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Traditionally, three requirements must be satisfied in order to make a valid inter vivos gift of personal property: (1) the donor must demonstrate his intention to make such a gift; (2) there must be a delivery to the donee of the property itself or of an instrument or deed of gift; and (3) the donee must accept this delivery.[1] If the subject matter of the gift is not susceptible of immediate delivery, a question arises as to the means by which the delivery requirement may be satisfied. Although a donor in such a situation commonly delivers an informal writing which reflects or confirms his intention to make the gift, the courts have been widely split on the issue of whether such delivery should be accepted as a substitute for delivery of the subject matter of the gift.[2] Two recent cases illustrate this divergence of opinion.

In *Lewis v. Burke*,[3] the alleged donor, prior to her death, addressed a letter to one George Lewis indicating her intention to make him a gift of all of her household furnishings. The letter stated that the furnishings are "yours now and you take them whenever you want to."[4] Thereafter a few pieces of furniture were transferred to Lewis' home, although the major portion of the furnishings remained with the decedent until her death. Lewis subsequently filed a petition against the estate of the decedent, claiming ownership of the household furnishings by virtue of the alleged inter vivos gift. The Indiana Appellate Court, in affirming a judgment against the alleged donee, held that the gift was incomplete for lack of delivery;[5] the delivered writing was found to give nothing to the intended donee.[6]

The court's decision was consistent with precedent,[7] but inconsistent with the obvious intention of the would-be donor. The result seems needlessly harsh in light of the approach taken recently by a Connecticut court. In *Hebrew University Association v. Nye*,[8] the plaintiffs brought an action against the trustees of a foundation cre-

1. See, *e.g.*, *In re* Scherzinger's Estate, 272 App. Div. 722, 74 N.Y.S.2d 756 (1947); *In re* Albert's Will, 68 N.Y.S.2d 539 (Surr. Ct. 1947); Tabor v. Tabor, 73 R.I. 491, 57 A.2d 735 (1948); BROWN, PERSONAL PROPERTY 84 (2d ed. 1955).

2. *Compare In re* Harlow's Estate, 239 Mo. App. 607, 192 S.W.2d 5 (1945) *and* Reynolds v. Maust, 142 Pa. Super. 109, 15 A.2d 853 (1940), *with* DeMouy v. Jepson, 255 Ala. 337, 51 So. 2d 506 (1951) *and* Bank of Manhattan Trust Co. v. Gray, 53 R.I. 377, 166 Atl. 817 (1933).

3. 214 N.E.2d 186 (Ind. App. 1966).

4. *Id.* at 187.

5. *Id.* at 189.

6. *Id.* at 188. The court mentioned that delivery of informal memoranda may be appropriate in "special situations," such as gifts involving real property or choses in action, but found no such "special situations" to exist in the present case.

7. See, *e.g.*, Kraus v. Kraus, 235 Ind. 325, 132 N.E.2d 608 (1956); Bulen v. Pendleton Co., 118 Ind. App. 217, 78 N.E.2d 449 (1948).

8. 26 Conn. Supp. 342, 223 A.2d 397 (Super. Ct. 1966). Additional facts may be found in the report of the first trial in 148 Conn. 223, 169 A.2d 641 (1961).

ated by the decedent's will, seeking to have the university declared the legal and equitable owner of decedent's library of rare books and manuscripts. The decedent, prior to her death, had stated orally that she was making a gift of her library to the university.[9] Subsequent to this and several similar declarations, the decedent delivered to the university a memorandum listing the contents of the library, although she did not transfer possession of the books themselves. The court held that the decedent's conduct demonstrated an intention to "give and to divest herself of any ownership of the library,"[10] and that this was sufficient to constitute an inter vivos gift. In arriving at this decision, the court noted the general rule that the subject matter of the gift must actually be delivered in order to constitute a completed gift, but concluded that, where the property does not readily admit of immediate delivery, a constructive or symbolic delivery is sufficient. Without clearly defining symbolic or constructive delivery, the court stated that "the donor must do that which, under the circumstances, will in reason be equivalent to an actual delivery . . . if manual delivery is impractical or inconvenient."[11] It was the court's opinion that the decedent's library was not susceptible of immediate transfer and consequently that the donor's oral pronouncement that a gift was made and her delivery of the written memorandum to the university constituted an adequate substitute for delivery of the library itself. Since there would appear to be no significant difference with respect to ease of delivery between the contents of a rare book library and the furnishings in a house, the holding in *Nye* seems to be directly contrary to the holding in *Lewis*, and the former decision, upholding the validity of the gift, seems to be the better view.[12] Nevertheless, the lack of clarity surrounding the notions of "constructive" and "symbolic" delivery suggests that there is need of a sounder conceptual framework for analysis.

