University of Arkansas at Little Rock Law Review

Volume 1 | Issue 1 Article 6

1978

Comment: The Federal Tax Consequences of Life Insurance in Estate Planning

John B. Peace

COMMENTS

COMMENT: THE FEDERAL TAX CONSEQUENCES OF LIFE INSURANCE IN ESTATE PLANNING

I. INTRODUCTION

There are certain characteristics of life insurance that make it one of the most flexible and useful tools at the hands of the skillful estate planner. For example, it can be the source of an instant estate without the years of accumulation necessary for other types of assets. In addition, unless made payable to the decedent's estate, life insurance will usually bypass probate, which results in many advantages. For one thing, the costs which are associated with probating a decedent's estate will be lower. Also, the beneficiaries of life insurance can usually obtain the proceeds much faster than the legatees or distributees can obtain possession of the assets of an estate in probate. Most importantly, life insurance proceeds will generally be exempted from the rights of creditors unless the estate is the beneficiary.[1]

Although the advantages are numerous, the federal tax provisions relating to life insurance are pervasive, and a basic understanding of them is essential before incorporating the use of insurance in a plan for distributing the decedent's wealth. The purpose of this comment is to explore the various federal income, estate and gift tax consequences of life insurance when used in estate planning.

II. THE INCOME TAX CONSEQUENCES

The general rule stated in section 101 of the Internal Revenue Code[2] is that proceeds received under life insurance policies because of the death of the insured are excluded from the gross income of the beneficiary and are, therefore, tax-free. However, if any of such proceeds are left with the insurance company under an option to pay interest on the amounts retained, the interest paid on such amounts is ordinary income.[3] Likewise, if the proceeds are to be paid in installments, the interest element of each installment is ordinary income.[4] A surviving spouse is allowed an exclusion of $1000 per year

1. *See* Ark. Stat. Ann. § 66-3228 (Repl. 1966).

2. I.R.C. § 101(a)(1). Unless otherwise specified, all sections cited in this comment are to the Int. Rev. Code of 1954, as amended.

3. I.R.C. § 101(c). Treas. Reg. § 1.101-3(a) (1957).

4. I.R.C. § 101(d). Treas. Reg. § 1.101-4 (1957) should be consulted to determine what

for the interest element received if the proceeds are to be paid in installments.[5]

It should be noted that this exclusion under Section 101 only applies when the proceeds are paid "by reason of the death of the insured." Therefore, the surrender of a life insurance policy for its cash value while the insured is still alive will be a taxable transaction.

An exception to the general rule of tax-free receipt of proceeds is the "transferee for value" rule.[6] Under this rule, if the insurance policy has been transferred for a valuable consideration, the beneficiary is taxed on the amounts received in excess of what was paid for the policy, plus any premiums paid after the transfer.[7] The "transferee for value" rule does not apply if the basis of the policy in the hands of the transferee is determined by reference to the transferer's basis[8] (for example, received in a tax-free exchange), or if the transfer was to the insured, a partner of the insured, a partnership including the insured, or a corporation in which the insured was a shareholder or officer.[9]

It should be noted that the "transferee for value" rule does not apply if the transferee is a partner of the insured but does apply if the transferee is a fellow shareholder. This could have harsh tax consequences in a close corporation when a cross-purchase shareholder buy-out agreement[10] is funded by life insurance. When one shareholder dies holding life insurance policies on the lives of the surviving shareholders, the remaining shareholders may wish to purchase those policies from the deceased shareholder's estate. In such a situation the "transferee for value" rule applies, and the

---

amount of each installment is considered a tax-free receipt of proceeds, and what amount is considered taxable interest.

5. I.R.C. § 101(d)(1)(B). It should be noted that this $1000 exclusion is only available if the proceeds are received in installments, not if interest alone is being paid on amounts left with the insurer. Treas. Reg. § 1.101-3(a) (1957) implies that a "substantial diminution" of the principal amount is required before the exclusion of § 101(d)(1)(B) is available.

6. I.R.C. § 101(a)(2).

7. *See also* Treas. Reg. § 1.101-1(b)(2) (1957), which states the general rule that once the "transferee for value" rule attaches, subsequent transferees, though gratuitous, will be subject to it.

8. I.R.C. § 101(a)(2)(A).

9. *Id.* § 101(a)(2)(B).

