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Cutting the "Strings"
on Inter Vivos Transfers
In Contemplation of Death

Professor Lowndes here discusses the Treasury's treatment of transfers of property in contemplation of death under the estate tax provisions of the Internal Revenue Code of 1954. He concludes that in these situations the taxpayer's gross estate should be determined by the effect of the transfer upon the assets of the estate rather than by the rules of property law.

Charles L. B. Lowndes*

Suppose that more than three years before his death, A conveys Blackacre to B, reserving a life estate in his own favor. Later, within three years of his death and in contemplation of death, A releases his life estate to B. What part of Blackacre, if any, should be included in A's gross estate for purposes of the federal estate tax?

It is possible that the full value of Blackacre may be taxed to A's estate under either one of two theories. First of all, it may be contended, as indeed it has been, that where property is transferred with a reservation of a life estate, the full value of the transferred property is taxable to the transferor's estate, regardless of the disposition which he makes of the life estate before his death. This is done on the theory that the transfer taxed is the inter vivos transfer with reservation of a life estate, rather than any transfer at death upon which the transferor's interest in the transferred property ceases. Secondly, it may be argued that the full value of Blackacre is taxable to A's estate, because this would have been the result if the life estate had not been relinquished in contemplation of death, and the taxability of the original transfer cannot be changed by a subsequent testamentary transaction.

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1. This theory was rejected in Estate of Thurston, 36 Cal. 2d 207, 223 P.2d 12 (1950). See, however, Rottschaeffer, Taxation of Transfers Taking Effect in Possession at Grantor's Death, 26 IOWA L. REV. 514 526-28 (1941); Lowndes & Kramer, Federal Estate and Gift Taxes 172, 173 (1956) [hereinafter cited as Lowndes & Kramer].
Under the literal language of Internal Revenue Code of 1954, section 2036, the section which taxes a transfer with a reservation of a life estate, it is possible to conclude that the statute taxes a transfer with a reservation of a life estate regardless of what transpires after the transfer. The statute says that the value of any property which the decedent has transferred at any time subject to a reserved life estate shall be included in his gross estate. Some of the other sections of the statute, which tax inter vivos transfers, specify explicitly that in order to be taxable the decedent's interest in the transferred property must have persisted up until his death. Thus, for example, section 2038, which taxes revocable transfers, provides for a tax if the decedent at the date of his death possessed power to alter or revoke the transfer. Section 2036, however, does not explicitly require that the decedent's life interest continue up until his death for a tax to be imposed under that section.

It is generally assumed however that a tax will not be imposed under section 2036 simply because the decedent transferred property during his life and retained a life estate, if he relinquished his interest in the property before his death, provided that the relinquishment was not in contemplation of death. The leading case in this connection is Estate of Thurston, where the Supreme Court of California held that under a California statute similar to section 2036, a transfer with a reservation of a life interest was not taxable if the transferor parted with all of his interest in the property before his death, at least if the life estate was not relinquished in contemplation of death. The court said that since the purpose of taxing inter vivos transfers under a death tax is to prevent tax avoidance by taxing transfers which operate like transfers by will or intestacy, the legislature did not intend to penalize an inter vivos transfer, which was not in contemplation of death, and under which the transferor retained no interest in the transferred property at his death. From a practical point of view, the position of the California court is equally appealing. If a man can give away his entire interest in property during his life at one time and escape a tax, pro-

4. "Even though a tax attaches to a transfer when the transferor has reserved a life estate in the property, however, it can be avoided by the subsequent relinquishment of the life estate before the death of the transferor. . . . The express purpose of provisions for the taxation of specified inter vivos transfers is to reach 'every transfer made in lieu of or to avoid the passing of property by will or the laws of succession' . . . and only such transfers are subject to taxation. The tax is not imposed on transfers not in contemplation of death to transferees whose interest in and possession or enjoyment of the property are not affected by whether the transferor lives or dies. It is immaterial whether such a transfer is accomplished by a single transaction or, as in the present case, by an initial transfer and the subsequent relinquishment, not in contemplation of death, of the only interests retained in the first transfer whose retention until the death of the transferor would have resulted in the estate or inheritance taxation of the transfer." Traynor, J., Id. at 211, 223 P.2d at 14.
vided, of course, that the transfer is not in contemplation of death, it is difficult to see any reason why he cannot achieve the same result by divesting himself of the property by successive transfers. In the hypothetical case at the start of this paper, for example, if A had given Blackacre to B outright, when he made the initial transfer, the property would clearly have been excluded from his gross estate. Is there any sensible reason for a different result if A first of all gives B the remainder after his reserved life estate, and then later gives him his life estate, provided that the relinquishment of the life estate is not in contemplation of death?

