Michigan Law Review

Volume 60 | Issue 5

1962

Taxation-Federal Estate Tax-The Construction of Section 2036

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Recommended Citation
William S. Bach S .Ed., *Taxation-Federal Estate Tax-The Construction of Section 2036*, 60 MICH. L. REV. 631 (1962).
Available at: https://repository.law.umich.edu/mlr/vol60/iss5/5

TAXATION—FEDERAL ESTATE TAX—THE CONSTRUCTION OF SECTION 2036—Among the more serious problems facing the estate planner is the question of how the various inter vivos transfers of property which a client may make while retaining some form of interest himself will be treated for federal estate tax purposes. The heart of this problem is section 2036 of the *Internal Revenue Code of 1954* which is designed to reach, generally, those interests in property retained by a decedent for the balance of his life.[1] The section provides:

> "(a) General Rule—The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer . . . , by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—
>
> (1) the possession or enjoyment of, or the right to the income from, the property, or
>
> (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."[2]

Like other sections of the Code which define includibility, section 2036 is directed at traditional concepts of property interests. Thus, property transferred in fee by the decedent with the reservation of a life estate for himself is clearly to be included in his gross estate under section 2036; the value of an inter vivos trust from which the settlor reserves income for life is similarly includible.[3] While

1 The types of property interests which are includible in the decedent's gross estate are defined by INT. REV. CODE OF 1954, §§ 2033-42. Section 2033 is the general provision which includes all property of the decedent to the extent of his interest at death. The other provisions make includible certain specific properties: § 2034—dower and curtesy interests, § 2035—transactions in contemplation of death, § 2036—life estates, § 2037—transfers taking effect at death where decedent has a 5% reversionary interest, § 2038—revocable transfers, § 2039—annuities, § 2040—joint interests, § 2041—powers of appointment, and § 2042—life insurance policies.

2 INT. REV. CODE OF 1954, § 2036.

3 Treas. Reg. § 20.2036-1 (1958).

section 2036 can be applied without question to these historical property interests, it is not so clear that it can or should be applied to such diverse property relationships as crossed trusts, survivorship annuities, trusts to satisfy legal obligations, powers to allocate trust funds between principal and income beneficiaries, or combined annuity-life insurance policies. If these property arrangements are to be included in the gross estate of a decedent, they must be analogized to the traditional life estate. A failure so to analogize them must have the effect of freeing these interests from federal estate tax because section 2036 contains the only general description which could encompass such arrangements.[4]

Recent decisions demonstrate that the courts have not been able to agree upon the intended scope of this key section. *Fidelity-Philadelphia Trust Co. v. Smith*[5] is an excellent illustration of this problem. In this case the decedent purchased three life insurance policies although she had reached an age at which she had become uninsurable. The policies were issued without a medical examination upon condition that decedent purchase in addition three annuities for her life.[6] At all times the insurer treated the arrangements as separate contracts. Decedent transferred the policies irrevocably to the beneficiaries and paid the gift tax. The Third Circuit reasoned that such an arrangement was equivalent to the decedent's setting up a trust for herself for life, remainder over,[7] and held the value of the insurance policies includible in decedent's gross estate under section 2036.

However, the Supreme Court reversed on appeal and held that the arrangement involved two distinct transactions. Since neither of the transactions individually constituted an arrangement subject

4 Section 2036 is the only provision in the Code which deals with the includibility of property interests measured by the life of the transferor. Thus if property interests which exist for the life of the decedent-transferor are not reached under § 2036, these interests will not be included in his gross estate. See note 1 *supra*.

5 356 U.S. 274 (1958), 56 MICH. L. REV. 1366.

6 The Court found that because the total amount of the premiums for both the annuities and the life policies was great enough to generate more than the required interest to make the annuity payments and was great enough to pay the face value of the life insurance policies, the company incurred no monetary risk by writing the policies. However, if the beneficiaries had surrendered their policies for their cash surrender value, it is doubtful that the fund remaining would have been sufficient to pay the annuity over a substantial period of time. See Note, 42 COLUM. L. REV. 162 (1942).

7 Fidelity-Philadelphia Trust Co. v. Smith, 241 F.2d 690 (3d Cir. 1957).

to estate tax liability,[8] the decedent had not created relationships which would subject her estate to the payment of the tax.

