dependent spouse and children; one of the children may make (or marry into) a fortune, or one of the children may fall victim to sickness or accident and be unable to provide for himself.

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(9) For a more extensive consideration of the advantages that may be obtained by using a general power of appointment refer M.C. Cullity, "Powers of Appointment", Report of Proceedings of the 28th Tax Conference Convened by the Canadian Tax Foundation (1977) 744; R.J. Bauman, "General Powers of Appointment Under the Ontario Succession Duty Act and Related Death Tax Legislation" (1974) 32 U.T. Fac. L. Rev. 159; W.B. Bolich, "The Power of Appointment: Tool of Estate Planning and Drafting" [1964] Duke L.J. 32; L.R. Rusoff, "Powers of Appointment and Estate Planning" (1971) 10 J. Family L. 443.

To provide for all of these events in a will would be a matter of some complexity and may merely result in a rigid plan of disposition which would not satisfactorily provide for other contingencies. However, they could be met by a simple provision in A's will whereby his residuary estate is settled upon trust with a life interest in the income arising therefrom settled on B, in addition B having a general power of appointment over all or part of the corpus of the trust. (10) In default of appointment, or to the extent that such appointment does not extend, provision can be made for the corpus to be distributed among A's grandchildren in equal shares.

By using a general power of appointment, the ultimate decision as to the manner in which A's residuary estate is to be distributed may be deferred until after his death and made in accordance with the respective needs of B and her children.

Assuming A pre-deceases B, if B during her lifetime requires all or part of the corpus of the trust, she may exercise the general power of appointment in her own favour. If her power extends to the entire corpus of the trust, by appointing the entire corpus to herself B may effectively terminate the trust. If B does not require the capital, she may refrain from exercising the power in which case the children will take the corpus in equal shares in accordance with the gift over in default of appointment (or to the extent that appointment does not extend) provided by the terms of A's will. Should equal distribution among the children be unnecessary or undesirable, B may redistribute the corpus at her discretion, if desired going beyond the class who benefit in the event of a default in appointment.

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(10) C could be excluded from the objects of the power: In re Byron's Settlement [1891] 3 Ch. 474.

THE ESTATE DUTY IMPLICATIONS OF GENERAL POWERS OF APPOINTMENT

The immediate purpose of estate duty legislation is to render liable to duty property which the deceased owned at his death, or property which he owned within a given time before his death. Under the New Zealand Act, duty is imposed on the "final balance" of the estate of a deceased person (11) the final balance being the total value of the dutiable estate, less allowable debts. (12)

A general power of appointment over property does not amount to ownership of the property which is subject to the power. Ownership of that property remains vested in the donor of the power (or his trustee) unless and until the general power of appointment is exercised by the donee of the power. However, a general power of appointment may give the donee of the power an advantage equivalent to ownership. For this reason it is usual for estate duty legislation to levy duty upon property which is the subject of a general power of appointment as if it were part of the property of the deceased person passing under his will or on his intestacy. (13)

In including within the deceased's dutiable estate property subject to a general power of appointment, the statutory definition in estate duty legislation of the expression "general power of appointment" will generally include and extend the common law definition of such a power. Thus, dispositions which at common law may be considered to confer hybrid powers rather than general powers may come within the ambit of the statute. (14) Essentially, the statute will be intended to bring within the deceased's dutiable estate any property over which the deceased could exercise a power of appointment and thereby make that property his own, or otherwise dispose of it as he desires.

In bringing such property within the deceased's dutiable estate, the

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(11) Estate and Gift Duties Act; s.3.

(12) Ibid; s.5.

(13) Grey v. F.C.T. (1939) 62 C.L.R. 49 per Rich, J. at 59-60

(14) eg, Re Byron's Settlement [1891] 1. Ch. 471; re Jones (1944) 61 T.L.R. 120; Orbell v. C.S.D. [1923] N.Z.L.R. 1342.

Legislature may adopt one of two statutory formulae, or a combination of them. Some statutory provisions catch property over or in respect of which the deceased had a general power of appointment. Others catch property of which the deceased was competent to dispose. Whichever form of wording is adopted, the relevant statutory provision must specify the time (or times) at which the estate of the deceased person and its consequent liability to duty, is to be ascertained. That point in time will generally be fixed by reference to the death of the deceased, thus giving rise to the problem of determining exactly to what time regard must be had:

> "A person's death is a common time for a revenue statute either to impose a charge or to take an account... although such a use of death is common, the difficulties of defining with precision what is really meant by death are notorious." (15)

However, at whatever point in time the relevant statutory provision requires a determination to be made as to whether property subject to a general power of appointment forms part of a deceased person's dutiable estate, that determination must be made after the death of the deceased person:

> "The determination whether or not any particular right or interest constitutes actual or notional property of a deceased person for the purposes of probate duty must, of necessity, be made after the death of such deceased person. At the period when the determination is made, the death and the time of death are therefore established facts." (16)

The point must be emphasised that where a statutory provision sets out to bring within the dutiable estate of a deceased person property over or in respect of which he had a general power of appointment, the property is not that of the deceased person, but property of some other person, in the case of a general power of appointment, the donee of the power. As Ostler and Blair JJ stated in Commissioner of Stamp Duties v. Pratt: (17)

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(15) R.A. Green, "Blood and Bone" [1977] N.Z.L.J. 220, 228

(16) Re Silk 5 A.T.R. 613; per Gillard J. at 624 (Full Ct.)

(17) [1929] N.Z.L.R. 163

> "What is aimed at ... is not the property of the deceased person, but property belonging to some other person over which he had at his death a general power of appointment." (18)

Even where the statutory formula used is that of property of which the deceased was "competent to dispose" the same reasoning will apply. In re Silk (19) Mason J. commented:

> "There is no persuasive consideration, textual or contextual, for restricting the property to which the (relevant) paragraph refers to property owned by the deceased..." (20)

In both the Full Court and the High Court, all the other judges expressed a similar view.

The only decision which appears to be inconsistent with this approach is that in Attorney-General v. Quixley. (21) There it was held the deceased's power of appointment by will in respect of a death gratuity constituted a general power of appointment for the purposes of the English legislation. More will be said about this decision later in the paper.

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(18) Ibid; 172. In re Going [1951] N.Z.L.R. 144, at 171-2 Hay. J.

(19) 6 A.T.R. 321 (High Court)

(20) Ibid; 327

(21) (1929) 98 L.J.K.B. 652

THE RELEVANT STATUTORY PROVISIONS

It is convenient at this point in the paper to set out the relevant statutory provisions in estate duty legislation relating to general powers of appointment, including the provisions contained in English and Australian legislation. This will serve two purposes. First, it will illustrate the manner in which the alternative statutory formulae, to which reference has already been made, may be employed. Secondly, it will form a basis for the discussion of a number of New Zealand, Australian and English cases considered subsequently in this paper.

The relevant provision in the Estate and Gift Duties Act 1968 is section 8. That section provides:

> "The dutiable estate shall include any property over or in respect of which the deceased had at the time of his death a general power of appointment."

The expression "general power of appointment" is defined by section 2(1) of the Act. The definition of that expression introduced by section 2 of the Death Duties Act 1909 remained substantially unaltered until the Estate and Gift Duties Amendment Act 1966 came into force. The latter Act applies in respect of any power of authority conferred by the will of any person dying on or after 1 April 1967, conferred by an inter vivos settlement executed on or after that date, or created in any other manner whatsoever on or after that date. Section 2(1) of the Estate and Gift Duties Act 1968 defines a general power of appointment as including: (22)

> "Any power or authority -
>
> (i) Conferred by the will of any person ... ; or
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> (ii) Conferred by any settlement inter vivos ... ; or
>
> (iii) Created in any other manner whatever ... -
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> which enables the holder of the power or authority, or would enable him if he was of full capacity, to [obtain or] appoint or dispose of any property, or to charge any sum of money upon any property,

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(22) The words in brackets were introduced by section 2 of the Estate and Gift Duties Amendment Act 1966.

> as he thinks fit for his own benefit, whether exercisable [orally or] by instrument inter vivos or by will [or otherwise howsoever]; but does not include any power or authority exercisable [by a person] in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee:"

The corresponding provision in English legislation was contained in section 2(1)(a) of the Finance Act 1894 (U.K.), supplemented by section 22(2)(a) and (c). The English provisions were framed in terms of property of which the deceased was competent to dispose. That property included property over which a person had an estate or interest such as would have enabled him to dispose of it and property over which he had a general power of appointment:

> "2. (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say -
>
> (a) Property of which the deceased was at the time of his death competent to dispose.
>
> 22 . . . (2) For the purposes of this Part of this Act -
>
> (a) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property including a tenant in tail whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument inter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act, 1882, or as mortgagee . . .
>
> (c) Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose."

However, reference must now be made to the Finance Act 1975 (U.K.) (23) Part III of which introduces a capital transfer tax, modifies estate duty as it applies to deaths after 12 November 1974, and abolishes estate duty in respect of deaths after 12 March 1975. The new tax

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(23) 45 Halsbury's Statutes (3 ed) 1770; see also "The Estate and Gift Duties Act 1968 - Time for a Change of Concept", L. McKay [1977] N.Z.L.J. 97, 100 et seq.

is chargeable, subject to certain exemptions, on gifts and other gratuitous transfers of value made during a person's lifetime. It is also chargeable on the property a person leaves at his death. In respect of transfers made during a person's lifetime, the tax is assessed on a cumulative basis, the final stage of cumulation being the inclusion by section 22 of the Finance Act 1975 of the property passing on an assumed transfer of the whole of the deceased's estate immediately before his death.

