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Taxation-Federal Estate Tax-Tax Consequences of a Gift in Contemplation of Death by a Joint Tenant or a Tenant by the Entirety

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TAXATION—FEDERAL ESTATE TAX—TAX CONSEQUENCES OF A GIFT IN CONTEMPLATION OF DEATH BY A JOINT TENANT OR A TENANT BY THE ENTIRETY—One of the more difficult problems facing the estate planner today is to determine the relationship between sections 2035 and 2040 of the Internal Revenue Code of 1954, as applied to a situation where a joint tenancy or tenancy by the entirety is severed in contemplation of death. The problem might arise in the following setting: Husband (*H*) and wife (*W*) hold 40,000 dollars worth of property in joint tenancy, *H* having contributed the entire purchase price. In contemplation of *H*'s death, *H* and *W* give the property to their son (*S*), with the intent of reducing *H*'s gross estate. (Alternatively, *H* might transfer his share to *W* in consideration for *W* transferring her share to *H*, thereby creating a tenancy in common.) *H* dies within three years after completion of the transaction. Section 2035, the general "contemplation of death" provision, provides:

"The value of the gross estate shall include the value of all property . . . *to the extent of any interest therein of which the decedent has at any time made a transfer* (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death."¹

Section 2040, dealing with joint tenancies held at the time of death, provides:

"The value of the gross estate shall include the value of all property . . . *to the extent of the interest therein held as joint tenants* by the decedent and any other person, or as tenants by the entirety by the decedent and spouse . . . except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth"²

¹ INT. REV. CODE OF 1954, § 2035. (Emphasis added.)

² INT. REV. CODE OF 1954, § 2040. (Emphasis added.)

The key interpretative problem under each section involves a determination of what "interest" *H* had in the property. Section 2040, the joint tenancy provision, uses a special *tax* concept in defining the decedent's interest. Thus, if at the time of *H*'s death *H* and *W* own property as joint tenants (or tenants by the entirety) and *H* has made the entire contribution necessary to purchase the property, then its entire value (40,000 dollars) is included in *H*'s gross estate.³ Although under local property law *H* owns only one-half of the jointly held property,⁴ section 2040 ignores this property law concept.⁵ Section 2035, the general "contemplation of death" provision, has, on the other hand, been interpreted to require that *H*'s interest be determined according to local property law.⁶ Thus, when *H* makes a gift in contemplation of death, his interest in the joint property is valued, for tax purposes, at 20,000 dollars.

The result of this divergent treatment under sections 2035 and 2040 is that *H* can partially deplete his gross estate by severing his joint tenancy even though the transaction is in contemplation of death.⁷ The anomaly of such a result becomes apparent upon an examination of the two following examples. If *H* has sole title to property valued at 40,000 dollars and makes a gift of this property in contemplation of his death, the entire 40,000 dollars is included in his gross estate.⁸ Likewise, where *H* and *W* continue to hold joint property valued at 40,000 dollars, and the entire contribution was made by *H*, at *H*'s death 40,000 dollars is included in his gross estate.⁹ But a combination of the two examples—a gift in contemplation of death of the jointly held property—results in only 20,000 dollars being included in *H*'s gross estate.¹⁰

³ *E.g.*, *United States v. Jacobs*, 306 U.S. 363 (1939); *Tyler v. United States*, 281 U.S. 497 (1930); *Treas. Reg. § 20.2040-1* (1962).

⁴ *E.g.*, *Sullivan's Estate v. Commissioner*, 175 F.2d 657 (9th Cir. 1949); *Estate of Don Murillo Brockway*, 18 T.C. 488 (1952), *aff'd on other grounds*, 219 F.2d 400 (9th Cir. 1954).

⁵ See cases cited in note 3 *supra*. As used in this comment, the phrase "local property law" means the generally applicable state common-law and statutory rules defining and governing rights and interests in things, as opposed to rules which are specially formulated for taxation or other purposes and which normally apply only in that context.

⁶ See, *e.g.*, *Sullivan's Estate v. Commissioner*, 175 F.2d 657 (9th Cir. 1949); *Baltimore Nat'l Bank v. United States*, 136 F. Supp. 642 (D. Md. 1955); *A. Carl Borner*, 25 T.C. 584 (1955); *Edward Carnall*, 25 T.C. 654 (1955). *Contra*, *United States v. Allen*, 293 F.2d 916 (10th Cir.), *cert. denied*, 368 U.S. 944 (1961); *Harris v. United States*, 193 F. Supp. 736 (D. Neb. 1961).

⁷ See, *e.g.*, *Sullivan's Estate v. Commissioner*, *supra* note 6.

⁸ *Treas. Reg. § 20.2035-1* (1962).

⁹ See cases cited in note 3 *supra*.

¹⁰ See cases cited in note 6 *supra*.

This comment will examine the foregoing problem in light of several recent cases which have cast doubt on the presently conceived relationship between section 2035 and section 2040.