10. This is an agreement among the shareholders that when one of them dies, the remaining shareholders will purchase the stock of the deceased shareholder from his estate. When such a plan is funded by life insurance, each shareholder will typically take out policies on the lives of each of the other shareholders naming himself as beneficiary. Then when a shareholder dies, the remaining shareholders will have the necessary cash to make the purchase.

ultimate beneficiary will probably be taxed on a portion of the proceeds.

To summarize the income tax consequences, in the usual situation life insurance proceeds received by reason of the death of the insured will escape income taxation.

III. ESTATE TAXATION OF THE PROCEEDS

A. *Section 2042 — In general.*

Section 2042 is the only estate tax provision which deals specifically with the taxation of life insurance. The section is composed of two parts. Under the first, the decedent's gross estate includes the proceeds of insurance on his life if such proceeds are "receivable by the executor."[11] The second part taxes insurance which is "receivable by other beneficiaries" with respect to which the decedent possessed at death any "incidents of ownership."[12]

B. *Section 2042(1) — Receivable by the executor.*

Although the Code speaks in terms of the "executor," the regulations and all case law interpret this to mean the "estate" of the decedent, whether it be testate or intestate. It is not necessary that the estate be specifically named as beneficiary for the proceeds to be receivable by the executor.[13] In one case the proceeds were payable not to the executor but to a trustee of a trust, the terms of which subjected the trust assets to the prior payment of expenses of last illness and burial. The proceeds were held includible to the extent of such expenses, whether they were actually paid out of the proceeds or not.[14] It was the obligation of payment to the estate, not the actual payment, which was important.

Another problem arises where the proceeds are payable to a trust, and the trustee is authorized, but not required, to use the proceeds to pay debts and taxes of the decedent. At least one court has held that the proceeds are includible only where the trustee is under a legally binding obligation to use them in payment of debts and taxes of the estate.[15] In that case the trustee was given discretion to use the proceeds for such a purpose but he did not actually use them to pay claims against the estate.

11. I.R.C. § 2042(1).
12. *Id.* § 2042(2).
13. Treas. Reg. § 20.2042-1(b) (1958).
14. Pacific National Bank v. Comm'r, 40 B.T.A. 128 (1939).
15. Old Colony Trust Co. v. Comm'r, 39 B.T.A. 871 (1939).

Still unanswered is the question of what happens when the trustee is not required to use the proceeds to pay debts or taxes of the estate but in fact does use them for this purpose. It would appear that the theory of taxability under Section 2042 is based upon the control by the decedent over the disposition of the insurance proceeds. If discretion is given to the trustee, the decedent has apparently parted with any such control, and he should not be taxed simply because the trustee exercised that discretion in favor of his estate.

C. *Section 2042(2) — Receivable by other beneficiaries and the incidents of ownership test.*

The term "incidents of ownership" is not limited to ownership of the policy in the technical sense. Generally, it refers to the right of the insured or his estate to the economic benefits of the policy. The term includes, but is not limited to, the power to:

1. change beneficiaries;
2. surrender or cancel the policy;
3. assign the policy;
4. revoke an assignment;
5. pledge the policy for a loan; and
6. obtain from the insurer a loan against the surrender value of the policy.[16]

The statute and regulations also state that the term "incidents of ownership" includes a reversionary interest in the policy or its proceeds (which includes a possibility that the policy or its proceeds may return to the decedent or his estate or may become subject to a power of disposition by him) if the value of the reversionary interest exceeded five percent of the value of the policy immediately before the death of the decedent.[17]

In the case of a sole or controlling shareholder of a corporation, the incidents of ownership owned by the corporation in policies on the life of the decedent shareholder will be attributed to the decedent if the proceeds are payable to someone other than the corporation.[18] To be considered a controlling shareholder, the decedent must own stock possessing more than fifty percent of the total com-

---

16. Treas. Reg. § 20.2042-1(c)(2) (1958).

17. Treas. Reg. § 20.2042-1(c)(3) (1974). To determine the value of a reversionary interest, this regulation states that the principles of Treas. Reg. § 20.2037-1(c)(3) and (4) (1958) are to be used.

18. Treas. Reg. § 20.2042-1(c)(6) (1974).

bined voting power of the corporation. If the proceeds are payable to the corporation, however, the corporation's incidents of ownership are not attributed to the decedent because the value of the proceeds is reflected in the value of the decedent's stock in the corporation.[19] Since the value of the stock is already included in the decedent's gross estate, attribution of the corporation's incidents of ownership to the decedent would result in including the proceeds in the gross estate twice.

