

JURISDICTION: OKLAHOMA TAX COMMISSION
CITE: 2005-03-01-02
ID: P-04-055-H
DATE: MARCH 1, 2005
DISPOSITION: SUSTAINED
TAX TYPE: ESTATE
APPEAL: NONE TAKEN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the request of counsel this matter was submitted on briefs¹ and stipulations,² with oral argument being held on October 26, 2004, at 10:00 a.m.³ The record in this matter remained opened until November 29, 2004, for the purpose of filing proposed findings of fact and conclusions of law. On November 29, 2004, the record in the matter was closed and submitted for decision.

STIPULATED PROCEDURAL FACTS

1. On August 29, 2003, the personal representative for DECEDENT caused the Oklahoma Estate Tax Return for the Estate to be timely filed with the Commission. A copy of the return is attached as Exhibit "A".

2. By letter dated November 3, 2003 ("Notice of Assessment"), the Division notified the Estate of a proposed additional estate tax liability in the amount of \$38,677.44 and interest through November 19, 2003 in the amount of \$966.93. The total amount due was equal to \$39,644.37. A copy of the Notice of Assessment, together with the Order Assessing Tax, is attached as Exhibit "B".

3. The Estate timely filed a formal protest to the proposed assessment of additional tax on December 31, 2003. A copy of the Estate's protest is attached as Exhibit "C".

4. The Estate tax Protest of the Estate is properly before the Commission.

¹ OKLA. ADMIN. CODE § 710:1-5-38 (2004).

² On August 20, 2004, counsel entered into stipulations as to the issue, procedural facts, and facts relating to the protest. The preamble to the document contains the following paragraph:

NOW, THEREFORE, it is hereby stipulated for the purpose of the above-styled Protest by and between the parties hereof, through their respective attorneys, that the facts contained herein shall be taken to be true for purposes of the resolution of this controversy, including appeals, if any, and for no other purpose. All Exhibits to the Stipulations are made a part of and incorporated into the Stipulation.

The Stipulations are set out herein as filed by counsel, verbatim.

³ Prior to oral argument, confidentiality was waived by counsel for the estate. OKLA. STAT. ANN. tit. 68, § 205.

STIPULATED FACTS RELATING TO THE PROTEST

5. The Decedent was born on May 25, 1932 and died on December 19, 2002, at the age of seventy. A copy of the Decedent's Certificate of Death is attached as Exhibit "D". The Death Certificate refers to "AHSD" as a contributing cause of death. The initials "AHSD" are used by the physician completing the certificate to mean Atherosclerotic Heart Disease.

6. The Decedent married HUSBAND in 1952. This marriage produced two sons, FIRST SON in 1954 and SECOND SON in 1955. The Decedent had no other children.

7. The marriage was terminated by divorce, effective May 17, 2000. The Decedent received approximately \$3,500,000 in assets as a result of the divorce settlement. The Decedent received a substantial part of her assets from the divorce in May, 2000.⁴

8. On June 29, 2000, the Decedent executed her Last Will and Testament ("2000 Will"). A copy of the 2000 Will is attached as Exhibit "E". The Decedent executed a prior Last Will and Testament on June 25, 1996 ("1996 Will"). A copy of the 1996 Will is attached as Exhibit "F".

9. The Decedent executed the REVOCABLE TRUST on June 29, 2000. The Decedent executed the "October, 2001, Amendment to REVOCABLE TRUST on November 13, 2001. The Revocable Trust and the October 2001 Amendment are attached as Exhibit "G".

10. The Decedent established the DECEDENT CHARITABLE REMAINDER UNITRUST ("Unitrust") on August 24, 2000. A copy of the Unitrust is attached as Exhibit "H".

11. The Decedent funded the Unitrust with 15,250 shares of Philadelphia Suburban Corporation stock. (Exhibit "H", Schedule A). The Estate valued the 15,250 shares of Philadelphia Suburban Corporation stock at \$343,125 (the value of the stock is not at issue in this case).

12. The Unitrust provided FIRST SON an income interest for life of "six percent of the net fair market value of the assets of the Trust valued as of the first day of each taxable year of the Trust". (Exhibit "H", ¶ 2.) The trust document requires the Unitrust amount to be paid in monthly installments. (Exhibit "H", ¶ 2.)

