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Personal Property - Gifts - Delivery to Third Party

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PERSONAL PROPERTY—GIFTS—DELIVERY TO THIRD PARTY—A husband changed the beneficiary of his life insurance policy from his wife to his mother during a temporary separation and failed to restore his wife as beneficiary after reconciliation. Subsequent to his death the mother, in the presence of the wife, signed a memorandum "waiving" her policy rights "to" the wife and handed the writing to the insurer's district manager. Before payment of the proceeds the mother discovered that the wife was the beneficiary of another policy and attempted to revoke the memorandum. In insurer's interpleader action, a gift to the wife was recognized. On appeal, *held,* affirmed. The memorandum signified the mother's rights, indicated her donative intent, and was delivered to the district manager as the representative of the wife. *Smith v. Smith,* (Mo. App. 1958) 313 S.W. (2d) 753.

The rights of a life insurance beneficiary are fixed at the insured's death[1] and constitute a chose in action[2] which may be the subject of a gift.[3] A valid gift requires, in addition to present donative intent, delivery

[1] VANCE, INSURANCE, 3d ed., §108, p. 680 (1951).
[2] Washington Central Bank v. Hume, 128 U.S. 195 (1888).
[3] BROWN, PERSONAL PROPERTY, 2d ed., §58, p. 183 (1955).

of the subject matter.[4] The purpose of the delivery requirement is to impress the donor with the finality of his act and to provide objective evidence of donative intent which will demonstrate to other parties and facilitate proof by the donee that a gift has been made.[5]

Delivery to a third party accomplishes the desired purposes and completes the gift only if the intermediary is not said to represent the donor.[6] Where the status of the third party is not apparent,[7] several cases have resolved the issue by applying some form of presumption as to representation.[8] More often various factors surrounding the delivery are examined. First, the clarity of present donative intent is investigated. Where evidence of intent is strong, as in the principal case, the courts are reluctant to defeat that intent by holding that the intermediary in fact represented the donor.[9] Second, a stronger case for validity is presented where, as in the instant situation, the donee knew of the delivery to the third party. This knowledge is closely related to the existence of present donative intent.[10] But, more important, such knowledge makes possible an otherwise unavailable agency analysis to explain the validity of the

4 Id., §48, p. 129.

5 See Mechem, "The Requirement of Delivery," 21 ILL. L. REV. 341, 457, 568 (1926-1927). Physical transfer of the res, the clearest act of delivery, is impossible where the subject of the gift is intangible. Consequently, transfer of a document symbolizing the rights of the donor completes the gift. Such documents include stock certificates, bonds, notes, bank books, insurance policies, etc. See BROWN, PERSONAL PROPERTY, 2d ed., §60, p. 194 (1955). Symbolic delivery is usually limited to documents commercially regarded as evidencing the rights of the donor. In the setting of the principal case, such a document would be the insurance policy, which was already in the hands of the donee. Thus, delivery of the memorandum constituted the best delivery possible under the circumstances. See Otis v. Beckwith, 49 Ill. 121 (1868); Matter of Babcock, 147 N.Y.S. 168, 85 Misc. 256 (1914); Dinslage v. Stratman, 105 Neb. 274, 180 N.W. 81 (1920). Alternatively the memorandum could be regarded as a deed of gift, despite its informality. See Matter of Cohn, 176 N.Y.S. 225, 187 App. Div. 392 (1919); Ellis v. Secor, 31 Mich. 185 (1875); Francoeur v. Beatty, 170 Cal. 740, 151 P. 123 (1915); 21 ILL. L. REV. 576-586 (1927).

6 See Matter of Rainbow, 298 N.Y.S. 79, 163 Misc. 732 (1936); Dodson v. National Title Ins. Co., 159 Fla. 371, 31 S. (2d) 402 (1947). The purpose of delivery is not accomplished by delivery to the donor's representative: the donor is not impressed with the finality of his act because the present holder of the res is subject to his control; the only evidence of donative intent supports a gift to a party other than the donee; and the donee has nothing to substantiate his claim.

7 Compare Baugh v. Howze, 211 Ark. 222, 199 S.W. (2d) 940 (1947) with Ammon v. Martin, 59 Ark. 191, 26 S.W. 826 (1894). Also see Szabo v. Speckman, 73 Fla. 374, 74 S. 411 (1917).

8 Presuming the third party represents the donee: Kennedy v. Nelson, 125 Neb. 185, 249 N.W. 546 (1933); Mollison v. Rittgers, 140 Iowa 365, 118 N.W. 512 (1908). Presuming the third party represents the donor: Chicago Bank v. Cohn, 197 Ill. App. 326 (1916); Clapper v. Frederick, 199 Pa. 609, 49 A. 218 (1901).