Generally, when courts have accepted delivery of a written memorandum as a valid substitute for delivery of the gift property itself, the rationale, as in *Nye*, has been that the writing constitutes either a symbolic or a constructive delivery.[13] Symbolic delivery has been defined as the transference of some symbol of the gift, such as a minia-

9. The university was located overseas but the court did not think this to be of relevance to its holding that physical delivery was impracticable.

10. 26 Conn. Supp. 342, 345, 223 A.2d 397, 399 (Super. Ct. 1966).

11. *Id.* at 344, 223 A.2d at 399.

12. Mechem considered delivery of a writing to be a valid substitute for actual delivery. Mechem, *The Requirements of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 586 (1926).

13. See, *e.g.*, Binnell v. Iverson, 147 Colo. 552, 364 P.2d 385 (1961); Kintzinger v. Millin, 254 Iowa 173, 117 N.W.2d 68 (1962); Hudson v. Tucker, 188 Kan. 202, 361 P.2d 878 (1961); Balfour's Estate v. Seitz, 392 Pa. 300, 140 A.2d 441 (1958); Smith v. Johnson, 223 S.C. 64, 74 S.E.2d 419 (1953).

ture replica, to the donee.[14] Constructive delivery, on the other hand, has been said to refer to the transference of some object which gives to the donee physical access or control over the subject of the intended gift.[15] A delivered written memorandum bears slight resemblance to constructive delivery since it does not provide access to the gift property. Admittedly, it may bear closer relation to symbolic delivery, although it clearly does not act as a symbol of the property in the same manner as does a miniature replica. The courts, in an effort to validate such gifts, have generally classified these informal writings as fitting into either one or the other category without taking notice of the formal definitions.[16] Since neither definition applies satisfactorily to the delivery of an informal written memorandum, confusion is certain to continue.

It is possible to justify upholding such gifts without torturing inappropriate concepts. The requirement of a manual delivery of the subject of a gift has often been said to serve three functions: (1) it makes the donor unequivocally aware of the significance of the act he is performing; (2) it makes clear to any third party the nature of the act performed; and (3) it gives the donee presumptive evidence of his claim to the property.[17] The delivery of a written document also would seem to fulfill these purposes. The donor's act of writing out his intention to make a gift and his subsequent transfer of this writing should be sufficient to impress upon him the finality of his decision. Furthermore, possession of the memorandum by the donee should constitute at least some evidence of his rights in the gift property.

Given this justification, there appear to be two sound approaches for effectuating a donor's written intention to make a gift when the subject of the gift is not susceptible of delivery. One possible solution is a formal judicial recognition that state statutes abolishing the requirement of a seal have, in effect, raised informal writings to the position formerly accorded sealed instruments. It was almost universally held that the transference of a sealed deed of gift constituted a valid delivery[18] and therefore it is arguable that an unsealed instru-

14. See, *e.g.*, Coleman v. Parker, 114 Mass. 30 (1873); Newman v. Bost, 122 N.C. 524, 29 S.E. 848 (1898); Lavender v. Pritchard, 3 N.C. 337 (1805).

15. Se *In re* Reist's Estate, 158 Pa. Super. 281, 44 A.2d 847 (1945); Smith v. Johnson, 223 S.C. 64, 74 S.E.2d 419 (1953); Collins v. McCanless, 179 Tenn. 656, 169 S.W.2d 850 (1943); *In re* Gallinger's Estate, 31 Wash. 2d 823, 199 P.2d 575 (1948).