If we assume that a transfer is not taxable under section 2036 simply because the transferor originally retained a life estate, provided that he relinquished the life estate before his death and the relinquishment was not in contemplation of death, we come to the question of the effect of a release of the life estate in contemplation of death. In a recent ruling, the Treasury has taken the position, which is also taken by the regulations, that the release of the life estate in contemplation of death does not change the pre-existing situation, and the full value of the property transferred initially is includible in the gross estate of the transferor. In support of this position, the Internal Revenue Service cites section 8 of the Technical Changes Act of October 25, 1949, which, as an aftermath of Commissioner v. Estate of Church, provided that where a transfer with a reservation of a life estate was made before March 4, 1931, or in some situations before June 7, 1932, the life estate could be released before 1951 without incurring an estate tax, even though the release was made in contemplation of death. Although the Technical Changes Act of 1949 was later amended to exempt transfers with a reservation of a life estate before March 4, 1931 and June 7, 1932 from the estate tax entirely, the Treasury contends that the 1949 Technical Changes Act, by specifically providing that certain

8. 335 U.S. 632 (1949). In the Church case, the Supreme Court, in a surprising reversal of May v. Heiner, 281 U.S. 238 (1930), held that a transfer with a reservation of a life estate was taxable under the estate tax as a transfer taking effect in possession or enjoyment at the transferor’s death. To negative the retroactive effect of this decision, Congress provided in the Technical Changes Act of 1949, cited note 7 supra, that a transfer with a reservation of a life interest, which was made before March 4, 1931, or in certain cases before June 7, 1932, should not be taxed to the transferor’s estate, if he released his life estate prior to 1951, even though the release was in contemplation of death. INT. REV. CODE OF 1954, § 2036(b) follows the Technical Changes Act of 1953, 67 Stat. 623, 26 U.S.C. § 811, app. (Supp. V 1958), by providing that transfers with a reservation of a life estate before March 4, 1931 or June 7, 1932 shall not be taxed at all. LOWNDES & KRAMER 133.
transfers where reserved life estates were released in contemplation of death were not taxable under the estate tax, manifested a congressional understanding that the release of reserved life estates in contemplation of death in other situations was taxable. Even if it can fairly be said that the Technical Changes Act of 1949 shows an intention on the part of Congress to treat the release of a reserved life estate in contemplation of death as a taxable transfer under the estate tax provisions, it seems a little far-fetched to stretch this into a further declaration of congressional intention to tax the full value of the property in which the life estate was reserved, rather than merely the value of the life estate which is released in contemplation of death. Yet this seems to be what the Service, by implication, at least, is trying to do.

As a further argument in support of the position that where a reserved life estate is released in contemplation of death, the full value of the property in which the life estate was retained is taxable to the decedent's estate, the Service cites a dictum from Estate of Thurston and a decision involving the District of Columbia inheritance tax. In Thurston, the California Supreme Court actually held that a transfer with a reservation of a life estate was not taxable to the transferor's estate under the California law, where the transferor released the life estate prior to his death and the release was not in contemplation of death. In answer to the argument that this encouraged tax avoidance by permitting people to release reserved life estates and avoid a death tax, the court pointed out that the relinquishment of the life estate in contemplation of death would not escape the tax, because the "testamentary effect of the earlier transfer cannot be altered by a later testamentary transfer, either by will or in contemplation of death."  