9 See In re Weingart's Estate, (Mo. App. 1943) 170 S.W. (2d) 972; Phillips v. Plastridge, 107 Vt. 267, 179 A. 157 (1935). Compare Horlocker v. Saunders, 59 Ohio App. 548, 18 N.E. (2d) 994 (1938); Foulke v. Hickman, (Mo. App. 1924) 259 S.W. 496.

10 If the donee does not know of the delivery, immediate enjoyment is unlikely and doubt is cast upon the present intention of the donor.

delivery to the intermediary.[11] Third, the reason for delivery to the third party rather than the more conventional delivery directly to the donee merits consideration.[12] In the principal case, anything given to the donee[13] would have been immediately handed to the district manager for communication to the insurance company. Fourth, subsequent actions of the third party in response to attempted direction by the donor or the donee help to determine his status at the time of delivery.[14] The fact that the manager accepted the revocation as readily as the waiver and that the insurance company thereupon filed a bill of interpleader rather than pay the proceeds either to the donee or to the donor points neither to donative intent nor its absence. Fifth, the status of the intermediary in other transactions with the donor or the donee may shed light upon his status in the delivery transaction.[15] In the instant case, the absence of any prior relationship between the intermediary and either party made this consideration of no value to the court. Finally, the disposition of the res if the gift is held defective may assist the court in determining the status of the third party on an ad hoc basis.[16] The result reached in

11 The agency status of the third party is unique and not expected to conform to the general law of agency. However, the donee must know the third party exists and possesses the res if the third party is to be regarded as the donee's agent. Where this knowledge exists, a valid delivery may be found on the familiar principle that possession of an agent is possession of the principal. Larkin v. McCabe, 211 Minn. 11, 299 N.W. 649 (1941); In re Fitzpatrick's Estate, 17 N.Y.S. (2d) 280 (1940). Excluding the possibilities of contract novation or third-party beneficiary analysis the only explanation for valid delivery where knowledge is absent is that the third party holds as trustee for the donee. Scoville v. Vail Investment Co., 55 Ariz. 486, 103 P. (2d) 662 (1940); Streeper v. Meyers, 132 Ohio St. 332, 7 N.E. (2d) 554 (1937). The courts are understandably reluctant to apply such a theory since the layman seldom thinks in trust terms. Therefore where the donee has no knowledge of the delivery to the third party, there is a tendency to hold the gift incomplete. Matter of Lafler, 1 App. Div. (2d) 84, 147 N.Y.S. (2d) 211 (1955); Crowell v. Milligan, 157 Neb. 127, 59 N.W. (2d) 346 (1953).

12 If the donor had a testamentary purpose in delivering to a third party the gift is invalid. In re Estate of Wright, 304 Ill. App. 87, 25 N.E. (2d) 909 (1940). Three common explanations for failure to deliver to the donee are (1) gift of part of a larger whole, Bond v. Bunting, 78 Pa. 210 (1875); (2) minor donee, In re Golos' Will, 64 N.Y.S. (2d) 625 (1946); Martin v. McCullough, 136 Ind. 331, 34 N.E. 819 (1893); (3) absent donee, Foster v. Rose, (Okla. 1951) 238 P. (2d) 332; Crystal v. Joerg, 16 N.J. Super. 514, 85 A. (2d) 218 (1951). Without some explanation the gift is likely to be held incomplete. Rinehart v. Rinehart, 14 Ill. App. (2d) 116, 143 N.E. (2d) 398 (1957); In re Adams' Estate, 58 N.Y.S. (2d) 899 (1945); Merchant v. German Bldg. and Loan Co., 1 Ohio App. 47 (1913).

13 The donee was already in possession of the policy.

14 See Cox v. Windham, (Tex. Civ. App. 1928) 10 S.W. (2d) 136 (third party accepts donee's direction, gift good); Chandler v. Roddy, 163 Tenn. 338, 43 S.W. (2d) 397 (1931) (third party accepts donor's direction, gift ineffective).

15 See Sauls v. Whitman, 171 Okla. 113, 42 P. (2d) 275 (1935) (prior agent of donor, delivery ineffective); Matter of Rainbow, note 6 supra (delivery to donor's attorney bad); In re Will of Gordon, 238 Iowa 580, 27 N.W. (2d) 900 (1947) (third party also donee, delivery good).

16 See In re Fetzer's Estate, (Ohio App. 1940) 34 N.E. (2d) 306 (unequal distribution to children if gift invalid, equal distribution if valid, gift held effective); Gordon v. Clark, 149 Ark. 173, 232 S.W. 19 (1921) (no other disposition of property, gift held valid).

this case gives the insurance proceeds to the original beneficiary, the widow, in a situation where it is inferable that this was the probable intention of the donor.

It should be clear, then, that the status of the third party becomes important only as a useful tool in determining whether the purposes of the delivery requirement have been satisfied. This ultimate question is best resolved through consideration of all the factors surrounding the delivery. An examination of these factors in the principal case indicates that there was conduct sufficient to establish donative intent and impress the donor with the finality of her act.

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