The *Fidelity-Philadelphia* decision decided the narrow problem of the application of section 2036 to the single-premium combined annuity-life insurance policy situation.[9] But the decision was greeted by many as one based on the form of the relationship rather than the substance of the property interests which in fact existed.[10] Because of the criticism of this decision as a deviation from the purpose for which section 2036 had been adopted, it seems appropriate to look at the intent which Congress manifested when the forerunners of section 2036 were enacted.

This comment will explore two problems: first, an analysis of the legislative history of the present section 2036 in an effort to discover exactly which property relationships Congress intended to reach by this provision; second, an examination of the treatment which several specific arrangements have been given by the courts to determine whether there is any degree of certainty or predictability in the application of section 2036.

I. THE LEGISLATIVE BACKGROUND OF SECTION 2036

The first federal estate tax was passed as part of the Revenue Act of 1916.[11] The tax was imposed on the net estate of every

8 The annuity was not taxable since the decedent had no interest in the property at the time of his death. INT. REV. CODE OF 1954, § 2035(a). The value of the insurance policy is excluded because decedent retained no incidents of its ownership. INT. REV. CODE OF 1954, § 2042(2).

9 Before the decision of the Fidelity-Philadelphia case, the federal circuits had been divided on whether to apply § 2036 to the single premium combination annuity-life insurance policy circumstance. The Sixth, Second and Ninth Circuits had held the property interest taxable on the theory decedent had carried out a single transaction, which was in substance equivalent to a life trust. Conway v. Glenn, 193 F.2d 965 (6th Cir. 1952); Burr v. Commissioner, 156 F.2d 871 (2d Cir. 1946); Commissioner v. Clise, 122 F.2d 998 (9th Cir. 1941), *cert. denied*, 315 U.S. 821 (1942). The Seventh Circuit in Bohnen v. Harrison, 199 F.2d 492 (7th Cir. 1952), held such an arrangement was not taxable since it involved two transactions. The *Bohnen* case was affirmed by an equally divided court, 345 U.S. 946 (1953). To decide the *Fidelity-Philadelphia* case it was also necessary for the Court to distinguish Helvering v. Le Gierse, 312 U.S. 531 (1941). That case was factually similar to the *Fidelity-Philadelphia* case except the decedent had retained the incidents of ownership of the insurance policy. However, the grounds for that decision were not that the arrangement was taxable as insurance, but that it did not constitute an insurance risk and was therefore taxable only under § 2036. 312 U.S. at 540.

10 See, *e.g.*, 72 HARV. L. REV. 109 (1958); 1958 U. ILL. L.F. 480; 56 MICH. L. REV. 1366 (1958); 43 MINN. L. REV. 354 (1958). See generally Meisenholder, *Taxation of Annuity Contracts Under Estate and Inheritance Taxes*, 39 MICH. L. REV. 856 (1941).

11 Revenue Act of 1916, ch. 463, §§ 1-901, 39 Stat. 756.

decedent.[12] The value of a decedent's gross estate was to include, according to section 202 (b), "a transfer . . . intended to take effect in possession or enjoyment at or after his death."[13] The committee reports in neither the House of Representatives nor the Senate indicate any elaboration of the terms used in the statute itself. The sole concern of the Congress seemed to be with the need to increase revenues in the face of world events in 1916.[14] The imposition of an estate tax was looked upon as one solution to this problem. A few decisions were handed down interpreting the meaning of section 202 (b), but these did little to modify what seemed to be the plain meaning of the statute. In *Shukert v. Allen*[15] the decedent with a life expectancy of sixteen years set up a trust, in which he retained no beneficial interest, to accumulate income for thirty years. The Court held that the managerial interest—as opposed to beneficial interest—did not make the trust includible in decedent's gross estate. In *Nichols v. Coolidge*[16] the decedent had created a trust for herself for life, with the corpus over after her death. In 1917 she had assigned her life interest to the holder of the remainder. The Court held that the decedent's interest in the trust was not includible in her gross estate. The conclusion, however, was reached solely on the ground that the trust was created before the enactment of the statute. Two trusts were involved in *Reinecke v. Northern Trust Co.*[17] The first trust to *A* and then on the death of the decedent-settlor to *B* was held non-taxable, while a second trust to the decedent for life with a power of revocation, remainder over to *B*, was held to be includible in the gross estate of the decedent. None of these cases attempted to define broadly the scope of section 202 (b); but it was generally assumed that the simple case of a trust with income to decedent for life and remainder over would be includible in the gross estate for federal estate tax purposes.

