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THE TAXATION OF TRANSFERS IN CONTEMPLATION OF DEATH

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If it were permissible we might borrow a portion of the title of a law review article of a few years ago, and head this paper "Death Taxes and How to Live With Them."[1] If we are to judge by the reaction of many taxpayers, and particularly a donee who has barely edged out *rigor mortis,* the term "contemplation of death" must be esoteric in concept. The meaning and breadth of the term is extremely important, however, because in these days great numbers of our fellow citizens resort to or avail themselves of devices, one sort or another, in avoidance of the fancied evils of probate administration or death taxes or both. The device is almost always a transfer of property, either outright or with a reservation or "string" attached, and the transfer is frequently accomplished upon the advice of a person unlearned in the law. To begin with, there is nothing immoral or illegal in an inter vivos transfer although such a transfer may often be utterly stupid. A single example should serve as an illustration: Some years ago an elderly lady residing in California, to avoid probate and death taxes, transferred to a married son everything she possessed. In the normal course of events she would have predeceased the son, but in this case he died first. The lady found herself, in the autumn of her life, dependent upon a daughter-in-law and a minor grandchild for the food she ate and the shelter over her head.

Even at best, these extra-legal or extra-judicial devices are not foolproof. A short cut is usually fraught with peril. One common device is the joint tenancy. The predominant feature of the joint tenancy is the right of survivorship—on the death of one joint tenant the entire joint tenancy property belongs to the survivor. So the contributor or original owner would seem to be able to eat his cake and have it, too. If the other dies, it returns to him. But the non-contributor can give away or sell his half, thus destroying the joint tenancy, or his creditors may take it.

Another common device is the conveyance with reservation of a life estate, income, or other interest. This device has the same disadvantages as the joint tenancy in that the remainderman may sell or give away his interest, or his creditors may take it. Moreover, if the remainderman dies

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[1] Garland and Garrity, *The Federal Death Tax and How to Live with It,* 30 ST. JOHN'S L. REV. 1 (1955).

before the grantor, his interest will not return or revert to the grantor, but will pass to the heirs or devisees of the remainderman.

The third common device is the transfer by way of revocable trust. This device has many advantages and none of the disadvantages of the first two devices, provided the transfer is made to a corporate trustee under an instrument drafted by a competent lawyer.

All three of these devices have one thing in common. The grantor has not fully and completely separated himself from his property. He has retained or held on to a "string." Another feature of these three is that all are clearly subject to the death tax, both federal and state, and the first two are also subject to the gift tax. Volumes have been written on each of these devices but they are not within the scope of our present discussion. We are here concerned with the outright transfer, where the donor cuts himself off from the transferred property without reservation. The property now belongs to the donee or grantee to do with as he wishes. Many such transfers are made by donors with no other motive than a desire to promote the donee's happiness and welfare. With such transfers, if the donor lives more than three years from the date of the transfer, and the gift tax liability is satisfied, we have no further concern other than to entertain an unvoiced admiration for a man who is willing to part with a portion of his property simply to promote another's happiness.

Transfers in Contemplation of Death

This article is directed solely to transfers in contemplation of death. Article 3 of chapter 4 of the California Inheritance Tax Law[2] treats of inter vivos transfers subject to taxation. In addition to transfers in contemplation of death, taxable transfers include those made in deferred possession or enjoyment; with reservation of a life interest; with a promise to care for the transferor; by way of a revocable trust; or, as an advancement. For the purpose of this discussion we eliminate all these latter types. We shall assume that all transfers under discussion were made without valuable and adequate consideration.[2a]

History of Death Taxes

Let us look back a bit into history.[3] Ancient Egypt had an inheritance tax as early as 700 B.C. The Emperor Augustus established such a tax in 6 A.D. as a means of supporting the Roman army. During the Middle Ages the inheritance tax was continued as a payment known as "relief," which the heir of a deceased tenant paid to his lord upon succeeding to his father's tenancy.

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[2] CAL. REV. & TAX. CODE §§ 13641–48.

[2a] As to what constitutes a "valuable and adequate" consideration, see the recent case of Estate of Stevens, 163 Cal. App. 2d ......, 329 P.2d 337 (1958).

[3] For references to source material see 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION ch. 1 (1942) [hereinafter cited as PAUL].