13. The Decedent gave \$340,000 to SECOND SON on August 24, 2000.

⁴ In the late 1990's, the assets of the Decedent's husband were worth more than \$7 million. Exhibit O, ¶ 3.

14. At the time the Decedent made the subject gifts, SECOND SON was employed as a stockbroker in Tulsa, Oklahoma and FIRST SON was a musician, living in New York City.

15. On August 24, 2000, the Decedent was sixty-eight years old.

16. Excluding the subject gifts to SECOND SON and to FIRST SON via the Unitrust, the Decedent reported a total gross estate of \$2,267,822. (Exhibit "A"). The Division valued the subject gifts at \$483,462. (Exhibit "B"). Including the subject gifts, the Decedent's total gross estate would be \$2,751,284. (Exhibit "B").⁵

17. PRIMARY DOCTOR became the Decedent's physician in 1997. PRIMARY DOCTOR'S affidavit together with the Decedent's medical chart for the period June 2, 1997 until her death on December 19, 2002, are attached as Exhibit "I".

18. The affidavit of PRIMARY DOCTOR, dated December 22, 2003, is attached as Exhibit "J".

19. Before the Decedent began seeing PRIMARY DOCTOR in 1997, she had been diagnosed with Chronic Obstructive Pulmonary Disease ("COPD"). This disease commonly is known as chronic emphysema.

20. PULMONARY DOCTOR was the Decedent's pulmonary specialist. PULMONARY DOCTOR'S medical records concerning the Decedent are attached as Exhibit "S".

21. DISEASE SPECIALIST was the Decedent's infectious disease specialist. When DISEASE SPECIALIST'S medical records concerning the Decedent are received they will be submitted as Exhibit "T".⁶

22. The affidavit of DIVORCE ATTORNEY dated December 3, 2003, is attached as Exhibit "K". DIVORCE ATTORNEY represented the Decedent in her divorce from HUSBAND.

23. The affidavit of TRUST ATTORNEY dated August 18, 2004, is attached as Exhibit "L". TRUST ATTORNEY represented the Decedent in the preparation and funding of her Charitable Remainder Unitrust.

24. The affidavit of NAME 1 dated December 15, 2003, is attached as Exhibit "M".

⁵ See Footnote 47.

⁶ The records were filed on September 24, 2004, as Exhibit T.

25. The affidavit of NAME 2 dated December 18, 2003, is attached as Exhibit “N”.

26. The affidavit of SECOND SON dated August 18, 2004, is attached as Exhibit “O”.

27. A copy of Decedent’s United States Gift Tax Return (Form 709) for the year 2000 is attached as Exhibit “P”.

28. A copy of Decedent’s United States Estate Tax Return (Form 706) is attached as Exhibit “Q”.

29. Copies of Decedent’s U.S. Individual Income Tax Returns (Forms 1040) for the years 2000, 2001 and 2002 are attached as Exhibit “R”.

30. Based on the Oklahoma Table, the value of FIRST SON’S life income and the charitable gifts were the following amounts, depending on the date on which the Commission uses as the effective date of the gifts.

<u>Date</u>	<u>FIRST SON’S Gift</u>	<u>Charitable Gift</u>
August 24, 2000	\$258,308	\$84,817
December 19, 2002	\$249,777	\$93,348

31. The Oklahoma Table for Computing Life Estates and Terms of Years for Purpose of Taxation applies an interest rate of 5% for the computations contained therein. The Unitrust specifies a rate of six percent. The Division applied six percent to the calculation of the gift to FIRST SON.

32. Based on the Life Expectancy Table published by the Internal Revenue Service, a person of the Decedent’s age has a life expectancy of 18.6 years for purposes of determining required minimum distributions under I.R.C. § 401(a)(9). Int. Rev. Regs. § 1.401(a)(9)-9. The IRS Life Expectancy Table is based on overall actuarial data without regard to any particular individual’s personal health situation.

33. Based on the Oklahoma Table for Computing Life Estates and Terms of Years for Purpose of Taxation, a person of the Decedent’s age has a life expectancy of 9.47 years. The expectancy of life computations contained in the Oklahoma Table are based on the American Experience Table.

STIPULATED ISSUE

Whether the the [sic] transfers made by DECEDENT within three years of her death to her sons FIRST SON and SECOND SON were made in contemplation of death.

