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TAXATION - FEDERAL ESTATE TAX - GIFT IN CONTEMPLATION OF DEATH

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TAXATION — FEDERAL ESTATE TAX — GIFT IN CONTEMPLATION OF DEATH — Decedent, when eighty years old and while still in good health, set up an irrevocable trust of one-third of his property, with a life estate to his daughter and remainder over on the daughter's death to her children and descendants. Under the trust deed the income was to be accumulated and added to the principal until the donor's death. The Supreme Court found that decedent, who was thinking about speculating on the stock exchange, was anxious to insure adequate provision for his daughter and her descendants upon his death, and that he therefore determined to make an irrevocable disposition of a substantial portion of his property in their favor and thereby avoid the hazards and uncertainties to which testamentary gifts would be subject because of possible shrinkage and depletion of his estate due to losses on the stock market. Decedent died about five and one-half years after the gift was made. The commissioner assessed additional taxes against the estate on the theory that the gift by trust was in contemplation of death within the meaning of § 302 (c) of the Revenue Act of 1926.[1] The Board of Tax Appeals reversed the commissioner's determination in a memorandum decision.[2] The Circuit Court of Appeals, by a two to one decision, reversed the board and upheld the commissioner.[3] *Held*, with one justice dissenting, that the board's decision should be affirmed and the Circuit Court of Appeals reversed, since the "mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.'" *Colorado National Bank v. Commissioner*, (U. S. 1938) 59 S. Ct. 48.

The provision in the federal estate tax law requiring inclusion in the gross estate of inter vivos gifts made by the decedent in contemplation of death, while obviously designed to prevent avoidance of the estate tax, has created a difficult problem of interpretation for the federal courts. In *United States v. Wells*,[4] the leading case on the construction of this language, the Court made it clear that this clause was not limited in its application to gifts causa mortis, but was intended to reach all cases where the dominant motive for making the gift during decedent's lifetime was associated with a purpose relating to his death rather than life.[5] Thus, to cite a few illustrations, gifts are deemed to be moti-

[1] 44 Stat. L. 70 (1926), 26 U. S. C. (1935), § 411 (c).

[2] Estate of Edwin B. Hendrie, Colorado National Bank, 34 B. T. A. 1315 (1936).

[3] Commissioner v. Colorado National Bank, (C. C. A. 10th 1938) 95 F. (2d) 160.

[4] 283 U. S. 102, 51 S. Ct. 446 (1931).

[5] "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, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter*

vated by purposes associated with the life of the decedent where the beneficiaries stand in immediate need of the donor's help,[6] or where the donor habitually makes gifts to his children in order to develop their sense of responsibility and skill in the handling of property,[7] or where the donor wishes to avoid income taxes.[8] On the other hand, and again by way of illustration, gifts are deemed to be motivated by purposes relating to the decedent's death where the purpose is to avoid estate taxes,[9] or where the donor wishes to avoid an anticipated contest over his will.[10] The test applied in the *Wells* case and followed in subsequent decisions is far from satisfactory: it emphasizes the subjective element entering into the gift together with all the speculation and conjecture suggested by an inquiry into motive plus the splendid opportunity furnished lawyers and their clients for "building up" an impressive array of evidence designed to emphasize the association of the gift with purposes of life; furthermore, the test, with its emphasis on the "impelling cause of the transfer," [11] implies an evaluation and weighing of various motives entering into the gift to ascertain which one is dominant.[12] In the principal case the decedent's beneficial purpose was to take care of his dependents after death. The gift, therefore, appeared to be associated with a purpose relating to decedent's death. However, not every inter vivos transfer creating a gift over effective upon the death of the donor is necessarily a gift in contemplation of death, according to the federal courts, since the motive in making the transfer at a particular time may be associated with purposes relating to life. And in the principal case a motive associated with life was found by the Court in the decedent's desire to protect the beneficiaries against the risks involved in playing the market.[13] Thus the

vivos which spring from a different motive." Chief Justice Hughes, speaking for the majority, in United States v. Wells, 283 U. S. 102 at 118, 51 S. Ct. 446 (1931).

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

[7] United States v. Wells, 283 U. S. 102, 51 S. Ct. 446 (1931).

[8] St. Louis Union Trust Co. v. Becker, (C. C. A. 8th, 1935) 76 F. (2d) 851.

[9] Farmers' Loan & Trust Co. v. Bowers, (C. C. A. 2d, 1934) 68 F. (2d) 916.

[10] Green, Exrs. of Dupignac Estate, 6 B. T. A. 278 (1927).

[11] United States v. Wells, 283 U. S. 102, 51 S. Ct. 446 (1931).

[12] For a very interesting discussion of this question, see the opinion in Farmer's Loan & Trust Co. v. Bowers, (C. C. A. 2d, 1938) 98 F. (2d) 794. In that case it appeared that the two chief motives of the gift were to avoid income taxes and estate taxes. The Circuit Court of Appeals affirmed the correctness of the trial court's ruling to the effect that if there were several motives for making the gift and the motive of avoiding the estate tax played a substantial part in causing the transfer, the jury should find the transfer to be in contemplation of death. The court rejected the notion that the Wells case requires the motive associated with death to be the most impelling or the dominant motive before the gift can be said to be in contemplation of death.

[13] A second possible motive for making the transfer at that time and in that particular form is that the settlor did not consider the size of the corpus sufficient to yield the desired amount of income, and merely used his death as the time when the accumulation of income to the corpus should cease, having assumed that then the principal would be large enough to produce income sufficient for the beneficiaries' needs. Such a plan would be roughly equivalent to a deferred payment annuity insurance policy. However, it does not appear that this motive was present in the instant case.

case emphasizes that it is not the ultimate beneficial purpose of the gift, but the motive for making the transfer at a particular time during the decedent's life which is the decisive factor. When it is considered that decedent was eighty years old, it is rather difficult to believe that the fear of depletion of the donor's estate because of contemplated stock market speculations was really a substantial motive.[14] Nevertheless, it was for the Board of Tax Appeals to determine what weight and probative effect was to be accorded to this evidence relating to motive.[15] Certainly it is probable that some of the justices voting in favor of reversing the Circuit Court of Appeals did so primarily because they thought that court exceeded its authority in reversing the determination of the Board of Tax Appeals on a question of fact when there was evidence in the record to support the board's finding. *Edmund O'Hare*

[14] The dissenting opinion is further supported by the fact that the terms of the trust correspond to the terms of the donor's will. It has been held that under such circumstances the gift is part of a general testamentary scheme and therefore in contemplation of death. See Real Estate Land Title & Trust Co. v. McCaughn, (C. C. A. 3d, 1935) 79 F. (2d) 602.

[15] See MONTGOMERY, FEDERAL TAX PRACTICE, rev. ed., 448-450 (1938).