FEDERAL ESTATE AND GIFT TAXATION

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THE year 1958 was one of rather intense activity so far as the federal estate and gift taxes are concerned, and yet, when viewed in long range perspective, doubts may arise about the actual significance of many of these developments. The truth may well be that the federal estate and gift taxes are not in the best of health, but their ills are apt to be increased rather than diminished by the remedies now applied, often, one suspects, with full knowledge on the part of the doctors of the ultimate unfortunate effects of their prescriptions upon the patient.

I

LEGISLATION

Legislatively, the outstanding event was that Congress enacted the Technical Amendments Act of 1958,¹ which however many loopholes it may have closed in the income tax, is chiefly a relief measure so far as the estate and gift taxes are involved. A rather ill-considered section in the original House version² of the Act which half-heartedly attempted to restore partially the premium payment test for taxation of life insurance proceeds on decedent's life payable to beneficiaries other than his estate, was eliminated from the final version of the Act. Whatever the merits or defects of the premium payment test, the provision in the original House bill had little to recommend it.³

Perhaps the most important provision⁴ of the Act concerns postponement of payment of the estate tax on a small business which is part of a decedent's estate. Under this new section 6166 of the Code, the executor may elect (not later than the prescribed time for filing the estate tax return or any extensions thereof⁵) to pay all or any

¹ 72 Stat. 1606. This Article was written with an editorial deadline of November 15, 1958.
⁵ 15 months after decedent's death. Int. Rev. Code of 1954, § 6075(a). For extensions, see Int. Rev. Code of 1954, § 6081(a). If the due date of the return is before September 3, 1958, the election applies only to a deficiency assessed after September 2, 1958, and the election must be made no later than 60 days after issuance of notice and demand for payment of the deficiency.
part of the tax (including a deficiency) attributable to the inclusion of the value of decedent's interest in a closely held business in not more than 10 nor less than 2 equal annual installments, the first being due at the usual time prescribed for payment of the tax. This provision applies only to estates of United States citizens or residents dying after August 16, 1954. Interest at the rate of 4 per cent per annum is payable annually upon the deferred unpaid amounts of the tax.

A closely held business is defined as: (1) an interest as a proprietor in a trade or business carried on as a proprietorship; (2) a partnership interest in a trade or business if the firm had no more than 10 partners or if 20 per cent or more of the total capital interest of the firm is included in decedent's gross estate; or (3) stock in a corporation carrying on a trade or business if the corporation had no more than 10 shareholders or if 20 per cent or more in value of the voting stock of the company is included in decedent's gross estate. Determinations are made as of the time immediately preceding decedent's death.

The election is not permitted unless the value of the interest of the closely held business included in decedent's gross estate exceeds either 35 per cent of the value of his total gross estate, or 50 per cent of the value of his taxable estate (based upon federal estate tax values). The maximum amount of tax deferable is that percentage of the total estate tax (reduced by credits) which is the same as the ratio of the value of the interest in the closely held business to the value of the entire gross estate. If more than 50 per cent of the total value of each of two or more closely held businesses is included in decedent's gross estate, they are treated as an interest in a single business. For this purpose and also in order to determine the proportion of the tax which is deferable and whether withdrawals have been made from the business which terminate the option to defer the tax, an interest in a closely held business which represents the surviving spouse's interest in property held by decedent and such spouse as community property is considered included in determining the value of decedent's gross estate.

There are also provisions making the entire amount of the unpaid tax due immediately if: (1) aggregate withdrawals of money or other property from the closely held business equal or exceed 50 per cent

of its value, or (2) 50 per cent or more of its value is distributed, sold, exchanged, or otherwise disposed of, except for (a) distributions in redemption of stock under section 303, provided an amount of the tax equal to the distribution is promptly paid, (b) certain stock exchanges under sections 355 and 368, and (c) transfers by the executor to legatees, heirs, or distributees. There is also a provision requiring accelerated payment under certain conditions where the estate has undistributed net income.

Four minor amendments described in last year’s Annual Survey were enacted in the 1958 Act. An additional amendment granting the privileges of sections 2039(c) and 2517(b) of the 1954 Code to certain retirement annuity contracts purchased by tax-exempt organizations for employees under nonqualified plans was also enacted.

Section 43(a) of the Technical Amendments Act of 1958 amends section 1015 of the 1954 Code to allow the donee to increase his basis for donated property by the amount of the gift tax paid on the gift, provided that in no case may the basis exceed the fair market value of the property at the time of the gift. The amendment applies to property acquired by gift on and after September 2, 1958, and to property so acquired before then but not disposed of until after that date.

Section 93 of the Act also amends the 1939 Code retroactively to April 1, 1948 to allow a marital deduction in the case of the life estate power of appointment exception to the terminable interest rule even if there is no trust, and even if the surviving spouse does not have the right to the entire income or a power over the entire property. Refunds, without interest, are allowed if the claim therefor is filed not later than September 2, 1959.

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7 Technical Amendments Act of 1958, §§ 65-68, U.S. Code Cong. & Ad. News 6620-24, 85th Cong., 2d Sess. (1958) [§§ 53-55, 57 of the original House bill, H.R. 8381, 85th Cong., 1st Sess. (1957)], described in 33 N.Y.U.L. Rev. 113-14 nn.8-9, in 1957 Ann. Survey Am. L. 161-62 nn.8-9 (1958). As finally enacted, § 68 of the Act (§ 57 of H.R. 8381), which adds § 2517 to the 1954 Code (exempting from the gift tax an irrevocable election by an employee to have benefits to which he has an unqualified right paid a survivor under qualified pension plans, so far as the employer's contributions are concerned), specifically states its enactment is without prejudice to the determination of the gift taxability of elections by employees under annuity plans if made prior to 1955, the effective date of this section.


9 The donee’s basis in the case of gain is the same as the donor’s adjusted basis at the time of the gift; in the case of a loss, his basis is either that of the donor or the fair market value at the time of the gift, whichever is lower. Int. Rev. Code of 1954, § 1015.

10 Thus the rule becomes the same under the 1939 Code as under Int. Rev. Code
Section 102 of the Act partially removes an anomaly by adding section 2208 to the 1954 Code stating that a United States citizen who is at death a resident of a United States possession is considered a United States citizen for estate tax purposes unless he acquired his citizenship solely because of being a citizen of the possession, or by birth or residence in the possession. A similar provision applies to the gift tax as well. Also, credit or deduction is now denied under sections 2011(a) and 2053(d)(1) for death taxes of United States possessions, which are treated as foreign countries under section 2014. This partially overrules decisions holding that United States citizens who were residents and citizens of Puerto Rico and the Virgin Islands were exempt from the federal estate tax.

II

REGULATIONS

A major development of 1958 was the release of the final estate and gift tax regulations for the 1954 Code. The fact that it took approximately four years after enactment of the Code, and almost two years after release of the proposed regulations, to obtain the final regulations speaks eloquently for itself.

