

or terminate was exercisable by the decedent only in conjunction with a person having a substantial adverse interest in the transferred property, or in conjunction with several persons some or all of whom held such an adverse interest, there is included in the decedent's gross estate only the value of any interest or interests held by a person or persons not required to joint in the exercise of the power plus the value of any insubstantial adverse interest or interests of a person or persons required to join in the exercise of the power.

(e) *Powers relinquished in contemplation of death*—(1) *In general.* If a power to alter, amend, revoke, or terminate would have resulted in the inclusion of an interest in property in a decedent's gross estate under section 2038 if it had been held until the decedent's death, the relinquishment of the power in contemplation of the decedent's death within 3 years before his death results in the inclusion of the same interest in property in the decedent's gross estate, except to the extent that the power was relinquished for an adequate and full consideration in money or money's worth (see § 20.2043-1). For the meaning of the phrase "in contemplation of death", see paragraph (c) of § 20.2035-1.

(2) *Transfers before June 23, 1936.* In the case of a transfer made before June 23, 1936, section 2038 applies only to a relinquishment made by the decedent. However, in the case of a transfer made after June 22, 1936, section 2038 also applies to a relinquishment made by a person or persons holding the power in conjunction with the decedent, if the relinquishment was made in contemplation of the decedent's death and had the effect of extinguishing the power.

(f) *Effect of disability to relinquish power in certain cases.* Notwithstanding anything to the contrary in paragraphs (a) through (e) of this section the provisions of this section do not apply to a transfer if—

(1) The relinquishment on or after January 1, 1940, and on or before December 31, 1947, of the power would, by reason of section 1000(e), of the Internal Revenue Code of 1939, be deemed not a transfer of property for the pur-

pose of the gift tax under chapter 4 of the Internal Revenue Code of 1939, and

(2) The decedent was, for a continuous period beginning on or before September 30, 1947, and ending with his death, after August 16, 1954, under a mental disability to relinquish a power.

For the purpose of the foregoing provision, the term "mental disability" means mental incompetence, in fact, to release the power whether or not there was an adjudication of incompetence. Such provision shall apply even though a guardian could have released the power for the decedent. No interest shall be allowed or paid on any overpayment allowable under section 2038(c) with respect to amounts paid before August 7, 1959.

[T.D. 6296, 23 FR 4529, June 24, 1958, as amended by T.D. 6600, 27 FR 4985, May 29, 1962]

§ 20.2039-1 Annuities.

(a) *In general.* A decedent's gross estate includes under section 2039 (a) and (b) the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under certain agreements or plans to the extent that the value of the annuity or other payment is attributable to contributions made by the decedent or his employer. Section 2039 (a) and (b), however, has no application to an amount which constitutes the proceeds of insurance under a policy on the decedent's life. Paragraph (b) of this section describes the agreements or plans to which section 2039 (a) and (b) applies; paragraph (c) of this section provides rules for determining the amount includible in the decedent's gross estate; and paragraph (d) of this section distinguishes proceeds of life insurance. The fact that an annuity or other payment is not includible in a decedent's gross estate under section 2039 (a) and (b) does not mean that it is not includible under some other section of Part III of Subchapter A of Chapter 11. However, see section 2039 (c) and (d) and § 20.2039-2 for rules relating to the exclusion from a decedent's gross estate of annuities and other payments under certain "qualified plans".

(b) *Agreements or plans to which section 2039 (a) and (b) applies.* (1) Section

2039 (a) and (b) applies to the value of an annuity or other payment receivable by any beneficiary under any form of contract or agreement entered into after March 3, 1931, under which—

(i) An annuity or other payment was payable to the decedent, either alone or in conjunction with another person or persons, for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, or

(ii) The decedent possessed, for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the right to receive such an annuity or other payment, either alone or in conjunction with another person or persons.

The term “annuity or other payment” as used with respect to both the decedent and the beneficiary has reference to one or more payments extending over any period of time. The payments may be equal or unequal, conditional or unconditional, periodic or sporadic. The term “contract or agreement” includes any arrangement, understanding or plan, or any combination of arrangements, understandings or plans arising by reason of the decedent’s employment. An annuity or other payment “was payable” to the decedent if, at the time of his death, the decedent was in fact receiving an annuity or other payment, whether or not he had an enforceable right to have payments continued. The decedent “possessed the right to receive” an annuity or other payment if, immediately before his death, the decedent had an enforceable right to receive payments at some time in the future, whether or not, at the time of his death, he had a present right to receive payments. In connection with the preceding sentence, the decedent will be regarded as having had “an enforceable right to receive payments at some time in the future” so long as he had complied with his obligations under the contract or agreement up to the time of his death. For the meaning of the phrase “for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death”, see section 2036 and § 20.2036-1.

