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Pragmatic View of Transfers in Contemplation of Death, A

John E. Riecker

A Pragmatic View of Transfers "in Contemplation of Death"

John E. Riecker*

> He was beginning to grow cold about the groin, when he uncovered his face, for he had covered himself up, and said: — they were his last words—he said: Crito, I owe a cock to Asclepius; will you remember to pay the debt? The debt shall be paid, said Crito; is there anything else? There was no answer to this question; but in a minute or two a movement was heard, and the attendants uncovered him; his eyes were set, and Crito closed his eyes and mouth. PLATO, THE PHAEDO ("Death of Socrates," Jowett translation).

Not all transferors of property in contemplation of death can rest as easily or as safely as did Socrates after sipping the draught of hemlock. For no attorney attempting to give advice on inter vivos gifts in connection with the drafting of a will or other "estate planning" can avoid the sweep of section 2035 of the Internal Revenue Code of 1954[1]—the section which pulls back into the donor's estate subject to tax all gifts made "in contemplation of death." In the writer's opinion this section has too often paralyzed both attorney and client engaged in planning the disposition of the latter's estate. Its very existence casts a pall on all gifts inter vivos designed to minimize future testators' taxable estates.

One can immediately imagine a middle-aged testator's jaws dropping at the prospect of the Commissioner rescinding the tax effects of his carefully-wrought lifetime gifts. We can speculate on how rapidly the client indulges in quick mental calculations on the state of his health, his age, his motives, and his nerves! Stealthy but thorough marshalling of "life motives" often ensues, and the harried subject emerges from the gift episode with a shaky determination to live out the critical three-year period, aloof from cars, busses, bad weather, air travel, and a high-serum cholesterol! Personal physicians are often summoned to give reassurance of glowing health, and the afflicted subject of such

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1. Unless otherwise stated, all future references to Internal Revenue Code sections in this article shall mean the 1954 statute. And all references to the attorney drafting wills, trusts and other inter vivos dispository instruments as an "estate planner," an "estate counselor," an "estate tax counselor," a "practitioner" and the like are not meant as lay epithets or equivalents.

estate planning rightfully rues the delays and procrastinations he has put in the way of a visit to his lawyer's office.

It is the purpose of this article to show that administrative and judicial enforcement of the "contemplation of death" rule —section 2035—does not really justify such widespread taxpayer alarm. It is herein urged that practicing attorneys in the field of estate counseling will plan the disposition of their clients' estates *in spite of* the possibility that any lifetime gifts of property will be negated by the Commissioner's enforcement of section 2035. Most certainly there is nothing abhorrently evasive in such planning! Draftsmen need only look for a predominant life purpose behind the gifts of their clients and, if one is present and provable, cause the dispository instruments to recognize and embody such purpose.

To demonstrate this thesis, a brief but necessary history of section 2035 of the Code will first be related. Second, after a recital of the present law and regulations governing the subject, a number of different taxpayer motives will be listed which have on occasion been held to rebut the applicable statutory presumption of estate taxability of such transfers. For example, it will be shown that transfers within three years of death by a donor, age 99,[2] and by a donor age 90 who proved his vivacity by clicking his heels together in mid-air,[3] were held not in contemplation of death. Or, hardly less sensationally, that a donor only 81 was granted favorable tax treatment of an inter vivos transfer of almost two million dollars little more than one year prior to his death.[4] Third, gifts between living persons of life insurance policies will receive special mention because of the inherently "testamentary" nature of this gift res. Fourth, and very important, this article shall investigate how aggressive estate planning can build a case against "contemplation of death" connotations by coupling the gift in question with the conferring of a *present* interest in the donee; or by emphasizing the fact that the donor actually did harbor a sufficiently separate, non-testamentary motive for his transfer. We shall also discuss how gifts held to have been made in contemplation of death are *valued* in the donor's estate, and review helpful rules of trial procedure in section 2035 cases. Finally, conjectural and proposed alternatives to present estate taxation of such gifts will be offered.

This article is written for the practitioner by a practitioner.

2. Kniskern v. United States, 232 F. Supp. 7 (S.D. Fla. 1964).
3. Oliver Johnson, 10 T.C. 680 (1948).
4. Percy B. Eckhart, 33 B.T.A. 426 (1935).

It cannot hope to be exhaustive of this extensively litigated subject.[5] Limitless factual situations have caused a plethora of trial determinations and, on the basis of the substantial evidence rule, these have led to ready affirmations by higher courts. Rather than simply catalogue this enormous range of judicial holdings, this article hopefully will have a more selective thrust—that of inculcating in the practitioner the need for the positive planning of gifts designed to withstand the challenge of section 2035 taxability and yet accomplish particular tax-saving purposes of the donor. We shall attempt to avoid comment on the ethics of this branch of estate taxation and limit our remarks to the pragmatism of its enforcement.

I. STATUTORY HISTORY

Unlike the history of many other Code sections, the statutory pattern behind the "contemplation of death" transfers has been one of increasing liberality in favor of the taxpayer. Legislation taxing such transfers first appeared in the Revenue Act of 1916,[6] at a time when 29 states imposed inheritance or estate taxes on such gifts.[7] This early statute created a rebuttable presumption that gifts made within two years of a donor's death were made in contemplation of death and were thus taxable in his estate. Ten years later, by section 302(c) of the Revenue Act of 1926,[8] Congress converted this rebuttable presumption into one conclusive of the presumed fact. Then, in the case of *Heiner v. Donnan*,[9] the Supreme Court held that such conclusive presumption of a death motive violated due process of law and constituted an unreasonable legislative classification, with the result that the "rebuttable" presumption was restored in 1932.[10] The 1932 legislation, moreover, contained a

5. Those desiring a compendium of cases on "contemplation of death" transfers are referred to: 1 A. CASNER, ESTATE PLANNING 192 *passim* (3d ed. 1961); 3 J. MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION §§ 22.01 *passim* (1959); 1 R. PAUL, FEDERAL ESTATE AND GIFT TAXATION 239 (1942). *See also* Pavenstedt, *The Limitation of Taxation of Transfers in Contemplation of Death by the Revenue Act of 1950*, 49 MICH. L. REV. 839 (1951).

6. Revenue Act of 1916, ch. 463, § 202(b), 39 Stat. 777-78.

7. 3 J. MERTENS, *supra* note 5, at § 22.01 n.1. In Milliken v. United States, 283 U.S. 15 (1931), the Supreme Court upheld the constitutionality of taxing transfers under this section even though they had been made prior to its enactment.

8. Revenue Act of 1926, ch. 27, § 302(c), 44 Stat. 70. *See also* H.R. REP. No. 1, 69th Cong., 1st Sess. 15 (1925).

9. 285 U.S. 312 (1932).

10. Revenue Act of 1932, ch. 209, § 803(a), 47 Stat. 279.

provision to the effect that all transfers within two years of the donor's death *of a material part of his estate* were taxable as part of his estate. We should note that gifts which took place *prior to* the two-year period could also be questioned by the Commissioner—unaided, however, by any statutory presumption of fact.

Such was the law until September 23, 1950. The Commissioner was not only armed with a rebuttable presumption for all gratuitous transfers within two years of death, but also could use a scatter-gun technique on gifts many years prior to death. Once an estate was challenged on the latter point, it had the burden of proving by a preponderance of evidence the incorrectness of the Commissioner's determination.[11] Thus if a donor managed to outlive the critical two-year period, he was still only half-safe—it was possible, though of course not as likely, that an older gift could be questioned.

By the Revenue Act of 1950[12] Congress removed the Commissioner's scrutiny of gifts made *prior to* the "rebuttable" period, installing instead a "conclusive" presumption that such older transfers were not made in contemplation of the donor's death. But the "rebuttable" period under which the donor's estate retained the burden of proving a life motive was extended from two to three years before death. Moreover, the pre-1950 requirement that the subject of the transfer must be a "material part" of the donor's estate was stricken, meaning that a pre-death gift, however small, could require the estate to come forward with sustaining evidence.[13] It is submitted that the replacement

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11. *See* Wishard v. United States, 143 F.2d 704 (7th Cir. 1944), where the challenged gift was completed seven years before donor's death, and Blunt v. Commissioner, 41 F. Supp. 721 (D.N.J. 1941), *aff'd*, 131 F.2d 632 (3rd Cir. 1942), where the period between the gift and donor's death was nine years, both of which decisions found against the Commissioner.

12. Ch. 994, § 501(a), 64 Stat. 962 [now INT. REV. CODE of 1954, § 2035(b)].

> Section 501 of your committee's bill removes from the scope of the contemplation of death clause all transfers made more than 3 years prior to the date of death. On the other hand, the burden of showing that the transfer was not in contemplation of death will be borne by the estate in all cases where the transfer was made within a period of 3 years ending with the date of death. This will strengthen the position of the Government in cases where the transfer occurred between two and three years prior to the date of death.

H.R. REP. No. 2319, 81st Cong., 2d Sess. 62 (1950).

13. Treasury Form 706 (revised Jan., 1966), Federal Estate Tax Return, Schedule G, excludes from reporting requirements any such gift of less than $1,000.00.

of the "rebuttable" with the "conclusive" presumption *against* estate inclusion was a far greater victory for the taxpayer than was the one-year extension of the presumptive period a corresponding defeat.

It should be noted that while we have been speaking here of "transfers" in contemplation of death, the language of section 2035(b) of the Code is more inclusive:

> If the decedent within a period of 3 years ending with the date of his death (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, *relinquished a power, or exercised or released a general power of appointment*, such transfer, relinquishment, exercise or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death. . . .[14]

We shall see, however, that occasionally the exercise or relinquishment of a power within the three-year period may be interpreted by the courts as the "perfection" of an earlier, safe transfer and thus be sustainable as an integrated transaction *not* in contemplation of death.

A review of the history of section 2035 has led one writer to chronicle four different meanings which Congress and the courts have conferred upon "contemplation of death" transfers:[15]

(1) Gifts *causa mortis*. These are so-called "death-bed" transfers intended to be revocable if the donor survives. Actually, such gifts are properly subsumed under section 2038 of the Code as transfers "to take effect in possession or enjoyment at or after death," and need not concern us here.

