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The Psychological Autopsy in Judicial Opinions under Section 2035

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THE PSYCHOLOGICAL AUTOPSY IN JUDICIAL OPINIONS UNDER SECTION 2035

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with comments by
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> The court's inquiry. . . is into the mind of the decedent, into that 'heap or collection of different perceptions.' Transfers prompted by the thought of death, even if they are also prompted by other motives, are includable in the gross estate. . . . The tax law does not require us here to determine 'motive' in those words, but it seeks an equally elusive shadow from the recesses of the mind of the deceased: did the thought of death prompt him to act? . . . [T]he conclusion may not be wholly intellectual. Decision may result also from intuition, emotional reaction, and visceral response to the composite picture that results from the images imposed on each other in court by advocates with opposite motives, one bent on proving that the deceased, whatever his age or health, was convinced of his immortality and impervious to thoughts of death, and the other seeking to show that the donor was weak of body and sick of mind, preoccupied by the converging approach of the grim reaper and the estate tax collector.[2]

It is surprising how many cases have been litigated under Section 2035[3] of the Internal Revenue Code, which imposes an estate tax on inter

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[1] I have been generously encouraged and assisted in this and in other aspects of the study of the psychology of testation by Dr. Shneidman and by two other distinguished clinical psychologists—Dr. Robert S. Redmount, who is also a lawyer, and Dr. Herman Feifel, who should probably be considered the founder of modern death psychology. Dr. Feifel is responsible for the noted work, THE MEANING OF DEATH (H. Feifel ed. 1959).

[2] Fatter v. Usry, 269 F. Supp. 582, 584-86, 20 Am. Fed. Tax R.2d 5941-42 (E.D. La. 1967).

[3] INT. REV. CODE of 1954, § 2035(b):

> If the decedent within a period of 3 years ending with the date of his death . . . transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exer-

vivos gifts in contemplation of death. It is also surprising that those hundreds of judicial opinions embody rigid perceptions of human life, and of attitudes toward death—perceptions which range from incisive to naive. They disclose a judicial system of death psychology which is detailed, systematic and (sometimes) accurate. This is an inquiry into those opinions as psychological autopsies. The inquiry has several practical possibilities:

—It may indicate something about the legislative wisdom in retaining a tax provision which turns on a post-mortem assessment of the attitude a dead man had toward his death.[4]

—It may indicate something about the judicial wisdom in construing a statutory word ("contemplation") literally[5]—as compared, say, with the judicial wisdom in construing a similar word ("intended") to refer only to the mechanical operation of a property-transfer device.[6]

—It may indicate something about trial tactics within a legislative and judicial system which continues to impose death taxes on transfers which are made in contemplation of death. It is an open secret that the process as it now exists is chaotic, but it probably presents the only common factual issue in federal estate tax litigation on which taxpayers can usually expect victory.

—It may indicate something about the way men are as they approach death. That assumes, of course, that judges are able to detect human facts and to report them accurately. One would hope that the Section 2035 opinions reveal how judges think men are as they approach death.

I make the inquiry against a model suggested by the eminent "suicidologist," Dr. Edwin Schneidman, who proposed several years ago a "psychological post-mortem."[7] He designed his system primarily

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cise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . . ; but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

[4] *See generally* C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES 60-79 (2d. ed. 1962); Lowndes & Stephens, *Identification of Property Subject to the Federal Estate Tax*, 65 MICH. L. REV. 105, 120-25 (1966); Riecker, *A Pragmatic View of Transfers "in Contemplation of Death,"* 53 MINN. L. REV. 265 (1968); Kimbrell, *Planning Insurance Transfers to Avoid Transfers in Contemplation of Death*, 36 U. MO. KAN. CITY L. REV. 1 (1968); Hochman & Lindsay, *Taxation, Interest and the Timing of Inter-Generation Wealth Transfers*, 20 NAT'L T. J. 219 (1967).

[5] United States v. Wells, 283 U.S. 102 (1931).

[6] Shukert v. Allen, 273 U.S. 545 (1927). *See* C. LOWNDES & R. KRAMER, *supra* note 4 at § 6.2; Wishard v. United States, 143 F.2d 704 (7th Cir. 1944); Estate of William F. Hofford, 4 T.C. 790, *aff'g* 4 T.C. 542 (1945).

[7] Dr. Shneidman has done an impressive study on the role of the individual in his own death. His objective was a psychologically oriented classification of death phe-

for death certification in suicide cases, but he developed it for all death certification, and he demonstrated that it is a model upon which attitudes toward death can be reconstructed after the man being studied is dead. This is precisely what judges do in Section 2035 cases.[8]

The traditional judicial view of a gift in a contemplation of death case implies that the dead man expressly, overtly, considered death as the fact which would bring a series of plans into operation. Giving in contemplation of death is seen as goal-striving behavior which death will implement. I suspect that this view is unsound because it equates "gift in contemplation of death" with "testamentary disposition". That equation is at work in most of the cases. It is a judicial rule of thumb. But it is probably psychologically inaccurate. There is a difference between giving one's property away because one is going to die and making written plans for what is to be done with one's property when one is dead.

The format used here attempts to consolidate hundreds of Section 2035 cases into some kind of unified presentation by proposing three *prototype* judicial opinions. Each of them is a composite of several real cases; each contains within itself discussion of precedent cases;

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nomena—an ordering based in large part on the role of the individual in his own death. His analysis is based both upon the affirmative premise that a man's death is a personal event, and the negative premise that our culture accepts "natural death" as an idol. Both premises apply to section 2035 cases because United States v. Wells, 283 U.S. 102 (1931), makes the inquiry a personal one. Through his research, Dr. Shneidman discovered that individuals fall into one of four categories in their manner of viewing their own death.

In one paper, Shneidman applied his theory to Herman Melville. Dr. Shneidman believed that Melville's preoccupation with death, combined with his almost obsessional resentment of literary critics, led him to a choice between protest and withdrawal. Melville chose to withdraw and Dr. Shneidman equates this with a "quasi" death. Therefore Melville was focusing on a post-self, a future in which his real-self would be vindicated. I believe Dr. Shneidman's analysis is cogent because the post-self concept has application in contemplation of death cases. A man survives his death in those he loves and the things he owns. He lives on in the act of giving away property. This is the type of living-on that Dr. Shneidman discovered in Melville, and it is a part of what one contemplates when he contemplates death. *See* Shneidman, *Orientations Toward Death: A Vital Aspect of the Study of Lives*, 2 INT'L JOURNAL OF PSYCHIATRY 167 (1966); Shneidman, *Orientations Toward Cessation: A Reexamination of Current Modes of Death*, 13 JOURNAL OF FORENSIC SCIENCE 33 (1968); Shneidman, *Suicide, Sleep and Death*, 28 JOURNAL OF CONSULTING PSYCHOLOGY 95 (1964); *The Deaths of Herman Melville*, in MELVILLE AND HAWTHORNE IN THE BERKSHIRES 118 (H. Vincent ed. 1966).

[8] United States v. Wells, 283 U.S. 102, 119 (1931). "There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his mental condition, and thus to give effect to the manifest purpose of the statute."

and each demonstrates what I believe to be typical judicial perceptions of human facts on attitudes toward death. A series of comments follows each of the *prototype* opinions; the comments are meant to suggest what may become the law review case comment of the future—a new approach which will combine close, logical analysis of what courts have done with a behavioral consideration of the process involved in the decision, and of the consequences the decision may be expected to portend for the profession and the people upon whom the law operates.[9]

ESTATE OF WILLIAM VARNER[10]

(Tax Court)

William Varner died at the age of eighty. At issue are three transfers he made during his life. The first, made two years, ten months, before his death, was of a summer cottage in Michigan. This transfer was made to his son, William Varner, Jr., "for the use of the grantor's granddaughter, Linda Snopes Cole." Linda Snopes Cole was the decedent's granddaughter. The decedent's daughter and her husband died in an airplane accident ten years before the transfer of the summer cottage.

The second transfer was of shares of stock in the Frenchman's Bend Realty Company, a corporation which owned and managed farm property in areas near the decedent's home. This transfer, made eighteen months before the decedent's death, was of all of the decedent's interest in the corporation. It mas made to his son, William Varner, Jr.

The third transfer, made six months before the decedent's death, was of several parcels of real estate—two farms, ten acres of undeveloped land, and the decedent's home. This transfer was to William Varner, Jr., in trust for Linda Snopes Cole. It was accompanied by a complex trust instrument which contained detailed directions for managing the trust corpus, attemped restraints on its alienation, elaborate restrictions on the alienation of equitable interests (spendthrift provisions) and directions for the distribution of corpus and income to Linda Snopes Cole and to her children, if she had any.

William Varner, Jr., as executor of his father's estate, timely filed a

[9] *See* Redmount, *Humanistic Law Through Legal Education*, 1 CONN. L. REV. 201 (1968).

[10] This is a composite of the following cases: Fatter v. Usry, 269 F. Supp. 582, 20 Am. Fed. Tax R.2d 5941 (E.D. La. 1967); Kiskern v. United States, 232 F. Supp. 7 (S.D. Fla. 1964); American Trust Co. v. United States, 175 F. Supp. 185 (N.D. Cal. 1959); Estate of Samuel Want, 29 T.C. 1223 (1958); Estate of Ernest Hinds, 11 T.C. 314 (1948), *aff'd* 180 F.2d 930 (5th Cir. 1950); Estate of William C. Atwater, 3 T.C. 1223 (1944). The footnotes which follow the text are, through the end of the Varner opinion, the court's.

federal estate tax return, reporting these three transfers as not taxable, and a gross estate exclusive of these transfers of $15,000. Since the gross estate as thus reported was well below the exemption allowed, the executor reported no taxable estate and paid no estate tax. The values at death of the property transferred during life are stipulated as:

—the summer cottage, $65,000;
—stock in Frenchman's Bend Realty Company, $150,000;
—real estate in trust, $210,000.

The evidence is that the property had approximately the same value on the dates it was transferred inter vivos and that after the transfers were completed the property held by the decedent did not exceed $20,000 in value.

The Commissioner of Internal Revenue objected to the estate's position on the three inter vivos transfers and issued notices of deficiency. He claimed estate taxes of $96,200, which assessments the estate protested. The case is here on the following issue: were the three inter vivos transfers includible in the gross estate under Section 2035(a) of the Internal Revenue Code of 1954,[11] which 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 . . . by trust or otherwise, in contemplation of his death.

This court must decide whether the dominant motive of the decedent in making each of these transfers was prompted by the thought of death. The leading authority on the tests which are to be applied is the decision of the Supreme Court in *United States v. Wells*,[12] which postulated the question as whether "the decedent's purpose in making the gift was to attain some object desirable to him during his life, as distinguished from the distribution of his estate as at death."[13] The court stated that the Congressional purpose in Section 2035 was "to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax."[14] We have determined that the transfers were *not* in contemplation of death.

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[11] Section 2035(b) creates a rebuttable presumption that transfers within three years of death are in contemplation of death, and a conclusive presumption that transfers more than three years before death are not in contemplation of death. In addition to these specific presumptions, determinations of the Internal Revenue Service are presumptively correct. *See* Neal v. Commissioner, 53 F.2d 806 (8th Cir. 1931).

[12] 283 U.S. 102 (1931).

[13] *Id.* at 114.

[14] *Id.* at 117.

The cottage. The decedent was seventy-seven years old when he transferred the cottage. The testimony is that he made the transfer in order to provide a restful, pleasant atmosphere for his granddaughter, so that she could spend her summer vacations there. The reason he transferred to his son, Mrs. Cole's uncle, rather than to Mrs. Cole, was that Mrs. Cole was somewhat unstable mentally. She had twice been hospitalized for "nervous breakdowns"; her husband had divorced her about a year before this transfer; she lived in the decedent's home when she was not on vacation; and the decedent cared for her during periods of emotional tension in her life. The evidence is that Mrs. Cole found the summer heat in Frenchman's Bend oppressive and that she enjoyed staying at the Michigan cottage and had stayed there off and on during summers since she was a child. The decedent spoke many times before the transfer of making the cottage available to Mrs. Cole so that she would not need to ask his permission to stay there.

Five years before he died, and shortly after the death of his wife, the decedent stopped going to the cottage. Aside from a two month visit by Mrs. Cole, the cottage was in caretaker status for a year and a half after the death of the decedent's wife. About three and one-half years before his death Mr. Varner visited the cottage on what he later referred to as an "inspection tour". When he arrived he found the caretaker intoxicated and the cottage neglected. Witnesses testified that this discovery disturbed Mr. Varner and that he decided to "get rid of the cottage". There is in evidence a letter he wrote William Varner, Jr., enclosing a copy of the executed, recorded deed; that letter said, in part:

> Your mother always preferred Michigan, but I have never liked it. Besides that, the worry of it has become too much for me; you have just got to go ahead and run it. I have had enough, and, besides, I need to reduce my tax bite. It has served its purpose so far as I am concerned. I have my home in Frenchman's Bend.

As a matter of fact, Mr. Varner still had, at that time, extensive ownership of real estate other than his home, as well as 25% of the common stock of a real estate holding company there. The letter said nothing of Mrs. Cole's use of the cottage, but the oral testimony was that William Varner, Jr., understood that the cottage, "was really for Linda," that the deed made that clear to him and that he managed the cottage for her and intends to continue doing so.

The decedent's health, prior to seventeen months before his death, was excellent for a man of his age. The first evidence of his terminal illness arose after the transfer of the cottage *and* of the corporate secur-

ities. He visited his physician with the complaint that he was not able to hold on to things. The physician diagnosed his ailment as amyosthemic lateral schlerosis of the spinal cord, a chronic degenerative disease of the central nervous system which is usually terminal in from two to six years. The physician did not inform Mr. Varner of this condition; he told Mr. Varner that he had a nervous condition, that he (the doctor) would prescribe medication for it, and that Mr. Varner should return for "checking up" at intervals of one month. At the time of this diagnosis, Mr. Varner was active, cheerful and optimistic. The physician never told him about his fatal condition, but he did tell William Varner, Jr., about seven months before Mr. Varner's death and the testimony is that William Varner, Jr., told his father about the condition shortly thereafter.

We think that Mr. Varner, who made this transfer before he had any information on his illness—even partial, undisturbing information—did not develop an altered attitude towards life, nor was he affected by thoughts of death. The evidence is that he was cheerful, pleasant, active, interested in many facets of life, sociable and fond of many forms of entertainment, including circuses, card games, and, when he was in Memphis, burlesque shows. Few men many years his junior could match his zest for living, both physically and mentally. We find as a fact that the transfer of the cottage was not in contemplation of death.

The corporate securities. This transfer was made eighteen months before death and one month before the decedent visited his physician for what turned out to be a diagnosis of fatal illness. The transfer was of all the decedent's interest in a corporate venture he had founded in 1928 and of which he had been variously president, secretary and treasurer. He resigned from office in the corporation three years before his death, and turned the day-to-day management of the business over to his associate, Colonel V. K. Ratliff. He remained as a director and saw that his son, William Varner, Jr. (who was then a nominal shareholder), was employed as secretary and business manager for the corporation. Eighteen months before his death, Mr. Varner resigned as a director and transferred all of his shares (about one-third of those outstanding) to William, Jr.

Although he had begun to suffer some muscular instability, his physician testified that there was nothing in his physical condition, at the time of the transfer of corporate securities, "which would lead any physician to anticipate his death at any time in the near future." Cross-examined about the condition which was diagnosed a month later, the

physician said he was not sure that a diagnosis would have disclosed this condition at the time of the transfer, and that in any event the prognosis at that time would have been survival for at least two years.

Mr. Varner's transfer of the securities was a part of his general retirement from business. Counsel for the government contends that he was "letting go, preparing to cash in his chips." That charming metaphor is not so apt as it may appear. Mr. Varner remained active in the management of rural real estate for another year. He climbed atop houses to inspect roofs, walked in fields which he owned to estimate crop yields, and even attempted minor repairs on his buildings. He began at about that time to make extensive plans for travel, and even to carry out some of them. He told his son and Mrs. Cole that he would make a sea trip around the world within a few months after retirement. He took an airplane trip to the World's Fair in New York City shortly after the transfer of securities, and he went on extensive automobile trips around his home region—some of them by himself. These travels were strenuous and included hiking in the hills of his native state. Mr. Varner's only complaint about his trips was that he was unable to deduct their cost on his income tax return. He took his physician on two of these trips into the hills and the physician testified that he tired more readily in hiking than did Mr. Varner. William Varner, Jr., hired a servant to assist his father around the house, but his father resisted the servant and resented his presence. He never complained about his health nor talked of death.

This evidence is similar to that on the cottage transfer. In the first situation Mr. Varner's manifest motive was to provide a pleasant summer retreat for his disturbed, unhappy granddaughter. In the case of the securities, the transfer was to provide a secure business future for his son, to reduce income taxes, and to enjoy, while he lived, his son's growth and success in a challenging business. Here, as in the transfer of the cottage, the dominant motives were living motives. Neither transfer was made in contemplation of death.

The real estate. Six months before he died, Mr. Varner transferred all of his remaining real estate to William Varner, Jr., as trustee for Mrs. Cole. The estate argues that this transfer, like the transfer of the cottage, was motivated by a desire to provide for Mrs. Cole. The government points to an additional circumstance—a steady, continuing deterioration in Mr. Varner's health. Beginning about eight months before his death (two months before this transfer), Mr. Varner had been forced to curtail his activities. He cancelled his worldwide trip.

One month before this trust transfer, he was hardly able to walk and had to use a wheelchair when he visited his physician. He ceased to complain about his servant and, in fact, became friendly with him. At the time of the trust transfer he could no longer use either hands or legs. The physician continued to tell Mr. Varner that he had a nervous condition from which, he implied, Mr. Varner would recover. One month before the third transfer, however, the physician finally told William Varner, Jr., about the gravity of his father's condition. William, Jr., testified that he relayed this information to his father within two or three days. He said his father took the information calmly, and that his father's disposition remained cheerful. Not even then was Mr. Varner given to morbid thoughts. He did not refer to his condition again, not even in the final moments of his life. When he executed the trust instrument at issue, he told William, Jr., that his reason for the transfer was to provide for Mrs. Cole. The estate argues that this fact, taken with Mr. Varner's continuing optimism about life, is evidence of a life motive, and we agree with that assessment. The size of the transfer, although significant, did not leave Mr. Varner without funds and is therefore not determinative, particularly in view of the fact that William Varner, Jr., as trustee, did not disturb his father's possession and use of the family home.