Section 2042(2) states that the incidents of ownership may be exercisable either alone or in conjunction with any other person. This may result in the inclusion of insurance proceeds when the decedent actually exercised very little control over the policies. In one case[20] the decedent had never owned the policy in the technical sense. It was issued to his wife on an application initiated by her, but she transferred the policy to a trust. The trust agreement provided that she could modify or alter the trust or revoke it in whole or in part only with the written consent of her daughter and her husband, the decedent. The entire proceeds were held includible in the decedent's gross estate because this amounted to the possession of incidents of ownership in conjunction with another. By altering the trust, the parties could have changed the beneficiary of the policy. It was unimportant that the decedent could not initiate the changes, as long as his consent was required.

Along these same lines, it is important to note that there is no "adverse interest" concept in this section, although this is sometimes important in other sections of the Code. If an incident of ownership is exercisable in conjunction with an adverse party who in actuality would never consent to such an exercise, the proceeds are nevertheless includible because of the specific language used in Section 2042(2).

There has been some controversy over whether the *actual* ability to exercise incidents of ownership is necessary. In 1961, the Internal Revenue Service ruled that it was the *legal* ability to exercise such incidents of ownership rather than the actual ability that was controlling.[21] In this particular situation the decedent purchased an accident insurance policy on his life before boarding an airplane. He reserved the right to change the beneficiary but mailed the policy to the named beneficiary from the air terminal and immediately boarded the plane. He was later killed when the plane crashed. The

19. *See* Treas. Reg. § 20.2031-2(f), T.D. 7312, 1974-1 C.B. 277.
20. Comm'r v. Estate of Karagheusian, 233 F.2d 197 (2d Cir. 1956).
21.. Rev. Rul. 61-123, 1961-2 C.B. 151.

Service said that since he reserved the right to change beneficiaries the insurance proceeds were includible in his gross estate even though, as a practical matter, he could not have exercised the right while the plane was in flight. The Service announced, in effect, that it would only look to the facts evident from the policy itself, rather than the peculiar circumstances, to determine whether the proceeds were to be taxed. The United States Supreme Court adopted this "policy facts" doctrine four years later in *Commissioner v. Estate of Noel,*[22] which was another air flight insurance case.[23]

One major problem within the incidents of ownership area is the situation in which the insured is named the trustee over a trust created by another person and the property of the trust includes insurance policies on the insured's life. In such a situation, the insured may possess incidents of ownership over the policies in his capacity as trustee. The problem was presented in *Estate of Fruehauf v. Commissioner,*[24] in which the decedent's wife had purchased insurance policies on his life. She died and her will bequeathed the policies to a trust in which the decedent was named a co-trustee and a life beneficiary of the income from the trust. Since the insurance policies produced no income, he appeared to have no beneficial interest in them other than his interest as a trustee. The Court of Appeals for the Sixth Circuit rejected the Tax Court's broad holding that a trustee who possesses incidents of ownership in policies on his life only in a fiduciary capacity must nevertheless have the proceeds included in his gross estate under Section 2042(2). However, the court distinguished this particular case because the decedent could have realized a benefit in his personal capacity by choosing to surrender the policies for their cash surrender value, investing the proceeds and receiving the income therefrom as income beneficiary. The proceeds were therefore included in his gross estate.

In *Estate of Skifter v. Commissioner*[25] the facts were similar to *Fruehauf* except that the insured-trustee was given no beneficial

22. 380 U.S. 678 (1965). The Court held that the decedent possessed incidents of ownership, even though the contract terms provided that the policies could not be assigned, nor could the beneficiary be changed, without a written endorsement on the policies. This was impossible at the moment of death since the decedent had given the policies to his wife before boarding the plane.

23. *See also* Kearns v. United States, 399 F.2d 226 (Ct. Cl. 1968), where insurance proceeds were includible in the decedent's gross estate when he retained the right to change beneficiaries, among other rights, even though a corporation was the named beneficiary, the premiums were paid by it, the policies were carried as an asset on the corporate books, the policies were assigned as collateral for loans to the corporation, and the corporation had physical custody of the policies.

24. 427 F.2d 80 (6th Cir. 1970).

