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Taxation - Internal Revenue - Transfers Made in Contemplation of Death

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It is submitted that the true test should be simply the fact of the contractor's negligence as a cause of the injury; certainly, a requirement of privity should not be the *sine qua non* of a successful suit where it can be shown that the plaintiff's harm has resulted directly from the defendant's negligent construction. The instant case is representative of those cases which still nominally adhere to the old rule but circumvent that rule by superficially applying an exception theoretically similar to the *MacPherson* doctrine.

MAURICE R. HUNKE

TAXATION—INTERNAL REVENUE—TRANSFERS MADE IN CONTEMPLATION OF DEATH—Within three years preceding his death, decedent transferred residential property and cash to four of his six children to enable each of them to purchase a home. The court felt that the important and moving cause behind the transfers to his children was the decedent's desire to meet their present needs. The United States District Court, *held* that the transfers to the children were not made in contemplation of death. *In re Boyd,* 192 F. Supp. 242 (E.D. Ky. 1961).

Gifts apparently made as a substitute for testamentary dispositions are held to be made in contemplation of death.[1]

The legal definition of a transfer made in contemplation of death is set out in *The United States Code*[2] as follows: "If the decedent within a period of three years ending with the date of his death transferred an interest in property . . . such transfer shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . ." When the transferror dies within three years from the time of such transfer, the burden of proving that such transfer was not made in contemplation of death is then upon the taxpayer.[3] The reasoning employed by the courts is that the thought of death is the impelling cause of the transfer[4] and is not limited to it being imminent.[5]

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ty of one who as manufacturer or independent contractor makes a chattel for the use of others."

19. 2 HARPER AND JAMES, TORTS § 28.10 (1956); PROSSER, TORTS § 85 (2d. ed. 1955).

1. **In re** Wadsworth's Estate, 92 Mont. 135, 11 P.2d 788 (1932).
2. 26 U.S.C. §2035(b) (I.R.C. 1954).
3. McGrew's v. Commissioner, 135 F.2d 158 (6th Cir. 1943).
4. Greer v. Glenn, 64 F. Supp. 1002, (E.D. Ky. 1946). **In re** Mann's Estate, 219 Iowa 597, 258 N.W. 904 (1935).
5. **In re** Adam's Estate, 39 Cal. 2d 309, 246 P.2d 625 (1952).

The adjudication of a "contemplation of death" case must be resolved from the facts peculiar to each case. In determining whether the donor's motives were in contemplation of death, the courts have considered and weighed most heavily the following four elements:

(1) The donor's state of mind,[6] *e.g.*, the court held that a 77 year old, in a cheerful and optimistic mood, in good health and had been leading an active life, had not made a gift, which was one of a long series, in contemplation of death.[7] Conversely, when the facts were that the donor *knew* he was seriously ill at the time of the transfer it was held to have been made within the purview of the statute.[8]

(2) The value of the gift.[9] Naturally, transfers of large portions of the estate never escape the scrutiny of the courts in their determination of gifts made in contemplation of death. But even when the proportion of the gift to the size of the estate is small, it may still be taxed, *e.g.*, the deceased made a gift to his wife of $23,000 out of a $2,000,000 estate and it was held to be a material part of the estate and therefore taxable.[10]

(3) The donor's age and condition of health,[11] *e.g.*, the court held that a 72 year old donor in poor health had made gifts in contemplation of death.[12] But, as may be seen in (1) above, age does not play an important part unless it is coupled with the elements of the condition of the donor's health or state of mind.

(4) Whether the donor's motive in making the gift was intended as a distribution of the estate or as an act of generosity. If the former is intended, it is a substitute for testamentary disposition and therefore a gift in contemplation of death.[13]

If the motive is a desire for the donee to have present use,[14] or to obtain some object desirable to him during his life it is

6. United States v. Wells, 283 U.S. 102 (1931).
7. Estate of Cyrus M. Beachy, 15 T.C. 136 (1950).
8. Mossberg, v. McLaughlin, 125 Conn. 680, 7 A.2d 910 (1939).
9. Chase's Ex'x v. Commonwealth, 284 Ky. 471, 145 S.W.2d 58 (1940).
10. **In re** Stephenson's Estate, 171 Wis. 452, 177 N.W. 579 (1920).
11. Chase's Ex'x v. Commonwealth, 284 Ky. 471, 145 S.W.2d 58 (1940).
12. **Ibid.**
13. Tax Commissioner of Ohio v. Parker, 117 Ohio St. 215, 158 N.E. 89 (1927).
14. **In re** Newman's Estate, 52 Cal. App. 2d 126, 125 P.2d 908 (1942). (The deceased wanted his wife to continue in some business in which she could use her artistic talents and knowledge of interior decoration).

not declared taxable.[15] Further, a transfer of property made in order to be relieved of responsibilities,[16] afford others experience in bearing them,[17] or to have children independently established[18] are transfers associated with life and are not taxable.[19]

The contemplation of death statute in North Dakota[20] is similar to the federal statute with the only exception a stipulation of two years prior to death rather than the federal three year requirement.

DARRELL T. O'CONNELL

WITNESSES—COMPETENCY—ACTS OF HUSBAND AND WIFE AS PRIVILEGED COMMUNICATIONS—The defendant was convicted of grand larceny in the second degree. He and three accomplices had stolen a number of guns, thereafter returning to the kitchen of the defendant's home. The defendant's wife unexpectedly entered the kitchen and saw the defendant and his companions with the stolen guns. The trial court allowed her to testify concerning this observation. On appeal the Court of Appeals *held,* three justices dissenting, that although an act may constitute a privileged communication under New York statute,[1] such act must be induced by absolute confidence in the marital relationship, and the communication must be intended to be confidential. The dissent argued that all knowledge derived by reason of the marital relationship was privileged. *People v. Melski,* 176 N.E. 2d. 81 (N. Y. 1961).

Because the public interest demands that courts have access to all pertinent facts in deciding the truth of a litigated issue, the policy of unrestricted inquiry is seldom curtailed.[2]

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15. United States v. Wells, 283 U.S. 102 (1931) (Decedent gave his children substantial sums of money during his lifetime so that he could advise them as to its proper use).
16. Estate of Anna Scott Farnum, 14 T.C. 884 (1950) (Decedent wanted to protect her property from loss by speculation and consequently had a trust indenture drawn up so the principal would be beyond her reach).
17. United States v. Wells, 283 U.S. 102, 118 (1931).
18. Commissioner of Internal Rev. v. Colorado Nat. Bank, 95 F.2d 160, 163 (10th Cir. 1938) (Decedent desired to make the transfer so that his daughter and her children would be provided for whatever might happen to his own financial affairs).
19. Mossberg v. McLaughlin, 125 Conn. 680, 7 A.2d 910 (1939).
20. N.D. Cent. Code §57-37-04 (1961).

1. N.Y. Penal Law § 2445, **Husband or wife as witness.**—The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage."
2. See McMann v. Securities Exchange Comm., 87 F.2d 377 (2d Cir. 1937); Mooney v. New York County, 269 N.Y. 291, 199 N.E. 145 (1936).