Mr. Varner is not shown to have entertained thoughts of death, even when he was dying.[15] He was neither reticent about his physical condition nor dominated by it.[16] This is especially apparent when one considers the transfers for Mrs. Cole, who was herself in poor health. The gifts for her benefit were to establish her financial independence and to protect her from the eventualities of a life which had been cruel to her.[17] A person who retains a healthy mental condition normally does not make gifts in contemplation of death.[18] Mr. Varner's were not thoughts of death,[19] nor were they thoughts which combined death and the desire to avoid estate taxes. "Standing alone, the desire to avoid death taxes cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase."[20] His was a

[15] *See* Moylan v. United States, 18 Am. Fed. Tax R.2d 6240 (N.D.N.Y. 1966).

[16] Helvering v. Tetzlaff, 1 CCH Tax Ct. Mem. 461 (1943), *aff'd* 141 F.2d 8 (8th Cir. 1944); *see* Estate of Chris M. Neilson, 26 CCH Tax Ct. Mem. 1086 (1967).

[17] Estate of Chris M. Neilson, 26 CCH Tax Ct. Mem. 1086 (1967) involved a trust for a retarded child, which is similar to the trust for Mrs. Cole in this case.

[18] *See* Peck v. United States, 16 Am. Fed. Tax R.2d 6125, 6130 (M.D. Ga. 1965).

[19] *See* Stiles v. United States, 2 Am. Fed. Tax R.2d 6391 (S.D. Fla. 1958) (jury charge).

[20] Rhoads v. United States, 12 Am. Fed. Tax R.2d 6195, 6196 (E.D. Pa. 1963)

more cheerful, more lifeful frame of mind.[21] He was interested in the happiness of his children and in helping them financially.[22] He was determined to carry out "promises and plans that were unconnected with the thought of impending death. . . ."[23]

Conclusions of law. The principal question in a gift in contemplation of death case is factual,[24] and a consideration of precedent supports and confirms our factual conclusions. The decedent's health, which was progressively worse at each of these transfers, is of course an important consideration.[25] But this court has repeatedly held that health is not determinative of purpose in making lifetime transfers. In *Estate of Fielder J. Coffin*[26] and *Estate of Benjamin Buerman*,[27] we held that the existence at transfer of serious, even fatal, conditions was not controlling in the face of evidence of living motives. This attitude is mirrored in opinions and jury charges from the federal district courts[28] which emphasize that cheerful demeanor and a disdain for morbid preoccupation indicate that a decedent has living motives even as he quite literally wastes into death. The controlling test, as the court said in *Peck v. United States*,[29] is whether the decedent "was motivated, moved, propelled, by the same considerations that cause one to make testamentary dispositions of property, and whether the gift made was a substitute for such testamentary dispositions without awaiting death. . . ."[30] We find that Mr. Varner's transfers were for the care of his granddaughter and the business success of his son and therefore not substitutes for testamentary dispositions.

An additional factor as to the first two transfers is that Mr. Varner

(jury charge). *See* Farmers Loan and Trust Co. v. Bowers, 68 F.2d 916 (2d Cir. 1934), *cert. denied*, 296 U.S. 649 (1935); Denniston v. Commissioner, 106 F.2d 925 (3d Cir. 1939); Estate of Dell H. Higgins, 9 CCH Tax Ct. Mem. 426 (1950).

[21] The decedent in Altendorf v. United States, 228 F. Supp. 969 (D.N.D. 1964) (jury verdict for taxpayer), was a cheerful 85; in Estate of Oliver Johnson, 10 T.C. 680 (1948), he was over 90; and in Metzger v. United States, 181 F. Supp. 830 (N.D. Ohio 1960), he was an optimistic alcoholic. *See also* Carlson v. United States, 7 Am. Fed. Tax R.2d 1825 (D. Minn. 1960) (jury verdict for taxpayer).

[22] Estate of Jessie E. Bond, 25 CCH Tax Ct. Mem. 115 (1966); Estate of T.M. Flynn, 3 CCH Tax Ct. Mem. 1287 (1944).

[23] Metzger v. United States, 181 F. Supp. 830, 834 (N.D. Ohio 1960).

[24] Kentucky Trust Co. v. Glenn, 217 F.2d 462 (6th Cir. 1954).

[25] Estate of Oliver Johnson, 10 T.C. 680 (1948).

[26] 13 CCH Tax Ct. Mem. 1149, 1152 (1954).

[27] 24 CCH Tax Ct. Mem. 599 (1965).

[28] *See e.g.*, Gordon v. United States, 163 F. Supp. 542 (W.D. Mo. 1958); Peck v. United States, 16 Am. Fed. Tax R.2d 6125 (M.D. Ga. 1965) (jury charge); Stiles v. United States, 2 Am. Fed. Tax R.2d 6391 (S.D. Fla. 1958) (jury charge).

[29] Peck v. United States, 16 Am. Fed. Tax R.2d 6125 (M.D. Ga. 1965).

[30] *Id.* at 6130.

did not know he was dying. Early decisions in the Eighth Circuit[31] turn in part on the fact that the decedents had no knowledge of their fatal conditions. In *Neal v. Commissioner*,[32] as here, doctors did not tell the decedent about his condition but did tell his family. The trial judge, in *Delaware Trust Co. v. Handy*,[33] reached a similar decision where it was shown that the decedent suffered from arteriosclerosis but did not know about it. Other cases in the federal courts are in accord,[34] as are *Estate of George C. Mills*,[35] *Estate of George S. MacDonald*,[36] and *Estate of Frank Bloise*,[37] in this court. The decedent in *Mills* was told he was ill, but not how long he had to live. *MacDonald* turned on medical evidence that the decedent may have been suffering from the disease for several years without any awareness of being ill.[38] There, as here, the disease was serious and the life expectancy was uncertain.[39] There, as here, the decedent did not talk about the condition even after he learned of it. *Bloise* held for the Commissioner, but is distinguishable because the condition there—terminal cancer—was diagnosed shortly before the transfers at issue (not, as here, after two of the three transfers), and because it was much more likely to bring speedy death.[40] Other decisions in this court buttress our reliance on the rule that serious illness is only minimally relevant when it is not shown that the decedent knew he was ill.[41]

We detect in Mr. Varner's later life three features which emphasize

[31] Neal v. Commissioner, 53 F.2d 806 (8th Cir. 1931); Willcuts v. Stoltze, 73 F.2d 868 (8th Cir. 1934).

[32] 53 F.2d 806 (8th Cir. 1931).

[33] 53 F.2d 1042 (D. Del. 1931).

[34] Commissioner v. Gidwitz's Estate, 196 F.2d 813, 816 (7th Cir. 1952), *citing and quoting* Allen v. Trust Co., 326 U.S. 630 (1946); United States Trust Co. v. United States, 23 F. Supp. 476 (Ct. Cl. 1938), *cert. denied*, 307 U.S. 633 (1939); First Nat'l Bank of Birmingham v. United States, 25 F. Supp. 816 (N.D. Ala. 1939) (family had knowledge, but decedent did not); Estate of Wolfe v. United States, 10 Am. Fed. Tax R.2d 6292 (E.D. Tex. 1962) (jury charge); Seattle First Nat'l Bank v. United States, 11 Am. Fed. Tax R.2d 1824, 1827 (W.D. Wash. 1963): "The decedent did not at any time have any serious thought of death or the imminence thereof. . . ."

[35] 5 CCH Tax Ct. Mem. 768 (1946).

[36] 10 CCH Tax Ct. Mem. 1038 (1951).

[37] 25 CCH Tax Ct. Mem. 251 (1966).

[38] *See* Estate of Herbert G. Larsh, 8 CCH Tax Ct. Mem. 799 (1949); Estate of D.W. Van Dever, 11 CCH Tax. Ct. Mem. 1179 (1952).

[39] *See* Estate of Charles H. Martin, 2 CCH Tax Ct. Mem. 1063 (1943); Estate of George H. Burr, 4 CCH Tax. Ct. Mem. 1054 (1945).

[40] *See* Estate of Fletcher E. Awrey, 5 T.C. 222 (1945).

[41] Estate of Lela B. Vardell, 35 T.C. 50 (1960); Estate of Ambrose Fry, 9 T.C. 503 (1947); Estate of Genevieve Brady Macaulay, 3 T.C. 350 (1944); Estate of Charles Delaney, 1 T.C. 781 (1943); Estate of Lilly A. Fleishmann, 13 CCH Tax Ct. Mem. 362 (1954). *See* Estate of Robert W. Hite, 49 T.C. 580 (1968).

that his thoughts were not thoughts of death. The first of these is the relinquishment of his business life in favor of a pleasant retirement, devoted to the care of his troubled granddaughter. The second is what we regard as a manifest desire to draw closer to the two loved ones who remained. The third is his desire to spend his last years in vigorous activity and travel. These factors combine, in our view, in a life style which seemed almost to turn away from thoughts of death. It was this life style which dictated the transfers at issue.

This life style can coexist with illness, and even with concern about health, as we held in *Coffin, Estate of Gus Sachs*[42] and *Estate of Oliver Johnson.*[43] Transfers made in these circumstances tend to contemplate pleasant retirement from the burdens of life rather than from life itself. This is obvious, as we held in *Helvering v. Tetzlaff,*[44] when one considers that careful and burdenless living *prolongs* life.[45] Mr. Varner's acquisitive years were over, but that is not necessarily a circumstance in which he would begin to contemplate death. On the contrary, he seemed to contemplate closer relations with his loved ones—a factor which tends to prove living motives for property transfer.[46] This factor is often present when the transfer is one to restore family harmony,[47] but it can equally be present where the family has been decimated by tragedy.[48] We think Mr. Varner was concerned more with what was thought of him while he lived than with happy memories after he was dead.[49] It is interesting to reflect how different the case might have been had he no loved ones to draw near him in his last years.[50]

He was also determined to enjoy the life which was left to him. There are scores of cases in which physical activity, vigor and especially, travel and plans for travel, are held to be indicative of living

[42] 14 CCH Tax Ct. Mem. 960, 961 (1955): "A man who is not in good health may, nevertheless, make a transfer which is . . . for purposes connected with life."

[43] 10 T.C. 680 (1948).

[44] 1 CCH Tax Ct. Mem. 461 (1943), *aff'd* 141 F.2d 8 (8th Cir. 1944).

[45] *Id.* at 466: "[H]is interest in and care for his health indicates that he was devoting his attention and thought to the extension of his life as long as possible."

[46] *See* Peck v. United States, 16 Am. Fed. Tax R.2d 6125 (M.D. Ga. 1965) (jury charge).

[47] *E.g.,* Estate of Halvor J.T. Jacobson, 9 CCH Tax Ct. Mem. 1112 (1950).

[48] *See* Estate of Chris M. Neilson, 26 CCH Tax Ct. Mem. 1986 (1967).

[49] Estate of George S. MacDonald, 10 CCH Tax Ct. Mem. 1038, 1055 (1951): "We cannot overlook the fact that the decedent appears as interested in what his family thought during his lifetime, but indifferent to their views after his death."

[50] *Compare* Estate of William Maxwell, 3 CCH Tax Ct. Mem. 1207 (1944) *with* Metzger v. United States, 181 F. Supp. 830 (N.D. Ohio 1960).

motives. In *Delaware Trust Co. v. Handy*,[51] the federal district court was influenced by the fact that the decedent, at the time of transfer, contemplated a two year trip around the world.[52] In *Heiner v. Donnan*,[53] which was reversed on other grounds in the Supreme Court,[54] the Third Circuit took account of the fact that the decedent was an inveterate traveller, that he had—as Mr. Varner had—taken extensive automobile trips, and that he regularly went to Europe and travelled in the United States. In *Commissioner v. Gidwitz's Estate*,[55] the court noted that the decedent, despite a serious heart condition, "did not believe at that time that he was in danger of imminent death but . . . expected to live for a number of years."[56] Evidence of this, *inter alia*, was the decedent's habitual travel in the United States and abroad, his fishing and automobile trips, and the fact that he did his own driving. In that case the executor listed the decedent's last illness as continuing for fifteen years. The transfer involved was one that did not in fact benefit beneficiaries until after the decedent's death. Despite these factors the court found that Gidwitz's cheerful attitude toward life, his energetic interest in travel and activity, was determinative evidence of living motives for the transfer involved. Finally, in *Old Colony Trust Co. v. United States*,[57] the federal district court, deciding a case in which the decedent took his own life, held that an active business life and domestic and foreign travel within the year before death indicated living motives in a trust transfer for children. The case resembled Mr. Varner's in several respects and differs notably only in the fact that Mr. Varner held onto his life until the last. A number of decisions for the taxpayer in the federal courts of appeal have relied on the fact that the decedent's general pattern of travel and activity indicated that he had no thought of death at the time of transfer,[58] and decisions

[51] 53 F.2d 1042 (D. Del. 1931).

[52] *See also* Dunn v. United States, 22 Am. Fed. Tax R.2d 6038 (S.D. Ill. 1968) (jury charge); Estate of George C. Mills, 5 CCH Tax Ct. Mem. 768 (1946); Rea v. Heiner, 6 F.2d 389, 391 (W.D. Pa. 1925); "The week before she died, she drove to Pittsburgh three times, was preparing to go to Canada for the summer, making arrangements for building a boathouse and sea wall there, and for changing the barn and building a dairy on the farm at home." Beeler v. Motter, 33 F.2d 788 (D. Kan. 1928).

[53] 61 F.2d 113 (3d Cir. 1932).

[54] 285 U.S. 312 (1932).

[55] 196 F.2d 813 (7th Cir. 1952).

[56] *Id.* at 815.

[57] Old Colony Trust Co. v. United States, 15 F. Supp. 417 (D. Mass. 1936).

[58] Bradley v. Smith, 114 F.2d 161 (7th Cir. 1940); Tait v. Safe Deposit & Trust Co. 74 F.2d 851 (4th Cir. 1935); Brown v. Commissioner, 74 F.2d 281 (10th Cir. 1934). This factor was held not determinative, though, in United States v. Tonkin, 150 F.2d 531 (3d Cir. 1945); Buckminster's Estate v. Commissioner, 147 F.2d 331

from federal district courts[59] and from this court[60] are essentially similar on this point. In many of these cases the decedent had been actively traveling at the time of the transfer in question;[61] in others he was making plans for future travel.[62]

We are aware of the limitations of judicial process in cases such as this. We are not so much determining what William Varner was like as we are determining what the evidence shows he was like. "We cannot be certain that our portrait . . . is a lifelike replica . . . but we are confident that it accurately reflects the portrait . . . drawn by the evidence in this record."[63] We find that none of the transfers at issue were made in contemplation of death.

COMMENTARY ON ESTATE OF WILLIAM VARNER

A. By Dr. Redmount

In Estate of William Varner, the Tax Court very skillfully wove evidence, interpretation and opinion, and precedents from other judicial reasoning, to produce a plausible and perhaps a reasonable decision and outcome. However, as the court is careful to note in its concluding statement, "We are not so much determining here what William Varner was like as we are determining what the evidence shows he was like. 'We cannot be certain that our portrait . . . is a lifelike replica . . . but we are confident that it accurately reflects the portrait . . . drawn by the evidence in this record.' " It might be noted too,

(2d Cir. 1944); Northern Trust Co. v. Commissioner, 116 F.2d 96 (7th Cir. 1940); Updike v. Commissioner, 88 F.2d 807 (8th Cir. 1937), *cert. denied*, 301 U.S. 708 (1937); Stubblefield v. United States, 6 F. Supp. 440 (Ct. Cl. 1934). *See* United States v. Wells, 283 U.S. 102 (1931).

[59] In re Kroger's Estate, 145 F.2d 901 (6th Cir. 1944); Flannery v. Willcuts, 25 F.2d 951 (8th Cir. 1928); Poor v. White, 8 F. Supp. 995 (D. Mass. 1934); Welch v. Hassett, 15 F. Supp. 692 (D. Mass. 1936), *rev'd on other grounds*, 90 F.2d 833 (1st Cir. 1937), *aff'd* 303 U.S. 303 (1938); Estate of Ridgely v. United States, 20 Am. Fed. Tax R.2d 5946 (Ct. Cl. 1967).

[60] Estate of Lilly A. Fleischmann, 13 CCH Tax Ct. Mem. 362 (1954); Estate of Jennie E. Hinde, 11 CCH Tax Ct. Mem. 55 (1952); Estate of Benjamin P. O'Neal, 6 CCH Tax Ct. Mem. 713 (1947), *aff'd* 170 F.2d 217 (5th Cir. 1948); Estate of Mary E. Cook, 9 T.C. 563 (1947); Estate of George H. Burr, 4 CCH Tax Ct. Mem. 1054 (1945); Estate of Nathalie Koussevitsky, 5 T.C. 650 (1945).

[61] Estate of Lela B. Vardell, 35 T.C. 50 (1960), *rev'd on other grounds*, 307 F.2d 688 (5th Cir. 1962); Estate of Salim Ackel, 17 CCH Tax Ct. Mem. 110 (1958); Estate of Robert W. Weir, 17 T.C. 409 (1951); Estate of Genevieve Brady Macaulay, 3 T.C. 350 (1944).

[62] Estate of Emeline L. Green, 4 CCH Tax Ct. Mem. 286 (1945); Estate of Charles A. Bickerstaff, 1 CCH Tax Ct. Mem. 28 (1942).

[63] Estate of Oliver Johnson, 10 T.C. 680, 691 (1948).

that the interpretations and opinions relating to William Varner and his attitudes about death are those of men of certain age whose views of life and of death are also relevant if not directly articulated.

Not only are there general reservations or uncertainties about the judgment reached in the Varner case, but there are particular reservations about the way the court arrived at or "found" its result and about the result itself. Judicial decisions, as with much decision making, are the result of selection and rejection, of emphasis and avoidance, and of neglect and oversight, as well as belief and acceptance. It is on both sides of the antimony that one will find the true case, albeit that expediency requires a decision in one direction. Let us consider the judicial neglects in the Varner case.

