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TRANSFERS IN CONTEMPLATION OF DEATH

EDWARD N. POLISHER*

The scope of this article is limited to the discussion of transfers prompted by motives associated with life and moral obligations; transfers made simultaneously with the execution of a will, or as a part of a plan of testamentary disposition; transfers of life insurance policies; and, lastly, valuation of such transfers.

BACKGROUND AND NEED FOR PROVISION

The Federal Estate Tax Statute, since its enactment in 1916, has included a provision for the taxation of transfers made during the decedent's lifetime "in contemplation of death." [1] This was necessary to prevent evasion of the estate tax through the medium of inter vivos transfers which were substitutes for testamentary dispositions.[2] Prior to the passage of the gift tax law on June 6, 1932, such inter vivos transfers would have gone entirely tax-free; subsequent to its enactment, the retention of the provision was deemed necessary in order to prevent avoidance of the difference in rates between the estate tax and the gift tax on the transfers.

A precise definition of the term "transfers in contemplation of death" was not contained in the statute or in the Internal Revenue Code.[3] However, the statute provided that gifts made within two years of death were presumed to have been made in contemplation of death. Until 1926, this was a rebuttable presumption and the Treasury had only limited success in establishing inter vivos transfers as substitutes for testamentary dispositions. The 1926 Revenue Act converted this provision into a conclusive two-year presumption.[4] The latter was held to be unconstitutional by the United States Supreme Court, as being in contravention of the due process clause of the Fifth Amendment.[5] Thereupon, the Revenue Act of 1932 restored the rebuttable presumption which has remained in force until the present time.[6]

STATUTE AND REGULATIONS

Section 811(c) of the Internal Revenue Code provides that there shall be

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1. Revenue Act of 1916, § 202(b), 39 STAT. 756 (1916).
2. United States v. Wells, 283 U. S. 102, 117, 51 Sup. Ct. 446, 75 L. Ed. 867 (1931).
3. INT. REV. CODE § 811(c).
4. Revenue Act of 1926, § 302(c), 44 STAT. 9 (1926).
5. Heiner v. Donnan, 285 U. S. 312, 52 Sup. Ct. 358, 76 L. Ed. 772 (1932).
6. Revenue Act of 1932, § 803(a), 47 STAT. 169 (1932); INT. REV. CODE § 811(c).

included in the gross estate of a decedent, the value of property at the time of his death:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of . . . his death . . . except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death. . . ."

The relinquishment within two years prior to his death of a power of revocation or amendment in respect to property transferred during the decedent's lifetime, which, if retained, would have subjected the property to estate tax, is also presumed to be a transfer in contemplation of death to the extent of each beneficiary's interest in excess of $5,000.00.[7]

Scope of the Statute

It is axiomatic that the decedent must own the property which he transfers before the statutory provisions can apply. Thus, where a decedent renounced certain legacies, no part of such legacies was includible in his estate, even though the renunciation may have been made in contemplation of death.[8] On the other hand, the fact that the decedent in his lifetime parted absolutely with his title to, and possession and enjoyment of, the property is of no consequence.[9]

The constitutionality of this provision has been upheld as to a transfer made prior to enactment of the estate tax.[10]

Transfers of Community Property

The 1948 Revenue Act repealed all the provisions of the Internal Revenue Code dealing with the Federal estate taxation of community property which were first inserted by the 1942 Revenue Act. Thus, the applicability of Sec. 811(d) (5) of the Code which dealt with transfers of community property in contemplation of death is now limited to transfers made by decedents who died between October 22, 1942, the effective date of the 1942 Revenue Act, and December 31, 1947, the effective date of the 1948 Revenue Act. With respect to decedents dying after December 31, 1947, the pre-1942 method of taxation of community property is restored.

Section 811(d) (5) provided as follows:

7. INT. REV. CODE § 811(d)(4).
8. Brown v. Routzahn, 63 F. 2d 914 (C. C. A. 6th 1933), *cert. denied*, 290 U. S. 641 (1933).
9. U. S. Treas. Reg. 105, § 81.16.
10. Milliken v. United States, 283 U. S. 15, 51 Sup. Ct. 324, 75 L. Ed. 809 (1931).

"... a transfer of property held as community property by the decedent and surviving spouse ... shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse."

Prior to the enactment of Section 811(d)(5), only one-half of the property was includible in the gross estate of a decedent who joined with his spouse in transferring community property in contemplation of death, regardless of the source of the property. Since the repeal of Section 811(d)(5), this is again the measure of taxability.

Definition of Contemplation of Death

The Regulations attempt to supply the definition of "contemplation of death" which is lacking in the Code. Based largely on the comprehensive discussion of broad principles by Chief Justice Hughes in *United States v. Wells,*[11] Regulations 105, Section 81.16 declares:

"The phrase 'contemplation of death,' as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death . . ."

From this language, it is clear that "contemplation of death" carries far beyond the narrow limits embraced by the common law concept of gifts causa mortis. No imminent fear of death is required. It is sufficient if the decedent was actuated primarily by a motive associated with death. With the decedent unavailable to establish his motivation, the problem of examining his state of mind at the time he made a particular gift, to discover his reasons therefor, is difficult at best. The Regulations provide that the bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not thoughts associated with death prompted the disposition.[12] The inquiry, therefore, must be directed to the myriad of circumstantial factors attending each gift which may hold some clue as to what the decedent's motivation may have been. Each case must be decided in the light of its peculiar factual background.