A person's estate is defined by section 23(1) of the Finance Act 1975 to be "the aggregate of all the property to which he is beneficially entitled", except certain excluded property. Section 23(2) of that Act states:

> "A person who has a general power which enables him, or would if he were sui juris enable him, to dispose of any property other than settled property, or to charge money on any property other than settled property, shall be treated as beneficially entitled to the property or money; and for this purpose "general power" means a power or authority enabling the person by whom it is exercisable to appoint or dispose of property as he thinks fit."

In the Australian state of Victoria, section 7(1) of the Probate Duty Act 1962 (Vic.) provides that the following classes of property ...

> "Shall ... be deemed to form part of the estate of a deceased person:-
>
> .....
>
> (f) Any property over or in respect of which the deceased had at the time of his death a general power of appointment;
>
> (i) Any property of which immediately prior to his death the deceased was (whether with the concurrence of some other person or not) competent to dispose, otherwise than in a purely fiduciary capacity;"

Section 4 of that Act defines the expression "general power of appointment" to include:

> "...any power or authority which enables the donee or other holder thereof or would enable him if he was of full capacity to appoint or dispose of any property or to charge any sum of money upon any property as he thinks fit for his own benefit whether exercisable by instrument inter vivos or by will but does not include any power exercisable in a fiduciary capacity under a disposition not made by himself or exercisable as mortgagee."

For the purposes of the above provisions, it makes no difference whether or not the donee or holder of a general power of appointment exercises that power: the test applied by the relevant statute depends upon whether the power is in existence at the time prescribed by the statute.

Reference should also be made to section 27 of the Wills Act 1837, the effect of which is that a gift by a testator in his will of real or personal property includes property over which the testator had a general power of appointment, unless a contrary intention appears in the will.

General powers of appointment exercisable in a fiduciary capacity are specifically excluded from the relevant statutory definitions. (24) Therefore, where a general power of appointment is conferred upon a trustee of an inter vivos or testamentary trust in his capacity as trustee, the property subject to that power will not form part of the holder's dutiable estate upon his death. The exclusion provisions apply to both mere powers and trust powers. (25)

There is one circumstance in which a general power of appointment may be exercisable in a fiduciary capacity by a person who is not a trustee: if there is a power intended by its donor to be in the nature of a trust but no gift is made to the objects and there is no provision made for a gift over in default of appointment, the donee of the power may be regarded as being under a duty to exercise the power. If the donee dies without exercising the power, there is an implied gift to the

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(24) The Victorian statute refers to a "purely" fiduciary capacity. The effect of this qualification is not clear: see Ford op.cit. at 251.

(25) For the distinction, refer 30 Halsbury's Laws (3 ed) 210; a trust power will always be exercisable in a fiduciary capacity but a mere power will not be so exercisable unless it is exercised by a trustee in his capacity as trustee.

objects in default of appointment, those objects taking in equal shares. (26)

In any event, a general power of appointment exercisable in a fiduciary capacity could not be exercised by its holder "as he thinks fit for his own benefit" within the terms of the New Zealand and Victorian statutes. (27)

A life-tenant of the income of a trust fund may have a power to appoint to himself part of the corpus of the settled fund. Whether such a power will constitute a general power of appointment for the purposes of the Estate and Gift Duties Act 1968 (or similar legislation in other jurisdictions) will depend upon the construction of the words conferring the power.

If the life-tenant is authorised to draw upon the capital of the settled fund for his personal maintenance, he is not considered to have a general power of appointment over the fund insofar as he is able to dispose of it. This is illustrated by the decision in Re Pedrotti's Will. (28) In that case, the testator bequeathed the income of his residuary estate to his widow for life providing "that in case anything should occur that her income is not sufficient, she shall be at liberty to go to principal". The remainder was given to the testator's brothers. The widow claimed the whole of the capital. It was held by Romilly M.R. that "the widow has no entitlement to the whole fund, but only to so much as, with the interest, would be sufficient to afford her a maintenance suitable to her station in life".

However, if the life-tenant is able to appropriate such part of the capital as he thinks fit, he has a general power of appointment over the corpus of the trust with the result that the corpus will, upon his death, form part of his dutiable estate. In re Richards Uglow v. Richards (29)

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(26) 30 Halsbury's Laws (3 ed) 210

(27) The same argument would appear to apply in relation to s.22(2)(a) of the Finance Act 1894 (U.K.) where the words are "as he thinks fit". Hence the comment in Green's Death Duties (7 ed) 43 to the effect that the statutory exception "was doubtless inserted ex cauteia".

(28) (1859) 27 Beav, 583; 54 E.R. 231

(29) [1902] 1 Ch. 76

the deceased bequeathed the income from his residuary estate to his widow but provided that "in case such income shall not be sufficient she is to use such portion ... (or capital) as she may deem expedient". The remainder was to be divided among certain residuary legatees. Farwell J. held the wife had a general power of appointment over the capital during her lifetime.

The distinction between the two cases rests on the use of the word "sufficient". As Farwell J. stated in Re Richards (30), in the former case it meant "sufficient for the widow's wants", whereas in the case before him, it meant "sufficient for her desires". The learned Judge concluded that the use of the words "as she may deem expedient" left it to the wife to say whether the income is sufficient and therefore if the wife did deem it expedient to add to her income, she could draw upon the capital.

(30) Ibid; 77

THE EFFECT OF THE 1966 AMENDMENT

Prior to the amendment of the statutory definition of the expression "general power of appointment" by the Estate and Gift Duties Amendment Act 1966 (31) it is difficult to establish just what the definition was intended to achieve. An explanation of the deficiencies in the "pre-1966 definition" will serve to illustrate the principal amendments to the definition that were brought about by the 1966 Act. It will also serve to state the law as it applies to a general power of appointment conferred by the will of a person dying on or before 31 March 1967, conferred by settlement inter vivos on or before that date, or created in any other manner on or before that date.

The first important limitation on the pre-1966 definition of the expression "general power of appointment" was that it applied only where the power was "exercisable by instrument inter vivos or by will". Hence it did not apply where the power could be exercised orally. In Commissioner of Stamp Duties v. Pratt (32) the testator bequeathed to his son a life interest in the income of a one-eighth share of his estate. A codicil to the will provided as follows:

> "If (the trustees) shall be requested to do so by any son or married daughter of mine for the benefit of whom or whose issue my trustees may then hold ... any interest in my estate ... (they) may from time to time raise any part or parts not exceeding in the aggregate one-half of the share in my estate ... then vested in my trustees upon trust for such son or married daughter and his or her issue and may pay the same for such son or married daughter's own use and benefit my intention being by this declaration to enable any son or married daughter to obtain payment to him or her for his or her own benefit of any sum or sums not exceeding in the aggregate one-half of the capital value of the share in my estate directed to be held by my trustees for the benefit of him or her and his or her issue".

The question arose of whether, for estate duty purposes the son had a general power of appointment over a one-eighth share in his father's

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(31) S.2(1)

(32) [1929] N.Z.L.R. 163

estate. In the Supreme Court, Sim J. decided the question on the ground that as the power could only be exercised with the consent of the trustees it did not constitute a general power of appointment within the Death Duties Act 1921. The Commissioner appealed. Although the Court of Appeal was divided on the issue of whether or not the consent of the trustees was necessary before the power could be exercised (33), all the members of the Court agreed that as the power could be exercised orally, it was not within the terms of the statutory definition. Smith J. stated:

> "The special definition of "general power of appointment" in the statute is ... qualified by the words 'whether exercisable by instrument inter vivos or by will'. In my opinion these words mean that a power or authority within the special definition must be exercisable either by instrument inter vivos or by will. The words 'whether' and 'or' state two alternatives. I do not think that it is possible to read a third case into this definition in a taxing statute". (34)

A general power of appointment which may be exercised orally has been brought within the statutory definition by the 1966 Amendment. (35)

The second important limitation on the pre-1966 definition of the expression "general power of appointment" was that it did not include a power to call for capital thereby making that capital the property of the holder of the power: that is, a power to "obtain" property as distinct from a power to "appoint" or "dispose of" property.

This is also an effect of the decision in Pratt's case. There the majority (36) expressed the view that, on an interpretation of the testator's will, the deceased had no power to appoint any property, nor did he have a power to dispose of any property. All the deceased could do was to "obtain" property. As Ostler and Blair J.J. stated:

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(33) And therefore whether the power constituted a general power of appointment.

(34) Supra n.32; 176

(35) The definition now refers to powers exercisable "...orally or by instrument inter vivos or by will or otherwise howsoever..." Presumably the words "otherwise howsoever" were intended to ensure the exercise of a general power of appointment by an informal document was caught by the definition.

(36) Ostler and Blair J.J., Reed J. agreeing on this point; Smith J. was of the view the deceased did have power to dispose of property.

> "It (the will) gives him (the deceased) power to obtain property. As soon as he obtains it he can at once dispose of it, not because of any power given to him by the will, but because it is his own." (37)

This interpretation of the statutory provision has not found favour in a number of other jurisdictions. It might be argued that the finding of the Court of Appeal in Pratt's case on the matter of statutory interpretation was merely obiter dicta: the Court being evenly divided on the interpretation of the will (38) the decision of Sim J. at first instance stood. However, each member of the Court of Appeal in re Going (39) expressly rejected this argument.