"The nineteenth century witnessed substantial development in European inheritance taxation. England expanded minor probate duties into a 'full fledged estate duty.' France developed its inheritance tax, established in 1796, by eliminating discrimination between classes of property, and adopted progressive rates in 1901. Italy adopted a tax in 1862, modeled on the French law, making its rates progressive in 1902. Prussia enacted a collateral inheritance tax in 1873; other German states followed this example; an imperial inheritance tax with relationship discrimination and progressive rates finally resulted in 1906."[4] In recent years inheritance taxes have accounted for a fairly substantial proportion of national revenue in Europe, particularly in England.

Pennsylvania was the first state in our Union to establish an inheritance tax, beginning in 1826.[5] Wisconsin, after considerable experience in the courts attempting to validate a workable inheritance tax law, enacted a well planned graduated inheritance tax in 1903, which became the model for such legislation.[6] It not only provided initial exemptions to widows and dependents of the deceased but also levied progressively higher rates according to the relationship of the heirs to the deceased (remoteness) and the amount of the legacy received. The tax was payable into the county treasury of the district in which the will was probated, and a percentage of collections was allocated to the county making the collection.

By 1952 all of the states except Nevada had imposed some form of inheritance or death tax. In addition there was the estate tax levied by the federal government on the same property. Nevada did have a death tax at one time although this tax was repealed in 1925.[7] In six states the tax was an inheritance tax only. In seven states the tax was an estate tax based upon the federal levies. Twenty-nine states (California included) had both an inheritance tax and a differential estate tax based upon the federal levy. The five remaining states had a death tax not falling into the above patterns.[8]

Of the forty states imposing a death tax, all save one, Vermont, tax transfers in contemplation of death. The phrase seems to have made its first appearance in an American death tax statute in 1891, in New York. California has had such a provision in its inheritance tax since the introduction or first imposition of the tax in this state in 1893.[9] The same situation prevails in the federal estate tax, which has had the provision since it was

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[4] *Id.* at 4.

[5] HELLERSTEIN, STATE AND LOCAL TAXATION, CASES AND MATERIALS 523 (1952) [hereinafter cited as HELLERSTEIN]. Oakes, *Development of American State Death Taxes*, 26 IOWA L. REV. 451 (1941).

[6] HELLERSTEIN 523.

[7] Nev. Laws 1925, ch. 27. The Nevada Constitution now provides that "no inheritance or estate tax shall ever be levied." NEV. CONST. art. 10, § 1.

[8] HELLERSTEIN 526–27.

[9] Cal. Stats. 1893, ch. 168, § 1.

included in the first act in 1916. Of all the states using the term, only six define it in the statute: Idaho, Ohio, Rhode Island, South Dakota, Tennessee and California. California first defined the term, in language similar to that now used, in the 1911 act.[10] Most states have written into their law a provision to the effect that any transfer made within a certain period prior to death is presumed to have been made in contemplation of death. Three states fix the presumption period at six months; seven at one year; eighteen at two years; six at three years; and one at five years. California does not have such a presumption period.

In this connection it should be stated that the presumption referred to is rebuttable and is not conclusive. An interesting sidelight is that some thirty years ago Wisconsin, after years of frustration in attempting to tax transfers in contemplation of death, enacted a provision whereby all transfers made within six years of death were *conclusively* presumed to be in contemplation thereof and taxable. On a record of success in twenty reported cases involving gifts of $4,250,000 and failure in seventy-eight reported cases involving gifts in excess of $120,000,000[11] the federal government, in 1926, enacted a two-year conclusive presumption. The Supreme Court of the United States held that each of these statutes was unconstitutional—the Wisconsin one in *Schlesinger v. Wisconsin*,[12] and the federal one in *Heiner v. Donnan*.[13]

In 1951 the California legislature amended the Inheritance Tax Law to provide that a transfer made more than three years before death shall be conclusively presumed *not* in contemplation of death.[14] This means that even though the transfer was in fact in contemplation of death, if the donor lives for three years from the date of the transfer it is not subject to death tax. The present federal rule is the same.

Definition of Terms

Let us now define our terms. The phrase "contemplation of death" has been given various meanings in different states. In one state it means one thing, in other states another. To the writer's knowledge it has been given four different meanings: (1) Gifts causa mortis; (2) Transfers where the donor thinks death is impending or imminent, usually because of some existing physical or mental condition; (3) Transfers by a donor who thinks death is not far off, though he need not be in a physical or mental condition which would cause him to believe death is imminent; and (4) Transfers

[10] Cal. Stats. 1911, ch. 395, § 27.