However, it is possible to recognize several guideposts in the welter of factual detail which pervades the decisions on this subject.

11. 283 U. S. 102, 51 Sup. Ct. 446, 75 L. Ed. 867 (1931).
12. U. S. Treas. Reg. 105, § 81.16.

Circumstantial Factors

In most of the decisions the courts have considered evidence of (1) the decedent's age and physical condition, (2) the size of the transfer involved in relation to the decedent's total estate at that time and (3) the time interval which elapsed between the transfer and decedent's death. These factors are of great importance in reconstructing the state of the decedent's mind at the time the gift was made. Against this background, the court must examine the various motives which counsel for the Treasury and the estate contend actuated the gift and then determine which motive or motives were uppermost in the decedent's mind.[13]

Age and Physical Condition

The natural inference that arises from a transfer made by a decedent of advanced age, while suffering from serious illness, will be difficult to overcome. The element of old age alone may be counteracted by evidence of mental outlook, business interest and physical activities. But illness is a more troublesome obstacle. Nevertheless, if clearcut proof of motives associated with life can be adduced, the factors of age and health will not be controlling.[14] At the same time, evidence that the donor was not of advanced years and in good health may be successfully contradicted by proof that he acted pursuant to a motive associated with death.[15]

Size of Transfer

The ratio between the size of the particular transfer and the then value of the decedent's entire estate is important as a possible indication that the transfer was actually a substitute for testamentary disposition. The larger the proportionate value of the gift, the more persuasive is the implication that thoughts of death were in the donor's mind. However, this element alone is likewise not conclusive. Thus, family precedent and other "life" motives were able to destroy the inference arising from an inter vivos transfer of practically the entire estate of the decedent.[16]

Time Interval

As for the factor of time interval between the gift and the decedent's death, its chief importance is to invoke the statutory presumption that trans-

13. Polisher, Estate Planning and Estate Tax Saving 68-72 (2d ed. 1948).
14. Lippincott v. Commissioner, 72 F. 2d 788 (C. C. A. 3d 1934).
15. See Slifka v. Johnson, 63 F. Supp. 289 (S. D. N. Y. 1945), *aff'd*, 161 F. 2d 467 (C. C. A. 2d 1947), *cert. denied*, 332 U. S. 758 (1947), where the express motive for the gift made by the decedent when forty-five years of age was the desire to avoid estate taxes.
16. Theodora C. Topliffe, 39 B. T. A. 13 (1939).

fers within two years prior to death were made in contemplation of death. Beyond that, a short interval may imply that death was contemplated;[17] and, conversely, a long interval would indicate the absence of death motivation.[18] But it must be remembered that this is only one of the numerous circumstantial factors that will be considered and may be overcome by other more persuasive evidence.[19]

In practice, the two-year presumption does not impose any burden of proof upon the taxpayer which he would not otherwise have had. It merely increases the probability that the Commissioner will assess a deficiency in the case of such transfers. Regardless of when the transfer was made, once the issue is submitted to a court, the burden of proof falls upon the taxpayer to overcome the usual presumption of the correctness of the Commissioner's determination.[20] It is only where the question of contemplation of death is raised for the first time after court proceedings have begun that the Commissioner must carry the burden. And even there, once a prima facie case is established, the burden of proving "life" motives shifts to the taxpayer.[21] The practical test, in court, is whether decedent's representatives can assemble sufficient evidence of motives associated with life to overcome the Commissioner's determination.

MOTIVES ASSOCIATED WITH LIFE

A vast variety of motives have been submitted to the courts for evaluation. In determining which of these are associated with life and which with death, reference is invariably made to the language of the *Wells* case:

> "Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. . . . If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts inter vivos which spring from a different motive. . . . As illustrating transfers found to be related to purposes associated with life, rather than with the distribution of property in anticipation of death, the Government mentions transfers made for the purpose of relieving the donor of the cares of management or in order that his children may experience the responsibilities of business under his guidance and supervision. The illustrations are useful but not exhaustive. The purposes which may be served by gifts are of great variety. It is common knowledge that a frequent inducement is, not only the desire to be relieved of responsibilities, but to have children, or others who may be the appropriate objects of the donor's bounty, independently established with competencies of their own, without being compelled to await the death of the donor and without particular consideration

17. McClure v. Commissioner, 56 F. 2d 548 (C. C. A. 5th 1932), *cert. denied,* 287 U. S. 609 (1932).
18. Estate of Mary W. Cushman, 40 B. T. A. 948 (1939), *appeal dismissed,* (C. C. A. 2d 1940).
19. See Slifka v. Johnson, 63 F. Supp. 289 (S. D. N. Y. 1945), *aff'd,* 161 F. 2d 467 (C. C. A. 2d 1947), *cert. denied,* 332 U. S. 758 (1947).
20. Heiner v. Donnan, 285 U. S. 312, 52 Sup. Ct. 358, 76 L. Ed. 772 (1932).
21. Estate of Nathalie Koussevitsky, 5 T. C. 650 (1945).