It is suggested that the decision in re Going adds little to a consideration of the correctness of the decision in Pratt's case. In Re Manson (40) it was argued that the judgments in Re Going express doubts on the correctness of the decision in Pratt's case, but the Court disagreed:

> "We do not so read the judgments; but whether that be right or wrong the fact is that all the Judges comprising the Court, except Stanton J. who in the course he took found it unnecessary to decide the point, held that Pratt's case was binding and must be followed." (41)

It was in Re Manson that the Court of Appeal was again required to consider the question of whether a power to "obtain" property by the exercise of a general power of appointment and thereby make that property one's own is a power or authority to "appoint or dispose of" that property within the terms of the pre-1966 definition. The testamentary provision under consideration in Re Manson was as follows:

> "Notwithstanding anything hereinbefore contained I direct my trustee at any time or times during the lifetime of my said wife

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(37) Supra n. 32; 173

(38) ie, Whether the trustees were under a duty or could exercise their discretion.

(39) [1951] N.Z.L.R. 144: O'Leary C.J. at 165, Stanton J. at 166, Hay J. at 169-170, Cooke J. at 176. See also Re Manson [1964] N.Z.L.R. 257 at 267 where the Court of Appeal rejected the argument that the authority of Pratt's case was weakened because the "obtain/dispose" point was not fully argued before the Court.

(40) [1964] N.Z.L.R. 257

(41) Ibid; 271

> to resort to the capital of the settled fund and to pay to her thereout such sum or sums as my said wife shall from time to time direct in writing for her adequate maintenance support or benefit or for any other purpose whatsoever."

In delivering the judgment of the Court of Appeal, McCarthy J. stated that initially the facts of the case under consideration appeared very similar to those in Pratt's case and therefore the decision in Pratt's case would dispose of the matter. However, on behalf of the Commissioner it was contended that Pratt's case was wrongly decided and should be over-ruled. The principal ground advanced in support of this contention was that the decision in Pratt's case was contrary to a number of English, Canadian and Australian authorities decided in relation to revenue statutes having a similar purpose to the New Zealand Estate and Gift Duties Act and containing similar language.

Although the Court did not find the Australian cases cited of relevance (42), consideration was given to a number of English cases, principally In re Penrose, Penrose v. Penrose (43) and In re Parsons, Parsons v. Attorney General (44). Both these cases were concerned with the application of section 5(2) of the Finance Act 1894 (U.K.) which imposed estate duty, in certain circumstances where duty had not been paid earlier, on property of which a testator was, at the time of his death, competent to dispose.

In re Penrose a wife gave a power of appointment to her husband in favour of a limited class which specifically included him within the class. Luxmoore J. held there was nothing to prevent the husband as donee of the power from appointing the whole property to himself and therefore he was competent to dispose of it. The learned Judge rejected the argument that found acceptance in Pratt's case, namely that the only power conferred on the donee was the power to acquire the property, not to dispose of it. The view was expressed that a person who is able to appoint a

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(42) Ochberg v. C.S.D. (1949) 49 S.R. (N.S.W.) 248; In the Estate of Roy Gladstone Taylor deceased (1950) 51 S.R. (N.S.W.) 16

(43) [1933] Ch. 793

(44) [1943] Ch. 12

fund to himself and thereby acquire the right to dispose of it, is "competent to dispose" of that fund:

> "...it can make no difference that this can only be done by two steps instead of one, namely, an appointment to himself, followed by a subsequent gift or disposition, instead of a direct appointment to the object or objects of his bounty ... The power to dispose is a necessary incident of the power to acquire the property in question." (45)

In re Parsons, a husband disclaimed a legacy under his wife's will with the result that it formed part of the residue of her estate. On the husband's death, estate duty was assessed on the legacy on the ground that he was competent to dispose of it. Holding that during the period between death and disclaimer the husband was competent to dispose of the property, Lord GreeneM.R. stated:

> "The phrase 'competent to dispose' is not a phrase of art, and, taken by itself and quite apart from the definition clause in the Act, conveys to my mind the ability to dispose, including of course, the ability to make a thing your own." (46)

These two English decisions have attracted both criticism and approval. Perhaps the most adverse comment in respect of these cases is to be found in the decision of the Scottish Court of Session in Tawse v. Lord Advocate (47) In the course of delivering their judgment, all the members of the Court (48) expressed reservations as to the proposition supported by these decisions that a power to obtain property makes a person "competent to dispose" of that property.

The approach adopted by the English Courts has received approval in Canada, and more recently in Australia (49). In Montreal Trust Co v. Minister of National Revenue (50) Kerwin C.J.C. (51) agreed unreservedly

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(45) Supra n. 43, 807-808
(46) Supra n.44, 15
(47) 1943 S.C. 124
(48) Ibid; Lord Cooper at 131; Lord Mackay at 138; Lord Wark at 142 and Lord Jamieson at 144. Refer also to the criticism expressed in the case note at (1934) 50 L.Q.R. 173.
(49) Re Silk 6 A.T.R. 321
(50) (1956) 4 D.L.R. (2 d) 449 (Supreme Court of Canada); see also McCarter & Rusznyak v. M.N.R. (1959) 22 D.L.R. (2 d) 109.
(51) Taschereau and Fauteux J.J. concurred with Kerwin C.J.C. Cartwright J. agreed with the Chief Justice on this point; Rand J. also expressed approval of re Penrose.

with the proposition expounded by Luxmoore J. in Re Penrose to the effect that the power to dispose of property is a necessary incident of the power to acquire property.

In Re Manson the Court recognised the existence of an apparent "substantial conflict" between the decisions in Re Penrose and Re Parsons, and the decision in Pratt's case insofar as those decisions concern the acceptance of the proposition that a person who has a power to acquire or obtain property also has a power to dispose of that property, a conflict which the Court noted becomes:

> "...even more obvious when the Montreal Trust Co. case is considered, for there the proposition was accepted and applied to facts which are almost indistinguishable from those before the Court in Pratt's case." (52)

Nevertheless, the Court affirmed the decision in Pratt's case and followed that decision in preference to the English authorities (53). It is interesting to observe that in declining to over-rule Pratt's case the Court pointed to the distinctions between the English and New Zealand legislation concluding:

> "We do not wish to make too much of these differences, but the fact is that the texts are not the same." (54)

The decisions in Pratt's case and Re Manson are now of importance only in respect of general powers of appointment conferred by the will of a person dying on or before 31 March 1967, or conferred by a settlement inter vivos executed on or before that date, or created in any other manner on or before that date. Other general powers of appointment are subject to the definition introduced by the Estate and Gift Duties Amendment Act 1966 which includes within the definition of the expression "general power of appointment" any power or authority to "obtain or appoint or dispose of any property...". The Amendment amounts to a statutory reversal of the approach adopted in Pratt's case in favour of the approach adopted by the English authorities.

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(52) Supra n. 40; 270

(53) The Court's reasons for declining to over-rule Pratt's case are set out at p.271 of the judgment.

(54) Supra n. 40; 270

In Re Silk (55) the Australian High Court was required to choose between the approach adopted in Pratt's case and Re Manson, and that adopted by the authorities in England and Canada. Gibbs J. (56) expressed approval of the view expressed by Lord Greene M.R. in Re Parsons that a person is competent to dispose of any property which he can make his own. Stephen J. similarly approved of Lord Greene's observations in Re Parsons, taking the view:

> "So long as a deceased had the ability to bring about a loss of ownership of property which had theretofore been enjoyed by another, that is enough; the destination of the ownership thus divested is, I think, irrelevant." (57)

Mason J's opinion was that the criticisms of Re Penrose and Re Parsons were misconceived, expressing a preference for Lord Greene's exposition in preference to that of Luxmoore J. (58)

In view of the statutory amendment to the definition of the expression general power of appointment enacted by the Estate and Gift Duties Amendment Act 1966, it is unlikely the Court of Appeal in New Zealand will again be called upon to determine whether it should follow its earlier decisions, or depart from them in favour of the approach adopted in England and Canada, and more recently in Australia. In Re Silk, Gibbs J. referred to the fact that "the statutory provisions considered in the New Zealand cases ... contained the words 'at the time of his death', or similar words, and in that respect are distinguishable from" the statutory provision considered by the High Court (59). It is difficult to see the relevance of the difference in wording in determining whether a power to obtain property is also a power to dispose of that property.

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(55) 6 A.T.R. 321

(56) Ibid.

(57) Ibid; at 323; however Stephen J. did "not adopt" the reasoning of Luxmoore J. in Re Penrose.

(58) Ibid; at 328. Jacobs J. distinguished Re Penrose and did not refer to Re Parsons, while Murphy J. did not refer to either decision.

(59) Supra n. 55

It is submitted that in a number of the decisions discussed above there has been a tendency to overlook the fundamental proposition that the property in question is not that of the donee of the general power of appointment, but the property of some other person. This has given rise to considerable confusion over what is essentially a simple issue. In Pratt's case the Court emphasised the point that the property in question was not that of the donee of the power, but only Smith J. in his dissenting judgment applied the principle. It is suggested that whether a power to obtain property is also a power to dispose of property merely depends on from whose point of view the transaction is considered. From the point of view of the donor (60) the exercise of a general power of appointment is a devesting or disposition. From the point of view of the donee or the person to whom he appoints, it is a vesting or acquisition. It is therefore submitted that, leaving aside differences in wording between the relevant statutory provisions in New Zealand, Australia and England, the reasoning of Lord Greene in Re Parsons (61) and Stephen J. in Re Silk (62) is to be preferred to that of the majority in Pratt's case. It is further submitted that the reasoning of Luxmoore J. in Re Penrose (63) merely adds to the confusion: what is involved is not a "two step" process as the learned Judge appeared to contemplate, but a "one step" process which may be looked at from two points of view, first that of the donor and secondly that of the donee.

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(60) Or his personal representatives, or according to Smith J. in Pratt's case, the remaindermen.