(2) Gifts made under threat or fear of imminent death. This seems to have been the judicial interpretation of includability before the 1931 landmark decision of *United States v. Wells* discussed below.[16]

(3) Gifts made where death was not necessarily impending or imminent but nevertheless constituted the "impelling cause" of the donor's transfer. This was the Supreme Court's standard in the *Wells* case and in *United States v.*

14. (Emphasis added). Section 2043 of the INT. REV. CODE of 1954 provides that where the transfer involved is made for "insufficient consideration," there shall be included in the transferor's gross estate the excess of the fair market value at the time of death over the value of the consideration the decedent received at the time of the transfer.

15. Barry, *The Taxation of Transfers in Contemplation of Death,* 10 HASTINGS L.J. 370, 373-75 (1959).

16. 283 U.S. 102 (1931). *See* language of Treas. Reg. 37; Revenue Act of 1918, 40 Stat. 1057. For pre-1931 rule *see* 3 J. MERTENS, *supra* note 5, § 22.06, at 57 n.42.

Allen.[17] Present Treasury Regulations substantially reflect this criterion.

(4) Gifts which are "a substitute for a testamentary disposition"—usually those benefiting the natural objects of the donor's bounty and taking effect as of his death. This is a somewhat more objective standard than (3) and shares with the *Wells* standard considerable modern judicial currency.[18]

Since 1931, the *Wells* case has spawned countless court holdings which collectively establish that the donor's general expectation of death "in common with all mankind" is not enough to cause estate taxability of the gift subject. In that trend-changing decision, the Supreme Court was faced with the full gamut of conflicting circumstances which so often characterize an elderly donor's lifetime transfers. The decedent donor, as early as 1901, had advanced property to his children in order to see how they handled the money, charging each of them with the amount of the transfers. The transfers were made both before and after the decedent drew his will. He was never seriously ill, but suffered intermittently during the 30-year period spanning the transfers from a condition diagnosed as "ulcerative colitis." Though his will provided that the amount on his books at death due from each child should be considered true advancements of their respective intestate shares, he later made unconditional transfers to the children which "evened them up." After being pronounced cured of colitis, he died at age 73 of a nonmalignant intestinal inflammation. The Court of Claims held all transfers of the decedent not in contemplation of death.[19]

In its affirmance of this decision the Supreme Court used some language destined for much repeated quotation:

> The words "in contemplation of death" mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is "near at hand." If it is the thought of death, as a controlling motive prompting the disposition of property, that af-

17. Allen v. Trust Co., 326 U.S. 630 (1946); United States v. Wells, 283 U.S 102 (1931).

18. *See, e.g.*, Old Colony Trust Co. v. Delaney, 69 F. Supp. 495 (D. Mass. 1947); Off v. United States, 35 F.2d 222 (S.D. Ill. 1929) where the execution of a will by the donee simultaneously with the inter vivos transfers under scrutiny raised the question of a testamentary intent. *See also* 3 J. MERTENS, *supra* note 5, at 22.06.

19. United States v. Wells, 39 F.2d 998 (Ct. Cl. 1930).

fords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive.[20]

Such a "different motive," the Supreme Court ruled, was the implementation of a long pattern of gifts during decedent's lifetime in order to accomplish the purpose desirable to him *if he continued to live.*

Treasury regulations applicable to transfers in contemplation of death say that a *Wells*-type transfer is "prompted by the thought of death" if: (1) made with the purpose of avoiding death taxes; or (2) made as a substitute for testamentary disposition; or (3) made for any other motive associated with death.[21] The present law and regulations thus make manifestly clear that the evidentiary test of taxability of such transfers reduces to one of motive. Proof of predominant "life motive" for a pre-death gift made within the statutory presumption period will absolutely bar inclusion of the value of the gift res in the donor's estate.[22] The way is therefore open, even for the aged and infirm donor, to carry out a lifetime transfer successfully against the backdrop of a living, viable purpose and by a means which confers a *present* benefit upon the donee. The importance here of skillful diagnosis of donors' motives by competent counsel—forewarned of the need for a predominant life motive—is obvious.

Before commenting on the methods available to the estate practitioner seeking to build such sustainability into latter-day inter vivos gifts, the writer would like to sample the great diversity of taxpayer motives which have on occasion resulted in exclusion of such gifts from the adjusted gross estate. Planning counsel may take heart from some of the seemingly extreme examples to be cited. From the history of section 2035 just reviewed, the *Wells* case assuredly emerges as a supreme criterion for present-day taxability of gifts in contemplation of death. Yet that Court's opinion has been said to mean all things to all people![23] The late and respected Randolph Paul noted, ". . .

20. United States v. Wells, 283 U.S. 102, 118 (1931).
21. Treas. Reg. § 20.2035-1(c) (1958).
22. This is almost exactly stated by the court in Lippincott v. Commissioner, 72 F.2d 788 (3rd Cir. 1934). *See also* 3 J. MERTENS, *supra* note 5, at § 22.43. Nor does the election of a husband to split gifts made by him with his wife allow the wife to claim successfully—after her spouse's decease—that at least her half of the gift should not be held in contemplation of death. *See* English v. United States, 68-1 U.S. Tax Cas. ¶ 12,526 (N.D. Fla. 1968).
23. *See* Barry, *supra* note 15, at 375. But it has been stated:
In the U.S. v. Wells case, the Government, in getting away from the imminence of death concept, scored a substantial victory.

too much should not be expected of the courts, for they are presented in most cases with carefully assembled evidence in proof of motive, which is a highly elusive, subjective test of taxability."[24] Nevertheless, it is submitted that awareness of the relative weight various courts have attached to more objective factors, such as age, health, timing of the decedent's will with inter vivos gifts, percentage of gross estate given away, needs of the donees, existence of a prior pattern of giving, and avoidance of income or estate taxation, will serve as a guide to the building of a case for exclusion of a challenged pre-death gift.

II. FACTS COLORING THE DONOR'S TRANSFER

The following factual circumstances surrounding alleged transfers in contemplation of death are given roughly in ascending order of importance. That is, the existence of facts consistent with the suggested ideal under each subject heading becomes progressively more suggestive of a life motive and thus moves the transfer further away from the factual presumption that it was made in contemplation of death. The ranking is, of course, open to question and rearrangement by the reader.

A. AGE OF DONOR AND INTERVAL BETWEEN GIFT AND DEATH

The intimations of mortality naturally felt by elderly donors most often are the foundation the Commissioner seeks for estate taxation of inter vivos gifts under section 2035.[25] Yet transfers nine months before death by a 95-year old donor, and within three years of death by a 99-year old person then in good health, were cleared of the contemplation of death presumption.[26] Similarly, the gifts of an 87-year old just nine months before death and of a 72-year old person one and one-half years before death were not pulled back into the estate subject to tax.[27] All that can be said in these unusual cases is that a pre-

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> However, if the case is closely analysed upon its facts . . . the scope of the Government's victory is substantially diminished.

3 J. MERTENS, *supra* note 5, § 22.30, at 110 n.45.

24. R. PAUL, *supra* note 5, at 279.

25. This state of facts most recently appeared in grounding the holding in Ridgely v. United States, 180 Ct. Cl. 1220 (1967).

26. *See* Kniskern v. United States, 232 F. Supp. 7 (S.D. Fla. 1964); Murphy v. United States, 64-2 U.S. Tax Cas. ¶ 12,244 (W.D. Mo. 1964).

27. *See* Studebaker v. United States, 211 F. Supp. 263 (N.D. Ind. 1962); Lockwood v. United States, 181 F. Supp. 748 (S.D.N.Y. 1959). *See also* cases reproduced in A. CASNER, ESTATE PLANNING—1965 SUPPLEMENT 124-25 (3d ed. 1965).

vailing life motive tipped the balance in favor of the taxpayer. For example, in *Kniskern v. United States*[28] the gifts upheld were not only prompted by the donor's prior exchange of stock which resulted in dividends in excess of his needs, but also constituted a relatively small percentage of his total estate and were a continuation of an established pattern of gifts to the donees involved. Given such redeeming circumstances, the advanced age of the donor and the proximity of his gifts to death were still facts capable of rebuttal.

B. ILLNESS OF THE DONOR—AND HIS KNOWLEDGE OF IT

While a donor's actual state of health is certainly relevant to a determination of whether his gift is in contemplation of his death, his familiarity with the extent of his illness is even more significant.[29] Quite obviously, on the other hand, a person in good health may make an exclusively testamentary-type transfer.[30] If motives associated with life are present in strength, the mere suspicion that the donor *knew* of his fatal illness at the time of the challenged gift is not enough to cause estate taxability.[31] Often the testimony of the donor's personal physician or his psychiatrist and records of past hospitalization are admissible for the bearing they may have on his mental disposition at the time of the gift in question.[32] If an elderly but active man who is accustomed to managing his own affairs suddenly sheds large amounts of property by gift, the situation points to an awareness of impending illness or death; whereas a woman of equivalent age who has never been a "manager" of her estate may divest herself of worldly goods simply because their care and management is too great a responsibility for an untutored investor.[33]

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28. 232 F. Supp. 7 (S.D. Fla. 1964).
29. *See, e.g.*, Browarsky v. Granger, 148 F. Supp. 665 (W.D. Pa. 1956); George A. Wheelock, 13 B.T.A. 828 (1928).
30. *See* Mary Lois K. McIntosh, 25 T.C. 794 (1956), *aff'd*, 248 F.2d 181 (2d Cir. 1957), *cert. denied*, 355 U.S. 923 (1958), where the decedent was quite openly attempting to avoid an inevitable future estate tax liability.
31. Samuel Want, 29 T.C. 1223 (1958), *rev'd and rem'd on other grounds*, Want v. Commissioner, 280 F.2d 777 (2d Cir. 1960).
32. Those readers interested in delving into the psychological motivation for gifts as affecting taxability in this area should see Ballantine, *Psychological Bases for Tax Liability*, 27 HARV. BUS. REV. 200 (1949).
33. *Compare* Updike v. Commissioner, 88 F.2d 807 (8th Cir.), *cert. denied*, 301 U.S. 708 (1937) *with* Estate of Bertha Low, 2 T.C. 1114 (1943) *and* Yeazel v. Coyle, 68-1 U.S. Tax Cas. ¶ 12,524 (N.D. Ill. 1968).