The problem posed by the hypothetical case goes beyond the tax consequences of the relinquishment of a reserved life estate in contemplation of death. It is but a single illustration of the broader question of the tax effects of cutting the "strings," which make inter vivos transfers taxable under the federal estate tax, in contemplation of death. More specifically, the problem underlying the hypothetical case may occur in connection with the transfer or release in contemplation of death of: (1) a reserved life estate in connection with section 2036; (2) a reversionary interest in connection with section 2037; (3) a power to alter or revoke a transfer in connection with section 2038; (4) the decedent's annuity in connection with section 2039; (5) the interest of a joint owner in connection with section 2040; (6) a taxable power of appointment in connec-

12. 36 Cal. 2d at 214, 223 P.2d at 16.
tion with section 2041; and (7) incidents of ownership in life insurance payable to beneficiaries other than the estate of the insured in connection with section 2042.

It is worth noting that in some of these situations the statute provides expressly what shall be taxed when a taxable incident of ownership is released in contemplation of death. This is true of section 2041, for example, which specifies in detail just what shall be included in the donee's gross estate when a taxable power of appointment is exercised or released in contemplation of death. It is also true of section 2038, which provides expressly that where a power to alter or revoke a transfer is released in contemplation of death, the amount which is taxed is the value of the interest subject to the power, rather than the value of the power itself. Thus, for example, if A transferred property to T in trust for C for life, remainder to D, and reserved power to revoke the trust with the consent of C, the value of this power would obviously be less than the value of the entire trust property. If, however, A released the power in contemplation of death, the amount which would be included in his gross estate under the express wording of section 2038 would be the full value of the trust property, rather than the value of the power which A relinquished.

Apart from sections 2038 and 2041, the statute makes no express provision with respect to the amount which is taxable when an incident of ownership attached to a taxable inter vivos transfer is released in contemplation of death. As far as the wording of the statute is concerned, the effect of relinquishing incidents of ownership in these situations appears to be governed by section 2035, which simply provides that where there is a transfer in contemplation of death, the amount to be included in the transferor's gross estate is the value of the "interest" transferred in contemplation of death.

If the word "interest" in section 2035 is interpreted as meaning

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13. Generally speaking, the property subject to the power of appointment must be included in the donee's gross estate when the power is exercised or released in contemplation of death. Where, however, the power can only be exercised with one, who is neither the donor of the power, nor one possessing a substantial adverse interest in the exercise of the power, only a fractional part of the property subject to the power is included in the donee's gross estate. Int. Rev. Code of 1954, § 2041(b)(1)(C)(iii).

14. Int. Rev. Code of 1954, § 2038(a)(1) provides that the gross estate "shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer . . . where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . by the decedent alone or by the decedent in conjunction with any other person . . . to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death." Treas. Reg. § 20.2038-1(e) (1958).

15. Int. Rev. Code of 1954, § 2035(a) provides: "The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time a transfer . . . in contemplation of his death."
the property interest which is transferred in contemplation of death, it would seem that where there is a transfer in contemplation of death of a reserved life estate,\textsuperscript{16} or a possibility of reverter,\textsuperscript{17} or a decedent's annuity,\textsuperscript{18} or the interest of a joint owner,\textsuperscript{19} or an incident of ownership in life insurance,\textsuperscript{20} only the value of the property interest transferred in contemplation of death will be included in the transferor's gross estate, rather than the amount which would have been taxed to his estate if the transfer in contemplation of death had never taken place. This unhappy conclusion finds support in the only cases where the question appears to have been litigated to any extent. There are a growing number of cases where property held by a decedent and another as joint tenants,\textsuperscript{21} or tenants by the entirety\textsuperscript{22} has been transferred in contemplation of death, or the joint estate has been converted into a tenancy in common in contemplation of death, and it has been held that only the decedent's fractional share in the property, rather than a part proportionate to his contribution to the property, is taxable to his estate.

\textsuperscript{16} INT. REV. CODE OF 1954, § 2036.
\textsuperscript{17} INT. REV. CODE OF 1954, § 2037.
\textsuperscript{18} INT. REV. CODE OF 1954, § 2039.
\textsuperscript{19} INT. REV. CODE OF 1954, § 2040.
\textsuperscript{20} INT. REV. CODE OF 1954, § 2042.
\textsuperscript{21} Sullivan's Estate v. Commissioner, 175 F.2d 657 (9th Cir. 1949), reversing 10 T.C. 961 (1948); Don Murillo Brockaway, 18 T.C. 488 (1952), acq., 1955–2 CUM. BULL. 4, aff'd on other grounds, 219 F.2d 400 (9th Cir. 1954). See LOWNDES & KRAMER 230–34.