The court failed to attach any significance to, and even failed to discuss, the fact of Varner's age. One may reasonably inquire (since judicial precedent on the issue is not cited) whether a man of seventy-seven contemplates, or consciously or unconsciously avoids, the contemplation of death and its consequences. Perhaps the men of the court, no more than Mr. Varner, *like not to think* about death, but that does not mean that persons of middle or advanced age *do not think* about death. The problem may be an evidentiary one. The vagaries of the adversary system being what they are, perhaps nobody thought or chose to inquire about evidence as to how Mr. Varner felt about his age and its implications and what he did about it. Even granted an effort to garner evidence on the matter, thought and contemplation on such a sensitive issue may as readily lead to suppression as to expression. Mr. Varner might very well contemplate death, and choose not to think further or in any way talk about it. In fact, his whole mode of life—an active, physical life—may be evidence of a strong desire to try to consciously avoid contemplating death.

On the matter of health, which is closely related to age, the Tax Court appears to have placed too much emphasis on statements concerning Mr. Varner's terminal illness, and how it was perceived, experienced and handled. Sense and reason should alert a contemplative court to the possibility, indeed, the likelihood, that a mentally normal man, nearly eighty, who is ill, severely incapacitated and deteriorating fairly quickly, would have some thoughts of death. However, the evidentiary fabric for the court's decision could not very well incorporate the thrust of such a view. Since comments about Varner's attitudes toward, and awareness of his, health reveal a merely heuristic collection of statements conveniently selected and placed, it is conceivable that

there was, by this system, no verifiable evidence made available of contemplation of death, even though the fact of quickening life failure was inescapable.

The Tax Court relies upon and uses the rationale of the Supreme Court decision in *United States v. Wells*[64] to frame its questions. The requirement read from *Wells* is whether "the decedent's purpose in making the gift was to attain some object desirable to him during his life, as distinguished from the distribution of his estate as at death."[65] One cannot question the Tax Court's judgment in following precedent according to the traditions of our judicial process, but one can question the kind of judicial reasoning manifest in the precedent or in the use of the precedent. The highest court, by offering the kind of distinction on which to base a decision, and without further qualification as to how the matter is to be weighed, provides more pegs at which to throw rings in hope that one may hit. The expediency of this procedure is clear, but the effect of the precedent as used in this case suggests that any evidence of a certain kind that serves a decision is good enough. It matters not whether the evidence is substantial or important in the larger scheme of things. One could be finished with the issue of contemplation entirely by making the literal argument, with whatever minimal proof might be needed, that the decedent's purpose in making a gift is *always* personal happiness and satisfaction in some form, clearly objects desirable to him during his life. The court in the Varner case virtually follows this cue with repeated reference to some acts and thoughts in Varner's life, both related and unrelated to the transfer of his property.

Other precedents the Tax Court uses may also be challenged for their verity. The jury charge in *Peck v. United States*,[66] a case involving a similar issue, was used as precedent in the Varner opinion. Varner interpreted *Peck* to declare that a person who retains a healthy mental condition normally does not make gifts in contemplation of death. One may as readily, and perhaps more validly, offer the opposite proposition that a person who retains a healthy mental condition, given sufficient personal circumstances, normally does make gifts in contemplation of death. Various cases are cited[67] to the effect that cheerful demeanor, and a disdain for morbid preoccupation, indicate that a decedent has living motives. It is not facetious to state that some living motives are to

[64] 283 U.S. 102 (1931).
[65] *Id.* at 114.
[66] 16 Am. Fed. Tax R.2d 6125 (M.D. Ga. 1965).
[67] See cases cited note 28 *supra.*

be found in nearly every, if not every, living person, if that is to be an evidentiary criterion. Much is made by the Tax Court of a series of precedents indicating that evidence of illness has no bearing if the party did not know of his likely and impending death. It would be incredulous that many dying persons, and especially elderly dying persons, would not feel, sense, or otherwise be aware of, or consider subsequent death. It may be fairer to the Tax Court and to the courts it follows to say that they choose not to find evidence of this, or they may have difficulty finding evidence addressed to the point. The courts may feel that public policy is better served and decisions come out "right" when this line of evidence and decision is not followed.

If the object in Varner, as in other litigation, is to make a "case", one could also make a "case" against the decision, with the same evidence, being interpreted to support conclusions opposite from those reached by Varner. In a logical sense and within the limits of available or acceptable trial evidence, admittedly, the case would not have been as strong meaning, not so well documented for "apparent" facts. But, in terms of truth as it relates to human behavior concerning death, as well as in terms of public policy preference, the more realistic decision may be opposed to the Varner result. The need may be for better ways to arrive at a better decision.

B. By Dr. Feifel

There is a presumption in the Varner opinion that the psychological influence of death is necessarily proportionate to the temporal nearness of actual death. This is not so. For example, you can be in good physical health and, yet, fear of death can significantly guide your behavior more than it guides one who is seriously ill. Fear of death, as a dimension, is not something which is limited specifically to the aged, terminally ill, or combat soldier. It can be a motivating life factor at any age.

The observation that Mr. Varner was cheerful, pleasant and active does not inevitably imply that he was not contemplating death. What we may be dealing with is his *reaction to* or coping with the idea of death. Death is a multifaceted symbol which can be "terrible to Cicero, desirable to Cato, and indifferent to Socrates." I had occasion to ask terminally ill patients, "How would you use your time under the threat of death?" A good proportion of them responded that they would "continue on as usual", "draw closer to loved ones", "travel", or "do, and accomplish". Mr. Varner's physical activity, travel and zest for

life could also reflect his preparation for oncoming death. The fact that he never complained about his health or talked of death to others cannot, psychologically, be construed as necessarily demonstrating lack of interest or concern about death. Not only could he be consciously or deliberately withholding his true feelings from others, but thoughts and anxieties about death could well be a steering variable for him on a below-the-level-of-awareness plane, hidden from his own cognizance. Psychological defenses which we term "denial" and "repression" might well be at work here. This is particularly relevant in an area such as attitudes toward death where our culture generally fosters an orientation of camouflage and expulsion. Differing levels of awareness and knowledge have to be considered.

With regard to Mr. Varner's "retirement", one must weigh the possibility that retirement can be a means of disengaging from life and preparing for death. What is viewed as being indicative of "living motives" may in reality be the possessing of as much of life as is possible before death, although that feeling may not be verbalized or consciously present.

C. By Professor Shaffer

The Tax Court in Varner, and the comments of Drs. Redmount and Feifel suggest that there is judicial reliance on six preconceived notions relating to death and property. The notions from which the precedents have sprung will now be discussed.

Contemplation is surrender. The court has some difficulty in pointing out that the transfer of the cottage was a relatively insignificant transfer in terms of Mr. Varner's total assets. The court also belabors the fact that Mr. Varner had enough to support a gracious retirement after transferring the corporate securities. Finally, the court finds that since Mr. Varner could and did live in the house until he died, its transfer was not death-motivated. In other words, a death-motivated transfer is one that lacks present day operation. This last point could as well be made in reverse. Since Mr. Varner wanted the house to be used for his granddaughter, and at the same time to live in it until he died (a clearly testamentary frame of mind), the transfer was within the statute. It is interesting to compare the judicial assumption, that dying people "give up", with clinical information:[68]

> [I]ndividuals on the brink of death or individuals who knew they were to die in the near future experienced the greatest insights, the

[68] Zinker & Fink, *The Possibility for Psychological Growth in a Dying Person*, 74 JOURNAL OF GENERAL PSYCHOLOGY 185, 186, 197 (1966).

greatest joys, and important re-evaluation of their past lives . . . greater religious strength, greater love . . . integration and closure of their past lives and sometimes 'grew.'

[W]e have found . . . that many patients often are . . . concerned with being respected as human beings, with being loved, and with understanding the nature of their illness. We have come in contact with several critically ill patients who showed signs of psychological growth. These individuals seemed to accept the fact of their coming death and, having freed themselves from the burden of fighting for physical survival, felt free to feel close to their fellow patients, to be creative, and to experience greater religious strength. . . .

[D]espite the fact that some dying individuals get "stuck" on certain basic needs and often deteriorate psychologically, other individuals begin to think in a more fluid way and are stimulated to examine their past lives, to examine their beliefs, and to examine afresh the nature of things around them. For the first time, they are able to cope with questions that continually have plagued them.

Death is a medical matter. Civilized Western man is the only animal to whom this norm is applied. It is assumed that other animals, for example, elephants and mice, know enough to prepare for death without having to be told.[69] The medical-death norm had two applications in the Varner opinion, both justified by precedent. The first application assumed that Mr. Varner, even though he was almost eighty years old and declining physically, would not be biologically or psychologically aware that his condition portended death. The second and corollary application of the medical-death norm is the court's treatment of the fact that a physician (at the time the securities were transferred) did not know Mr. Varner was dying and, therefore, Mr. Varner cannot have known. The insight supporting both applications is that dying is not a matter of human experience or of instinct. It is a matter of medical information. Behavioral research is to the contrary because there is now clinical and systematic evidence that dying people often foresee their deaths at a virtually conscious level. Even more often they sense death unconsciously and begin an almost instinctive preparation for it.[70]

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69 K. LORENZ, ON AGGRESSION 235-37 (Bantam ed. 1967), discusses and compares the Freudian "death wish" theory with his ethological findings and relates both to Margolin's study of Ute Indians. J. GOODY, DEATH, PROPERTY AND THE ANCESTORS 278-81 (1962), discusses property transfers *propter mortem* in primitive societies in Africa.

70 Hutschnecker, *Personality Factors in Dying Patients*, in H. FEIFEL, *supra* note 1 at 237; B. GLASER & A. STRAUSS, AWARENESS OF DYING (1965); K.R. EISSLER, THE PSYCHIATRIST AND THE DYING PATIENT (1955); Joseph, *Transference and Countertrans-*

Travelers forget death. This norm relates to the first two. It is applied whether or not the traveler is dying or knows that he is dying. The Varner court is candid about its assumption, both in terms of negative evidence (Mr. Varner's surrender of the cottage was actuated by compassion for his granddaughter—who arguably gained nothing by it), and in terms of affirmative evidence (Mr. Varner continued to climb atop houses, go hunting, and take trips even when he was dying). The genesis and growth of this travel-and-activity norm is probably related to the death-is-surrender norm (or to a general attitude that death is something that happens to a man, rather than something he does). However, there is a substantial amount of literature which questions this, which is relevant because judges often adhere to literary insight even though they usually spurn psychological insight.

Tolstoy's story, *Three Deaths*, in which a dying consumptive woman believes she will survive if she can make her way out of Russia, is an example. (And incidentally her family and doctor think she does not know she is dying.)[71] O'Connor's recent memoir on the last days of the Irish poet and editor, George Russell, relates the fact that Russell suddenly left his home in Dublin, gave away his possessions and moved to London. Yeats remarked that this was a matter of his "giving up the world to go on a world cruise." But O'Connor thought not:[72]

> Of all the men I have known, Russell was most a creature of habit, and for him to give up everything—his house, his books, his pictures, his friends—was already a sort of death.

And there is solid behavioral evidence to support the poetic insight.[73]

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ference in the Case of a Dying Patient, 49 PSYCHOANALYSIS AND THE PSYCHOANALYTIC REVIEW 21 (Winter, 1962); Weisman & Hackett, *Predilection to Death*, 23 PSYCHOSOMATIC MEDICINE 232 (1961); DEATH AND IDENTITY 293 (R. Fulton ed. 1965). Some federal judges demonstrate similar insight. *See* Gregg v. United States, 13 F. Supp. 147 (Ct. Cl. 1936); Kengel v. United States, 57 F.2d 929 (Ct. Cl. 1932). The facts in Estate of George H. Kent, 6 CCH Tax Ct. Mem. 933 (1947), are the kind of facts these psychological researchers talk about.

Ridden v. Thrall, 125 N.Y. 572, 26 N.E. 627 (1891), is an interesting, largely implied judicial recognition of the fact that men somehow foresee in their tissues not only the time of death but maybe even the occasion of death. The decedent there had given property *causa mortis* as he was about to undergo a relatively minor operation. He died from a heart ailment, shortly after surgery. The question was whether he contemplated the cause of death and the court held that he did—even though his physician did not. *See also* CAL. CIV. CODE §§ 1150-53 (West 1957) (codifying property rules on gifts "in view of death.").

[71] L. TOLSTOY, THE DEATH OF IVAN ILYITCH AND OTHER STORIES 72 (1923).

[72] O'Connor, *Bring in the Whiskey Now, Mary*, THE NEW YORKER, August 12, 1967, at 36.

[73] Shneidman, *supra* note 7; Feifel, *Attitudes of Mentally Ill Patients Toward Death*,

Even practicing lawyers know that travel and death are psychologically related. Those I have interviewed said that the prospect of a trip is the usual reason clients come in to have wills prepared.

Dying people are sad. This norm has a tacit assumption—that people who are dying may make gifts in contemplation of death—but the court did not state it because it would have tended to undermine the court's conclusions on the house transfer. In explaining the cottage transfer the court was almost intemperately anxious to mention Mr. Varner's contemporaneous optimism, even though the evidence also indicated sadness at the relatively recent death of his wife and disgust at the intoxication of caretakers. In explaining the house transfer, the most difficult part of the opinion, the court relied almost exclusively on Mr. Varner's optimism in the face of a death which was obvious by this time even to Mr. Varner himself. Mr. Varner's disapproval of the servant his son provided for him was taken by the court to indicate that the servant symbolized death. Life-centered man's reaction to symbols of death is resentment. The court did not express that assumption, possibly because Mr. Varner later grew closer to the servant, and even then, according to the court, did not contemplate death.[74]

Support is only for life. Following what is perhaps the most commonplace of all platitudes in these cases, the court gave it as the law that a person who is concerned about the support of loved ones is not concerned about his death.[75] The norm has two sub-norms. One is that no one worries about how his loved ones will be taken care of after he is dead (the life insurance industry to the contrary notwithstanding). The other is that satisfactions derived from providing support are seen in terms of one's lifetime. This is a judicial denial of the insight represented by Shneidman's "post-self" concept.[76]

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122 JOURNAL OF NERVOUS AND MENTAL DISEASE 375 (1955), *discussed in* DEATH AND IDENTITY, *supra* note 70, at 131, 137-39; Jung, *The Soul and Death*, in THE MEANING OF DEATH, *supra* note 1, at 3, 10; Stern, Williams & Prados, *Grief Reactions in Later Life*, 108 AMERICAN JOURNAL OF PSYCHIATRY 289 (1951), *discussed in* DEATH AND IDENTITY 240, 242. C.R. ROGERS, CLIENT-CENTERED THERAPY 115-23 (1965), reports a course of psychotherapy which took a sudden, sharp turn for the worse when the patient ("client") was about to leave for a vacation trip. The reported interview and diary material surrounding this event is filled with allusions to death.

74 Tolstoy's story, *The Death of Ivan Ilyitch*, *supra* note 71, portrays a dying man becoming more human, more *alive*, as his death approaches. See the psychological sources note 70 *supra*, and R.C. FOX, EXPERIMENT PERILOUS (1959).

75 The collection of suicide notes in E.S. SHNEIDMAN & N.L. FARBEROW, CLUES TO SUICIDE 197-215 (1957), is heart-rending evidence to the contrary.

76 *See* Shneidman, *supra* note 7; B. GLASER & A. STRAUSS, *supra* note 70, at 128, and Feifel, *Death*, in N.L. FARBEROW & G.W. ALLPORT, TABOO TOPICS 8, 11 (1963).

Dying people withdraw. This norm seems superficially to resemble Shneidman's analysis of Melville's "social death", but the resemblance is only superficial. The factual basis for it in this case is the conclusion that Mr. Varner's retirement—retirement, ultimately, even from the ownership of the roof over his head—was carried out so that he could devote more time and attention to those he loved and so that he could, by giving them property, entice them into unfamiliar intimacy with him. The court takes this aspiration for togetherness to be the opposite of withdrawal. Melville, by contrast, withdrew *towards* his work (and would, Shneidman says, have withdrawn toward his family too, if he could have). Melville and Mr. Varner did similar things, but Shneidman's conclusion from this fact is that Melville was dying. The court's conclusion is that Mr. Varner was not dying, at least not in the tax sense.

ESTATE OF MARCH V. COMMISSIONER[77]

(United States District Court)

This is a claim for refund of estate taxes paid, brought by the executor of the will of Ruth March. The taxes were assessed on the theory that a single set of inter vivos transfers, made by the decedent on April 1, 1960, were made in contemplation of death and were therefore subject to estate taxes under Section 2035 of the Internal Revenue Code of 1954. The case is before this court on submission to the court after trial without jury. Briefs have been filed by the executor and by the government.

The late Mrs. March was the widow of Leonard March. He died in June, 1959; she died in August, 1962. While both were alive, very little of the family's considerable wealth (in excess of $500,000) was owned by Mrs. March. Leonard March's will provided that all of his property was to be placed in trust; the income from the trust property was to be paid to Mrs. March during her life, and she was to have a testamentary power to appoint one-half of the principal at her death. The other half of the principal—or all of the principal if Mrs. March

[77] This is a composite of the following cases: Hoover v. United States, 180 F. Supp. 601 (Ct. Cl. 1960); Abbett v. Commissioner, 17 T.C. 1293 (1952); Estate of Lillie B. Carr, 11 CCH Tax Ct. Mem. 406 (1952); Estate of William L. Belknap, 10 CCH Tax Ct. Mem. 769 (1951); Estate of Arthur W. Davis, 11 CCH Tax Ct. Mem. 814 (1952); and Estate of Meyer Goldberg, 10 CCH Tax Ct. Mem. 977 (1951). The characters and, to some extent, their personalities, are taken in part from C.P. SNOW, THE CONSCIENCE OF THE RICH (1960). The footnotes which follow, through the end of the opinion, are the court's.

did not exercise her power—was to be paid to Leonard March's brother, Philip March. Mrs. March elected against this will, under applicable provisions of state law, and was awarded one-half the estate of her husband; the other half accelerated and was distributed to Philip March.

After this transaction Mrs. March owned approximately $250,000. This was distributed to her in April, 1960. Within less than a month she conveyed almost all of it—$232,000 according to the stipulation—to her two children, Charles March and Katharine March Clark. At her death, she had only $8,000 and was living in a house which she had deeded to her son as part of the transfers here at issue. The question is whether the April, 1960, transfers were made with testamentary motives. The inquiry is not whether the transfers were made in contemplation of death, but whether they were *not* made in contemplation of death.[78] The estate has the burden of proof on this issue.

