JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-11-16-015 / NOT PRECEDENTIAL**
ID: **P9800117**
DATE: **11-16-00**
DISPOSITION: **DENIED**
TAX TYPE: **ESTATE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Stipulated Facts

The Estate of DECEDENT, "Estate" hereafter, and the Audit Division of the Oklahoma Tax Commission, "Division" hereafter, jointly filed the following "Stipulations for Hearing Before ALJ," on November 16, 1998:

1. MS. DECEDENT is the same person as DECEDENT.

2. DECEDENT died June 23, 1996 at ANYTOWN, Oklahoma, at 85 years of age.

3. At the time of her death she was a resident of the ANYTOWN Retirement and Care Center.

4. At the time of her death, her life expectancy according to actuarial tables used by the State of Oklahoma was 2.77 years and the life expectancy tables from I.R.C. Reg. 1.72-9 Table V provided her life expectancy was 6.9 years.

5. If called to testify, HER DOCTOR, her treating physician and the doctor who signed her Certificate of Death, would testify that:

a. DECEDENT died of respiratory failure and myocardial infarction.

b. DECEDENT became his patient on April 19, 1993. At that time, DECEDENT was an 82 year-old woman residing at the ANYTOWN Retirement and Care Center.

c. DECEDENT was in good health at the time she became his patient. She enjoyed socializing and participating in activities at the Center.

d. DECEDENT considered herself well and without pain. She looked forward to her long life.

e. DECEDENT'S health remained good from the time I undertook her care until June of 1996.

f. In June of 1996, DECEDENT fell at the Center and was taken to the hospital.

g. As a result of the fall, DECEDENT suffered a fractured wrist. It was also discovered that DECEDENT'S shoulder had been fractured.

h. The fractures to DECEDENT'S wrist and shoulder were not life threatening. His prognosis for DECEDENT was that after the fractures healed she would return to good health.

I. Prior to the fractures, DECEDENT had not experienced any life threatening illness, and there had been no significant change in her health since 1993. DECEDENT'S death on June 23, 1996 was a sudden event and not at all anticipated or expected.

6. In 1994, within three years of her death, DECEDENT gave gifts totaling $180,000 to twenty-four persons. Each gift was under the federal gift reporting limit.

7. These 1994 gifts amounted to 24% of DECEDENT'S net estate and 20% of her gross estate.

8. In 1993, she gave gifts totaling $152,000 to twenty-four persons.

9. In 1992, she gave gifts totaling $136,000 to twenty-four persons.

10. Protestant has records to support gifts of at least $15,000 by decedent in 1986.

11. Protestant has records to support gifts of at least $5,000 by decedent in 1985.

12. Protestant has records to support gifts of at least $10,000 by decedent in 1984.

13. In 1992 DECEDENT had disposable annual income, excluding taxable interest, of $34,147.00.

14. In 1994 DECEDENT had disposable annual income, excluding taxable interest, of $47,570.00.

15. Of the twenty-four persons receiving gifts from DECEDENT in 1994 only ten (10) of those persons received a testamentary disposition upon DECEDENT'S death.

16. Three (3) persons who received a testamentary disposition from DECEDENT at her death did not receive a gift from DECEDENT in 1994.

II. Facts Adduced At Hearing On November 16, 1998

1. "Decedent" hereafter, had been married for 46 years before her husband's death in 1991. Decedent and her husband did not have any children or lineal descendants but did have many collateral heirs. After her husband's death in 1991, Decedent's family moved her from her home in ANYCITY, Oklahoma, to a nursing home facility in ANYTOWN, Oklahoma. On February 22, 1992, Decedent established a trust and named her sister as Trustee.

2. The Decedent's estate in 1992 consisted entirely of liquid assets in certificates of deposit, municipal bonds, U.S. Treasury Bonds and cash accounts which provided a good income to the Decedent. The Decedent's nursing home care was paid for with insurance and therefore she did not require any of her assets or income to live on.