I. PURPOSES OF SECTIONS 2035 AND 2040

In the Revenue Act of 1916 the predecessors of sections 2033,¹¹ 2035,¹² and 2040¹³ were all part of the same section. Section 2033 of the 1954 Code is a "shotgun" provision which requires inclusion of a decedent's entire probate estate in his gross estate for estate tax purposes.¹⁴ Sections 2035 and 2040 are policing provisions intended to prevent avoidance of section 2033.¹⁵ Thus, if *H* makes a testamentary type gift, intending to deplete his probate estate, section 2035 is designed to bring the entire amount of this gift into his gross estate.¹⁶ "Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death."¹⁷ Once a testamentary purpose is found, the gift is treated, for valuation purposes, as though it had never been made.¹⁸

Section 2040 is also designed to complement section 2033 by preventing estate tax avoidance through use of concurrent ownership devices.¹⁹ Under local property law, *H* could put all of his property into a joint tenancy or a tenancy by the entirety, with a resultant partial depletion of his probate estate.²⁰ For instance, in the hypothetical example where *H* owned property valued at 40,000 dollars and placed it all in joint tenancy with *W*, he has depleted his net worth by 20,000 dollars from a property law standpoint. In reality, however, *H* has retained many of the normal benefits of ownership. He still has, at least, an undivided interest

¹¹ Revenue Act of 1916, ch. 463, § 202(a), 39 Stat. 777.

¹² Revenue Act of 1916, ch. 463, § 202(b), 39 Stat. 777.

¹³ Revenue Act of 1916, ch. 463, § 202(c), 39 Stat. 778.

¹⁴ INT. REV. CODE OF 1954, § 2033: "The value of the gross estate shall include the value of all property . . . to the extent of the interest therein of the decedent at the time of his death."

¹⁵ See *United States v. Wells*, 283 U.S. 102, 116 (1931) (§ 2035); *Milliken v. United States*, 283 U.S. 15, 23 (1931) (§ 2035); *Tyler v. United States*, 281 U.S. 497, 505 (1930) (§ 2040); *Igleheart v. Commissioner*, 77 F.2d 704 (5th Cir. 1935) (§ 2035).

¹⁶ Section 2035, however, treats only a gift made within three years prior to death as made in contemplation of death.

¹⁷ *Milliken v. United States*, 283 U.S. 15, 23 (1931).

¹⁸ See, e.g., *Igleheart v. Commissioner*, 77 F.2d 704 (5th Cir. 1935).

¹⁹ See *Tyler v. United States*, 281 U.S. 497 (1930).

²⁰ See cases cited in note 4 *supra*.

in the income and possession of the property, and, even more important, he has retained a right to receive the entire property if he survives *W*.²¹ Thus, but for section 2040, the transfer by *H* to *H* and *W* would be a device by which *H* could retain many of the benefits of ownership and at the same time partly deplete his gross estate. Section 2040 purports to close this loophole by including within *H*'s gross estate that proportionate amount of the property which was contributed solely by *H* and which has depleted his probate estate. Thus, when *H* makes the entire contribution and dies before *W*, the entire value of the tenancy is included in *H*'s gross estate.²² However, if *W* dies before *H*, nothing is included in *W*'s gross estate.²³

It is apparent that section 2040 is grounded upon a tax concept of ownership, for it ignores the "shadowy and intricate distinctions of common law property concepts and ancient fictions."²⁴ However, section 2040 does not contain a built-in "contemplation of death" provision. Thus, when the tenancy is severed in contemplation of death, any attempt to preserve the integrity of section 2040 depends on whether section 2035 will be interpreted as incorporating the special *tax* concept of section 2040.

II. JUDICIAL TREATMENT OF SECTIONS 2035 AND 2040²⁵

Although sections 2035 and 2040 are both intended to have the same sort of policing function, they use somewhat different language to implement this general purpose. Section 2035 is built around the phrase "interest therein of which the decedent has at any time made a transfer." Section 2040 is keyed to the phrase "to the extent of the interest therein held as joint tenants." In *United States v. Field*²⁶ the Supreme Court interpreted the phrase "to the extent of the interest therein of the decedent at the time of his death," as used in the predecessor to section 2033 (the "shotgun" provision), to mean "local property interest" when applied to a testamentary exercise of a general power of appointment.²⁷

²¹ See 4 POWELL, REAL PROPERTY §§ 615-18 (1954 ed.); Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466 (1954).

²² See cases cited in note 3 *supra*.

²³ Treas. Reg. § 20.2040-1 (1962).

²⁴ *United States v. Jacobs*, 306 U.S. 363, 369 (1939).

²⁵ See Wright, *Transfers of Joint Property in Contemplation of Death*, 55 MICH. L. REV. 1, 3, 4 (1956).

²⁶ 255 U.S. 257 (1921). See Wright, *supra* note 25, for a more detailed analysis of the history of §§ 2035 and 2040 and the role of *Field*.