ADDITIONAL ISSUE

Whether the transfers made by the Decedent to FIRST SON and SECOND SON comprise a material part of the Decedent's estate.⁷

ADDITIONAL FINDINGS OF FACT

1. FIRST SON was not able to generate enough income to live comfortably in New York City.⁸

2. FIRST SON did not have the ability to invest and manage money. The Decedent had serious concerns about his ability to manage money.⁹

3. From 1995 through 1999, the Decedent and her husband gave FIRST SON and SECOND SON at least \$20,000 per year each. During this time, the Decedent repeatedly expressed her desire to provide additional money to FIRST SON and SECOND SON while they were young and their families were growing.¹⁰

4. In 1997, FIRST SON married. The Decedent had concerns about the marriage and wanted to develop a "divorce-proof" way to provide income to FIRST SON for the rest of his life. The Decedent wanted to assure both that FIRST SON would not be able to transfer the income stream to his wife and that a divorce court would know that the assets involved were assets from the Decedent's side of the family, not commingled assets. Additionally, Decedent wanted to make sure that the income stream, and the assets that were set aside to produce the income, could not be attached by FIRST SON'S creditors.¹¹

5. The Decedent discussed the following advantages of a Unitrust for FIRST SON with her attorney:

- (a) The assets would be held in a trust. Someone other than FIRST SON would invest the money. FIRST SON'S reduced ability to make prudent investments would be addressed by having a competent trustee.
- (b) A Unitrust would give FIRST SON monthly payments for the rest of his life.

⁷ There is no dispute that (1) the transfers occurred, (2) the transfers were not made for an equivalent in monetary consideration, and (3) the transfers were made within three (3) years of death.

⁸ Exhibit O, ¶¶ 5.

⁹ Exhibit O, ¶ 5.

¹⁰ Exhibit O, ¶¶ 6 and 7.

¹¹ Exhibit L, ¶ 3.

- (c) Since a Unitrust gives the assets to a charity after FIRST SON dies, it would be almost impossible for a creditor to attach the trust's assets.
- (d) It would be difficult for a creditor to attach the monthly payments.
- (e) In a divorce, the assets should be treated as assets belonging only to FIRST SON instead of being marital assets subject to division.
- (f) A gift to a unitrust is considered a gift in part to a charity. A substantial current income tax deduction is generated.¹²

6. In 1998, Unitrust calculations were prepared for SECOND SON and FIRST SON.¹³

7. The Decedent's husband was against giving their sons any more money. As a result, the Unitrusts were not funded.¹⁴

8. In November 1999, the Decedent's husband announced that he was divorcing the Decedent after more than 47 years of marriage. The Decedent was furious and firmly resolved to do many of the things that she had not been able to do during her marriage to HUSBAND.¹⁵

9. Shortly after the divorce was final, the Decedent created a living trust to hold her assets. The trust's terms disposed of her entire estate when she died.¹⁶

10. After her divorce was final, the Decedent's attorney again proposed a Charitable Remainder Unitrust for FIRST SON. The Decedent's attorney did not discuss the estate tax effect of the gifts for the reason that the impact of estate taxes was small. The gifts did not affect the much-larger Federal unified gift and estate tax. The Decedent's attorney discussed the income tax consequences because the income taxes were more significant in light of the Decedent's net worth and physical condition.¹⁷

11. The Decedent gave stock worth \$343,125 to the Unitrust. The Unitrust was funded with stock in which the Decedent had virtually a zero income tax basis. The Decedent received federal income tax deductions of \$40,671.50 as a result of funding of the Unitrust. In addition, the Decedent avoided approximately \$68,000 of federal capital gains taxes by transferring the securities to the Unitrust.¹⁸

¹² Exhibit L, ¶ 5.

¹³ Exhibit L, ¶ 6.

¹⁴ Exhibit O, ¶ 7.

¹⁵ Exhibit O, ¶¶ 9 and 12, Exhibit K, ¶ 4, and Exhibit M, ¶ 2.

¹⁶ Stipulation ¶ 8; Exhibit E.

¹⁷ Exhibit L, ¶¶ 5, 7, 8, and 11.

¹⁸ Exhibit L, ¶¶ 9-10.