C. SIZE OF GIFT RELATIVE TO DONOR'S TOTAL ESTATE

A small gift transfer relative to the size of the donor's adjusted gross estate has been held to indicate lack of an estate tax avoidance motive.[34] It should be remembered that former statutory treatment of gifts in contemplation of death required for estate taxability that the gift be a "material part" of the donor's esate.[35] Further, lack of a donor's "testamentary" intent can often be read into a pre-death gift of relatively small sums.[36] Yet here again some particular transfers have been held not in contemplation of death regardless of the comparative amount of assets transferred. Thus, decisions have upheld a living transfer of 60 per cent of a 73-year old donor's estate,[37] and of 40 per cent of an 83-year old donor's property[38] where countervailing life motives were proved. Just as in the case of old age, the large relative size of the donor's planned gift should not deter an estate counselor from at least exploring for so-called "exculpatory" facts and motives and, if they are present in strength, recommending the resolved gift.[39]

D. RELATIONSHIP OF DONEE TO DONOR

When the donor makes gifts during the presumptive period to the natural objects of his bounty, his wife or children, courts will often ascribe a testamentary motive to the transaction. This judicial tendency is illustrated by *City Bank Farmers Trust Company v. McGowan*,[40] a 1945 Supreme Court decision. There the donor was a mental incompetent and the subject of probate court jurisdiction. His guardian had secured the court's approval for transfer of assets from the ward's estate to his children and also to some collateral heirs. It was held that the gifts to the children were in contemplation of death, except to the extent of $6,000.00 per annum which the ward had given them each year when competent. However, as for the gifts to collateral heirs, the Court found that a need existed and held

34. *See* Duncan v. United States, 148 F. Supp. 264 (D. Mass. 1957).

35. Revenue Act of 1932, ch. 209, § 303(a), 47 Stat. 279.

36. *See, e.g.*, Pyne v. United States, 169 F. Supp. 811 (Ct. Cl. 1959); Black v. United States, 68 F. Supp. 74 (N.D. Ohio 1946), *aff'd*, 164 F.2d 96 (6th Cir. 1947); Theodora Casey Topliffe, 39 B.T.A. 13 (1939).

37. Smith v. United States, 16 F. Supp. 397 (D. Mass. 1936).

38. Robert Wetherill, 36 B.T.A. 1259 (1937).

39. *See, e.g.*, Mary W. Cushman, 40 B.T.A. 948 (1939), where the donor gave away $794,000.00 in value, dying with an estate of merely $6,000.00, yet the Board held the gift not in contemplation of death because of the presence of other life motives. *See also* 3 J. MERTENS, *supra* note 5, at § 22.50.

40. 323 U.S. 594 (1945), *aff'g in part and rev'g in part* 142 F.2d 599 (2d Cir. 1944).

that since the recipients were not direct heirs, no allowance to them could be considered in lieu of their estate shares. These gifts consequently were held not in contemplation of the donor's death.

It is difficult to see a satisfactory evidentiary alternative to this bald circumstance of relationship between donor and donee, since a large percentage of inter vivos gifts are for the benefit of natural, direct heirs. It would be just as logical, although not nearly as likely, for the Commissioner to challenge a pre-death gift to a charity or other exempt organization since the latter too are often testamentary beneficiaries, though for different tax reasons. Estate counselors must accept this affinity of many gift recipients and attempt to plan around it.

E. Existence of an "Overall Testamentary" Scheme

Another important factual circumstance surrounding gifts inter vivos is their timing in relation to the donor's last will and testament. Where the donor has created a living trust or made direct gifts to his immediate family at or about the time he executed his will, the gifts are naturally colored by the testamentary context of the entire transaction.[41] The Commissioner and many courts will often simply assume that one's drawing of a will indicates contemplation of death to the exclusion of other collateral motives. Yet the execution of a will some time *after* lifetime transfers have been made, even if such transfers constituted little more than the advance payment of legacies, has been held to exonerate the prior gifts from the contemplation of death pull-back provisions of section 2035.[42]

F. The Testamentary Nature of the Gift Res

> A conveyance of property which the grantee can by no chance use until the grantor's death, will so commonly be in the main testamentary, that it is fair to infer that that was its preponderating, if not indeed its only, purpose, unless there be affirmative evidence of other contributory motives.[43]

The concept of the vesting of *presently* enjoyable gifts in the donee is an important one. A donor's gift of, for example, an insurance policy on his life may be immediately suspect under section 2035 because of the inherently testamentary nature of the property given.[44] However, other gift items can suggest the

41. *See* Old Colony Trust Co. v. Delaney, 69 F. Supp. 495 (D. Mass. 1947).

42. Ernest Hinds, 11 T.C. 314 (1948), *aff'd*, 180 F.2d 930 (5th Cir. 1950); T.M. Flynn, 3 CCH Tax Ct. Mem. 1287 (1944).

43. Garrett v. Commissioner, 180 F.2d 955, 956-57 (2d Cir. 1950).

44. *See* Flick's Estate v. Commissioner, 166 F.2d 733 (5th Cir. 1948),

same pattern of enjoyment deferred by intent of the donor until after death. In *Commissioner v. Gidwitz' Estate*,[45] for example, the donor created a trust eight years before death providing that income was to be accumulated during his life, then to go to his surviving wife for her life and on her death all principal to be distributed to the donor's surviving children. Under the applicable pre-1950 rule, where the Commissioner could reach back to question such transfers for a limitless prior period, the predeath transfers were found to be testamentary and thus in contemplation of death. An estate design by which the children would have received a *present* interest in the trust income during the donor's remaining lifetime might have fared differently.

G. Donor's Avoidance of Management Responsibility

On our ascending scale, a donor's timorous purpose to avoid "the slings and arrows of outrageous fortune" quite often will lead to a like avoidance of the clutches of section 2035 estate inclusion. For example, a transfer induced by a motive of the donor to keep his property free from his own speculative transactions on the stock market has been held clearly associated with life, and outside the ambit of contemplation of death transfers subsumed under section 2035.[46] An irrevocable insurance trust for the benefit of donor's wife and children has also been insulated from estate inclusion where it was created to protect donor's family from the anticipated hazards of his business activities.[47] Similarly, a transfer of securities in trust made to facilitate their investment by a competent trustee has been recognized as constituting a living purpose.[48] Even the relatively defensive motive evidenced by a transfer of property into

rev'g 6 T.C.M. 72 (1947); Cronin v. Commissioner, 164 F.2d 561 (6th Cir. 1947), *rev'g* 7 T.C. 1403 (1946); *cf.* Hull v. Commissioner, 325 F.2d 367 (3rd Cir. 1963). Insurance is so prominent a subject in contemplation of death transfers that it will receive special mention elsewhere in this article. *See* notes 101-108 *infra*, and accompanying text.

45. 196 F.2d 813 (7th Cir. 1952), *aff'g* 14 T.C. 1263 (1950). For a donor's motive of post-death assistance to a donee, *see* Burns v. Commissioner, 177 F.2d 739 (5th Cir. 1949).

46. Colorado Nat'l Bank v. Commissioner, 305 U.S. 23 (1938), *rev'g* 95 F.2d 160 (10th Cir. 1938).

47. Wilbur B. Ruthrauff, 9 T.C. 418 (1947).

48. Mary W. Cushman, 40 B.T.A. 948 (1939); James C. Webster, 38 B.T.A. 273 (1938). A donor often wants to shift investment responsibility to some more competent person or institution. *See, e.g.*, Duncan v. United States, 148 F. Supp. 264 (D. Mass. 1957). Indeed, the intended result may be *to prolong* the donor's life by shedding such worrisome responsibility!

trust beyond the reach of so-called unscrupulous advisors has been held to exhibit a predominantly living purpose.[49]

H. TRANSFERS TO ASSIST THE DONEE IN AN IMMEDIATE NEED

A donor may not only harbor a "defensive" motive in transferring property beyond the reach of himself or others; much more often he may want actively to help the intended donee in a given immediate need or purpose. Thus, where a donor within three years of his death transferred to four of his children either residential lots or cash to enable each of them to build or purchase a home, it was held that the transfer satisfied living, specific needs and was excludable from the donor's estate.[50] Gifts have likewise been upheld as exclusions from an adjusted gross estate where they were made to give the donor's sons business experience,[51] or to give a donee opportunity to take part in management of the donor's investments.[52] Nor is the particular morality of donor's motive or the worthiness of the need satisfied by the gift given much weight. A gift was upheld where the so-called living purpose was to allow an extravagant daughter the home she longed for,[53] and to provide for two sons who were alcoholics and narcotics users.[54] Even a gift evincing the donor's elliptically fatalistic motive to help his relatives ". . . while he was living so that they would not sit around waiting for him to die . . ." resulted in a determination against contemplation of death imputation.[55]

Gifts of a more general purpose—to help the donee become "financially independent" or to instill notions of thrift—are also recognized as indicating a motive associated with life.[56] Not so, however, with lifetime gifts where the donor is quite plainly trying to shirk a legal or moral responsibility which would otherwise attach on his death. In the Sixth Circuit case of *Kroger v. Commissioner*,[57] the court conceded that the decedent had made

49. Blunt v. Commissioner, 41 F. Supp. 721 (D.N.J. 1941).
50. Boyd v. United States, 192 F. Supp. 242 (D. Ky. 1961).
51. Blakeslee v. Smith, 26 F. Supp. 28 (D. Conn. 1939), *aff'd*, 110 F.2d 364 (2d Cir. 1940).
52. First Nat'l Bank v. United States, 25 F. Supp. 816 (N.D. Ala. 1939).
53. John Moir, 47 B.T.A. 765 (1942).
54. David Little, 1941 P-H Tax Ct. Mem. ¶ 41,207.
55. Pyne v. United States, 144 Ct. Cl. 399, 410-11 (1959).
56. *See* Allen v. Trust Co., 326 U.S. 630 (1946); Becker v. St. Louis Union Trust Co., 296 U.S. 48 (1935). *See also* Des Portes v. United States, 171 F. Supp. 598 (E.D.S.C. 1959).
57. 145 F.2d 901 (6th Cir. 1944), *cert. denied*, 324 U.S. 866 (1945).

pre-death gifts of one million dollars to each of his children from a desire to give them the obvious advantage of these benefits during his lifetime. But in marked contrast, a trust the decedent had drawn up just before his second marriage in which he reserved income to himself for life, then to the children of his first marriage, with corpus finally distributable to his grandchildren, was held to have been created with the dominant motive of barring his future (and younger) wife from any dower rights. Finding also that the children took no "present" interest in the trust, at least during the decedent's life, the court held that it was created in contemplation of the decedent's death.