The Commissioner has announced his acquiescence in the Tax Court's decision in A. Carl Borner, note 22 supra. In this case the decedent had paid all the consideration for property to which he took title in his name and that of his wife as tenants by the entirety. Later the decedent and his wife, in contemplation of the decedent's death, transferred the property in trust, reserving the income to themselves equally during their lives, and then to the survivor during the survivor's life. The Tax Court held that only half of the trust property was taxable to the decedent's estate, since he had only transferred half of the property to the trust. In Rev. Rul. 57–448, 1957 INT. REV. BULL. No. 41, at 43, however, where jointly held property was transferred to a trust with a reservation of the income from the property in favor of the transferees for their lives and the life of the survivor, the Service ruled that upon the death of the tenant who had furnished the consideration for the joint property, the entire value of the property, less only a life estate in one-half of the property for the life of the surviving co-tenant, should be included in the decedent's gross estate. In connection with this ruling the Service announced that the acquiescence in the Borner case "insofar as it relates to the reservation of income for life is limited only to situations where the tenancy was created prior to June 7, 1932, the effective date of the Revenue Act of 1932. . . ."
These cases, of course, interpret section 2035 to mean that the interest which is transferred in contemplation of death, and which is includible in the gross estate of the transferor, is the property interest which passes by virtue of the transfer, rather than the interest which would have been included in the gross estate of the transferor, if the transfer in contemplation of death had not taken place.

In the proposed estate tax regulations, the Treasury adopted inconsistent positions, which seem to have little justification beyond a desperate desire to salvage something from the tax avoidance implications of the joint ownership decisions. According to the proposed regulations, if jointly held property was transferred in contemplation of death, or converted into a tenancy in common in contemplation of death, only the decedent’s fractional share of the joint property had to be included in his gross estate. On the other hand, if a reserved life estate in connection with section 2036, or a possibility of reverter under section 2037, or a power to alter or revoke a transfer taxed by section 2038, was transferred in contemplation of death, the amount which was taxable to the transferor’s gross estate was the full value of the property which would have been taxable if the transfer in contemplation of death had not occurred. The final regulations avoid the inconsistent positions taken by the proposed regulations by omitting any reference to the transfer of a joint owner’s interest in jointly held property in contemplation of death. Presumably, this means that the Treasury is still unwilling to finally commit itself to support the cases which have held that only the deceased joint owner’s fractional interest in the common property is taxable as part of his gross estate in such a case. Oddly enough, neither the proposed nor the final regulations make any reference to the release of incidents of ownership in life insurance in contemplation of death, which seems to present precisely the same problem as the other situations which are noted. Nor does the Treasury commit itself as to the effect of a release in contemplation of death of the primary annuitant’s annuity in a situation taxable under section 2039.

On the policy plane, it is pretty clear that the relinquishment of incidents of ownership in connection with a taxable inter vivos transfer in contemplation of death should not affect the taxability

24. Proposed Treas. Reg. § 20.2035-1(b), 21 Fed. Reg. 7879 (1956). Section 2035-1(b) also provides that where a taxable power of appointment is exercised or released in contemplation of death, “the property subject to the power is included in the decedent’s gross estate to the extent provided in section 2041 and the regulations thereunder.” This means in general that the full value of the property subject to the power will be taxed to the donee’s estate, except where there is a joint power and only a fractional part of the property equal to the value of the property divided by the total number of holders of the power will be taxed.
of the original transfer. Any other position opens possibilities of tax avoidance which in effect nullify the design of the estate tax of taxing inter vivos transfers to prevent their being utilized to circumvent the tax. If the only thing which will be taxed, when an incident of ownership in connection with a taxable inter vivos transfer is released in contemplation of death, is the value of the incident of ownership transferred in contemplation of death, a man could easily retain the enjoyment of, and control over, his estate until his death without incurring an estate tax, as long as he took precautions to sever the strings tying any inter vivos transfer to his taxable estate on his death-bed. 25

Sections 2035 through 2042, which provide for the taxation of inter vivos transfers, are obviously designed to prevent avoidance of the tax by means of inter vivos transfers which are testamentary in character, either because they enable the transferor to retain control over, or enjoyment of, the transferred property until his death, or because they are consciously intended as a substitute for a testamentary disposition. If a decedent cannot escape an estate tax either by means of an incomplete transfer, under which he retains an interest in the transferred property during his life, or by means of a complete transfer in contemplation of death, why should he be allowed to do so by combining the two?

