

JURISDICTION: OKLAHOMA TAX COMMISSION DECISION
CITE: 87-06-18-07 / NON-PRECEDENTIAL
ID: P-85-327
DATE: JUNE 18, 1987
DISPOSITION: DENIED
TAX TYPE: ESTATE
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above styled cause comes on for consideration pursuant to assignment regularly made to ALJ, Administrative Law Judge, by the Oklahoma Tax Commission. A hearing was had, at which hearing, Protestant appeared by ATTORNEY, and the Estate Tax Division of the Oklahoma Tax Commission appeared by OTC ATTORNEY. Testifying on behalf of the Protestant were PROTESTANT'S WITNESS ONE and PROTESTANT'S WITNESS TWO, and testifying on behalf of the Estate Tax Division was DIVISION'S WITNESS ONE. Exhibits, not herein itemized, were received into evidence, closing arguments were heard, and upon the submission of proposed Findings, Conclusions and Recommendations by the parties, this case was submitted for a decision.

STATEMENT OF FACTS

DECEDENT died intestate on January 13, 1984 at the age of ninety-two (92). At the time of her death, she was a resident of Oklahoma. Her executors filed an Oklahoma Estate Tax Return with the Estate Tax Division on or about August 24, 1984.

On July 16, 1985, the Estate Tax Division assessed the estate in the amount of Forty-One Thousand Five Hundred Eighty-One Dollars and Eighteen Cents (\$41,581.18). By letter dated August 14, 1985, the Estate Tax Division granted an extension of time in which to file protest until October 16, 1985. On October 16, 1985, the executors of the estate of DECEDENT filed a written protest to the assessment, and on November 18, 1986, paid under protest Forty-Nine Thousand Nine Hundred Thirty-Three Dollars and Seventy-Three Cents (\$49,933.73), the amount of the assessment plus interest to date.

The assessment was based on gifts that the decedent made in April of 1982, approximately one year and nine months before her death, while a resident of the State of Texas, and on other gifts made by decedent in April of 1983, while a resident of the State of Oklahoma. In April of 1982, the decedent made gifts of Ten Thousand Dollars (\$10,000.00) each to nine (9) of her nieces and nephews and transferred One Hundred Thirty Thousand Dollars (\$130,000.00) to the DECEDENT Irrevocable Trust for Minors.

In April of 1983, decedent made gifts of Two Thousand One Hundred Fifty Dollars (\$2,150.00) to each of her twenty-six (26) nephews, nieces, grandnephews and grandnieces. The total amount of the gifts in question is Two Hundred Seventy-Five Thousand Nine Hundred Dollars (\$275,900.00). By these transfers, decedent gifted slightly less than fifty percent (50%)

of her total estate. At the time decedent made the gifts, she was ninety (90) years old and ninety-one (91) years old.

Testimony on behalf of decedent's estate was that the decedent had a long history of gift giving and gave other cash gifts to family members in 1962, 1970, 1974 and 1976. These gifts were for no more than Ten Thousand Dollars (\$10,000.00) to Twenty Thousand Dollars (\$20,000.00) in any given year and represented a small portion of the estate compared to the gifts in question.

On March 26, 1982, decedent executed a trust agreement, and in April of 1982 and April of 1983, decedent executed amendments to that trust agreement. Decedent died without a will, but the trust agreement was executed at or near the same time as the gifts, thereby taking the place of a will in determining the ultimate disposition of decedent's property.

ISSUES AND CONTENTIONS

Issue One: Whether the gifts made by decedent were in contemplation of death and thus includable in her estate under the provisions of 68 O.S. 1981, § 807(A)(2).

Issue Two: Whether decedent's residency in Texas and the fact that the property was located in Texas at the time of the transfer of the funds is relevant to the inclusion of the April, 1982 gifts in decedent's estate.

The Protestant contends that none of the gifts in question are includable in the decedent's gross estate under the applicable contemplation of death statute because of the decedent's health, the decedent's motive of lowering her income tax liability in giving the gifts, and decedent's long history of gift giving and the generosity she exhibited in all areas of her life. Protestant also contends that the 1982 transfers made by decedent while a Texas resident are more properly excluded from estate tax under 68 O.S. 1981, § 807(A)(1), which excludes intangible personal property of a non-resident from inclusion in the gross estate.