I. TRANSFERS SATISFYING LEGAL OR MORAL OBLIGATIONS

While courts look askance at gifts intended to circumvent legal obligations of the donor, what about the "life-like" character of those which are intended to meet such responsibilities? Are these considered at all "testamentary" in motive or purpose? The Court of Claims has held not. In *Hoover v. United States*[58] the decedent, a widow, made substantial gifts to her four children prior to her death because their deceased father had made promises to them which he had never kept. The court found a life motive in the widow's feeling of obligation even though the death of another—her husband—was the real cause of the gift. Gifts between living persons in pursuance of a previous promise from one to the other can be said to "relate back" in time to the earlier promise or obligation. Mertens states that "cases involving fulfillment of a previous single 'plan' or promise, as distinguished from a periodic series of repeated gifts, have been treated very generously by the courts."[59]

Where an earlier plan or promise of the donor can be shown to exist, an illness or other morbid occurrence which intervenes between such promise and the actual date of the gift may be held to be immaterial. The independent significance of a prior event, such as a living and provable commitment by the donor, has such pervasive strength that it has been held to give "life" character to a transfer made one day before death.[60]

58. 180 F. Supp. 601 (Ct. Cl. 1960).
59. 3 J. MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION § 22.29, at 105 (1959); *See* Amy H. DuPuy, 9 T.C. 276 (1947), where decedent's forgiveness of her surviving husband's debt was planned by her long before her actual gift inter vivos.
60. Edith Huggard Sharp, 30 B.T.A. 532 (1934), 33 B.T.A. 290, *aff'd*, 91 F.2d 804 (3d Cir. 1937).

J. PROTECTION OF INTERESTS IN CLOSELY HELD CORPORATIONS

Estate planners frequently recommend present gifts of unlisted, closely held stock in relatively unmarketable family corporations. The well known inflationary divergence of appraisers' opinions of the value of such interests in a decedent's estate, alleviated only partially by the stock redemption provisions of Code section 303 and the estate tax installment payment option under section 6166, results in attempts to sprinkle out such interests in anticipation of death to one's family or business associates. "Gift-sales" of closely held stock, the price being the donor's cost basis, are also prevalent and provide the donor's future estate with a modicum of cash liquidity to meet expected death taxes. The question here is whether the very nature of the gift res—that of a *proprietary* corporate stock interest—suggests a contemplation of death motive.

It is submitted that motives of independent living significance capable of withstanding the Commissioner's contention regarding taxability are not too difficult to discover in this area. For example, a gift of such stock by an 82-year old donor one day after suffering a severe heart attack, made for the express purpose of stabilizing family control of a corporation, was held not in contemplation of death.[61] And where a decedent had transferred a 50 per cent interest in each of two corporations to his son with the desire not only that his son have a financial interest in the business but also that this constitute appreciation for the latter's willingness to undertake the attendant responsibility, the court was quick to find a living motive in the gift.[62]

K. DONOR'S DESIRE TO AVOID FUTURE TAXES

It has been held that a transfer motivated predominantly by the donor's desire to avoid *estate* taxes indicates that the thought of death was uppermost in the donor's mind.[63] Contrarily, where the donor's avoidance motive is directed at the federal tax on *income*, a life motive is generally imputed.[64] But this

61. Brigid Angela Casey, 25 T.C. 707 (1956).

62. Belyea v. Commissioner, 206 F.2d 262 (3d Cir. 1953). Decedent subsequently had made annual gifts to the son, mostly within the limits of the gift tax exclusion. *See also* Baxter v. United States, 68-2 U.S. Tax. Cas. ¶ 12,546 (E.D. Ark. 1968).

63. Mary Lois K. McIntosh, 25 T.C. 794 (1956), *aff'd*, 248 F.2d 181 (2d Cir. 1957), *cert. denied*, 355 U.S. 923 (1958). The donor was in excellent health at the time of the gift.

64. *See* Farmer's Loan & Trust Co. v. Bowers, 98 F.2d 794 (2d Cir. 1938) (dictum), *cert. denied*, 306 U.S. 648 (1939). "A desire to avoid or

distinction has a large penumbral area. In *Denniston v. Commissioner*[65] a federal circuit court held that, particularly in a young and vigorous donor, the sole motive to avoid estate taxes is not of sufficient strength to characterize the transaction as one in contemplation of death, for a decrease in estate taxes is an inevitable concomitant of any successful estate planning.

The root question the courts face is how to separate a particular planned gift having the inevitable *result* of estate tax-saving from one undertaken with that predominant *motive*. Factual circumstances of varying intensities will color and tint the subject gift on one or the other side of the crucial line. The only rule which can be safely stated is that, given a sustaining "life" purpose for the gift, the fact that the gift *does* reduce estate taxes will be ignored. Thus in *Lockwood v. United States*[66] the attorney for the decedent's estate was able to show that an estate tax-saving codicil drawn at the same time as the questioned gift inter vivos was the "general practice" of most area draftsmen. Consequently, such clause was held not to detract from the testator's otherwise provable life motives in making the gift.

L. Pattern of Donor's Prior Gifts and His Dispository Instruments

A donor may frequently be so attuned to the relative advantage of incurring gift rather than estate taxes that he makes regular, annual gifts to his wife and/or children. A prior and consistent pattern such as this will often protect later gifts which may be attacked as having been made in contemplation of death—provided the later transfers do not deviate conspicuously from the prior pattern.[67] Gift habits which extend back into a donor's younger, healthier, more penurious years are as important in this respect as all other life-sustaining motives and tend to characterize later transfers as a "continuation" of a

decrease federal income taxes is clearly a motive associated with life, even though no income is distributable until after the donor's death." 3 J. Mertens, *supra* note 59, § 22.20, at 90.

65. 106 F.2d 925 (3d Cir. 1939). *Compare* Peter Rasmussen, 20 CCH Tax Ct. Mem. 1694 (1962) *with* Lockwood v. United States, 181 F. Supp. 748 (S.D.N.Y. 1959), for a contrast between judicial treatment of gifts purporting to avoid estate taxes and those avoiding taxes on income.

66. 181 F. Supp. 748 (S.D.N.Y. 1959).

67. *See* Florence M. Harrison, 17 CCH Tax Ct. Mem. 776 (1958) in which transfers by donor at age 93, five months prior to her death, were associated with transfers over a prior ten-year period beginning at age 82.

consistent, uninterrupted plan or policy.[68]

The existence of such a pattern was judicially recognized by the United States Supreme Court in *City Bank Farmers Trust Company v. McGowan*,[69] where the *only* part of a large inter vivos gift upheld by the Court was the $6,000 portion the donor had customarily given his children each preceding year. Many times courts will resolve the motivational fact issue against the taxpayer if the evidence fails to show a regular pattern of lifetime gifts. Thus, recently in *Ridgely v. United States*,[70] the isolated fact that the donor had made *some* prior gifts was not enough to avoid estate inclusion of the instant transfer; the court failed to find an "established" or "well considered" plan in such gifts.

Any practitioner drafting a client's will ought to be forever conscious of the importance of "pattern." When a future testator unfolds the details of his estate and his past lifetime gifts, whether outright or in trust, the opportunity is presented to the attorney to relate and integrate these with the proposed estate plan. The more pervasive the attorney's original concept of estate tax minimization for his client, the clearer will be the successive steps the client takes in future years to implement such concept; all of which will tend to relate back to the beginning of the plan.

The sampling just undertaken of the more objective facts surrounding a donor's inter vivos gifts within the section 2035 presumptive period could run on and on. We have attempted to organize a list of fact situations in order of their ascending utility for winning exclusion from the operation of the Code's contemplation of death provisions. Thus, establishing a prior pattern of lifetime transfers will more successfully meet the Commissioner's challenge than will proof of the donor's young age and good health. Yet not one of the single classifications, standing alone, is completely determinative of the ultimate fact whether the donor was motivated by contemplation of his death.

68. *See* Belyea v. Commissioner, 206 F.2d 262 (3d Cir. 1953); Adolph J. Koch, 1 CCH Tax Ct. Mem. 898 (1943), *aff'd*, 146 F.2d 259 (9th Cir. 1944); Alice B. Davis, 1 CCH Tax Ct. Mem. 476 (1943), *aff'd*, 142 F.2d 450 (6th Cir. 1944).

69. 323 U.S. 594 (1945), *aff'g in part and rev'g in part* 142, F.2d 599 (2d Cir. 1944).

70. 180 Ct. Cl. 1220 (1967).

III. ESTATE PLANNING AROUND "CONTEMPLATION OF DEATH" TRANSFERS

Having looked backward into the allowances courts have made for a donor's life motives in making gifts, we now must synthesize these rules and opinions into a workable procedure on a kinetic level for the practitioner facing his subject client and charged with the responsibility of evolving a viable estate plan. The objective is to recommend lifetime transfers which will result in lowering the client's estate tax and to anticipate future threats of section 2035 inclusion in his taxable estate. The writer believes that from the recited life-associated acts and circumstances under which a donor makes gifts, three primary objectives become clear.[71] As a general matter, the transfer should have a "pragmatic" effect, meaning that it has practical consequences or values. The donor's gift should do something in the "here and now" and its motive must have an "independent significance" from death or from a tax occasioned by death.[72] The following discussion will center around the timing of the gifts, the creation of a lifetime gift pattern and creation of a present interest in the donee—the three considerations which best focus upon the desired "pragmatism."