12. The Division determined that the value of FIRST SON'S interest in the Unitrust was \$143,462.¹⁹

13. A Unitrust sets assets aside. A percentage of the assets' fair market value is paid to the individual (here, FIRST SON) for his life. When the individual dies, the assets go to tax-exempt charities.²⁰

14. The charities named in the Unitrust were not beneficiaries of the Decedent's Living Trust. They were not the natural objects of the Decedent's bounty.²¹

15. The Decedent's Living Trust gave all of her testamentary assets to her sons immediately, not in trust.²² According to the Oklahoma Estate Tax Return filed by the Estate, SECOND SON received \$1,089,840 and FIRST SON received \$1,129,841.²³

16. The Unitrust's effect was to continue the approximately \$20,000 annual distributions to FIRST SON that the Decedent and her husband had given before their divorce.

17. At the same time, SECOND SON was facing several personal obligations. In an effort to be fair and to help SECOND SON with his personal obligations, the Decedent gave \$340,000 to SECOND SON.²⁴

18. The Decedent made the gifts approximately two and a one-half (2½) years before her death.

19. When the Decedent made the gifts, her primary physician believed that the Decedent's life expectancy exceeded three years and that she was not terminal. The Decedent was neither depressed nor suicidal.²⁵

20. At the time of the gifts and until her death, the Decedent remained socially active, handled her own affairs, and shopping. She was not homebound and had an upbeat and sunny outlook on life.²⁶

¹⁹ Exhibit B, Page 3.

²⁰ I.R.C. § 664.

²¹ See Exhibit H. The charities named in the Unitrust are CHARITY 1 (25%), CHARITY 2 (25%), CHARITY 3. (28 1/3 %), and CHARITY 4 (21 2/3 %).

²² Exhibit G.

²³ See Exhibit A, Schedule J.

²⁴ Exhibit O, ¶ 15 and Stipulation ¶ 13.

²⁵ Exhibit J, ¶ 2.

21. After these gifts, the Decedent had assets remaining worth approximately \$3,000,000. The Decedent had no debt, was single, and had a good lifestyle. After these gifts, her estimated cash flow exceeded \$150,000 per year. Much of her cash flow came from tax-sheltered real estate investments, so her income taxes were modest.²⁷

22. The Decedent appointed others as the Trustees of the Unitrust. The Decedent avoided the tasks of selling the stock and making diversified investments. The Decedent escaped the burden of managing the Unitrust.

23. Near the time of her gifts, the Decedent took several long trips. In late 1999, the Decedent went to Spain with SECOND SON and others. The Decedent participated in many activities involving an international contractors association. In November 2000, the Decedent flew to New York and spent Thanksgiving. Neither trip was a “farewell” trip.²⁸

24. For many years before the gifts at issue were made, the Decedent had lived with some symptoms of emphysema.²⁹ The medical name for “emphysema” is Obstructive Pulmonary Disease. Emphysema can be “chronic” or “acute.” “Chronic” emphysema is represented by the initials “COPD.” The Decedent’s medical records and her doctors diagnosed the Decedent with “chronic” emphysema. “Chronic” means “with reference to diseases, of long duration, or characterized by slowly progressive symptoms, deepseated and obstinate, or threatening a long continuance; — distinguished from acute.”³⁰

25. At the time that the Decedent made the gifts, her health, as she knew it was that she had “chronic” emphysema, but her condition was stable.³¹

26. On December 19, 2002, shortly before FIRST SON was scheduled to arrive from New York City, the Decedent died suddenly and unexpectedly at home of acute cardiorespiratory arrest due to Atherosclerotic Heart Disease (“ASHD”), attributable to hardening of the arteries due to the build up of plaque.³²

²⁶ Exhibits M and N.

²⁷ Exhibit O, ¶¶ 16 and 17.

²⁸ Exhibit O, ¶ 8.

²⁹ Stipulation 19.

³⁰ Stipulation 19. BLACK’S LAW DICTIONARY 219 (5th ed. 1979).

³¹ See Exhibit J, ¶ 2.

³² Exhibit D.