(61) Supra n. 46

(62) Supra n. 57

(63) Supra n. 45

AVOIDANCE OF THE STATUTORY PROVISIONS

It has been suggested that a general power of appointment represents a particularly useful device in estate planning. However, the extent of its usefulness must depend upon the extent to which a general power of appointment may be conferred upon a donee without bringing into the dutiable estate of that person the property subject to the general power of appointment, thereby rendering the property subject to duty both in respect of the estate of the donor and the estate of the donee.

There are two aspects to the problem. The first is how can the holder of a general power of appointment prevent the property subject to the power from forming part of his dutiable estate? The second is how can the draftsman confer a general power of appointment in such a manner as to prevent the property subject to the power from forming part of the dutiable estate of the donee of the power.

A donee of a general power of appointment has two options open to him if he wishes to avoid the property subject to the power from forming part of his dutiable estate on his death.

First, he may disclaim the general power of appointment. A person may not be compelled to accept the beneficial interest in the property, but it is clear that acceptance of the gift will be presumed until the contrary is established. In Standing v. Bowring (64) Lord Halsbury L.C. stated:

> "You cannot make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation." (65)

Cotton L.J. expressed a similar view when he said:

> "Now I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some

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(64) (1885) 31 Ch. D. 282

(65) Ibid; at 286

obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it'. When informed of it he may repudiate it, but it vests in him until he so repudiates it." (66)

For the purposes of the Estate and Gift Duties Act 1968, a disclaimer of an interest under a disposition made inter vivos or by will (or of an interest under an intestacy) does not constitute a "disposition of property": therefore a disclaimer of a general power of appointment does not constitute a gift to those entitled to succeed to the property in default of an appointment. Furthermore, the disclaimer of a general power of appointment will prevent the property subject to the power from forming part of the donee's dutiable estate.

Secondly, the donee of a general power of appointment may irrevocably exercise that power and appoint all or part of the property subject to the power. If the exercise of the power extends to all the property subject to the power, the donee will have put an end to the trust. The power may be exercised by the donee of the power either in his own favour, or in favour of some other person. If the donee exercises the power in his own favour consideration may have to be given to planning the donee's affairs in such a manner as to ensure that the property does not form part of the donee's dutiable estate by reason of the fact that on his death the property passes under his will or on his intestacy. (67) If the donee exercises the power in favour of another person, that exercise of the power will constitute a "disposition of property" for the purposes of the Estate and Gift Duties Act 1968. (68)

One way in which the draftsman may ensure that property subject to a power of appointment does not form part of the donee's dutiable estate is to make the exercise of that power subject to the consent of another

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(66) Ibid; at 288. There appears to be no time limit in which a person must disclaim: In re Paradise Motor Co Ltd [1968] 1 W.L.R. 1125; c.f. the disclaimer of an interest under an intestacy - s.81 Administration Act 1969.

(67) S.7 Estate and Gift Duties Act 1968.

(68) See para (e) of the definition of "disposition of property" in s.2(1) of the Act. As to the possible consequences, see ss. 10-12 and 61 of the Act.

person. (69) That person may also be a donee of the power, in which case the power is a joint power, or it may be some other person such as a trustee.

Where the power is a joint power, the law has long been clear. In Attorney-General v. Charlton (70) James L.J. stated:

> "A joint power of appointment is, in my opinion, an entirely different thing in intention and practical operation from a general and absolute power of appointment in one individual." (71)

The matter was again considered in Re Churston Settled Estates. (72) In that decision, after observing that a person who has a general power of appointment over property although not quite in the same position as an owner of that property, is treated for all practical purposes as if he were the owner, Roxburgh J. asked the question:

> "Ought that (doctrine) to be applied to a joint power of appointment or a power of appointment to which the consent of somebody is required?" (73)

Expressing the view that it makes no difference whether the consent that is required is that of a donee of the power or some other person and citing with approval the above dictum of James L.J., Roxburgh J. concluded that a joint power of appointment could not be considered a general power of appointment. (74)

Whether a power of appointment that may only be exercised with the consent of some person other than a donee of the power, such as a trustee, is a

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(69) As the cases discussed will show, such a power of appointment does not constitute a 'general' power of appointment either at common law or under the Estate and Gift Duties Act 1968. However, as such powers fall outside the scope of s.8 of the Act, they are of some importance and for this reason are discussed in this paper.

(70) (1877) L.R. 2 Ex D. 398

(71) Ibid; at 412

(72) [1954] 1 Ch. 334

(73) Ibid; at 344

(74) But see In re McEwen [1955] N.Z.L.R. 575 where it was not considered whether the power that was held to be a general power of appointment might not be such a power by reason of the fact it was a joint power.

general power of appointment was considered by the Privy Council in Commissioner of Estate and Succession Duties v. Bowring. (75) In this case, the deceased was the settlor of a trust fund. Under the terms of the deed of trust, the settlor had a power to amend or revoke the trusts with the consent of the trustees. The deed of trust contained a provision that it should be governed by the law of Massachusetts. The laws of that State did not authorise the court to control the trustees in the exercise of their power to consent to the revocations or amendments of the trust, provided that they acted honestly and did not act with an improper motive. The question arose of whether the deceased was "competent to dispose" of the settled property for the purposes of Barbados estate duty legislation.

In Bowring's case the Board answered the other half of the question posed by Roxburgh J. in Re Churton Settled Estates, forming the opinion that a power of appointment which may be exercised only with the consent of another person is not a "general" power of appointment. (76)

The view that a general power of appointment does not exist when the trustees (or some other person) have a discretion as to whether they will consent to an exercise of the power, with the result that the donee of the power is not entitled to insist upon payment being made, is supported by the decision in Pratt's case. (77) The provision in the testator's will under consideration in Pratt's case provided that "the trustees ... may from time to time raise..." part of the corpus of the trust and "... may pay the same ..." to the donees of the power. At first instance Sim J. held:

> "...the testator intended his trustees to have a discretion as to whether or not they would make any payment under the authority in question." (78)

Therefore, the learned Judge found the deceased did not have a general power of appointment conferred upon him by the will. In the Court of

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(75) [1962] A.C.171

(76) At least when the trustees have a wide discretion as to whether they will give or withhold their consent.

(77) [1929] N.Z.L.R. 163

(78) Ibid; at 166

Appeal, Ostler and Blair J.J. agreed with this finding. Reed and Smith J.J. disagreed, holding the trustees were under a duty to act upon request, but not disputing the view that if the trustees had been given a discretion,' the power could not have been a general power of appointment.

It may also be possible for the draftsman to endeavour to ensure that property subject to a general power of appointment does not form part of the donee's dutiable estate on his death by providing that the power may be exercised by the donee during his lifetime only, that is by an inter vivos exercise of the power and not by a testamentary exercise of the power. The Estate and Gift Duties Act 1968 (79) catches property subject to a general power of appointment by the donee of the power "at the time of his death". If the power is one that may only be exercised during the donee's lifetime it is arguable that the general power of appointment has ceased to be exercisable by the donor at the moment of his death and therefore the property which was subject to the power is not caught by the Act. This argument does not appear to have been considered by the New Zealand courts. In the second part of this paper, it is therefore proposed to consider the argument in more detail for, if it is sustainable, it provides a means of utilising a general power of appointment without producing the adverse consequence of rendering the property subject to the power liable to duty as part of the estate of the donee of the power to the extent to which the power has not been exercised.

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(79) Section 8

PART II

THE TIMES AT WHICH THE ACT APPLIES

Under section 8, the Estate and Gift Duties Act, 1968, property over or in respect of which the deceased held a general power of appointment will form part of the deceased's dutiable estate if that power existed "at the time of his death". The expression "at the time of ... death" is not defined in the Act. Other provisions in the Act use varying expressions in fixing the time at which it must be ascertained whether other property exists which forms part of the deceased's dutiable estate. For example, section 11(2) of the Act excludes from the deceased's dutiable estate certain property in respect of which the deceased has retained an interest in that property for which full consideration has been paid or is owing "at the date of his death". Section 13 of the Act includes within the dutiable estate any beneficial interest in joint property held by the deceased "immediately before his death".

These variations in wording in the Act when prescribing the time at which it must be ascertained whether certain property forms part of the deceased's dutiable estate appear to have attracted little attention in the past (80) and it may well be that, as Kitto J. observed in Robertson v. Federal Commissioner of Taxation (81) "it is only in an exceptional case that lack of precision matters".

The question must therefore be asked whether it is possible to distinguish between the instant or moment of death and the times immediately before and immediately after death and thereby give an order of precedence to a series of events which apparently happen at the same moment. Certainly the New Zealand statute would appear to envisage a distinction at least between the time "immediately before" death (82), and "the time of" (83)

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(80) The general powers of appointment under consideration in both Pratt's case [1929] N.Z.L.R. 163 and Re Manson [1974] N.Z.L.R. 257 were exercisable only during the lifetime of the donee, yet in neither case does it appear to have been argued that the general powers of appointment did not exist "at the time of ... death".

(81) (1952) 86 C.L.R. 463; 482

(82) S.13. The value of an interest in a joint tenancy would be negligible if valued taking death into account as the interest ceases on death.

(83) Section 8.

or "the date of" death (84). If it is possible to distinguish between the instant of death and the times immediately before and immediately after death, the further question must be asked of the relevance, if any, of such a distinction in relation to general powers of appointment.

(84) Section 11(2)

DEATH : A SEQUENCE OF EVENTS?

