JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-08-29-007 / NOT PRECEDENTIAL**
ID: **P9700348**
DATE: **08-29-00**
DISPOSITION: **DENIED IN PART / SUSTAINED IN PART**
TAX TYPE: **ESTATE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The DECEDENT, died March 18, 1997, at the age of 93 years, a resident of AN ANONYMOUS County.

2. The estate tax return filed by the estate on August 20, 1997, showed the adjusted gross value of the estate as $487,161.00. The Order of Assessment of estate tax filed by the Oklahoma Tax Commission showed the adjusted gross estate as $735,162.00

3. The decedent initiated a gift giving program for lineal and collateral heirs December 20, 1994. The final gift was transferred February 18, 1997.

4. During the following periods, decedent transferred the following amounts:

12/20/94 - 01/01/95	$ 98,001.00
07/24/95 - 08/29/95	$ 50,000.00
04/17/96 - 02/18/97	$100,000.00

These transfers were reported on the supplement to Schedule E of decedent's return. The transfers were made on the dates to the persons and in the amounts shown.

5. Decedent transferred $248,001.00 within a 27-month period immediately preceding his death.

6. Decedent transferred $200,000.00 to lineal heirs.

7. Decedent transferred $48,001.00 to collateral heirs.

8. By letter dated October 22, 1997, the Trustee of the DECEDENT Trust timely protested the Order Assessing Tax.

9. The subject transfers were made over four (4) tax years, but within 27 months of the decedent's death.

10. DECEDENT, the deceased, inherited approximately $700,000.00 upon the death of his sister. He received the bulk of this inheritance in July of 1994.

11. Prior to receipt of this inheritance, DECEDENT'S total net worth was less than $65,000.00, which included his home. He had a very modest income and standard of living up to the time he received this inheritance, and he had no plans for changing his standard of living.

12. DECEDENT had guilt feelings over the fact that he had not been able to provide for his children while they were growing up, and his own failure to pay child support, and wanted to make up for what he had not been able to do for his children during their early years.

13. DECEDENT'S second wife died in 1994. She had been ill for a long period of time and was bedfast for approximately six (6) years before she died. Because of this, and DECEDENT'S desire that his wife not go to a nursing home, it took a great deal of time and effort on the part of his children, his wife's children, and certain family friends, to assist him in seeing to her care.

14. DECEDENT made one time gifts in December of 1994 totalling $40,000.00 to his stepchildren as a show of appreciation for the kindness and attention they had shown his wife during the years of her illness. He also made one time gifts in December of 1994 totalling $8,001.00 to certain friends at the same time as a show of appreciation for this kindness and assistance during his wife's illness.

15. The inheritance from his sister allowed DECEDENT to set up a gifting program beginning in December of 1994 of annual gifts to his children.

16. DECEDENT beginning in December of 1994 made periodic gifts to his children. These gifts were made in each of four (4) tax years; 1994, 1995, 1996, and 1997.

17. At the time he began his gifting program, DECEDENT was in reasonably good health. He was diagnosed with prostate cancer in June of 1991, and had surgery to remove his prostate gland. There had been no recurrence after his surgery. DECEDENT was still carrying on his normal activities until shortly before his death.

18. Decedent's immediate cause of death was from cerebral thrombosis and generalized arteriosclerosis.

19. The decedent's death certificate did indicate other significant conditions contributing to the decedent's death were anemia, gastric ulcers, and prostate cancer.

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether the provision "within three (3) years prior to death" as found in 68 O.S. 1991, § 807(A)(2) refers to calendar years or tax years. The second issue is whether the transfers at issue were made in contemplation of death.

Protestant contends that the presumption the gifts were made in contemplation of death should not be applied to the transfers made in 1994. In support of this contention, Protestant argues that it is unclear whether the provision "within three (3) years prior to death" refers to calendar years or tax years and asserts that the ambiguity must be resolved in the favor of the taxpayer, citing ***Wilson v. State ex rel. Oklahoma Tax Commission***, 594 P.2d 1210 (Okl. 1979) and ***State v. Bailey***, 305 P.2d 548 (Okl. 1956).

Protestant also contends that the transfers were not made in contemplation of death. In support of this contention, Protestant argues that although Decedent was 90 years of age when he began the gifting program, he was in reasonably good health and he was engaging in normal activities. Protestant further argues that the transfers were made to fulfill what Decedent considered to be obligations to those who had assisted him and his wife during her illness and to his children who he had not been financially able to care for prior to receiving the inheritance from his sister.