Protestant also asserts that the Oklahoma Tax Commission is without jurisdiction to tax the 1982 transfers since the property transferred never assumed an actual or constructive situs within the State, and the transferor was not a resident of the State at the time of the transfer. Protestant relies on In re Harkness Estate, 24 P.2d 911 (Okl. 1921); In re Jones Estate, 294 P.2d 792 (Okl. 1930); and Wilson v. Oklahoma Tax Commission, 594 P.2d 1210 (Okl. 1979) to support this contention.

Protestant also asserts that inclusion of the 1982 gifts in decedent's estate would be violative of the Due Process Clause, the Equal Protection Clause, and the Privileges and Immunities Clause of the United States Constitution. Protestant relies on Shapiro v. Thompson, 394 U.S. 618 (1969) in contending that taxation of the 1982 transfers would exact a penalty on decedent's right to travel.

The Estate Tax Division contends that the provisions of 68 O.S. 1981, § 807(A)(2) create the presumption that the transfers in question were made in contemplation of death since they

were made within the three (3) year statutory period prior to her death. In contending that decedent was making the ultimate disposition of her property because of the possibility of her death, the Estate Tax Division relies on the decedent's age at the time of the transfers, ninety (90) and ninety-one (91); the portion of the estate transferred, slightly less than fifty percent (50%); the large amount of the transfers, a total of Two Hundred Seventy-Five Thousand Dollars (\$275,000.00); and the fact that decedent executed a will substitute, the trust of March, 1982, one month prior to the first series of gifts.

The Estate Tax Division also contends that the fact that decedent was domiciled in Texas at the time a portion of the gifts were made has no bearing on the inclusion of those gifts in decedent's estate at the time of her death. In contending that the time of death and not the time of the transfer is relevant for estate tax purposes, the Estate Tax Division relies on Iglehart v. Commission of Internal Revenue, 77 F.2d 704 (5th Cir. 1935) and Page v. Commission of Revenue, 450 NE.2d 590 (Mass. 1983).

APPLICABLE LAW

Title 68 O.S. 1981, § 807(A)(2) includes in the value of the gross estate:

(2) The value of any real or personal property, including the homestead passing by deed, grant, bargain, sale or gift made in contemplation of death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after his death. Any transfer made by the decedent of a material part of his estate within three (3) years prior to death, without an equivalent in monetary consideration, shall, unless shown to the contrary, be deemed to have been in contemplation of death, and such transfers shall be included at their net value at the date of decedent's death. (Emphasis Added)

Title 68 O.S. 1981, § 807(A)(2) creates a rebuttable presumption that transfers by decedent of a material portion of her estate within three (3) years prior to her death are transfers made in contemplation of death.

The evidence and testimony presented at the hearing established that a material portion of decedent's estate was transferred to her nieces, nephews, grandnieces and grandnephews within three (3) years of her death. These transfers were admittedly gifts, thus such transfers were made "without an equivalent in monetary consideration" as provided by 68 O.S. 1981, § 807(A)(2), supra. As such, a rebuttable presumption that the transfers in question were made in contemplation of death was established.

The issue remaining is, therefore, whether the facts established at the hearing are sufficient to rebut the presumption that the gifts were made in contemplation of death. Since there are no Oklahoma cases on point, cases from other jurisdictions can be properly resorted to for guidance.

In Berman v. U.S., 487 F.2d 70, (5th Cir., 1973), the Federal contemplation of death statute, found at 26 U.S.C. §2035, provided as follows:

(a) General rule.

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

(b) Application of general rule.

If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); 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. (Emphasis Added)

At the outset, it is to be noted that the federal statute in Berman created a rebuttable presumption, much like 68 O.S. 1981, § 807(A)(2), that transfers made within three years of death were to be included in the estate, unless shown to the contrary. In Berman, the question was whether the decedent, who had purchased a life insurance policy before dying in a plane accident, had purchased and given the policy in contemplation of death.

In discussing the estate's burden, the Court of Appeals stated:

It appears to us that the District Court confused expectation of death with contemplation of death. There is little doubt that Berman expected to live. He was a vigorous man leading an interesting and useful life with great plans for the future. His death was a tragic event. The finding that he did not expect to die on the plane flight is almost compelled by the record, let alone immune under the clearly erroneous standard of review. But the question is not whether he expected to die, but whether the assignment of the policy was motivated by the thought that he might die. To be precise, the estate's burden was not to prove that Berman expected to live or intended to live, as the estate argues, but that the assignment was dominantly motivated by that expectation of continued life.