Since the proposed estate and gift tax regulations have been thoroughly discussed in the Annual Survey and elsewhere, attention here will be directed mainly to the differences between the proposed and final regulations. In general, one may say that the differences are mainly ones of omission—by and large parts of the proposed regulations which ventured into controversial areas to assert tax liability have been omitted in the final regulations. The significance of such omissions remains to be seen.

Thus the proposed estate tax regulations specified that a transfer

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13 See Lowndes, Summary and Analysis of Final Estate Tax Regulations, 97 Trusts & Estates 708, 787 (1958); Rodman, New Estate Tax Regulations on Estates of Nonresidents Not Citizens, id. 712.
14 The Code was approved August 16, 1954. The proposed estate tax regulations were filed on Oct. 15, 1956; the final regulations on June 23, 1958. The proposed gift tax regulations were filed Jan. 2, 1957; the final regulations on Nov. 14, 1958.
of property which (or the income from which) was to be used to support a dependent whom the decedent was legally obligated to support was not one for an adequate consideration under the estate tax unless (1) under local law it operated to discharge completely the decedent’s obligation (the proposed regulations asserted that decedent’s obligation was merely discharged pro tanto by each support payment, and not by the original transfer, so a transfer in trust to support a dependent would be taxable under section 2036 if the trust and the dependency relationship existed when decedent died), or (2) it was made pursuant to a court decree (or approved by or incorporated in the decree) in a divorce, annulment or separate maintenance proceeding. Even if made pursuant to such a court decree, it was taxable to the extent it involved payments to children beyond the time when decedent’s obligation to support them would have ended (had he lived) except for the decree. Similarly, a claim against the estate was not deductible under section 2053 because of lack of adequate consideration if based upon an agreement to support a dependent after decedent’s death unless embodied in such a court decree.7

All these provisions are omitted in the final estate tax regulations.18

There was also a provision in the proposed gift tax regulations that a transfer of property which (or the income from which) was to be used in the future to discharge a donor’s obligation to support a dependent was not one for adequate consideration unless by local law the transfer completely discharged the donor’s obligation. The final regulations omit this statement.20 Moreover, the final gift tax regulations omit a provision in the proposed regulations that current expenditures to satisfy an obligation to support a spouse or minor child are not taxable gifts. It is difficult to believe that this omission indicates a belief of the Treasury that such expenditures would normally be taxable gifts.23 Finally, the proposed gift tax regulations provided that a transfer in settlement of a spouse’s property rights arising out of marriage was not taxable if it either (1) fell within the scope of section 2516 of the 1954 Code by being made pursuant to a written agreement between the spouses entered into within two years prior to a final divorce decree; or (2) did not fall

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within the scope of section 2516 but was effected by a court decree, either because (a) the agreement was conditioned upon entry of a divorce decree and was incorporated therein, or (b) the transfer was made solely pursuant to a divorce, separation, or annulment decree, with no prior out-of-court agreement between the spouses. The final regulations omit this provision.\textsuperscript{25} Does this indicate that the Treasury contends that section 2516 impliedly repudiates the doctrine of the \textit{Harris}\textsuperscript{26} case so that any transfer not within the exact pattern of section 2516 is taxable? This construction seems harsh and unwarranted.\textsuperscript{27}

The proposed estate tax regulations\textsuperscript{28} contained rather obscure and puzzling provisions regarding the taxation of the proceeds of insurance on decedent's life used to fund agreements for the purchase of partnership or corporate interests from his estate. The final regulations\textsuperscript{29} omit these entirely. The proposed estate tax regulations\textsuperscript{30} also dealt at some length in a not too satisfactory manner with the valuation of such interests subject to restrictive purchase agreements. They specified that "ordinarily, no effect" was given in valuing the interest to the agreement if decedent was free to dispose of it at any price while alive. The final regulations\textsuperscript{31} provide that "little weight" is given to such an arrangement; perhaps this infers that it may depress the value to some extent. The proposed estate tax regulations,\textsuperscript{32} contrary to several court decisions,\textsuperscript{33} asserted that an agreement "amounting only to a right of first refusal during the decedent's life" was considered to leave decedent free to dispose of the securities while alive. The final regulations\textsuperscript{34} omit this statement. The proposed estate tax regulations\textsuperscript{35} also stated that the agreement, even if effective during decedent's life, did not control valuation unless full and adequate consideration was given for the contract or option when

\textsuperscript{25} Treas. Reg. § 25.2516-1(a) (1958).
\textsuperscript{26} Harris v. Commissioner, 340 U.S. 106 (1950).
\textsuperscript{27} Cf. Lowndes & Kramer, op. cit. supra note 23, at 322-23, 746-47.
\textsuperscript{29} Treas. Reg. § 20.2042-1(c) (1958).
\textsuperscript{34} Treas. Reg. § 20.2031-2(h) (1958).
originally made. There was a presumption in favor of such consideration except where there was an arrangement with the natural objects of his bounty. The final regulations,\(^3\) no doubt wisely, do not attempt to spell out the matter but simply assert that the price in the restrictive agreement is disregarded in valuation unless the circumstances reveal a "bona fide business arrangement" and not a device to pass the business interest to a natural object of decedent's bounty for inadequate consideration.

The proposed estate tax regulations,\(^7\) following judicial decisions,\(^8\) provided that when a joint tenant or tenant by the entirety transferred his interest in the jointly-owned property and severed the tenancy in contemplation of death, only the transferor's fractional share of the property (not the part proportionate to his contribution to its acquisition, which would have been taxed to his estate in the absence of the transfer in contemplation of death) is taxed to his estate. The final regulations\(^9\) omit this provision, no doubt because, however equitable the result may be in the case of jointly owned property, the possibilities for tax avoidance are large if the same principle is applied, as logic would require, to other inter vivos transfers in contemplation of death. Thus, in the case of the release in contemplation of death of a reserved life estate, a reversionary interest, or incidents of ownership in life insurance, the final regulations expressly state that not merely the value of the string which is relinquished, but the value of all the property taxable but for the transfer of the string, is taxable.\(^4\) Here, unlike powers to alter or amend or powers of appointment,\(^4\) there is no express provision in the Code requiring taxation not merely of the "string" transferred in contemplation of death but of the entire property otherwise taxable if the "string" is not cut before death. It remains to be seen whether in the case of such a transfer only the value of the transferred string or interest—the reversion, life estate, etc.—is taxable because only that interest is transferred in contemplation of death, or whether the


\(^4\) Int. Rev. Code of 1954, §§ 2038(a), 2041(a)(1)(B), (2).
situation is to be viewed as if the transfer in contemplation of death was of no effect so that the entire value of all the property subject to the string is still taxable.

