DePaul Law Review

Volume 3
Issue 1 *Fall-Winter 1953*

Article 5

Federal Estate Tax Law - Transfers in Contemplation of Death

DePaul College of Law

entered into the marital union.[42] The *Ramon* case was cited by the New York Supreme Court in *Shearer v. Shearer*,[43] but the court made its position clear when it said that it was charged with a responsibility more impelling than the religious rights of the father. The controlling consideration was the welfare of the children. The court then determined that the children's welfare would best be served by enforcing the prenuptial agreement.

In determining what considerations will best serve the interests of the child, the preference of the child carries some weight, but is not conclusive.[44] The court privately examines the child in chambers, with the consent of counsel, to determine, if possible, the predilection of the child. The limitations of such an interview are obvious, as are its dangers, among them that of influenced judgment. Age and capacity on the part of the child to make a rational judgment are important considerations.[45]

In retrospect, the modern principle that the best interests and welfare of the child are of paramount consideration permits the courts to exercise their discretion in a manner that will meet the circumstances of each case. This approaches justice more closely than do rigid doctrines under which the court either directs the child to be raised in its father's religion (the former English rule) or finds that it cannot deal with the problem at all (the *Sisson* doctrine).

FEDERAL ESTATE TAX LAW—TRANSFERS IN CONTEMPLATION OF DEATH

Those portions of the Federal Estate Tax law which have provided for the taxation of transfers made in contemplation of death have always been the subject of a large part of the litigation involving estate tax liability.

This subject has also been a source of constant frustration to the Congressional Committees who from the beginning have realized that large amounts of money and property were being withdrawn from the operation of the estate tax by gifts inter vivos under circumstances which clearly indicated that, but for the gifts, all of those amounts would have been taxed as a part of the donors' estates and that by far the greater number

[42] Weinberger v. Van Hessen, 260 N.Y. 294, 183 N.E. 429 (1932); People ex rel. Rich v. Lackey, 139 Misc. 42, 248 N.Y. Supp. 561 (1930); Matter of Mancini, 89 Misc. 83, 151 N.Y. Supp. 387 (S. Ct., 1915); In Re Luck, 10 Ohio S.&C.P. (1899); Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920); consult Williston on Contracts, § 1744 A, p. 4939.

[43] 73 N.Y. S. 2d 337 (S.Ct., 1947).

[44] Callen v. Gill, 7 N.J. 312, 81 A. 2d 495 (1951).

[45] Cf. Hawksworth v. Hawksworth, L.R. 6 Ch. 539 (1871); Richards v. Collins, 45 N.J. Eq. 283, 17 Atl. 831 (1889); Weinman, The Trial Judge Awards Custody, 10 Law & Contemp. Prob. 721 (1944).

and amount of such gifts had been made within two years of death by persons of advanced age.

Under the 1916 Act,[1] there was a rebuttable presumption that gifts made within the statutory period were made in contemplation of death but the government had little success in sustaining assessments. The government was involved in 102 court cases in the ten year period in which that Act was in effect and was successful in 20 cases involving $4,250,000 and partially successful in four others. In 78 cases involving gifts greatly in excess of $120,000,000 it was unsuccessful. In 56 of the total of 78 cases decided against the government, the gifts were made within two years of death. In this group of 56 donors, 2 were more than 90 years of age at time of death; 10 were between 80 and 90; 27 were between 70 and 80; and only one was younger than 50. There was one gift of $46,000,000 made within two months of death by a donor 71 years of age;[2] one of $36,790,000 made by a donor over 80 who consulted a tax expert before making the gift;[3] one of over $10,400,000 made by a donor, aged 76, six months before death;[4] and one by a donor over 75 at death in which the tax assessed was over $1,000,000.[5]

Realizing the inadequacy of the 1916 Act, Congress enacted Section 302 (c) of the Revenue Act of 1926[6] in which it attempted by statute to create a conclusive presumption which would exist as a rule of substantive

[1] Int. Rev. Act, Tit. III, § 202(b), 39 Stat. 777 (1916). "Any transfer of material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; . . . ."

