JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-09-21-010 / PRECEDENTIAL**
ID: **P9900278**
DATE: **09-21-00**
DISPOSITION: **DENIED**
TAX TYPE: **ESTATE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The parties stipulate to the following:

1. On the 14th day of February, 1994, (the "Trustor") residing and domiciled in ANYCITY, Oklahoma, created THE "TRUSTOR" Revocable Living Trust (the "Trust") whereby she appointed herself and her husband, (the "Surviving Spouse"), as Independent Co-trustees of the Trust.

2. On the 10th day of December, 1997, the Trustor amended various provisions of the Trust which do not effect the protest filed herein.

3. The Trustor died on or about the 28th day of March, 1998, a resident of AN ANONYMOUS County, State of Oklahoma.

4. The Successor Co-trustees distributed approximately $670,451.00 of the Trust property to CO-TRUSTEE and the Surviving Spouse, as Co-trustees of the "TRUSTOR" Family Trust.

5. A marital deduction was taken on the Trustor's Form 454-R, Oklahoma Estate Tax Return, filed with the Oklahoma Tax Commission on the 23rd day of December, 1998, in the amount of $164,418.00 for the Surviving Spouse's life estate in the "TRUSTOR" Family Trust.

6. The Oklahoma Tax Commission removed from taxation certain exempt bonds in the amount of $251,602.00. Also, the marital deduction was reduced from $1,784,782.00 to $1,368,762.00 with notation "Adjust to show marital deduction as determined in the "TRUSTOR" Revocable Living Trust, Article V, (A.) 2.a." The amount in controversy is $164,418.00.

7. The Successor Co-trustees filed their written protest with the Oklahoma Tax Commission on the 23rd day of July, 1999, protesting the denial of the marital deduction for the Surviving Spouse's life estate in the "TRUSTOR" Family Trust.

8. The Successor Co-trustees also filed an IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return for the Estate of "TRUSTOR" with the Internal Revenue Service on the 23rd day of December, 1998.

B. Additional findings:

1. Pursuant to the terms of the Trust, the Successor Co-trustees divided the trust property into two separate trust known as the "Marital Trust" and the "Family Trust".

2. The relevant provisions of the Marital Trust are:

> 1. The Trustee shall pay the net income from the property of the Marital Trust to the Trustor's Spouse in convenient installments at least as often as quarter-annually during the Spouse's lifetime.
>
> 2. The Trustee shall distribute to the Trustor's Spouse such portions or all of the principal of the Marital Trust as the Trustor's Spouse, or his [sic] guardian, attorney-in-fact or conservator, from time to time, requests in writing. Whenever the Trustee determines that the income available to the Trustor's Spouse from all sources known to the Trustee is not sufficient for the Spouse's reasonable support, maintenance and health, the Trustee shall pay to or use for the benefit of the Trustor's Spouse, so much of the principal of the Marital Trust as the Trustee determines to be necessary for those purposes.

3. The relevant provisions of the Family Trust are:

> 1. The Trustee shall pay the net income from the property of the Family Trust to the Trustor's spouse in convenient installments at least as often as quarter-annually during the Spouse's lifetime.
>
> 2. Whenever the Trustee determines that the income available to the Trustor's Spouse from all sources known to the Trustee is not sufficient for the Spouse's reasonable support, education, maintenance and health, the Trustee shall pay to or use for the benefit of the Trustor's Spouse so much of the principal of the Family Trust as the Trustee determines to be necessary for those purposes. However, invasions of principal of the Family Trust for the Trustor's Spouse shall be made only after all of the property conveniently available for invasion in the Marital Trust has been exhausted. In addition, if the income and property available to any of the Trustor's children or other descendants from all sources known to the

> Trustee are not sufficient for such person's reasonable support, maintenance, health and education, the Trustee may, in his or its discretion, pay to or use for the benefit of the Trustor's children, or other descendants, so much of the principal of the Family Trust as it deems necessary for those purposes; however, no such distribution shall be made by the Trustee for the purpose of discharging a legal obligation of support by the parent of such child or descendant. Such payments are not to be considered advancements.

4. The aggregate amount assessed in this cause is $5,926.31, inclusive of estate tax in the amount of $5,487.32 and interest accrued through July 10, 1999, in the amount of $438.99.

ISSUES AND CONTENTIONS

The issue presented for decision is whether the Division's denial of the marital deduction equal to the value of the surviving spouse's life estate in the principal of the Family Trust is erroneous.

Protestant contends that the denial of the marital deduction is erroneous. In support of this contention, Protestant argues that the surviving spouse has a vested interest in the property of the Family Trust.

The Division contends that the denial of the marital deduction is correct. In support of this contention, the Division argues that the surviving spouse does not have a vested interest in the property of the Family Trust.

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. The value of any interest in decedent's estate, beneficial or otherwise, vesting in the surviving spouse shall be excluded in determining the value of the decedent's gross estate. 68 O.S. Supp. 1998, § 807(B)(1) and (2).

3. Testamentary dispositions are presumed to vest and take effect at the testator's death. ***Matter of Shaw Estate***, 620 P.2d 483 (Okl.App. 1980). Interest devised by will shall be construed as contingent only when impossible to construe extent of interest devised. ***Hugo v. Giacomo***, 465 P.2d 787 (Okl.App. 1970).

4. A vested estate or interest exists when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment, in an ascertained person, and a contingent estate or interest is one in which a fixed right will arise in the future under certain specified contingencies. 96 C.J.S. *Wills* § 921. An interest is contingent when it is limited to take effect on the happening of an uncertain or doubtful event. *Id.*

5. A testamentary gift may be vested in interest although the possession or actual enjoyment is postponed to a future time; and the fact that it is uncertain whether or not the beneficiary will ever actually enjoy or possess his estate does not render it contingent, since it is uncertainty as to the right to that enjoyment which differentiates a contingent from a vested interest. 96 C.J.S. *Wills* § 922. A legacy or devise to be paid at a future time vests immediately, whereas a legacy or devise which is not given until a future time is contingent and does not vest until the time occurs. *Id.*

6. Where the vesting of an estate is dependent on a contingency, the estate will not vest until the happening of such contingency, a contingency being some future event which may or may not occur. 96 C.J.S. *Wills* § 925. Mere uncertainty as to the exact time an event will happen does not make it such a contingency as will render an interest contingent, since it is uncertainty that the contingency will ever occur rather than uncertainty as to the time of the occurrence that makes an interest contingent. *Id.*

7. Here, the surviving spouse's right to the principal of the Family Trust is contingent on the exhaustion of the property of the Marital Trust. Whether the property of the Marital Trust will be exhausted is uncertain given the provisions governing the distribution of such property. Accordingly, the surviving spouse's interest in the principal of the Family Trust is not vested and the denial of the marital deduction equal to the value of the surviving spouse's life estate in the principal of the Family Trust should be sustained.

8. Protestant's protest should be denied.

DISPOSITION

Based on the above and foregoing, it WAS DETERMINED that the protest of Protestant, Estate of THE "TRUSTOR", be denied. It WAS further DETERMINED that the aggregate amount assessed, inclusive of any additional accrued and accruing interest, be fixed as the deficiency due and owing.

OKLAHOMA TAX COMMISSION