Both Charles March and Katharine March Clark lived in their father's house until they were in their thirties. Both married somewhat later than is common in our society and both were married to persons of whom their father disapproved. In Mrs. Clark's case, the marriage was disapproved because her husband was not of the family religion. In Charles March's case, the marriage was disapproved because Charles' wife, Ann, had been at some point in her youth a member of the Communist Party. Charles also incurred the disapproval of his father, several years before his marriage, when he abandoned the profession for which he was trained, the law, and decided to enter medical school. Charles is now a practicing physician. Although the late Mr. March paid for the education of these children (even including Charles March's medical education) and provided for them generously, he vowed to disinherit them if these marriages were performed. That, obviously, he did.

The personality with which this court must primarily be concerned is that of the decedent, Ruth March. But it is difficult to examine this lady's purposes without examining also the character of her late husband. He was a demanding father who lived in almost constant tension with his son. It is possible to conclude from testimony of Charles and Philip March that Leonard March's disagreement with his son's

[78] The statute seems to compel this negative formulation. See the forms of verdict used in Jefferies v. United States, 19 Am. Fed. Tax R.2d 1847 (D. Tex. 1966), and the court's explanation of the issue in Smith v. United States, 4 Am. Fed. Tax. R.2d 6108 (D. Utah 1959). *See also* Estate of Don Murillo Brockway, 18 T.C. 488 (1952); MacDonald v. United States, 12 Am. Fed. Tax R.2d 6191 (E.D. Tenn. 1956).

choice of profession, and his disapproval of his son's marriage, were not the real emotional reasons for his disinheriting Charles, but that their differences ran deeper. On the other hand, the disinheritance of Mrs. Clark was more "normal"—and even to be expected—considering the elder March's devotion to his religion. In any event, it appears that Mrs. March felt that the disinheritance of Mrs. Clark was justified, but that the disinheritance of Charles was not. She determined, almost as soon as Leonard March was dead, to right the wrong she felt had been done Charles. She was heard to say that she intended to carry out her late husband's "moral obligations", and that she prayed that she would live long enough to do it.

Mrs. March had a cheerful disposition and did not complain of illness, although she was not particularly well, and was, at the time of these transfers, seventy-eight years of age. She was never morbid and did not discuss the prospect of death or future life with members of her family, or others. In her early married life she was a jovial person—talkative, fond of expensive clothing and jewelry. However, her first child, a son, died in early infancy. The testimony of her brother-in-law, Philip March, was that she was severely affected by this unexpected tragedy and she thereafter showed less interest in social life and, when her other children were born, concentrated her life on them.

She became frugal and did not, for instance, own a car. She does not appear to have worried about her health. Although she appeared not to mourn her husband's death excessively, she collapsed physically about three months after the funeral. She was hospitalized and found to suffer from "general depression, arteriosclerosis and fatigue." The physician who attended her testified that the principal causes of her illness were "old age and grief." She was released and treated as an outpatient after one week in the hospital, and did not become seriously ill again until about two weeks before her death. She was again hospitalized, declined rapidly and died. The cause of death is listed on the death certificate as "hypostatic pneumonia, cerebral hemorrhage and arteriosclerosis."

She was generally calm and pleasant during the years following her husband's death. Her condition, prior to the last illness, was not so grave that the court can infer that it caused the idea of death to possess her mind, nor was it good enough to constitute that sound health from which could be inferred purposes entirely associated with life.

In January, 1960, when the distribution from her husband's estate was imminent, Mrs. March invited her children to her home and an-

nounced that she intended to "do right by Charles." Both Charles and Mrs. Clark objected to her plans because they did not include equal treatment for Mrs. Clark. Mrs. Marsh resisted them, stating that Mrs. Clark knew why she had been disinherited and that nothing could be done about it. They were in complete disagreement on the matter, with one relatively minor exception: both children agreed with Mrs. March's plans to deed the family home at Bryanston Square to Charles so that he and his wife would "have the security of the family home in the event of the ever present possibility of one kind of an emergency or another."

The three members of this family then entered into a two-month period of bickering, an unusual circumstance for Charles, who had not resisted his mother in the past. He apparently pursued the issue with the zeal of one who has found a cause in which he can be unselfish, and in which he can challenge the older generation.

In April, 1960, without notice to either of her children, Mrs. March called her lawyer to her home and announced that she wanted transfers made of all of her share of her husband's estate to the children equally. Only at her lawyer's insistence did she even retain the $8,000 in cash with which she died two years later. Her lawyer reported that she said that both children had insisted that they were entitled to their father's money and that, although she did not agree with them, she was weary of argument and wanted the lawyer to arrange the transfers. As the lawyer left that day she said, "I am glad to stop all this talk. It will be a relief to get it off my mind. They can have it." The instruments of transfer were prepared within two or three days and conveyed to the children, with a terse cover letter, prepared by the lawyer but signed by Mrs. March, stating that the transfers were "out of love and affection and in order to assure your independence and support." Mrs. March's lawyer filed a gift-tax return for her for the calendar year 1960 which listed the motive for the gifts as "betterment of beneficiary—peace in family."

Both children replied to Mrs. March's letters with gratitude and attention, which was, at first, spurned by Mrs. March. She told them that the gifts were made so that she would not consider herself obligated to them and that she wanted no more calls for money from them. However, Mrs. March's natural affection for her children soon overcame this apparent resentment, and the family grew closer over the following year. The children spent holidays with their mother; she rejoiced at the birth of a son to Mrs. Clark; Charles provided for his mother's support and made no claim to the house at Bryanston Square which

she had deeded to him; and both children were at her hospital bedside when she died.

The government contends that these transfers were testamentary in character and that the critical motivation in making them lay with the children—especially with Charles March—and not with the decedent herself. The intentions of the two children, in the government's view, overbore the will of Mrs. March, and *their* intentions were clearly testamentary. The executor contends that both transfers fall within the pattern of cases involving transfers to establish the independence and provide for the support of donees.[79]

The court cannot help but notice that the two theories are not necessarily inconsistent. But of course the results to which each body of precedent supposedly points *are* inconsistent. It may therefore be helpful to examine the factors that appear to have been prominent in Mrs. March's mind, to decide which of them is dominant, and then to decide what result is indicated by this dominant factor. (The government's allusion to the intention of the children is relevant only insofar as the court can infer that their intention became Mrs. March's.)

Pressure from children. An easy answer to this difficult determination would be to say that Mrs. March transferred virtually everything she owned in order to stop the family argument. Transfers to avoid the importunities of relatives have been held not in contemplation of death.[80] However, I believe the executor is incorrect in his reliance on the *Estate of Dell H. Higgins*,[81] *United States Trust Co. v. United States*[82] and *Estate of Halvor J. T. Jacobsen*[83] cases. The transfers in those cases were, to be sure, responsive to family pressure, but none of them was like the transfer here. In *Higgins*, the decedent transferred to protect her property from her husband. The evidence was that she did this in order *to have it for herself*, and in order to diminish pressure on her which was literally destroying her health. She transferred in order,

[79] Allen v. Trust Co., 326 U.S. 630 (1946); Llewellyn v. United States, 40 F.2d 555 (D. Tenn. 1929); Vaughan v. Riordan, 280 F. 742 (W.D.N.Y. 1921); Estate of Charlotte A. Hopper, 22 T.C. 138 (1954); Estate of William C. Coffin, 9 CCH Tax Ct. Mem. 1129 (1950); Estate of Robert M. McCulloch, 8 CCH Tax Ct. Mem. 110 (1949); Estate of Bertha M. Engel, 6 CCH Tax Ct. Mem. 70 (1947); Estate of George H. Burr, 4 CCH Tax Ct. Mem. 1054 (1945); Estate of Charles T. Smith, 1 CCH Tax Ct. Mem. 518 (1943).

[80] Estate of Emilie Weaver, 11 CCH Tax Ct. Mem. 1073 (1952) (decedent's husband had died two years before the transfer at issue); Estate of William F. Hofford, 4 T.C. 542 (1945).

[81] 9 CCH Tax Ct. Mem. 426 (1950).

[82] 23 F. Supp. 476 (Ct. Cl. 1938), *cert. denied*, 307 U.S. 633 (1939).

[83] 9 CCH Tax Ct. Mem. 1112 (1950).

physically and materially, to stay alive.

In *United States Trust Co.*, the decedent transferred to her husband in order to avoid the importunities of two of her twelve children. She did so in order to prevent the dissipation of the estate at the hands of the importuners. In *Jacobsen*, the decedent transferred property to establish the independence of his wife after considerable pressure from her. The decedent there wrote his wife a letter after the transfer explaining that he made it "so that from now on throughout our lives this one cause of misunderstanding may be altogether absent . . . . It is what I am anxious to do for you and for our life together."[84] The court did not feel that the disposition was testamentary. That situation is somewhat similar to Mrs. March's, but it seems to me to differ in one crucial particular. A husband who transfers property to his wife still, in a very real sense, retains it. As a matter of fact, one of the decedent's motives in *Jacobsen* was to remove the necessity for his wife's asking him for money for personal and household needs. He was providing by the transfer what he would probably have had to provide in any event. That is not true of transfers to adult children. While it cannot be said that the family pressure consideration proves that Mrs. March's gift was in contemplation of death, neither can it be said that it proves the contrary.

Family unity. The executor points to the fact that Mrs. March's transfers operated to pull her small family together after the death of the head of the household—a living motive. The government contends that the transfers were testamentary in effect because they operated, as a will would have, to establish the financial independence of the children. The government also points to the fact that Mrs. March's transfers were within nine months of her husband's death, and within six months of her collapse from grief and depression. Transfers soon after the death of a loved one, which are temporally related to disabling grief, are arguably death-related although this is not a factor that has been significantly discussed in the cases.[85]

Fatter v. Usry[86] is a compelling instance of this phenomenon. Both husband's and wife's estates were at issue. The husband, dying shortly

[84] *Id.* at 1113.

[85] *See* Neal v. Commissioner, 53 F.2d 806 (8th Cir. 1931), where the decedent's rapidly declining health was undoubtedly related to the recent death of his wife. United States Trust Co. v. United States, 23 F. Supp. 476 (Ct. Cl. 1938), *cert. denied*, 307 U.S. 633 (1939), is a similar situation, but the court held for the Government. Estate of George M. Spiegle, 11 CCH Tax Ct. Mem. 1004 (1952), is also factually similar but the court does not discuss this factor.

[86] 20 Am. Fed. Tax R.2d 5941 (E.D. La. 1967).

after his wife, who cared for him like a child, had apparently wasted away after her death. In that case, though, and in *Estate of Mary C. Budd*,[87] the death of a loved one was an expressed, obvious, health-related obsession in the decedent. In *Budd*, where the decedent mourned her dead daughter, there was even evidence that she did not want to live. This was an important part of what the court found to be "a general attitude of mind inviting contemplation of death."[88] In a way, her transfer of property was suicidal. Finally, *Estate of Fielder J. Coffin*,[89] makes a point which seems important here: the decedent there had been depressed virtually all of his life because of the death of his father. His change in personality was doubtless related to the effect of parental death, but his was not shown to be a death-contemplating personality. The court held for the taxpayer. We find here, as the court found there, that the deaths of Mrs. March's first child and the more proximate death of her husband, did not cause her to contemplate her own death.

The fact that she made these transfers in order to benefit her children economically seems clearly established. This sort of transfer is like the transfer in *Estate of Annie T. Stinchfield*,[90] where a wife conveyed to children in discharge of her husband's moral obligation and to secure isolation of assets from the risk of her husband's business. Similarly, in *Kaufman v. Reinecke*,[91] the transfer was to remove assets from the operation of a corporate buy-sell agreement.[92] There also are resemblances to *In re Kroger's Estate*[93] and other cases,[94] in which a father transfers property to insulate it from the demands of a second wife. In *Kaufman*, the court spoke of a gift in contemplation of contract; and in *Kroger v. Commissioner*, of a gift in contemplation of marriage. What did Mrs. March's gift contemplate? It will not do to answer that it was intended

87 4 CCH Tax Ct. Mem. 601 (1945).

88 *Id.*

89 13 CCH Tax Ct. Mem. 1149 (1954).

90 4 CCH Tax Ct. Mem. 511 (1945), *rev'd on other grounds*, 161 F.2d 555 (9th Cir. 1947).

91 68 F.2d 642 (7th Cir. 1934).

92 *See also* Brown v. Commissioner, 74 F.2d 281 (10th Cir. 1934).

93 145 F.2d 901 (6th Cir. 1944).

94 Lippincott v. Commissioner, 72 F.2d 788 (3d Cir. 1934); Terhune v. Welch, 39 F. Supp. 430 (D. Mass. 1941), *rev'd on other grounds*, 126 F.2d 695 (1st Cir. 1942) ("a present arrangement of his affairs in view of his coming marriage"); Estate of Samuel Want, 29 T.C. 1223 (1958) (in which transfers were to protect the decedent's daughter from a lady-friend); Estate of Berman Barad, 13 CCH Tax Ct. Mem. 223 (1954). *See* Studebaker v. United States, 211 F. Supp. 263 (N.D. Ind. 1962); Estate of Charles J. Rosebault, 12 T.C. 1 (1949); Estate of E. Coray Henry, 16 CCH Tax Ct. Mem. 352 (1957).

to establish the financial independence of her children, because that is factually ambiguous and an observation which begs the question. It is important to notice that this was not simply one of a lifelong series of transfers to children, which would present a different case.[95]

There are cases[96] in which the gift was held not in contemplation of death because the decedent desired to see the donee made financially independent. In *Wishard v. United States*,[97] the court thought that a transfer to make a wife and sister independent of the financial vicissitudes the decedent might encounter was with lifetime motives. But that factor—risk—is not present here. Mrs. March's only risk was the risk of death. In *Des Portes v. United States*,[98] the court held purchase of single-premium life insurance not in contemplation of death, but that case relies heavily on the decedent's good health. As previously noted, the state of Mrs. March's health is of no probative value one way or the other. In *Estate of Ernest Hinds*,[99] the issue of health was closer, but the court, erroneously, in our view, held it determinative.

This case seems to more closely resemble *Igleheart v. Commissioner*[100] and *Neal v. Commissioner*.[101] The *Igleheart* court distinguished between a transfer for the economic health of the donee during the transferor's life and a transfer to secure economic health *after the decedent's death*. The latter is in contemplation of death.

The *Igleheart* court also relied on the fact that the arrangement was to provide for the donee in the event the donor was "absent," which in the circumstances was held to mean "dead." The same conclusion is possible here, with reference to the transfer of the house "in the event of the ever present possibility of one kind of an emergency or another." We place no particular weight on the letter Mrs. March sent her children, which was drafted by her lawyer (circumstances are more important than a lawyer's words, and the circumstances here, as in *Neal*,[102] are testamentary).[103]

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95 Belyea's Estate v. Commissioner, 206 F.2d 262 (3d Cir. 1953).

96 Wishard v. United States, 143 F.2d 704 (7th Cir. 1944); Des Portes v. United States, 171 F. Supp. 598 (E.D.S.C. 1959); Estate of Ernest Hinds, 11 T.C. 314 (1948).

97 *Id.*

98 171 F. Supp. 598 (E.D.S.C. 1959).

99 11 T.C. 314 (1948).

100 77 F.2d 704 (5th Cir. 1935).

101 53 F.2d 806 (8th Cir. 1931).

102 *Id.* at 808. The court quoted a letter *written by the decedent* which accompanied the gift: "I hope you will keep this present intact as much as possible, and will enjoy the income therefrom the rest of your life. I trust you will see fit to, in turn,

The executor insists, however, that this was a transfer to "pull the family together" after the death of a strong and vengeful father. Family harmony, as a purpose of gift giving, is usually conceded to be not in contemplation of death,[104] although the contrary has been held where there is strong evidence of death-centered motivation, as, for instance, where poor health is shown.[105] An excellent treatment of the point is to be found in *Russell v. United States*,[106] in which the female decedent had transferred property to her son in order to induce him (and his wife and children) to remain in her apartment building.[107] That situation is somewhat like Mrs. March's, and were it not for evidence of testamentary motive, coupled with the statutory presumption against the taxpayer, it might be determinative.

Reward-Revenge. The executor argues, finally, that these transfers were made to reward Mrs. March's children and to redress the wrong done Charles by the late Mr. March, and possibly to obtain some measure of retaliation against a domineering husband and father. There are several cases[108] in which the transfers involved were vindictive, but they seem wide of the mark here. It may be that Mrs. March was vindictive, but that is conjecture. There is no evidence of anything but positive motives in both her desire to restore Charles' patrimony to him and her ultimate decision to treat Katharine equally. The same can be said of the argument that she was fulfilling a moral obligation of her husband,[109] or rewarding the children for something.[110]

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divide this gift between your children when you get ready to provide for their welfare after you are gone."

[103] See the factors outlined in the jury charge in Robinson v. United States, 8 Am. Fed. Tax R.2d 6082 (N.D.N.Y. 1961).

[104] Wishard v. United States, 143 F.2d 704 (7th Cir. 1944); Estate of Cora D. Metz, 10 CCH Tax Ct. Mem. 970 (1951).

[105] Igleheart v. Commissioner, 77 F.2d 704 (5th Cir. 1935); Estate of Robert W. Hite, 49 T.C. 580 (1968).

[106] 260 F. Supp. 493 (N.D. Ill. 1966).

[107] *Id.* at 503: "The dominant motive prompting the transfer was that of insuring that her grandchildren, whose presence was a source of happiness to her, would remain as tenants of the building in which she resided." *See* Estate of Baxter v. United States, 22 Am. Fed. Tax R.2d 6047 (E.D. Ark. 1968).

[108] United States Trust Co. v. United States, 23 F. Supp. 476 (Ct. Cl. 1938), *cert. denied*, 307 U.S. 633 (1938); McGregor v. Commissioner, 82 F.2d 948 (1st Cir. 1936); Estate of Berman Barad, 13 CCH Tax Ct. Mem. 223 (1954); Estate of Charles E. Haley, 10 CCH Tax Ct. Mem. 805 (1951).

[109] Willcuts v. Stoltze, 73 F.2d 868 (8th Cir. 1934) (promise to late wife); Studebaker v. United States, 211 F. Supp. 263 (N.D. Ind. 1962); Estate of Charles J. Rosebault, 12 T.C. 1 (1949). *See* Dunn v. United States, 22 Am. Fed. Tax R.2d 6038 (S.D. Ill. 1968).