²⁷ Congress subsequently incorporated a "contemplation of death" provision into §§ 2038 (revocable transfers) and 2041 (powers of appointment). However, §§ 2036 (re-

However, when a section 2035/2040 case finally reached the Tax Court, the local property law approach of the *Field* case was not extended to section 2035.²⁸ As to both a joint tenancy and a tenancy by the entirety, the Tax Court found that *H*'s section 2035 interest was to be determined by reference to his section 2040 interest. Thus, *H*'s section 2035 interest was equal to the amount by which his gross estate would have otherwise been depleted. Where *H*, in contemplation of his death, transferred his share to *W* and in turn *W* transferred her share to *H*, creating a tenancy in common, the court found that *H* had not received an adequate consideration since his estate would have otherwise been depleted by one-half the value of the jointly held property. However, in *Sullivan's Estate v. Commissioner*²⁹ the Ninth Circuit applied the local property law concept of *Field* to section 2035. *H* had created a joint tenancy with *W*. In contemplation of *H*'s death *H* and *W* made two transfers, giving part of the joint property to *S* as a gift, while the rest of the joint property was transferred from *H* and *W* to *H* and *W*, thereby creating a tenancy in common. As to the first transfer, the court found that under local property law *W* owned one-half of the property prior to the transfer, and since *W* was still alive this one-half could not have been transferred in contemplation of death. As to the second transfer, the court again found that *W* owned one-half of the property and therefore her transfer to *H* was full consideration for *H*'s transfer to her. The result was that *H* successfully depleted his gross estate by one-half the value of the joint tenancy.

The *Sullivan* case view of section 2035 was extended by the Tax Court, in *A. Carl Borner*,³⁰ to a tenancy by the entirety. The court reasoned that there was no real difference between a joint tenancy and a tenancy by the entirety, and thus *Sullivan* was applicable. This decision arguably rests upon an improper interpretation of *Sullivan*,³¹ since there is a significant difference be-

tained life estates) and 2040 were not amended and still depend upon § 2035 to maintain their total effectiveness.

²⁸ William MacPherson Hornor, 44 B.T.A. 1136 (1941), *aff'd on other grounds*, 130 F.2d 649 (3d Cir. 1942). See also Frank K. Sullivan, 10 T.C. 961 (1948), *rev'd*, 175 F.2d 657 (9th Cir. 1949). The Third Circuit also accepted the Tax Court view in *Commonwealth Trust Co. v. Driscoll*, 137 F.2d 653 (3d Cir. 1943).

²⁹ 175 F.2d 657 (9th Cir. 1949).

³⁰ 25 T.C. 584 (1955).

³¹ For a criticism of *Borner*, see Note, 66 YALE L.J. 142 (1956). *Sullivan* requires an analysis at the local property law level. In terms of local property law, each tenant is seized "of the whole interest and not of a share." Thus, any transfer by *H* and *W* is made totally by each. So *H* has transferred a 100% interest in contemplation of death.

tween a joint tenancy and a tenancy by the entirety when viewed from the standpoint of local property law. Nevertheless, the Commissioner subsequently acquiesced in this approach.³²

It is apparent that, under the doctrine of *Sullivan* and related cases, the usefulness of section 2035 as a measure to preserve fully the effectiveness of section 2040 and, ultimately, the utility of section 2033, in this respect, is severely limited.³³ A complete solution to this problem may well require a change in the provisions of the Internal Revenue Code. What appears to be at least a partial answer, however, was supplied by the Tenth Circuit in 1961.

III. A PARTIAL ANSWER: THE ALLEN CASE

In *United States v. Allen*³⁴ *A* created an irrevocable trust, retaining three-fifths of the income for life. At age seventy-eight, *A*'s life estate had an actuarial value of 135,000 dollars. However, if *A* had died the life estate would bring 900,000 dollars into her gross estate under section 2036. Apparently realizing her precarious estate tax situation, *A* sold her life estate to *B* for 140,000 dollars, which was more than its fair market value. Valued by actuarial methods, *A*'s interest was worth 135,000 dollars so that, although in contemplation of death, her transfer was for an adequate consideration within the *Sullivan* view of section 2035. However, the Court of Appeals for the Tenth Circuit held that any amount less than 900,000 dollars was not adequate consideration for purposes of section 2035. Thus, 760,000 dollars was included in *A*'s gross estate as a gift in contemplation of death. Significantly, this holding implies that *A*'s "interest" under section 2035 was determined by reference to the "tax interest" concept embodied in section 2036, rather than by reference to the *local property law* concept previously attributed to section 2035.³⁵

Extending this reasoning to the section 2040 setting, it becomes

³² 1957-2 CUM. BULL. 4, *acquiescing in A. Carl Borner*, 25 T.C. 584 (1955); 1956-2 CUM. BULL. 5, and 1956-1 CUM. BULL. 3, *acquiescing in Edward Carnall*, 25 T.C. 654 (1955); 1955-2 CUM. BULL. 4, *acquiescing in Estate of Don Murillo Brockway*, 18 T.C. 488 (1952).

³³ For criticism of the post-*Sullivan* situation, see LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* 78 (2d ed. 1962); Lowndes, *Cutting the "Strings" on Inter Vivos Transfers in Contemplation of Death*, 43 MINN. L. REV. 57, 64, 70 (1958); Wright, *supra* note 25.