3. MS. ACCOUNTANT, niece of Decedent, and a certified public accountant, assisted the Decedent with her income tax and estate planing as stated in Audit Exhibit 4. While working with her on her income taxes, MS. ACCOUNTANT discussed with the Decedent the best way to make gifts to the family without incurring a hefty income tax bill. Decedent was adamant that the families of each of her brothers and sisters were to receive equal gifts. The calculations for the gifts were complicated because the Decedent was gifting 24 people in such a way that each "sibling family" shared equally. The Decedent maximized her tax bracket without going into the next bracket at the federal level and without gifting any one person more than $10,000.00 during any one year in order to avoid federal gift tax filing requirements. The gifts were not based on the individual need of a particular donee.

4. MS. ACCOUNTANT provided her professional services to the Decedent to make these calculations and accomplish these gifts in 1992, 1993 and 1994. In 1995, MS. ACCOUNTANT was not able to help the Decedent make her intended gifts because of an illness and therefore no gifts were made in that year. In 1996, the Decedent died before her intended gifts in that year could be made. The Decedent made no gifts without the assistance of her CPA, MS. ACCOUNTANT, and her Trustee, DECEDENT'S SISTER, because of the complicated calculations that were required.

5. The Estate filed its Oklahoma Estate Tax Return on November 7, 1997, reporting an adjusted gross estate of $404,546.00 less allowable deductions of $126,339.00 for a net taxable estate of $278,207.00. The Estate paid taxes of $17,799.00 on its return. The Division reviewed this return and increased the adjusted gross estate by adding the value of the gifts made in 1994 within three (3) years of the Decedent's death, in the amount of $180,000.00 pursuant to 68 O.S. 1991 §807(A)(2). The Division calculated a tax due for the estate of $39,766.91. On March 17, 1998, the Division issued its Order Assessing Tax for an additional tax of $21,967.91 with interest of $5,032.38 for a balance due of $27,000.29. On March 26, 1998, the Estate paid the assessed taxes and interest and timely filed a protest against the assessment.

ISSUE

Whether gifts made by Decedent in 1994 are includible in the Decedent's adjusted gross estate pursuant to 68 O.S. 1991 §807(A)(2) as transfers made in contemplation of death.

CONCLUSIONS OF LAW

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

2. Title 68 O.S. 1991 §807(A)(2) provides that 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:

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. This section was amended effective November 1, 1998, to exclude any gift for which the descendent was not required to file a federal gift tax return, i.e. any gift less than $10,000.00 per year, see 68 O.S. Supp. 1999 §807(A)(2). The Protestant characterizes this amendment as "evidence" of clarification of prior law. The Protestant's assertion that this amendment should receive retroactive application is incorrect. The Oklahoma Supreme Court has ruled in *Wilson v. Oklahoma Tax Commission*, 594 P.2d 1210, 1979, OK 62, in consideration of an amendment to this same statute in 1974, that the amendment does not receive retroactive effect as follows:

There is nothing in the amended statute to suggest that the legislature intended it to apply to gifts previously made. The general rule is that statutes are presumed to operate prospectively only. A clear expression of legislative purpose is required to justify a retroactive application. In the case of doubt, the doubt must be resolved against retrospective effect. Where a statute or a portion thereof is amended by setting forth the amended section in full, the provisions of the original statute which are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions or changed portions are to be understood as enacted in the time the amended act takes effect, and not to have any retroactive operation. The Supreme Court held in Wilson that, "The legislative purpose of the statute is to encompass within its terms transfers which are donative in nature. It represents a legislative scheme to prevent inheritance tax evasion by imposing certain criteria on inter vivos transfers. Contemplation of death statutes promote equality of taxation and prevent avoidance of estate taxes."