The proposed and final estate tax regulations specify that if \( A \) gives \( B \) outright $50,000 in stock which \( B \) sells, using the proceeds to purchase bonds in his and \( A \)'s names as joint tenants, the full value of the bonds is taxed to \( A \)'s estate if he predeceases \( B \). If \( B \), however, after collecting $500 in dividends, sold the stock for a capital gain of $1,000 and invested the proceeds and the dividends in bonds, the proposed and final regulations include the value of the bonds in \( A \)'s estate if he predeceased \( B \), but apparently deduct therefrom the proportionate amount for the $500 of interest as an independent contribution by \( B \). The proposed regulations refuse to allow any proportionate deduction for the $1,000 of capital gain realized by \( B \) as \( B \)'s independent contribution, but the final regulations omit this provision and appear to allow realized (but not unrealized) capital gain as an independent contribution by \( B \). They appear to state that any income (which would seem to include realized capital gains) earned by the donated property after the gift by \( A \) is regarded as \( B \)'s independent contribution (the example in the final regulations may possibly mean only that income attributable to \( B \)'s original contribution, if any, to the acquisition of the property, is excluded), and so it is not taxed to \( A \).

The final gift tax regulations point out that when \( A \) creates a joint bank account for himself and \( B \), and \( B \) makes withdrawals for his (\( B \)'s) benefit, there is a gift only "to the extent of the amount drawn without any obligation to account for a part of the proceeds to \( A \)." The same principle applies to United States savings bonds payable to \( A \) and \( B \). The proposed regulations omitted the quoted language.

The final gift tax regulations contain several changes in regard to section 2515. This section provides that there is no tax upon the creation of a tenancy by the entirety or joint tenancy between spouses in real property, unless the donor spouse elects to the contrary. Under section 2515(b) there is a tax upon the termination of such a tenancy, other than by a tenant's death, if one spouse receives a larger propor-

\[47\] Treas. Reg. § 20.2040-1(a) (2), -1(c) (4), -1(c) (5) (1958).
\[48\] In Harvey v. United States, 185 F.2d 463 (7th Cir. 1950), the court included unrealized capital gain, but excluded all income and realized capital gain, in this situation.
tion of the proceeds of the property than the proportionate amount of the consideration furnished by that spouse for the acquisition of the property. When the property is sold or disposed of, there is ordinarily a termination of the tenancy, except where the property received in exchange is held in an identical tenancy or the proceeds are reinvested within a reasonable time in property held in an identical tenancy. The final regulations, unlike the proposed ones, further provide that if the proceeds upon termination of a tenancy are applied to the purchase or construction of improvements which constitute real property and are made to other real property held in an identical tenancy to that of the property disposed of, the proceeds are deemed to be used for the purchase of the other real property and so are not subject to a gift tax at that time. In addition, the final regulations, unlike the proposed ones, state that any increase in indebtedness on a tenancy is a termination of it to the extent of the increase, unless the increase is offset by additions to the tenancy within a reasonable time after the increase. These additions, to the extent of the increase in the debt, are not treated as contributions by the spouses.

Finally, in measuring the proportion of consideration contributed by each spouse, both the final and proposed regulations state that any readily measurable general appreciation in the value of the jointly owned property between two successive contribution dates is considered additional consideration furnished by the spouse who furnished the prior consideration, provided the appreciation can be determined with reasonable certainty to be allocable to any particular previously furnished consideration. The final regulations, unlike the proposed ones, provide that this same rule applies to a general depreciation in value. Thus, suppose \( H \) and \( W \) in 1955 purchase for $15,000 real property as joint tenants, \( H \) paying $10,000 and \( W \) $5,000. In 1960, when the fair market value of the land is $21,000, \( W \) makes improvements thereto of $5000. The property is then sold for $26,000. The $6,000 appreciation results in an additional contribution by \( H \) of $4,000 (10,000/15,000 \times 6,000), and by \( W \) of $2,000 (5,000/15,000 \times 6,000). \( H \)'s total contribution is $14,000 (10,000 + 4,000) and \( W \)'s is $12,000 (5,000 + 2,000 + 5,000).

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The final estate tax regulations\(^{59}\) state that a reversionary interest and the necessary survivorship provisions do not make a transfer taxable under section 2037 if possession or enjoyment of the property can be obtained by a beneficiary during decedent's life through the exercise of a general power of appointment (as defined in section 2041) exercisable immediately before decedent's death. Does this imply the transfer is taxable if the beneficiary had a nontaxable power? If so, questions may be raised.\(^{60}\)

There are four important changes in regard to powers of appointment. The final estate tax regulations\(^{61}\) omit a provision of the proposed regulations\(^{62}\) that a power exists at the date of death even if decedent then and at all times since the power's creation lacked physical, mental or legal capacity to exercise the power. This raises the perplexing question of whether such a power, if not taxable under section 2041, will qualify a life estate power of appointment interest in a surviving spouse for the marital deduction under the exceptions to the terminable interest rule of section 2056(b)(5).\(^{63}\) The proposed gift and estate tax regulations\(^{64}\) contained a surprising statement that a nontaxable power to invade property for the donee's support or maintenance, while "not limited to the bare necessities of life" and including "other reasonable living expenses," did not necessarily extend to "all expenditures that might be considered customary in the decedent's position in life." This language indicated that a power of invasion to maintain the donee in his accustomed standard of living might be taxable if he usually lived on a lavish scale. The final gift and estate tax regulations\(^{65}\) remove this uncertainty by stating only that support and maintenance are not limited to bare necessities, and by giving as an example of a nontaxable power one exercisable by the donee to provide "support in his accustomed manner of living." Third, the proposed gift and estate tax regulations\(^{66}\) expressly asserted that a disclaimer of a power over a portion only of the property subject to the power, was a release, and therefore taxable, instead of


\(^{60}\) See Lowndes, op. cit. supra note 13, at 760; Lowndes & Kramer, op. cit. supra note 23, at 127-28.

\(^{61}\) Treas. Reg. § 20.2041-3(b) (1958).


\(^{63}\) See Lowndes & Kramer, op. cit. supra note 23, at 257, 413 n.47, 415 n.56. If the power is not taxable, the property subject to it will not be included in the gross estate of the surviving spouse. Could there be a marital deduction for it from the estate of the prior deceased spouse?


a nontaxable disclaimer or renunciation. The final gift and estate tax regulations more leniently provide that such a partial disclaimer may be nontaxable if there is a complete and unqualified refusal to accept the rights compatible with all the facts and circumstances of the particular case, and if the partial disclaimer is effective under local law. The final gift and estate tax regulations, unlike the proposed ones, give specific examples concerning the time of creation of a power in an inter vivos instrument executed before October 22, 1942. The examples illustrate that, as stated in the proposed regulations, the power is considered a post-1942 one if the instrument creating it was revocable by the settlor until after October 21, 1942; on the other hand, a power is considered a pre-1942 one if the holder acquired it after October 21, 1942 by reason of appointment as a successor trustee by the original trustee (who was not the settlor), the original trustee having no right to create the power (if the donee receives the power as a new power created after October 21, 1942 by the original trustee, the power is a post-1942 one). The examples also illustrate that contrary to a statement in the proposed regulations, a power acquired by the holder after October 21, 1942, as a result of the mere failure of another person to exercise a power, is not a post-1942 power.