27. PRIMARY DOCTOR was surprised to learn of the Decedent's death. PRIMARY DOCTOR had not expected the Decedent to die at the time, and did not think the Decedent was terminal. The Decedent's medical records do not mention ASHD before her death. The Decedent's primary cause of death on the Certificate of Death is listed as acute cardiorespiratory arrest.³³

28. DIVORCE ATTORNEY, the attorney who handled her divorce, had known the Decedent since junior high school. During all of their conversations and in connection with the divorce proceeding, he never got the idea that she was contemplating her death. Instead, the Decedent indicated that her gifts were motivated by her desire to supplement FIRST SON'S lifestyle and to take care of some of SECOND SON'S personal obligations to avoid hard feelings between her sons³⁴

29. The Decedent wanted her sons to have some of the money that had been accumulated during her marriage. The Decedent's husband had controlled the family's finances and been reluctant to give his sons any money and the Decedent wanted them to immediately share in some of the money that her husband would pay her as a result of the divorce. The Decedent had plenty of money and did not need more.³⁵

30. The attorney who assisted the Decedent in developing the Unitrust agreed that the Decedent's motives were to help FIRST SON and to give SECOND SON some financial assistance, and that the Decedent was not contemplating death.

31. After the Decedent made the gifts, the Decedent kept a well-funded living trust as her means of disposing of her assets upon her death. The Decedent's Estate paid almost \$960,000 in federal and state estate taxes.

32. The Decedent's Oklahoma Estate Tax Return as originally filed reflects that FIRST SON received \$1,129,841 and SECOND SON received \$1,089,840 from the Decedent's Living Trust.

CONCLUSIONS OF LAW

1. The Tax Commission has jurisdiction to hear this protest.³⁶
2. A tax is levied on the transfer of the net estate of every decedent including the transfer of property to persons by gift made in contemplation of death.³⁷

³³ Exhibit D; Exhibit J, ¶ 7; and Stipulation ¶ 5.

³⁴ Exhibits K and L.

³⁵ Exhibits K and M.

³⁶ OKLA. STAT. ANN. tit. 68, § 207 (West 2001).

³⁷ OKLA. STAT. ANN. tit. 68, § 802 (West 2001).

3. 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 decedent, or intended to take effect in possession or enjoyment at or after the decedent's 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 the decedent's death.³⁸

4. Section 807(A)(2) represents "a legislative scheme to prevent inheritance tax evasion by imposing certain criteria on inter vivos transfers."³⁹ While it is generally the rule that the burden is on the taxpayer to show in what respect the proposed action of the Tax Commission is incorrect, this rule does not apply when there is a statute providing otherwise.⁴⁰ Section 807(A)(2) is such a statute. There is a presumption that the transfers were made in contemplation of death, shifting the burden of proof to the estate. The burden shifts only after certain elements are established by the Division.

5. Before the presumption arises that the transfers were made in contemplation of death, the Division must prove the following elements:

- (a) the transfers occurred;
- (b) the transfers were a material part of the decedent's property;
- (c) the transfers were not made for an equivalent in monetary consideration;
- and
- (d) the transfers were made within three (3) years of death.

.If these elements are shown, the presumption arises that the transfers were made in contemplation of death. The burden then shifts to the estate to establish that the transfers were not gifts made in contemplation of death.

6. The Estate does not dispute that the transfers occurred, that the transfers were made within three (3) years of the Decedent's death, and that the transfers were not made for an equivalent in monetary consideration. The only element remaining for the Division to prove is that the transfers were a material part of the Decedent's estate.

7. The proportion the gifts bear to the total estate is relevant to a determination of whether the transfers were a material part of the estate. However, there are other factors to be considered, such as the size of the gift, its nature, and the nature of the remainder of the estate.⁴¹

³⁸ OKLA. STAT. ANN. tit. 68, § 807 (West 2001).

³⁹ *Wilson v. Oklahoma Tax Commission*, 1979 OK 62, 594 P.2d 1210.

⁴⁰ OKLA. ADMIN. CODE § 710:1-5-47 (2004).

⁴¹ *Oklahoma Tax Commission Order No. 1994-06-21-003*. (Precedential).