25. 468 F.2d 699 (2d Cir. 1972).

interest in the income or corpus of the trust. The Court of Appeals for the Second Circuit held that the insured did not possess any incidents of ownership under Section 2042(2) upon his death. The court said at page 701:

> It seems significant to us that the reference point in the regulation[26] for "incidents of ownership" is "the right . . . to the economic benefits of the policy," since there was no way in which Skifter could have exercised his powers to derive for himself any economic benefit from these insurance policies. (Footnote added).

Under the *Fruehauf* and *Skifter* decisions, the test appears to be whether the insured-trustee can derive any economic benefit from the policies in his individual capacity; if not, he will not be deemed to possess any incidents of ownership. In *Terriberry v. United States,*[27] however, the Fifth Circuit refused to follow *Fruehauf* and *Skifter* and held that the trustee of a trust which held insurance policies on his life could be taxed on the proceeds under Section 2042(2) even though he could not in any event realize any economic benefit from the policies. There was a vigorous dissent which stated that *Fruehauf* and *Skifter* should have been followed. In Revenue Ruling 76-261,[28] the Service announced that it would follow the holding in *Terriberry;* therefore, it has taken the position that the proceeds will be includible where the decedent possessed any incidents of ownership at his death, even though held only in a fiduciary capacity. About the best that can be said for this "inadvertent trustee" problem is that the question of inclusion under the "incidents of ownership" test is still undecided. With different circuits holding inconsistently, the United States Supreme Court will probably be called upon to decide the question.

D. Section 2035 — The contemplation of death problem.

If an insured makes a gift of an insurance policy along with all incidents of ownership within three years of death, the proceeds will be included in his gross estate under Section 2035 as a gift made in contemplation of death.[29] However, a different problem arises when

26. The court was referring to Treas. Reg. § 20.2042-1(c)(2) (1958).

27. 517 F.2d 286 (5th Cir. 1975), *cert. den.*, 424 U.S. 977 (1976).

28. Rev. Rul. 76-261, 1976-2 C.B. 276.

29. Before the Tax Reform Act of 1976, there was only a rebuttable *presumption* that a gift made within three years of death was made in contemplation of death. The gift was, therefore, included in the decedent's gross estate unless the decedent's executor or administrator could prove otherwise. The presumption was eliminated by the new Act, so that any gift made within three years of death will *automatically* be included in the decedent's gross

the policy was given away more than three years before the insured's death, but the insured continued to pay the premiums within three years of death. There are three possibilities for determining the amount of the proceeds to be included in the insured's gross estate:

1. the full amount of the proceeds, on the theory that if the insured had not paid the last premium the policy might have lapsed, and it was his act made in contemplation of death that kept the policy alive;

2. a pro rata portion of the proceeds, based upon a fraction in which the numerator is the amount of premiums paid during the three years preceding death and the denominator is the total amount of premiums paid; or

3. the amount of the premiums paid within three years of death, on the theory that only the money gifts of the premiums were in contemplation of death.[30]

The Internal Revenue Service announced in 1967 that the second alternative above would be followed. The ruling stated in part that:

> a premium payment under a contract of life insurance by other than the owner of the policy is analogous to the gift of specific property by the donor to the owner. Unlike the unrestricted gift of money, a premium payment is a gift of insurance protection, a transfer of an interest in the policy which is transmitted at death into the proceeds of the policy.[31]

The courts were not receptive to the ruling and almost uniformly rejected it.[32] In 1971, the Service revoked Revenue Ruling 67-463 and adopted alternative three above in Revenue Ruling 71-497.[33] In this ruling the decedent had purchased and transferred all incidents of ownership in a whole life policy and a five-year term policy on his life but had continued to pay the premiums until his death. The Service announced that only the amount of premiums paid within three years of death would be included in the decedent's gross estate and that no part of the proceeds would be included.

The Service's position in Revenue Ruling 71-497 has gained added significance under the Tax Reform Act of 1976,[34] at least

---

estate, except to the extent of the annual $3000 exclusion. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001(a)(5), 90 Stat. 1525, 1848 (1976) (amending I.R.C. § 2035).

30. *See* Tax Management Portfolio, *Life Insurance*, No. 111-3d, A-11 (1972).

31. Rev. Rul. 67-463, 1967-2 C.B. 327.

32. *See, e.g.*, Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968).