Berman, 487 F.2d at 72. (Emphasis Added)

The Court, later in the opinion, stated:

It is not enough for the estate to show that decedent was in good health and did not anticipate immediate death. Section 2035 is not limited to gifts causa mortis made in anticipation of a certain event. United States v. Wells, 283 U.S. 102, 51 S.Ct. 446, 75 L.Ed. 867 (1931); Treas.Reg. § 20.2035-1(c). Rather, the estate has the task of persuading the court that the decedent had specific life motives in assigning this insurance policy to his son.

Berman, 487 F.2d at 73.

The Berman Court ultimately held that the estate did not overcome the presumption of includability and that the transfer was in fact in contemplation of death. (Berman, 487 F.2d at 73).

While the transfer of a life insurance policy may create a heavier burden, since such a transfer is so inherently death oriented, the discussion of the various factors and burdens within Berman have been applied in several cases concerning the federal contemplation of death statute.

As applied to the instant case, the evidence at the hearing showed that decedent's gift giving was not wholly motivated by the expectation of continued life. Decedent was ninety (90) and ninety-one (91) at the time she made the transfers in question. The ratio of the gifts to her total estate was approximately fifty percent (50%), and the gifts were given at approximately the same point in time that she ultimately disposed of much of her property by setting up an irrevocable trust.

In Fatter v. Usry, 269 F.Supp. 582 (E.D. La. 1967), the Court discussed the state of mind of the decedent at the time of the transfers as the determinative factor in deciding whether the estate had overcome the statutory presumption that a gift had been made in contemplation of death. The Court stated:

The dominant purpose of the statute is to reach substitutes for testamentary dispositions and thus to prevent evasion of the estate tax. "As the transfer may otherwise have all the indicia of a valid gift inter vivos, the differentiating factor must be found in the transferor's motive. Death must be 'contemplated' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition... The question, necessarily, is as to the state of mind of the donor."

But "the determinative motive" cannot be said to be lacking "merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand."

Fatter, 269 F.Supp. at 584 (citing U.S. v. Wells, 283 U.S. 102 (1931)) (Emphasis Added).

The Court continued:

The court’s inquiry then 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.

Fatter, 269 F.Supp. at 584 (citation omitted) (Emphasis Added).

In Cunningham v. U.S., 553 F.2d 394 (5th Cir. 1977), the United States Court of Appeals listed the major factors which have been considered in determining whether a contemplation of death presumption had been overcome. The Court set out those factors as follows:

Those factors include, inter alia, (a) the age of the decedent at the time the transfers were made; (b) the decedent’s health, as he knew it, at or before the time of the transfers; (c) the interval between the transfers and the decedent’s death; (d) the amount of the property transferred in proportion to the amount of property retained; (e) the nature and disposition of the decedent; (f) the existence of a general testamentary scheme of which the transfers were a part; (g) whether the donees to the decedent were the natural objects of his bounty; (h) the existence of a long established gift-making policy on the part of decedent; (i) the existence of a desire on the part of the decedent to escape the burden of managing property by transferring the property to others; (j) the existence of a desire on the part of the decedent to experience vicariously the enjoyment of the donees of the property transferred; and (k) the existence of the desire by the decedent of avoiding estate taxes by means of making inter vivos transfers of property.

Cunningham, 553 F.2d at 396.

The statutory presumption that gifts given three (3) years prior to death are in contemplation of death is a rebuttable presumption. Taking into consideration the common guidelines for determining whether a gift was made in contemplation of death: decedent’s age, her physical condition and length of time the decedent survived after making the gifts, the presumption herein was not overcome by testimony that decedent made the gifts to decrease her income tax liability or testimony of decedent’s generosity. The other guidelines weigh too heavily in the other direction for the presumption to be overcome. Decedent was ninety (90) and ninety-one (91) years of age at the time of the gifts and disposed of slightly less than fifty percent (50%) of her estate by gifts of large amounts of cash.

These gifts were intended to be the ultimate disposition of that portion of decedent’s property and were given at the same time that decedent executed a trust which disposed of the remainder of her estate, and which was in effect, a will substitute. The decedent executed the trust agreement only one (1) month prior to setting up the One Hundred Thirty Thousand Dollars

(\$130,000.00) irrevocable trust for minors and giving nine (9) Ten Thousand Dollars (\$10,000.00) cash gifts to family members. In April of 1982 and in April of 1983, decedent gave the gifts in question and executed amendments to the trust which disposed of the remainder of her estate.

Also significant is the fact that the ratio the total amount of the gifts had to the total estate. The decedent, between the two periods of giving, gave away slightly less than fifty percent (50%) of her estate. Weighing all the facts established at the hearing, it is the opinion of the undersigned that the statutory presumption has not been overcome.

