JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-11-16-024 / NOT PRECEDENTIAL**
ID: **P0000008**
DATE: **11-16-00**
DISPOSITION: **SUSTAINED IN PART / DENIED IN PART**
TAX TYPE: **ESTATE**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The parties stipulate to the following:

1. The exhibits in the memorandum brief of the [Division], "A" through "O" are admitted into evidence without objection of either party.

2. Both parties will be allowed an opportunity to file reply briefs in this matter.

3. [Protestant] will be allowed to provide affidavits to the Court from DONEE 1 and DONEE 2. The [Division] will be allowed to object to the introduction of these affidavits because they fail to provide the [Division] an opportunity for cross-examination.

4. The parties agree that with their signatures on [the] joint stipulation, a hearing on this matter is unnecessary.

B. Additional statements not disputed by Protestant:

1. THE DECEDENT died on [sic] July 22, 1998, in ANYTOWN, Oklahoma. She was 85 years old at the time of her death.

2. A United States Estate (and Generation-Skipping Transfer) Tax Return was filed for the deceased.

3. The deceased filed Gift Tax Returns with the United States Treasury Department [for the years 1958, 1959, 1960, 1963, 1964, 1965 and 1966].

4. The deceased filed United States Gift (and Generation-Skipping) Tax Returns with the United States Treasury Department [for the years 1988, 1989, 1995 and 1996].

5. After review, the [Division] issued an Order of Assessment for Thirty-three Thousand Nine Hundred Ninety-Three Dollars and Ninety-Five Cents ($33,993.95) in additional tax due, plus interest.

6. A protest was timely filed on January 20, 2000 by the Protestant.

C. Additional statements not disputed by the Division:

1. Within the three (3) years prior to her death, the Decedent made the following gifts to members of her family:

Date of Gift	Amount of Gift	Donee
01/15/96	$ 91,059.00	DONEE 2
01/15/96	10,118.00	SPOUSE OF DONEE 2[1]
02/05/96	90,000.00	DONEE 1
02/05/96	10,000.00	SPOUSE OF DONEE 1[2]
1995	250,000.00	DONEE 1

B. Additional Findings:

1. Decedent died a resident of Oklahoma.

2. Protestant opted for the date of death valuation of Decedent's personal and real property.

3. The Will admitted to probate was executed by Decedent on July 31, 1984.

4. Decedent made the following cash gifts to DONEE 2 and his family in 1988 and 1989, to-wit:

	1988	1989
DONEE 2	$80,000.00	$80,000.00
DONEE 3	10,000.00	10,000.00
DONEE 4	10,000.00	10,000.00
DONEE 5	10,000.00	10,000.00
SPOUSE OF DONEE 2	10,000.00	10,000.00

5. Decedent did not make any equivalent gifts to DONEE 1 and her family in 1988 or 1989.

6. The 1995 transfer to DONEE 1 was a cash gift.

[1] Spouse of DONEE 2

[2] Spouse of DONEE 1

7. The 1996 gifts to DONEE 2 and SPOUSE OF DONEE 2 were a forgiveness of indebtedness and outstanding interest.

8. The 1996 transfers to DONEE 1 and SPOUSE OF DONEE 1 were cash gifts.

9. The Order Assessing Tax increased the amount reported as "Total gross Estate in Oklahoma" by a total of $456,177.00, inclusive of $441,177.00 representing "Transfers during Lifetime" and $15,000.00 representing an increase in the valuation of Decedent's condominium.

10. The reported value of Decedent's condominium was adjusted to show the net sales price of the unit less the estimated selling and fix-up expenses.

11. The Condominium sold for $160,000.00 on September 10, 1999.

12. The total settlement charges to the sellers on the sale of the Condominium were $11,341.05.

13. Protestant placed into evidence, without objection from the Division, invoices showing repairs to the condominium in the amount of $10,566.27.

14. Protestant offered into evidence an Affidavit from DONEE 1 and DONEE 2. The Affidavit recites facts regarding Decedent's nature, disposition and motivation for the gifts.