There are extensive differences between the proposed and final estate tax regulations so far as treatment of section 2039 is concerned. Four points deserve mention here. First, the proposed regulations limited the exclusion from estate taxation granted by section 2039(c) for employer contributions to survivorship annuities which are part of a qualified pension, stock bonus, or profit sharing plan, to amounts which would, "if it were not for section 2039(c), be includible in the decedent's gross estate under section 2039(a) and (b)." The final regulations omit this limitation and seem more in accord with the statutory language which provides for the exclusion "notwithstanding the provisions of this section or of any provision of law." Thus, bene-

68 Treas. Reg. §§ 20.2041-1(e), 25.2514-1(e) (1958). For a decision that a trust created before 1942 but revocable by the settlor until 1946, which gave decedent settlor a general power of appointment resulted in a pre-1942 power, nontaxable because not exercised, see Merchants Nat'l Bank v. United States, 156 F. Supp. 827 (S.D. Ala. 1957). This is contrary to both the final and proposed regulations.
fits in the nature of insurance, contrary to an express statement in the proposed regulations,\(^72\) seem covered by the exclusion under section 2039(c), as indicated by an express statement in the final regulations.\(^73\) Second, an example added by the final regulations\(^74\) makes it clear that if an employee has "constructively received" all amounts due him under a qualified pension plan, then the exclusion granted by section 2039(c) does not apply because the surviving beneficiary receives the designated amount from the deceased employee directly and not as a beneficiary under a pension plan. So if a deceased employee before death and at retirement selected an option which left all amounts due him under a pension plan with a trustee, with interest to be paid to the employee during his life and principal to be paid to the beneficiary at his death, but with the employee retaining the privilege of withdrawing all principal at any time before death, the employee has constructively received all amounts due under the pension plan, and the exclusion of section 2039(c) does not apply to any amounts paid the beneficiary at his death, even if the deceased had withdrawn none of the principal. Third, the final regulations\(^75\) state that the decedent has an enforceable right to receive future annuity payments at death "so long as he had complied with his obligations under the contract or agreement up to the time of his death." The mere fact the employee would forfeit his rights if he severed his employment does not matter under the final regulations if he, in fact, was employed at the time of his death.\(^76\) Fourth, an example added by the final regulations\(^77\) makes it clear that a single lump sum payment to a beneficiary may qualify for the exclusion granted by section 2039(c), provided decedent at his death had an enforceable right to future payments for himself (as, for example, when he had not yet retired), or was then receiving annuity payments. The right to a future payment possessed by decedent may be a right to a lump sum payment only, so far as section 2039 is concerned.\(^78\)

\(^{73}\) Treas. Reg. § 20.2039-2(b) (example 3) (1958).
\(^{74}\) Treas. Reg. § 20.2039-2(b) (example 4) (1958).
\(^{77}\) Treas. Reg. § 20.2039-2(b) (example 2) (1958).
\(^{78}\) Treas. Reg. §§ 20.2039-1(b)(2) (example 5), -2(b) (example 2) (1958).
The final gift tax regulations\textsuperscript{79} contain a brief reference only to the effect of section 2517, under which transfers of survivor annuities in connection with qualified pension and profit sharing plans, which are exempt under the estate tax, are also exempted from the gift tax. Curiously enough, this reference is to "section 2517 and the regulations thereunder," although there do not seem to be any regulations under section 2517, or, at least, if there are, they are not included in the final gift tax regulations.

In dealing with valuation problems, the final estate tax regulations increase from $50 to $100 the maximum value of furnishings for a room which need not be listed separately.\textsuperscript{80} Similarly, the maximum value for jewelry, art objects, and other chattels not requiring expert appraisal is raised from $2,000 to $3,000.\textsuperscript{81}

Both the final\textsuperscript{82} and proposed\textsuperscript{83} estate tax regulations require dividends on corporate stock to be listed separately as part of the deceased shareholder's estate, if the dividends were accrued but unpaid at the date of death. Both also specify that the stockholder record date is when dividends accrue. In fact, the language of the final regulations\textsuperscript{84} for the first time eliminates possible ambiguity on this point which the language of the proposed regulations contained (the language of the proposed regulations\textsuperscript{85} could be construed to specify the declaration date instead of the record date as the time of accrual). This means that if a shareholder dies after the record date but before the dividend is paid, it is listed separately. If he dies before the record date but after the declaration date, the dividend's value is reflected in the market price of the stock, unless the stock is quoted ex dividend on the day of death. Here the dividend will escape tax unless listed separately or added to the market price of the stock. The final regulations,\textsuperscript{86} following a Tax Court decision,\textsuperscript{87} assert that under these circumstances the value of the stock is not the ex dividend price but rather the ex dividend price plus the amount of the dividend. How this principle can be applied if the alternate valuation date is elected is not clear.\textsuperscript{88}

The proposed estate tax regulations\textsuperscript{89} seemed to state that if the

\textsuperscript{80} Treas. Reg. § 20.2031-6(a) (1958).
\textsuperscript{81} Treas. Reg. § 20.2031-6(b) (1958).
\textsuperscript{84} Treas. Reg. § 20.2033-1(b) (1958).
\textsuperscript{87} George McNaught Lockie, 21 T.C. 64 (1953).
\textsuperscript{88} See Lowndes & Kramer, op. cit. supra note 23, at 35-38, 466-68.
alternative valuation date was chosen, all stock dividends declared within a year of decedent’s death on securities included in his gross estate were taxable. The final regulations,\textsuperscript{60} perhaps in deference to a court decision excluding stock dividends declared after a transfer of securities by decedent in contemplation of death but before the date of death,\textsuperscript{91} state that such stock dividends are included in the gross estate only if they represent earnings and profits accumulated prior to the date of death, where decedent owned a substantial interest in the corporation.

The final estate tax regulations\textsuperscript{62} also refer expressly to “the degree of control of the business represented by the block of stock to be valued,” as one of the relevant factors to be considered in valuing securities where actual sale or bid and asked prices are lacking.

The final estate tax regulations\textsuperscript{63} omit the paragraphs of the proposed regulations\textsuperscript{94} which specifically dealt with the valuation of property included in the gross estate under sections 2036, 2037 and 2038, excluding therefrom the value of improvements or additions to the property made by the transferee before decedent’s death. A similar exclusion in the valuation of property transferred in contemplation of death (in addition to the exclusion of income from the property) was retained in the final regulations.\textsuperscript{95} What inferences can be drawn from this as to the Treasury’s attitude toward these perplexing questions\textsuperscript{96} is far from clear.