[11] See the dissenting opinion of Mr. Justice Stone in Heiner v. Donnan, 285 U.S. 312, 343–46 (1932).

[12] 270 U.S. 230 (1926).

[13] 285 U.S. 312 (1932).

[14] CAL. REV. & TAX. CODE § 13642.

in lieu of testamentary disposition or transfers made by a person because of the general expectancy of death which actuates the mind of a person on the execution of his will.

A causa mortis transfer is a death bed transfer made in anticipation of impending death. It is revocable and is defeated if the donor survives the apprehended peril. This rule is antiquated and is no longer applied to any great degree. It was specifically rejected by the Supreme Court of California in 1915.[15] Technically, causa mortis transfers are not embraced within our phrase because they are revocable. More correctly, such transfers are taxable under the "to take effect in possession or enjoyment at or after death" provisions.

The majority of the states, and, apparently, the federal courts, formerly adhered to the "impending death" rule, although the trend in recent years seems to be toward a broader view. The Supreme Court of the United States, in *United States v. Wells*,[16] expressly rejected the doctrine. This is not now, nor has it been for many years, if ever, the rule in California.

The next step is the "death not far off" doctrine which is broader to some degree than the rule last mentioned, and is gradually becoming the majority rule. It is, under the *Wells* case, the federal rule. Contemplation here is something more than the general expectancy of death which all entertain, yet there need be no apprehension that death is imminent. It is where one comes to the realization that death is not far away, with the result that the normal desire to retain ownership and control of property is subordinated to a desire to make a final disposition thereof.

The fourth, broadest and by far the most realistic approach to a meaning of the term under discussion is to be found in the California definition—"transfers made in lieu of testamentary disposition." Along with California, Idaho, New Jersey, Ohio, South Dakota and Tennessee adhere to this doctrine.

We may safely state the rule in California to be: A transfer is in contemplation of death if made because of that expectancy of death which actuates the mind of a person on the execution of his will.

The Federal Rule

Section 2035(a) of the Internal Revenue Code of 1954 provides for the inclusion in the gross estate of the value of all property "to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of death." Subdivision (b) of section 2035 provides for a rebuttable presump-

15 Estate of Reynolds, 169 Cal. 600, 603, 147 Pac. 268, 270 (1915).

16 283 U.S. 102 (1931).

tion that any transfer made within three years of death is presumed to be in contemplation of death, "but no such transfer, . . . made before such 3 year period shall be treated as having been made in contemplation of death." Parenthetically, we might remark that Randolph Paul, in his excellent work on federal estate and gift taxation, remarks that the federal provision "certainly might have been more artistically framed" and then goes on to suggest that the language of California's statute is more appropriate and had been recommended by the Secretary of the Treasury in 1919 as an amendment to the federal act.[17]

The new federal estate tax regulations state that the phrase does not refer 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 imminent or near. 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). A transfer is prompted by the thought of death if (1) made with the purpose of avoiding the tax, (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."[18]

The leading federal case on the question is *United States v. Wells*. It has been said, perhaps in jest, that this case is truly all things to all people, for language may be found in the opinion to support any of the four theories. This is not strictly true for the case came to the Supreme Court from the Court of Claims which had applied the narrow "impending death" rule.[19] In its opinion the Supreme Court commented upon the phrase in the following language:[20]

> As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or nonexistence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. . . . The question, necessarily, is as to the state of mind of the donor.

It is regrettable that the Supreme Court did not, in the *Wells* case, state its position clearly and unequivocally. Probably the most we may extract from this case is that the "impending death" theory of the Court of Claims

17 The language of the California Statute is set out at page 376, *infra*.
18 Treas. Reg. § 20.2035-1 (c) (1954).
19 United States v. Wells, 69 Ct. Cl. 485, 39 F.2d 998 (1930).
20 283 U.S. at 117.

was rejected, and a step taken toward the slightly more enlightened theory of "death near at hand."

If the *Wells* case is the leading federal case on the question, certainly *Estate of Oliver Johnson*[21] is one of the most amusing. That case involved a whimsical bit of evidence to the effect that shortly before his death the nonagenarian Johnson, to the delight and, perhaps, dismay of his family, would leap into the air and click his heels two or three times before descending to the floor. Taxability was of course denied.