15. The Division objected to the introduction of the Affidavit. In support of its objection, the Division argues that the Affidavit contradicts evidence not in dispute and the lack of an opportunity to cross-examine the affiants.

ISSUES AND CONTENTIONS

Three issues are presented for decision. The first issue is whether the gifts made by Decedent within three (3) years of her date of death comprise a material part of her estate. The second issue is whether Protestant sustained its burden of proving by a preponderance of the evidence that the gifts made by Decedent within three (3) years of her date of death were not made "in contemplation of death." The third issue is whether Protestant sustained its burden of proving by a preponderance of the evidence that the Division's adjustment to the reported value of Decedent's condominium is erroneous.

With respect to the first issue, Protestant writes at page 4 of its Memorandum Brief, "[a]lthough on its face the transfer was a material part of the Decedent's Estate, the Decedent had ample remaining resources as subsequently stated." At page 10 of the Brief Protestant writes that Decedent was the beneficiary of a trust created by her late husband which had a value of approximately $450,000,00 at her death and that she had gross income of $87,000,00, plus $20,000.00 in nontaxable income in 1987.

With respect to the second issue, Protestant contends that the uncontested facts contained in the Affidavit from Decedent's son and daughter effectively rebuts the presumption and proves the gifts were not made in contemplation of death. In support of this contention, Protestant argues that Decedent's age by itself does not prove the gifts were in contemplation of death especially considering she died of Pneumonia, that Decedent had a pattern of making gifts to her family, that Decedent had ample resources and that there was no "deathbed" testamentary instruments executed by Decedent around the time of the gifts.

With respect to the third issue, Protestant contends that the value of the condominium as reported on the estate tax return should be sustained. In support of this contention, Protestant argues that the selling expenses and expenses for repairing and rehabilitating the condominium should be deducted from the selling price.

The Division contends that the gifts were "material". In support of this contention, the Division argues that the gifts represent approximately forty percent (40%) of Decedent's estate.

The Division also contends that the evidence shows the gifts were made in contemplation of death. In support of this contention, the Division cites the following factors: (a) Decedent's age at the time of the gifts; (b) the lack of evidence regarding Decedent's health; (c) the interval between the gifts and Decedent's death; (d) the amount of property transferred in relation to the amount of property retained; (e) the lack of evidence regarding Decedent's nature and disposition; (f) the lack of a long established gift making policy; (g) the lack of any desire to escape the burden of managing her property through the gifts; and (h) the lack of any evidence regarding Decedent's desire to experience the vicarious enjoyment of the donees or to avoid estate taxes.

The Division further contends that the value of the condominium as adjusted by the Division should not be disturbed. In support of this contention, the Division argues that Protestant has failed to prove the value is erroneous.

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.[3]

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.[4] 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*.

"Material" as used in the context of Section 807(A)(2) means "having real importance or great consequences", Webster's New Collegiate Dictionary 702 (1979); and "important, more or less necessary, having influence or effect", Black's Law Dictionary 880 (5th ed. 1979). See, 25 O.S. 1991, § 1. Whether a transfer of property is a "material part" of an estate is determined under the following factors; the proportion the gifted property bears to the total estate, the size of the gift, the nature of the gift and the nature of the remainder of the estate. ***In re Miller's Estate***, 404 Pa. 156, 170 A.2d 857 (1961); 42 Am.Jur.2d. *Inheritance, Etc., Taxes* § 95.

When considering the proportion the gifted property bears to the total estate, all transfers made within three years of death should be considered together, not individually, annually or by donee. To hold otherwise would permit a person to avoid the thrust of the statute by making numerous gifts, none of which would be a "material part" of the estate but which, when taken together, would constitute the disposition of a material part of the estate within the three-year period prior to death. This is consistent with the requirement that statutes be construed in order that legislative intention will be given effect and the object and purpose intended will be accomplished. ***State ex rel. Otjen v. Mayhue***, 476 P.2d 317 (Okl. 1970). In addition, when considering the size of the gift, a large sum of money is a material part of any estate, no matter how large, because it is a matter of substance - a matter that is not immaterial.