(2) The application of this paragraph is illustrated and more fully explained in the following examples. In each example: (i) It is assumed that all transactions occurred after March 3, 1931, and (ii) the amount stated to be includible in the decedent’s gross estate is determined in accordance with the provisions of paragraph (c) of this section.

Example (1). The decedent purchased an annuity contract under the terms of which the issuing company agreed to pay an annuity to the decedent for his life and, upon his death, to pay a specified lump sum to his designated beneficiary. The decedent was drawing his annuity at the time of his death. The amount of the lump sum payment to the beneficiary is includible in the decedent’s gross estate under section 2039 (a) and (b).

Example (2). Pursuant to a retirement plan, the employer made contributions to a fund which was to provide the employee, upon his retirement at age 60, with an annuity for life, and which was to provide the employee’s wife, upon his death after retirement, with a similar annuity for life. The benefits under the plan were completely forfeitable during the employee’s life, but upon his death after retirement, the benefits to the wife were forfeitable only upon her remarriage. The employee had no right to originally designate or to ever change the employer’s designation of the surviving beneficiary. The retirement plan at no time met the requirements of section 401(a) (relating to qualified plans). Assume that the employee died at age 61 after the employer started payment of his annuity as described above. The value of the wife’s annuity is includible in the decedent’s gross estate under section 2039 (a) and (b). Includibility in this case is based on the fact that the annuity to the decedent “was payable” at the time of his death. The fact that the decedent’s annuity was forfeitable is of no consequence since, at the time of his death, he was in fact receiving payments under the plan. Nor is it important that the decedent had no right to choose the surviving beneficiary. The element of forfeitability in the wife’s annuity may be taken into account only with respect to the valuation of the annuity in the decedent’s gross estate.

Example (3). Pursuant to a retirement plan, the employer made contributions to a fund which was to provide the employee, upon his retirement at age 60, with an annuity of \$100 per month for life, and which was to provide his designated beneficiary, upon the employee’s death after retirement, with a similar annuity for life. The plan also provided that (a) upon the employee’s separation from service before retirement, he would have a

nonforfeitable right to receive a reduced annuity starting at age 60, and (b) upon the employee's death before retirement, a lump sum payment representing the amount of the employer's contributions credited to the employee's account would be paid to the designated beneficiary. The plan at no time met the requirements of section 401(a) (relating to qualified plans). Assume that the employee died at age 49 and that the designated beneficiary was paid the specified lump sum payment. Such amount is includible in the decedent's gross estate under section 2039 (a) and (b). Since immediately before his death, the employee had an enforceable right to receive an annuity commencing at age 60, he is considered to have "possessed the right to receive" an annuity as that term is used in section 2039 (a). If, in this example, the employee would not be entitled to any benefits in the event of his separation from service before retirement for any reason other than death, the result would be the same so long as the decedent had complied with his obligations under the contract up to the time of his death. In such case, he is considered to have had, immediately before his death, an enforceable right to receive an annuity commencing at age 60.

Example (4). Pursuant to a retirement plan, the employee made contributions to a fund which was to provide the employee, upon his retirement at age 60, with an annuity for life, and which was to provide his designated beneficiary, upon the employee's death after retirement, with a similar annuity for life. The plan provided, however, that no benefits were payable in the event of the employee's death before retirement. The retirement plan at no time met the requirements of section 401(a) (relating to qualified plans). Assume that the employee died at age 59 but that the employer nevertheless started payment of an annuity in a slightly reduced amount to the designated beneficiary. The value of the annuity is not includible in the decedent's gross estate under section 2039 (a) and (b). Since the employee died before reaching the retirement age, the employer was under no obligation to pay the annuity to the employee's designated beneficiary. Therefore, the annuity was not paid under a "contract or agreement" as that term is used in section 2039 (a). If, however, it can be established that the employer has consistently paid an annuity under such circumstances, the annuity will be considered as having been paid under a "contract or agreement".