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

³⁵ For another illustration of this approach, see *Harris v. United States*, 193 F. Supp. 736 (D. Neb. 1961), where the court reached a "tax interest" result, citing *Sullivan*. Cf. *Phillips v. Gnichtel*, 27 F.2d 662 (3d Cir. 1928); *Heller v. District of Columbia*, 198 F.2d 983 (D.D.C. 1952); *Estate of Thurston*, 36 Cal. 2d 207, 223 P.2d 12 (1950) (*dictum*). *But see Glaser v. United States*, 306 F.2d 57 (7th Cir. 1962).

clear that *Allen* and *Sullivan* take inconsistent positions.³⁶ The *Allen* view would conclude that section 2035 assumes importance when applied to transfers of property which would otherwise be included by sections 2033, 2036, or 2040. If *Allen* is extended to the 2040 setting, the critical test for section 2035 would no longer be the extent of decedent's interest measured by local property law, but rather the extent of decedent's interest measured in terms of the amount by which his gross estate would be depleted for federal estate tax purposes.

The future of the *Allen* "tax interest" theory is still uncertain. The Seventh Circuit refused to apply the *Allen* view in *Glaser v. United States*.³⁷ In *Glaser*, *H* and *W* held property as tenants by the entirety, with the entire contribution coming from *H*. *H* and *W* transferred this property to *S* with a retained life estate. Upon *H*'s death the Government claimed that the total value of the property, less the value of *W*'s life estate, should be included in *H*'s gross estate under section 2036. The court, however, held that only one-half of the value of the property transferred to *S* should be included in *H*'s gross estate, relying on *Sullivan*. The court reasoned that the transfer from *H* and *W* to *S* terminated the tenancy by the entirety; therefore, section 2040 was not applicable. Since under local law *H* owned only one-half of the property, he could transfer only one-half with a retained life estate. Therefore, only one-half of the value of the property could be included in *H*'s gross estate. It must be noted that, although section 2035 was not involved, the phrase "interest . . . of which the decedent has at any time made a transfer" is used in both section 2035 and section 2036. Therefore, *Glaser* is clearly inconsistent with *Allen*.

While *Glaser* casts some doubt on the future of the "tax interest" view, the Commissioner has reacted to *Allen* by withdrawing his previous acquiescence and substituting his non-acquiescence in three Tax Court cases decided on the basis of *Sullivan* in the section 2035/2040 setting.³⁸ Also, the "tax interest" view of *Allen* is consistent with the view advocated by many writers in the field.³⁹ In light of the Commissioner's action, one could conclude that any estate planner who hopes to take advantage of

³⁶ See Comment, 33 ROCKY MT. L. REV. 103 (1960) (written before the Tenth Circuit reversed the lower court in *Allen*).

³⁷ 306 F.2d 57 (7th Cir. 1962).

³⁸ 1962-1 CUM. BULL. 4, *withdrawing acquiescence and substituting non-acquiescence in* A. Carl Borner, 25 T.C. 584 (1955); Edward Carnall, 25 T.C. 654 (1955); Estate of Don Murillo Brockway, 18 T.C. 488 (1952), *aff'd on other grounds*, 219 F.2d 400 (9th Cir. 1954).

³⁹ See materials cited in note 33 *supra*.

Sullivan in the future will be taking the risk of becoming involved in extended litigation.

However, even working on the assumption that *Allen* will be extended to the section 2040 setting in the future, it is clear that there remains at least one barrier to complete harmonization of section 2035 and section 2040. Section 2035 refers only to a transfer made by the decedent. However, when *H* and *W* hold joint property and *W* makes the transfer, this requisite to applicability is not met. Thus, the effectiveness of the *Allen* "tax interest" approach in neutralizing attempts to avoid the reach of section 2040 depends to a substantial degree upon whether the non-contributing tenant can unilaterally sever the tenancy, and, ultimately, a satisfactory resolution of the problems raised by *Allen* can be gained only by an analysis of the incidents of ownership attributable to a tenancy by the entirety and a joint tenancy.

IV. APPLICATION OF ALLEN TO TENANCIES BY THE ENTIRETY

A. Common-Law Incidents of Ownership

At common law a tenancy by the entirety could be created by transferring real property to a husband and wife.⁴⁰ Essentially, the tenancy by the entirety was a joint tenancy modified by the common-law fiction that husband and wife are legally but one person.⁴¹ To create this tenancy, the four "unities" of interest, title, time, and possession were necessary, along with a fifth "unity" of marriage.⁴² In common-law theory each tenant was seised "of the whole interest and not of a share,"⁴³ as opposed to joint tenants who were seised "of a share and of the whole."⁴⁴ The result of this was that the survivorship right of one tenant in a tenancy by the entirety could not be defeated by any unilateral act on the part of the other.⁴⁵

Although the tenancy was held by husband and wife, the common law gave virtually all of the incidents of ownership to the husband.⁴⁶ During the marriage he had the power to manage,

⁴⁰ See MEGARRY & WADE, REAL PROPERTY 408-09 (1957); 4 POWELL, *op. cit. supra* note 21, § 620, at 653; Phipps, *Tenancy by Entireties*, 25 TEMPLE L.Q. 24 (1951).

⁴¹ See MOYNIHAN, REAL PROPERTY 136 (1940); Phipps, *supra* note 40. See also United States v. Jacobs, 306 U.S. 363, 370 (1939).

⁴² See 4 POWELL, *op. cit. supra* note 21, § 620, at 653.

⁴³ MOYNIHAN, *op. cit. supra* note 41, at 136. See also MEGARRY & WADE, *op. cit. supra* note 40, at 408-09.