In Keel Estates (No.2), In re Aveling v. Sneyd (85) the argument was put before the Court of Appeal that it was necessary "to divide up by a minute process of temporal calibrations the series of events which occurred, beginning with (for it was the first of them)....death". The argument did not commend itself to the Court. However, as no liability or charge for estate duty arises until death occurs (86) Evershed M.R. was prepared to concede that there must be some distinction drawn in time between death and the imposition of duty. That, however, was the limit of the Court's concession. In dismissing the validity of counsel's argument, Evershed M.R. stated:

> "I am prepared (for the sake of argument) to accept the view that some interval of time must elapse, or be deemed to elapse, between the death and the imposition of the duty. But I cannot go further and assume that the duty attaches by some infinitesimal margin of time before there arises or springs into existence the next succeeding beneficial limitation." (87)

Insofar as Evershed M.R. was prepared to recognise a distinction in time between death and the imposition of estate duty, the decision in Keel Estates is not inconsistent with the decision of Palles C.B. in Re Augusta Magan (88) but in fact the latter decision would appear to go a considerable way towards accepting the "minute process of temporal calibration" rejected in the decision in Keel Estates.

In Re Magan the deceased was the donee of a general power of appointment conferred upon her by her mother's will. The power was contingent upon the deceased failing to leave issue surviving her on her death. To use the words of Palles C.B., the deceased died "without ever having been married". The deceased's will, in which the general power of appointment was exercised, purported to be made "in pursuance of the power contained in my mother's will, and of all other powers and authorities whatsoever".

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(85) [1952] 1 Ch. 603

(86) "It is not until there is an estate of a deceased person that the Act speaks": Robertson v. F.C.T. Supra n. 81 per Kitto J. at 486.

(87) Supra n. 85 at 617

(88) [1922] 2 Ir. R. 208 (The case was decided in 1908)

The question arose of whether the property subject to the power was, on the death of the deceased, "settled" property under the will of her mother for the purposes of the Finance Act 1894 (U.K.) in the sense that it was "for the time being limited to or in trust for any persons by way of succession:". (89) If the property was "settled" property and passed under her mother's will, it would not form part of the deceased's estate for duty purposes.

Up until the deceased's death, the law contemplated the deceased might have children. Such children would take under the will of the deceased's mother. Palles C.B. therefore found that "up until the moment of" her death, the property was settled property. However, at that moment the possibility of there being issue ceased and only the deceased could take under her mother's will. Therefore, at the moment of the deceased's death, the property ceased to be "settled" property. As the Chief Baron stated:

> "Thus arises a question of some nicety: was the property 'settled' when it passed from Miss Magan at the moment of her death? I am of the opinion that it was not. The two events - death and the passing of property - took place, in point of time, at the moment; but in nature one preceded the other. The passing of the property was the effect of the death; the death was the event upon which it passed, and in nature the event must precede the effect which is to ensue upon it. This is so, not only metaphysically, but it is a recognised principle of our law". (90)

The decision in Re Magan was reached by dividing up into a series of events the various events which transpired at the moment of the deceased's death: death itself, the consequence that the deceased could not be survived by issue, the consequence that only the deceased could take under her mother's will, the consequence that the property in question was no longer limited to or in trust for any persons by way of succession, and the passing of the deceased's estate. It is suggested that it would be difficult to better describe the approach of the Court than one of dividing up "by a minute process of temporal calibrations the series of events which occurred, beginning with...death".

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(89) Within s.2 of the Finance Act 1894 (U.K.)

(90) Supra n. 88; 210

While the reasoning adopted in Re Magan would not have received the approval of the Court (91) in the subsequent case of Keel Estates, it did find favour with the High Court of Australia in Robertson v. Federal Commissioner of Taxation. (92) In Robertson the deceased held shares in a company, the articles of association (article 6) of which contained a provision to the effect that on the death of the deceased all the shares in the company would be divided into two classes. The division would take place according to whether or not at the date of the deceased's death these shares were held by the deceased (no.2 class shares) or by persons other than the deceased (no.1 class shares). Upon the death of the deceased the no.2 class shares would acquire less valuable rights than the no.1 class shares. Therefore, upon the death of the deceased, the shares held in his name would loose a substantial part of their value while the shares held by other persons would substantially increase in value, thereby reducing the duty payable on the deceased's estate. The question for the Court was the basis on which the shares were to be valued.

The Commissioner relied upon two provisions in the Estate Duty Assessment Act 1914-47 (Commonwealth). The first provision was section 16A(1) allowing the Commissioner for the purpose of assessing the value of shares for estate duty purposes to assume that at the date of death the company's memorandum and articles of association were such that the company was eligible to obtain a listing on the Stock Exchange. The second provision was section 8(4)(e) of the Act, bringing within the deceased's estate a beneficial interest in property which the deceased had "at the time of his decease" but which as the result of a settlement or arrangement made by him "passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person."

The Court held the Commissioner could not rely on section 16A(1) as once the deceased had died, the articles no longer prevented the company from obtaining a listing on the Stock Exchange. Therefore, there was

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(91) There is no reference to it having been cited.

(92) (1952) 86 C.L.R. 463

no need to apply that section in order to notionally alter the articles in relation to article 6. The decision of Kitto J. makes it clear that the Court regarded the conversion of the deceased's shares into no.2 shares by the operation of article 6 as an event subsequent to death, the learned Judge stating:

> "...the very method of reasoning which Magan's case supports requires the conclusion that the application of the Estate Duty Assessment Act itself to the particular case is a consequence of, and therefore is logically to be treated as subsequent to, the death of the deceased..." (93)

The Commissioner's argument under section 8(4)(e) of the Act was also rejected, the Court finding no beneficial interest in the shares passed, occured or devolved on or after the death of the deceased: all that happened was that after the deceased's death the no.2 shares were less valuable than before his death.

It may also be that support for the "temporal calibration" concept rejected in Keel Estates may be found in the recent Opinion of the Privy Council in Commissioner of Stamp Duties (N.S.W.) v. Bone. (94) The deceased, Mrs Bone, made loans to each of her children. On the same day as the loans were made, the deceased made her will appointing her children as her executors and including a clause in the will forgiving "all sums whether for principal or interest" owing to her by her children. For the purpose of assessing duty on the deceased's estate, the Commissioner included the amounts of principal outstanding under the loans.

Under section 102(1)(a) of the Stamp Duties Act 1920 (N.S.W.), the estate of a deceased person is deemed to include "all property of the deceased which is situate in New South Wales at his death... to which any person becomes entitled under his will". The issue therefore arose of whether the debts were property of the deceased at her death.

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(93) Ibid; at 486

(94) (1976) 6 ATR. 66 on appeal from the High Court of Australia (1975) 4 A.T.R. 553

Certainly the debts were property of the deceased immediately before her death, but as has been observed:

> "...at the moment of her death, her will began 'speaking' (95) Two things happened at the same time - her death and the will becoming operative." (96)

If these two events, death and the will becoming operative, are regarded as happening at the same time, assuming the release clause in the will was effective, the debts ceased to be the property of the deceased at her death. Therefore they could not form part of her estate by virtue of section 102(1)(a) of the Act.

The Privy Council did not accept this argument, nor did they consider it in their Opinion, yet they held the debts formed part of the deceased's estate by virtue of section 102(1)(a) of the Act. It is therefore possible to argue that, if the Opinion of the Board in Bone's case is correct, the two events of death and the will becoming operative must have occurred in that order: if the events had occurred at the same time, the will would have operated to extinguish the debts.

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(95) Section 24 Wills Act 1837 (U.K.)

(96) Supra n. 15: at 229

AT THE TIME OF ... DEATH

It might be said that there is no doubt as to the meaning of the expression "at the time of ... death" for the matter is determined by the decision of Rowlatt J. in Attorney-General v. Quixley (97) The question in that case was whether estate duty was payable in respect of a "death gratuity" payable in relation to the deceased's employment and which, upon the death of the deceased, became payable to her personal representative. The relevant statutory provision was section 2(1)(a) of the Finance Act 1894 (U.K.) (under which property passing on the death of a deceased person is deemed to include property of which at the time of his death the deceased was competent to dispose). Rowlatt J. considered the proceeds of the gratuity could not come within that provision alone:

> "I think that so far, the mere words in subsection (1)(a) point to a disposition which a person can make at the time of his death in the sense of effectively, while still alive and till the moment of death, when the breath leaves his body - in other words, at his disposition inter vivos." (98)

However, after taking into consideration the further "deeming" provision contained in section 22(2)(a) of the Act, Rowlatt J. found the deceased must be deemed to have been competent to dispose of the property in question and therefore estate duty was payable in respect of it.

It is apparent that in Quixley, Rowlatt J. clearly construed the expression "at the time of ... death" as meaning "immediately before ... death". Therefore, if this construction is equally applicable to the Estate and Gift Duties Act 1998, a power to dispose of property which may be exercised only during the lifetime of the donee will nevertheless be exercisable by him "at the time of his death" and the property subject to the power will be caught by section 8 of that Act.

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(97) (1929) 98 L.J.K.B. 315; affirmed by the Court of Appeal (1929) 98, L.J.K.B. 652

(98) Ibid; at 317

However, it is submitted there may be grounds for distinguishing the decision in Quixley in New Zealand having regard to the differing provisions in the New Zealand and English legislation insofar as they relate to property subject to a general power of appointment.