[2] The District Court's decision was reversed, however, in Farmers Loan and Trust Company v. Bowers, 98 F. 2d 794 (C.A. 2d, 1938).

[3] Commissioner of Internal Revenue v. Nevins, 47 F. 2d 478 (C.A. 3d, 1931).

[4] Rea v. Heiner, Collector of Internal Revenue, 6 F. 2d 389 (W.D. Pa., 1925).

[5] Flannery v. Willcuts, 25 F. 2d 951 (C.A. 8th, 1928).

[6] Int. Rev. Act, § 302 (c), 44 Stat. 70 (1926). "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; . . . ."

law that gifts made within two years of death were to be deemed made in contemplation of death. The Supreme Court in *Heiner v. Donnan*,[7] held this unconstitutional, as a violation of the due process clause of the Fifth Amendment of the Constitution. The Court declared:

> If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law.[8]

As a result of this ruling the section was interpreted as creating a rebuttable presumption. It was held in *First Trust and Deposit Co. v. Shaughnessy*,[9] to mean that if the government sued for the tax, it could rest its case after it proved that the donor died within two years of making the gift and the decedent's representative would be obliged to bring forward some evidence that the gift was not made in contemplation of death. However, if the executor paid the tax and sued for a refund on the ground that it was unjust for the collector to keep it because it was not due, the executor not only had to bring forward some evidence that the decedent did not make the gift in contemplation of death, but was required to carry the burden of proof on that issue, a duty which comprised considerably more than the duty imposed by the presumption.

It is established that the findings of the Board of Tax Appeals if supported by substantial evidence are conclusive and the Court of Appeals may not substitute its view of the facts for that of the Board.[10]

Recent Congressional Committee investigations revealed that very few findings of taxability were made where the gifts had been completed several years before death. In order to eliminate nonproductive litigation, Congress amended the estate tax law, effective as to estates of decedents dying after September 23, 1950, the date of the enactment of the 1950 Revenue Act, to provide that transfers made more than three years before death should not be taxed as transfers in contemplation of death.[11] As to transfers made within three years before death, however, the amended

[7] 285 U.S. 312 (1932).

[8] Ibid., at 329.

[9] 134 F. 2d 940 (C.A. 2d, 1942).

[10] Wilmington Trust Company v. Helvering, Commissioner of Internal Revenue, 316 U.S. 164 (1942).

[11] Int. Rev. Code, § 811(c), 26 U. S. C. A. 811(c) as amended by Tit. V, § 501(a), 64 Stat. 962 (1950). "If the decedent within a period of three years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of subsections (c), (d), and (f); but no such transfer, relinquishment, exercise, or release made prior to such three year period shall be deemed or held to have been made in contemplation of death."

law deems all such transfers to have been made in contemplation of death, unless the estate proves otherwise or unless the transfer was made as a bona fide sale for an adequate and full consideration in money or money's worth.[12]

This present amendment allows wealthy middle aged people in good health to make gifts of any size or amount without fear that the transferred property will be included in their gross estates for Federal Estate Tax if they live more than three years beyond the date of the gift.

The definition by the Supreme Court of the phrase "in contemplation of death" as set out in *United States v. Wells*[13] has been consistently followed by the courts and is reaffirmed in the present Regulations. The words "in contemplation of death" mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is near at hand. If it is the thought of death which mainly prompts the disposition of property, that affords the test. It follows that the statute does not embrace gifts inter vivos which are prompted by different motive.[14]

In view of this definition we find the courts deciding contemplation of death cases on the basis of the decedent's motives in making the transfers and his physical condition at the time he made it. If his motives were associated with continued life and his physical condition acceptable at the time of gift, there is little likelihood that the transfer will be taxed and even when the donor's physical condition was below standard at the time of gift but he was unaware of it, or optimistic about recovery and his motives were strongly in conformity with an expectation of continued life, the gift will not be taxed in contemplation of death.

Frequently a single case will require consideration of several motives and when this occurs, the courts usually try to determine the dominant motive or motives and decide the case from that viewpoint.