8. “Material” is defined to mean “having real importance or great consequence,”⁴² and “important, more or less necessary, having influence or effect.”⁴³ “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.”⁴⁴

9. As originally filed, the Decedent’s estate totaled \$2,267,822.00,⁴⁵ comprised of the following:

Decedent’s House	\$ 208,500.00
Intangible Personal Property	\$1,870,322.00
Transfers During Lifetime	\$ 189,000.00

10. The Division adjusted the value of the transfers⁴⁶ to FIRST SON and SECOND SON as follows:

<u>Transferee</u>	<u>As Reported</u>	<u>As Adjusted</u>
SECOND SON	\$94,000	\$340,000
FIRST SON	\$95,000	\$143,462

11. As adjusted by the Division, the Decedent’s estate totaled \$2,562,284.00,⁴⁷ comprised of the following:

Decedent’s House	\$ 208,500.00
Intangible Personal Property	\$1,870,322.00
Transfers During Lifetime	\$ 483,462.00

12. The transfers that the Division included in the Decedent’s Gross Estate totaled \$483,462 in transfers constituting nineteen percent (19%) of the Decedent’s Gross Estate. As used in the context of Section 807(A)(2), the transfers made by the Decedent were a material part of the Estate.

⁴² WEBSTER’S NEW COLLEGIATE DICTIONARY 702 (5th ed. 1979).

⁴³ BLACK’S LAW DICTIONARY 880 (5TH ed. 1979).

⁴⁴ *State ex rel. Otjen v. Mayhue*, 1970 OK 204, 476 P.2d 317.

⁴⁵ Exhibit A.

⁴⁶ Exhibit B.

⁴⁷ Exhibit B. There appears to be a scrivener’s error on the Division’s adjustment of the Decedent’s Gross Estate. The value of the transfers as originally reported were added together with the adjustments, which reflected the total value of the transfers as adjusted, and not just the increase in value. That is why the Division’s calculations reflect the Decedent’s Gross Estate as adjusted at \$2,751,284.00 and not \$2,562,284.00 (\$189,000.00 plus \$483,462.00 equals \$672,462.00, instead of \$189,000.00 plus \$294,462.00 equaling \$483,462.00).

13. Having established all four elements necessary to give rise to the presumption, the transfers are deemed to have been made in contemplation of death and the burden of proof shifts to the Estate to show the contrary.

14. At one time, federal law used the same phrase to recapture gifts made by a decedent and return the assets to the estate for purposes of calculating estate tax liability.⁴⁸ The Oklahoma Legislature did not choose the words “in contemplation of death” in a vacuum.⁴⁹

15. The differentiating factor between an inter vivos gift⁵⁰ and one made in contemplation of death is the transferor’s motive.⁵¹ A transfer “in contemplation of death” is a disposition of property prompted by the thought of death.⁵² 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.⁵³

16. The factors to be considered in determining whether the estate has overcome the presumption that the gift is made in contemplation of death⁵⁴ 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;

⁴⁸ *U.S. v. Wells*, 283 U.S. 102, 51 S.Ct. 446, 75 L.Ed. 867 (1931).

⁴⁹ 1965 Okla. Sess. Law Serv. c. 250 § 2.

⁵⁰ “Gift made when donor is living and provides that gift take effect while donor is living as contrasted with testamentary gift which is to take effect on death of donor (testator).” BLACK’S LAW DICTIONARY 880 (5th ed. 1979).

⁵¹ *Oklahoma Tax Commission Order No. 1995-10-17-029*.

⁵² 26 C.F.R. § 20.2035-1(c)(1954).

⁵³ *Id.*

⁵⁴ *Oklahoma Tax Commission Order No. 1995-10-029*. (Precedential), (citing), *Cunningham v. U.S.*, 553 F.2d 394 (5th Cir. 1977).

- (h) the existence of a long established gift-making policy on the part of the 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;
- (k) the existence of the desire by the decedent of avoiding estate taxes by means of making inter vivos transfers of property.

The challenge in applying these factors on a case-by-case basis is best summarized by the following quote:

It is evident that the determination whether a gift was made in contemplation of death requires detailed factual analysis, but the conclusion may not be wholly intellectual. Decision may result also from intuition, emotional reaction, and visceral response to the composite picture that results from the images imposed on each other in court by advocates with opposite motives, one bent on proving that the deceased, whatever his age or health, was convinced of his immortality and impervious to thoughts of death, and the other seeking to show that the donor was weak of body and sick of mind, preoccupied by the converging approach of the grim reaper and the estate tax collector. Regardless of advocacy, however, we know that by the mandate of the statute amplified by the regulations, the burden of proof is imposed on the taxpayer. This means that the taxpayer has the ultimate task of persuading the Court that the gifts were not in fact made in contemplation of death, although it is not necessary for him to show affirmatively that they were made for motives associated with continued life.⁵⁵