On a general level, three distinctions may be made between the Estate and Gift Duties Act 1968 and the Finance Act 1894 (U.K.). First, there is a difference in the primary description of the property passing on death. In New Zealand, it is property over or in respect of which the deceased held a general power of appointment. In England, it is property of which the deceased was competent to dispose. In re Going (99) Hutchison J. observed:

> "The words 'competent to dispose' in the English section are not technical words ... while the New Zealand words 'a general power of appointment' are technical words bearing a well recognised meaning." (100)

Secondly, under the English provision, the expression "competent to dispose" covers two distinct situations, one where a person has an estate or interest in property that would enable him to dispose of it, the other where a person has such a general power (101) as would enable him to dispose of the property. Under the New Zealand provision, the first situation is omitted. In re Going, after referring to the English and New Zealand statutory provisions, Hay J. stated:

> "A comparison of the ... (English) provisions with the corresponding provisions of our own statute makes it apparent that the latter were derived from the former. For that reason, great significance attaches to the variations, which it must be assumed were deliberately made by our legislature." (102)

Thirdly, unlike the New Zealand statutory provisions, the English provisions are deeming provisions. Section 2(1) of the Finance Act 1894 (U.K.) deems certain property to pass on a person's death, including property

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(99) [1951] N.Z.L.R. 144

(100) Ibid; at 149; approved by Hay J. at 171

(101) c.f. "general power of appointment": In re Going (Ibid; at 171) Hay J. expressed the view that "this difference of itself calls for a more limited construction as to the scope of our section than is the case in England".

(102) Supra n. 99; at 171. See also re Manson [1964] N.Z.L.R. 257, at 270

of which the deceased was competent to dispose. Section 22(2)(a) of that Act then deems a person to be competent to dispose of certain property.

On a more specific level, it might be asked why, if as Rowlatt J. stated "at the time of ... death" means immediately before death, it is necessary for the English provisions to deem a person to be competent to dispose of property if he has a power or authority enabling him to appoint or dispose of that property by instrument inter vivos? The ability of a person to dispose of property by instrument inter vivos is a consequence of the deceased being alive and a deeming provision is therefore unnecessary.

In considering the applicability of the interpretation of the expression "at the time of ... death" adopted by Rowlett J. in Quixley to section 8 of the New Zealand Act, reference must be made to decisions of Australian and Canadian courts, particularly the decisions of the Supreme Court of Victoria in Re Alex Russell, deceased (103) and the Canadian Federal Court in Mastronardi v. The Queen (104) In the first of these cases it was submitted on behalf of the Commissioner of Probate Duty that the expression "at the time of ... death" means immediately prior to death. In the second case, it was submitted on behalf of the Minister of National Revenue that the expression "immediately before ... death" means at the instant of death. In each case the Court rejected the submission that the two temporal concepts could be equated.

In re Alex Russell, the deceased sold land to a company. The purchase price was paid partly in cash and partly by the allotment to the deceased of 20,000 preference shares of £1 each in the capital of the company at a premium of £4 per share. The preference shares conferred on the holder the right to a fixed dividend on paid up capital and a right to rank in a winding up as regards return of capital in priority

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(103) [1968] V.R. 285

(104) [1976] C.T.C. 572 (Federal Court); affirmed by Federal Court of Appeal [1977] C.T.C. 355

to ordinary shares, but did not participate further in the profits or assets of the company. The deceased had a power exercisable by notice in writing to convert the preference shares into ordinary shares, such ordinary shares carrying a right on a winding up of the company to participate in the surplus assets of the company. Hence, while the shares remained preference shares, those shares could only be regarded as having a value of £2. The deceased did not exercise the power of conversion during his lifetime.

The Commissioner included in the deceased's notional estate an amount of £80,000 in excess of the amount returned by the executors. Among the contentions put forward on behalf of the Commissioner was that as the deceased obtained a right to convert the preference shares into ordinary shares, paragraphs (f) and (j) of section 104(1) of the Administration & Probate Duties Act 1958 applied. Under paragraph (f) property was caught if it was property of which, "at the time of his death" the deceased was competent to dispose.

On behalf of the Commissioner it was argued the property in question consisted of all the rights which would have attached to the 20,000 preference shares if, before his death, the deceased had exercised his right to convert these shares into ordinary shares. McInerney J. rejected this submission, holding the property that was the subject of the power consisted of the preference shares registered in the name of the deceased. The "rights" to which the Commissioner referred had no separate existence beyond the preference shares themselves, and therefore did not constitute property of the deceased.

McInerney J. went on to consider whether the power which attached to the preference shares existed at the time when the Act required the composition and value of the deceased's estate to be ascertained, that is, at the time of the deceased's death, bearing in mind the power to convert the preference shares into ordinary shares could be exercised by the deceased only during his lifetime and did not survive his death.

Having considered the provisions in the Victorian Act corresponding with section 13 of the Estate and Gift Duties Act 1968, which includes within the dutiable estate of a deceased person the beneficial interest of that person in property as a joint tenant, the Victorian Act using the expression "immediately prior to ... death" and the New Zealand Act using the equivalent "immediately before ... death", McInerney J. was unable to accept that the expression "at the time of ... death" appearing in paragraphs (f) and (j) of section 104(1) of the Victorian Act should be construed as referring to a time immediately before the death of the deceased:

> "It is clear that up to the very moment of his death the ... (deceased) retained and could have exercised the power conferred on him ... of delivering a notice in writing of his desire to convert all or any of his preference shares into ordinary shares ... It could not, however, be exercised by will. The ... (deceased) not having exercised that power during his lifetime, it ceased, upon his death, to exist or to be exercisable." (105)

The differences between the New Zealand and English statutory provisions have already been noted. Certainly the Victorian provisions considered in re Alex Russell contained a dual primary description of the property in question. However, in considering the relevance of that decision in New Zealand, it is interesting to observe the comments of McInerney J. as to the similarity of the New Zealand and Victorian statutory provisions. Although the finding on the "time of death" point was sufficient to decide the case before him, the learned Judge went on to consider whether the deceased's power to convert the preference shares into ordinary shares could be regarded as conferring upon the deceased a general power of appointment, or making him competent to dispose of the shares. In the course of this consideration, in which the decisions in Pratt's case (106) and Re Manson (107) are discussed, McInerney J. commented:

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(105) Supra n. 103; at 301

(106) [1929] N.Z.L.R. 163

(107) [1964] N.Z.L.R. 257

> "Pratt's case ... was a decision as to the meaning of the phrase 'power of appointment' in section 5(1)(a) of the Death Duties Act 1921 (108) - a paragraph in substantially similar terms to section 104(1)(f) of the Administration and Probate Act 1958." (109)

In Mastronardi v. The Queen (110) the statutory provision under consideration was section 70(5) of the Income Tax Act 1952 which provides that where a person dies, he is deemed to have disposed "immediately before his death of each property owned by him at that time that was a capital property and to have received proceeds of disposition therefore equal to the fair market value of the property at that time". (111)

The deceased owned shares in a company which had an insurance policy over his life. He died unexpectedly. The Minister of National Revenue sought to value the shares owned by the deceased having regard to the fact that the insurance policy was worth $500,000. In support of this basis of valuation, reliance was placed on the converse argument to that presented by the Commissioner in re Alex Russell (112). On behalf of the Minister it was argued that "immediately before ... death" meant at the instant of death. Therefore at the time referred to in the subsection, the insurance policy had become payable, thereby increasing the value of the company's shares. The fair market value of the shares would reflect the fact that the proceeds of the policy had increased the value of the shares and, according to the view taken by the Minister, the shares should be valued on this basis.

Gibson J. rejected this argument, holding that the words "immediately before his death" should not be construed as meaning the equivalent of

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(108) Now s.8 of the Estate and Gift Duties Act 1968.

(109) Supra n. 103; at 307

(110) [1976] C.T.C. 572; refer case note (1976) 24 C.T.J. 597.

(111) Section 70(5)(c) of the Act contains the corresponding "rollover" provision deeming such property to have been acquired by its recipient at a cost equal to its fair market value immediately before the deceased's death.

(112) Supra n. 103

the instant of "death..." (113) The view was expressed by the learned Judge that valuation:

> "... must be considered as having taken place at some other time than at the instant of death of the deceased and no premise of imminence of death of the deceased should form any part of such valuations." (114)

(113) Supra n. 110; at 576. No judicial authority was referred to in support of this finding. Although counsel cited English, Australian and Canadian authorities, Gibson J. found them of no substantial assistance in interpreting section 70(5).

(114) Ibid.

RE SILK

The deceased died in October 1975, her husband having pre-deceased her some 9 years earlier. The husband's will, having made various dispositions, required his trustees to divide the residuary estate into two equal parts holding each of those parts upon trust. One of these trusts made provision for the testator's wife, the other for his children. Insofar as the trust in respect of his wife (the deceased) was concerned clause 6(A)(a) of the will provided that the income from that trust should be paid to her during her lifetime. The clause then continued as follows:

> "And I authorise and direct my trustees notwithstanding the trusts declared by this my will at any time or times during the period of five years from the date of my death on the request in writing of my wife to raise any sum or sums out of the capital of such half part of my estate not exceeding in the aggregate one half of such part and pay the same to my wife for her use and benefit in addition to the income of the share of my residuary estate to which she is entitled and after the expiration of such period of five years at any time or times on the request in writing of my wife to raise any sum or sums out of the capital of such half part of my residuary estate and pay the same to my wife for her use and benefit in addition to the income of the share of my residuary estate to which she is entitled."

On the death of the testator's wife, the capital and income was to be held for the beneficiaries of the trust created in respect of the other half of the testator's residuary estate.