A. Relative Timing of Donor's Lifetime Gifts with His Last Will and Testament

It has already been shown how inter vivos gifts executed simultaneously with the donor's last will and testament arouse testamentary suspicion whereas no such inference may be drawn if the gifts have preceded the will in time.[73] Even if the donor prepares a lifetime trust by an instrument separate and distinct from his will, simultaneous execution of the will containing similar or complementary provisions will often give the entire transaction a testamentary character.[74]

In *Igleheart v. Commissioner*[75] the decedent at age 74 had

71. *See* Polen, *In Contemplation of Death*, 104 T. & E. 777 (1965) for a similar synthesis.

72. The writer is perhaps unduly fond of the term "independent significance," a concept borrowed from, *inter alia*, one of the exceptions to the hearsay rule in the law of evidence. It is used in this article to mean a motive or purpose "standing on its own" and negating a sole motive of death anticipation.

73. *See* Garrett v. Commissioner, 180 F.2d 955 (2d Cir. 1950); Old Colony Trust Co. v. Delaney, 69 F. Supp. 495 (D. Mass. 1947).

74. Commissioner v. Gidwitz, 196 F.2d 813 (7th Cir. 1952).

75. 77 F.2d 704 (5th Cir. 1935).

created two substantial trusts for his family, one irrevocable, the other revocable. At the time his general health and outlook on life was good, and he had just received a large amount of income from the sale of his business—both circumstances ordinarily favorable toward a life-associated transfer. The donor had an impressive grouping of reasons for these transfers: he wished to make his wife financially independent and to teach her skills of property management; he wanted some of his property in the hands of a competent investor; and he hoped to reduce his income taxes. Alas, these motives were of no avail! Coming within the two-year presumptive statute,[76] the transfer was held in contemplation of death by the court, which found: (1) that the donor had no pre-existing policy of such gifts, (2) that his will was executed simultaneously with the trusts, and (3) that the wife was named executrix of the will, thus any investment training she received from trust management would inure to the benefit of the donor's estate as well.

In *Wishard v. United States*,[77] the donor's will was executed six years after the gift of an annuity contract to his wife and sister, and contained provisions dissimilar to the annuity. This was a salient factor in the court's finding that the gift of the annuity was not in contemplation of the donor's death.[78]

In practice it is even better for the donor's will to *precede* the creation of a lifetime trust than to be executed simultaneously with it. In the Supreme Court case of *Colorado National Bank v. Commissioner*,[79] the decedent had created a large irrevocable trust for his descendants two years after executing his will. In the Court's view, the will, executed before the trust and itself providing a testamentary trust for the children, provided support for the finding of an overall motive of the donor not directly springing from apprehension of death.

It is thus clear that if the living gift is independent in time from the donor's will, the donor's estate has an additional point of reference for the finding of a life motive when challenged by the Commissioner.[80] However, a question may be

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76. Revenue Act of 1926, § 302(c), 44 Stat. 9.

77. 143 F.2d 704 (7th Cir. 1944).

78. The case was decided under the pre-1950 regulations where the Commissioner could challenge *any* previous transfer of the decedent—no matter how remote in time—as having been made in contemplation of death.

79. 305 U.S. 23 (1938).

80. *See, e.g.*, Ernest Hinds, 11 T.C. 314 (1948), *aff'd*, 180 F.2d 930 (5th Cir. 1950); T.M. Flynn, 3 CCH Tax Ct. Mem. 1287 (1944).

raised concerning the familiar life insurance or other revocable trust and pour-over will combination which is common in the planning of estates of young professional persons and corporate executives. Such a device is a simultaneous execution of dispositary instruments and would thereby appear to be subject to adverse future holdings on the issue of contemplation of death. Yet, the creation of such a *revocable* trust is not really an independent act having any estate tax benefit; rather it is predominantly a strategem to avoid future probate administration of the trust assets and some state inheritance taxes. Since by the very nature of the revocable trust the settlor's transfer is incomplete, it cannot even qualify for adjudication under section 2035.[81] The transfer, so far as section 2035 is concerned, is identical to a testamentary bequest or devise. Only if the settlor later amends the trust to provide for irrevocability is the original transfer subject to consideration as having been made in contemplation of death. The question then becomes, "Does the 'amendment' update the trust so that it no longer is an integral part of the will transaction?"

While there is a paucity of case authority on the point, it is submitted that an additional transfer to the corpus of such a revocable trust—made at the same time it is amended to be *irrevocable*—would be a transfer of "independent significance"[82] not tainted by the fact that the donor had previously executed his will simultaneously with the creation of the revocable trust. However, even without such an additional transfer one might well ask whether the amendment to irrevocability *alone* is not enough to confer such independence. It is believed that it is sufficient if positive proof of a life motive for the donor's amendment is offered.

In the landmark case of *Allen v. Trust Company*,[83] the decedent, in 1925, had created two spendthrift trusts for his son and daughter to assure their future well-being. In 1934, he enlarged the trusts but retained his original power to amend them. The decedent, a lawyer, obviously believed that the trusts were complete gifts at the time, for he had paid a gift tax on them. He also believed that his reservation of the power to amend with the consent of the trust beneficiaries would not cause inclusion of the trust assets in his estate. In 1937, after learning of the

81. Only completed or irrevocable transfers are contemplated by section 2035. 3 J. MERTENS, *supra* note 59, at § 22.04.
82. *See* note 72 *supra*.
83. 326 U.S. 630 (1946).

Supreme Court's adverse decision in *Helvering v. City Bank Farmers Trust Company*,[84] he released his amendment power in order to put the trust in the "completed gift" position he had originally intended and to conform to the new holding. As circumstances would have it, his release occurred within two years of his death. The Supreme Court held that his release related back to the 1925 and 1934 transfers, saying: "This is not a case where a settlor, having made one plan for the disposition of his property, later makes a different one to avoid death taxes."[85] The settlor had not given additional property in 1937; all he had done was perfect legally an earlier, planned transfer, and by such act he hoped to carry out his original intention. The 1937 release was thus "integrated back" to the 1925 date of the trust's creation and was thereby protected from "contemplation of death" treatment.[86]

In addition, in the familiar case of a pour-over will and life insurance trust, the donor often initially names the trust as a primary beneficiary of his policies and retains the incidents of ownership in himself. If at some later time he amends the "dry" trust to irrevocability, and also assigns to the trust the incidents of ownership of the policies, the transaction becomes independent in time from his pour-over will. Such amendments often follow several years after the origination of a revocable trust, depending upon the increasing affluence of the settlor and his growing conviction in the utility of the trust and the competence of its administration.

B. Creation of a Positive, Consistent and Enduring Plan of Gifts by the Donor

The creation of a consistent "plan" of inter vivos transfers apart from the donor's last will and testament is another facet of estate planning in apprehension of the Commissioner's imposition of section 2035. There is a gradation of donor's motives here which we might note in passing. For example, evidence of a past "promise" of the donor would not as strongly indicate life-associated motives as would evidence of certain repeated or successive gifts. And repeated gifts would not have as great evidentiary weight as a previously conceived and partially

84. 296 U.S. 85 (1935).
85. 326 U.S. 630, 636 (1946).
86. *See* Daniel W. Wardwell, 20 CCH Tax Ct. Mem. 1530 (1961). *See also* Chris M. Neilson, 26 CCH Tax Ct. Mem. 1086 (1967) (conversion of a savings account to an irrevocable trust held to perfect an earlier, safe transfer).

executed plan of transfer.[87] The habitual regularity of a donor's gifts pinned to Christmas giving,[88] and even simple evidence of regular gifts to a donor's children over a lengthy period, has vindicated the donor's life motives and resulted in estate exclusion.[89] But habit or regularity in giving is not nearly as strong a revelation of a donor's life motive as is a gift made to perfect or protect a previously conceived plan. When the latter subjective element is added to the more objective physical pattern of the gifts a case for estate exclusion is difficult for courts to deny.

Where there is a *causal connection* between the challenged transfer and an earlier plan, design or general purpose, the gift can be treated *as if* it took place prior to the three-year presumptive period. The decedent in *Joseph Giuliani*,[90] a mere five months before his death, transferred business property to his son as a gift. The transfer was held not in contemplation of death because it was shown that it resulted from a plan for the vesting of such interest which decedent had proposed ten years earlier. Similarly, in *Brown v. Commissioner*[91] a transfer made within three months of the decedent's death but pursuant to a plan formed 20 years before, when the decedent was in rugged good health, was held non-testamentary and not includable in his estate.[92]

Many clients coming before attorneys for estate planning or counselling can marshal together at least some gifts they have previously made to family members. If so, the attorney should try to weave these gifts into a synthesized future pattern —perhaps by a continuation of the client's same past practice, perhaps by the creation of an irrevocable living trust for the same beneficiaries in which the settlor explicitly recites his past gifts and adds that he now wishes professional investment counsel for future funds. The addition of such precatory lan-

87. This gradation or continuum of increasing intensity is more fully developed in 3 J. MERTENS, *supra* note 59, at § 22.29 *passim*.

88. *See* Black v. United States, 68 F. Supp. 74 (N.D. Ohio 1946), *aff'd*, 164 F.2d 96 (6th Cir. 1947).

89. *See* Routzahn v. Brown, 95 F.2d 766 (6th Cir. 1938); Florence M. Harrison, 17 CCH Tax Ct. Mem. 776 (1958).

90. 11 CCH Tax Ct. Mem. 673 (1952).

91. 74 F.2d 281 (10th Cir. 1934). *See also* Edith Huggard Sharp, 30 B.T.A. 532 (1934), 33 B.T.A. 290, *aff'd*, 91 F.2d 804 (3d Cir. 1937), where the challenged transfer was made within one day of death but the preparation of the trust instruments of transfer had been under way for several years.