Applying the factors articulated by the Court in *Cunningham*, the following composite picture of the Decedent develops from the facts presented in this matter:

- (a) On August 24, 2000, the time of the transfers, the Decedent was sixty-eight (68) years old. The Decedent's life expectancy ranged from 9.47 years to 18.6 years, depending on which actuarial table is used.
- (b) At the time the Decedent made the transfers, her health as she knew it was that she had "chronic" emphysema, but was in good health. When the Decedent made the transfers, her primary physician believed that the Decedent's life expectancy exceeded three (3) years.
- (c) The transfers were made on August 24, 2000. The Decedent died unexpectedly at home of a heart attack on December 19, 2002, approximately 2½ years after the transfers were made.
- (d) The transfers constituted nineteen percent (19%) of the Decedent's gross estate. After the transfers were made, the Decedent had assets remaining worth approximately \$3,000,000. The Decedent had no debt, was single and

⁵⁵ *U.S. v. Fatter*, 269 F. Supp. 582 (1967).

had a good lifestyle. The Decedent's cash flow, after the transfers, exceeded \$150,000 a year. Much of her cash flow came from tax-sheltered investments.

- (e) At the time the Decedent made the transfers, she was neither depressed nor suicidal. The Decedent remained socially active, handled her own affairs, and shopping. The Decedent was not homebound and had an upbeat and sunny outlook on life.
- (f) Shortly after the divorce the Decedent established a living trust which disposed of the Decedent's estate, with SECOND SON receiving \$1,089,840 and FIRST SON receiving \$1,129,841. The transfers were not part of the general testamentary scheme. The Unitrust was established to provide FIRST SON with a yearly income of approximately \$20,000, which was divorce proof, creditor proof, and to protect FIRST SON from his inability to manage and invest money.
- (g) The donees were the Decedent's sons, the natural objects of her bounty, but the charities which will receive the funds from the Unitrust upon termination are not the natural objects of her bounty and did not receive any funds under the provisions of the Decedent's living trust.
- (h) The Decedent and her husband gave SECOND SON and FIRST SON \$20,000 per year from 1995 through 1999. During her marriage, the Decedent's husband owned and controlled the family assets, and opposed the Decedent's desire to give their sons any more money, through proposed unitrusts. Within a few months of the Decedent receiving a \$3.5 million divorce settlement, the Decedent established the Unitrust for FIRST SON and made the transfer to SECOND SON.
- (i) Shortly after the divorce the Decedent established the living trust and unitrust and appointed others as Trustees of the Unitrust. The Decedent avoided the tasks of selling the stock and making diversified investments and escaped the burden of managing the Unitrust.
- (j) The Decedent wanted her sons to be able to raise their families appropriately during her lifetime, while protecting first son from divorce, creditors, and himself.
- (k) After the divorce was final, the Decedent's attorney again proposed a unitrust for first son. The Decedent's attorney did not discuss the estate tax effect of the gifts. The estate tax impact of the transfers did not affect the much larger Federal unified gift and estate tax. The Decedent's attorney discussed the income tax consequences because the income taxes were more significant in light of the Decedent's net worth and physical condition. By funding the Unitrust with the stock in which the Decedent had virtually a zero income tax basis, the Decedent received federal income tax deductions of \$40,671.50, and avoided approximately \$68,000.00 in federal capital gains. By including the transfers in the estate as gifts in contemplation of death, the Division has proposed an assessment of additional estate tax of \$38,677.44, plus interest through November 19, 2003, in the amount of \$966.93, for a total of \$39,644.37. Considering that the Estate has already paid approximately \$960,000.00 in federal and state estate taxes, the avoidance of estate taxes

does not appear to be the purpose or motive behind the transfers at issue in this matter, nor does it appear that the transfers were a substitute for testamentary dispositions.

Based upon an analysis of the evidence presented in this matter, the composite picture of the Decedent is of a woman who, for the first time in her life, had control of substantial assets to live life on her own terms and fulfill her desire to provide for her sons and their families as she wished during her lifetime. The Estate has come forward with sufficient evidence to overcome the presumption that the gifts were made in contemplation of death.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the Estate's 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.