3. Commission Order 94-06-21-003 states that Section 807 (A)(2) requires the inclusion of property transfers made in contemplation of the death of the grantor in the value of the gross estate. The burden of proving that the transfers were gifts made in contemplation of death is on the Division. However, the legislature alleviated this burden by providing a presumption that any transfer of a material part of the Decedent's estate without consideration within three (3) years of death is deemed to have been made in contemplation of death and includible in the gross estate value. Before the presumption arises, the Division must establish the basic facts that, (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 basic facts are established, the rebuttable presumption arises that the transfers were made in contemplation of death and the burden of persuading the trier of fact shifts to the Estate to establish the contraposition, 12 O.S. § 2303.

4. The parties have stipulated that the transfer of $180,000 by gift did occur in 1994 within three (3) years of death of the donor/Decedent which establishes three parts of the presumption. The parties also stipulated that the 1994 gifts amounted to 24% of Decedent's net estate value and 20% of her gross estate value. From these facts it can fairly be concluded that a gift of this size constitutes a material part of Decedent's property because its inclusion in the gross estate significantly affected the estate taxes owed by increasing the liability 123% from the tax reported of $17,799.00 to the adjusted tax of $39,766.91. The Commission Order 94-06-21-003 held that a gift equalling 8% of the total estate in a similarly sized estate as in the case at bar was a material part of the estate. Therefore, the Division has established all four elements of the rebuttable presumption and the Estate is therefore obliged to prove that the 1994 gifts are not includible in the gross estate as transfers in contemplation of death. The fact is presumed that the transfers were made in contemplation of death, 12 O.S. § 2303(1).

5. The facts presented at hearing by the Estate show that the Decedent did not have a lifetime pattern of giving in excess of 20% of her estate to her family on an annual basis. Before the Decedent's spouse died in 1991, DECEDENT AND HER SPOUSE only gave small amounts to their relatives at traditional family occasions. It was only after the death of her husband when she was moved to a nursing home at the age of 82 did she begin a systematic program to deplete her estate by gifting to her relatives. The Decedent's Trustee, DECEDENT'S SISTER, testified that the Decedent gave out of love for her family. The Decedent gave' gifts to 24 people, some with greater financial need than others. However, the financial need was not the basis upon which the gifts were made. Rather, as MS. ACCOUNTANT explained in her filing with the Commission in Audit Exhibit 4, the Decedent's overriding goal was that each sibling family would share equally and the gifts would be calculated in order to avoid taxes. In order to accomplish these goals, the Decedent required the assistance of MS. ACCOUNTANT, her CPA, in order to calculate the amount of gifts. When MS. ACCOUNTANT was unable to assist the Decedent in 1995, the Decedent made no gifts. Under these circumstances, it appears that the Decedent was using these transfers to deplete her estate in avoidance of taxes in

contemplation of her death as part of her estate planning.

6. The Estate argues that notwithstanding the fact that Decedent was 85 years old on the date of her death, she was in good health and her death was not expected, therefore the transfers were not made in contemplation of her death. This testimony is insufficient to carry the Estate's burden of persuasion as to the presumed fact that the transfers were made by Decedent in contemplation of her death. The Commission has held in Commission Order 94-06-21-003, citing Treasury Regulation 26 CFR § 20.2035-1(C) as follows:

The phrase "in contemplation of death" as used in this section does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is immanent or near. A transfer "in contemplation of death" is a disposition of property 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. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition. The facts of this case demonstrate the donor was of advanced age at the time she began gifting material amounts of her estate to her family. The Decedent's husband had recently died and she was moved from her home to a nursing home. The amount of the gifts were substantial and not the kind frequently given in prior years before her husband's death. MS. ACCOUNTANT stated the motive for the gifts was to avoid taxes and to insure that each sibling family shared equally. The transfers were therefore prompted by both a motive to avoid taxes and as a substitute for a testamentary disposition. The Estate has failed to sustain its burden of persuasion to overcome the presumed fact that the transfers made by Decedent in 1994 were made in contemplation of her death.

7. The Estate's protest to the proposed assessment should be denied.

DISPOSITION

It WAS the DETERMINED, based upon the specific facts and circumstances of this case, that the estate tax protest of the Estate of DECEDENT be denied.

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.