The California Rule

Section 13641 of the Revenue and Taxation Code provides that certain transfers, if made without valuable and adequate consideration, are subject to inheritance tax. "Adequate and valuable consideration" is defined. The next section provides that a transfer made without adequate and valuable consideration and made in contemplation of the death of the transferor is a transfer subject to section 13641.[22] The statute then defines "contemplation of death" as including "that expectancy of death which actuates the mind of a person on the execution of his will. The term is not restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis."

Although five sections intervene it is necessary to read section 13648 as though it were a part of section 13642. Its language is as follows:

> It is hereby declared to be the intent and purpose of this part to tax every transfer made in lieu of or to avoid the passing of property by will or the laws of succession.

Actually, in the 1935 act, sections 13642 and 13648 were embraced within a single section.[23] In any event both sections of the present codification must be considered and applied in the resolving of any question involving contemplation of death.

The California regulations are short, simple and right to the point. They state that "the term 'contemplation of death' means that general expectancy of death, whether immediate or distant, which ordinarily actuates the mind of a person in the execution of his will. It is not restricted to an expectancy of imminent or speedy death. A transfer motivated by a general expectancy of death, without which it would not have been made, is one in contemplation of death, notwithstanding that other motives were also present."[24] This regulation states the law on this question as it actually is under the authority of the leading California case, *Estate of Newman*.[25]

In considering the California cases it is well to keep in mind that, al-

21 10 T.C. 680 (1948).

22 CAL. REV. & TAX. CODE § 13642.

23 Cal. Stats. 1935, ch. 358, § 2 (4).

24 CAL. ADMIN. CODE, tit. 18, § 708.

25 52 Cal. App.2d 126, 130, 125 P.2d 908, 910 (1942).

though what is or is not contemplation of death is a question of law, whether a particular transfer was made in contemplation of death is a question of fact. Of course, in fact cases if there is any substantial evidence to support the ruling of the trial court the appellate court must affirm its judgment. Thus, while transfers by the hundreds are made which may or may not be taxable within the intendment of the statute, relatively few are taken to the appellate courts, and, of these, only a few are useful as authority. *Estate of Newman* was decided on May 15, 1942. The latest appellate decision is *Estate of Adams*,[26] decided on July 15, 1952.

Although the District Court of Appeal, in *Spreckels v. California*,[27] said that "a reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden," it is extremely doubtful whether the "impending death theory" was ever the rule in California. In fact, in *Estate of Reynolds*[28] the California Supreme Court expressly rejected the "causa mortis" theory, which was then the New York construction, with these words: "Nothing in our law compels us to adopt the restricted construction put by the courts of New York upon their own statute and everything directs that a liberal construction should be placed upon it to the end that its provisions be not evaded."[29]

It appears from *Chambers v. Larronde*[30] that the "in lieu of testamentary disposition" theory was the California rule even before the term was defined by the 1911 act, if we are to judge by this language of the state supreme court:[31]

> In other words, the phrase "in contemplation of death" as defined in the act of 1911 is merely the equivalent in meaning with that under the act of 1905, which does not purport to define the phrase, for the phrase must necessarily be construed as the language of the act of 1911 imports—a transfer of property, the transferor having in mind the general expectancy of death which ordinarily actuates one in the execution of his will.

Two earlier cases are landmarks in the contemplation of death field, and both are good authority. They are *Estate of Reynolds*, referred to above, and *Estate of Pauson*.[32] Certain language in this latter opinion is particularly apt:[33]

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[26] 39 Cal.2d 309, 246 P.2d 625 (1952).
[27] 30 Cal. App. 363, 369, 158 Pac. 549, 551 (1916).
[28] 169 Cal. 600, 147 Pac. 268 (1915).
[29] *Id.* at 603, 147 Pac. at 270.
[30] 196 Cal. 100, 235 Pac. 1024 (1925).
[31] *Id.* at 110, 235 Pac. at 1028.
[32] 186 Cal. 358, 199 Pac. 331 (1921).
[33] *Id.* at 364, 199 Pac. at 333.

> That the object of such imposition of taxes upon transfers made in contemplation of death is to prevent evasion of laws imposing a tax upon the right to succeed to an estate at death is conceded in all the cases. It is obvious that this purpose is not achieved when the phrase "transfers made in contemplation of death" is limited, as in New York, to gifts causa mortis. . . . It is equally obvious that the legislative intent will be frustrated if the transfer in order to be taxable must be made with a sense of impending death, for under this view no tax can be collected where a donor in expectation of death and for the purpose of vesting title in his heirs makes a transfer *inter vivos* with no contemplation of death other than that involved in arranging his affairs so that when the contemplated event occurs the property will be distributed or vested in accordance with his wishes in that event.