92. Smaller, earlier gifts of the donor may even protect larger, later ones where a sufficient causal connection is shown *via* an identifiable plan. *See* Belyea v. Commissioner, 206 F.2d 262 (3d Cir. 1953).

gauge indicating a "wish" or "desire" of the donor, while not legally binding upon the trustee, certainly loses nothing in a later argument as to the donor's motive. Even though, as we have seen,[93] almost any assembled proof of a donor's life motive is bound to be regarded as self-serving, nothing is lost by embodying the donor's purpose in the dispository instrument itself.[94]

If one's client is more fortunate and can show not only a past practice of gifts but also some consistent thread of purpose or plan in what has preceded, the planner's job is made even easier. One obvious example of such a lifetime plan involves the desire of many donors to preserve control of a closely-held family enterprise in their descendants or their trusted associates. For example, the creation of an irrevocable trust with a corpus of closely-held corporation stock benefiting minor sons of the settlor, with business associates of the donor as trustees, implicitly would seem to spell out a life motive of continuity of management of the business.[95] Given this founding purpose, all later gifts to the trust until the children reach the age for distribution would seem safe. If the donor's children are of age and inclined to carry on the business, a gift motive expressing the desire for such preservation builds yet a sharper case for estate exclusion.

So, too, a gift to an interested child by a farmer or rancher of the land, buildings, stock or equipment of a farm enterprise demonstrates a desire that the family unit carry on the business already established. Yet demonstration of a plan or purpose need not be limited to family businesses. Gifts to aid children in professions can be tailored and patterned by an initial gift of an interest in, say, an office building, at first a fractional interest or a life estate and later perhaps a remainder release, depending upon the donor's gift tax lifetime exemption

93. *See* note 24 *supra*, and accompanying text.

94. Courts sometimes pay no attention to recitals of this type in a donor's will or trust, or even in a gift tax return. In Campbell v. Kavanagh, 114 F. Supp. 780 (E.D. Mich. 1953), the donor's prepared gift tax return contained the statement: "motive—to avoid future inheritance taxes." The court, in its benificent wisdom, held the gift not in contemplation of death, remarking: ". . . we are forced to the conclusion that this man's gift became the unintended target of a public accountant's enthusiasm with misapprehension of the law. That is all." *See also* Bertha Engel, 6 CCH Tax Ct. Mem. 70 (1947).

95. Often a nonvoting common or preferred stock issue is created and given to the child directly or through the Uniform Gifts to Minors Act in force in most states. However, the lack of voting control may hint at the lack of a "present" interest conferred upon the donee.

or his ability to finance a gift tax. Again, a substantive motive expressing such a purpose *initially* will serve to characterize later gifts close to death made in the same medium.

C. CREATION OF A PRESENT INTEREST IN THE DONEE

In this subsection we are not concerned with direct or outright gifts to a donee, for those obviously create a present living interest in the gift res. It is the more sophisticated method of transfer by an accumulation trust or trust designed to skip a generation of donees in the interest of saving two or more successive estate taxes which most often comes under section 2035 scrutiny. Often in his effort to construct such an elaborate mechanism for insulating successive generations from estate tax, a draftsman will overlook the fact that the failure of the transfer to confer a *present* interest in an immediate donee may be construed as a "testamentary" feature of the transfer and thus bring down a tax as a gift in contemplation of death.

The importance of vesting present interests in intended gift recipients is illustrated by *Commissioner v. Gidwitz.*[96] In that case, the decedent had made a transfer in trust eight years before his death, under which no benefits were payable to the trust beneficiaries until his death. Income was to be accumulated during the settlor's life and the beneficiaries expressly were prevented from alienating their expectancy. The decedent and his wife were named trustees. Presumably, however, their duties were limited to those of a fiduciary nature. The court found that the Tax Court's decision affirming treatment of the transfer as made in contemplation of death was not clearly erroneous.[97] We could assume that either the vesting of an income interest in the *Gidwitz* donees for the life of the donor or the elimination of the trust's spendthrift clause would have materially changed the court's opinion. As it was, the failure of the settlor to convey a present interest was fatal.

A "present interest" can be read into any irrevocable living trust in which the settlor is "trustful" enough to allow the beneficiaries a present income interest and, even better, a power of principal invasion either with ascertainable standards or governed by the five per cent or $5,000 standard allowed by sec-

96. 196 F.2d 813 (7th Cir. 1952).

97. The court was also aided by the fact that the decedent had executed a will with similar provisions at the same time as the trust in question, and that by the trust he had disposed of a major portion of his property.

tion 2041 of the Code.[98] When the facts are evenly balanced between a life or death motive of the donor in creating the trust and making the initial transfer, this single "present interest" feature may tip the scales in the taxpayer's favor.

Instead of waiting until the drafting of a last will and testament to become "trust conscious," the testator might create an irrevocable, living, residuary trust in advance of his will—and similar to the "residuary" or "Trust B" provisions of a marital share formula will. By vesting a present income interest in the trust beneficiaries, the settlor would have two strings to his bow in future combat with the Commissioner. Not only would he have established a living motive by benefiting an immediate donee presently, he would also have spared his transfer from the "contemplation of death" taint of a simultaneous will. When the will is finally drawn, it could pour over its residuary share into the existing trust rather than into a testamentary-type "Trust B."

This emphasis on the importance of a present interest as a gift res suggests another popular estate planning device—the ten-year income trust.[99] Here, a present, usable interest is conveyed to the donee, who must report the income therefrom on his own federal income tax return until either the corpus reverts to the donor at the end of the trust's term or until the donor's earlier death. Should the donor die within the ten-year period—or indeed within the three years following the execution of the trust—only the actuarial value of the outstanding term income interest would be subject to section 2035 treatment as a gift in contemplation of death. Could the Commissioner claim the whole property as the "interest" transferred under section 2035? This question anticipates a later discussion.[100]

We have in the preceding analysis suggested to the practitioner three considerations in planning lifetime gifts which may withstand their attack as gifts in contemplation of death. To be sure, this delineation is not mutually exclusive; the timing of a lifetime gift vis-à-vis the donor's last will and testament may also involve or refer to a previous pattern of such gifts.

98. INT. REV. CODE of 1954, § 2041, permits an absolute, non-cumulative invasion power by the donee of five per cent of the trust corpus or $5,000, whichever is the greater, exercisable per annum, without subjecting the balance of the trust corpus to tax in the donee's estate.

99. *See* INT. REV. CODE of 1954, § 673, for the mechanics of this trust, which is basically an *income* tax-saving device. The settlor under this section must also have a life expectancy of ten years or more.

100. *See* notes 109-128 *infra*, and accompanying text.

And each gift in the pattern may have been of a "present interest" in the gift res. The practitioner who keeps the necessity of all three elements in mind will be the most successful in salvaging lifetime dispositions from later estate taxation. And his clients, particularly his elderly, infirm, and apprehensive clients, will better be able to assess the risks of such taxation.

Before looking at some of the valuation of gifts in contemplation of death difficulties, it is necessary briefly to analyze transfers of insurance. This seeming digression is dictated not only by the peculiarly testamentary nature of a life insurance policy but also by the increasing popularity of insurance policy transfers in typical estate planning procedures.

IV. LIFE INSURANCE AS A SPECIAL SUBJECT OF INTER VIVOS TRANSFERS

It has already been noted that a donor's transfer of a life insurance policy is often characterized as contemplative of death because of the "inherently testamentary" nature of the gift res.[101] One authority remarks that

> . . . insurance fits rather snugly into testamentary patterns and where there is no present need of the transferee and no other material reason for the timing of the transfer of the policies it is difficult to avoid the normal conclusion that thought of death and its aftermath prompted decedent's acts, regardless of his age, health or activities.[102]

A classic case tending to confirm this view is *Vanderlip v. Commissioner*.[103] Long before her death the decedent had purchased life insurance policies aggregating one million dollars, upon which she borrowed all the insurers would lend. Fourteen years later she irrevocably assigned all the policies to four trustees to hold until they became payable on her death, thereafter to continue to hold the policies as a trust fund for her heirs. The trustees were given power to use the policy dividends to pay premiums and also interest on the insured's loans; they could even borrow on the policies for this purpose. Nevertheless, during the remainder of her life the insured was forced to supplement heavily the premium payments to keep the policy loans current. The court held that the insured's donees did not enjoy

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101. *See* Sloan v. Commissioner, 168 F.2d 470 (2d Cir. 1948); Empire Trust Co. v. United States, 226 F. Supp. 623 (S.D.N.Y. 1963); George P. Rhodes, 6 CCH Tax Ct. Mem. 174 (1947), *aff'd*, 174 F.2d 584 (3d Cir. 1949).

102. 3 J. MERTENS, *supra* note 59, § 22.41, at 145.

103. 155 F.2d 152 (2d Cir. 1946), *cert. denied*, 329 U.S. 728 (1946).

the gift res until her death and that her motive in the transaction was to avoid estate taxes. The policy gifts were found to be merely a substitute for a bequest, and though the donor-insured died five years after the assignment in trust, her supplemental cash contributions were held to "taint" the entire transaction as one in contemplation of death. The holding is an unusual example of how a donor's earlier "plan" unfortunately was "pulled forward" or integrated with *later* transfers within the presumptive period—to cause estate taxation.