[110] Belyea's Estate v. Commissioner, 206 F.2d 262 (3d Cir. 1953) (involving, how-

In the view we take of the case—which is that, on balance, Mrs. March's transfers appear to be the sort of transfers she could have made by will, this consideration is ambiguous. A parent may reward and punish his children and redress past wrongs as fully in a will as in inter vivos transfers. When a factor in a gift in contemplation of death case is ambiguous, the case must be decided on other factors. In my opinion, the testamentary factors discussed above, point to the application of the statute in this case.

The burden of deciding what was in the mind of a person long dead, at a point in time months before her death, is almost too much for Congress to have required of the judiciary:

> It is unfortunate that the Congress, in the estate tax law, used the phrase "in contemplation of death", without defining its intended meaning; and it is equally unfortunate that courts should undertake the legislative function of defining the legislative intent. . . . The fact that every person of sound mind knows that he will eventually die makes it indefinably difficult to determine when persons act in contemplation of death and when they do not. The best that can be said of such a decision is that the judge, having the duty of deciding, exercised his best judgment. The decision on such a problem is inherently difficult.[111]

In the last analysis, it is sufficient to hold, and this court does hold, that the executor has not met the burden of proving that Mrs. March's transfers to her children were not in contemplation of death.

COMMENTARY ON ESTATE OF MARCH V. COMMISSIONER

A. By Dr. Redmount

In March, some of the matters with which issue is taken are in many respects very much like the neglected matters of the Varner case. The effects of age and illness on the contemplation of death are recurring considerations. In March, as in Varner, one might think that the issue is over and the decision is gainsaid when the court, following precedent, thus frames the matter: "The inquiry is not whether the transfers were in contemplation of death, but whether they were *not* made in contemplation of death." It is not hard to realize and not hard to prove, using the thinking of the Varner case, that every or nearly every person in some manifest way contemplates life as well as, or more than, death. Perhaps the judicial result one comes by with such thinking is

ever, a series of lifetime gifts); Estate of Carrie M. Cowan, 24 CCH Tax Ct. Mem. 595 (1965); Estate of Baxter v. United States, 22 Am. Fed. Tax R.2d 6047 (E.D. Ark. 1968).

111 Des Portes v. United States, 171 F. Supp. 598, 602 (E.D.S.C. 1959).

no more than the execution of legislative intent, but if so, then why bother to insert Section 2035 of the Code? The court in the March case does better. It seeks the "dominant factors", thus seeking to balance the possibilities, rather than any available peg on which to hang its decision.

In the effort to balance life and death motives the court seeks to establish something about Ruth March's contemplation of death from her relationships with her children. Almost inevitably, the court must enter the realm of psychological speculation about family relationships. The court seems to be aware of the intricacy and subtlety of family relations. It does not oversimplify. It recognizes that to understand Ruth March's attitude in transferring property to her children is also relevant and important to understand her relationship with her deceased husband and his attitudes. It also recognizes a distinction between real or more meaningful and apparent attitudes. It speculates that the father's "disagreement with his son's choice of profession, and even his disapproval of his son's marriage, were not the real emotional reasons for his disinheriting Charles, but that their differences run deeper."

The court gives further evidence of psychological sophistication in the recognition that ostensible acts may be ambiguous as to their meaning and purpose, and inconclusive on their face. Seeking conclusions, or perceiving the impossibility of establishing them, the court recognized that the status of Mrs. March's health could be valued in terms of both a life interest and a death interest. It decided that Mrs. March could have transferred wealth because of pressure from her children, that she could have done so to create or preserve family unity, but it still recognized that her decision in either instance might as readily have reflected testamentary motives at the same time. Finally, the court reached a procedural point to arrive at a solution, and "passed the buck". It decided, under statutory authority, that the executor had not satisfied the burden of proof that Mrs. March did not make a transfer "in contemplation of death".

The court, in the concluding statements of an astute decision, identified the culprits who saddled it with a problem of psychological analysis and decision making that it was not prepared to handle. "The burden of deciding what was in the mind of a person long dead, at a point in time months before her death, is almost too much for Congress to have required of the judiciary." It quotes *Des Portes v. United States*,[112] where the court states, "[T]he fact that every person of sound

[112] *Id.*

mind knows that he will eventually die makes it indefinably difficult to determine when persons act in contemplation of death and when they do not." Perhaps *Des Portes* makes the point with exaggeration, but the matter of finding precedence in life or death motives is a difficult evidentiary task. It assumes, with the possible exception of findings relating to suicide, more systematic or certain knowledge about psychological experience relating death, and to death vis-a-vis life, than now exists.

Section 2035 of the Internal Revenue Code puts in issue the matter of the transfer of property in contemplation of death. The issue is one of great behavioral and psychological complexity and even ambiguity.

The matter of contemplation. To contemplate, a mental act, is "to have in view" or to give "attentive consideration". One must determine that contemplation has taken place, more from logic than from observation. And, one must rely on evidence from behavior sufficient to support a conclusion.

If we regard the matter as procedural, the decision-making may not be difficult. The process of inference allows great latitude in speculation, especially where all the acts and events to which the logical process applies are not clear and certain. And, if one regards behavior extempore and not as part of a system, any and all behavior can be used freely in speculation and interpretation. One can build a neatly contrived cardboard pyramid of seemingly purposive behavior from passing remarks, momentary stresses, exaggerated dispositions, circumstantial occurrences and the like. And the mortar of interpretation that accounts for the pyramid derives, not from close validation of individual experience within a careful scientific framework, but from logical implications of selected events, general or reasonable meanings attached to personal phenomena, juxtapositioning of events to reduce or to emphasize absurdities, and the like. In short, if one searches for "contemplation" as a matter of juridical procedure, one likely can make a case for contemplation and, if one chooses to recognize it, one can make a case against contemplation. The issue turns on whether the judge objectively decides or bases his decision on purely impressionistic phenomena that strike him most vividly and tend to tilt his thinking.

Contemplation from a substantive point of view may be another matter. And it may be more properly and reasonably the province of the psychologist who truly seeks to examine behavior than of the jurist, whose essential effort and responsibility is to somehow pass judgment. Contemplation, from this view, is part of a system of behavior. Con-

templation may be goaded by external events, or by internal stresses and needs. It may be evidenced in verbal and expressive behavior, in symbolic behavior, or it may not be observably evidenced at all. It may be an intense, meaningful and continuous experience, or it may be relatively brief, passing or unimportant. If the system of behavior in which contemplation is regarded is to be complete, then the reasons and circumstances for non-contemplation may be just as important as the causes and phenomena relating to contemplation. A person who is too anxious may suppress rather than contemplate, because the issue that concerns him is too important and disturbing, rather than unimportant and unnoted. One may contemplate a particular event or circumstance because one is, relatively, a contemplative person. Or, one may not contemplate important events or circumstances because one is not, tempermentally or for other reasons, disposed to such a kind of thinking.

The concern about death. Even given the study of "contemplation" by a jurist in a life-probing sense, there are yet other difficult shoals in the interpretation of mental acts and behavioral phenomena. The contemplation in this instance is the contemplation of a phenomenon called death. "Death" is a behavioral event, a matter of psychological interpretation, a social phenomenon and a theological construct. It has legal implication, social significance, and consequences of various kinds. In personal terms death is "in the eye of the beholder". It is either thought of, or perhaps deliberately not thought of, by the octogenarian. It is a matter of recklessness and some indifference to some younger persons. It is a prospective event to be reasoned for the more thoughtful person, but it is also one consciously to be avoided by the more anxious individual. Death attaches to soul, psyche, relation and property, but it likely does so in different ways for different people. And, as if this were not difference or difficulty enough, there is even an implied behavioral norm in our culture that shuns the open and conscious contemplation of death. Thus, in itself and in its attending features, it is an experience ripe for more intense and specific psychological and social investigation.

Usually it is fear and anxiety that attaches to death or to the thought of death. Fear and anxiety may be expressed or revealed in different ways. There may be preoccupation in particular thought and feeling, so that there may be considerable evidence of concern about death. There may be denial, and reactive behavior to deny any contemplation of death when there is really great concern about it. There may be a displacement to other concerns, such as a concern about one's prop-

erty or an interest in religion, which may be a preoccupation in place of or on top of stronger and possibly more terrifying concern about death. There may be a substitution from an interest or concern about death to an interest and exaggerated involvement in having fun or maintaining health.

The importance of property. Finally, in the juridical questioning of matters possibly relating to future interests, it is not only the mental act of contemplation and the phenomenon of death that are to be comprehended in some terms. It is also the social and legal data, and in this context, the psychological meaning of property, that should be identified. Property as an extension of individual personality, defining and affecting intimate as well as business relationships, is not clearly understood. The value and the meaning of property may be akin to the incidents to a drive in certain personalities. The "acquisitive or possessive drive" may function not unlike sexual or aggressive drives. To some personalities, it may be one of the less important modes to personality expression and interpersonal relationship. The point is, property is an important psychological phenomenon on which many human relationships in our society turn. It is used in the exercise of power, of love, of guilt and remorse, of hope and resignation, and in many other ways. The character as well as the use of property can be in large part an idiom of personality. There are psychological dispositions, social conventions and legal conventions regarding the character, the value and the use of property. Psychological dispositions in this matter are hardly illumined. It is an act of sheer intellectual creativity when jurists probe motives regarding the meanings and uses of property thought to be exercised possibly in the contemplation of death.

Policy choices and means of decision. Whatever the status of our system of inquiry and our knowledge about transfer of matters of personal right and value in contemplation of death, sooner or later some policy choices must be faced. In the matter of estate taxation, it may be a form of abandonment and irresponsibility to say there is insufficient knowledge or inadequate procedure on which to act equitably or intelligently. Legislative enactments and judicial process are best thought of as approximations—"most reasonable" or "best available" means—for dealing with some complex social problems. The issue is not "should there be" enactments on estate taxation but "what kind", not "should it be decided" but "who is to decide" and "how".

In the matter of statutory enactment, the issue regarding Section 2035 of the Internal Revenue Code may present itself on the question of

whether objective or subjective criteria should be utilized in deciding about transfers before death, considering the current state of our knowledge about motivations leading up to death. It is at least easier, if not possibly more reasonable or more accurate, to accept only: 1) evidence of age (any person over sixty?), 2) professional certification of health (determined evidence relating to terminal illness), 3) transfer of property executed shortly before death (within a year of death, unless this presumptive evidence of death transfer is conclusively refuted "beyond a shadow of a doubt"), and perhaps some other, similar tests to determine whether a testamentary transfer has occurred.

The issue in Section 2035 regarding judicial determination, especially on the matter of "contemplation of death", may be thought to raise a question as to whether a panel or commission of behavior experts may be used best to advise the court on this consideration. The question, if it is not semantically modified, largely voided of substance through legal fiction and convention and the like, or abandoned to fairly unrestrained logical exercise, presents a profound psychological problem. The most expert judgment and advice is likely to lack full understanding and agreement, but again, it represents a truly best effort on which a judge could more comfortably and veritably rest his *ratio decidendi.*

The "panel of experts" idea really addresses itself to two issues regarding trial procedure in the matter of Section 2035 of the Code. Such panels may be used as part of the end process in decision-making machinery, in this case as an adjunctive or advisory function in deciding the outcome of a case. They may be used also to augment or replace the adversary process in the matter of acquiring and presenting evidence. The relative efficacy of the adversary process in dealing honestly, reasonably, thoroughly and reliably with complex social and psychological behavior is the subject of a brief that in itself would overshadow the issues presented by Section 2035 of the Internal Revenue Code. It may be easier to grant, for the moment, that experts as well as laymen, and evidentiary procedures used in psychology and in other forms of science as well as those used in law, should be systematically used, presented and evaluated on all matters of social and psychological behavior before the courts.

B. By Dr. Feifel

A finding of mine which I think has relevance for the March case and makes things somewhat more thorny is the information that attitudes toward death can oscillate in the same individual from strong avoidance

to calm acceptance. The point in time one centers on can be crucial. My data underline the coexistence of contradictory attitudes toward death, i.e., realistic acceptance of death and its simultaneous rejection in a subtle equilibristic balance in numerous persons.

[There follows portions of the text of a brief report, "Perception of Death as Related to Nearness to Death," by Dr. Feifel and Mr. Robert B. Jones of the Veterans Administration Outpatient Clinic in Los Angeles.[113] It is reproduced here with permission of the authors and of the American Psychological Association.[114] The research reported was conducted on 371 persons in four major groups—seriously and terminally ill (ninety-two); chronically ill and physically disabled (ninety-four); mentally ill (ninety); and healthy (ninety-five). Their ages ranged from twelve to eighty-nine, with a mean age of forty. All groups were average in intelligence, high school graduates and of average socio-economic status. About half were male and a few more than half were Protestant. The data were secured by psychologists and psychiatrists using tests, rating scales, and open-ended questionnaires. Qualitative answers were scored by investigators who showed a percentage of agreement ranging from 81% to 96%. These findings—especially as to denial defenses—are as important for Varner as for March.]

"Man is a creature in time and space whose consciousness permits him to nullify their strictures. Anticipation steers many of his deliberations, and expectation serves as a principal mediator of goal-directed and purposeful behavior. One cogent aspect of this capacity, it seems, would be the influence on the individual of temporal nearness or distance from probable personal death. One's perception of the world and attitudes toward death might not be quite the same next week as it is at present if one were then to learn of a . . . cancer. . . .

"With regard to consciously verbalized fear of death, a majority (71%) of all the groups denied fearing death primarily because 'it's inevitable.' Those who admitted to fear of death did so essentially because of 'fear of the unknown.' Frequency of thoughts about dying and death was dominated by 'rarely' (44%) and 'occasionally' (42%). Almost half (49%) stated that no changes had occurred in their attitudes toward death since their illness (patients) or in the past five years (healthy), with another 30% actually indicating less fear now than heretofore. Additionally, a majority . . . in each group assessed their

113 American Psychological Association, 76th Annual Convention in PROCEEDINGS 545-46 (1968).

114 The study listed two general secondary references—THE MEANING OF DEATH (H. Feifel ed. 1959), and DEATH AND IDENTITY (R.L. Fulton ed. 1965).

overall attitude toward death as 'positive' with the physically ill patients ranking highest in this respect.

"A somewhat contradictory and contrasting picture emerged when other conscious material and below-the-level-of-awareness measures were examined. Interviewers' assessments of the patients' attitudes toward death underlined an 'ambivalent' rather than 'positive' outlook. Forty-four per cent of the population reacted with rejection to the idea of personal death, with acceptance indicated by only 30%. Analysis of color-word interference and word-association tests showed greater interference, increased reaction times, and more recall errors on death than on neutral words. Scrutiny of dying and death imagery data disclosed 'negative' imagery as regnant. Further, denial was the major (63%) coping technique used . . . to deal with the idea of personal death.

"Certain significant differences were manifest among the groups. 'Own illness' was reliably more important . . . for the patients than the healthy in bringing death to mind and in making a lasting impression . . . on them. Anxiety and depression characterized the seriously ill and terminally ill patients more than the healthy. The seriously ill and terminally ill also blocked significantly more often . . . than the healthy when asked to conceptualize death verbally and graphically. Additionally, they used denial as a coping defense relevant to death thoughts reliably more often . . . than the healthy. The healthy, on their side, resorted to intellectualization as their prevailing coping technique.[115] This does not imply, naturally, that denial was not available to a substantial number of the healthy or intellectualization to the patients, not to mention such other shields as reaction formation, isolation and displacement. . . .

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[115] Dr. Feifel supplied some underlying data for this article from the study on the use of intellectualization and denial as techniques for coping with death:

The percentage of occurrence of denial and intellectualization in the four groups (I—seriously and terminally ill; II—chronically ill; III—mentally ill; IV—normal) as judged by clinically trained interviewers were as follows:

	I	II	III	IV
% Denial	84.8	56.4	51.1	57.9
% Intellect.	47.8	51.1	40.0	56.8
Total N	92	97	90	95

In the case of denial, the *difference* between groups when adjustments are made for differences in age, sex, socio-economic status, marital status, intelligence, number of children, education, and religious denomination, are such that they would occur by chance less than once in a thousand.

In the case of intellectualization, when the same adjustments are made, the differences would occur by chance less than once out of 20 times. *See also* the clinical discussion of the denial defense in K.R. EISSLER, *supra* note 70, at 149, 157-58.

"Concerning general view of self and the world, no sharp overall differences among the groups were evident. 'Feel fulfilled' was rated 'yes' by 42%, 'no' by 41%. As expected, however, more of the healthy reported 'yes' than did mentally ill patients. Self-description was generally positive, with the mentally ill bringing up the rear. Major personal assets were designated as 'friendly and sociable' (57%) and 'helpful and sympathetic to others' (52%); major liabilities, 'personal defects' (57%) and 'lack of emotional control' (39%). The most important thing in life now was 'health' for the physically ill, 'family' for the healthy, and 'being a better person' for the mentally ill. The world itself was delineated as 'OK' (39%) and 'good' (38%), along with a pronounced minority vote of 'messed up' by the mentally ill. The path of life ranked highest by all groups emphasized 'integration of diversity,' that is, accepting things from all paths of life as needed and appropriate. This was followed closely by the path stressing 'group participation in achieving common goals.' The paths least favored were 'being a quiet vessel through whom others work' and 'the rich, inner contemplative life.' Passivity and the meditative life as dominant guides were eschewed.

"Concerning personal fate after death, 55% of the present population adopted a religious orientation—the physically ill being more partial in this direction than the other two groups. The physically ill also manifested a significantly more . . . 'conventional' religious outlook than did the others. Nevertheless, scores for all four groups on this variable centered broadly in the 'average' range. No significant differences were noted on the intrinsic-extrinsic religious dimension. Self-rating in the area was primarily 'somewhat religious.' Major reasons for being religious were 'tradition' (31%) and 'belief in God' (22%); for being nonreligious, 'false teachings' (24%). The impact of religion on behavior was reported as 'improves me' (48%) and 'makes little difference' (39%).

"Time was considered 'valuable' by most, but also 'meaningless' by a good proportion of the seriously ill and terminally ill patients. The 'future' was the time period of most concern to the patients, particularly the seriously ill and terminally ill; the 'present' to the healthy. 'Personal gratification' (58%) and 'social orientation' (56%) governed the essential use of time under the threat of death.

