JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **1999-09-14-005 / NOT PRECEDENTIAL**
ID: **P9600457**
DATE: **09-14-99**
DISPOSITION: **SUSTAINED**
TAX TYPE: **ESTATE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate to the following:

1. DECEDENT died May 9, 1995.

2. At the time of her death, decedent was a resident of ANONYMOUS County.

3. Decedent died intestate, her heirs at law and the objects of her bounty being her sons, SON "A" and SON "B", and her DAUGHTER.

4. Decedent's SON "A", was appointed Personal Representative of decedent's estate in Case No. P-XX-XXX-XX, by the District Court of ANONYMOUS County, on June 14, 1995.

5. An Oklahoma Estate Tax Return for the estate of decedent was timely filed on December 13, 1995.

6. A total gross estate of $345,237.28 was reported (later amended to $312,419.93), of which $299,890.57 consisted of cash on hand or deposit and other tangible personal property (later amended to $267,073.22).

7. Upon review and audit of the return, the Oklahoma Tax Commission, Estate Tax Division issued an Order Assessing Tax dated April 23, 1996, in the total amount of $43,016.00 (later amended to $40,555.11). The assessment resulted from the inclusion of a transfer of cash made by the decedent within three (3) years of her date of death in the total amount of $630,000.00 (the "transfer").

8. The transfers from the decedent were gifts of cash to the decedent's three children in the amount of $210,000.00 each.

9. The estate tax return reported the transfer of cash made within three (3) years of decedent's date of death; however, the amount was excluded from the gross estate.

10. On May 8, 1996, the Estate of DECEDENT ("Protestant") under protest paid to the Oklahoma Tax Commission the full amount of the additional assessed tax (after allowing for the amendments to the gross estate amounts shown above). Protestant submitted with said payment, a letter of protest dated May 2, 1996, and by said letter took exception to the inclusion of the transfers in the gross estate.

11. The Division reviewed and approved the amendments to the values of the various properties in the gross estate and issued their Order Releasing Taxable Estate dated February 3, 1997.

12. The transfers made by decedent within three (3) years of her date of death are reported on Schedule E of the estate tax return by reference to a copy of the United States Gift (and Generation Skipping Transfer Tax) Return Form 709 for the calendar year 1992, which was attached and showed the following:

Donee's Name and Relationship	**Donor's Basis**	**Date of Gift**	**Value**
SON "A"	$210,000	12/30/92	$210,000
SON "B"	$210,000	12/30/92	$210,000
DAUGHTER	$210,000	12/30/92	$210,000

13. The explanation accompanying Schedule E reads as follows:

> Per attached federal gift tax return, decedent made gifts to her three children on November (sic) 30, 1992, which has not been included on this estate return.
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> At the time of the gifts, the decedent was in good health. The decedent loved her children and made the gifts out of love and concern for each of them. No gifts were made in contemplation of death or for any estate tax savings as only cash was given. In fact, as per federal law, the cash taxable gifts were drawn back into the estate.
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> On May 8, 1995, decedent entered the hospital for routine problems (not life threatening) and was sent home. The following day, May 9, she returned and suddenly and unexpectedly died. Attached hereto is a copy of the death certificate and the federal gift return form 709.

14. The amount of estate tax at issue in this cause is $35,233.95.

15. The transfers were a material part of decedent's estate.

16. Decedent was age 84 at the time of the transfers and was age 87 at the date of her death.

17. The transfers were made at a time when decedent had no knowledge of any health condition that would give rise to extraordinary concern to her or to cause her to contemplate death.

18. Decedent's death occurred 2 years, 5 months, 8 days after the transfers.

19. The decedent was in relatively good health immediately prior to her death. Her health history as noted on hospital records was of Parkinson's disease, Pernicious Anemia/B12 deficiency, osteoarthritis, hypothyroidism, chronic congestive heart disease and renal insufficiency.

20. The decedent was a resident of THE LOCAL retirement home at the time of the transfers. The purpose of her residency there was to maintain her good health with regular meals, activities and companionship with the other residents.

21. The decedent's death was sudden. The events that lead up to the death of the decedent are as follows:

> On May 8, 1995, decedent was taken to HOSPITAL ONE in ANONYMOUS City, suffering from an episode of vomiting together with abdominal pain and cramps. An EKG and other tests were performed. She was diagnosed with a blockage to her bowels and sent home with instructions for her home care. The retirement home staff was instructed to give the decedent enemas until the blockage was cleared. The decedent was given 5 enemas over the next several hours. The pain continued that evening and decedent was returned to HOSPITAL ONE by ambulance early in the morning of May 9, 1995. During the trip to HOSPITAL ONE, the ambulance staff was diverted to HOSPITAL TWO. During the transfer, the decedent again started to vomit. According to hospital records, large amount of vomitus was aspirated by the decedent. The decedent ceased breathing and her heart stopped beating shortly thereafter, while still en route. Upon arrival at HOSPITAL TWO, the emergency room staff performed cardiopulmonary resuscitation on the decedent for 25 minutes, including shocking for defibrillation of the heart, 3 times. The emergency room staff was unable to revive the decedent and she was pronounced dead at 9:45 p.m. on May 9, 1995. The Oklahoma State Department of Health Death Certificate notes the immediate cause of death to be Acute Aspiration.