The final estate and gift tax regulations,\textsuperscript{97} like the proposed ones,\textsuperscript{98} recognize blockage in valuation, but also state that “complete

\textsuperscript{60}Treas. Reg. § 20.2032-1(d)(4) (1958).
\textsuperscript{64}Proposed Treas. Reg. §§ 20.2036-1(c), 2037-1(c), 2038-1(c), 21 Fed. Reg. 7875, 7874, 7876 (1956).
\textsuperscript{66}See Lowndes & Kramer, op. cit. supra note 23, at 468-74.
data in support of any allowance claimed due to the size of the block of stock being valued shall be submitted."

The final estate tax regulations, in spite of a contrary decision of the Tax Court, reaffirm (with an added example) the position of the proposed regulations that a widow's allowance during administration of an estate is an interest passing from the decedent and may qualify for the marital deduction if it is not a terminable interest. The final estate tax regulations also emphasize the disallowance of a marital deduction in several recent court decisions where the widow was given a life interest with a power to consume or invade the principal, but not to dispose of it by will. The final gift and estate tax regulations assert, as did the decisions, that this type of power is not one exercisable in all events, and, therefore, it is not eligible for the marital deduction under the life estate power of appointment exception to the terminable interest rule. Frequently local law will impose restrictions despite the broad language of decedent's will. The final gift and estate tax regulations further state that the donee or surviving "spouse must have the unrestricted power exercisable at any time during her life to use all or any part of the property subject to the power, and to dispose of it in any manner, including the power to dispose of it by gift (whether or not she has power to dispose of it by will)."

The final estate tax regulations on the credit for prior transfers omit the clause in the proposed regulations that if the interest received by decedent from the transferor could not be valued by actuarial principles, it was considered to have no value. It is not clear if this means the Treasury will allow a credit for a contingent interest.

In the case of gifts to third persons by one spouse, the final regulations provide that the election to split the gift with the other

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100 Proctor D. Rensenhouse, 27 T.C. 107 (1955), remanded, 252 F.2d 566 (6th Cir. 1958) (Government abandoned ground on which Tax Court decided case).
spouse where both file returns may be signified either (1) by both spouses on one return; (2) by each spouse on his or her return only; or (3) by each spouse on the other's return. The proposed regulations\textsuperscript{107} did not recognize the second category.

The final gift tax regulations,\textsuperscript{108} unlike the proposed ones,\textsuperscript{109} no longer require the filing of information returns by donees, trustees, or trust beneficiaries.

The determination of whether a settlor has made a taxable gift when he has reserved powers over the donated property exercisable only with the consent of other persons, or has conferred such powers only upon persons other than himself, depends upon whether the holders (other than the settlor) of the powers have a substantial adverse interest in the disposition of the property or its income.\textsuperscript{110}

The significance to be attached to the fact that the holders of the powers may be close relatives of the settlor is not clear, since the courts have expressed varying views on this problem.\textsuperscript{111} The proposed gift tax regulations\textsuperscript{112} contained the puzzling assertion: "Nor is a person considered as having an adverse interest in the property or income solely by reason of his standing as a spouse or relative of the donor." Unless the word "donor" is a misprint for "donee," it is hard to understand why a relationship to the donor would give the power holder an interest adverse to the donor; the usual feeling is that such a relationship only weakens an otherwise substantial adverse interest. The final regulations\textsuperscript{113} wisely omit this sentence.

In many instances the determination of whether a taxable gift has been made by a donor depends upon whether a reserved power or a power conferred on a third person is a fiduciary one, the exercise or nonexercise of which is limited by a standard.\textsuperscript{114} This is true when a trustee having a beneficial interest in the trust transfers the property to another, or where the donor reserves power to name new beneficiaries or change the interests of the beneficiaries as between themselves, or where the donor transfers property to himself as trustee and retains only a power to change the beneficiaries, or where the trustee has a discretionary power to pay the settlor income. The proposed gift tax regulations\textsuperscript{115} stipulated that the standard must be

\textsuperscript{110} Lowndes & Kramer, op. cit. supra note 23, at 694-98.
\textsuperscript{111} Id. at 703-04.
\textsuperscript{113} Treas. Reg. § 25.2511-2(e) (1958).
\textsuperscript{114} Lowndes & Kramer, op. cit. supra note 23, at 707-08, 710-13.
limited by a "reasonably fixed or readily ascertainable standard which is set forth in the trust instrument." The final regulations\textsuperscript{116} require an "ascertainable," not "a readily ascertainable" standard, in these situations—perhaps a more lenient test.

Transfers by a corporation are treated as gifts by the stockholders to the donees. If one of the stockholders is also a donee, the proposed regulations\textsuperscript{117} stated there was a gift to him by the other shareholders to the extent there was not a distribution of earnings or liquidation to which he was entitled as a stockholder. The final regulations\textsuperscript{118} more simply state that there is a gift to the donee shareholder only to the extent that what he receives exceeds his own interest in this amount as a shareholder.

The question of the gift tax treatment of refusals by heirs or legatees to accept legacies or property from a decedent has proved a troublesome one. The proposed regulations\textsuperscript{119} following the distinction made by several courts,\textsuperscript{120} stated that a "renunciation of a vested property interest," where title immediately vested under local law in the devisee or heir at decedent's death, was a taxable gift. Renunciation where title did not immediately vest under local law was not a gift if all the property was renounced within a reasonable time. The final regulations\textsuperscript{121} avoid the use of the terms "devisee," "renunciation," or "vesting." Instead they state there is no gift if by local law the beneficiary or heir or next-of-kin may completely and unqualifiedly refuse to accept ownership of the property, and does so. Whether the transfer is effected by will or intestacy is immaterial. There is a gift only if local law does not permit such a refusal, or does not allow the beneficiary or heir to prevent himself from becoming owner of the property. Moreover, the final regulations, as in the case of a disclaimer or renunciation of a power of appointment, recognize that the refusal may be valid and prevent a taxable gift even if it applies only to a part of the property, depending upon the effect of such a refusal under local law. The test of the final regulations seems more satisfactory and not so strictly confined to technical concepts of property law as that of the proposed regulations.

The final regulations\textsuperscript{122} omit a statement in the proposed regula-

\textsuperscript{116} Treas. Reg. §§ 25.2511-1(g)(2), -2(b), (c), (g) (1958).
\textsuperscript{120} Lowndes & Kramer, op. cit. supra note 23, at 682-83.
\textsuperscript{121} Treas. Reg. § 25.2511-1(c) (1958).
\textsuperscript{122} Treas. Reg. § 25.2503-3(b) (1958).
tions\textsuperscript{123} that an exclusion will not be allowed for a gift of an interest which does not commence immediately or whose value cannot be ascertained by accepted actuarial methods. Does this omission indicate that an exclusion may be allowed in such cases?