In 1930, however, the Supreme Court handed down its famous decision of *May v. Heiner*.[18] In that case, the decedent had created

12 Revenue Act of 1916, ch. 463, § 201, 39 Stat. 777.
13 Revenue Act of 1916, ch. 463, § 202(b), 39 Stat. 777.
14 H.R. REP. No. 922, 64th Cong., 1st Sess. 1 (1916).
15 273 U.S. 545 (1927). See generally LOWNDES & KRAMER, THE ESTATE AND GIFT TAX ch. 8 (1956).
16 274 U.S. 531 (1927).
17 278 U.S. 339 (1929).
18 281 U.S. 238 (1930).

a trust for herself for life, then to her husband for his life, the corpus over on the death of both. The Court reasoned that the transfer took place not at death but at the time of the execution of the trust agreement. The thought that *May v. Heiner* could be distinguished because of the intervening life estate was dispelled a year later when the Court handed down three per curiam opinions holding that a trust for the decedent-settlor for life, corpus over, was not includible in the decedent's gross estate.[19] The day following these per curiam decisions, Congress passed the Joint Resolution of March 3, 1931[20] (the forerunner of section 2036) aimed at correcting the problem of the *Heiner* case. Discussion on the floor of Congress indicated that Congress had thought since the passage of the 1916 act that the life trust had been taxable under the provisions of that act.[21] It is also apparent from the reports that the urgency of the action of Congress was caused solely by the possible loss of revenue to the government if life trusts continued to be outside the reach of the federal estate tax.[22] The discussion of this resolution contains nothing which would indicate that Congress intended to do more than simply make includible in the decedent's gross estate a trust giving the decedent the income for his life. Section 803 of the Revenue Act of 1932[23] took the changes of the joint resolution and attempted to

19 Burnet v. Northern Trust Co., 283 U.S. 782 (1931); Morsman v. Burnet, 283 U.S. 783 (1931); McCormick v. Burnet, 283 U.S. 784 (1931).

20 ". . . a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom." Joint Resolution of March 3, 1931, 46 Stat. 1516.

21 Mr. Smoot: "It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so contrued the statute since the first Federal estate tax law in 1916 and its regulations so provide. If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children after his death, but in the meantime reserved the use, income and enjoyment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of the estate tax. Under the decisions rendered yesterday, the property would not be included in computing the Federal estate tax.

"It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. . . . It is of the greatest importance, therefore, that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed." 74 CONG. REC. 7078 (1931).

22 74 CONG. REC. 7198 (letter of Ogden L. Mills, Acting Secretary of the Treasury and discussion thereof).

23 Revenue Act of 1932, ch. 209, § 803, 47 Stat. 279.

clarify them and put them in context in the law.[24] In addition the 1932 act added the words "or for any period not ascertainable without reference to his death" to make includible a trust where income was payable to the decedent only to the last payment period before his death. Prior to 1932, since any income accrued during the last interest period was not to be paid to him or to his estate, he had been held not to have retained a trust for his life.[25] Also added by the 1932 act was a provision dealing with concurrence in the right to designate income beneficiaries.[26] The committee reports also indicate that two clarifying changes were made by the 1932 act,[27] but the act in general was not designed to broaden the scope of the joint resolution. There is nothing in the committee reports which would support an inference that Congress was concerned with a broader application of the statute than to encompass life trusts. No significant changes have been made in the substance of section 2036 since the Act of 1932.

It must be noted that it is possible to interpret the language of section 2036 broadly enough to encompass many other types of property arrangements, especially when the courts are willing to consider the substance rather than the form of the interests created. The fact remains that in the light of the history of the section an intent of Congress to go farther than merely to include a simple trust arrangement in the decedent's gross cannot be established. The large number of other types of property arrangements which have been found to be within the scope of section 2036 have been put there by the process of judicial interpretation. Even if the legitimacy of an expanded construction of the statute is granted, the courts, nevertheless, have been inconsistent in its application.