"Strong contrasts are apparent in attitudes toward death. Both acceptance and rejection coexist, with acknowledgment and manageable fear generally commanding verbal conscious considerations, denial and

dread, the 'gut' level. Avoidance and evasion strategies tend to become intensified, particularly at the nonconscious level, when a person realizes that death is possible in the near future. Undoubtedly, this counterpoise serves adaptational needs. This is increasingly understandable in an era of dissolving beliefs and traditions when one no longer possesses unquestioned conceptual creeds which transcend and integrate death or furnish one with sustaining continuity and meaning. Nevertheless, it also mirrors unhealthy expulsion and inadequate binding of fears and anxieties concerning death. Expanded communication and openness concerning death rather than suppression is called for in providing emotional support, especially for the seriously ill and terminally ill. The expressions of gratitude and relief verbalized by many of the interviewees suggest its pertinence for all. Closer affinity with the notion of death is required in developmental perspectives. One also needs to comprehend more penetratingly varying and fluctuating meanings of death within as well as between individuals. Additionally, one faces the task of unraveling more intelligibly bonds existing among verbally expressed ideas, fantasy musings, and unconscious concepts concerning death."

These data tend to indicate two facts which are contrary to the almost universal assumptions apparent in Section 2035 opinions: 1) The most common coping technique for all groups of all ages, and in all conditions of health, is denial ("I am not going to die"), rather than intellectualization ("We all die sometime"); 2) The older the subject is, or the poorer his health, the more likely it is that he will select denial, rather than intellectualization.

Two caveats might be added to this data: 1) These are just group statistical findings, i.e., the seriously ill can make use of intellectualization just as well as the healthy; they do so, however, significantly less often; 2) both denial and intellectualization, as coping techniques, can coexist within the same individual—one does not necessarily exclude the other—be the individual sick or healthy.

C. By Professor Shaffer

The March opinion is as ambivalent as the Varner opinion is assertive. Since ambivalence is less useful in jurisprudence than it is in psychology, the court is therefore driven to resolving its problem as all difficult factual problems are resolved by judges—by the application of a presumption.[116] "Presumption" in this sort of case means a policy

[116] See my reports on this phenomenon in judges dealing with juries—*Bullets, Bad*

determination to be applied in deciding the unprovable; it is not here a matter of factual inference.

At least one of the Varner opinion's group norms— *Contemplation is surrender*—is implicit here. The court is at some pains to suggest that all of the things that happened to Mrs. March are consistent with its (statutory) presumption that she had surrendered to the grim reaper. Two other of the Varner norms are clearly rejected—*Support is only for life* and *Dying people withdraw.* Aside from these areas of resemblance or difference, the mood of the March opinion is uncertainty. The uncertainty can be stated in terms of five variable principles:

Moral obligations may be satisfied after death. The Varner court, on solid authority, distinguished between transfers in contemplation of death and transfers to satisfy moral obligations. March, on almost equally solid authority, took the view that satisfaction of moral obligations is not necessarily a living motive.[117] "Rules", such as they are in these cases, are like that. There is almost literally no "rule" which is not, like some sort of law of physics, matched by an equal and opposite contrary "rule".[118] This phenomenon is familiar in death-related cases, or at least where the issue turns on the decedent's intent. It is almost impossible to confront the judiciary with what seems to be a doctrinal inconsistency, because it is always possible for judges to say or infer that precedent counts for very little when intention is the central inquiry.[119] This rejoinder is used by the judiciary even though it is perfectly obvious that courts do not, with any sincerity or seriousness, attempt to find out what was the decedent's intention. The judge in March is refreshingly candid about that.

Another aspect of moral obligation as producing a life-centered motive (or ambivalent motive), is the distinction which the facts here present. Mrs. March seems to have made the transfers to Charles be-

Florins, and Old Boots: A Report of the Indiana Trial Judge's Seminar on the Judge's Control Over Demonstrative Evidence, 39 NOTRE DAME LAWYER 20 (1963); *Appellate Courts and Prejudiced Verdicts,* 26 U. PITT. L. REV. 1 (1964), in PERSONAL INJURY ANNUAL 751 (Frumer & Friedman ed. 1965); *Judges, Repulsive Evidence, and the Ability to Respond,* 43 NOTRE DAME LAWYER 503 (1968).

117 Even classifying this as a satisfaction of moral obligation is debatable, of course. It is possible that Mrs. March reacted out of hurt at Charles' reaction to her attempt to satisfy moral obligation. She withdrew, in a way, and thereby possibly put herself within Shneidman's "social death" generalization.

118 See legal discussion cited *supra* note 4.

119 *See* Schuyler, *The Art of Interpretation in Future Interests Cases,* 17 VAND. L. REV. 1407 (1964); Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts,* 52 CALIF. L. REV. 921 (1964).

cause she thought he had been wronged, and to have made the transfers to Ann to settle a family squabble. The court regards both motivations as doubtful, and resolves the issue in the case by reference to a presumption rather than by reference to either motive. If the presumption were not used, the court might then have to inquire into the relationship between Mrs. March and each of her children, and this especially in reference to her relationship with her late husband and to the apparently radical change in her life which followed the death of her first child. That sort of inquiry might be characteristic of a serious attempt to find out her intention.[120] It would undoubtedly have to involve the kind of interdisciplinary inquiry Dr. Redmount suggests.[121] The alternative of using a presumption is an easy out—for which the court cannot be criticized, of course, since Congress provided it. Another alternative might be to abandon the venture the *Wells* case began nearly forty years ago and have taxation turn on the manifest operation of transfers rather than on the hidden contents of the hearts of dead men.

Grief reactions color behavior, but it is impossible for judges to know how they do it. However honest this reaction might have been—and despite what seems to be Dr. Redmount's acceptance of it—I suspect that this conclusion is wrong. And the failure is not really the court's; it belongs on the shoulders of the lawyers who try these cases. My impression from reading hundreds of Section 2035 cases is that the estates win them too easily and the Internal Revenue Service does not aggressively try them. One can read dozens of cases under Section 2035 without detecting the slightest indication that Sigmund Freud and his precursors ever lived, or the further fact that substantial numbers of clinical and research psychologists and psychiatrists have devoted volumes of work to death research in the past decade. It is possible to inquire into the effect of relatively tangible psychological trauma, and to inquire into it with the clarity and certainty required for judicial decision. Dr. Feifel's exacting work is particularly encouraging on that score. The inquiry could be undertaken as a result of procedural reform, possibly the interdisciplinary board Dr. Redmount recommends. It could be undertaken within existing procedures by using judicially noticeable data in Section 2035 trials. There is now, I think, a sufficient body of clinical, experimental and survey research to justify ju-

120 "Intention" can be given a medieval definition in this context: "Intentional characteristics represent above all else the individual's primary modes of addressing the future." G.W. ALLPORT, BECOMING at 89 (1955).

121 His fine article, *Humanistic Law Through Legal Education, supra* note 9, develops this more fully.

dicially cognizable scientific opinion in Section 2035 trials. This can be demonstrated in terms of reported clinicial cases and in terms of reported research generalizations.[122]

Manipulative property transfers may or may not contemplate Death. This point is nicely illustrated by the court's comparison of its case with the facts of the *Russell*[123] case. It was fairly clear in *Russell* that the decedent (also a widowed lady) had made transfers so that her children and grandchildren would be close to her as she grew older. That was a possible conclusion in March, but it was certainly not inevitable. Mrs. March may have wanted her son and daughter emotionally close to her so that her old age could be spent in satisfaction and peace, but her motives may have been more indefinite than that. They may, specifically, have involved a redress of wrongs she felt her late husband had done; and this in turn may have involved a manipulation of their emotional attitude toward her and toward their late father. The operation of a transfer to manipulate affections would have been important *after* her death, as well as *until* her death. This was very much the government's view, which was sustained by attempting to attribute to Mrs. March the motives of her children. But the government's case apparently presented only legal precedent in support of this psychological conclusion. The government finally relied on the statutory presumption, which worked out well for it in this case, but which has failed it more often than not in other cases. Could the government have offered data from which the judge might have concluded that Mrs. March's transfers were manipulative, and in contemplation of her own death?

"Just in case" transfers are in contemplation of death, but may not be a dominant factor. This principle has a doctrinal side. The doctrine that transfers "in case anything happens" are in contemplation of death is one of those "principles" Dr. Redmount recognizes as essential to adjudication. Facts do not have to support a principle like this with precision. It is sufficient that they seem to come pretty close to supporting it. It is probably a good doctrine, not so much because it is invariably correct, as because it is in reasonable approximation to correctness—as reasonably approximate as any general prin-

122 One might start with H. Feifel, *supra* note 1; R.L. Fulton, *supra* note 70; E.S. Shneidman & N.L. Farberow, *supra* note 75; and N.L. Farberow & G.W. Allport, *supra* note 76. And one should not neglect K.R. EISSLER, *supra* note 70, which is now available in paperback. Federal tax lawyers seem to eschew these subtleties in favor of trying the decedent as a tax evader. *See* Robinson v. United States, 8 Am. Fed. Tax R.2d 6082 (N.D. N.Y. 1961).

123 Russell v. United States, 206 F. Supp. 493 (N.D. Ill. 1966), *supra* note 106 and accompanying text.

ciple can be when it is to be applied in every case. But the court, even though it identifies a useful general principle, fails to apply it because it finds that factor not dominant on the facts of this case. Again, ultimate decision is based on the statutory presumption rather than on the facts. Is it possible to separate out donative factors, and to isolate the dominant one, on the basis of scientific information? If scientific assistance is not acceptable, the alternative is to pile a doctrine (that a given factor is or is not dominant), on another doctrine (that the factor designated dominant is a contemplation of death factor).

In a case where the factor is found to be dominant, the considerations will closely parallel the considerations that Professor Leon Green develops regarding "proximate cause" in tort cases.[124] The judiciary will have delimited a zone of liability, because of policy considerations, with only indirect allusion (if any at all) to scientific information. In a case where no factor is designated dominant, the primary doctrine will—as in this case—have failed its purpose and the case will be decided on the statutory presumption. If it were possible to sort out and weight factors scientifically, cases could be decided either on a single doctrine (that the factor so isolated is a contemplation of death factor), or on the basis of no doctrine at all (when the factor so isolated is itself capable of scientific evaluation in terms of contemplation of death). Some of Dr. Feifel's careful research may very well point to that manner of weighting factors.[125]

For example, scientific information might be available to demonstrate that the "just in case" motivation behind Mrs. March's transfer of the house was a contemplation of death motive. This information would be substituted for the use of precedent; facts would be used rather than policy. And I mean here what Brandeis called "legislative facts"—facts of the sort developed in Dr. Feifel's research. The court would then have to decide whether, on the peculiar "judicial facts" of this case, this motive was dominant. If scientific evidence could demonstrate that it was or was not dominant, the case would be decided on the basis of facts, in both senses, rather than on the basis of presumptions and doctrines.

Vindictive transfers may be life-related but they may also be focally suicidal. This of course overstates what the March court said. It simply noted that the transfer in *Budd* seemed to have been sui-

124 L. GREEN, THE RATIONALE OF PROXIMATE CAUSE (1927); L. GREEN, JUDGE AND JURY (1930).

125 See Feifel, *Death*, *supra* note 76.

cidal.[126] The *Budd* case was then declared to be not helpful in resolving the issues in the case before the court. But the insight—which was not stated in the *Budd* opinion—seems to be useful. It is probably accurate to say that some inter vivos property transfers are suicidal. The reasoning would be this: 1) The transferor identified himself in some significant way with his property, 2) he transferred his property in a suicidal frame of mind and 3) suicidal frames of mind are within the statutory phrase "contemplation of death". The first point is a case by case factual inquiry. The second is a conclusion based on inquiry but applied more or less generally; it is a "legislative fact". Finally, there is and has been for a generation a significant amount of psychological groundwork for the inquiry; the groundwork is more solid every year, as clinicians[127] and experimenters[128] reach large areas of consensus on suicidal behavior. An exploration of this factor in Section 2035 cases—and in the psychology of testation generally—may be worthwhile, and may result in the conclusion that psychological information on suicidal property transfer would be useful in the general process of replacing doctrines and presumptions with facts.

ESTATE OF DUMAY V. COMMISSIONER[129]

(United States Court of Appeals)

John Richard Dumay, had a wife, a son, and a daughter. He also had a business and a fine old house in the city, a brother who was his business "angel", and a large policy of life insurance. This appeal deals with the last days of his life with these people and these things.

Mr. Dumay's life was divided between his home and his business. At home were his wife Janet and his disabled, unmarried daughter Millicent. Mr. Dumay spent his weekends in this home environment. He grew a garden there, an unusual avocation for a businessman who lived in the city, and he made routine repairs around the house. He

126 See note 87 *supra* and accompanying text.

127 The leading discussion is in K.A. MENNINGER, MAN AGAINST HIMSELF (1938).

128 Shneidman, *supra* note 7; E.S. Shneidman & N.L. Farberow, *supra* note 75; E.S. Shneidman, *Suicide,* in N.L. FARBEROW & G.W. ALLPORT, *supra* note 76; Shneidman & Farberow, *Suicide and Death,* in FEIFEL, *supra* note 1.

129 This case is based upon the following: Yeazel v. Coyle, 21 Am. Fed. Tax R.2d 1681 (N.D. Ill. 1968); Estate of Hull v. Commissioner, 325 F.2d 367 (3d Cir. 1963); Estate of Brigid Angela Casey, 25 T.C. 707 (1956); Garrett's Estate v. Commissioner, 180 F.2d 955 (2d Cir. 1950); Estate of Ralph Owen Howard, 9 T.C. 1192 (1947); and Kaufman v. Reinecke, 68 F.2d 642 (7th Cir. 1934). The names are taken from Iris Murdoch's novel, THE RED AND THE GREEN (1965). The remainder of the footnotes, through the end of the opinions, are the court's.

bought the house, which had been constructed in 1881, in his early married life, at a time when it was beyond his means. He appears to have maintained it at considerable sacrifice of other interests which might have been normal to a man growing in prosperity—business connections, life at the country club, and some of the status of middle class respectability. It was and is an impressive house, and Mr. Dumay undoubtedly had an unusually strong attachment to it (and, we think, to the people who lived in it).

Mr. Dumay was engaged in the manufacture of embalming fluid. He entered this business in his youth and took it over when its founder died in 1934. He built it by thrift and diligence from a tenuous venture to a respected, dependable concern. Of course, he found the economic aspects of doing that, difficult. When he took over the business from its founder's estate he borrowed some $40,000 from his older brother, then and now a successful real estate broker in California. When he expanded it in 1938, he returned to his brother for financing. His brother observed that none of the principal of the 1934 loan had been paid, and Mr. Dumay countered with an offer to discharge the 1934 debt and cover new capital by incorporating the business and giving his brother one-third of the stock. His brother agreed to this arrangement and has retained 333 shares of the 1,000 shares of outstanding stock in the company since 1938.

As part of this 1938 transaction, Mr. Dumay and his brother, Arthur Dumay, entered into a cross-purchase buy-sell agreement. This was a simple arrangement, apparently set up as an afterthought to the larger transaction, and probably traceable to the diligence and thoroughness of counsel who supervised the transaction. In any event, the agreement provided that either shareholder had a right of first purchase at book value of the other shareholder's holdings at death, *and* in the event either shareholder sought to sell any of his holdings *to an outsider.*[130] This agreement would have required that the estate offer all of the stock in the corporation to Arthur Dumay at book value. The evidence is that book value of these shares is $150 and that their fair market value, although disputed, is at least $600 a share.

The business prospered after 1938. Mr. Dumay was able to pay himself an adequate salary as its president, reinvest earnings and put the company on a solid footing. He did not move from his house, when his circumstances might have so dictated, and he continued to

[130] The parties have stipulated as controlling value for estate-tax purposes the value specified in the agreement.

live the simple life he had always led. He did not invest his personal savings in either frivolity or the stock market, but he did buy a $100,000 life insurance policy in 1954, and completed payment of the premiums within three years. That life insurance policy, the house and two-thirds of the stock in the family business are at issue in this appeal.

Mr. Dumay's relationship with his family was apparently normal. His son, Brian, attended college and law school and became an attorney in his home city. His daughter, Millicent, suffered a tragic automobile accident while in college, which left her disabled and disfigured and, as it turned out, indefinitely dependent on her loving father. She lived in the parental home until her father's death, and still lives in it. She is not employed but is able to "do things" around the house and to help her mother. It is reasonable to infer that the purchase of life insurance in 1954, the year after Millicent's accident, was related to Mr. Dumay's concern for her welfare.

In 1964, Mr. Dumay discussed his business situation with his son, Brian. The gist of that conversation was that Mr. Dumay needed help with the expanding business, that he hoped to reduce the time he spent in his work and devote more time to his garden and home, and that he could offer Brian a secure future in the business. He orally offered Brian managerial authority and a share in the business if Brian would give up his law practice and devote all of his time to the company. Brian accepted this proposition and, since early 1966, has been secretary and general manager of the company. His father remained active in the office, however, and until his death was president of the corporation. Mr. Dumay died December 10, 1967.

Mr. Dumay did not immediately transfer stock to Brian, as he had promised, and Brian (with support from Mrs. Dumay and from Millicent) pressed his father to begin stock transfers in performance of the bargain. There is no evidence that this pressure was either protracted or intense, but there is no doubt, either, that it was a matter which weighed in some way on Mr. Dumay's mind, and on the minds of Brian, Millicent and Mrs. Dumay.

In 1965, Mr. Dumay consulted an attorney for "estate planning" services. This attorney pointed out that Mr. Dumay's death would result in the sale of his corporate shares to his brother for about a fourth of their value; that the house would, under local law, be divided among wife, daughter, and son; and that the insurance proceeds would be given entirely to the wife, as beneficiary. He also pointed out that the cross-purchase agreement with Arthur Dumay was binding only as

to inter vivos *sales* and to disposition at death. Mr. Dumay, in other words, was free to *give* the shares away during his life.

Mr. Dumay's situation at that time was typical of many businessmen of his age (sixty-four). His son had promise and a good future in the family business, and Mr. Dumay was frequently reminded of general and specific obligations toward him. His wife and daughter, on the other hand, were in need of continued support and protection, and were of no economic value in the business. His attorney advised him that any planned transfer of corporate shares to Brian should be undertaken promptly, so that those shares would be removed from the cross-purchase agreement with Arthur Dumay; that the life insurance policy afforded protection for Mr. Dumay's wife and daughter, but that it should be removed from the risks of the business (which it bore so long as Mr. Dumay owned it); and that Mr. Dumay could and should take steps to guarantee that the family home would be controlled by his wife and daughter.