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[3]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.

[4]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 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 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).

For estate tax purposes, property shall be appraised at fair cash market value. 68 O.S. 1991, § 816(A). "Fair cash market value" is defined as "the value and price at which the property transferred would change hands between a willing buyer and a willing seller, both free of any compulsion to buy or sell." Id.

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. An affidavit is generally inadmissible as evidence on a material question at issue. See, ***In Re Free's Estate***, 181 Okla. 564, 75 P.2d 476 (1937); ***Watkins v. Grieser***, 11 Okla. 302, 66 P. 332 (1901). Accordingly, the Division's objection to the introduction of the Affidavit of DONEE 1 and DONEE 2 as evidence of Decedent's nature, disposition and motivation should be sustained.

3. 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).

4. 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).

5. Here, there is no dispute that transfers occurred, that the transfers were made within three (3) years of decedent's death and that the transfers were not made for an equivalent in monetary consideration. Likewise, Protestant does not dispute that the gifts comprised a material part of Decedent's estate. A large sum of money is a material part of any estate, no matter how large, because it is a matter of substance - a matter that is not immaterial. ***State ex rel. Otjen v. Mayhue***, 476 P.2d 317 (Okl. 1970). Accordingly, it is presumed that the transfers were made in contemplation of death. See, 68 O.S. 1991, § 807(A)(2).

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 582, 584 (5th Cir. 1973).

7. Here, it appears from the evidence that Decedent was attempting to equalize the gifts between her son and daughter. Protestant argues that such evidence reflects life motives for the gifts. However, it is equally likely that the gifts were testamentary in nature; i.e., motivated by the desire for an equal distribution of her estate between her son and daughter. Decedent had executed her Will in 1984 and under the terms of the Will, her son and daughter were to share equally in her estate.

8. Protestant failed to come forward with sufficient evidence to overcome the presumption that the gifts made within three (3) years of Decedent's death were made in contemplation of death.

9. The parties agree to the method to be used for valuing the condominium for estate tax purposes. The Division's value is based on estimates of the selling expenses and expenses for repairing and rehabilitating the condominium. Protestant has presented evidence of the actual expenses. The actual expenses should be allowed. Accordingly, the value of the condominium for estate tax purposes should be $138,092.68.

10. Protestant's protest to the Order Assessing Tax 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 adjusted in accordance herewith and that the resultant amount of estate tax and interest be fixed as the deficiency due and owing.

OKLAHOMA TAX COMMISSION

ADDENDUM TO FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

NOW on this day of October, 2000, the ***Findings, Conclusions and Recommendations*** ("Findings") issued in the above-styled and numbered cause on September 13, 2000, come on for consideration of additional findings of fact and a recommendation as to the amount of the deficiency which should be confirmed by an Order of the Tax Commission.

The Division, as directed by the Findings, adjusted the estate tax assessment and provided notice to Protestant. Protestant has not challenged the adjustment proposed by the Division.

Upon consideration of the Findings and the adjustment to the assessment, the undersigned finds that the following Findings of Fact should be added to and incorporated in the Findings:

1. That notice of the adjustment to the assessments was filed of record in this cause on October 26, 2000.

2. That the Division revised the estate tax assessment to an amount of $36,866.68, consisting of tax in the amount of $30,047.88 and interest accrued through October 27, 2000, in the amount of $6,818.80.

3. That the aggregate amount in controversy is $36,866.68.

4. That the adjustment complies with the recommendations set forth in the Findings.

5. That Protestant was provided notice of the adjustment.

6. That Protestant responded to the adjustments by submitting a check in the amount of $33,457.28, with the notation that "this represents the additional estate tax in the amount of $30,047.88 and (by agreement) one-half of the interest in the amount of $3,409.80 [sic]."

The undersigned further finds that the following Recommendation should be added to and incorporated in the Findings:

> It is further recommended that the aggregate amount in controversy be fixed as the deficiency.

THEREFORE, the Findings, Conclusions and Recommendations issued on September 13, 2000, are amended to include and incorporate the above and foregoing findings of fact and recommendation.

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.