22. A short time prior to the transfers in question, the decedent was involved in an altercation with another resident of THE LOCAL retirement home, in which they both lived. This altercation escalated to the level of a physical confrontation and resulted in the decedent actually knocking the other resident to the floor. At the time of the transfers, a main concern of the decedent was of the legal repercussion from this incident.

23. Despite the altercation noted in the prior paragraph number 21, decedent was always a good natured individual who was easy to get along with.

24. The transfers were not a part of a general testamentary scheme. No gifts had ever been made prior to, or since those transfers.

25. The decedent had a desire to escape the burden of managing her affairs for some time prior to the transfers. She had asked SON "A", to manage her affairs. SON "A'S" WIFE wrote the checks to pay all decedent's bills from decedent's checking account. SON "A" was a joint owner on the decedent's investment account with AN ANONYMOUS Company, for management purposes. The decedent did not wish any involvement in the investment decisions or other money management affairs. The decedent stated on numerous occasions that she "didn't want to worry about it", meaning money management.

ISSUES AND CONTENTIONS

The sole issue to be decided is whether the transfers made by decedent within three (3) years of her death were made in contemplation of death.

Protestant contends that the gifts were not made in contemplation of death. In support of this contention, Protestant states that although 84 years old at the time of the transfers, decedent was in good health and was not aware of any specific health condition that would have caused her to contemplate death. As motive for the transfers, Protestant argues that decedent desired to save assets from litigation based on her concern over potential legal repercussion of an incident involving an altercation with a resident at the retirement home where decedent lived. Further, Protestant asserts that decedent wished to enjoy her children's use of the gifts and that decedent no longer wished to be burdened with the management of her assets.

The Division asserts that the facts in this case support the statutory presumption that the gifts were made in contemplation of death and that the assessment should be upheld. In support of this contention, the Division argues that decedent was 84 years old at the time of the transfers and that it could be reasonably argued that almost all decisions, especially ones concerning the cash gifts, could have been made in contemplation of death. Further, Division asserts that decedent had not established a pattern of giving.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission has jurisdiction to hear this protest. 68 O.S. 1991, § 207.

2. A tax is levied on the transfer of the net estate of every decedent including the

transfer of property to persons by gift made in contemplation of death. 68 O.S. 1991, § 802. The rate of tax upon the net estate and transfers is governed by 68 O.S. 1991, § 803.

3. Subsection (A)(2) of 68 O.S. 1991, § 807, mandates inclusion of gifts made in contemplation of death as follows:

> (A) The value of the gross estate, used as a basis for a determination of the value of the net estate, shall be determined by including:
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> * * *
>
> (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.

68 O.S. Supp. 1992, § 807(A)(2).

4. 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). This scheme has been in place since enactment of the Inheritance and Transfer Tax Act of 1939[1].

5. The Commission has the burden of establishing, (1) the transfers occurred, (2) the transfers were a material part of decedent's property, (3) the transfers were not made for an equivalent in monetary consideration, and (4) the transfers were made within three years of death. If these elements are shown, the presumption arises that the transfers were gifts made in contemplation of death. The burden then shifts to the estate to establish that the transfers were not gifts made in contemplation of death.

6. Here there is no dispute that the transfers occurred, that the transfers were made within three years of decedent's death, that they were not made for an equivalent of monetary consideration and that the transferred property comprised a material part of decedent’s estate. Accordingly, the presumption that the transfers were made in contemplation of death is applicable.

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[1] [1] [1]The Inheritance and Transfer Tax Act of 1939 was enacted in Laws 1939, p. 400 §1. This Act was repealed in 1965 and recodified as Article 8 of Title 68 of the Oklahoma Statutes and called the Estate Tax Laws.

7. Having established all four elements necessary to give rise to the presumption, the transfers are gifts deemed to have been made in contemplation of death, unless the Estate can show the contrary.

8. Under federal law, the differentiating factor between a gift inter vivos and one made in contemplation of death was the transferor's motive. *U.S. v. Wells*, 283 U.S. 102, 51 S.Ct. 446, 75 L.Ed. 867 (1931).

9. 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).

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).

10. Here, the evidence indicates that the transfers were not made in contemplation of death. The decedent made the gifts at a time when she was concerned over the legal ramifications of an altercation with a fellow resident of THE LOCAL retirement home which occurred a short time prior to decedent’s giving the cash gifts to her children. The altercation resulted in a physical confrontation which culminated in decedent knocking the other resident to the floor. These circumstances demonstrate that the decedent’s dominant motive for giving the cash gifts to her two sons and daughter was life oriented.

11. Protestant presented sufficient evidence to overcome the presumption that decedent's gifts to her children were made in contemplation of death.

12. Protestant's protest to the proposed assessment 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.