16. See cases cited note 14 *supra*. In a leading New York case, the court allowed a writing to effectuate an inter vivos gift, but the court termed the writing variously as an "instrument of gift," "a good symbolical delivery," or "a good constructive or symbolic delivery." Matter of Cohn, 187 App. Div. 392, 176 N.Y.S. 225 (1919). For other illustrations of the problems inherent in defining the legal impact of delivered writing, see 45 KY. L.J. 160 (1956).

17. 1 AIGLER, SMITH & TEFFT, PROPERTY 226 (1960); BROWN, PERSONAL PROPERTY 86 (2d ed. 1955); Mechem, *supra* note 12, at 348.

18. See, *e.g.*, McRae v. Pegues, 4 Ala. 158 (1842); Wyche v. Greene, 11 Ga. 159 (1852);

ment should have the same effect in states that have abolished the requirement of a seal. This issue seems never to have been litigated, although a literal reading of many of these statutes seems to support such a judicial recognition.[19] The Indiana statute, for example, states explicitly that an unsealed writing will have the "same force and effect that it would have if sealed,"[20] and, therefore, the courts in that state seem to have a clear statutory basis for allowing the delivery of informal unsealed writings to pass valid inter vivos gifts of personal property.

A second and perhaps better solution would be for the states to enact a statute permitting the transference of informal memoranda to satisfy the delivery requirement. To date, six states have adopted such statutes.[21] Typical of these is the West Virginia statute which prescribes that, regardless of the circumstances, delivery of an informal writing is to be an alternative to delivery of the gift property.[22] A federal court in applying this statute held that a letter delivered to a donee stating the donor's intention to make a gift of certain bonds was a valid gift even though the donor did not deliver the bonds and later denied ever having intended to do so.[23] Since such an application of the statute raises the spectre of fraud, it might be desirable to build in a procedural safeguard. The burden of proof could be placed on the alleged donee to explain not only the circumstances surrounding the gift itself, but also the reason that the gift was not delivered. Thus, the courts could raise a rebuttable presumption against the validity of any present gift that was actually suitable for delivery. Coupling this presumption with a requirement that the writing demonstrate on its face the intention of the donor to make a gift should provide the courts with an adequate safeguard against fraud.

Curriden v. Chandler, 79 N.H. 269, 108 Atl. 296 (1919); Garrison v. Spencer, 58 Okla. 442, 160 Pac. 493 (1916).

19. See, *e.g.*, FLA. STAT. ANN. § 52.08 (1941); IND. STAT. ANN. § 2-1601 (1933); MINN. STAT. ANN. § 358.01 (1957); MO. ANN. STAT. § 431.010 (1949); TENN. CODE ANN. § 47-15-101 (1955); WYO. STAT. ANN. § 34-57 (1957).

20. The statute provides that "there shall be no difference in evidence between sealed and unsealed writings; and every writing not sealed shall have the same force and effect that it would have if sealed. A writing under seal, except conveyances of real estate, or any interest therein, may, therefore, be changed, or altogether discharged, by a writing not under seal." IND. STAT. ANN. § 2-1601 (repl. vol. 1946).

21. ARIZ. REV. STAT. ANN. § 33-601 (1956); CALIF. CIV. CODE § 1147 (1954); MONT. REV. CODES ANN. § 67-1707 (repl. vol. 1962); N.D. CENT. CODE § 47-11-07 (1960); TEX. REV. CIV. STAT. ANN. art. 3998 (1945); W. VA. CODE ANN. § 36-1-5 (1966).

22. The section of the statute relating to delivery of a writing provides, *inter alia*, that "no gift of any goods or chattels shall be valid unless made by writing, signed by the donor or his agent, or by will . . . . No seal shall be necessary to give validity to a gift of goods or chattels by writing, as hereinbefore provided." W. VA. CODE ANN. § 36-1-5 (1966).

23. Smith v. Smith, 253 F.2d 614 (4th Cir. 1958).