JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **99-08-03-003 / NOT PRECEDENTIAL**
ID: **P9700166**
DATE: **08-03-99**
DISPOSITION: **SUSTAINED**
TAX TYPE: **ESTATE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate to the following:

I. Procedural Facts

1. The Division by letter dated September 3, 1996, proposed an assessment of $45,671 of additional estate taxes, together with $3,141 of interest thereon, against the Estate of DECEDENT.

2. The Estate timely filed a formal protest objecting to the proposed assessments of all additional tax and interest on October 1, 1996 (the "Protest").

3. On June 20, 1997, SON NUMBER 1, on behalf of the Estate, paid the Commission the amount of the assessment, with interest, under protest.

4. On December 3, 1997, a pre-hearing conference was held before the Administrative Law Judge with respect to the Protest.

5. The Protest was set for submission for decision on briefs, if a hearing is not necessary, with the Estate's brief due on or before February 17, 1998.

6. The Protest of the Estate was set for formal hearing, if necessary, on February 24, 1998.

II. Facts Regarding the Issues

7. DECEDENT died on July 6, 1995, at the age of eighty-four.

8. An Oklahoma estate tax return for DECEDENT, showing a taxable estate of $3,948,829 was filed with the Commission on April 6, 1996.

9. On December 31, 1992, two years and seven months prior to her death, DECEDENT created and funded a charitable lead trust (the "Charitable Trust") with $1,000,000.

10. At the time of her gift, DECEDENT was 81 years old, dated regularly, and was socially active.

11. The terms of the Charitable Trust require aggregate annual distributions of $60,000 per year, which represents six percent of the initial fair market value of the Charitable Trust, to ten designated charities for ten years.

12. The duration of the Charitable Trust and the obligation to make the distributions were not affected by DECEDENT'S death. After ten years, any remaining trust corpus is to be distributed to DECEDENT'S son.

13. Under the terms of the governing instrument of the Charitable Trust, $60,000 must be distributed annually to the Charities, even if the income of the Charitable Trust in any year is less than that amount.

14. Pursuant to Okla. Stat. Tit 68 § 807(A)(2), transfers made by a decedent of a material part of her estate within three years prior to death shall, unless shown to the contrary, be deemed to have been in contemplation of death and included within the gross estate of the decedent.

15. The Commission has proposed the assessment on the basis that the Charitable Trust was created within three years of DECEDENT'S death.

16. The amount of the assessment reflects the value of the remainder interest of the Charitable Trust at the time of DECEDENT'S death, which interest will ultimately be distributed to SON NUMBER 1.

17. The remainder interest, valued at $574,660, represents 12% of DECEDENT'S estate, which consisted primarily of stocks, bonds, cash, a promissory note representing monies loaned by DECEDENT to a family limited partnership in which she was not a partner, and certain items of personal property.

18. Pursuant to DECEDENT'S last will and testament and revocable trust agreement, SON NUMBER 1 received all of his mother's estate with the exception of a $1,000,000 bequest left to her only grandson, who is the child of a second son, SON NUMBER 2, for whom no provision was made by DECEDENT.

19. At the time of the creation of the Charitable Trust, SON NUMBER 1 had been involved in an extremely vexing and difficult dispute with SON NUMBER 2.

20. The dispute resulted in SON NUMBER 2's filing a lawsuit against SON NUMBER 1 and DECEDENT'S late husband regarding their management of the family business.

21. DECEDENT believed SON NUMBER 1 had merely followed his father's wishes in his management of the family business and had been unfairly criticized by SON NUMBER 2.

22. The suit, and the inevitable bitterness and estrangement among family members, greatly upset DECEDENT. DECEDENT would become quite emotional when discussing what she regarded as the damage the dispute had caused to family relationships, to the family's reputation, and, in particular, to her late husband's image as a loving father.

23. The Charitable Trust was, in part, a product of DECEDENT'S desire to do "good work" at a time when the family's recent public activities were negative.

24. DECEDENT stated to her son at the time of the creation of the Charitable Trust that she believed that a series of gifts, extending over a number of years, would be more helpful in restoring the family reputation than would be a single gift, even if quite sizeable.

25. DECEDENT wished to experience the satisfaction of making charitable gifts during her lifetime and seeing how those gifts assisted the persons whom she wished to help.