The *Vanderlip* transfer failed because the donees did not receive a *present* interest. A similar situation was found to exist in *Davidson v. Commissioner.*[104] There the decedent irrevocably assigned all her interest in certain life insurance policies in trust in 1937, directing the trustee to collect the proceeds on her death (which occurred in 1941) and distribute same for the benefit of named relatives. The trustee was also directed to use the proceeds to purchase assets from the donor's estate in order to pay off certain remainders due under her husband's will. The donor executed her will in favor of the same beneficiaries at the time she created the insurance trust. The court held that the insurance trust was created in contemplation of the grantor's death, stating:

> Viewed in their entirety, it is not difficult to consider the will and the trust instruments as integrated parts of a single plan, testamentary in nature, for the disposition of decedent's estate to take effect at her death. . . . Nothing was accomplished by the trust instrument that could not have been done in the same way and to the same extent by the will.[105]

Yet where a *present* interest or a *present* obligation has been conveyed to the recipient along with the donated life insurance policy, courts have found that the transfer is not testamentary in nature. For example, in *Cronin v. Commissioner,*[106] the donor assigned ownership of his life insurance policies to his wife and the wife thereafter paid the premiums. There was corroborative evidence that the donor's corporation faced a trying period with creditors at the time of the transfer. The court looked beyond the testamentary nature of the policies given and refused to include the gift in the donor's estate, finding that the donee of the policies had a sufficient life interest in the gift res. The donor was found to have intended the donee to exercise forthwith all rights inherent in the policies other than the right

104. 158 F.2d 239 (10th Cir. 1946).
105. *Id.* at 243.
106. 164 F.2d 561 (6th Cir. 1947).

to collect the policy proceeds on the donor's death.[107]

Ownership rights in an insurance policy could include the power of the donee to change beneficiaries, to borrow on the cash value of the policy, or to exercise the various policy options. It is submitted that, regardless of the donee's rights under law with reference to these incidents of ownership, the explicit and perhaps even redundant enumeration of them in a well-drafted trust instrument can be an important factor in bolstering the alleged living motive of the donor. Careful draftsmen would thus do well to spell out in the trust instrument the powers of the policy and the incidents of ownership so conferred upon the donee.[108]

V. VALUATION OF INTERESTS CONVEYED IN CONTEMPLATION OF DEATH

A discussion of taxation of gifts in contemplation of death is not complete without some note of their valuation, both in the donor's estate and to the donee. We can begin with the proposition that where the decedent has made a gift later held to be in contemplation of death, his adjusted gross estate is determined by including not the value of the gift res when made, but its value on the date of his death or on the elected optional valuation date.[109] Moreover, if the decedent had relinquished a power to alter, amend, or revoke a transfer in contemplation of death, his adjusted gross estate will include the whole property subject to the power to the extent it would otherwise be includable under sections 2036, 2037 or 2038 of the

107. *Cf.* Flick v. Commissioner, 6 CCH Tax Ct. Mem. 72 (1948), where a gift of life insurance in trust was held to have been made in contemplation of death despite the power given the trustees to surrender the insurance policies and use the paid-up portion to invest in income-producing securities. The court felt that this investment power was only a "potentiality" and may not have been the dominant purpose of the donor. However, this case was reversed on appeal. Flick v. Commissioner, 166 F.2d 733 (5th Cir. 1948).

108. A final distinction can be made, also, among the kinds of life insurance policies transferred. The donor's objective in transferring an "endowment" policy might be to save future income taxes (a life motive), while his transfer of an ordinary life policy would arguably involve the saving of estate taxes (a death motive).

109. *See* INT. REV. CODE of 1954, § 203(a). Such gifts are simply treated as if a transfer had never taken place. *See* Igleheart v. Commissioner, 77 F.2d 704 (5th Cir. 1935). However, at least one authority feels that the donor should not be held responsible for fluctuations in the value of the gift res after transfer and that its value should be pegged as of the date of gift. *See* AMERICAN LAW INSTITUTE, FEDERAL INCOME, ESTATE AND GIFT TAX STATUTE 235 (Tent. Draft No. 10, 1955).

Code.[110] The ravages of inflation thus work against the unsuccessful donor in these cases. If the subject of the gift has steeply increased in value during the three-year presumptive period of section 2035, the estate must report the increment; whereas, if a gift tax was paid in the year following transfer, the section 2012 gift tax credit may be a less-than-satisfactory offset to the donor's estate.

On the side of the donee, the basis of the gift res for income tax purposes is the same as his donor's basis when the gift was made—regardless of its inclusion in the donor's estate.[111] And the donee's holding period for capital gains begins on the date of the gift and not on the date of the donor's death.[112] The donee thus actually pays a penalty where section 2035 is imposed; had he inherited the gift res via a bequest or devise, he would at least have received an improvement in basis.

But suppose the donee, while the donor is still living, has converted, sold or reinvested the subject given. Will the avails of such a transaction be included in the donor's estate? If the donor's gift was of cash, only the cash amount will be counted.[113] If the donor made an outright gift of securities and the securities were then traded by the donee, presumably tracing principles apply. Yet it has been said that where the gift subject is stock, post-transfer cash dividends, and their avails, are not included as part of the estate valuation of the gift.[114] Reinvested earnings, adding to the value of the stock transferred, as well as stock dividends would, however, be added to the donor's taxable estate for they would be reflected in the date of death value of the gift res.[115] One can see that inconsistencies in treatment abound in this area.

To add to these inconsistencies, there is an apparent discrepancy between the section 2035 taxation of outright lifetime gifts and taxation of equivalent gifts made in trust. In the case of gifts in trust, the donor's estate tends to be taxed on the full increment in value of the trust res between the date of contribu-

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110. *See* Treas. Reg. § 20.2035-1(b) (1958).

111. *See* A. Casner, Estate Planning—1965 Supplement 123 (3d ed. 1965).

112. Rev. Rul. 59-86, 1959-1 Cum. Bull. 209.

113. *Id.*

114. 3 J. Mertens, The Law of Federal Gift and Estate Taxation § 22.80 (1959).

115. Burns v. Commissioner, 177 F.2d 739 (5th Cir. 1949); Delia Crawford McGehee, 28 T.C. 412 (1957), *rev'd*, 260 F.2d 818 (5th Cir. 1958). *See also* O'Malley v. United States, 220 F. Supp. 30 (N.D. Ill. 1963), *aff'd*, 340 F.2d 930 (7th Cir. 1964), *rev'd*, 383 U.S. 627 (1966).

tion and the date of death, regardless of the amount of reinvesting by the trustee. That is, the avails of a gift in contemplation of death made *in trust* are "locked into" the trust mechanism and do not spill out into the usual exclusion from estate tax afforded untraceable income from an outright gift made under similar circumstances. In the outright or indefeasible gift situation, the real "taxable event" is the inter vivos transfer. In the gift in trust, particularly where the donor has retained any powers at all, the donor's death is viewed as the "taxable event" completing the transfer which was begun inter vivos but only made final and free of all strings at the later time.[116] Accumulated, post-gift income will thus be included in the latter instance but not in the former.

In the several valuation problems just reviewed, one also encounters a conceptual divergence between the tax imposed on the local property law value of the "interest" conveyed in contemplation of death and the calculated value of the same "interest" were it to have remained in the donor's estate.[117] Under local property law valuation principles, if *A* conveys *X* stock to *B* by inter vivos gift made in contemplation of death, *A*'s estate would have to include the value of the interest *as conveyed*. However, the "tax" valuation of the same interest would require its inclusion in *A*'s estate at the exact amount by which *A*'s adjusted gross estate has been diminished as a result of the inter vivos transfer. The courts are even now unsettled as to which of these valuation principles should prevail.

This difference in valuation theories was dramatically illustrated in the Tenth Circuit's decision in *United States v. Allen*.[118] The donor had created an irrevocable trust, reserving to herself three-fifths of the trust income for life and providing that the remaining two-fifths income interest vest in two of her children. Eighteen years later she sold her retained life estate to a third

116. This divergency in tax policy has been criticized by Young, *Proposed Estate Tax Regulations*, 95 T. & E. 1080 (1956). *See also* Pavenstedt, *Taxation of Transfers in Contemplation of Death; A Proposal for Abolition*, 54 YALE L.J. 70 (1944). *Compare* Commissioner v. Gidwitz, 196 F.2d 813 (7th Cir. 1952), which included in donor's estate only the exact subject of the indefeasible transfer, *with* United States v. O'Malley, 383 U.S. 627 (1966), *rev'g* 340 F.2d 930 (7th Cir. 1964), in which the increment or later avails of the donor's gift in trust was also included. For a more thorough explanation of this divergence in valuation see Lowndes & Stephens, *Identification of Property Subject to the Federal Estate Tax*, 65 MICH. L. REV. 105, 106 (1966).

117. These two concepts of the "interest" subject to estate tax are discussed in Comment, 61 MICH. L. REV. 1335 (1963).

118. 293 F.2d 916 (10th Cir. 1961), *cert. denied*, 368 U.S. 944 (1961).

child for its then actuarial value at a price far less than the value of the three-fifths *principal* interest required to generate the income. Her death within three years after this "sale" raised the question of whether the transfer was a "gift" under section 2035.[119] Under local property law concepts the donor had sold for fair consideration exactly what she owned at the time of the sale—a three-fifths income interest actuarially valued. But the court held that an amount equal to three-fifths of the principal of the trust, less the proceeds received from the sale of the income interest, should be included in the donor's estate under section 2036 of the Code.[120] That is, the court both viewed and valued the sale of the income interest as if this transaction pulled the corresponding trust principal along with it—and the trust principal became equivalent to a gift in contemplation of death. Thus the donor's "interest" subject to inclusion in her estate became the so-called "tax" interest—the amount by which her adjusted gross estate would have been reduced by the transfer, if allowed.

The *Allen* decision contradicted an earlier holding of the Ninth Circuit in *Sullivan v. Commissioner*.[121] There a husband, expecting imminent death, joined with his wife in conveying by gift certain jointly-held property to their son. They later segregated and divided the remainder of their jointly-held property between themselves as tenants in common. After the husband's death two months later, the court held that only one-half of the joint property transferred to the son could be taxed as property given in contemplation of death because, under applicable local property law, that was the "interest" the husband actually owned. As to the balance of the property owned in undivided common interests, only the one-half interest held by the decedent at death was included in his estate. The court felt that the transfer of the *other* one-half common interest from husband to wife had been bona fide and in return for an adequate consideration—the wife's relinquishment of her former joint interest.[122]

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119. The federal district court held to this effect. *See* 60-2 U.S. Tax Cas. ¶ 11965 (D. Colo. 1960).

120. Section 2036, in effect, pulls back into the donor's estate the full value of any transfer as to which the donor retains an income interest ending with his death.

121. 175 F.2d 657 (9th Cir. 1949), *rev'g* 10 T.C. 961 (1948).

122. These cases are more fully explained and related in the writer's article, *Joint Tenancy: The Estate Lawyer's Continuing Burden*, 64 MICH. L. REV. 801, 824-27 (1966). *See also*, as to tenancies by the entirety, A. Carl Borner, 25 T.C. 584 (1955).

The definition of the taxpayer's "interest" conveyed thus is of vital importance to the practitioner advising a client on suspected contemplation of death transfers. The above examples show that one rule of valuation obtains in the Tenth Circuit, another in the Ninth. The law of the locality must also be studied, for at least four different views affecting valuation are extant in the 21 state jurisdictions recognizing tenancy by the entirety.[123] The prevalence of joint or entireties ownership between spouses demands appraisal of the varying approaches of the *Allen* and *Sullivan* cases.