II. THE JUDICIAL DEVELOPMENT OF SECTION 2036

The application of section 2036 to varying fact situations provides no degree of certainty or predictability. The courts seem rather to have adopted an *ad hoc* approach in their interpretation of the statute. In construing section 2036 the courts have been forced to consider, under a provision intended to encompass only

24 H.R. REP. No. 708, 72d Cong., 1st Sess. 46 (1932).
25 H.R. REP. No. 708, 72d Cong., 1st Sess. 47 (1932).
26 Revenue Act of 1932, ch. 209, § 803(a), 47 Stat. 279; H.R. REP. No. 708, 72d Cong., 1st Sess. 47 (1932).
27 H.R. REP. No. 708, 72d Cong., 1st Sess. 47 (1932).

life estates in the historic sense of that word, property interests which could not have been held taxable under any other section. If an expanded construction is to be given section 2036, it should be applied consistently to basically similar property interests, which should be included in the decedent's gross estate only if they closely parallel the historic life estate.

In the *Fidelity-Philadelphia* case, discussed at the outset,[28] the Court did not take account of the substance of the interests created and held that section 2036 was inapplicable. Contrast this with the treatment given section 2036 in *State Street Trust Co. v. United States*.[29] There the decedent created a trust with himself as trustee, retaining only broad investment powers. He retained no income for himself and no specific power to appoint the income. The First Circuit, however, reasoned that because his power over investments was broad enough to make allocations between principal and income, he had retained the power to determine the beneficial enjoyment of the income from the trust. As a result of the property interests created, the decedent in *Fidelity-Philadelphia* received beneficial enjoyment of a life income, while the trustee in *State Street Trust* had no beneficial enjoyment. Yet no tax was suffered by the estate in *Fidelity-Philadelphia,* while in the *State Street* case the trust was included in the decedent's gross estate. If we are to distinguish between the two cases, it would seem more logical to tax the property transfer which gave the decedent a beneficial interest.

The application of section 2036 in the area of crossed trusts is illustrative of the same basic confusion. In *Lehman v. Commissioner*,[30] two brothers created trusts for one another. The trust which named the first brother to die as its income beneficiary was held includible in his gross estate even though it had been created (transferred) by the surviving brother. The Court found that one trust served as the *quid pro quo* for the other and so the interest created was the same as if decedent had created the trust for himself. In *McLain v. Jarecki*[31] decedent set up a trust to accumulate income until his death; then this income was to be paid to his

28 See text at p. 632 *supra*.

29 263 F.2d 635 (1st Cir. 1959), 45 CORNELL L.Q. 598 (1960). See Gray and Covey, *State Street—A Case Study of Sections 2036(a)(2) and 2038*, 15 TAX L. REV. 75 (1959).

30 109 F.2d 99 (2d Cir. 1940).

31 232 F.2d 211 (7th Cir. 1956).

wife for life, remainder over to his daughter. His wife set up a similar trust with an accumulation of income until her death, and she named decedent income beneficiary for his life. Despite the fact that the instruments were drawn at the same time by the same lawyer, the Court concluded that one trust was not the consideration for the other and held the trust in question was not includible in the decedent's gross estate. Some courts have adopted the reasoning of the *McLain* case and have concluded that a mere "unity of action" in the establishment of trusts is not proof of consideration, and trusts thus created are not subject to federal estate tax.[32] At least one court, however, has held that consideration can be presumed from the creation of crossed trusts.[33] Crossed trusts, because of the beneficial enjoyment of the decedent, would seem to be logically includible under section 2036.

Section 2036 faces uncertain application as well in the area of discretionary trusts. In *Commissioner v. Irving Trust Co.*[34] the decedent set up a trust to pay his ex-wife a monthly income of $150. The balance of income was to be paid to the decedent. The trustee had the power to refund to the settlor the corpus of the trust so long as enough remained to pay the ex-wife her monthly income. Decedent received enough back from the trustee at his request to establish a similar trust for his second wife. He received no payments from the second trust as he did from the first. It was held here that the trusts were not includible in his gross estate.[35] It would seem that the estate tax could be avoided completely simply by picking a trustee who in fact could be trusted and letting him pay over income at his discretion. Is there really a significant difference if the trustee is a personal friend, an attorney or the decedent himself? The reason behind the establishment of a discretionary trust, which could pay income to the settlor, would seem to be one of tax avoidance, and under section 2036 it would seem logical to include this type of trust in the decedent's gross estate, unless in fact the decedent received no beneficial enjoyment of the income.

32 Newberry's Estate v. Commissioner, 201 F.2d 874 (3d Cir. 1953); *In re* Lueders' Estate, 164 F.2d 128 (3d Cir. 1947).

33 Cole's Estate v. Commissioner, 140 F.2d 636 (8th Cir. 1944).

34 147 F.2d 946 (2d Cir. 1945).