33. Rev. Rul. 71-497, 1971-2 C.B. 329.

34. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001(a)(5), 90 Stat. 1525, 1848 (1976) (amending I.R.C. § 2035).

where the premium payments are less than the $3000 per donee annual exclusion from gift tax.[35] If the premium payments within three years of death are of a present interest so as to qualify for the exclusion, the new Act provides that even the payment of premiums within the $3000 limit will not be considered to have been made in contemplation of death. For the gift of premiums to be a present interest, the donee of the policy must generally own the policy outright.[36] However, if the gift is to a trust, it will generally be considered a gift of a future interest and will not qualify for the annual exclusion.[37]

A related problem is presented when the decedent never owned the insurance policy on his life but paid the premiums on the policy within three years of his death. This situation was also present in Revenue Ruling 71-497.[38] The Service ruled that the proceeds of a one-year accidental death policy in which the insured was never the owner but paid the premiums would be fully includible in his gross estate under Section 2035. This position taken by the Service was given judicial approval by the Fifth Circuit in *Bel v. United States.*[39] The court was faced with facts almost identical to the situation in the ruling and held that the act of the decedent in procuring the one-year accidental death policy and paying the premiums thereon was a "transfer" within the meaning of Section 2035. The court said:

> In our opinion the broad legal principle enunciated by the Supreme Court . . . is that the word "transfer" is not limited to the passing of property directly from the donor to the transferee, but encompasses a donation "procured through expenditures by the decedent with the purpose effected at his death, of having it pass to another."[40]

Estate of Silverman v. Commissioner[41] presented a new twist on the value of an insurance policy to be included in the insured-decedent's gross estate when the policy itself was transferred within three years of death. The decedent transferred a whole life policy to his son six months before his death. Before that time he had made fifty-five monthly premium payments on the policy. After the transfer the son made seven premium payments. The Tax Court[42] held

35. I.R.C. § 2503(b).
36. *See* Treas. Reg. § 25.2503-3(a) (1958), and discussion under part IV below.
37. *See* Treas. Reg. § 25.2503-3(c), Ex. (2) (1958), and discussion under part IV below.
38. Rev. Rul. 71-497, 1971-2 C.B. 329.
39.. 452 F.2d 683 (5th Cir. 1971), *cert. den.*, 406 U.S. 919 (1972).
40. *Id.* at 691, *quoting* Chase Nat'l. Bank v. United States, 278 U.S. 327, 337 (1929).
41. 521 F.2d 574 (2d Cir. 1975).
42. Estate of Silverman, 61 T.C. 605 (1974).

that the amount includible in the decedent's gross estate under Section 2035 was 55/62 of the face amount of the policy, which was his pro rata share of the premium payments, rather than the full amount of the proceeds. The Court of Appeals for the Second Circuit affirmed the Tax Court's decision but expressed some doubt about prorating the proceeds in this manner. It hinted that if the Service had raised the issue, it might have included the entire face amount in the decedent's gross estate rather than the fraction that was included.[43] It is, therefore, doubtful that the case can be cited for the proposition that premium payments made by the donee of a policy transferred in contemplation of death will reduce the amount includible under Section 2035.

E. Section 2033 — Taxation in the estate of someone other than the insured.

Where the decedent is the owner of a life insurance policy on the life of someone else, the policy is considered property under Section 2033,[44] and the value of the policy is included in the decedent's gross estate should he die before the insured.[45] The amount to be included is not the face amount of the policy because the insured is still alive and the policy has therefore not matured. If it is a term policy, nothing is included because the policy has no value until the death of the insured. However, in a whole life policy the owner does possess valuable rights in the policy, and the problem becomes how to value these rights. The regulations state that the proper amount to be included is the *replacement value* of the policy, rather than its *cash surrender value.*[46] In the case of a single premium or paid-up policy, the replacement value is the amount that a commercial insurance company would charge for a single premium contract of the same amount on the life of someone the same age as the insured. If additional premiums are to be paid on the policy, the value is approximated using a formula provided in the regulations.[47]

A peculiar valuation problem arises when the owner of the policy and the insured die simultaneously. Should the method in the regulations[48] be used (replacement value), or should the entire proceeds be included on the theory that the policy has matured? After