Mr. Dumay did not act on this advice for more than two years. There is no clear evidence explaining the delay, but we assume the sort of procrastination familiar to any lawyer who draws wills. In any event, Mr. Dumay returned to his lawyer in 1967 to relate the fact that he had transferred the shares of stock—all 667 of them—to Brian, and that he wanted "to take care of the house and life insurance." Within a week, the lawyer prepared, and Mr. Dumay executed, a conveyance of the house to Mrs. Dumay and a conveyance of the insurance policy to a non-removable trustee. The trustee was directed to apply insurance proceeds to the support of Mrs. Dumay so long as she lived, and then to the support of Millicent. Mr. Dumay did not, however, make a will. He died intestate six weeks later.

Mr. Dumay's death was sudden. He was not unusually old and had not been ill until stricken shortly before he died. He had been under the care of a physician, for arthritis, but this ailment was not serious. He had not consulted a physician otherwise, except for routine physical examinations (which he had taken since early in his life once a year, and took in the last three years of his life four times a year). The cause of death was listed as "short term coronary thrombosis."

The question here is whether those three transfers—the stock (approximately $400,000); the house (approximately $85,000); and the insurance policy (worth about $65,000 at transfer) were gifts in contemplation of death under Section 2035 of the Internal Revenue Code of 1954. The Commissioner prevailed in the Tax Court as to the house

transfer and as to the insurance transfer. The Tax Court found for the taxpayer on the stock transfer. Both the Commissioner and the estate have appealed.

The stock. We affirm the Tax Court and hold that the transfer of stock was not in contemplation of death. The test, we think, is that suggested by the court in *Lockwood v. United States*:[131] "The question is whether the decedent made this gift for a purpose which would reasonably be effected during the lifetime of the decedent, or is the gift a substitute for testamentary disposition."[132] In that case, as here, the purpose was one which could not possibly be effected after the decedent's death. In *Lockwood*, the motive was saving income taxes; here it was placing property beyond the operation of an agreement *which could only have operated after death.* This is the usual holding where income taxes, as distinguished from death taxes, appear to be the decedent's principal concern.[133] This is altogether different from the result where saving of death taxes is indicated as a dominant motive.[134]

The government argues that Mr. Dumay delayed the conveyance of these securities until the imminence of death added a decisive consideration to those motives he already had. The government points to three factors: 1) the desire to avoid the buy-sell agreement (a living motive), 2) the desire to transfer the business to the son (a death motive), and 3) the desire to retire from the business (an ambivalent motive which is ar-

131 181 F. Supp. 748 (S.D. N.Y. 1959).

132 *Id.* at 750.

133 In Safe Deposit & Trust Co. v. Tait, 3 F. Supp. 51 (D. Md. 1933), *aff'd* 70 F.2d 79 (3d Cir. 1933), an income-tax saving, on advice of counsel, of about 20 percent, was held to override even evidence of age and ill health. Estate of Annie F. Howell, 1 CCH Tax Ct. Mem. 481 (1943); Estate of Salim Ackel, 17 CCH Tax Ct. Mem. 110 (1958); and Estate of Florence M. Harrison, 17 CCH Tax Ct. Mem. 776 (1958), are similar. Here health and attitude were good—*see* Estate of Charles J. Rosebault, 12 T.C. 1 (1949)—which adds, as in Estate of May Hicks Sheldon, 27 T.C. 194 (1956), a potent additional factor. *See* Commissioner v. Hofheimer's Estate, 149 F.2d 733 (2d Cir. 1945); Rowe v. Fahs, 54-2 U.S. Tax Cas. para. 10,955 (S.D. Fla. 1954); Poor v. White, 8 F. Supp. 995 (D. Mass. 1934); Vaughan v. Riordan, 280 F. 742 (W.D. N.Y. 1921); Estate of Carrie L. Minzesheimer, 13 CCH Tax Ct. Mem. 760 (1954); Estate of Jennie E. Hinde, 11 CCH Tax Ct. Mem. 55 (1952); Estate of Charles F. Haley, 10 CCH Tax Ct. Mem. 805 (1951); Estate of Anna S. Farnum, 14 T.C. 884 (1950); Estate of Mary E. Cook, 9 T.C. 563 (1947); Estate of Louis Bendet, 5 CCH Tax Ct. Mem. 302 (1946); Estate of Anna T. Stinchfield, 4 CCH Tax Ct. Mem. 511 (1945).

134 Vanderlip v. Commissioner, 155 F.2d 152, 154 (2d Cir. 1946) (L. Hand, J.):

> [A] donor, interested in saving [estate] taxes, is not concerned with the donee's enjoyment while he himself lives; he is interested in relieving his legatees from taxes after he dies, and, not only may his legatees not be the donees, but when they are, their relief will not concern their enjoyment of the property while he lives. Such a motive is necessarily testamentary . . . .

guably made a death motive by a process of morbid contamination).

We think the government places too much emphasis on its own conjecture. Transfers of business, during life, to the next generation, are not necessarily testamentary. In *Estate of T. M. Flynn*,[135] the court considered the fact that the objectives of retirement and new business management could have been accomplished by some method other than stock transfer, but held that the decedent was not bound to choose non-transfer methods in order to avoid Section 2035. Nor was it enough that the decedent obviously must have had in mind the continuation of the business after his death. The jury charge in *Estate of Mollenkamp v. United States*[136] was even more emphatic: "[I]f the transferor . . . desired to avoid the cares and burdens of continuing to manage the property . . . such a purpose would be consistent with the enjoyment of life. . . ."[137] Whether the court's language is stronger than an objective consideration of the precedents would justify, is unimportant in this case. We have here additional evidence of living motive, especially evidence that Mr. Dumay, who was in good health and not unusually old, planned to devote his time and energies to home and garden rather than to business. What he seems to have contemplated, in other words, was a transition *in* his life, not a transition *out* of his life.[138]

Another factor, Mr. Dumay's delay in effecting the transfer, explains the government's argument on the stock. Mr. Dumay was reluctant to turn over his business, even when it was explained to him that failure to do so would frustrate his plans with respect to his son in the business. That reluctance was understandable as it did relate to the surrender of his life's work. That was a momentous event for him, one he came to slowly, but not, we think, necessarily one that can be explained only by an apprehension toward death. Here, as in *Estate of Meyer Goldberg*,[139] his attitude toward his son, toward his retirement, and toward the buy-sell agreement, all point toward living motives for the

135 3 CCH Tax Ct. Mem. 1287 (1944).

136 11 Am. Fed. Tax R.2d 1819 (D. Kan. 1963).

137 *Id.* at 1821. This is not like Estate of Joseph E. Goar, 9 CCH Tax Ct. Mem. 854 (1950), where the court felt the dominant motive was post-death support for children and discounted the probative value of evidence that the decedent was concerned about the management of his business.

138 This may resemble anthropological information about certain primitive farmers who gradually turn over parts of their farms to their sons as they retire. *See* Estate of Marshall G. Pearson, 11 CCH Tax Ct. Mem. 296, 297 (1952), where the court held that the transfers there were not in contemplation of death: "The decedent enjoyed life, resented being thought of as old and never spoke of death." *See also* Estate of Baxter v. United States, 22 Am. Fed. Tax R.2d 6047 (E.D. Ark. 1968).

139 10 CCH Tax Ct. Mem. 977 (1951).

delay, rather than death motives. We do not believe that this case falls within the well established line of authorities which equate "gift in contemplation of death" with "testamentary transfer".[140] It falls instead within precedents which overcome that conclusion—and even sometimes strain a bit to do it—with evidence that there was more in the transfer than merely testamentary motivation.[141]

The life insurance. We reverse the Tax Court and find that the transfer of life insurance to the trust was not in contemplation of death. The dominant motive in this situation—a motive which realistically dates from the *purchase* of the insurance, and which was merely carried one step further in the *transfer* of it, was provision for the support of Mr. Dumay's disabled daughter Millicent.[142] It is true that life insurance transfers seem by their nature to be death-centered, since the insurance will not usually ripen into any sort of economic benefit for anyone until the insured is dead. But an insured may purchase or maintain insurance because he wants to have economic protection for the support of his family which is not subject to business risk.[143] It is possible, and we think the case here, for him to transfer ownership of existing insurance in order to increase and protect that economic immunity.[144] This is a case where concern for support overcomes concern for death (which means that the statute compels us to *assume* the existence of concern for death and then determine whether evidence of other concern overcomes this concern). The life insurance trust is a familiar device. In *Estate of Samuel Want*,[145] the decedent was concerned about the physical care of an infant daughter. In *Colorado Bank v. Commissioner*,[146] the presence of an adult dependent daughter was determinative, and it was stated, "Broadly speaking, thoughtful men habitually act with regard to ultimate death, but something more than this is required in order to show that a conveyance comes within the ambit of the statute."[147] There is, in other words, a difference between disposing of

140 Pate v. Commissioner, 149 F.2d 669 (8th Cir. 1945); Koch v. Commissioner, 146 F.2d 259 (9th Cir. 1944); Smails v. O'Malley, 127 F.2d 410 (8th Cir. 1942).

141 Welch v. Hassett, 90 F.2d 833 (1st Cir. 1937), *aff'd* 303 U.S. 303 (1938); Lippincott v. Commissioner, 72 F.2d 788 (3d Cir. 1934); Shwab v. Doyle, 269 F. 321 (6th Cir. 1920); Estate of Charlotte A. Hopper, 22 T.C. 138 (1954); Estate of Genevieve Brady Macaulay, 3 T.C. 350 (1944).

142 The distinction between purchase and transfer was determinative in Aaron's Estate v. Commissioner, 224 F.2d 314 (3d Cir. 1955).

143 Estate of Achille F. Israel, 3 CCH Tax Ct. Mem. 1301 (1944).

144 Estate of Edmund W. Mudge, 27 T.C. 188 (1956).

145 29 T.C. 1223 (1958).

146 305 U.S. 23 (1938).

147 *Id.* at 27.

property as in a will and disposing of property as one would provide for the medical expenses of a dependent child. This is true even though the provision may have an effect after the parent is dead.[148]

The house. Two factors compel us to affirm the Tax Court and to hold that Mr. Dumay's transfer of the house to his wife and daughter was a gift in contemplation of death. First, we can find no non-testamentary purpose in the transfer. He could have accomplished the same result by making a will. Second, we think the evidence shows an attachment, or an involvement, with this asset which is more intense and more personal than his involvement with his business shares or with his life insurance. This involvement leads us to conclude that his transfer was death-centered.

It seems that property owners have a stronger personal identity with residential (or agricultural) real property than they have with relatively impersonal economic interests in business and insurance investments. Mr. Dumay was in every way an old-fashioned householder, the sort of man who takes pride in discharging a mortgage quickly, in growing a handsome garden, and in remaining in his home even after industrial expansion and changing neighborhood patterns have driven his more transient neighbors into the suburbs. Why then did he give his home away? There seem to be three explanations: 1) He wanted the home to be immediately and easily available to his wife and daughter (a "how to avoid probate" motive which is inherently testamentary), 2) he wanted the home to be available to them and not to his son, who did not live in it. He may also have intended an equalization for the stock transfer to his son, and 3) he had begun to think of the home as less the place where *he* would live than the place where his wife and daughter would live.

All three possible explanations seem to point to the application of the statute. There is some authority to the effect that transfers "to make sure the property stays in the family" are not death-motive

148 Clear testamentary equivalence should result in judgment for the Government. Pate v. Commissioner, 149 F.2d 669 (8th Cir. 1945); Oliver v. Bell, 103 F.2d 760 (3d Cir. 1939); Purvin v. Commissioner, 96 F.2d 929 (7th Cir. 1938); Anneke v. Willcuts, 1 F. Supp. 662 (D. Minn. 1932); Estate of Jacob C. Gidwitz, 14 T.C. 1263 (1950), *aff'd* Commissioner v. Gidwitz's Estate, 196 F.2d 813 (7th Cir. 1952); *but see* Estate of Anna S. Farnum, 14 T.C. 884 (1950). However, time, or concern for support, or the size of the gift, may indicate a contrary result. Denniston v. Commissioner, 106 F.2d 925 (3d Cir. 1939); Routzahn v. Brown, 95 F.2d 766 (6th Cir. 1938); Estate of Charles T. Smith, 1 CCH Tax Ct. Mem. 518 (1943).

transfers.[149] But that authority seems to us wrong. The only way property leaves a family, in circumstances such as these, is when the owner dies and it is given to persons outside the family. Concern over that eventuality seems precisely a matter of concern about what will happen to property at death. There is some resemblance between the situation in which we find Mr. Dumay when he transferred his house and the man who disposes, inter vivos, of virtually everything he owns. In the latter case, the courts have almost uniformly held that the transfer was in contemplation of death.[150] Without applying that kind of quantification to Mr. Dumay, we think the same result follows here. Real estate transfers seem especially indicative of this death-centered transfer—as in *MacDonald v. United States*.[151] There, the court directed the jury to consider, in a case involving transfer of real estate, "the amount of property transferred in proportion to the amount of property retained."[152] In *Heiner v. Donnan*,[153] the court reached an opposite conclusion but was impressed that the transfer related to residential real estate.

The insight attempted here is that there are circumstances in which a decedent seems to have obliterated a part of his personality, a sort of "property-personality". It seems likely to occur, and to have occurred here, since the subject of transfer is a home in which the decedent was doubtless personally involved. This should explain our motive in using precedents which involve transfers of all the decedent's property. Both circumstances suggest an obliteration of property, logically related to death, more than they suggest a calculated dispensation of, or expenditure of, property.

149 Estate of Selnes v. United States, 1 Am. Fed. Tax R.2d 2141, 2145 (D. Minn. 1957).

150 In Stubblefield v. United States, 6 F. Supp. 440 (Ct. Cl. 1934), which involved a similar situation, the decedent was almost unbalanced in the literal obliteration of his property ownership. This sort of obliteration was determinative in Buckminster's Estate v. Commissioner, 147 F.2d 331 (2d Cir. 1944); Northern Trust Co. v. Commissioner, 116 F.2d 96 (7th Cir. 1940); Purvin v. Commissioner, 96 F.2d 929 (7th Cir. 1938); Updike v. Commissioner, 88 F.2d 807 (8th Cir. 1937), relying on Igleheart v. Commissioner, 77 F.2d 704 (5th Cir. 1935), and on Rengstorff v. McLaughlin, 21 F.2d 177 (N.D. Cal. 1927); and in Tait v. Safe Deposit & Trust Co., 74 F.2d 851 (4th Cir. 1935). Welch v. Hassett, 15 F. Supp. 692 (D. Mass. 1936), *rev'd on other grounds* 90 F.2d 833 (1st Cir. 1937), *aff'd* 303 U.S. 303 (1938), and Lippincott v. Commissioner, 72 F.2d 788 (3d Cir. 1934), are to the contrary but seem to turn on special circumstances. *See* Koch v. Commissioner, 146 F.2d 259 (9th Cir. 1944); Llewellyn v. United States, 40 F.2d 555 (D. Tenn. 1929); Vaughan v. Riordan, 280 F. 742 (W.D.N.Y. 1921); and Gaither v. Miles, 268 F. 692 (D. Md. 1920).

151 12 Am. Fed. Tax R.2d 6191 (E.D. Tenn. 1956).

152 *Id.* at 6194.

153 61 F.2d 113 (3d Cir. 1932), *rev'd* 285 U.S. 312 (1932).

We therefore find that: 1) the transfer of securities was not in contemplation of death, 2) the transfer of life insurance ownership to the trust was not in contemplation of death, and 3) the transfer of residential real estate was in contemplation of death.

COMMENTARY ON ESTATE OF DUMAY V. COMMISSIONER

A. By Dr. Redmount

The court in Dumay appears to show a rare intelligence about human behavior, even though it may not have conveyed this intelligence in terms of some systematic framework of behavior explanation. It recognizes, as have other courts, that there is a dominance of motives in relation to acts. A decision about a stock transfer is not a matter of *either* life motives *or* death motives. Both may be relevant and the question is which kind of motive is substantially stronger.

The court also recognizes that vital decisions about one's self in relation to one's family and in relation to one's wealth or property (an extension of personality) do not come easily. In fact, decisions may be piecemeal and delayed. The manner in which the decisions are formed and expressed may reflect indecision and uncertainty extended in time rather than clear and consistent contemplation followed by decisive action. This appears to be the case in Dumay's handling of his business transfers and perhaps his home transfer as well. The court recognized the true significance of delayed and seemingly belated decisions that all too glibly might have been construed as fear, panic or concern because of the imminence of death. The court, in fact, is ahead of the psychology of its time in recognizing and differentiating the importance of property of various kinds as an important attribute of personality around which or through which some needs, feelings, thoughts and actions grow. It offers the pregnant thought that a person's attachment to his residential property is heavily invested with acquisitive, possessive or protective feelings much like some of his attachment to his family. The court suggests, correctly or not, that this is not as true or vital in the case of a person's interest in his business, commercial investments and the like.

The essential thrust of the court's style of thinking can be put in the form of a sound proposition. The character and purpose, the timing and direction, and the meaning of a person's actions are validly comprehended only in terms of a cohering system of behavior. One must understand, or at least appreciate, the person's system of needs, his modes of expressing or revealing himself, his ideas about life and his

feelings and practices relating to family, to career, to property and wealth, to health and other such considerations. One must contemplate all of these in relation to one another before he can make meaningful and reliable statements about any facet or facets in the person's life. This approach and analysis the court approximates in the Dumay case, though it does not articulate a systematic framework of behavior. It acts more intelligently than many and perhaps most other courts where the judicial vogue is to take a behavioral event, roughly isolated, and then make fragmented and spurious speculations about persons and other matters relating to and deriving from the event.

B. By Professor Shaffer

The judicial sophistication which Dr. Redmount finds in the Dumay opinion is a composite of insights from a relatively small number of cases. It is accurate analyzation of real judicial behavior. But it is an aspiration too, because it represents a stronger concentration of psychological insight than I have found in any one opinion. It also suggests a limit—it is as far into psychological inquiry as the judiciary is likely to go. In reference to Dr. Redmount's observation that the judges in Dumay "may not have conveyed this intelligence in terms of some systematic framework of behavior examination," I think it unlikely that American judges will ever be open about their adherence to systematic psychological examination. But I think they can engage in psychological examination more frequently and more deeply than they have in most Section 2035 cases.