⁴⁴ *Ibid.*

⁴⁵ See 2 AMERICAN LAW OF PROPERTY § 6.6 (Casner ed. 1952).

⁴⁶ *Ibid.*

control and dispose of income, and the right to total possession of the property.⁴⁷ In case of litigation the husband alone represented the tenants.⁴⁸ In addition, the husband's possessory and survivorship rights were subject to the claims of his creditors.⁴⁹ The wife, on the other hand, had no present possessory right, and her interest was not vulnerable to creditors.⁵⁰

Upon the death of either tenant the total property passed to the survivor, just as in a joint tenancy. Since the survivorship right could not be defeated by either tenant's unilateral action,⁵¹ it followed that neither tenant could convey a fee simple interest in the property unless his co-tenant joined in the conveyance.⁵² Although the husband's interest was subject to his creditors, this did not affect the wife's survivorship right;⁵³ for, if the husband predeceased his wife, the wife owned the property in fee, notwithstanding the fact that her husband's creditor has attached his share.⁵⁴ But if the wife predeceased her husband, his creditor would get the entire fee.⁵⁵ One might conclude that the outstanding characteristic of the tenancy by the entirety at common law was the indestructible nature of the right of survivorship.⁵⁶

B. *The Modern Tenancy by the Entirety*

The tenancy by the entirety still exists in some form in twenty-one states.⁵⁷ Generally, this estate concept has been expanded to include personal property,⁵⁸ and it is generally severed upon divorce.⁵⁹ Aside from these basic changes, state law has evolved into four basic concepts.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² See 4 POWELL, *op. cit. supra* note 21, § 623, at 665.

⁵³ See 2 AMERICAN LAW OF PROPERTY § 6.6 (Casner ed. 1952).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ See *United States v. Jacobs*, 306 U.S. 363, 370 (1939).

⁵⁷ For the most complete discussion of the attitude of the various states, see 2 AMERICAN LAW OF PROPERTY § 6.6 (Casner ed. 1952); 4 POWELL, *op. cit. supra* note 21, § 616; Phipps, *supra* note 40. The various writers have found between nineteen and twenty-one states (not counting Alaska and Hawaii) recognizing a tenancy by the entirety. Since the common-law concepts have been substantially changed, it is difficult to classify a few of the states at all. The Phipps article, which lists nineteen states, would seem to provide the most complete survey. To this list must be added Alaska and Hawaii. See ALASKA COMP. LAWS ANN. § 22-1-6 (1949); HAWAII REV. LAWS § 345-2 (Supp. 1961).

⁵⁸ See Phipps, *supra* note 40, at 43-44.

⁵⁹ See 4 POWELL, *op. cit. supra* note 21, § 623, at 666.

Group A, including a majority of the twenty-one states, has altered the husband's dominant common-law position so that both the husband and wife have an equal right to occupancy, use and profit of the property.⁶⁰ At the same time, the wife's common-law immunity from creditors has been extended to the husband.⁶¹ These states have retained the common-law rule that the tenancy cannot be severed by the unilateral action of either spouse.⁶²

Group B consists of four states⁶³ which have substantially altered the common-law incidents of ownership with the result that either tenant can convey his or her present right to income and contingent right to survivorship.⁶⁴ This modern tenancy by the entirety is often referred to as a "tenancy in common with an indestructible right of survivorship,"⁶⁵ for the tenants can dispose of their present rights as if they had a tenancy in common, but cannot unilaterally affect the other tenant's right of survivorship. Thus, *H* might mortgage his interest to *X*. In case of a foreclosure, *X* and *W* would share the profits from the tenancy but *W* would still retain her right of survivorship.⁶⁶ So, if *W* survives *H*, it is clear that *W* receives the entire estate and *X*'s interest ceases to exist. On the other hand, if *H* survives *W*, then *X* owns the entire estate, with *H* receiving nothing.⁶⁷ The same result would follow if *H* sold his interest to *X* without *W* joining in the transaction.

Group C, consisting of two states,⁶⁸ allows either tenant to convey unilaterally his or her contingent right of survivorship, much like group B. However, the transferee takes no present possessory right in the property, in contrast to group B.⁶⁹ Thus, *W*'s creditor, *X*, can attach *W*'s contingent right of survivorship, but *X* has no present interest in the property. And, if *H* survives *W*,

⁶⁰ See Phipps, *supra* note 40, at 34, 46-57.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Arkansas, New Jersey, New York, and Oregon. See Phipps, *supra* note 40, at 34.

⁶⁴ See, e.g., Pope v. McBride, 207 Ark. 940, 184 S.W.2d 259 (1944); Zanzonico v. Zanzonico, 24 N.J. Misc. 153, 46 A.2d 565 (Sup. Ct. 1946); J. & A. Steinberg Co. v. Pastive, 97 N.J. Eq. 52, 129 Atl. 201 (Ch. 1925); Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895); Lopez v. McQuade, 151 Misc. 390, 273 N.Y. Supp. 34 (Sup. Ct. 1934); Bartkowiak v. Sampson, 73 Misc. 446, 133 N.Y. Supp. 401 (Oneida County Ct. 1911); Ganoe v. Ohmart, 121 Ore. 116, 254 Pac. 203 (1927).