An inadvertent ambiguity in the phrasing of section 2035 is a flimsy excuse for construing the tax on transfers in contemplation of death, which is intended to supplement the other taxes on inter vivos transfers in preventing avoidance of the estate tax, as a method of circumventing the taxes imposed by those other sections. The crucial question in connection with section 2035 is, of course, the meaning of the word "interest," when the statute provides that the interest transferred in contemplation of death shall be included in the transferor’s estate. Should interest be interpreted in a tax sense or a property sense?

Generally a transfer in contemplation of death is treated for tax purposes as though the transfer had never taken place. 26 Since the purpose of the tax is to prevent depletion of the transferor’s estate by a transfer in contemplation of death, the transfer in contemplation of death has no effect upon the decedent’s taxable estate. The

25. For example, a man could transfer property to a trust for his children when he was young and vigorous and it was virtually certain that he would live more than three years. He could retain the right to the income from the trust for his life. Many years later when he was about to die he could relinquish his life estate and avoid an estate tax.

26. In Nathalie Koussevitsky, 5 T.C. 650 at 660 (1945), the Tax Court said if property was transferred in contemplation of death “it would be the same for tax purposes as if the decedent had never made the transfer and at the time of death still owned the property previously transferred.”
interest which is transferred in contemplation of death is, therefore, as far as the tax law is concerned, the interest which would otherwise be taxable to the transferor’s estate, if the transfer had never been made, rather than the property interest which is the subject of the transfer. This is also the general approach which is adopted by the other sections of the statute which tax inter vivos transfers. The measure of the tax in the case of these transfers is not the value of the property interest which passes at death, but the interest which must be included in the transferor’s gross estate to prevent his taxable estate from being depleted. For example, where a man transfers property with a reservation of a life estate accompanied by a grant of a fully vested remainder in the transferee, the only thing which passes at his death is the possession or enjoyment or the property. The amount which is taxed to his gross estate, however, is not the value of this possessory interest, but the full value of the property which would have been included in his gross estate if the transfer had not taken place. In the same way, when a man makes a transfer which is taxed as a transfer taking effect at death, because he retains a possibility of reverter, the amount which is taxed to his estate is the value of the property which may revert to the decedent, not the value of the possibility of reverter which lapses at his death. In the case of a defeasible transfer, the tax is not limited to the value of the power to alter or revoke the transfer which lapses at the transferor’s death, but extends to the value of the property subject to the power. Where a joint tenant or tenant by the entirety dies, the amount which is taxed to his estate is not his fractional interest in the property which survives to his co-tenant under the property law, but a part of the property proportionate to his contribution to the acquisition of the property. If an insured dies possessed of some, but not all of the incidents of ownership in an insurance policy, payable to beneficiaries other than his estate, the full value of the insurance must be included in his gross estate, rather than the value of the incidents of ownership which passed at his death. In some situations an inter vivos transfer of property is regarded as both complete and incomplete. When this occurs, the part of the property which was completely transferred will not be included in the transferor’s estate. However, the part of the property

27. Treas. Reg. § 20.2036-1(a) (1958), provided: “If the decedent retained or reserved a right with respect to all of the property transferred by him, the amount to be included in his gross estate under section 2036 is the value of the entire property, less only the value of any outstanding income interest which is not subject to the decedent’s right and which is actually being enjoyed by another person.”
over which the transferor retains "strings" will be included in his gross estate. Moreover, the amount which will be included in the gross estate in this situation is the value of the property subject to the strings, rather than the value of the strings. Thus, for example if A transfers Blackacre to B for life, then to A for life, and then to C in fee, and A predeceases B, the value of B's life estate will be subtracted from the value of Blackacre which will be included in A's gross estate. In this case, A is regarded as having made a complete and irrevocable transfer of B's life estate, so that part of the property is not taxed to his estate. However, the remainder of the property in which A retained a life interest is taxed to his estate, not merely the value of his retained right of possession. In much the same way, if A transfers property to T in trust to pay the income to C for life, remainder to D in fee, and reserves power to change the remainderman under the trust, but no power to alter the life estate, the life interest will not be taxed to A's estate if he predeceases C, because he has made a complete disposition of this part of the property. However, the full value of the remainder in the trust, not simply the value of A's power to alter or amend the trust, will be taxed to his estate.