In *Estate of Newman,* the court first remarked that it is well settled in this state that the phrase is not limited to an expectation that death is imminent or is likely to occur within a few years, and then went on to say that "the question whether or not a gift is one made in contemplation of death is essentially a question as to whether the gift was one in the nature of a distribution of the donor's property or was one which was intended merely as a lifetime favor to the donee. While the solution may depend upon an impelling and inducing motive or motives it does not always depend upon any single motive which controls to the exclusion of all others. Where a contemplation of death is one of the motives, an important moving cause of the transfer, and one without which the transfer would not be made, the transfer is taxable even though other substantial motives may have contributed to the result. If one purpose of the transfer is a distribution of the donor's property as a substitute for testamentary or similar disposition, with the effect of merely hastening or anticipating the effects of what would otherwise be a testamentary or similar disposition, the transfer is taxable."[34]

The latest expression of the Supreme Court of California on this question is to be found in *Estate of Adams.* Lillian T. Adams died in January, 1946, at the age of ninety years, a resident of Los Angeles county. In November, 1935, Mrs. Adams transferred to her son, Morgan Adams, property worth about $300,000. The property was to be held by him in an irrevocable trust to pay the income to Morgan for life and thereafter to pay the income to his two sons, the grandsons of the decedent, until each reached the age of 35 years. When each became 35 he would receive his proportionate share of the corpus. The trustee was given the power to distribute the corpus to the sons at any earlier time he deemed advisable. In 1945 the trustee exercised this power and distributed the corpus to the sons, thus terminating the trust. At this time the sons were of the respective ages of twenty-eight and thirty.

[34] 52 Cal. App.2d at 135, 125 P.2d at 912–13.

The property transferred at the creation of the trust constituted about three-fourths of Mrs. Adams' property. No life estate was retained by the transferor in the transferred property. Mrs. Adams died before the effective date of the legislation providing that transfers made more than three years prior to death are not subject to inheritance tax.

Evidence was introduced to the effect that at the time of the transfer and up to within a few months of her death Mrs. Adams was in good health; that she was alert and intelligent; that she was interested in and active in clubs and charitable projects; that she had traveled in Japan in 1934 and in Panama and Mexico in 1936.

The trial court found that the transfer was made in contemplation of death, and overruled the objections to the appraiser's report wherein the transfer was taxed. The supreme court, after reciting the facts of and quoting at length from *Estate of Newman,* noted that the evidence in the two cases was so similar that it was apparent that inferences could reasonably be drawn from the evidence to support the trial court's finding. The order of the superior court was affirmed.

We may conclude from these cases that the California statute is clear, and that the regulations do not enlarge the statute and are in conformity with the reported decisions. It remains, then, to apply the law.

Evidentiary Factors

Doubtless the reader observed that in reference to the foregoing decisions, with the exception of the *Adams* case, any recital of facts has been studiously avoided. This was for two reasons. (1) We wished to set forth the legal points, and (2) the courts have said again and again that cases in this category are fact cases, that the decision in each turns upon the particular facts involved. It has been remarked by eminent writers in the field of death taxes that it has become increasingly apparent in contemplation of death cases that the place to win (or lose) them is in the trial court. Further, the more and detailed evidence presented by counsel for the estate enhances his chance of winning. There is at least one case in the books, however, where they went too far. There, after putting in what appeared to be a strong case, counsel presented as a witness an architect who had recently drawn plans for a new house for the decedent to show, probably, an expectancy of many years of life ahead. Government counsel, in his cross-examination, took up the plans and asked, "What is this room?" "The living room." "And this room?" "The downstairs bedroom—you see Mr. Blank had a bad heart and could not climb stairs." Taxability sustained. End of case!

Gifts and transfers are rarely induced by a single undiluted motive.[35]

[35] See 1 PAUL § 6.06; dissenting opinion of Mr. Justice Stone in Heiner v. Donnan, 285 U.S. 312, 342–43 (1932).

Mixed motives induce the making of most gifts. There may be an ostensible motive as well as a real one. There may be several reasonable motives combined. Which is the impelling motive? Which is the most important factor in reaching a determination of this question in a given case? It is this: Is the motive one associated with continuing life or death?