⁶⁵ See, e.g., Zubler v. Porter, 98 N.J.L. 444, 120 Atl. 194 (Ct. Err. & App. 1923); Hiles v. Fisher, *supra* note 64.

⁶⁶ See, e.g., Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895); Bartkowiak v. Sampson, 73 Misc. 446, 133 N.Y. Supp. 401 (Oneida County Ct. 1911); Ganoe v. Ohmart, 121 Ore. 116, 254 Pac. 203 (1927).

⁶⁷ See, e.g., Pope v. McBride, 207 Ark. 940, 184 S.W.2d 259 (1944).

⁶⁸ Kentucky and Tennessee. See Phipps, *supra* note 40, at 35.

⁶⁹ See, e.g., Hoffmann v. Newell, 249 Ky. 270, 60 S.W.2d 607 (1932); Sloan v. Sloan, 182 Tenn. 162, 184 S.W.2d 391 (1945).

then *X*'s interest in the property ceases to exist.⁷⁰ On the other hand, if *W* survives *H*, then *X* receives the total estate.⁷¹

Group D, consisting of three states,⁷² retains the basic common-law incidents of ownership. *H* has the right to complete possession and to the use and income of the property.⁷³ *W* has no present interest.⁷⁴ Following the common-law rules, *W*'s interest is immune from her creditors and she cannot unilaterally convey any interest in the tenancy.⁷⁵ *H*, on the other hand, can transfer his interest unilaterally, and the transferee has an immediate right to possession and use of all the property, with a contingent right of survivorship.⁷⁶ However, *H*'s transfer, as at common law, does not affect *W*'s indestructible contingent right of survivorship.⁷⁷ In one of these states, *H*'s interest is subject to his creditors, as it was at common law.⁷⁸ In the other two states the common law has been changed so that *H*'s interest is immune from creditors.⁷⁹

The remaining states have either done away with the tenancy by the entirety or have altered it so radically that it is the equivalent of a joint tenancy.⁸⁰

C. *Application of Allen to the Modern Tenancy by the Entirety*

Group A requires *H* and *W* to join in any conveyance. Assuming that *H* has made the entire contribution necessary to purchase the property, application of the *Allen* "tax interest" theory would result in a finding that any transfer by *H* and *W* to *S* was made totally by *H* if made in contemplation of *H*'s death, since the total value of the tenancy is the amount by which *H*'s gross estate is depleted. Alternatively, if *H* and *W* sever the tenancy, thus creating a tenancy in common, in contemplation of *H*'s death, the *Allen* approach would again find a total transfer by *H*, for again the decedent's estate is depleted. In these states *W* cannot transfer

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Massachusetts, Michigan, North Carolina. See Phipps, *supra* note 40.

⁷³ See, e.g., *MacNeil v. MacNeil*, 312 Mass. 183, 43 N.E.2d 667 (1942); *Phelps v. Simons*, 159 Mass. 415, 34 N.E. 657 (1893); *Arrand v. Graham*, 297 Mich. 559, 298 N.W. 281 (1941); *Dombrowski v. Gorecke*, 291 Mich. 678, 289 N.W. 293 (1939).

⁷⁴ *Ibid.*

⁷⁵ See, e.g., *Phelps v. Simons*, 159 Mass. 415, 34 N.E. 657 (1893).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ See Phipps, *supra* note 40.

⁷⁹ See, e.g., *Bankers Trust Co. v. Humber*, 264 Mich. 71, 249 N.W. 454 (1933).

⁸⁰ See, e.g., OKLA. STAT. tit. 60, § 74 (1961). The statute provides for the creation of a tenancy by the entirety which has all the incidents of a joint tenancy.

her share unilaterally,⁸¹ so the "transfer-by-the-decedent" requirement of section 2035 would necessarily be fulfilled.

Group B allows either tenant to convey unilaterally his or her present right to income and contingent right of survivorship, although prohibiting either tenant from defeating his co-tenant's right of survivorship. If *H*, in contemplation of his death, transfers his interest to *S*, the *Allen* view would find a section 2035 transfer equal in value to *H*'s section 2040 interest in the property, since this is the amount by which *H*'s estate would otherwise be depleted—*H*'s interest for section 2035 purposes is the same as it would have been for section 2040 purposes had he not made the transfer. If *H* has made the total contribution and joins *W* in a conveyance to *S*, then *H*'s interest is again equal to the total value of the transfer, just as it would be if *H* had made a unilateral conveyance, for *W*'s tax interest is zero. The more troublesome problem arises where *W* unilaterally conveys her present interest and future contingent right of survivorship to *S*. Since there is no transfer by a decedent, the transaction is not within section 2035. However, *H*'s ownership is similar to a joint tenancy with *S*. *H* and *S* share equally in the profits from the property, and *H* still has his contingent right of survivorship. If *H* predeceases *W*, then *S* for the first time has total ownership of the property. This has the practical effect, from *H*'s point of view, of a purchase by *H* and *S* as joint tenants with *H* making the entire contribution, in which case the total value of the property would be included in *H*'s gross estate under section 2040. Thus, the gift from *W* to *S* should be treated as if it were a joint tenancy as to *H*, so that the entire value of *H*'s interest is included in his gross estate under section 2040, without reference to section 2035.