26. DECEDENT had been advised by her counsel and tax accountant that a charitable lead trust would be the most income tax efficient method for making sizeable annual gifts to charities.

27. DECEDENT had been advised by her counsel and tax accountant that a charitable lead trust would ensure that annual gifts in designated amounts would be made to designated charities throughout the term of the trust, and that such gifts would not be affected by any changes to her or SON NUMBER 1's financial conditions, nor by her own death.

28. SON NUMBER 1 is a natural object of both DECEDENT'S inter vivos and testamentary bounty.

29. In 1993, the first year in which the trust was in operation, DECEDENT had adjusted gross income of $54,551.

30. As is evidenced by the 1993 federal income tax return, while DECEDENT was a wealthy woman, she had invested heavily in obligations issued by Oklahoma municipalities, trust authorities, and state instrumentalities.

31. DECEDENT did not like to pay income taxes and, as a result, had directed that her investments be maintained largely in tax-exempt bonds. Her taxable income was, therefore, expected to remain low or decline in future years.

32. That DECEDENT'S taxable income did not, in fact, decline, was a result of extraordinary and unforeseeable events.

33. DECEDENT was also concerned about her son, SON NUMBER 1's financial ability to discharge his obligation to pay his brother, SON NUMBER 2, the $500,000 per year required for a number of years under the terms of the Settlement Agreement between SON NUMBER 1 and SON NUMBER 2 that had ended SON NUMBER 2's lawsuit.

34. At the time of the creation of the Charitable Trust, SON NUMBER 1 had been unable to satisfy the settlement obligation without his mother's direct assistance.

35. DECEDENT was concerned that the financial terms of the Settlement Agreement between SON NUMBER 2 and SON NUMBER 1 would cause SON NUMBER 1 to become insolvent, and she wished to establish a fund which would be available to SON NUMBER 1, at some point when the settlement was concluded, and all disputes between the brothers had been resolved.

36. By creating the Charitable Trust, DECEDENT was therefore able both to satisfy her strong charitable inclinations and, at the same time, provide a future "safety net" for SON NUMBER 1 should he require it.

37. Monies contributed to the Charitable Trust were invested primarily in taxable bonds which produced an income sufficient to pay the annual gifts to charities, rather than in equities that would have afforded the greatest opportunity for appreciation, and resulting benefit to the remainderman, SON NUMBER 1.

ISSUES AND CONTENTIONS

The sole issue to be decided is whether decedent's funding of an irrevocable charitable lead trust within three years of her date of death was done in contemplation of death, thereby subjecting the remainder interest to estate tax under 68 O.S. 1991, § 807(A)(2).

Protestant contends that the funding of the trust was not made in contemplation of death. In support of this contention, Protestant argues that the evidence demonstrates the trust was established for life motives rather than those of a testamentary nature. In support of this argument, Protestant asserts that the trust was established to fulfill decedent's tax and investment goals, to benefit the charities and improve the reputation of the family and to reward her son and protect him from future financial hardship.

The Division contends that the creation of the trust was motivated by thoughts of death and, therefore, the assessment of the remainder interest should be sustained. In support of this contention, the Division argues that decedent was eighty-one years old when the trust was created and decedent had not established a pattern of gifting. The Division further argues that on the same day the charitable trust was created decedent amended her revocable trust to delete certain bequests to two named charities.

APPLICABLE LAW

Gifts of real or personal property made by a decedent in contemplation of death shall be included in the value of the gross estate of the decedent. 68 O.S. 1991, § 807(A)(2). A presumption that the gift of property was made in contemplation of death arises where the transfer is made within three (3) years of the death of decedent, without an equivalent in monetary consideration, and the transfer consists of a material part of decedent's estate. Id.

Section 807(A)(2) represents "a legislative scheme to prevent inheritance tax evasion by imposing certain criteria on inter vivos transfers." ***Wilson v. Oklahoma Tax Commission***, 594 P.2d 1210, 1212 (Okl. 1979). The Legislative scheme has been in place since the enactment of the Inheritance and Transfer Act of 1939.[1]

The Tax Commission has the burden of establishing that (1) the transfer occurred; (2) the transfer was a material part of decedent's estate; (3) the transfer was not made for an equivalent in monetary consideration; and (4) the transfer was made within three years of death. Oklahoma Tax Commission Order No. 94-06-21-003.[2] Where the Commission establishes the above elements, the statutory presumption arises and the burden of proof shifts to the Estate to show that the transfers were not gifts made in contemplation of death. *Id*.