of that event. There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death." [22]

Often, the evidence indicates that the decedent may have had several motives for making a particular transfer. Where the decedent was motivated by thoughts of life as well as those of death, the type which was dominant or controlling will determine whether the transfer is taxable as one made in contemplation of death.[23]

Motives which have been recognized by the courts as being associated with continuance of life include the following: the desire to teach one's children how to handle money and to avoid the annoyance of their frequent money demands; [24] to induce children to enter the business of the parent, or to remain in such business;[25] to relinquish active control of one's affairs and retire to the enjoyment of a life of ease;[26] to provide security for transferor's family in the face of business uncertainties or in anticipation of a speculative venture;[27] to provide a means of support for a divorced daughter and her family;[28] to secure a husband's debt;[29] to enable donor's husband, a man of modest circumstance, to meet his increased expenses after their marriage;[30] to improve the financial circumstances of his children so that they could live comfortably, educate their children and experience the responsibilities of business under his guidance and supervision;[31] to induce brothers not to contest the will under which donor inherited the property;[32] to procure competent management for donor's property;[33] to provide one's wife with an independent income;[34] to reimburse wife for her financial losses suffered as a result of the stock market crash, satisfy her desire for a country home, and escape personal liability as stockholder for corporation income tax;[35] to be rid of vacant

22. United States v. Wells, 283 U. S. 102, 117, 51 Sup. Ct. 446, 75 L. Ed. 867 (1931).
23. United States v. Wells, *supra* note 22; Omaha National Bank v. O'Malley, 69 F. Supp. 354 (D. Neb. 1946).
24. Estate of Robert Wetherill, 36 B. T. A. 1259 (1937), *appeal dismissed*, (C. C. A. 3d 1938).
25. Willcuts v. Stoltze, 73 F. 2d 868 (C. C. A. 8th 1934); Estate of D. I. Cooper, 7 T. C. 1236 (1946).
26. Tait v. Safe Deposit & Trust Co. of Baltimore, 74 F. 2d 851 (C. C. A. 4th 1935).
27. Colorado National Bank v. Commissioner, 305 U. S. 23, 59 Sup. Ct. 48, 83 L. Ed. 20 (1938).
28. Estate of John B. Bryan, 1 T. C. M. 1030 (1943).
29. Estate of Sarah H. Bradley, 2 T. C. M. 609 (1943).
30. Estate of Genevieve B. Macaulay, 3 T. C. 350 (1944).
31. Estate of B. H. Kroger, 2 T. C. M. 644 (1943), *aff'd*, 145 F. 2d 901 (C. C. A. 6th 1944), *cert. denied*, 324 U. S. 866 (1945).
32. Estate of Elsie D. Rothschild, 3 T. C. M. 143 (1944).
33. Estate of Mary W. Cushman, 40 B. T. A. 948 (1939), *appeal dismissed*, (C. C. A. 2d 1940).
34. McGregor v. Commissioner, 82 F. 2d 948 (C. C. A. 1st 1936); Estate of R. O. Howard, 9 T. C. 1192 (1947).
35. Estate of George H. Burr, 4 T. C. M. 1054 (1945), *appeal dismissed*, (C. C. A. 2d 1947).

and unproductive property;[36] to present a son with a wedding gift;[37] to make gifts of U. S. Savings Bonds to children in place of customary birthday and Christmas gifts;[38] to provide for daughters as they approached marriageable age, place property out of the reach of possible Nazi pressure, and hedge against possible wartime restrictions;[39] to carry out decedent's well established custom of making gifts, even though the gifts in question were made at age 87 and within two months of death;[40] to save income taxes, gift taxes and state property taxes;[41] and to avoid an increase in gift tax rates.[42] On the other hand, transfers admittedly made for the purpose of avoiding the estate tax are generally held to have been made in contemplation of death.[43]

TRANSFERS TO DISCHARGE MORAL OBLIGATIONS

Among the motives which have been held to indicate thoughts of life, rather than of death, are those which are concerned with the discharge of moral obligations. Mr. Chief Justice Hughes, writing the opinion for the Supreme Court in *United States v. Wells*,[44] specifically named this type of motive as one of the desires whose gratification "may be a more compelling motive than any thought of death." The decisions of the courts illustrate a variety of moral obligation situations.

Thus, transfers were held not to have been made in contemplation of death where they were prompted by a desire to relieve the donor of a moral duty to support certain collateral relatives;[45] to fulfill an ante-nuptial promise to turn over property to the transferor's second wife which would give her an independent income;[46] to express the transferor's appreciation to his wife and son for their faithful attendance upon him during his illness and hospitalization;[47] or to reward children for their assistance to the donor in managing his farms.[48]

Where a decedent, who had adhered rigorously to a rule of impartiality in making gifts to his children, felt obliged to make compensating transfers