Group C allows either spouse to convey his contingent right of survivorship but does not allow alienation of the present right to possession or profits. If *H* or *H* and *W* transfer the property to *S*, the *Allen* "tax interest" theory would result in *H*'s section 2035 interest being equal to his section 2040 interest. From *H*'s point of view, even if *W* sells her contingent right of survivorship to *S*, a tenancy by the entirety still exists between *H* and *W*, at least in regard to *H*'s interest. *H* and *W* continue in possession of the property, and *H* has a right of survivorship. So, at *H*'s death his interest in the tenancy should be included in his gross estate under section 2040.

⁸¹ See Phipps, *supra* note 40, at 34, 46-57.

Group D allows *H* to transfer the total right to income and possession and his contingent right of survivorship. *W*, however, cannot make any transfer. She has, in substance, an inalienable contingent remainder.⁸² Any conveyance by *H*, or by *H* and *W*, in contemplation of *H*'s death would come within the foregoing analysis of section 2035. Difficulty arises where *W* has made the entire contribution and *H* severs the tenancy in contemplation of *W*'s death by a sale or gift to *S*.⁸³ Since there is no transfer by the decedent (*W*), section 2035 is not applicable. Unlike the situation in the group B states, *W* does not have the substance of a joint tenancy with *S*. *W* has no right to income or possession, but merely a contingent right of survivorship, and thus she has no joint tenancy or tenancy by the entirety and her property falls outside section 2040. It would seem that if *W* predeceased *H* none of this amount would be included in her gross estate even under the *Allen* view of depleting the gross estate. Thus, this very limited situation exemplifies one area where *Allen* would not completely close the gap left by *Sullivan*.

V. APPLICATION OF ALLEN TO JOINT TENANCIES

A. Common-Law Incidents of Ownership

At common law a joint tenancy was an interest in land held by two or more persons (usually not husband and wife), with a right of survivorship.⁸⁴ Like a tenancy by the entirety, the four "unities" of interest, title, time and possession were necessary for its creation.⁸⁵ The important characteristic of the joint tenancy was the right of survivorship, which could not be defeated by the testamentary devise of a single co-tenant.⁸⁶ However, unlike a tenancy by the entirety, this right of survivorship could be defeated by the co-tenant's unilateral conveyance during his lifetime.⁸⁷ When a co-tenant conveys his interest to a third party, the joint tenancy is terminated and a tenancy in common is created

⁸² See note 75 *supra*.

⁸³ This is a very limited occurrence if the reported cases are a valid indicator. Normally *H* makes the contribution and, even if he does not, *W* usually has a greater life expectancy.

⁸⁴ See generally CHESHIRE, *MODERN REAL PROPERTY* 308-10 (8th ed. 1958); MOYNIHAN, *op. cit. supra* note 41, at 129-32; 4 POWELL, *REAL PROPERTY* §§ 615-18 (1954 ed.); Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466 (1954).

⁸⁵ See MOYNIHAN, *op. cit. supra* note 41, at 129; 4 POWELL, *op. cit. supra* note 84, § 615, at 639.

⁸⁶ See *United States v. Jacobs*, 306 U.S. 363, 370 (1939); Swenson & Degnan, *supra* note 84, at 469-70.

⁸⁷ See Swenson & Degnan, *supra* note 84, at 468.

between the third party and the non-transferring tenant.⁸⁸ A corollary of this right of unilateral conveyance was that creditors of either tenant could reach their interests in the tenancy.⁸⁹

Today the joint tenancy still exists in the majority of states with few substantial changes. Joint tenancies usually may include personal property as well as real property. Also, in those states which have abandoned the tenancy by the entirety it is not uncommon to find husband and wife holding property in joint tenancy.⁹⁰

B. *Application of Allen to the Severance of a Joint Tenancy*

Assume that *A* and *B* hold 40,000 dollars worth of property in joint tenancy, *A* having made the entire contribution. If *A* and *B* join in conveying the property to *X*, in contemplation of *A*'s death, the *Allen* "tax interest" theory would operate to include the total value of the property in *A*'s gross estate under section 2035, for this is the amount by which *A*'s probate estate would be depleted by the gift. This is in effect the pre-*Sullivan* Tax Court approach to joint tenancies.⁹¹

If *A* conveys to *X* in contemplation of his own death, there is little difficulty, under the *Allen* theory, in including the entire 40,000 dollars within *A*'s gross estate. Furthermore, when *A* and *B* make reciprocal transfers in contemplation of *A*'s death, thus creating a tenancy in common, the same result is reached, for the *Allen* "tax interest" theory will apply to any transfer to which *A* is a party. However, in the joint tenancy, as opposed to the tenancy by the entirety, it is possible for *B* to sever the tenancy unilaterally.⁹² Since section 2035 requires a transfer by the decedent, this creates a major problem. For instance, *B* might convey his interest to *X* for 20,000 dollars in contemplation of *A*'s death. Since *A* and *X* then hold as tenants in common, the tenancy is thereafter outside the reach of section 2040. Since there is no transfer by the decedent, the conveyance is outside section 2035's scope. The same result is reached when *B* transfers to a straw man

⁸⁸ *Ibid.* See also MOYNIHAN, *op. cit. supra* note 41, at 131.