Here are some factors to consider when confronted with a contemplation of death problem:

(1) *Motives associated with life.* In this classification are to be found wedding gifts, anniversary and Christmas gifts, and so on.[36]

(2) *The saving of income tax.* If avoidance of estate and inheritance tax is a motive associated with *death,* it would seem to follow, logically, that saving income tax is a motive associated with *life.* It is rather paradoxical that a desire to defeat one tax should result in the defeat of another, but this seems to be the rule, at least as to the federal estate tax.[37]

(3) *Settlement of litigated or unlitigated family disputes.* Here is a motive which appears associated with life. Moreover, there seems to be some element of compulsion present.[38]

(4) *Desire to escape further responsibility.* This motive seems to cut both ways. Why shift the burden if the transferor is in full vigor and looking forward to many productive years? On the other hand the transferor may have more than sufficient for his needs and entertain a desire that the donees should have the benefit of wealth in order to enhance their position in life, etc.[39]

(5) *Protection of property against the hazards of age and business.* Paul seems to think this motive is associated with continued life, but this seems to be another one of those touch and go motives, as indicated in the second sentence of (4) above.[40]

(6) *Long established gift making policy.* Generally evidence of this sort is helpful to the taxpayer, unless the transfers are so large as to indicate a parcelling out of the donor's capital.[41] Was only excess income being transferred or was the transferor's capital being gradually reduced? Moreover, there is no guaranty, despite a long line of gifts, that transfers which crowd too hard upon the date of death will escape taxation.

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[36] See 1 PAUL § 6.07; LOWNDES AND KRAMER, FEDERAL ESTATE AND GIFT TAXES 72 (1956) [hereinafter cited as LOWNDES AND KRAMER].

[37] See 1 PAUL § 6.08; LOWNDES AND KRAMER 73; Becker v. St. Louis Union Trust Co., 296 U.S. 48 (1935).

[38] See 1 PAUL § 6.09; LOWDNES AND KRAMER 72; Gillette's Estate v. Commissioner, 182 F.2d 1010 (9th Cir. 1950); Terhune v. Welch, 39 F. Supp. 430 (D.C. Mass. 1941).

[39] See 1 PAUL § 6.10; LOWNDES AND KRAMER 72; Georgiana M. Romberger, 21 B.T.A. 193 (1930).

[40] See 1 PAUL § 6.11; LOWNDES AND KRAMER 72; Colorado Nat'l Bank v. Commissioner, 305 U.S. 23 (1938).

[41] See 1 PAUL § 6.12; United States v. Wells, 283 U.S. 102 (1931).

(7) *Fulfillment of moral obligations.* One example would be a transfer to one child to equalize or balance prior transfers to another child. Under the federal law, this type of transfer might well escape taxability,[42] but under California law it is questionable. Was the transfer in the nature of a testamentary disposition?

(8) *Avoidance of estate and inheritance taxes.* Definitely a motive associated with death.[43]

(9) *Age of decedent.* This is purely evidential and, standing alone, in no sense determinative of the question.[44]

(10) *State of decedent's health.* This is an evidential consideration of greatest importance, although not conclusive. Bad health, incurable or progressive disease make for the contemplation of death.[45]

(11) *Time interval between transfer and death.* This is circumstantial. A short interval suggests taxability; a long interval would tend to have the opposite effect. In *Chambers v. Larronde,* the interval was eleven years. This factor is no longer of any great significance, since neither the federal government nor the state of California any longer attempt to tax transfers as being in contemplation of death if made more than three years prior to death.

(12) *Value proportion of the transfer to the decedent's entire estate at the same time.* No precise proportion can be stated, but the greater the proportion, the greater is the suggestion that the decedent was substituting a gift inter vivos for a testamentary disposition of his property. In the *Newman* case the transfers amounted to seventy-three per cent of the decedent's property. Transfers have been held taxable in California ranging from ten per cent of a decedent's estate, upward.

(13) *Gift part of a general testamentary scheme.* Transfers to the same persons named in the decedent's will and in the same proportions are especially vulnerable. These are clearly taxable in California.[46]

(14) *Contemporaneous transfer and execution of decedent's will.* Such a transfer is clearly taxable in the writer's opinion. A New Jersey case (which state applies the same rule as California) has so held.[47] A few years ago, in this connection, such a case arose in California. Counsel for the executor, an eminent practitioner, had delivered an address some months before at a State Bar convention in which he stated, in substance, that an attorney should never, *never* permit his client to execute a trust instrument

[42] United States v. Wells, 283 U.S. 102, 119 (1931).