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36. Estate of John Moir, 47 B. T. A. 765 (1942).
37. Guinzburg v. Anderson, 54 F. 2d 629 (C. C. A. 3d 1931), *cert. denied*, 285 U. S. 553 (1932).
38. Estate of G. C. Mills, 5 T. C. M. 768 (1946).
39. Estate of Julius Bloch-Sulzberger, 6 T. C. M. 1201 (1947).
40. Estate of Louis Schumacher, 2 T. C. M. 1018 (1943).
41. Becker v. St. Louis Union Trust Co., 296 U. S. 48, 56 Sup. Ct., 78, 80 L. Ed. 35 (1935).
42. Fair v. United States, 59 F. Supp. 801 (W. D. Pa. 1945).
43. Estate of Frank A. Vanderlip, 3 T. C. 358 (1944), *aff'd*, 155 F. 2d 152 (C. C. A. 2d 1946), *cert. denied*, 329 U. S. 728 (1946); Estate of E. R. Rickenberg, 11 T. C. No. 1 (1948).
44. 283 U. S. 102, 119, 51 Sup. Ct. 446, 75 L. Ed. 867 (1931).
45. Estate of B. H. Kroger, 2 T. C. M. 644 (1943), *aff'd*, 145 F. 2d 901 (C. C. A. 6th 1944), *cert. denied*, 324 U. S. 866 (1945).
46. Mary W. Boggs, 11 B. T. A. 824 (1928).
47. Estate of J. F. Lohman, Sr., 6 T. C. M. 1071 (1947).
48. Estate of H. M. Springer, 45 B. T. A. 561 (1941).

to all his children when financial aid to a widowed daughter became necessary, such transfers were held not includible as transfers in contemplation of death;[49] and, similarly, where a trust was created for the benefit of a son because of the transferor's desire to compensate this son for great expenditures already made for the education and financial establishment of another child.[50]

Also held not to have been made in contemplation of death were transfers of stock to children, induced by the transferor's feeling that she was obligated to comply with the desire of her deceased husband, from whom she received the stock, that it be kept in the family;[51] as were transfers of life insurance motivated by the transferor's belief that money he had received under certain other policies was morally that of the donees.[52]

The mere presence of one of these "moral obligation" motives in the mind of the donor at the time of his transfer will not effectively rebut a presumption of contemplation of death. As in all other situations, it must be established that this motive, or another "life" motive was dominant.

Transfers Interrelated or Simultaneous with Will

In many contemplation of death cases, the Commissioner has contended that the decedent's will, or codicil thereto, was so closely related to the transfers in question that there existed a controlling testamentary motive on the part of the decedent in making such transfers. Where the will and the transfers were executed contemporaneously, or substantially so, and together created an integrated plan for testamentary disposition of the decedent's property, the transfers have been declared to be in contemplation of death.

This rationale prevailed where the decedent conveyed a valuable piece of real estate to Northwestern University as an endowment fund for scholarships in return for certain annuities to himself and a number of his relatives and friends. On the same day, the decedent executed his will, leaving his entire estate to the same scholarship foundation for identical purposes, reciting therein that he was making no bequests or devises to friends and relatives because he had "already made provision for them in another manner during his life time." The Seventh Circuit Court of Appeals, affirming the Board of Tax Appeals, held that the two instruments constituted a final scheme of complete distribution of the decedent's estate and that the annuities provided by the agreement were made in contemplation of death.[53]

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49. R. B. White, 21 B. T. A. 500 (1930).
50. First National Bank of Birmingham v. United States, 25 F. Supp. 816 (N. D. Ala. 1939).
51. Estate of Annie T. Stinchfield, 4 T. C. M. 511 (1945).
52. Boyle Trust and Investment Co. v. United States, 4 P-H 1943 Fed. Tax Serv. ¶ 62,530 (D. C. Tenn. 1943).
53. Purvin v. Commissioner, 96 F. 2d 929 (C. C. A. 7th 1938), *cert. denied*, 305 U. S. 626 (1938).

Similarly, where the decedent made gifts of stock shortly after executing a codicil to his will with closely related provisions;[54] so, too, where a transfer of life insurance policies in trust was executed at the same time as decedent's revised will and together with the will represented a complete plan for disposition of her estate upon death.[55]

Moreover, in situations where a considerable period of time has elapsed between execution of the decedent's inter vivos transfers and his will, a clear interdependence of the two instruments has induced the courts to subject the transfers to estate tax as being in contemplation of death.

Thus, a transfer in trust by the decedent, aged 82, which contained practically identical conditions and named the same beneficiaries as a will executed six years previously by the decedent, was held to be in contemplation of death.[56]

So, also, where the decedent had transferred irrevocably insurance policies on his life to a trustee eleven years before the making of his last will. The trust was for the benefit of decedent's sons and their descendants and specifically provided that it had been created to aid decedent's executors in administering his estate. From this language and the provisions of the will, the court found that the only purpose for creating the trust was a testamentary one—to provide the executors with necessary funds. The insurance transfers were held taxable as having been made in contemplation of death.[57] But a will executed four years after an inter vivos transfer of stock in trust and making parallel disposition of the decedent's property was held not sufficiently contemporaneous to indicate a testamentary motive in creating the trust, especially where a compelling motive associated with life was present.[58]

A rather unusual situation arose in *Pate v. Commissioner*.[59] There, the decedent made a joint will with his first wife by the terms of which the survivor was to give certain real property to Pate, a nephew of the wife. After the death of his first wife, and just prior to a second marriage, the decedent conveyed the specified property to Pate, subject to the reservation of a life interest. Although he survived for eleven years following this transfer, the Eighth Circuit Court of Appeals found that the decedent's controlling motive in making the transfer was his desire to carry out the provisions of the joint will—a continuing testamentary motive.

