

JURISDICTION: OKLAHOMA TAX COMMISSION - DECISION
CITE: 1999-09-16-002 / NOT PRECEDENTIAL
ID: P9700170
DATE: 09-16-99
DISPOSITION: SUSTAINED
TAX TYPE: ESTATE
APPEAL: NO APPEAL TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the file and records, including record of the hearing and exhibits received into evidence, the undersigned finds:

FINDINGS OF FACT

1. The decedent died on June 3, 1996, a resident of ANONYMOUS County, State of Oklahoma.
2. Decedent was seventy-eight (78) years of age at the time of her death.
3. The immediate cause of decedent's death was pneumonia due to or as a consequence of respiratory insufficiency and cerebrovascular accident. Decedent's other significant conditions consisted of coronary atherosclerosis and cardiomyopathy.
4. Decedent had no history of life-threatening illnesses and she was believed to be in reasonably good health for a person in their 70's.
5. On January 14, 1997, the estate tax return was filed by Protestant. Estate tax of \$18,198.00 on the reported adjusted gross estate of \$613,136.00 was remitted with the return.
6. The Division audited the return and on April 7, 1997, issued its order assessing additional tax and interest in the amount of \$6,438.00.
7. Protestant timely protested the order assessing additional estate tax.
8. The assessment increased the value of the reported adjusted gross estate by the amount of \$95,000.00 to an amount of \$708,136.00. The increase is attributable to the inclusion of the transfers made by Decedent within three (3) years of the date of her death.

9. Decedent made the following transfers: on August 10, 1993, decedent gave \$1,000.00 to each of her six (6) grandchildren; on December 7, 1993, decedent gave \$5,000.00 to each of her six (6) grandchildren, her son and her daughter; on August 4, 1994, decedent gave \$5,000.00 to her son; on December 13, 1994, decedent gave \$500.00 to each of her six (6) grandchildren, her daughter and her daughter-in-law; on September 15, 1995, decedent gave \$5,000.00 to her son; on November 23, 1995, decedent gave \$5,000.00 to each of her six (6) grandchildren; and on December 26, 1995, decedent gave \$5,000.00 to her son.

10. Decedent's husband had established Certificates of Deposit (CDs) in the amount of \$3,000.00 for each of their six (6) grandchildren at the time of their respective births. As the CDs matured, he would make additional small gifts to round up the accounts.

11. Prior to his death, decedent's husband had complete control of the financial affairs. Decedent had little to no knowledge of their financial situation.

12. Decedent's husband died in 1991.

13. Subsequent to her husband's death, decedent became aware of her financial situation and was of the opinion that she had more than enough assets needed for her lifestyle.

14. After consulting with her son, a certified public accountant, decedent decided to maintain an estate of approximately \$500,000.00 each year and gift the excess. Decedent believed that \$500,000.00 would be enough to defray the cost of nursing home care.

15. Decedent began making gifts in 1992 at the time a CD matured. After making the gifts, she invested the remainder (\$20,000.00) in shares of stock of four publicly traded companies.

16. At the time of making the initial gifts in 1992, decedent established trusts for her son's three (3) minor children. The funds were intended for the grandchildren's college education. The gifts to her daughter's children, who were adults at the time of the gifts and who were struggling financially, were intended to alleviate their financial situations.

17. The August 10, 1993 gifts were funded by the proceeds (\$6,000.00) decedent received from the sale of a lot.

18. The source of the remaining gifts was AN ANONYMOUS Mutual Fund. Decedent could write checks on this fund.

19. The gifts were generally made between the Thanksgiving and Christmas holidays. According to Protestant's representative, the gifts were made in the holiday spirit rather than due to the maturity of any funds.

20. According to Protestant's representative, the gifts made in 1994 were smaller than any previous or subsequent gifts because of a downturn in the stock market during that year.

21. The aggregate amount of the gifts totaled 13.5% of the audited adjusted gross estate.

ISSUES AND CONTENTIONS

The sole issue to be decided is whether the gifts in question were made in contemplation of death, thereby subjecting such gifts to estate tax under 68 O.S. 1991, § 807(A)(2).

Protestant contends that the gifts were not made in contemplation of death. In support of this contention, Protestant argues that the evidence demonstrates life motives were the basis for the gifts rather than those of a testamentary nature. In support of this argument, Protestant asserts that decedent had no life-threatening illnesses, that she began a pattern of gifting as soon as she was in control of the family funds, that the gifts were made to the natural objects of her bounty, that the gifts were made during the holiday season in a holiday spirit and that decedent maintained an estate.

The Division contends that Protestant did not present sufficient evidence to overcome the presumption that the gifts were made in contemplation of death. In support of this contention, the Division argues that decedent was 74 years of age when she began gifting, that the gifts were of a substantial sum and that there was not a pattern of substantial gifting prior to the gifts in question. The Division further argues that the evidence demonstrates the gifts were made as an estate planning tool.

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 (Okla. 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).

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 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;

¹Laws 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.

²The 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.

(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 (Okla. 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 transfers occurred, that the transfers were made within three (3) years of decedent's death, that the transfers were not made for an equivalent in monetary consideration and that the aggregate amount of the transfers comprised a material part of decedent's estate. Accordingly, it is presumed that the transfers were made in contemplation of death.

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. Here, the evidence establishes that although decedent was 74 years of age when she began her gifting program, she did not have control of the family funds prior to this time. The evidence also establishes that decedent believed she was in relatively good health during this period; she was living alone at her home and driving a car. In addition, the evidence establishes that decedent had an estate plan whereby she retained approximately \$500,000.00 annually for purposes of long term nursing care and gifted the remainder which gifts were relatively small compared to what she could have given without the incurrance of gift tax. Finally, the evidence establishes that the gifts were made to the natural objects of her bounty in the spirit of the holidays.

7. Protestant came forward with sufficient evidence to overcome the presumption that the gifts were made in contemplation of death. Accordingly, the gifts in question should be excluded from the taxable adjusted gross estate.

9. Protestant's protest to the Order Assessing Tax should be sustained.

DISPOSITION

Based on the above and foregoing, it WAS DETERMINED that the protest 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.