The taxes which are imposed upon incomplete inter vivos transfers under the estate tax are all measured by the interest which would have been in the transferor's taxable estate if the incomplete transfer had not taken place, rather than by the value of the retained incident of ownership which passes at the decedent's death, and is technically, perhaps, the transfer which is the subject, as distinguished from the measure, of the tax. If the tax on transfers in contemplation of death is treated in the same way as the taxes imposed upon other inter vivos transfers to prevent avoidance of the estate tax, the amount which will be included in the transferor's taxable estate will be the tax interest which was transferred in contemplation of death, rather than the property interest; that is, the interest which will be included in his gross estate will be the interest which would have been included, if the transfer in contemplation of death had never taken place.

The incongruity of the current judicial construction of section 2035 in connection with a transfer in contemplation of death by a joint tenant, or a tenant by the entirety, may appear more clearly from a consideration of the tax consequences of a transfer in contemplation of death by the tenant who has not contributed anything to the acquisition of the joint property. Suppose, for example, that A purchases Blackacre and takes title in his name and that of B as joint tenants. Some years later B falls ill and realizing that death is near, he deeds his interest in Blackacre back to A in contemplation of death. If B had not made the conveyance and the
property had passed to A by survivorship, none of the property would have been taxable to B's estate. However, under the cases which hold that where a joint owner transfers his interest in jointly-held property in contemplation of death, there is a transfer of his fractional interest in the property, rather than the interest which he is regarded as owning for tax purposes, one-half of Blackacre would be taxable to B's estate under section 2035. This means, of course, that a man will be taxed if he transfers a property interest in contemplation of death, even though from the point of view of the tax law he has no interest in the property, and he would not have been taxed if he had retained the interest until his death. If the result appears absurd, it also appears to be the inevitable consequence of construing section 2035 as measuring the interest which a man is regarded as transferring in contemplation of death in terms of property law, rather than the tax law.

It seems fairly obvious that from the point of view of the basic objectives behind the sections of the estate tax taxing inter vivos transfers, the tax imposed upon transfers in contemplation of death by section 2035 requires the inclusion in the transferor's taxable estate of the interest which would have been taxed if the transfer had not taken place, rather than the property interest which was transferred. There are, however, several practical problems in connection with this construction. First of all, this is not the construction which has been given to section 2035 by the cases dealing with jointly owned property. Outside of the Tax Court, which has changed its position, the cases have been quite uniform in holding that the interest which is taxed under section 2035 is the fractional property interest of the deceased joint owner, rather than his taxable interest in the jointly-owned property before transfer. It is difficult to see any justification for construing section 2035 as taxing the property interest which is transferred in contemplation of death where joint ownership is involved, and as taxing the transferor's tax interest in the case of transfers in contemplation of death of incidents of ownership in connection with other taxable inter vivos transfers, in the absence of some specific language in the sections taxing these other inter vivos transfers which justifies this result, although this is what the proposed regulations did. There is, as we have seen, specific

33. Authorities cited notes 21 and 22 supra.  
34. Sullivan's Estate v. Commissioner, 10 T.C. 961 (1948), rev'd by 175 F.2d 657 (9th Cir. 1949).  
36. Authorities cited notes 21 and 22 supra.  
37. Proposed Treas. Reg. §§ 20.2040-1(d), 20.2035-1(b), 21 Fed. Reg. 7879, 7872 (1956). The final regulations are silent as to the effect of a transfer in contemplation of death by a joint tenant or tenant by the entirety.
language in section 2038 which provides that where a power to alter or revoke a transfer is released in contemplation of death, the value of the property subject to the power, rather than the value of the power itself, shall be included in the decedent's gross estate. There is also explicit language in section 2041 by which the exercise or release of a taxable power of appointment makes the property subject to the power taxable to the donee's estate. The presence of such language in these sections and the absence of any equivalent language in the other sections of the statute taxing inter vivos transfers raises the second problem in connection with the proper construction of section 2035. Does the fact that Congress has expressly provided in certain cases for the taxation of the interests to which incidents of ownership which are released in contemplation of death are attached, mean that only the incidents of ownership themselves, which are relinquished in contemplation of death, are to be taxed where there is no such language?