The effect of the simultaneous or interrelated transfer as evidencing thoughts of death, can, however, be overcome by evidence tending to prove

54. The Travelers Bank and Trust Co., 29 B. T. A. 88 (1933).
55. Estate of A. R. Davidson, 4 T. C. M. 972 (1945), *aff'd*, 158 F. 2d 239 (C. C. A. 10th 1946); Estate of Barneth Satuloff, 6 T. C. M. 1246 (1947).
56. Estate of Alice B. Davis v. Commissioner, 1 T. C. M. 476 (1943), *aff'd*, 142 F. 2d 450 (C. C. A. 6th 1944).
57. Estate of William E. Sloan v. Commissioner, 168 F. 2d 470 (C. C. A. 2d 1948).
58. Estate of T. M. Flynn, 3 T. C. M. 1287 (1944).
59. 149 F. 2d 669 (C. C. A. 8th 1945).

that the decedent's primary motive for the transfer was one associated with life. Thus, the Sixth Circuit Court of Appeals reversed the Tax Court's finding that a transfer was made in contemplation of death where the decedent's motive for the assignment of life insurance policies was his desire to protect his family from the consequences of a possible business failure, despite the similarity of insurance settlement provisions to those of decedent's will. That the decedent, at the time of the transfers, was an extremely active man of 53 years and in perfect health played no small role in the final result.[60]

Similarly, where the execution of a will and transfer to a trust were made simultaneously, in order to secure to a prospective wife a financial position similar to the one she would forego under the will of her prior husband, if she remarried.[61] So, too, inter vivos trusts for children, created at the same time and with conditions similar to those in the decedent's will, were found to have been prompted by a desire to provide these children with a regular income in accordance with an established policy of annual gifts.[62] Likewise, transfers of stock in trust, made for the purpose of securing the services of decedent's son-in-law and effecting family peace were held not in contemplation of death merely because a proposed will was drafted for the decedent's consideration at the same time that the trust instruments were executed.[63]

That the decedent's transfer makes reference to the last will of another has been held not to be evidence of a testamentary motivation. Thus, the decedent, in creating an inter vivos trust, expressed a desire to have the property of such trust disposed of in accordance with the provisions of a testamentary trust created under her deceased husband's will. The Tax Court decided that this reference to the husband's will could have no bearing upon the character of the decedent's own disposition.[64]

The fact that the decedent made certain transfers in trust for the benefit of his wife and daughter, which were held to be transfers in contemplation of death, does not necessarily mean that an outright gift made at the same time to a son to encourage him to take an active interest in the father's business was also in contemplation of death. Where the transfers are separate and distinct, each must be tested in the light of its own surrounding circumstances and underlying motives.[65]

Summarizing, it appears that transfers which are so closely integrated with the decedent's will as to represent a comprehensive plan for disposition

60. Estate of A. D. Cronin v. Commissioner, 164 F. 2d 561 (C. C. A. 6th 1947), *rev'g* 7 T. C. 1403 (1946).
61. Byram, 9 T. C. 1 (1947).
62. Estate of B. P. O'Neal, 6 T. C. M. 713 (1947), *aff'd*, (C. C. A. 5th 1948).
63. Hofford, 4 T. C. 542 (1945), *modified on another issue*, 4 T. C. 790 (1945), *appeal dismissed*, (C. C. A. 3d 1945).
64. Estate of M. E. Girvin v. Commissioner, 3 T. C. M. 1290 (1944), *rev'd on another issue, sub nom.*, Commissioner v. Bank of California, 155 F. 2d 1 (C. C. A. 9th 1946), *cert. denied*, 329 U. S. 725 (1946), *reh. denied*, 329 U. S. 827 (1946).
65. Estate of D. I. Cooper, 7 T. C. 1236 (1946).

of his estate are likely to be held includible in the gross estate as transfers made in contemplation of death; this, despite a considerable lapse of time between the execution of the two instruments. Transfers which make reference to the provisions of decedent's will create a strong inference of interrelation and should be avoided. The same precaution should be observed in respect of the insertion of statements in a will which attempt to explain the omission of legacies to persons who received inter vivos gifts. However, the mere contemporaneous execution of transfer and will is not conclusive of a testamentary motive on the part of the decedent. Convincing evidence that a transfer was primarily induced by a motive associated with life will generally forestall a finding of contemplation of death.

ASSIGNMENT OF LIFE INSURANCE POLICIES AND RELINQUISHMENT OF RIGHTS THEREUNDER

The taxability of life insurance proceeds for the federal estate tax is treated under Section 811(g) of the Internal Revenue Code. However, the Regulations provide that life insurance proceeds not taxable under Section 811(g) may be includible under some other paragraph of Section 811, depending upon the circumstances of the particular case. Cited as examples are gratuitous assignments of life insurance policies and the relinquishment of incidents of ownership therein in contemplation of death and thus taxable under Section 811(c).[66]

In general, the same tests which are applied to transfers of other types of property for determining whether they were made in contemplation of death will be used for life insurance transfers. However, the inherent testamentary nature of life insurance tends to increase the taxpayer's burden of establishing life motivation and, consequently, to heighten the likelihood of such transfers being included in the gross estate.