A great variety of motives for transfers inter vivos have been considered by the courts and declared proper to make the gift non-includible for Federal Estate Tax. An examination indicates that these motives come within four general classifications of the decedent's desires.

1. *A desire to assist members of donor's family*. Transfers are properly not taxable where the impelling cause of the transfers is not any present apprehension of death, but the carrying out of a long followed policy of making liberal gifts to the family during the donor's lifetime;[15] to

[12] Ibid.

[13] 283 U.S. 102 (1931).

[14] Ibid., at 118.

[15] Jennings v. Smith, 63 F. Supp. 834 (D.C. Conn., 1945).

assure children of an education;[16] to provide security to a widowed daughter;[17] to equalize gifts to children;[18] to aid beneficiaries in distress;[19] to give one's family immediate enjoyment;[20] or to see that children have use of money while young, so they can live comfortably, educate their children, and experience the responsibilities of business under transferor's guidance and support.[21]

The generosity of the transferor is important in deciding these cases. If he has established a pattern of gifts over a period of time or the gift is made pursuant to a long entertained plan, it is almost certain to escape Federal Estate Tax, but as a matter of caution it should be noted that transfers to one's family are also the ones most likely to be taxed because the family is the natural object of decedent's bounty and therefore a suspicion arises that gifts to them are in lieu of a testamentary disposition. If the transfer is made close to the time that the will is executed and in somewhat similar proportions and to the same beneficiaries it is likely to be taxed as a gift in contemplation of death.[22] Also if the decedent wishes to transfer to favored children to escape a will contest such a transfer very likely will be taxed in decedent's gross estate.[23]

2. *A desire to avoid or reduce taxes.* This is usually considered a satisfactory motive for a transfer to render it non-includible as a gift in contemplation of death. The courts have held that a transfer made to remove property from the scope of Estate Tax law was not a transfer in contemplation of death.[24] The Court of Appeals for the Third Circuit declared in *Denniston* v. *Commissioner*[25] that:

> The desire to avoid estate taxes may be just as clearly present in the mind of a young and vigorous donor who thinks of death as far distant as in that of one who is old and feeble and who looks momentarily for its coming. Standing alone it cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase 'contemplation of death.'[26]

However, the motive of avoidance of estate tax must be accompanied with the expectancy of continued life in order to escape includibility.[27]

[16] Estate of Wilson, 13 T.C. 869 (1949).

[17] Dickson v. Smith, Dec. 877 (S.D. Md., 1945).

[18] Henshaw v. Anglius, Dec. 21233 W (N.D. Cal., 1940).

[19] Orvis v. Higgins, 80 F. Supp. 64 (S.D. N.Y., 1948).

[20] Estate of McCarthy, 38 B.T.A. 1211 (1938).

[21] Estate of Kroger, 2 T.C.M. 644 (1943).

[22] Rengstorff v. McLaughlin, Collector of Internal Revenue, 21 F. 2d 177 (N.D. Calif., 1927).

[23] Estate of Dupignac, 6 B.T.A. 278 (1927).

[24] Allen, Collector of Internal Revenue v. Trust Company of Georgia, 326 U.S. 630 (1946).

[25] 106 F. 2d 925 (C.A. 3rd, 1939). [26] Ibid., at 928.

[27] Vanderlip v. Commissioner of Internal Revenue, 155 F. 2d 152 (C.A. 2d, 1946).

Transfers made to reduce income tax are validly motivated,[28] as are gifts for the purpose of reducing state taxes.[29] Similarly gifts made in anticipation of increased gift tax rates are excludible for estate tax.[30]

3. *A desire to aid himself or members of his family in business.* This is usually regarded by the courts as a proper motive for excluding the transfer as a gift in contemplation of death. The Board of Tax Appeals has ruled that a transfer of stock to a grandson employed in the corporation of which decedent was a principal stockholder was non-includible.[31] Where decedent made outright gifts of stock in a corporation of which he was president to dissuade his son from taking an active interest in another business,[32] and where there was a transfer to a key executive to hold him in the business,[33] the gifts were held non-includible by the Tax Court.