43. Estate of Silverman v. Comm'r, 521 F.2d 574, 577 (2d Cir. 1975).
44. I.R.C. § 2033.
45. *See* Estate of Donaldson, 31 T.C. 729 (1959).
46. Treas. Reg. § 20.2031-8(a) (1958).
47. Treas. Reg. § 20.2031-8(a)(3), Ex. (3) (1958).
48. Treas. Reg. § 20.2031-8(a)(1958).

an assertion by the Commissioner of the Internal Revenue Service that the entire proceeds were includible and a decision by the Tax Court to that effect, the Court of Appeals for the Fifth Circuit reversed in *Estate of Wien v. Commissioner.*[49] The court noted that under Georgia law when the insured and the owner-beneficiary die simultaneously, the insured is presumed to have survived the owner-beneficiary, and it held that the replacement value should accordingly be applied.[50]

In connection with the discussion of Section 2033, it should be noted that if the alternate valuation date is chosen by the executor,[51] and the insured dies within the six-month period, the amount to be included in the owner-decedent's gross estate is the full face amount of the policy.[52]

IV. GETTING THE PROCEEDS OUT OF THE GROSS ESTATE — GIFT TAX CONSEQUENCES

A transfer of a life insurance policy by the insured during his life is subject to gift taxation, as long as he has successfully divested himself of all incidents of ownership and the beneficiary is not his estate.[53] The method for determining the value of the gift is the same as the one used for valuing insurance policies on the life of someone other than the decedent for estate tax purposes, which is the replacement value of the policy.[54]

The Tax Reform Act of 1976 minimized the benefit of making lifetime gifts of life insurance policies by substituting a uniform rate for lifetime transfers and transfers made at death in place of the previously lower gift tax rates.[55] It further minimized the benefit by cumulating lifetime transfers with death transfers for purposes of calculating the estate tax, thus placing death transfers at a higher

---

49. 441 F.2d 32 (5th Cir. 1971). *Accord,* Estate of Meltzer v. Comm'r, 439 F.2d 798 (4th Cir. 1971); Estate of Chown v. Comm'r, 428 F.2d 1395 (9th Cir. 1970); Old Kent Bank and Trust Co. v. Comm'r, 430 F.2d 392 (6th Cir. 1970).

50. The state law referred to was Georgia's version of the Simultaneous Death Act which at last count has been adopted by 47 states (including Arkansas) and the District of Columbia. *See* Ark. Stat. Ann. § 61-127 (Repl. 1971).

51. I.R.C. § 2032.

52. Rev. Rul. 63-52, 1963-1 C.B. 173.

53. Treas. Reg. § 25.2511-1(h)(8) (1958). If the insured has not divested himself of all incidents of ownership or if the proceeds are payable to his estate, the face amount will still be includible in his gross estate under § 2042 upon his death. The Service thought it was undesirable to impose a gift tax unless the insured has successfully removed the proceeds from his gross estate.

54. Treas. Reg. § 25.2512-6(a) (1958).

55. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001(a), 90 Stat. 1525, 1846 (1976) (amending I.R.C. § 2001).

rate on the progressive scale.[56] However, it may still be advantageous to make gifts of policies because of the difference in the *amount* subject to taxation. As noted earlier, the amount subject to gift taxation is the replacement value of the policy whereas the amount subject to estate taxation is the face amount. The replacement value will obviously always be the lesser of the two.

One problem concerning the gift tax is whether the annual exclusion of $3000 under Section 2503(b) is applicable to gifts of life insurance policies or to gifts of premiums on policies previously given away. Since Section 2503(b) only applies to gifts of a present interest, it becomes necessary to determine whether life insurance qualifies as a present interest.

As long as there is an outright gift of the policy, the regulations state that it is not a gift of a future interest merely because payment of the policy cannot be received until the death of the insured.[57] The donee is receiving more than just the right to the proceeds upon the death of the insured. Thus, if the donee receives the full rights to surrender the policy or convert it into cash immediately, it is treated as a gift of a present interest and qualifies for the annual exclusion.[58]

However, if the gift is to a trust, the question becomes whether the *beneficiary* has these rights immediately. With a few exceptions, a gift in trust will be treated as a gift of a *future* interest.[59] As to gifts of premiums on policies previously given away, if the owner has a present interest in the policy, the premium payments will be gifts of a present interest.[60] If the owner only has a future interest in the policy, however, the premium payments will also constitute gifts of future interest.[61]

A further concern is whether a gift of life insurance policies to a spouse will qualify for the marital deduction under Section 2523.[62] As in the case of the annual exclusion, an outright transfer to the spouse will qualify for the marital deduction. If the transfer is in

56. *Id.* § 2001(b) (amending I.R.C. § 2502(a)).