Obviously, in a field as technical as this, it is sheerest fiction to attribute any intention to Congress as to the measure of the tax, when an incident of ownership in connection with a taxable inter vivos transfer is released in contemplation of death. If Congress had actually thought about the matter it seems clear, however, what they would have decided. It would be extremely unfortunate if, on the basis of a word as ambiguous as "interest," the carefully contrived provisions designed to safeguard the estate tax against tax avoidance were frustrated. The ugly fact remains, however, that the courts have quite cheerfully emasculated the provisions taxing jointly-held property by construing section 2035 as taxing the property interest which is transferred in contemplation of death, rather than the tax interest which is taken out of the transferor's taxable estate.\(^8\) There is some support for this position in the statutory language which expressly provides in certain situations that the release in contemplation of death of incidents of ownership shall be treated as a transfer of the interests to which the incidents attach, but makes no such provision in other cases. Moreover, regardless of what one thinks of the joint-property cases, it is difficult to see how a different construction can be given to section 2035 when it is applied to other situations, such as the relinquishment of a reserved life estate, as long as those cases stand.

A question, which is closely connected with the problem of the effect of a transfer in contemplation of death of incidents of ownership retained in connection with an inter vivos transfer taxable under the estate tax, is the effect of consideration for such a transfer. Suppose, for example, that in the hypothetical case at the beginning of this paper, when A relinquished his life estate to B in contempla-

\(^8\) Authorities cited notes 21 and 22 supra.
tion of death, B paid A the then value of the life estate. Would this prevent Blackacre from being taxed to A's estate?

None of the inter vivos transfers which are taxable under the estate tax are taxed if they are made for an adequate and full consideration in money or money's worth. Obviously, the question of what is an adequate consideration for a transfer depends on what is transferred. If when A relinquishes his reserved life estate in contemplation of death, we regard this as a transfer of Blackacre, rather than merely A's life estate in Blackacre, a consideration equal only to the value of the life estate is not an adequate and full consideration. On the other hand, if the subject of the transfer in contemplation of death is A's reserved life estate, consideration equal to the value of the life estate appears to be adequate and full.

This, of course, brings us back to what is transferred where there is a transfer in contemplation of death of the incidents of ownership which make inter vivos transfers taxable under the estate tax. In connection with section 2038, the statute expressly provides that where a power to alter or revoke a transfer is relinquished in contemplation of death, the value of the interest subject to the power, rather than the value of the power itself, shall be included in the gross estate of the decedent. It seems to follow that since section 2038 treats the property subject to the power, rather than the power itself, as being transferred when such a power is released in contemplation of death, only consideration equal in value to the property subject to the power will prevent the transfer from being taxed. The release of taxable powers of appointment in contemplation of death presents a similar situation. Since the statute expressly provides that the property subject to the power shall be included in the donee's gross estate, except in the case of joint powers, it seems obvious that only consideration at least equal in value to the property subject to the power will be adequate to prevent the property from being taxed to the donee's gross estate.

In the joint ownership cases, where the joint tenant who contributed the consideration for the joint property transfers his interest in contemplation of death, it has been held that the interest which is transferred in contemplation of death is the transferor's fractional interest in the property, rather than the interest which would have been taxed to his estate if the transfer had not taken place. The corollary of these decisions is that consideration equal in value to the decedent's fractional interest in the joint property is adequate to prevent the relinquishment of his interest from being taxed as a transfer in contemplation of death. If this approach is
sound, it is difficult to escape the conclusion that the relinquishment in contemplation of death of a reserved life estate under section 2036, a possibility of reverter under section 2037, a primary annuity under section 2039, or an incident of ownership in life insurance under section 2042, will not be taxable, if consideration equivalent in value to the property interest released in contemplation of death is received for the relinquishment. This is, of course, an attractive invitation to tax avoidance.