In a broad sense, it is true that every person who takes out an insurance policy on his own life is contemplating death. But this does not necessarily mean that any subsequent transactions involving such a policy will likewise be of a testamentary character. The decisions indicate that while this inherent characteristic of life insurance is a factor to be considered, it does not of itself conclusively establish that a life insurance transfer was made in contemplation of death. Thus, the Tax Court has said that:

"It is true . . . that life insurance policies are inherently testamentary in nature, but this fact alone does not create an inference that a *transfer* of rights in such policies, as distinguished from the *creation* of such rights, is in contemplation of death. Where the transfer is primarily motivated, as here, by the decedent's preoccupation with circumstances connected with his life, the transaction does not come within the scope of the contemplation of death provisions, even though the rights transferred were original-

66. U. S. Treas. Reg. 105, § 81.25.

ly created because the assured realized that at some indefinite time in the future he would die." [67]

Life insurance transfers which have been held not to be in contemplation of death, because they were actuated primarily by motives commonly associated with life, are illustrated by the following: Where assignments of insurance policies on decedent's life were prompted by his desire to protect his family from the consequences of a possible business failure;[68] where policies were transferred to decedent's first wife pursuant to a separation agreement and divorce decree and because the decedent desired to rid himself of all obligations toward her;[69] where the decedent relinquished incidents of ownership because he felt under a moral obligation to make such transfer to the beneficiaries;[70] where the transfer was pursuant to decedent's policy of making gifts to his children;[71] where policies were assigned to a son because of his straitened financial condition.[72]

At the same time, it should be noted that the motives usually associated with death will be as significant in life insurance transfer cases as they are where other forms of property are concerned. Thus, a decedent's renunciation of the reserved right to change beneficiaries was held to be in contemplation of death where his sole motive was to save estate taxes.[73] Similarly, a close integration of insurance transfers with provisions of a simultaneously executed will produced a finding of contemplation of death.[74]

Transfers of life insurance in trust that would avoid taxation in the transferor's estate under Section 811(c) require careful draftsmanship. Any provisions which have the effect of postponing or restricting the donee's enjoyment of policy benefits until donor's death will be closely scrutinized by the courts as possible indications of testamentary intent.

Thus, the Second Circuit Court of Appeals, in examining an assignment of certain life insurance policies in trust, gave considerable weight to the fact that the transferor had already borrowed all that the insurers would lend on these policies and that the trustee was required to hold them until the proceeds became payable.[75] Similarly, a finding that an irrevocable transfer of insurance policies in trust had been made in contemplation of death was

67. Estate of Wilbur B. Ruthrauff, 9 T. C. 418, 427 (1947), *now on appeal*, (C. C. A. 3d).

68. Estate of A. D. Cronin v. Commissioner, 164 F. 2d 561 (C. C. A. 6th 1947), *rev'g* 7 T. C. 1403 (1946).

69. George F. Hurd, 9 T. C. 681 (1947).

70. Boyle Trust and Investment Co. v. United States, 4 P-H 1943 FED. TAX SERV. ¶ 62,530 (D. C. Tenn. 1943).

71. Routzahn v. Brown, 95 F. 2d 766 (C. C. A. 6th 1938).

72. Estate of Charles T. Smith, 1 T. C. M. 518 (1943).

73. First Trust and Deposit Co. v. Shaughnessy, 134 F. 2d 940 (C. C. A. 2d 1943), *cert. denied*, 320 U. S. 744 (1943).

74. Estate of Barneth Satuloff, 6 T. C. M. 1246 (1947).

75. Vanderlip v. Commissioner, 155 F. 2d 152 (C. C. A. 2d 1946), *aff'g* 3 T. C. 358 (1944), *cert. denied*, 329 U. S. 728 (1946).

based in part on the fact that the trustees were not authorized to obtain the cash surrender value or to borrow on the policies, except to pay premiums.[76] In holding another life insurance trust includible in the decedent's estate, the Tax Court pointed out that although the decedent retained none of the incidents of ownership, the trusts were so designed as to prevent any rights to the enjoyment of policy benefits arising until after his death. The spendthrift provisions in the trust and the fact that the trustee had no power during decedent's lifetime to exercise any of the rights of ownership, made this transfer approximate the operation of a testamentary disposition. This factor, together with integration with the decedent's will, induced the court to conclude that the transfer had been made in contemplation of death.[77]

Moreover, a full release of control and benefits under the transferred policies may serve to bolster the taxpayer's contention that "life" motives actuated the transfer. Thus, in reversing the Tax Court and finding an insurance trust not to have been created in contemplation of death, the Fifth Circuit Court of Appeals placed considerable emphasis upon the facts that under the trust decedent had retained no right of reversion or control, that the trustees could cash in the policies whenever they saw fit and that they could and did collect dividends during decedent's lifetime.[78]

Summarizing, a transfer of life insurance, involving either an assignment of policies or a relinquishment of certain reserved powers, may be taxed as a gift in contemplation of death if it fails to meet the ordinary "life-motive" test. The inherent testamentary character of life insurance will increase, to some extent, the taxpayer's burden of establishing such motivation. However, this burden is not insurmountable. In cases of transfers of insurance in trust, the taxpayer's position will be considerably weakened by evidence that full control and enjoyment of policy benefits were not granted to the trustee or beneficiary under the trust.