The Dumay opinion exemplifies what judges can do, and do well, when they are commissioned to divine human feeling. This is illustrated in three respects: 1) The court identified a relationship between John Richard Dumay and his property. 2) It recognized that this relationship varied depending on what the property was, and how owning and giving it affected human relationships in Dumay's family. 3) It began to move towards some understanding of the role property plays in attitudes towards death. In this case, it seems to have realized judicially what Drs. Weisman and Hackett have realized clinically in their "appropriate death" concept.[154] My discussion of these points may serve as a summary of this venture into the judicial use of the psychological autopsy.

Property relationship. Dumay, observes the court, had a personal relationship with the three kinds of property he transferred.

[154] *See* Weisman & Hackett, *supra* note 70.

Seemingly, there are several levels at which this insight might have been worked out in Dumay's life and death. The unifying factor would have been that all of his property was centrally involved in what psychologists would regard as Dumay's ego life, in his conscious living. Some of his property might have been involved in his life as a part of himself, a personal extension. An example of that might have been Dumay's favorite hammer or saw, the tools he used in his garden, or the desk fixtures which he had on his desk throughout his business career.[155] I have tried to demonstrate elsewhere that property held in this intensely personal way is not seen as economically significant but is regarded almost as a physical extension of the self.[156] This personal character seems to have extended in this case to Dumay's house, not only on the symbolic level, as *representing* something in his life, but also on the level of identity. In a very real way the house was Dumay and Dumay was the house.[157] And those of us who think we understand the testamentary behavior of clients requesting wills, might add that the house *is* Dumay now, long after his death.

There are less intense levels of identity with property. The business shares, for example, seem not to have a quality of personal extension. I believe this sort of asset is best described in a client's life as representing his *work*, and I have found indications that clients in Dumay's situation tend to regard their family businesses less as assets (economic value) or personal things (identity) than as projects (what they do). If that is true—and the court's opinion assumes that it is—Dumay's disposition of the business shares may be related to his interest in having the work continued, and in this sense his work is a part of his life. His work life ended at retirement. Retirement can be a traumatic event, but absent a psychopathology which is probably prevalent in our society, it is not necessarily a death-related trauma.

The life insurance seems to have been seen by the court as occupying a third kind of property relationship in Dumay's life. If the house was a matter of personality, and the business a matter of personal project, the insurance was a matter of personal power. It is possible for a man to be in a "doing" relationship with one part of his property and in a

155 Shaffer, *Psychology of Testation*, 108 TRUSTS AND ESTATES 11 (1969), attempts to establish a theoretical basis for this. *See also* Shaffer, *Will Interviews, Young Family Clients, and the Psychology of Testation*, 44 NOTRE DAME LAWYER 345 (1969).

156 *Will Interviews, Young Family Clients, and The Psychology of Testation, supra* note 155.

157 Jung, *The Soul and Death*, in H. FEIFEL, *supra* note 1, at 3, finds special significance in houses as death-related property extensions, as does K.R. EISSLER, *supra* note 70, at 130.

"power" relationship with another. A "pure" capitalist, for instance, would probably not occupy either a personal relationship or a project relationship with his shares of stock in public corporations. But he might be in a personal relationship with them in the sense that capital is a source of power with which he can provide for and influence the lives of others. If that was true as to Dumay's life insurance, and the court appears to have treated it that way, then the question is whether his transfer of it related to the lives of others during Dumay's life, or to their lives after his death. The court, fairly, it seems to me, decided on the former characterization.

In each of these senses property has become real and personal in the life of the dead man. In some sense each of these aggregations of things has been loved, and in being loved has become real, like the toys in the children's story:[158]

> 'What is REAL?' asked the Rabbit one day, when they were lying side by side near the nursery fender. . . .
>
> 'Real isn't how you are made,' said the Skin Horse. 'It's a thing that happens to you. When a child loves you for a long, long time, not just to play with, but REALLY loves you, then you become Real.'
>
> '[O]nce you are Real you can't become unreal again. It lasts for always.'

Differences in property relationships. The court assumed a personal relationship between Dumay and his property, and built upon the assumption, a theory for treating each of the three assets differently. There is no other way to explain its three part decision (and I repeat at this point that its three part decision fairly represents one kind of judicial behavior in Section 2035 cases). The two ways one might explain the psychological process of differentiation are in terms of giving as goal-striving behavior, and in terms of death as something Dumay did rather than something that happened to him.

Property disposition is goal-striving behavior. It could be that death is a necessary condition in the goal towards which the donor is directing his effort. This is true when one makes a will; it is often true when one purchases life insurance.[159] Purchasing life insurance, however, may have lifetime objectives and its transfer, as in this case, may conduce to protection or isolation from lifetime activity.

The court seems to have considered these factors in deciding that

158 "The Velveteen Rabbit," by Margery Williams Bianco.

159 Briggs, *The Psychology of Successful Persuasion*, C.L.U. Journal, April 1967, at 49; July 1967, at 59; April 1968, at 51.

Dumay's goal in transferring the business was related to his retirement, his promise to his son, and his desire to maintain the family business. These factors are also involved in the court's deciding that the isolation of life insurance and the equalization of patrimony were related to lifetime goals more than they were related to objectives to be accomplished after Dumay's death. One can disagree with the results in cases such as this without disapproving of the psychological considerations involved.

The court did not do what courts commonly do when faced with significant human motivations. It did not ignore its own behavioral insight and decide the case on unstated, even unconscious assumptions which are patently unsound. The scores of decisions like Varner, which regard frantic physical activity and frenetic travel as evidence of life-centered motivation, belong under that indictment.[160]

The Dumay court did not, on the other hand, surrender its decision to the "experts". That would have added a new chapter to the long unwholesome list of judicial problems which are falsely centered on a misuse of psychiatric and psychological information. The gift in contemplation of death problem is a legal problem; if psychology is relevant to its solution, it is a psychology which is embedded in the legal problem and which must be understood and applied by the officers who are commissioned to solve legal problems. Psychology is indispensable in bringing data to the process, but psychology as it is presently derived in the adversary system, through adversary expert witnesses, often dilutes its scientific integrity, and does not serve the law well.[161] This is not to disagree with Dr. Redmount's creative suggestion that courts seek the cooperation of behavioral scientists in solving factual problems in cases which involve human behavior. It is to disagree with the common reaction that the solution to problems which fairly involve psychological science is to assign the decision to competing expert witnesses. One sound alternative would be to develop general legislative and judicial policies around the available "legislative facts" on the way people develop and act upon their attitudes toward death. Dr. Redmount's suggestion aims, instead, at evidentiary fact finding, but neither suggestion involves the expert witness.

Appropriate death. "[T]he purpose of living," according to Weisman and Hackett, "is to create a world in which we would be will-

160 See notes 74-76 *supra* and accompanying text.

161 Halleck, *The Psychiatrist and the Legal Process*, PSYCHOLOGY TODAY, February 1969, at 25.

ing to die."[162] And an appropriate death is a death in that kind of world. It is a death which the dying man sees and accepts as his own. This insight is at work in the Dumay opinion, particularly when the court discusses the transfer of the house. The house is seen as involved in Dumay's appropriate death.

Weisman and Hackett developed their concept after three years of clinical psychiatric practice at the surgical wards of Massachusetts General Hospital. It is the product of the thorough examination of five cases. The five cases are a composite of some 600 consultations. Each of the five patients analyzed had a predilection of death and a realistic acceptance of death. The predilection was not necessarily psychopathological because the patient was firmly convinced of approaching death. Not only did he regard it as appropriate, but its impendency was accompanied by little depression and no anxiety. These were not cases of psychic death, where anxiety (at, for instance, imminent surgery) *causes* death. The predilection patient *had*, on the contrary, *come* to terms with life and with people. His attitude was the opposite of suicidal, even though some of the patients suffered intensely and without hope of survival. They were people who knew and accepted the imminence of death, and sometimes even the time and manner of death. One of these resisted his psychiatrist's attempts to console him and, "he considered it strange that anyone should attempt to talk him out of death when everything in his experience pointed to its appropriateness at this point in his life."[163] It was almost characteristic of these patients that family and physicians were the ones who needed to be consoled. It was often the patient himself who acted as consoler.

Death in these cases was not necessarily related to the ailment which caused hospitalization. One patient was being treated for cancer, but died of a heart attack. Another was being treated for bone fractures and died of pulmonary embolism.

These patients accepted dying as part of living and participated in their own deaths. "Life *as it is lived* has more parameters than there are laboratory methods available to use them; death encompasses the human personality as much as life does."[164] The evidence is that the distinction between dying and living gradually fades in this sort of "natural" (human?) death, and that anxieties about death, fantasies of

[162] Weisman & Hackett, *supra* note 70 at 328.

[163] *Id.* at 302; *see* the discussions of Weisman and Sato after Shneidman, *Orientations Towards Death: A Vital Aspect of the Study of Lives*, 2 INTERNATIONAL JOURNAL OF PSYCHIATRY 167, 190, 196 (1966).

[164] Weisman & Hackett, *supra* note 70 at 311.

rescue from it, depression and suicidal impulses also fade.

Weisman and Hackett accept the Freudian dogma that it is impossible to conceive of oneself as dead. This makes it difficult for them to explain how the appropriate-death phenomenon works. The explanation they choose is derived from their conclusion that subjective death (death seen as happening to me, and not simply as a process but as a subjective reality)[165] always involves some fantasy of survival. "If there is some meaning or emotion in the phrase, 'When I am dead,' there is also a trace of psychological survival in which 'I' continue to exercise an influence in some form or other. . . . The notion of 'I am dead' is a paradox."[166]

An interesting instance of this among their patients was a career woman who felt humiliated by her illness and who welcomed death because it would restore her dignity. With this explanation, Weisman and Hackett see the appropriate death as involving these features:[167]

> 1) [T]here is quiet acceptance that death is a solution to abiding problems, or that few problems remain at the time of death; 2) super ego demands [the demands of conscience] are reduced; 3) optimal interpersonal relations are maintained; and 4) the ego [consciousness] is encouraged to operate at as high a level as may be compatible with the physical illness.

"Appropriate death" is therefore, in their view, a uniquely personal way to approach the grim reaper. Everyone's death is (or can be) his own. This scientific conclusion supports the federal judiciary's attempt to resolve gift in contemplation of death cases one at a time, in what we have been calling a psychological autopsy. It may not, of course, support the legislative wisdom of imposing the pathologist's office on judges.

The court in this third composite case appears to have thought that John Richard Dumay died an appropriate death, a death in which the house transfer was central to his predilection. The court, without any systematic disclosure of its psychological processes, appears to have concluded that Dumay calmly accepted his death. It further concluded that he saw it as problem-resolving rather than problem-creating;

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165 *Id.* They see death as personified in any one of three ways: (1) impersonal ("it", a corpse, is dead), (2) interpersonal ("he", a person, is dead), and (3) intrapersonal ("I", a subject, am dead). This last category has a dual aspect, which they treat as (a) attitudes toward the process of dying and (b) attitudes toward subjective death.

166 *Id.* at 317.

167 *Id.* at 324.

that he was not found to be tense or anxious or ambivalent about it; that he maintained "optimal interpersonal relations" with those he loved as the end of his life approached; and that he continued to live his conscious life at a high level.

Appropriate death rests on some personal conception of immortality on what Weisman and Hackett see as a survival fantasy, and on what Shneidman treats as the post-self concept. That part of Dumay's death seems to have involved his house and plans in reference to his house which were psychologically similar to "will making", that is, to testamentary activity.

The court seems to have been sound, as a matter of judicial policy, in holding that testamentary activity is in contemplation of death. The mistake other courts have made is in adopting the view that contemplation of death activity is always testamentary. The statutory concept is seemingly broader. But Dumay is seen as being well within both concepts. The court sees him as being attached to his children and anxious to provide for them appropriately (for his daughter's care and for his son's business future). As previously noted, he was personally involved with his house; it was somehow a part of, an extension of, his personality.[168] In giving it to his wife and daughter he reached out to them and expressed love and concern for them, and envisioned

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[168] Here is the kind of judicial insight I have in mind, from Kengel v. United States, 57 F.2d 929, 935 (Ct. Cl. 1932):

> It is abundantly proved that Joseph Kengel was a frugal and astute businessman; he knew full well the value of property and the consequences which might follow his parting irrevocably with title to the same. . . . [A]nd as we view it [he] must have appreciated what it meant to him to deed it to another; a transaction of such consequences to such an active, careful, and prudent man justifies the inference, to say the least, that the time had arrived when he confidently believed he would have no further use for it.

See also Welch v. Hassett, 15 F. Supp. 692 (D. Mass. 1936), *rev'd on other grounds*, 90 F.2d 833 (1st Cir. 1937), *aff'd* 303 U.S. 303 (1938); Estate of E. Coray Henry, 16 CCH Tax Ct. Mem. 352 (1957).

It is important to distinguish this view of death as appropriate from what Shneidman calls social death. The two are opposites; one is realistic and one not. Withdrawal, social death, is neurotic. C. JUNG, PSYCHOLOGICAL REFLECTIONS 291 (J. Jacobi ed. 1961);

> The neurotic who tries to escape from the necessities of life gains nothing and only takes upon his shoulders the fearful burden of age and death tasted in advance, which must be especially cruel because of the total emptiness and pointlessness of his life. When the libido is denied a progressive life which also desires all dangers and decay, then it follows the other road and buries itself in its own depths. . . .

The predeliction patient sees death coming when it really is coming. He, in a way, welcomes it. C. JUNG, MODERN MAN IN SEARCH OF A SOUL 112 (Harvest ed. 1933):

> I am convinced that it is hygenic—if I may use the word to discover in death a goal towards which one can strive; and that shrinking away from it is something unhealthy and abnormal which robs the second half of life of its purpose.

a human relationship with them (care at least, and maybe love), which would survive his own death. This was an example of the manner in which a will can implement the testator's plans, and the court accepted it in that spirit. The house transfer was an appropriate part of Dumay's appropriate death, just as his growing vegetables or painting the front door was an appropriate part of his life.

CONCLUSION

Four purposes were suggested at the beginning of this article, any one or more of which I thought might be served by applying the psychological autopsy to cases under Section 2035. The first of these purposes related to the wisdom of retaining a provision taxing "gifts in contemplation of death." A conclusion on that score is relatively simple: Section 2035 is troublesome and wasteful. It has probably not produced enough revenue to pay the court costs for the hundreds of losing cases the Internal Revenue Service has brought under it.[169] And it has never had the *in terrorem* effect it was designed to have. It rests on what is undoubtedly an archaic view of the federal government's constitutional power to tax[170] and should probably be replaced with a resurrected provision imposing a tax on all transfers within three years of death.[171]

The second purpose of the inquiry was to test the judicial wisdom of a subjective test for the word "contemplate" (as compared with an objective test for the word "intended").[172] That judicial response to Section 2035 has been administratively unsound. A test based upon the mechanical operation of Section 2035 would probably have produced less litigation than the subjective test has produced.[173] Even a test which narrowed the question to whether or not the decedent intended to evade death taxes would probably operate more smoothly than Section 2035, as interpreted in *Wells*, has worked during the last thirty-eight years. The litigation has been a boon to the legal profession and a fertile source of conjecture for legal scholars, but it has probably not redounded to the public good—partly because it is uneconomical and

169 R. STEPHENS & G. MAXWELL, THE FEDERAL ESTATE AND GIFT TAXES 63 (2d ed. 1967); M. EGAN JR., PROBLEMS OF FEDERAL TAXATION OF ESTATES - GIFTS - TRUSTS ¶ 1.302 (1966).

170 Heiner v. Donnan, 285 U.S. 312 (1932).

171 *See* W. WARREN & S. SURREY, FEDERAL ESTATE AND GIFT TAXATION 231-34 (1961).

172 See note 4 *supra*, United States v. Wells, 283 U.S. 102 (1931).

173 See the periodical authorities discussed in W. WARREN & S. SURREY, *supra* note 171 at 252.

partly because many judges have proven themselves to be callous psychological pathologists.

The third and fourth purposes of the article—inquiries into planning and trial tactics for Section 2035 cases, and behavioral inquiry into attitudes towards death and judicial attitudes towards attitudes towards death[174]—are more fully illuminated by a psychological analysis of the cases and by the comments of the psychologists who contributed to this article. Both of these purposes seem to be summarized in the Dumay opinion and in the judicial opinions on which it was based. This composite case suggests a realistic psychological point of view. Advocates have almost literally never used psychological learning in building cases under Section 2035, nor have judges consulted psychological information. The result has been a wide array of attitudes and assumptions that are either untested or patently unsound. Recent psychological research on attitudes toward death[175] is correcting similar errors in the behavioral sciences. This scholarship is useful to advocates who are able to build their cases on accurate psychological theory, and to judges who are able to decide cases on the basis of scientific conclusions. Judges and lawyers who bother to look will find this data available to them directly. They will find that they need not sift their interest through expert witnesses.

The fourth purpose is the most interesting to a lawyer who looks upon contemplation of death as something relevant both to his law office practice and to his life in the courts. Judges in Section 2035 cases even if they are often inaccurate, are not always callous men. Many of their opinions are searching inquiries into the way men feel about death, inquiries into how we relate our property to our deaths and to the people we love. These judicial opinions, in other words, are research reports on how the decedent felt about his death; and they are exhibitions as well, of the way the judge feels about his own death. They range from the insensitive (Varner) to the confused and defensive (March) to judicial openness that is instructive (Dumay). The *Wells* court caused lawyers and judges more effort and dismay than it could have predicted when it decreed that "there is no escape from the necessity of carefully scrutinizing the circumstances of each case."[176] As a matter of tax policy, the struggle has not been worth the grain of objective inquiry it has

[174] The attitudes-toward-attitudes research model is suggested in Crown, O'Donovan & Thompson, *Attitudes Toward Attitudes Toward Death*, 20 PSYCHOLOGICAL REPORTS 1181 (1967).

[175] See notes 1, 7, 70, 155 *supra*.

[176] 283 U.S. 102, 119 (1931).

provided. But as a means of exploring what Judge Rubin called the "heap or collection of different perceptions," the "elusive shadow from the recesses of the mind,"[177] which make up a personal psychology of death, the cases are important to lawyers as counselors and as thoughtful men.

[177] Fatter v. Usry, 269 F. Supp. 582, 584-86; 20 Am. Fed. Tax R.2d 5941 (E.D. La. 1967).