A more specific valuation problem encountered in "contemplation of death" assignments of life insurance policies should be mentioned. Where the donor has assigned all the incidents of ownership of his policy well in advance of death and, as is customary, continues to pay the premiums, what effect does his incremental payment of premiums *within* the three-year presumptive period have? Is the whole face value of the policy pulled back into the donor's estate by virtue of his continuation of such payments, or a prorated part of the face value, or none of it? At least one case has suggested inclusion of the policy's full face value,[124] the rationale of such view seeming to be that continuing premium payments are tantamount to a continuing gift ended only by death. Other authorities have claimed equally vociferously that the payment of premiums by a donor long after an irrevocable transfer of the policies should not be held in contemplation of death.[125] In a recent ruling the Commissioner has taken the position that premium payments by the donor within the three-year period require estate inclusion of the proportionate part of the policy's face value.[126]

One solution would be to require the donee to make the post-transfer premium payments, or in the case of a funded insurance trust require that the trustee pay the premiums by invading corpus if necessary to do so. Even unrestricted gifts of cash from the donor to the policyowner would be held "premium payments." The Commissioner's above mentioned ruling could also be circumvented by having the policyowner pay

123. *See* Comment, *supra* note 117, at 1349-50.

124. Liebman v. Hassett, 148 F.2d 247 (1st Cir. 1945). *See also* Mannheimer, Wheeler & Friedman, *Gifts of Life Insurance by the Insured,* in NEW YORK UNIVERSITY SEVENTH INSTITUTE ON FEDERAL TAXATION 247 (1955).

125. *See, e.g.,* Brown & Sherman, *Payment of Premiums as Transfers in Contemplation of Death,* 101 T. & E. 790 (1962). *See also* Treas. Reg. § 20.2042-1(c)(1) (1958).

126. Rev. Rul. 67-463, 1967 INT. REV. BULL. No. 52, at 11.

premiums from policy loans after the transfer. If the jurisdiction involved should hold that the whole policy be pulled back into the donor's taxable estate, at least the portion supported by the owner-beneficiary's payments would seem excludible. The problem here, as in the preceding discussion of "valuation," is the one of "identification" of property subject to federal estate tax.[127]

It should be noted that the Commissioner's Ruling is not being given a very docile judicial reception. In *Gorman v. United States*,[128] a federal district court ruled that only the insurance premiums paid by an insured decedent within three years of his death were subject to inclusion in his gross estate; the court called the revenue ruling "unfounded" and a futile attempt by the Service to revive the "premium payment" test of insurance includibility.

VI. PROCEDURE IN SECTION 2035 CASES

The Internal Revenue Service has indicated that it will not issue advance rulings on whether a given transfer is in contemplation of death.[129] So, for the practitioner expecting a challenge of any decedent's gift on this point, the compilation of relevant

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127. See the excellent article, Lowndes and Stephens, *Identification of Property Subject to the Federal Estate Tax*, 65 MICH. L. REV. 105, 124 (1966). *See also* Goodson, *Gifts in Contemplation of Death?* 103 T. & E. 25 (1964). The case of *In re* Irenee duPont, 194 A.2d 309 (Del. Ch. Ct. 1963), is a "storybook" example of a deliberate gift in contemplation of death which resulted in estate tax-saving. Two members of the family of Irenee duPont, serving as court-appointed guardians of the failing 86-year-old donor, secured Delaware Chancery Court approval for a gift of securities valued at $36 million. The ward's estate then amounted to $176 million. To get such approval the proponents of the transfer successfully pointed out that the gift tax of $21 million on the transfer would be removed from the ward's estate for tax purposes (either as having been actually paid or as an estate debt) and also that the gift tax paid could be a credit against the estate tax if the amount of the gift should later be included under section 2035. The end result would be at least a saving of 77 per cent of $21 million—a greater saving than if no gift had been made at all. Mr. duPont's family successfully anticipated an estate deduction and an estate tax credit for the same item!

The same policy will often reap tax benefits where a donor has made a charitable gift clearly and deliberately in contemplation of death. If the date-of-death value of the gift is later included in the donor's estate, the allowable marital deduction is proportionately enlarged. Because of the completed charitable gift, the gross estate will still get the same reduction as if the gift had been made in the donor's will. *See* Polen, *In Contemplation of Death*, 104 T. & E. 777, 779 (1965).

128. 68-2 U.S. Tax Cas. ¶ 12,533 (E.D. Mich. 1968).

129. Rev. Proc. 62-32, 1962-2 CUM. BULL. 527. *See also* Rev. Proc. 64-31, 1964 INT. REV. BULL. No. 30, at 14.

data on the Federal Estate Tax Return Form 706 is obviously important.

Page two of the return will reveal facts of the decedent's last illness, and, if the protection privilege is waived, an examining agent can be expected to ask for hospital records such as laboratory tests, electrocardiograms, and hospital chart notations. The agent may also question members of decedent's family as to his physical and mental health during the three-year period prior to death. Recipients of gifts may be interrogated. Prior wills and life insurance applications may be investigated.[130] Even the decedent's attorney may receive inquiry as to decedent's requests during the period, and the attorney's maintenance of an office diary of client visits and their purpose may be helpful to establish a case for the estate. Certainly, it is likely that an examiner will review past income tax returns to see the nature of any medical expense deduction taken. Also, where the property listed in Schedule G of Form 706 is in excess of $1,000 in value, the donor's executor must file sworn statements of all facts and circumstances relating to his gift motives and health condition at the time of the transfer, together with a copy of the death certificate.[131] All these facets of investigation should be anticipated at the field or office audit level.

Beyond the level of the Internal Revenue Appellate Division Conference, trial courts will treat the question of the donor's intent exclusively as one of fact. Precedents, unless they are four-square on point, will thus not be controlling. The three-year rebuttable presumption of section 2035 requires the taxpayer to bear the burden of proving by a fair preponderance of the evidence that the transfer was not made in contemplation of death.[132] In addition to this advantage, the Commissioner may avail himself of the general presumption that his determination is correct.[133] However, "[a] showing of facts sufficient to establish that the rebuttable presumption is overcome will also usually overcome the presumption in favor of the correctness of the Commissioner's determination."[134]

The practitioner reading this imposing array of opposing

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130. *See* Polen, *supra* note 127.
131. Treas. Reg. § 20.6018-4(g) (1958).
132. *See* Farmers Loan & Trust Co. v. Bowers, 98 F.2d 794 (2d Cir. 1938), *cert. denied*, 306 U.S. 648 (1939).
133. *See* Welch v. Helvering, 290 U.S. 111 (1933). Rule 32 of the U.S. Tax Court imposes a general burden of proof on the petitioner before that tribunal.
134. 3 J. MERTENS, *supra* note 114, § 22.75, at 243.

evidentiary burdens should, of course, take heart in the simple but real truth that the evidence as to the donor's motives for the transfer in issue is largely within his control. Self-serving though they may be, the facts as to motive can be selected and assembled in the first instance by the estate attorney. The most informed and the most knowledgeable witnesses will invariably be related or partisan to the deceased donor. Even the supposedly more objective medical evidence as to the donor's physical and mental state may be withheld on the ground of privilege. The game, in other words, must be fought out in the donor's home stadium and largely on his terms. The evidentiary rules are clear and present for the donor's attorney to scout. The Commissioner, on the other hand, may have to face supportive evidence unknown in advance and thrown into the balance only after his own trial gauntlet has been flung down.

VII. A VIEW TO THE FUTURE

Both government and private tax attorneys would agree that any tax provision relying so heavily on subjective evidence as does section 2035 of the Internal Revenue Code is ripe for legislative improvement. It is little wonder that numerous substitutes and alternatives have been proposed. These range from merely extending the presumptive period to far more radical remedies. One suggestion, authoritatively supported, is that the three-year rebuttable presumption be extended to five years.[135] Another would provide for a conclusive two-year presumption if the donor had reached a specified minimum age and had made a transfer of a substantial part of his property to the natural objects of his bounty.[136] A third would impose the test that if a reasonably prudent man in the donor's position would have realized that he had no substantial life expectancy at the time of his gift, the gift would be pulled back into his taxable estate.[137] A fourth would merge all estate and gift taxation, integrating gift and estate taxes under a single transfer tax with a continuing exemption usable during life, and the residue of the exemption used up at death.[138] Finally, the English system of taxing to the estate any transfer inter vivos made up to five years prior

135. *See* AMERICAN LAW INSTITUTE, FEDERAL INCOME, ESTATE AND GIFT TAX STATUTE 97 (Tent. Draft. No. 9, 1954).

136. R. PAUL, FEDERAL ESTATE AND GIFT TAXATION § 6.26 (1942).

137. *See* Lowndes & Rutledge, *An Objective Test of Transfers in Contemplation of Death*, 24 TEXAS L. REV. 134 (1945).

138. *See* Barry, *The Taxation of Transfers in Contemplation of Death*, 10 HASTINGS L.J. 370, 382 (1959).

to the donor's death has been endorsed. The amount of gift res included in the donor's estate would be prorated, however, according to the length of time the donor survives the gift.[139]

Those who have sought in this article a new and original solution to either the planning or the enforcement of gifts made in contemplation of death will have to quaff their disappointment. The writer's purpose has been to show the practicing attorney the nature of present enforcement and how best to meet it for planning purposes. If attorneys are made conscious of the limits of what can be done in this area the amount of litigation in section 2035 cases will undoubtedly diminish. And if the amount of litigation diminishes, the need for a drastic revision of this section of the Code can abate until such time as an over-all revamping of the American system of estate and gift tax laws can be maturely considered.[140] There are enough inconsistencies in the enforcement of section 2035 already to warrant a reappraisal rather than patchwork repair of estate tax philosophy regarding this and other sections. In the meantime the role of the alert and informed estate planning counselor is a worthy and vital one.

139. *See* 11 VILL. L. REV. 814 *passim* (1966).

140. Such a re-vamping appears to be looming in the form of the third draft of the AMERICAN LAW INSTITUTES, FEDERAL ESTATE AND GIFT TAX PROJECT (April 30, 1968).