The final regulations contain two important changes in regard to section 2503(c). This section allows an exclusion for a gift to a minor where the property and income may be expended by or for his benefit during minority (before 21), with the unexpended portion passing to him at 21, provided that if the donee dies during minority, the undisposed property passes to his estate or as he may appoint under a general power of appointment as defined in section 2514(c). The proposed regulations\textsuperscript{124} asserted that if by local law a minor was incapable of exercising a power of appointment, then a gift to a minor would not qualify under section 2503(c) for an exclusion even if the minor had been given a general power of appointment. The final regulations\textsuperscript{125} take exactly the opposite point of view and assert that the fact that by local law a minor is incapable of exercising a general power of appointment given to him does not disqualify the gift for the exclusion under section 2503(c). This raises the question of whether the property will be included in the minor's gross estate if, in such a case, he dies before reaching 21. The final estate tax regulations\textsuperscript{126} omit the provision of the proposed regulations that a power exists at the date of death even if the holder lacks legal capacity to exercise it. Since section 2503(c) requires a general power as defined in section 2514(c), and since section 2514(c) defines a general power in the same way as section 2041 of the estate tax, it would seem that the minor's power should be taxable under section 2041 if the intent of Congress is to be carried out. At least, there should be consistency here between the gift and estate taxes. Moreover, the final gift tax regulations\textsuperscript{127} state that a failure to exercise a post-1942 general power caused by the incapacity of the holder because of his minority is not a taxable lapse of the power. This seems inconsistent with the treatment of such cases under the regulations for section 2503(c).

The final regulations\textsuperscript{128} state that under section 2503(c) there may be left to the discretion of a \textit{trustee} the determination of what

\textsuperscript{125} Treas. Reg. § 25.2503-4(b) (1958).
\textsuperscript{126} See notes 61-62 supra.
\textsuperscript{127} Treas. Reg. § 25.2514-3(c)(4) (1958).
amounts to expend for the minor's benefit and the purposes of the expenditures, provided there are no substantial restrictions on the exercise of this discretion. The proposed regulations\textsuperscript{120} stated that any person could have discretion to determine the amounts to be expended and to limit them to those necessary for the minor's support, health, or education, provided the discretion could not be exercised to deny the donee's right to income or corpus in case of need. The final regulations permit the grant of discretionary powers to a trustee only, but allow and require a far wider grant of discretionary power to him, so that it is possible that the minor may never obtain any income or corpus at all before 21.

III

CASES

In the judicial realm, any decision of the Supreme Court is, of course, noteworthy. Yet, the one case decided by that Court in 1958 dealing with the federal estate tax is not one which, irrespective of whether the result is viewed favorably or otherwise, makes any substantial contribution to the law. In \textit{Fidelity-Philadelphia Trust Co. v. Smith},\textsuperscript{130} the majority of the Court in an opinion by the Chief Justice reversed the United States Court of Appeals for the Third Circuit\textsuperscript{131} and held nontaxable the proceeds of a single premium life insurance policy when the insured decedent had retained no incidents of ownership in the policy and had assigned it to her children, the beneficiaries. In order to obtain the insurance, decedent had purchased at the same time from the insurer a single premium nonrefundable annuity on her life, the combined premiums for the insurance and annuity equalling 11/10 of the face amount of the policy. The majority opinion, in a fashion strikingly reminiscent of the opinions of the Court in the pre-\textit{Hallock}\textsuperscript{132} days of the estate tax, when the strictest adherence to the most technical property concepts was emphasized, simply reasoned that the annuity and insurance policy were two

\textsuperscript{132} Helvering v. Hallock, 309 U.S. 106 (1940).
separate "items of property," and viewing the insurance policy as a separate contract, found no basis for including its proceeds in decedent's gross estate. This reasoning, if it can be labeled such, of course, assumes the whole point at issue and ignores the fundamental problem of whether under the circumstances the decedent has not simply in a "single integrated transaction" made a transfer with a reservation of a life interest. For a Court which has so often ignored form for substance, the reasoning of the majority opinion is remarkable. From the standpoint of policy, there seems little social or economic justification for allowing this peculiar arrangement to escape the estate tax, even if it is probably available only to a relatively small group of individuals. No doubt Congress can close this gap if it chooses, but to do so will require skilled draftsmanship and will further burden a cumbersome Code with added provisions to deal with minute details. Perhaps the majority simply felt it was time for a taxpayer to win a victory and that this case was a good one to accomplish that result. One can hope that this type of reasoning will not be followed in future tax cases decided by the Supreme Court.

In the lower courts there were few decisions of more than passing interest. Two courts\(^\text{133}\) ruled that the right of a decedent's estate to share in the post-death income of his partnership should be included in his gross estate under section 2033, the right being valued as of the date of death. One case\(^\text{134}\) involved a department store with substantial capital, the other\(^\text{135}\) a law firm with little capital. Both opinions had to overcome the obstacles raised by the Supreme Court opinion in the *Bull* case,\(^\text{136}\) where the post-death income from a partnership was held not taxable under the estate tax for reasons not fully clear (one possible ground being that the Treasury attempted to tax the actual amount of the post-death payments received by the estate rather than the value of the right to receive them, estimated as of the date of death). Both opinions were able to distinguish the facts of the *Bull* case from the facts of the case in question,\(^\text{137}\) but both also proceeded further and indicated a belief that the *Bull* case is no

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\(^\text{134}\) Winkle v. United States, supra note 133.

\(^\text{135}\) Estate of Riegelman v. Commissioner, 253 F.2d 315 (2d Cir. 1958).


\(^\text{137}\) In Riegelman, unlike Bull, the agreement did not provide for continuation of the partnership with decedent's estate as a partner (sharing both losses and profits). In Winkle, unlike Bull, the partnership owned valuable tangible property and had a large capital investment by the partners.
longer law and not likely to be followed by the Supreme Court today—a prophecy which seems reasonable.\textsuperscript{138}

The United States Court of Appeals for the Fifth Circuit\textsuperscript{139} ruled that a transfer after March 3, 1931, but prior to the effective date of the 1932 amendments to section 2036, was not taxable when the settlor’s right to income for life was postponed until the death of another life beneficiary who survived the settlor. The court felt that such a transfer was taxable not as one for the transferor’s life or “for any period which does not in fact end before” the transferor’s death, but rather as one “for any period not ascertainable without reference to his death,” the prior phrase being a clarifying change made by the 1932 Act, the last being new matter, not retroactive, added by it. The court’s conclusion seems open to question (for it assumes that the exact transfer involved in \textit{May v. Heiner}\textsuperscript{140} was not taxable under the joint resolution of 1931\textsuperscript{141} enacted to repudiate the \textit{May} case), but in accord with the new regulations.\textsuperscript{142}

The Tax Court\textsuperscript{143} decided that when the grantor made an irrevocable transfer in trust for his wife and children and provided for invasion of corpus for the benefit of the income beneficiaries under certain circumstances (which never occurred), the mere fact that he reserved the power to veto any distribution of corpus before termination of the trust did not make it taxable to his estate. The court reasoned that his veto power was a contingent one, the contingency did not occur prior to his death, and, therefore, the trust was not taxable under either section 2038 or section 2036.\textsuperscript{144}

A district court\textsuperscript{145} decided that when a beneficiary could obtain possession of property transferred before 1949 by decedent either by surviving decedent or by a power to terminate the transfer, whichever occurred first, the property was not taxable under section 2037.