VALUATION OF TRANSFERS IN CONTEMPLATION OF DEATH

The general rule of valuation for federal estate taxes that all property includible in the gross estate shall be valued as of the date of decedent's death (or the optional valuation date, one year later, under Section 811(j)), is applicable to property transferred prior to death but later included in the gross estate as having been made in contemplation of death. The value at the date of the transfer is not material.[79]

76. Estate of William E. Sloan v. Commissioner, 168 F. 2d 470 (C. C. A. 2d 1948).
77. Rhodes, 6 T. C. M. 174 (1947).
78. Flick v. Commissioner, 166 F. 2d 733 (C. C. A. 5th 1948), *reh. denied,* (C. C. A. 5th Apr. 16, 1948), *rev'g* 6 T. C. M. 72 (1947).
79. INT. REV. CODE § 811(c); U. S. Treas. Reg. 105, § 81.15; Igleheart v. Commissioner, 77 F. 2d 704 (C. C. A. 5th 1935); Schoenheit v. Lucas, 44 F. 2d 476 (C. C. A. 4th 1930). See also POLISHER, ESTATE PLANNING AND ESTATE TAX SAVING 231-349 (2d ed. 1948), for detailed explanation of Valuation and Optional Valuation.

Should the gifted property be retained by the donee, in its original form and quantity, until the time of decedent's death, this rule is not difficult of application. However, where the property, during the interim, has been converted into other forms, or has been improved or consumed by the donee, or has enhanced in value through accumulations of income, more complex problems of valuation arise.

What will be the effect of improvements to the transferred property made by the transferee? The Regulations provide that in determining valuation for estate tax purposes " . . . if the transferee has made additions to the property, or betterments, the enhanced value of the property due thereto should not be included." [80]

There is some doubt as to the precise scope of the language "additions to the property, or betterments," but indications are that it will be narrowly construed. In a case which involved a revocable trust, the Board of Tax Appeals declared that this phrase in the Regulations evidenced an intention to limit the exclusion to buildings or other physical properties; that where the trustees merely sold the trust corpus at a profit and invested the proceeds in other property, this did not amount to "additions" or "betterments." [81]

Thus, it would appear that enhancement in the value of the inter vivos gift which results from wise reinvestment will not escape taxation. The Tax Court has flatly rejected the contention that the value of trust corpora, includible in decedent's gross estate as transfers in contemplation of death, should not exceed the value as of the date of death of the assets actually transferred by the decedent to the trusts. On the contrary, the court ruled that where the transferred property has been converted into other property, the value of such other property at the date of death is the measure of the tax; that this rule would apply whether the property transferred in contemplation of death were transferred to a trust or outright.[82]

It is difficult to reconcile this approach with the decision recently announced by the 5th Circuit Court of Appeals in a case where the decedent made sizable cash gifts to his sons in contemplation of death. The sons lost one-half of this money in a speculative venture prior to the transferor's death; nevertheless, the entire sum transferred was held includible in the decedent's gross estate. In support of its conclusion, the court said: "The evident purpose [of Regulations 105, Section 81.15] is to make the transferred property cause the same tax result as if the decedent had kept it till he died instead of transferring it." [83]

80. U. S. Treas. Reg. 105, § 81.15.
81. Guggenheim v. Helvering, 40 B. T. A. 181 (1939), *modified and aff'd,* 117 F. 2d 469 (C. C. A. 2d 1941), *cert. denied,* 314 U. S. 621 (1941).
82. Kroger v. Commissioner, 2 T. C. M. 644 (1943), *aff'd,* 145 F. 2d 901 (C. C. A. 6th 1944), *cert. denied,* 324 U. S. 866 (1945).
83. Estate of A. P. Humphrey v. Commissioner, 162 F. 2d 1, 2 (C. C. A. 5th 1947), *cert. denied,* 332 U. S. 817 (1947).

It has been suggested that these two cases indicate judicial support of a Treasury policy which makes a distinction between outright transfers, as in the *Humphrey* case, and transfers in trust, as in the *Kroger* case.[84] Such a policy would treat the trust corpus as an entity, without regard to the specific assets which comprise it, and thus evaluate the corpus, in whatever form it may exist, on the date of the transferor's death. However, there are no published rulings to confirm the existence of such a Treasury policy. One cannot be certain that the Commissioner might not urge the application of the *Humphrey* rationale to a trust whose corpus had been reduced, rather than increased, through reinvestment.