⁸⁹ See 4 POWELL, *op. cit. supra* note 84, § 618, at 646.

⁹⁰ See *Sullivan's Estate v. Commissioner*, 175 F.2d 657 (9th Cir. 1949); *Harris v. United States*, 193 F. Supp. 736 (D. Neb. 1961); *Estate of Don Murillo Brockway*, 18 T.C. 488 (1952), *aff'd*, 219 F.2d 400 (9th Cir. 1944).

⁹¹ See *Frank K. Sullivan*, 10 T.C. 961 (1948), *rev'd*, 175 F.2d 657 (9th Cir. 1949); *Nathalie Koussevitsky*, 5 T.C. 650 (1945) (dictum). *Cf. Estate of Thurston*, 36 Cal. 2d 207, 223 P.2d 12 (1950) (dictum).

⁹² See *Swenson & Degnan*, *supra* note 84, at 468.

who immediately conveys back to *B*, thus destroying the unity of time and creating a tenancy in common between *A* and *B*.

This type of transaction illustrates that the *Allen* "tax interest" theory is only a partial solution to the problem of providing section 2035 with maximum effectiveness in the section 2040 context. Limiting section 2035 to any interest "of which decedent has at any time made a transfer" clearly does not cover the entire range of possibilities; the language of the provision is intrinsically defective. At the same time, it should be remembered that the "tax interest" theory has supplied an acceptable answer to almost all of the tenancy by the entirety situations, and to a substantial number of the joint tenancy situations. One might argue that the "tax interest" theory is unacceptable because it results in divergent treatment of the two types of interests and is therefore a discriminatory concept. There are, however, at least two replies to this criticism. First, it must be apparent that the post-*Sullivan* view presented an evasion device to the taxpayer, and any improvement on this situation, albeit only partial, is good.⁹³ Second, even under the *Sullivan* view, a correct analysis of the two tenancies requires a divergent treatment. *Sullivan* laid down a rule as to a joint tenancy between *H* and *W* in a situation where it was quite apparent that *W* could alternatively have transferred her interest unilaterally and defeated section 2035. The tenancy by the entirety situation, however, is quite distinct at the local property law level, for *W* generally cannot convey without *H* joining in the transfer, and, therefore, in this situation there would be a conveyance by the decedent. Thus, the reasoning of *Sullivan*, when applied to a tenancy by the entirety, is at least questionable, even without considering the effect of *Allen*.⁹⁴

VI. THE TOTAL ANSWER: STATUTORY REVISION

It must be obvious at this point that even the judicially developed "tax interest" theory has left a gap between sections 2035 and 2040 which only a statutory revision can fill. One might suggest incorporating the standard "contemplation of death" provision into section 2040, much like Congress did in sections 2038 and 2041. This would have the salutary attribute, at least, of

⁹³ For a criticism of the post-*Sullivan* view, see the materials cited in note 33 *supra*.

⁹⁴ See Note, 66 *YALE L.J.* 142 (1956). In terms of local property law, each tenant in a tenancy by the entirety owns the whole of the property. This is an offspring of the common-law fiction that *H* and *W* were one person. Thus, even under *Sullivan*, when *H* and *W* transfer a share to *S*, *H* is transferring a 100% interest.

stabilizing the often equivocal judicial treatment of the tax interest and property law interest views. It would, in effect, be a codification of *Allen*. However, as was previously pointed out, such an amendment would supply only a partial answer, since transfers made other than by the decedent would remain beyond the reach of the statute.

A complete solution might be effected by changing the language of the "contemplation of death" provision, presently section 2035, to read as follows:

"The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent *or his co-tenant, in a joint tenancy or a tenancy by the entirety*, has at any time made a transfer . . . by trust, or otherwise, in contemplation of *the decedent's death*."

By adding this revised "contemplation of death" provision to section 2040, the following results might be obtained. First, the gap left by *Allen* in situations where the decedent's co-tenant makes the transfer in contemplation of the decedent's death would be closed. Certainly this would implement the underlying purpose of the "contemplation of death" provision, which is "to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax."⁹⁵ Second, it would accord equal treatment to both the joint tenancy and the tenancy by the entirety.

One note of caution is necessary as to the scope of this proposed amendment. It would apply only to "contemplation of death" situations, *i.e.*, testamentary type transfers. Even more importantly, it would have a significant impact only where one co-tenant has contributed a disproportionate amount of consideration for the tenancy and the other is acting unilaterally to reduce his co-tenant's gross estate.⁹⁶ In fact, a tenant who feels his co-tenant is near death stands to gain from the death because of the right of survivorship. Thus, the tenant in an arm's-length setting, with no financial interest in helping his co-tenant avoid estate tax, would in no way be affected by this amendment. As a practical matter, only testamentary transfers in family situations would be included within this suggested revised provision.

Fredric L. Smith, S.Ed.

⁹⁵ *United States v. Wells*, 283 U.S. 102 (1931). See *Milliken v. United States*, 283 U.S. 15 (1931), where the Court stated: "Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes made before, but in contemplation of, death." *Id.* at 23.

⁹⁶ *Cf. Philips v. Gnichtel*, 27 F.2d 662, 664 (3d Cir. 1928).