A United States Court of Appeals for the Fourth Circuit deci-

\textsuperscript{138} Cf. McClennen v. Commissioner, 131 F.2d 165 (1st Cir. 1942); Lowndes & Kramer, op. cit. supra note 23, at 38-42.
\textsuperscript{139} Estate of Hubbard v. Commissioner, 250 F.2d 492 (5th Cir. 1957).
\textsuperscript{140} 281 U.S. 238 (1930).
\textsuperscript{143} Frederick M. Kasch, 30 T.C. No. 9 (April 23, 1958).
\textsuperscript{144} Treas. Reg. §§ 20.2036-1(b)(3)(iii), 2038-1(b) (1958) (Int. Rev. Code of 1954, § 2038 not applicable to contingent power; § 2036 may apply to this type of power). The power to invade corpus would seem to be a power to affect the enjoyment of income under § 2036. If the contingency were survivorship by the grantor, § 2037 might apply. See generally Lowndes & Kramer, op. cit. supra note 23, at 116 n.28, 143-44, 167-70, 201-02.
sion\textsuperscript{146} held taxable under section 2037 an inter vivos transfer in trust where the corpus at the settlor's death, if he had not created other trusts, was to go to the trustee of the residuary estate under his will. Answering the argument that the settlor had no reversionary interest, the court pointed out that he had a power of disposition over the corpus, which section 2037 expressly defines as a reversion.

Where a widow waives all her vested interest in half of the community property and elects instead to take under her decedent husband's will which gives her a life interest in the entire community property, with remainders to children, it is clear that by her election the widow makes a taxable gift to the children of her remainder interest in her one-half of the community property. In valuing the amount of this gift, several recent decisions have held that there should be deducted therefrom the value of the life interest she receives in the one-half of the community property belonging to decedent, this one-half (but not her one-half) having been included in his gross estate, of course.\textsuperscript{147} By similar reasoning, at the death of the widow, her half (but not her husband's) of the community property in which she has retained a life interest will be included in her gross estate under section 2036, but there will again be deducted therefrom the value of the life interest she received in her husband's half of the community property. The theory is that she has transferred the remainder interest to the children in consideration of the receipt of the life estate in decedent's property. Whether the doctrine of consideration should be applied to this type of intra-family transaction is open to question; there may or may not be actual arm's length bargaining in these cases if only relatives are involved. Where the remaindermen are children, the natural objects of the widow's bounty, the net result is to reduce sharply the tax cost to her of a transfer she probably would have made in any event. The transaction seems actuated by a desire to provide for her family, not by business bargaining.

\textsuperscript{146} Estate of Tarver v. Commissioner, 255 F.2d 913 (4th Cir. 1958).
The Tax Court has refused\textsuperscript{148} to follow the Seventh Circuit\textsuperscript{149} and has held constitutional the premium payment test under the 1939 Code for inclusion of proceeds of insurance on decedent's life payable to beneficiaries other than his estate. The Tax Court ruled that the tax was not a direct one on the proceeds, but a tax on the inter vivos transfer of the insurance, with payment of the tax postponed until death. Such a tax was a reasonable method to prevent avoidance of the estate tax. Furthermore, the retroactive features of the tax were not a violation of due process.

Under section 2055, a deduction is allowed for transfers (1) to or for the use of any corporation "organized and operated exclusively" for certain charitable purposes; or (2) to a trustee or trustees if the property transferred is "to be used . . . exclusively for" certain charitable purposes. The importance of this distinction between these two categories is vividly illustrated by two recent cases. In one, the court\textsuperscript{150} construed a bequest of $5,000 as being made to the members of the Rhode Island Bar Association \textit{in trust} for limited charitable purposes, and not to the Association outright (the Association admittedly was not devoted solely to the charitable purposes specified in section 2055). A deduction was therefore allowed. In the second case,\textsuperscript{151} the court denied a deduction for bequests made outright to New York city, county, and state bar associations, since the associations were not \textit{operated exclusively} for the charitable purposes specified by section 2055.

The Court of Claims\textsuperscript{152} ruled that where a surviving spouse received real estate from decedent which at his death was subject to an unpaid mortgage, the estate could deduct the amount of the unpaid mortgage as a claim under section 2053, having included the property at its full value in his gross estate. In addition, when the estate paid off the mortgage, as it was required to do by local law, the full value of the property could be deducted as a marital deduction. Under section 2056(b)(4)(B), where the interest passing to the surviving spouse is encumbered, the encumbrance is to be taken into account "in the same manner as if the amount of a gift" to the spouse were involved. When the donor discharges an encumbrance on donated property at the same time as the gift, the gift is the full value of the property.\textsuperscript{153}


\textsuperscript{149} Kohl v. United States, 226 F.2d 381 (7th Cir. 1955).


\textsuperscript{151} Dulles v. Johnson, 155 F. Supp. 275 (S.D.N.Y. 1957). The two opinions reach opposite conclusions as to whether a substantial part of the activities of the legatees consisted of carrying on propaganda or otherwise attempting to influence legislation. See Lowndes & Kramer, op. cit. supra note 23, at 354-56.

\textsuperscript{152} Wachovia Bank & Trust Co. v. United States, 163 F. Supp. 832 (Ct. Cl. 1958).