The question of how to treat accumulations of income, earned by the transferred property prior to death, arose in *Estate of James E. Frizzell*.[85] Decedent had created an irrevocable trust in contemplation of death for the sole benefit of an incompetent son and directed the trustee to accumulate all undistributed income. The Commissioner included in the gross estate the total value of the trust corpus at the date of death (then consisting of the original corpus, increments of corpus resulting from investment of undistributed income and cash not yet invested). The Tax Court, however, held that only the property actually transferred to the trust by the decedent was includible. It recognized this as a case of first impression and distinguished it from a line of other cases in which the value of the entire corpus at time of death was subjected to estate tax liability. The distinction rested on the ground that the Frizzell trust instrument provided for no retention of interest in the decedent so that the inter vivos gift was completed in every respect during his lifetime and was not affected by his death; while in all the cases which had reached the opposite result, the transferor had reserved certain strings of interest or control up to the time of his death, so that the gift was not fully completed until death.[86]

It is interesting that in the course of its opinion the Tax Court referred to the "additions or betterments" provision of Regulations 105, Section 81.15 but declined to consider its application in the absence of any administrative interpretation on the subject. However, the net effect of its decision was to create a similar exclusion for income accumulation.

Also worthy of note is the following broad statement which appears in the *Frizzell* opinion:

> "Therefore, we think that where *transfer* of property has been completed during life and the death of the grantor does not operate upon the completion of the transfer, the estate tax is measured by the value of the property which the decedent transferred

84. See MONTGOMERY, FEDERAL TAXES—ESTATES, TRUSTS AND GIFTS, 1947-48, p. 567.

85. 9 T. C. 979 (1947), *reconsidered and aff'd*, 11 T. C. No. 69 (1948).

86. See Guggenheim and Helvering, 40 B. T. A. 181 (1939), *modified and aff'd*, 117 F. 2d 469 (C. C. A. 2d 1941), *cert. denied*, 314 U. S. 621 (1941).

to a trust, only, and the tax is not measured by other property in the trust when death occurs."[87]

Taken at face value, this statement of the Tax Court appears to reverse that court's earlier position in the *Kroger* case. One can only conjecture as to whether future decisions will so construe it or whether its effect will be limited to the Frizzell situation, *i.e.,* enhanced value of corpus arising from undistributed income accumulations.

Contradictory as these valuation decisions in contemplation of death cases may appear, there is nevertheless emerging a faintly discernible trend. When fully matured, this trend may find valuation at date of death (or optional valuation date) based solely on the original property transferred, whether given outright or in trust, and without regard to any diminution or enhancement of corpus resulting from reinvestment. Thus, the transfer would be taxed in the gross estate as if the donor had retained the specific property in his possession, unchanged except for age and market fluctuations, till the date of his death.

LOOKING AHEAD

During the second session of the 80th Congress, H. R. 6712, known as the Revenue Revision Bill of 1948, was approved by the House of Representatives but was not acted upon by the Senate. Section 204 of the Bill affected transfers in contemplation of death. It provided that any transaction, other than a bona fide sale, *made within three years* of the decedent's death shall be deemed to have been made in contemplation of death, unless shown to the contrary; but no transfers made prior to such three-year period shall be deemed or held to have been made in contemplation of death. Aside from increasing, from two to three years, the period during which the prima facie presumption would be operative, this section sought to bar the Commissioner from attacking transfers in this category where they were made more than three years prior to the decedent's death. The decisions of the courts are replete with instances where transfers made many years before the decedent's death have been included, nevertheless, in his gross estate as transfers in contemplation of death. It was this situation which seems to have been the primary motivation for the proposed amendment. If enacted into law, this section would establish a definite line of cleavage which would determine the incidence of taxation for transfers in contemplation of death.

The political complexion of the new Congress raises serious doubts as to the fate of the Revenue Revision Bill of 1948. Some of the amendments proposed by it will undoubtedly be supported by the Treasury and be adopted by

87. 9 T. C. 979, 988 (1947), *reconsidered and aff'd,* 11 T. C. No. 69 (1948).

the Congress. It is not likely, however, that Section 204 will be one of the favored provisions.

At the same time, this change in the political make-up of the new Congress may lend support to the recent proposals for integration of the estate and gift taxes into a single transfer tax and its correlation with the income tax.[88]

In general, this plan would replace the dual gift and estate tax system now in operation with a single transfer tax on "completed" gifts. Thus, inter vivos transfers which were complete during the lifetime of the transferor would not be includible in his gross estate, but would be taxed at the time of their completion. On the other hand, where the transferor failed to make a complete gift during his lifetime, either through retention of benefits or control of the subject matter of the transfer, the property involved would be taxed in his gross estate at his later death when the transfer became complete. The incidence of tax on the income from transferred property would also hinge on completion of the gift. With such a scheme of taxation, the need for determining whether a transfer had been made in contemplation of death would be eliminated.[89] The 80th Congress gave no consideration to this proposal and the attitude of its leaders was clearly hostile to its enactment. There has been, also, considerable opposition to the transfer tax concept from sources friendly to the present administration. The fate of integration still hangs very much in the balance.

88. See Report of the Advisory Committee of the Treasury, entitled, FEDERAL ESTATE AND GIFT TAXES: A PROPOSAL FOR INTEGRATION AND CORRELATION WITH THE INCOME TAX (1947).

89. See POLISHER, ESTATE PLANNING AND ESTATE TAX SAVING 596-604 (2d ed. 1948).