[43] LOWNDES AND KRAMER 73–76; Vanderlip v. Commissioner, 155 F.2d 152 (2d Cir. 1946); *cf.* Allen v. Trust Co., 326 U.S. 630 (1946).

[44] LOWNDES AND KRAMER 78.

[45] *Ibid.*

[46] CAL. REV. & TAX. CODE §§ 13642, 13648.

[47] Hartford v. Martin, 122 N.J.L. 283, 4 A.2d 31 (1939).

or make a transfer on the day on which he executes his will. But, in this case, there it was—a lengthy will with detailed trust provisions and an irrevocable inter vivos trust executed the same day, with identical dispositive provisions. It appeared that the decedent had several years prior to his death made a division of his property, about one-half of which he put in the trust with himself as trustee but retaining no income. He retained the other one-half, and it was in his probate estate. The report was filed, followed by objections thereto. Here was an opportunity to secure a California decision akin to the New Jersey case referred to above. The objections were withdrawn, however, prior to going to trial.

Difficulty of Proof

To say that contemplation of death is difficult to prove is to indulge in an understatement. It is well nigh impossible! Mr. Justice Frankfurter once said that "the Devil himself . . . knoweth not the mind of man."[48] The taxing authorities know only what the decedent did, but not why he did it. They are apprised of his acts, but not his motives. Whatever evidence there is is in possession of the family. Accordingly, while the taxing authorities must rely upon circumstantial evidence, the family is in a position to introduce all manner of trivia and they do so. The witnesses testify that the decedent was of kind and generous disposition; that despite his ninety years he had a full head of hair and none of it was gray; that he looked twenty years younger than his age and acted forty years younger, and so on, ad nauseam.

Is it any wonder that statisticians tell us that the federal government is successful in only five per cent of its contemplation of death cases and that the California record of success in the last ten years, in contested cases, may be even lower?

Suggestions and Recommendations

What is the remedy? Contemplation of death provisions were inserted in death tax statutes to prevent transfers before death so as to put the property beyond the reach of the statutes. Such statutory provisions were intended to reach substitutes for testamentary disposition and thus prevent evasions of the death tax. In the large majority of cases, the contemplation of death provisions have failed to accomplish what was intended. When the contemplation of death provision was found inadequate to cope with the resourcefulness of taxpayers and their counsel the legislatures resorted to the conclusive presumption. When the Supreme Court held the conclusive presumptions unconstitutional, the gift tax law was enacted. Learned writers now doubt whether *Schlesinger v. Wisconsin* and *Heiner v. Donnan* were, in

[48] FRANKFURTER, LAW AND POLITICS, 55 (1939).

reality, victories for the taxpayers, and now seem to believe that the Supreme Court would overrule these cases if the question were again to be presented.[49] The rebuttable presumption in the federal law and in the law of many states has also proved inadequate.

From the loss of revenue aspect alone the problem appears serious enough to justify, in nearly all jurisdictions, statutory revision. In addition to the second try at a conclusive presumption two proposals have been made which merit serious consideration. These are:

(1) A direct statutory enactment providing for inclusion in the gross estate of a decedent any and all transfers made within a specified period prior to his death.[50] England has had just such a provision in its death duties for many years.

(2) A complete integration of gift and death taxes under a single transfer tax. Under such a law there would be annual exemptions applicable to inter vivos gifts and a single specific exemption for the transferor which might be exhausted wholly or in part during life, and the balance, if any, applied to the estate. All transfers would be aggregated, thus bringing the last transfers into the higher brackets.[51]

Of the two the first is the more simple and the second the more comprehensive and complete. The second might well solve the problem for all time.

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[49] 1 PAUL § 6.26; BRUTON AND BRADLEY, CASES ON FEDERAL TAXATION, 654–55 (1955); WARREN AND SURREY, FEDERAL ESTATE AND GIFT TAXATION, CASES AND MATERIALS, 234-35 (1956).

[50] Lowndes, *Current Constitutional Problems in Federal Taxation*, 4 VAND. L. REV. 469, 488–90 (1951).

[51] See FEDERAL ESTATE AND GIFT TAXES: A PROPOSAL FOR INTEGRATION AND FOR CORRELATION WITH THE INCOME TAX, Joint Study by Advisory Committee to the Treasury Department and by Office of the Tax Legislative Counsel, 14–17 (1947).