Turning now to the second issue, decedent was a resident of Texas at the time she made the first set of gifts totaling approximately Two Hundred Ten Thousand Dollars (\$210,000.00). The determinative issue is whether the domicile of the decedent at the time of the transfer or at the time of death controls for estate tax purposes. The similar case of Page v. Commissioner of Revenue, 450 N.E.2d 590 (Mass. 1983) addressed this issue.

In Page, the decedent was domiciled in Maryland when the gift was made and was domiciled in Massachusetts at the time of death, less than three years after the gift was made. One of the issues before the Supreme Judicial Court of Massachusetts, was whether Massachusetts had the power to tax a gift made in contemplation of death where the gift was made thirty months prior to the donor's establishment of a Massachusetts domicile.

In analyzing the issue, the Court stated:

Because the gift was made in contemplation of death, the tax on the gift was imposed as if "the property given had been a part of the donor's estate passing at death." Milliken v. United States, 283 U.S. 15, 22, 51 S.Ct. 324, 326, 75 L.Ed 809 (1931). See Heiner v. Donnan, 285 U.S. 312, 322, 52 S.Ct. 358, 359, 76 L.Ed 772 (1932). "For the purposes of the tax, property transferred by the decedent in contemplation of death is in the same category as it would have been if the transfer had not been made and the transferred property had continued to be owned by the decedent up to the time of his death." Igleheart v. Commissioner of Internal Revenue, 77 F.2d 704, 711 (5th Cir. 1935).

A transfer in contemplation of death is a disposition which is deemed testamentary. Heiner v. Donnan, supra 285 U.S. at 322, 52 S.Ct. at 359. We discern no constitutional impediment to including the gift in the Massachusetts taxable estate.

Page, 450 N.E. 2d at 594.

The Court ultimately held:

We conclude that it is the domicile of the decedent at the time the right to impose the tax arises that determines the propriety of tax. Kingsbury v. Chapin, 196 Mass. 533, 538, 82 N.E. 700 (1907). As the property which is

the subject of a gift in contemplation of death is deemed, for tax purposes, to be part of the decedent's estate, the right to impose the tax arises at the time of the decedent's death. See Milliken v. United States, supra 283 U.S. at 22-23, 51 S.Ct. at 326-327. See also City Bank Farmers Trust Co. v. Martin, 126 N.J.L. 506, 507, 20 A.2d 56 (1941). Wimpfheimer v. Martin, 126 N.J.L. 502, 505, 20 A.2d 433 (1941); 26 U.S.C. § 2104 (1976) (in reference to a gift in contemplation of death, location of property is determined by situs either at time of transfer or at time of death). Accordingly, the decedent's domiciliary status in Maryland at the time of the transfer does not constitutionally proscribe a tax on the transfer by the State of the decedent's domicile at the time of death. Thus, we conclude that the Commissioner properly included the transfer as part of the Massachusetts estate.

Page, 450 N.E. 2d at 595.

The facts of Page are strikingly similar to the facts of the instant case. Since the estate tax is triggered by death, the position of the Estate Tax Division that the domicile at the time of death should control, is the more tenable position.

Protestant contends that the Oklahoma Supreme Court case of Wilson v. State of Oklahoma, 594 P.2d 1210 (Okla. 1979) is relevant to this issue. However, in Wilson, the dispositive issue was whether the two (2) year statute or the amended statute which increased the statutory presumption of contemplation of death to three (3) years was applicable to a gift given before the statute was amended. In Wilson, the decedent had died two (2) years and eleven (11) months after he had given the gift. To avoid a retroactive effect which is not present in the case herein, the Supreme Court held the gift statute in effect at the time of the transfer to be the controlling statute. Page is much more relevant to the issue herein having addressed a similar question.

As to the constitutional arguments raised by the Protestant, the undersigned, in accordance with the Page decision, finds no constitutional impediments in including the 1982 gifts in the Oklahoma taxable estate.

CONCLUSIONS

In view of the above and foregoing findings of fact and applicable law relevant thereto, the undersigned Administrative Law Judge concludes as follows:

- (1) That the Oklahoma Tax Commission has jurisdiction in this matter.
- (2) That the gifts made by decedent in April of 1982 and April of 1983 were made in contemplation of death and the statutory presumption was not overcome.
- (3) That the gifts made by decedent while a resident of Texas, were properly includable in the Oklahoma taxable estate.

- (4) That the Estate Tax Division's assessment letter of July 16, 1985, is proper.
- (5) That the estate tax protest of the PROTESTANT be denied.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION that the protest of the PROTESTANT be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.