Example (5). The employer made contributions to a retirement fund which were credited to the employee's individual account. Under the plan, the employee was to receive one-half the amount credited to his account upon his retirement at age 60, and his designated beneficiary was to receive the other one-half upon the employee's death after re-

tirement. If the employee should die before reaching the retirement age, the entire amount credited to his account at such time was to be paid to the designated beneficiary. The retirement plan at no time met the requirements of section 401(a) (relating to qualified plans). Assume that the employee received one-half the amount credited to his account upon reaching the retirement age and that he died shortly thereafter. Since the employee received all that he was entitled to receive under the plan before his death, no amount was payable to him for his life or for any period not ascertainable without reference to his death, or for any period which did not in fact end before his death. Thus, the amount of the payment to the designated beneficiary is not includible in the decedent's gross estate under section 2039 (a) and (b). If, in this example, the employee died before reaching the retirement age, the amount of the payment to the designated beneficiary would be includible in the decedent's gross estate under section 2039 (a) and (b). In this latter case, the decedent possessed the right to receive lump sum payment for a period which did not in fact end before his death.

Example (6). The employer made contributions to two different funds set up under two different plans. One plan was to provide the employee upon his retirement at age 60, with an annuity for life, and the other plan was to provide the employee's designated beneficiary, upon the employee's death, with a similar annuity for life. Each plan was established at a different time and each plan was administered separately in every respect. Neither plan at any time met the requirements of section 401(a) (relating to qualified plans). The value of the designated beneficiary's annuity is includible in the employee's gross estate. All rights and benefits accruing to an employee and to others by reason of the employment (except rights and benefits accruing under certain plans meeting the requirements of section 401(a) (see § 20.2039-2)) are considered together in determining whether or not section 2039 (a) and (b) applies. The scope of section 2039 (a) and (b) cannot be limited by indirection.

(c) *Amount includible in the gross estate.* The amount to be included in a decedent's gross estate under section 2039 (a) and (b) is an amount which bears the same ratio to the value at the decedent's death of the annuity or other payment receivable by the beneficiary as the contribution made by the decedent, or made by his employer (or former employer) for any reason connected with his employment, to the cost of the contract or agreement bears to its total cost. In applying this ratio,

the value at the decedent's death of the annuity or other payment is determined in accordance with the rules set forth in §§ 20.2031-1, 20.2031-7, 20.2031-8, and 20.2031-9. The application of this paragraph may be illustrated by the following examples:

Example (1). On January 1, 1945, the decedent and his wife each contributed \$15,000 to the purchase price of an annuity contract under the terms of which the issuing company agreed to pay an annuity to the decedent and his wife for their joint lives and to continue the annuity to the survivor for his life. Assume that the value of the survivor's annuity at the decedent's death (computed under § 20.2031-8) is \$20,000. Since the decedent contributed one-half of the cost of the contract, the amount to be included in his gross estate under section 2039 (a) and (b) is \$10,000.

Example (2). Under the terms of an employment contract entered into on January 1, 1945, the employer and the employee made contributions to a fund which was to provide the employee, upon his retirement at age 60, with an annuity for life, and which was to provide his designated beneficiary, upon the employee's death after retirement, with a similar annuity for life. The retirement fund at no time formed part of a plan meeting the requirements of section 401(a) (relating to qualified plans). Assume that the employer and the employee each contributed \$5,000 to the retirement fund. Assume further, that the employee died after retirement at which time the value of the survivor's annuity was \$8,000. Since the employer's contributions were made by reason of the decedent's employment, the amount to be included in his gross estate under section 2039 (a) and (b) is the entire \$8,000. If, in the above example, only the employer made contributions to the fund, the amount to be included in the gross estate would still be \$8,000.

(d) *Insurance under policies on the life of the decedent.* If an annuity or other payment receivable by a beneficiary under a contract or agreement is in substance the proceeds of insurance under a policy on the life of the decedent, section 2039 (a) and (b) does not apply. For the extent to which such an annuity or other payment is includable in a decedent's gross estate, see section 2042 and § 20.2042-1. A combination annuity contract and life insurance policy on the decedent's life (e.g., a "retirement income" policy with death benefits) which matured during the decedent's lifetime so that there was no longer an insurance element under the

contract at the time of the decedent's death is subject to the provisions of section 2039 (a) and (b). On the other hand, the treatment of a combination annuity contract and life insurance policy on the decedent's life which did not mature during the decedent's lifetime depends upon the nature of the contract at the time of the decedent's death. The nature of the contract is generally determined by the relation of the reserve value of the policy to the value of the death benefit at the time of the decedent's death. If the decedent dies before the reserve value equals the death benefit, there is still an insurance element under the contract. The contract is therefore considered, for estate tax purposes, to be an insurance policy subject to the provisions of section 2042. However, if the decedent dies after the reserve value equals the death benefit, there is no longer an insurance element under the contract. The contract is therefore considered to be a contract for an annuity or other payment subject to the provisions of section 2039 (a) and (b) or some other section of Part III of Subchapter A of Chapter 11. Notwithstanding the relation of the reserve value to the value of the death benefit, a contract under which the death benefit could never exceed the total premiums paid, plus interest, contains no insurance element.