At the deceased's death, the five year period referred to in clause 6(A)(a) of her husband's will had expired and consequently the limitation on the amount of capital that could be raised was no longer effective. The deceased could therefore, up until her death, require the trustees to raise and pay to her a sum of money equal to the value of her entire one half-share in her husband's residuary estate. The Commissioner of Probate Duty claimed the value of the interest formed part of the deceased's estate for duty purposes as property over or in respect of which the deceased had "at the time of her

death" a general power of appointment within section 7(1)(f) of the Probate Duty Act 1962 (Vic.). Alternatively, the Commissioner relied on section 7(1)(j) of that Act which included within the estate of the deceased property of which "immediately prior to her death" she was competent to dispose.

At first instance (115) Pape J. found in favour of the estate. He held that in the circumstances, the only relevant provision was section 7(1)(j) of the Act. The line of reasoning adopted by the learned Judge rested on three propositions, two of which involve matters of statutory interpretation, the third involving a matter of the interpretation of the will of the husband of the deceased. The first finding on a matter of statutory interpretation was that the words "immediately prior to .... death" appearing in paragraph (j) referred to an "infinitely short" period of time before death. The second was that the deceased could not have been competent to dispose of the property unless immediately prior to her death she was able to acquire the property in question. Insofar as the interpretation of the will was concerned, Pape J. held the trustees were authorised to raise the sums requested and to pay them to the deceased for her use and benefit alone: they were not authorised to make payment to the personal representatives of the deceased. Therefore, said the learned Judge, it followed that immediately before her death all the deceased could have done in respect of the exercise of the power conferred upon her by clause 6(A)(a) of her husband's will was to take the preliminary step of making a request in writing to the trustees to raise money out of the capital of the one half share in the residue of her husband's estate in order that the money might be paid to her. It would have been impossible for the trustees to have raised the money and paid it to the deceased in the infinitely short period of time which would elapse before her death. As it was impossible for the deceased to acquire the money immediately before her death, she could not have been competent to dispose of it.

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(115) 5 A.T.R. 613

On an appeal by the Commissioner, (116) the Full Court of the Supreme Court of Victoria took a different view. All three judges (117) rejected the three propositions relied on by the judge at first instance. Gillard J. expressed the view that Pape J's opinion that "immediately prior to ... death" meant an infinitesimally (118) short period of time before death placed a too restrictive meaning on the expression which was

> "...intended to pick up any property over which a person might have a power or authority of disposition which would terminate on death." (119)

Lush J. did not express a view on the meaning of the expression "immediately prior to ... death". However, the Full Court rejected the view that whether property subject to a power or authority of disposal that would otherwise terminate on death could form part of the estate of a deceased person would depend on whether the power could in fact be exercised by the deceased during a short period of time at the end of his lifetime.

The Full Court also rejected the contention that a power or authority to obtain property, thereby forcing the proprietor of the legal or equitable interest in that property to part with title to the person exercising the power or authority, was not sufficient to make the person exercising the power or authority competent to dispose of that property for the purposes of paragraph (j).

On the point of the interpretation of the will, the Full Court held that the phrase in clause 6(A)(a) of the will "for the use and benefit" was not inconsistent with payment being made by the trustees

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(116) 5 A.T.R. 624

(117) Gillard, Lush and Crockett J.J., Crocket J. agreeing with the judgment delivered by Lush J.

(118) Pape J. in fact referred to an "infinitely" short period of time: supra N.115 at 623

(119) Supra N. 116, at 627

after the death of the deceased. If the deceased gave to the trustees written notice to make payment of a specific amount which was within the limits contained in the clause, she was entitled to the money. The clause did not require as a condition of payment that the deceased should be living before payment was made.

Therefore, the Full Court found that immediately before her death, the deceased had a right to require the trustees to make payment to her in terms of clause 6(A)(a) of her husband's will. The right to payment would arise immediately and questions of whether it was in fact possible to make payment were irrelevant. Therefore, for the purposes of section 7(1)(j) of the Act, the deceased immediately prior to her death was competent to dispose of the property in question.

An appeal on behalf of the estate to the High Court of Australia was dismissed. (120) The leading judgments were delivered by Stephen and Mason JJ. (121) The Court agreed with the Full Court in finding that the relevant statutory provision in the Probate Duty Act was section 7 (1)(j). The only member of the High Court to consider the meaning of the expression "immediately prior to ... death" appearing in that provision was Stephen J. who observed that:

> "...the temporal requirement of the section will be satisfied whenever a deceased had, at the moment before his death, the legal competency to dispose." (122)

The High Court also agreed with the Full Court insofar as it took the view that a person is competent to dispose of property for the

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(120) 6 A.T.R. 321

(121) Gibbs J. expressed a brief opinion on the concept of "competency to dispose" and in other respects agreed with Stephen and Mason J.J. Murphy J. delivered a short and substantially unreasoned judgment also dismissing the appeal. Jacobs J. dissented from the decision of the majority.

(122) Supra N.120 at 324. Mason J. discussed the expression "immediately prior to ... death" (at 327), but only for the purposes of contrasting it with the expression "at the time of ... death" appearing in paragraph (f).

purposes of paragraph (j) if the person vested with the power or authority could by the exercise of that power or authority bring about the loss of ownership of property owned by another person: whether the new owner becomes the holder of the power, or some other person, is irrelevant. As Mason J. stated:

> "The appointment of property by a donee of a power to himself is correctly described as a disposition and as an acquisition. The fact that it is an acquisition by the appointer does not deny its other character as a disposition by him. So long as he possesses the power to appoint he is competent to dispose of the property which is the subject of the power." (123)

The Court also took the view that in determining whether immediately prior to her death the deceased was competent to dispose of property, questions relating to the practical ability of the deceased to make an effective disposition were irrelevant.

On the matter of the interpretation of the will, it was accepted that the full court was correct in its interpretation of clause 6(A)(a) insofar as the right of the deceased to make payment was not conditional upon the survival of the deceased after a request had been made.

The High Court therefore dismissed the appeal, holding that the right conferred upon the deceased by clause 6(A)(a) of her husband's will to request the trustees to raise money from her husband's residuary estate rendered her competent to dispose of that property immediately prior to her death. Consequently, on her death, that property formed part of the deceased's estate pursuant to section 7(1)(j) of the Probate Duty Act 1972 (Vic.)

Two observations need to be made in respect of the power conferred by the will of the deceased's husband. The first is that the testator used the words "authorise and direct" when empowering his trustees to raise sums out of capital on a request in writing from the deceased. As the judge at first instance observed (124) these words

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(123) Supra n. 120; at 328

(124) Supra n. 115; at 617

conferred a power coupled with a duty on the trustees and not merely a discretionary power. Upon a request being made, the trustee's were bound to comply with it. The full court and High Court took the same view. (125)

Secondly, the power conferred upon the deceased was exercisable by the deceased only during her lifetime (126) and could not be exercised by will:

> "It is quite clear that whatever power was conferred upon the deceased by clause 6(A)(a) of her husband's will, such power came to an end on her death." (127)

It is for this reason that the Commissioner did not succeed under paragraph (f) of section 7(1) of the Probate Duty Act 1962 (Vic.), an aspect of the decision in Re Silk it is proposed to consider in more detail.

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(125) In the full court, Lush J. observed (supra n.116; at 633): "The making of the request placed the trustees under a duty devoid of any element of discretion, to raise the money and to pay it." In the High Court (supra n.120 at 326), Mason J. expressly approved of this observation.

(126) Notwithstanding that the survival of the deceased was not a condition precedent to payment being made.

(127) Supra n. 116; per Gillard J. at 624.

THE ALTERNATIVE ARGUMENT IN RE SILK

As has been stated, in Re Silk the Commissioner relied on both paragraphs (f) and (j) of section 7(1) of the Victorian Act, succeeding under paragraph (j) but failing to succeed under paragraph (f). The decisions insofar as they relate to paragraph (f), however, are of particular interest in the context of section 8 of the New Zealand Act for as has also been stated, that paragraph includes within the dutiable estate of a deceased person property over or in respect of which the deceased had a general power of appointment "at the time of his death".

At first instance, it was conceeded by counsel for the Commissioner that, having regard to the decision in Re Alex Russell (128), the Commissioner could not rely on paragraph (f). The application of paragraph (f) was therefore not argued before Pape J., although the point was taken that Re Alex Russell was wrongly decided, thereby preserving the Commissioner's right to argue the application of paragraph (f) on appeal.

Before the Full Court, it was in fact argued on behalf of the Commissioner that the decision in Re Alex Russell was wrong. This argument was disposed of very shortly. The Court agreed that Re Alex Russell was correct. (129) However, the judgments delivered by Gillard and Lush J.J. contain some interesting comments as to the meaning of the expression "at the time of ... death". Gillard J. rejected any suggestion that the expression "at the time of ... death" could mean immediately before or immediately after death, commenting:

> "The phrase 'at the time of death' means what it says: it does not mean, as was contended for on behalf of the Commissioner, that a power which ceased at death also existed at the time of death. I find that contention completely contradictory". (130)

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(128) [1968] V.R. 285

(129) Supra n. 116; per Gillard J. at 625, Lush J. at 633.

(130) Supra n. 116 at 624.

In emphasising the need for a "strict interpretation" when considering the statutory criteria specifying the time at which a deceased person's estate is to be determined for duty purposes, Gillard J. drew attention to the varying temporal expressions used in the Act, among them the expression "immediately prior to ... death". Having made similar observations, Lush L.J. concluded:

> "So far as I know it has never been contended that a power exercisable by will is not a power which the deceased 'had at the time of his death' and if such an approach is accepted it would exclude from the description of powers existing 'at the time of death' any power which the deceased could exercise only in his lifetime." (131)

The Commissioner's argument under paragraph (f) met a similar fate in the High Court. Stating that the words "at the time of ... death" must be given "their precise and literal meaning". (132), Stephen J. emphasised the "nice but quite deliberate distinction" (133) between the temporal concepts of "immediately prior to ... death" appearing in paragrpah (j) and "at the time of ... death" appearing in paragraph (f), concluding that as death was the event which terminated the power conferred upon the deceased by clause 6(A)(a) of her husband's will, it could not have been exercisable "at the time of her death".