4. *A desire to isolate part of donor's property.* It is an adequate motive for an excludible transfer to attempt to put property out of reach of an estranged wife,[34] or to avoid a judgment levy,[35] or to protect a property from the hazards of stock market speculation.[36]

In the case of transfers made to children of a first marriage by a donor in anticipation of a second marriage, the courts formerly held that the looking forward to marriage by donor was in opposition to contemplation of death..[37] However, the courts in recent years have reversed this view and now consider such gifts as motivated by the donor's desire to avoid contests upon his death and therefore includible in his gross estate.[38]

The age and physical condition of the decedent at the time he made the transfers is heavily weighed in determining whether the gifts should be included in his estate as transfers in contemplation of death. Transfers by a person of advanced years are considered not in contemplation of death where the activities of the donor indicate that he entertained an expectation of continued life.[39] Also, gifts were held not in contemplation of death where the physical condition of the donor remained unchanged

[28] First National Bank of Kansas City v. Nee, Collector of Internal Revenue, 67 F. Supp. 815 (W.D. Mo., 1946).

[29] Tonkin v. United States, 56 F. Supp. 817 (W.D. Pa., 1945).

[30] Fair v. United States, 59 F. Supp. 801 (W.D. Pa., 1945).

[31] Estate of Hausmann, 5 B.T.A. 199 (1926).

[32] Estate of Cooper, 7 T.C. 1236 (1946).

[33] Estate of Fry, 9 T.C. 503 (1947).

[34] Estate of Hunter, 26 B.T.A. 417 (1932).

[35] Estate of Murfey, B.T.A. Mem. Dec. 11731 D (1941).

[36] Estate of Boswell, 37 B.T.A. 970 (1938).

[37] Terhune v. Welch, Collector of Internal Revenue, 39 F. Supp. 430 (D.C. Mass., 1941).

[38] In re Kroger's Estate, 145 F. 2d 901 (C.A. 6th, 1944).

[39] Jennings v. Smith, Collector of Internal Revenue, 63 F. Supp. 834 (D.C. Conn., 1945).

for a period of time before the transfer,[40] or where the donor had a serious disease which was the direct cause of death but which was unknown to him at the time of transfer.[41] A transfer, however, by a person of advanced age who is knowingly suffering from a disease likely to cause death will almost always be included as a gift in contemplation of death.[42]

In summarizing the cases it is apparent that although the Commissioner frequently assesses a deficiency based upon a claim of contemplation of death, the courts have set up a reasonable standard for the determination of the issue. If the estate representative produces proof that the motives of the decedent were those associated with life and that decedent, although of advanced age, was in generally good health or, if suffering from a serious ailment, was unaware of it or optimistic about recovery, the estate representative will be able to overcome the presumption in favor of the Commissioner. Furthermore the amendment enacted in the Revenue Act of 1950 will relieve estates of the expense of litigation in cases where the transfer was completed more than three years prior to donor's death and permit persons now living to give greater consideration to estate planning by making gifts inter vivos as a means of reducing their Federal Estate Tax.

CONSTITUTIONAL RIGHTS OF PERSONS BEFORE A COURT MARTIAL

From the inception of the draft in 1940 to the present, millions of men have been or are in military service. Upon entering the military life the soldier loses his rights under the civil courts and becomes amenable to court martial. Many questions arise as to the constitutional rights of military personnel. When all appellate remedies within the framework of the military courts have been exhausted, there remains only one remedy to secure the constitutional rights of those convicted—the writ of habeas corpus.[1]

Much confusion has plagued the courts in determining the constitutional rights of persons tried by a court martial. Much of this confusion is attributable to the uncertainty of the scope of the habeas corpus review.

In the case of *In re Grimely*[2] the court concluded that the habeas

[40] Llewellyn v. United States, 40 F. 2d 555 (D.C. Tenn., 1929).

[41] Levi v. United States, 14 F. Supp. 513 (Ct. Cl., 1936).

[42] Estate of Wright, 43 B.T.A. 551 (1941).

[1] 62 Stat. 964 (1948), 28 U.S.C.A. § 2241 (1950). "The writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution or the Treaties of the United States."

[2] 137 U.S. 147 (1890).