Example. Pursuant to a retirement plan established January 1, 1945, the employer purchased a contract from an insurance company which was to provide the employee, upon his retirement at age 65, with an annuity of \$100 per month for life, and which was to provide his designated beneficiary, upon the employee's death after retirement, with a similar annuity for life. The contract further provided that if the employee should die before reaching the retirement age, a lump sum payment of \$20,000 would be paid to his designated beneficiary in lieu of the annuity described above. The plan at no time met the requirements of section 401(a) (relating to qualified plans). Assume that the reserve value of the contract at the retirement age would be \$20,000. If the employee died after reaching the retirement age, the death benefit to the designated beneficiary would constitute an annuity, the value of which would be includable in the employee's gross estate under section 2039 (a) and (b). If, on the other hand, the employee died before reaching his

retirement age, the death benefit to the designated beneficiary would constitute insurance under a policy on the life of the decedent since the reserve value would be less than the death benefit. Accordingly, its includability would depend upon section 2042 and § 20.2042-1.

[T.D. 6296, 23 FR 4529, June 24, 1958; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7416, 41 FR 14514, Apr. 6, 1976]

§ 20.2039-1T Limitations and repeal of estate tax exclusion for qualified plans and individual retirement plans (IRAs) (temporary).

Q-1: Are there any exceptions to the general effective dates of the \$100,000 limitation and the repeal of the estate tax exclusion for the value of interests under qualified plans and IRAs described in section 2039 (c) and (e)?

A-1: (a) Yes. Section 245 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) limited the estate tax exclusion to \$100,000 for estates of decedents dying after December 31, 1982. Section 525 of the Tax Reform Act of 1984 (TRA of 1984) repealed the exclusion for estates of decedents dying after December 31, 1984.

(b) Section 525(b)(3) of the TRA of 1984 amended section 245 of TEFRA to provide that the \$100,000 limitation on the exclusion for the value of a decedent's interest in a plan or IRA will not apply to the estate of any decedent dying after December 31, 1982, to the extent that the decedent-participant was in pay status on December 31, 1982, with respect to such interest and irrevocably elected the form of benefit payable under the plan or IRA (including the form of any survivor benefits) with respect to such interest before January 1, 1983.

(c) Similarly, the TRA of 1984 provides that the repeal of the estate tax exclusion for the value of a decedent's interest in a plan or IRA will not apply to the estate of a decedent dying after December 31, 1984, to the extent that the decedent-participant was in pay status on December 31, 1984, with respect to such interest and irrevocably elected the form of benefit payable under the plan or IRA (including the form of any survivor benefits) with respect to such interest before July 18, 1984.

Q-2: What is the meaning of "in pay status" on the applicable date?

A-2: A participant was in pay status on the applicable date with respect to a portion of his or her interest in a plan or IRA if such portion is to be paid in a benefit form that has been elected on or before such date and the participant has received, on or before such date, at least one payment under such benefit form.

Q-3: What is required for an election of the form of benefit payable under the plan to have been irrevocable as of any applicable date?

A-3: As of any applicable date, an election of the form of benefit payable under a plan is irrevocable if, as of such date, it was a written irrevocable election that, with respect to all payments to be received after such date, specified the form of distribution (e.g., lump sum, level dollar annuity, formula annuity) and the period over which the distribution would be made (e.g., single life, joint and survivor, term certain). An election is not irrevocable as of any applicable date if, on or after such date, the form or period of the distribution could be determined or altered by any person or persons. An election does not fail to be irrevocable as of an applicable date merely because the beneficiaries were not designated as of such date or could be changed after such date. If any interest in any IRA may not, by law or contract, be subject to an irrevocable election described in this section, any election of the form of benefit payable under the IRA does not satisfy the requirement that an irrevocable election have been made.

[T.D. 8073, 51 FR 4335, Feb. 4, 1986]

§ 20.2039-2 Annuities under "qualified plans" and section 403(b) annuity contracts.

(a) *Section 2039(c) exclusion.* In general, in the case of a decedent dying after December 31, 1953, the value of an annuity or other payment receivable under a plan or annuity contract described in paragraph (b) of this section is excluded from the decedent's gross estate to the extent provided in paragraph (c) of this section. In the case of a plan described in paragraph (b) (1) or (2) of this section (a "qualified plan"),