The differentiating factor between an inter vivos gift and one made in contemplation of death is the transferor's motive. ***U.S. v. Wells***, 283 U.S. 102, 51 S.Ct. 446, 75 L.Ed. 867 (1931). A transfer "in contemplation of death" is a disposition of property prompted by the thought of death (although it need not be solely so prompted). 26 C.F.R. § 20.2035-1(c)(1954). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. Id. Contemplation of death is the statutory criteria, not necessarily contemplation of imminent death, ***Fatter v. Usry***, 269 F.Supp. 582, 584 (E.D. La. 1967); or expectation of death, ***Beaman v. U.S.***, 487 F.2d 70, 72 (5th Cir. 1973).

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[1] Laws 1939, p. 400, § 1. The Inheritance and Transfer Act was repealed in 1965 and recodified as the Estate Tax Laws, 68 O.S. Supp. 1985, § 801 et seq. Laws 1965, c.250. §§ 1-3.

[2] The Order of the Tax Commission which adopted the Findings, Conclusions and Recommendations of the Administrative Law Judge decreed that the statements of law contained therein were of precedential effect.

Factors to be considered in determining whether the estate has overcome the presumption that the gift is made in contemplation of death are:

> (a) the age of the decent 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 v. U.S.***, 553 F.2d 394, 396 (5th Cir. 1977).

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. Gifts of real or personal property made in contemplation of death are included in the value of the gross estate of a decedent for estate tax purposes. 68 O.S. 1991, § 807(A)(2). See, ***Wilson v. Oklahoma Tax Commission***, 594 P.2d 1210, 1212 (Okl. 1979).

3. Gifts of a material part of a decedent's estate made within three (3) years of death are presumed to be made in contemplation of death. 68 O.S. 1991, § 807(A)(2).

4. Here, there is no dispute that a transfer occurred, that the transfer was made within three (3) years of decedent's death, that the transfer was not made for an equivalent in monetary consideration and that the transferred property comprised a material part of decedent's estate. Accordingly, the presumption that the transfer was made in contemplation of death is applicable.

5. The differentiating factor between gifts inter vivos and gifts in contemplation of death is the transferor's motive. ***U.S. v. Wells***, 283 U.S. 102, 51 S.Ct. 446, 75 L.Ed. 867 (1931). Transfers prompted by the thought of death, even if they are also prompted by other motives, are includable in the gross estate of the decedent. 26 C.F.R. § 20.2035-1(c)(1954). See, ***Fatter v. Usry***, 269 F.Supp. 582, 584 (1967). Contemplation of death is the statutory criteria, not necessarily contemplation of imminent death, ***Fatter***, *supra*; or expectation of death, ***Beaman v. U.S.***, 487 F.2d 582, 584 (5th Cir. 1973).

6. The prevailing test for determining the reason for the establishment of a trust requires an evaluation of the dominant motive of the decedent as a whole. ***Block, II v. United States***, 507 F.2d 603 (5th Cir. 1975) and ***Cleveland Trust Company v. United States***, 421 F.2d 475 (6th Cir. 1970). To fragment the motives behind separate interests in the same trust is unrealistic. *Id*.

7. Here, the evidence establishes that decedent created the trust at a time when, in her mind, the family reputation had been tarnished by the lawsuit and her son, SON NUMBER 1, was attempting to continue the family business though struggling with the debt obligation from the settlement of the lawsuit. Decedent did not retain any interest in the property transferred to the trust, the trust was funded two years and seven months prior to her death and the annual gifts to the named charities continued for a fixed period of time despite the event of her death. These circumstances demonstrate that the decedent's dominant motive for the creation of the trust was life oriented.

8. Protestant came forward with sufficient evidence to overcome the presumption that the transfer to the trust was made in contemplation of death. Accordingly, the remainder interest was improperly included in decedent's gross estate.

9. Protestant's protest to the assessment of estate tax on the remainder interest should be sustained.

DISPOSITION

Based on the above and foregoing, it WAS DETERMINED that the protest of Protestant, Estate of DECEDENT, be sustained.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not 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.