57. Treas. Reg. § 25.2503-3(a) (1958).

58. C. Lowndes, R. Kramer & J. McCord, Federal Estate and Gift Taxes 838 (3d ed. 1974).

59. *See* Treas. Reg. § 25.2503-3(c), Ex. (2) (1958); C. Lowndes, R. Kramer & J. McCord, Federal Estate and Gift Taxes 839 (3d ed. 1974).

60. Treas. Reg. § 25.2503-3(c), Ex. (6) (1958).

61. Francis P. Bolton, 1 T.C. 717 (1943).

62. I.R.C. § 2523, *as amended by* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(b), 90 Stat. 1525, 1854 (1976). This section generally allows the donor to take a deduction from gifts made to his spouse of the total amount of the gift up to a total of $100,000, and 50% of the amount of total gifts over $200,000. The deduction is not allowed for gifts of a "terminable interest."

trust, however, various requirements must be met. The conditions are similar to those required for the estate tax marital deduction.[63] The requirement that the donee spouse be entitled to the income for life cannot normally be met with a gift of insurance policies in trust because they are not income-producing assets.[64] There are at least two possible solutions to this problem. If the donee spouse is given the right to require the conversion of the policies to income-producing property, the gift will apparently qualify for the marital deduction.[65] The problem can also be avoided by the use of an "estate trust," which provides that upon the death of the spouse the property in the trust will pass to his or her estate. The "estate trust" will qualify for the marital deduction because it is not a "terminable interest."[66]

V. CONCLUSION

After the decision to use life insurance as part of an estate plan has been made, it becomes necessary to explore the tax ramifications so that asset shrinkage due to taxes can be minimized. If gifts are to be made of some of the policies, a careful analysis of which ones to give away can prove to be beneficial. For example, the gift of a term policy will produce no gift tax liability while the gift of a whole life policy will. Furthermore, if the choice is between two whole life policies of the same face value, the newer policy will produce less gift tax because of its lower replacement value.

After a life insurance policy is given away, the insured should make absolutely sure that he has retained no incidents of ownership in the policy and should be certain that his estate cannot be made a beneficiary of the proceeds. It would be disastrous for an insured to make the decision to part with all effective control over the policy

63. Treas. Reg. § 25.2523(e)-1(a) (1958). The conditions are as follows:

(1) The donee spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest;

(2) The income payable to the donee spouse must be payable annually or at more frequent intervals;

(3) The donee spouse must have the power to appoint the entire interest or a specific portion to either herself or her estate;

(4) The power in the donee spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events; and

(5) The entire interest or a specific portion must not be subject to a power in any other person to appoint any part to any person other than the donee spouse.

64. Estate of C. C. Smith, 23 T.C. 367 (1954); Treas. Reg. § 25.2523(e)-(1)(f)(5) (1958).

65. Estate of C. C. Smith, 23 T.C. 367, 371 (1954).

66. I.R.C. § 2523(b).

and then have the proceeds included in his gross estate anyway because of an oversight.

It should not be inferred from this discussion that making gifts of life insurance is always the best approach to take. It may be necessary or desirable to make the proceeds payable to the decedent's estate to provide the liquidity needed to pay debts and taxes, especially if all of the other assets of the estate are nonliquid.

The insured may want to consider setting up an inter vivos insurance trust to use as a will substitute or for various other reasons. The trust can be revocable or irrevocable, and funded or unfunded. If the trust is revocable there are no gift tax consequences upon its creation and the proceeds will be included in the insured's gross estate at death. If it is irrevocable, there may be gift tax liability and all the problems relating to the "incidents of ownership" test and the "contemplation of death" problem will be present. The subject of life insurance trusts is sufficiently broad to warrant a separate comment, and this is but a cursory introduction to them.

This comment is not intended to be an exhaustive source of all the possible tax consequences of life insurance within the context of estate planning. It is hoped that it may serve as an outline for someone considering the use of life insurance, with an emphasis on some of the problem areas. In the constantly changing area of federal taxation, however, a study of the current status of the law is always essential.

John B. Peace