\textsuperscript{153} See Lowndes & Kramer, op. cit. supra note 23, at 493 n.139.
The court pointed out that the situation was substantially the same as if the decedent had bequeathed to his widow cash which she used to pay off the mortgage—a marital deduction would be allowed for both the cash and the value of the equity in the mortgaged land. The court stressed that the situation here involved a claim owed to a third person and not to the surviving spouse, and refused to distinguish between cases where the debt was paid off at the direction of decedent and where it was required to be paid by local law.154

In Commissioner v. Vander Weele155 the court held there was no taxable gift when the settlor, a young woman, transferred a substantial sum to trustees, reserving some of the life income for herself and giving the trustees power to invade principal and pay her the remaining income for her comfortable well-being, the remaindermen being her husband and children. The court stressed the fact that the settlor's creditors under local law could reach her life interest and that the real purpose of the trust was to preserve the property for the settlor, so that very likely the remaindermen would never receive anything. The court expressly distinguished other decisions imposing a gift tax where payment of income or principal to the settlor was discretionary with a person other than the grantor,156 and also decisions refusing to impose an estate tax here at the settlor's death.157 If such transfers are not taxable under the estate tax, they certainly should not also escape the gift tax. The reasoning of the courts seems to be to look at the actual facts and circumstances of each case and not to impose a gift tax if the court is of the opinion that there is little chance that anyone except the settlor will ever receive the income or corpus.158 If this approach is adopted, it would seem that

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154 Cf. Treas. Reg. §§ 20.2056(a)-2(b)(2), (3), 2056(b)-4(b) (1958), which are not clear but seem contrary to the decision. See Lowndes & Kramer, op. cit. supra note 23, at 375-76. The court also rejected the argument that the interest deductible under Int. Rev. Code of 1954, § 2053 did not pass from decedent to his spouse. See Lowndes & Kramer, supra, at 383-84.

155 254 F.2d 895 (6th Cir. 1958).


158 Cf. Alice Spaulding Paolozzi, 23 T.C. 182 (1954); Christianna K. Gramm, 17 T.C. 1063 (1951); Rev. Ruls. 54-537, 538, 1954-2 Cum. Bull. 316; Lowndes & Kramer, op. cit. supra note 23, at 705-13; 33 N.Y.U.L. Rev. 116-18, in 1957 Ann. Survey Am. L. 164-66 (1958). In Clement v. Smith, 167 F. Supp. 369 (E.D. Pa. 1958), the court found no taxable gift where the settlor transferred property to a trust giving the trustees power to pay income for maintenance and support of his father, reserving power over the remainder for himself. The father (age 62) had an independent annual income for life of $50,000, with assets worth over $700,000. The court stressed that the father was unlikely to receive any trust income, and that the corpus would be taxed to the settlor at

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if in fact at the settlor’s death the beneficiaries do receive corpus or accumulated income, there should be an estate tax—but this result is hard to achieve under the present case law.

The Tax Court continued to hold under the 1939 Code, which has been changed on this point by the 1954 Code, that where there is a gift in trust of income to beneficiaries for a stipulated period, with remainders to them upon termination of the trust, no annual exclusion is allowed for the present income interests if the trustees have power to pay corpus to the beneficiaries before the termination of the trust, because it is impossible to determine if the value of the income interest exceeds $3,000 in view of the power to invade corpus. The Tax Court has allowed the exclusion, however, when the power of invasion is limited by an ascertainable standard and the facts of the case show that the probability of invasion is remote.

IV
Conclusion

As one turns from details to a broader perspective, there seems real cause for concern about the future of the federal estate and gift taxes. There is little public interest in or support for them. The bar has shown little desire to strengthen them—indeed, the House of Delegates of the American Bar Association is on record as favoring a constitutional amendment to abolish them. The Treasury is so busy defending the income and excise taxes that it has little time or energy to spare on behalf of the gift and estate taxes. The courts at best have never been able fully to free themselves from the intricacies of highly technical property concepts in deciding gift and estate tax cases. Congress, since 1942, has scarcely passed a major, or even minor amendment which has not weakened rather than tightened
death because of his power over the remainder. Cf. Marjorie M. Merritt, 29 T.C. 149 (1957). Here all the shareholders (5 members of one family) who owned all the stock of a corporation made an agreement reserving to each settlor a life interest in his stock, with remainders to children or other shareholders. They reserved the right to all cash dividends, whether paid from earnings or capital. The court held there was no taxable gift of the remainder because all the settlors as sole shareholders could strip the remainder interests in the stock of all value by distributions of capital as dividends. The court felt that it was immaterial that all the donors must agree to such capital distributions, because there were no substantial adverse interests since each shareholder was a life tenant, a donor, and a donee of the remainders. At the death of any settlor, there apparently would be a taxable transfer under § 2036.

160 Under Int. Rev. Code of 1954, § 2503(b) this strange result is reversed and the exclusion allowed so long as only the income beneficiary may receive corpus.
the structure of these taxes. In fact, much the same thing is happening to these taxes as to the income tax: the fantastically high war-time rates of the tax are still in effect, but they have become largely ineffective because of the many loopholes in the tax structure, eroding the tax base. Congress, the bar, and the Treasury no doubt reflect public opinion correctly when they believe that any tax with a top rate of 77 per cent is stiff enough. What is perhaps unknown to most of the public is that (1) the 77 per cent rate applies only to the top bracket—the taxable estate in excess of $10,000,000; (2) the rates of progression in the lower brackets advance slowly and reasonably—only 39 per cent is reached, for example, in the $1,000,000 bracket; and (3) these rates apply only to the taxable estate, and what with the marital deduction, the exemption, powers of appointment, life insurance, the weakness of the contemplation of death section, the opportunity to use a life estate and so omit one generation from the tax, community property, charitable foundations, the lower rates and generous deductions, gift splitting provisions, exclusions of the gift tax, and similar legitimate avenues for tax avoidance and reduction, the top bracket rates of the estate and gift tax are mainly window dressing, a fiction constituting only a trap for the unwary and unsophisticated. As a result, the estate and gift taxes are in reality imposed not on a man's wealth or on what he actually transmits to his family, but mainly as a penalty for a lack of sophistication in expert planning to avoid these taxes. A striking illustration of this fact is the amazing proliferation of courses and institutes on "estate planning," which in most cases is a polite euphemism for instructions on how to exploit legitimately the loopholes in the estate and gift taxes.

Perhaps, though, seeds of reform have been planted and may produce results in the years ahead. When the House Ways and Means Committee early this year invited a group of experts to present their views on general tax reform and revision, several of these witnesses placed great emphasis upon needed changes to strengthen the federal estate and gift taxes. The members of the committee showed no hostility to these ideas; but, to tell the truth, neither did they demonstrate more than a polite interest in them.

163 Thus in the Technical Amendments Act of 1958, 72 Stat. 1605, only one minor change strengthens these taxes—§102 of the Act, relating to United States citizens who are residents of United States possessions. Whether Int. Rev. Code of 1954, §2039 (annuities) may have strengthened the estate tax is questionable, in view of the broad exemption of §2039(c).

164 Hearings on General Revenue Revision Before the House Committee on Ways and Means, 85th Cong., 2d Sess. (1958). See the testimony of M. Slade Kendrick, id., pt. II, at 2153-57; Robert Anthoine, id. at 2232-33; William L. Cary, id. at 2269; Harry J. Rudick, id. at 2344, 2348-49. See also Hearings Before the Subcommittee on Tax Policy of the Joint Committee on the Economic Report, 84th Cong., 1st Sess. (1955). See the testimony of Louis Eisenstein, id. at 690-91; C. Lowell Harriss, id. at 692-93; Discussion, id. at 693-707.