35 *Contra*, Selznick's Estate v. Commissioner, 15 T.C. 716, *aff'd*, 195 F.2d 735 (9th Cir. 1952).

In *Delaney v. Gardner*[36] the decedent made an inter vivos transfer of stocks to a family corporation set up to take care of a family homestead. It was a non-stock corporation, but decedent was one of a seven-member board who exercised control of the corporation. While the court found that the decedent did not in fact exercise dominion over the other members of the board, it is apparent from the opinion that the decedent's wealth was a large part of the corporate assets, and it would have been possible to reconvey the beneficial interest to the decedent by action of the board (although the transfer was in form irrevocable). Again, the result seems to be justified by the wording of the statute, but it might be asked if even the First Circuit is consistent in its application of section 2036, when one compares *Delaney v. Gardner*[37] with *State Street Trust Co. v. United States*.[38] However, in reviewing all the cases, the result reached in the *Delaney* case seems justified since the decedent received no beneficial enjoyment of the transferred property.[39]

While the provisions of section 2036 have been leniently applied in some areas, they have been held to include in the gross estate most forms of survivorship annuities.[40] An annuity purchased from community property providing for payments to the husband for his life and then to the wife for her life was held taxable to the husband's estate.[41] The court apparently reasoned that since the wife had a much longer life expectancy, such an annuity transaction was merely a device to avoid the estate tax. A survivorship annuity bought by two sisters, each paying one half of the cost is taxable to the estate of the first to die.[42] The principal exception to the includibility of survivorship annuities seems to have been in the area of pension benefits. In the normal case the employer sets up an annuity for the employee to begin upon his retirement. Under most such plans, however, the employee has the option of electing a smaller annuity payment for himself and the payment of an annuity after his death to a third person, usually

36 204 F.2d 855 (1st Cir. 1953).
37 *Ibid.*
38 263 F.2d 635 (1st Cir. 1959).
39 *Cf.* Estate of Klauber, 34 T.C. 968 (1960).
40 *E.g.*, Commissioner v. Clise, 122 F.2d 998 (9th Cir. 1941), *cert. denied*, 315 U.S. 821 (1942).
41 Commissioner v. Wilder's Estate, 118 F.2d 281 (5th Cir. 1941).
42 Pruyn's Estate v. Commissioner, 184 F.2d 971 (2d Cir. 1950).

his wife, for life. The courts, apparently reasoning that this does not constitute a "transfer" but rather a relinquishment of part of a larger right, have held this type of transaction not includible in the employee's gross estate.[43] The same result has been reached in a case where the employer and the employee both made contributions to the pension fund.[44]

The above-described pension plans take property belonging to the decedent and divide it into present and future interests. The present interest is retained by the decedent and the future interest is "transferred" to another person. This arrangement gives the decedent a beneficial interest in the property which should be reached if section 2036 is to be consistently applied.

Becklenberg's Estate v. Commissioner[45] illustrates the confusion further. There decedent set up an irrevocable trust out of which the trustee was to purchase annuities for the decedent, but in the absence of such annuities, decedent was to be allowed up to $10,000 per year from the trust. Decedent was paid income and no annuities were in fact ever purchased. *Held,* since decedent could have been paid from principal, this did not constitute a retention of income. In other cases, the Seventh Circuit has held that a trust to pay $100 income, with discretion to pay more is includible in gross income,[46] and a survivorship annuity to decedent for life and then to his daughter for her life is also includible.[47] It has been argued that these decisions cannot be reconciled using any "rational basis of estate taxation."[48]

Finally section 2036 has been applied to trusts created to satisfy a legal obligation of the decedent. For example, decedent in the typical case will establish a trust to pay his wife's support for her life, remainder over. Since decedent already had the obligation to support his wife, and if the funds did not come from this trust he would have to provide them from his other income, the courts have treated this trust in the same way in which a trust payable to the decedent for life would be treated.[49] So long as the trust is

43 Higg's Estate v. Commissioner, 184 F.2d 427 (3d Cir. 1950).

44 Commissioner v. Twogood's Estate, 194 F.2d 627 (2d Cir. 1952).

45 273 F.2d 297 (7th Cir. 1959).

46 *In re* Uhl's Estate, 241 F.2d 867 (7th Cir. 1957).