There is an easy and sensible solution to this problem if adequate and full consideration is construed to mean consideration which will prevent an estate from being depleted. This is the sense the Tax Court has tried to attach to the phrase, and there has been some intimation on the part of the Supreme Court that it is the way in which it should be defined. It is obviously the only definition which can be reconciled with the underlying objectives of the estate tax. The reason why an inter vivos transfer for an adequate and full consideration is not taxed under the estate tax is that the consideration received for the transfer will be taxed, and to tax both the transfer and the consideration would result in double taxation. It follows, therefore, that the test of whether consideration is adequate and full should be whether or not it fully compensates for the property taken out of the taxable estate by the inter vivos transfer. The proper test of whether consideration is adequate from a tax point of view, is its adequacy to prevent depletion of the taxable estate. From this point of view, the adequacy of the consideration, which will prevent a tax when an incident of ownership in connection with a taxable inter vivos transfer is relinquished in contemplation of death, will be measured against the value of the interest which would be taxable apart from the transfer in contemplation of death, rather than the property interest which is transferred. Thus, for example, in the hypothetical case where A released his life estate in Blackacre for a consideration which did not equal the value of Blackacre, although it equalled the value of A's life estate, the difference between the value of Blackacre and the amount of the consideration would be taxable to A's estate.

42. Sullivan's Estate v. Commissioner, 10 T.C. 961 (1948), rev'd, 175 F.2d 657 (9th Cir. 1949); Estate of Rickenberg, 11 T.C. 1 (1948), rev'd on other grounds, 177 F.2d 114 (9th Cir. 1949), cert. denied, 338 U.S. 949 (1950).

43. In Commissioner v. Wemyss, 324 U.S. 303 (1945), the Supreme Court held that where a man, in order to induce a widow to marry him, transferred property to her equal in value to an interest, which she lost by the marriage in a trust set up for her by her first husband, this was a gift rather than a transfer for an adequate and full consideration which was not subject to the gift tax. Mr. Justice Frankfurter said: "The section taxing as gifts transfers that are not made for 'adequate and full [money] consideration' aims to reach those transfers which are withdrawn from the donor's estate. To allow detriment to the donee to satisfy the requirement of 'adequate and full consideration' would violate the purpose of the statute and open wide the door for evasion of the gift tax." 324 U.S. at 307-08.
It seems clear that the determination of what interest is transferred in contemplation of death and of what is adequate consideration to prevent a transfer in contemplation of death from being taxable, should be made on the basis of the tax effect of the transfer and the effect of the consideration on the transferor's taxable estate, rather than by the comparatively irrelevant rules of property law. From the viewpoint of the tax law, the interest which is transferred in contemplation of death is the interest which would otherwise be included in the transferor's taxable estate, except for the transfer. The consideration which is adequate to prevent a transfer in contemplation of death from being taxed to the transferor's estate is a consideration which will prevent the transferor's taxable estate from being depleted. The joint tenancy cases have obscured these considerations beneath the technicalities of the property law. On previous occasions, the Supreme Court has rescued the estate tax from unhappy entanglements with the property law. Perhaps, if the joint tenancy cases reach the Court, it may do so again. In the meantime, serious consideration should be given to the advisability of amending the law to close what is obviously a substantial loophole in connection with the taxation of joint estates, and could easily develop into a fatal weakness in connection with the other parts of the statute taxing inter vivos transfers.

44. Outstanding examples are Helvering v. Hallock, 309 U.S. 106 (1940), which overruled Helvering v. St. Louis Union Trust Co., 296 U.S. 39 (1935), and Becker v. St. Louis Union Trust Co., 296 U.S. 48 (1935), and Commissioner v. Estate of Church, 335 U.S. 632 (1949), which overruled May v. Heiner, 281 U.S. 238 (1930). In fairness to the lower federal courts, it should be noted perhaps that the mesalliances with the property law, from which the Supreme Court was required to rescue the estate tax, were originally contracted before that tribunal.