Mason J. expressed reluctance to draw the distinction alluded to by Stephen J. but accepted that the Act required such a distinction to be made. He therefore agreed with the full Court that the Commissioner could not succeed under paragraph (f), concluding that in the case under consideration:

> "As death is the event which terminates the (deceased's) power to make a request in writing, it cannot be said with accuracy that the power existed at that time." (134)

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(131) Supra n. 116; at 634

(132) Supra n. 120; at 322

(133) Ibid.

(134) Supra n. 120; at 327

THE RELEVANCE OF THE ALTERNATIVE ARGUMENT IN NEW ZEALAND

It is implicit in the decision of the High Court of Australia in Re Silk that a general power of appointment which the donee may exercise only during his lifetime (because the death of the donee is the event upon which the power is terminated) is not a general power of appointment which exists at the time of the donee's death. If this statement represents the law in New Zealand, it must follow that property over or in respect of which a person has a general power of appointment, that power being exercisable only during the lifetime of the donee and not being exercisable by him by will, cannot be property "over or in respect of which the deceased had at the time of his death a general power of appointment" for the purposes of section 8 of the Estate and Gift Duties Act 1968. It would therefore be possible to prevent property which is the subject of a general power of appointment from forming part of the donee's dutiable estate on his death merely by ensuring that the power may be exercised only during the donee's lifetime. The donee of the power could make provision for a gift over in default of appointment in his will in the case of a testamentary settlement and in the deed of trust in the case of an inter vivos settlement. The effect of section 8 of the Act would thereby be restricted to the situation where the general power of appointment could be exercised during the donee's lifetime and by will, or only by will.

As it has been endeavoured to show, prior to the decision in Re Silk, the authorities were far from settled as to whether it was possible in an estate duty context to consider death and its consequences as a series of events, each divided in time. The decision of the English Court of Appeal in Keel Estates (135) stands as authority for the firm rejection of such an approach. However, the decision in Re Magan (136) which represents a contrary approach, has found

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(135) [1952] 1 Ch. 603

(136) [1922] 2 I.R. 208

favour with the High Court of Australia in Robertson's case. (137) Furthermore, although not the subject of consideration in Bone's case (138), the conclusion reached by the Board in that case requires a temporal sequence to be given to the events which transpired at the death of the deceased, for without the acceptance of such a sequence of events, the Commissioner could not have succeeded.

As to whether there is a distinction between a power which exists immediately before death, and a power which exists at the time of death, the decision in Quixley (139) would appear to deny the existence of such a distinction with the result that any argument which rests upon such a distinction being drawn is destined to failure. However, the decision in Re Alex Russell (140) clearly rejects the contention that the expression "at the time of ... death" means immediately before or prior to death, while the converse proposition is supported by the decision in Mastronardi (141). The decision in Re Silk also rejected the contention that the expressions "at the time of ... death" and "immediately prior to ... death" may be equated. (142)

It must be conceded that all the Judges in Re Silk to whose decisions reference has been made, in discussing the meaning of the expression "at the time of ... death" placed considerable emphasis on the different temporal concepts used in paragraphs (f) and (j) of section 7(1) of the Probate Duty Act 1962 (Vic). As Mason J. explained, (143) paragraph (j) was derived from section 104(1) of the Administration and Probate Act 1958 (Vic.). In that Act, the relevant time prescribed was "at the time of ... death". It was

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(137) (1952) 86 C.L.R. 463

(138) 6 A.T.R. 66

(139) (1929) 98 L.J.K.B. 315

(140) [1968] V.R. 285

(141) [1976] C.T.C. 572. Mastronardi was decided after Re Silk

(142) The full Court in Re Silk expressly approved of the decision in Re Alex Russell but the High Court did not refer to it.

(143) Supra n. 120; at 327

amended in 1962 to read "immediately prior to ... death". Mason J. also noted that in section 7(1) of the 1962 Act, the expression "immediately prior to ... death" or its equivalent "immediately before ... death" is used on four occasions (144) whereas the expression "at the time of ... death" appears twice in the same subsection. (145) As the learned Judge commented, "the difference cannot be ignored". (146)

However, this does not necessarily detract from the argument that the interpretation of the words "at the time of ... death" adopted in Re Silk does not apply in relation to those words as they appear in section 8 of the New Zealand Act. First, it must always be asked why, if it was intended that section 8 of the New Zealand Act should apply in respect of a general power of appointment which existed "immediately before" or "prior to" the donee's death but which is terminated by his death, the legislature did not adopt either of these alternative expressions in place of the words "at the time of ... death". Secondly, it is relevant to note that Re Alex Russell was decided under section 104 of the Administration and Probate Act 1958 (Vic.) (147). In concluding that a power which came to an end upon death was not a power which existed "at the time of ... death", Mc Inerney J. considered the other temporal concepts adopted by section 104(1) of that Act, in particular paragraph (e) which, in including within a deceased person's estate his beneficial interest in joint property, uses the words "immediately before ... death" as that interest ceases upon death. It is suggested that it is difficult to see why a general power of appointment exercisable only during the lifetime of the deceased and terminating on his death should not require a similar temporal expression before property subject to that

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(144) Section 7(1)(d), (e), (i) & (j)

(145) Section 7(1)(c) & (f)

(146) Supra n. 143

(147) The testator in that case died on 22 November 1961. The Probate Duty Act came into force on 1 July 1962. By virtue of section 2(2) of that Act, the provisions of section 104 of the Administration and Probate Act 1958 applied to the testator's estate.

power forms part of the holder's dutiable estate on his death pursuant to section 8 of the New Zealand Act.

A further objection that might be raised in respect of reliance being placed upon the decisions in Re Alex Russell and Re Silk is that in neither of those cases was it decided that the power or authority in question was in fact a general power of appointment. In Re Alex Russell Mc Inerney J. (148) raised the question of whether the deceased's preference shares were property over which he had a general power of appointment but, having reached a conclusion on the time of death issue, found it unnecessary to answer the question. Similarly, in Re Silk, the finding that the power or authority did not exist "at the time of ... death" made it unnecessary for consideration to be given to the question of whether clause 6(A)(a) of her husband's will conferred upon the deceased a general power of appointment over a one half share of his residuary estate. In Re Silk, Lush J. in the full Court (149) was the only judge to express doubts as to the existence of a general power of appointment. In the High Court, Stephen J. (150) simply stated "whatever the power" conferred upon the deceased, it did not exist at the time of her death. Mason J. (151) commented that the statutory definition of a general power of appointment was of little assistance and that "the frailty of the Commissioner's argument stems not so much from the elements in the statutory definition" as the requirement that the power should exist at the time of the deceased's death. (152) Murphy J. (153) was prepared to assume the existence of a general power of appointment, but only for the purpose of finding it did not exist at the time of death. However, it is submitted that the failure of the Courts in either of these cases to make a finding on the question of whether there was in existence a general power of appointment over property does not detract from the persuasive authority

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(148) Supra n. 128; at 30

(149) Supra n. 116; at 634

(150) Supra n. 120; at 322

(151) Supra n. 120; at 327

(152) Ibid.

(153) Supra n. 120; at 333

of the decisions. In order for property to be caught under section 8 of the New Zealand Act, as with the corresponding statutory provisions under consideration in Re Alex Russell and Re Silk, two conditions have to be satisfied. The first is that the property in question is subject to a general power of appointment. The second is that the general power of appointment over that property exists at the time of death. A finding that either condition is not satisfied is sufficient for a court to make a finding in favour of the estate of the deceased person: whether the power under consideration is or is not a general power of appointment is irrelevant if that power does not exist at the time of its holder's death.

CONCLUSIONS

The advantages that may accrue from using a power of appointment as an estate planning device must be balanced against the disadvantages that may follow in terms of the liability to death duty pursuant to section 8 of the Estate and Gift Duties Act 1968 of the property subject to the power.

It has been suggested in this paper there may be two general ways of avoiding the effect of section 8 of the Act. The first is to confer upon the donee a power which is not a general power of appointment within the terms of the section. The second is to confer a general power of appointment ensuring that it comes to an end at the donee's death and therefore does not exist "at the time of his death" for the purposes of the section.

Section 8 of the Act catches property subject to a "general power of appointment" as that expression is defined in section 2(i) of the Act. A power of appointment which may not be exercised by its donee without the consent of some other person, whether or not that person is also a donee of the power, is not a general power of appointment either at common law or for the purposes of the Act. Therefore, property subject to the power will not form part of the donee's dutiable estate on his death.

Where it is specifically desired to confer a general power of appointment upon a person, it may nevertheless be possible to prevent the property subject to the power from forming part of the donee's dutiable estate on his death by restricting the exercise of the power to the lifetime of the donee. This proposition rests on the argument that section 8 of the Act only applies to property subject to a general power of appointment where that power may be exercised by its donee "at the time of his death". If the donee's death is the event which terminates the

power, the power cannot exist "at the time of his death".

English authorities do not support the arranging of events which happen at the moment of death into a temporal sequence, or the drawing of a distinction between the times of death and immediately before death. However, there are more recent decisions to the contrary which support the argument outlined above, those having been decided under legislation bearing a greater similarity to the New Zealand legislation than does the English legislation. Whether the argument will succeed in New Zealand remains to be seen. It is predicted, not without some confidence, that success is likely.

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