47 Forster v. Sauber, 249 F.2d 379 (7th Cir. 1957).

48 Covey, *Section 2036—The New Problem Child of the Federal Estate Tax,* 4 TAX COUNSELOR'S Q. 121 (1960).

49 Helvering v. Mercantile-Commerce Bank and Trust Co., 111 F.2d 224 (8th Cir. 1940).

declared to be for the "support and maintenance" of the wife, it has been held taxable even though in reality the use of the trust money was for a purpose upon which the decedent was not legally obligated.[50] Trusts used to satisfy obligations arising out of separation agreements present the greatest problems in the application of section 2036. Where the wife gives up her marital rights, there is no consideration for the trust,[51] and it has been held includible in the decedent's gross estate.[52] However, the wife's promise to support the children has been treated as an adequate consideration for the trust.[53] When a trust satisfies a legal obligation of the decedent, it frees other funds for his beneficial enjoyment and thus is equivalent to a reservation of a beneficial enjoyment in transferred property.

It is apparent from the previous discussion that section 2036 has been applied to property relationships beyond the reservation of the life trust. Even though this is not in accord with the apparent intent of Congress, it perhaps could be justified if the section were applied equally to all property relationships which are analogous in substance to the life trust. The obvious fact is that there is little if any consistency in the section's application. In *Greene v. United States*,[54] decedent transferred property to his daughters, and they agreed to pay him the income for life. The court held that the interest here created was taxable since it was analogous to a trust giving decedent the income for life. Compare this to the treatment of the combination annuity-life insurance policy which was held not includible in decedent's gross estate,[55] and then try to put into section 2036 logically the includibility of a trust in which decedent merely retained broad management powers.[56] None of these three cases presents a property interest which is exactly the life estate intended to be included under section 2036. But if we are to distinguish between the cases, it would be logical not to include the last situation in the decedent's gross estate because it confers no beneficial interest on him.

50 Commissioner v. Dwight's Estate, 205 F.2d 298 (2d Cir. 1953).

51 Commissioner v. Douglass' Estate, 143 F.2d 961 (3d Cir. 1944); 74 HARV. L. REV. 1191 (1961).

52 Chase National Bank v. Commissioner, 225 F.2d 621 (8th Cir. 1955).

53 Helvering v. United States Trust Co., 111 F.2d 576 (2d Cir. 1940). *Contra*, National Bank of Commerce v. Henslee, 179 F. Supp. 346 (M.D. Tenn. 1959). See generally, STEPHENS & MARR, FEDERAL ESTATE AND GIFT TAXES 75 (1959).

54 237 F.2d 848 (7th Cir. 1956).

55 Fidelity-Philadelphia Trust Co. v. Smith, 356 U.S. 274 (1958).

56 State Street Trust Co. v. United States, 263 F.2d 635 (1st Cir. 1959).

If a judicial gloss must be put on the statute in spite of the apparent intent of Congress, at least the courts should apply this gloss evenly. Until there is some greater degree of consistency in the application of section 2036, intelligent planning and prediction become impossible. Because the courts have been unable to give a consistent application to this statute which has been law since 1932, Congress should take affirmative action and make it clear to the courts exactly what kinds of property interests are to be taxed under section 2036.

Even in the absence of congressional action a more definite line can be drawn between the cases than the *ad hoc* approach used at present has developed. If the courts insist upon including within section 2036 property interests other than the historic life estate and the life trust, the following test would at least provide a greater degree of consistency: the property should be included in the gross estate if the decedent actually enjoys a beneficial interest therein. In the discussion above of the various property interests to which section 2036 has been applied, an attempt has been made to look at each in the light of this test. The test should be a factual one. If in fact the decedent had actually received beneficial enjoyment for the period of his life from the property transferred, such property should be included in his gross estate under section 2036.

The use of this test would separate those cases in which the decedent retained only managerial benefits from those cases where he retained actual beneficial enjoyment. Retention of strictly managerial powers would cause the estate no tax liability, while the retention of a beneficial interest would cause the tax to be imposed in every case. Such a test would also be in tune with the intent of Congress in that it would be taxing beneficial interests similar in substance, albeit not in form, to the historic life estate. Until the time that Congress sees fit to give the courts a guide for their use in the application of section 2036, the beneficial interest test would give certainty to estate planners in relying upon the interpretation the courts would give section 2036. This is a desirable result not only in insuring a decedent the disposition he wishes to make of his assets, but also in eliminating a good deal of expensive litigation which results when a court is called on to make its independent analysis of a particular property arrangement.

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