The Division contends that the transfers at issue are properly includable in Decedent's gross estate and the assessment thereof should be sustained. In support of this contention, the Division argues that the transfers constitute a material part of the estate since they represent 34% of the total gross estate. The Division further argues that the evidence presented does not overcome the presumption that the transfers were made in contemplation of death. In support of this argument, the Division relies on the age of the Decedent at the time of the transfers and his knowledge of the condition of his health. The Division further relies on the fact that the gifting program began within 27 months of Decedent's date of death.

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 four elements that the Commission has the burden of establishing have not been challenged by Protestant in this cause.

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, ***Berman 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)

---

[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.

> 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).

The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the legislature as expressed in the statute. ***Wal-Mart Stores, Inc. v. Switch***, 878 P.2d 357 (Okl. 1994). When words, phrases, clauses, sentences, or provisions are not explicit, the intention is to be collected from the context, tenor, spirit, occasion, and necessity of the law, and the remedy in view. ***Federal Land Bank of Wichita v. Howell***, 123 F.2d 50 (C.C.A. Okla. 1941). Statutes are to be construed according to the fair import of their words taken in their usual sense, in connection with the context and with reference to the purpose of the provision. ***Lincoln v. Lincoln***, 840 P.2d 41 (Okl.App. 1992).

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. Protestant does not challenge the fact that the transfers at issue were a material part of Decedent's estate. Protestant, however, contends that the presumption under Section 807(A)(2) should not be applied to the transfers in 1994 since it is unclear whether the provision "within three (3) years prior to death" refers to calendar years or tax years.

5. The purpose of the provision is to promote equality of taxation and prevent avoidance of estate taxes. ***Wilson v. Oklahoma Tax Commission***, 594 P.2d 1210, 1212 (Okl. 1979). The fair import of the provision when taken in its usual sense, context, tenor and spirit shows a legislative intent to create a rebuttable presumption for gifts made during the three (3) year period ending with the date of decedent's death. The transfers at issue were made within 27 months of Decedent's date of death. Accordingly, the rebuttable presumption is applicable to the transfers.

6. 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, ***Berman v. U.S.***, 487 F.2d 70 (5th Cir. 1973).

7. There are factors both for and against the inclusion of the transfers in Decedent's gross estate. First, during the time period of the gifting program, Decedent was in reasonably good health and was carrying on his normal activities. However, Decedent was 91 years of age when he initiated the gifting program. Second, there is no evidence of a long established gift-making policy on the part of the Decedent and the transfers occurred within the 27 month period ending with the date of his death. However, the evidence shows that Decedent initiated the gifting program shortly after receiving a considerable inheritance and that up until such time Decedent had a very modest income and standard of living. Third, the evidence shows that although Decedent gifted away approximately 35% of the gross estate during the 27 month period, the transfers were spread among several family friends, children of his second wife and his children and were relatively small compared to what Decedent could have transferred. Fourth, the evidence would show that the one time gifts in December of 1994 to his stepchildren were intended as a show of appreciation for the kindness and attention they had shown his deceased wife during the years of her illness. However, the same amount of money was given to each of the stepchildren. Finally, the evidence would show that the gifts to his children were intended to make up for Decedent's failure to provide for them while they were growing up. However, such intention also shows a sense of guilt on the part of Decedent and a desire to fulfill an obligation prior to his death. In addition, Decedent's wife recently died from a lengthy illness.

Based on the above, the undersigned finds that the transfers to the three family friends were not made in contemplation of death and should not be included in Decedent's gross estate. The undersigned further finds that in regard to the transfers to Decedent's stepchildren and children, Protestant did not present sufficient evidence to overcome the presumption that the transfers were made in contemplation of death.

8. Protestant's protest to the assessment of estate tax on the transfers at issue should be sustained in part and denied in part.

DISPOSITION

Based on the above and foregoing, it WAS DETERMINED that the protest of Protestant, Estate of DECEDENT, be sustained in part and denied in part. It WAS further DETERMINED that the Order Assessing Tax be amended to comply herewith and that the resultant amount of tax and interest be fixed as the deficiency due and owing.

CORRECTION AND ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Upon review of the Division's ***Notice of Adjustment of Estate Tax***, filed of record in this cause on August 1, 2000, the undersigned finds:

(1) That paragraphs 6 and 7 on page 2 of the Findings, should be corrected as follows:

> 6. Decedent transferred $240,000.00 to lineal heirs.
>
> 7. Decedent transferred $8,001.00 to collateral heirs.

(2) That the adjustment to the Order Assessing Tax complies with the Findings.

(3) That the adjustment results in a refund of $301.28.

Based on the above and foregoing, the Findings should be and the same are hereby corrected and supplemented.

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.