Michigan Law Review

Volume 54 | Issue 4

1956

Personal Property - Gifts Causa Mortis - Effect of Informal Writing Where There is No Actual Delivery

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PERSONAL PROPERTY—GIFTS CAUSA MORTIS—EFFECT OF INFORMAL WRITING WHERE THERE IS NO ACTUAL DELIVERY—Prior to entering the hospital to undergo a serious operation, the decedent wrote an informal note to her husband telling him where he would find some money, a bank passbook, and a building and loan association stock book, which were hidden in their home. The note stated that this property was his. While the wife was under ether on the operating table, her husband found the note, after being directed to its location by a friend of the wife, and took possession of the items referred to. The wife did not recover consciousness and subsequently died. In an action by the personal representatives of the decedent to recover possession of the property, the trial court found that there was not sufficient delivery to perfect a gift causa mortis. The appellate division of the Superior Court reversed.[1] On certification[2] to the Supreme Court of New Jersey, *held,* reversed, three justices dissenting. An informal writing does not satisfy the separate and distinct requirement of delivery for a gift causa mortis. *Foster v. Reiss,* 18 N.J. 41, 112 A. (2d) 553 (1955).

Although the courts often state that complete physical delivery is necessary to make a valid gift, they have recognized a number of situations where this requirement is modified.[3] One such situation is where the donor

1 31 N.J. Super. 496, 107 A. (2d) 24 (1954).

2 16 N.J. 221, 108 A. (2d) 211 (1954).

3 See Mechem, "The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments," 21 ILL. L. REV. 341 (1926).

has executed a written instrument—though there is dissension as to what kind of instrument is necessary. Despite authority to the effect that the requirement of delivery is the same for inter vivos and causa mortis gifts,[4] a distinction is often drawn when a written instrument is offered as a substitute for actual delivery. There is vast authority to support an inter vivos gift based on a deed or sealed instrument.[5] In like manner, a number of cases have given effect to a formal instrument which is not a deed or under seal.[6] The informal letter, note, or memorandum is not so graced; the traditional rule is that it alone, even when delivered, will not perfect an inter vivos gift.[7] More recently, however, there seems to be a tendency for some relaxation of this rule.[8] Because they are regarded as evasions of the statutes of wills, gifts causa mortis seem to be treated as particularly obnoxious when they are based on a writing that does not satisfy the formalities of that statute.[9] Accordingly, it is the law in some jurisdictions that not even a deed or sealed instrument can perfect the gift, absent manual delivery.[10] However, these authorities appear to be in the distinct minority.[11] The usual rule for formal instruments that are not deeds or sealed instruments and for informal letters and notes is that they will not perfect a causa mortis gift that has not been manually delivered, although they may have some relevance in establishing donative intent.[12] Also of importance, for both inter vivos and causa mortis gifts, are the theories adopted by the courts in giving legal effect to a written instrument. Deeds and sealed instruments have been supported on a theory of estoppel.[13]

4 Wilson v. Wilson, 151 Tenn. 486, 267 S.W. 364 (1924).

5 Tarbox v. Grant, 56 N.J. Eq. (11 Dick.) 199, 39 A. 378 (1898). See Irons v. Smallpiece, 2 B. & Ald. 550, 106 Eng. Rep. 467 (1819); 63 A.L.R. 537 at 539 (1929).

6 Slyvain v. Page, 84 Mont. 424, 276 P. 16 (1929); 63 A.L.R. 528 (1929) (formal bill of sale); Jackman v. Jackman, 271 Mich. 585, 260 N.W. 769 (1935) (formal assignment). This result has been attributed to the statutory abolition of the seal. See Roberts, "The Necessity of Delivery in Making Gifts," 32 W. VA. L. Q. 313 (1926).

7 See 63 A.L.R. 537 at 550 (1929).

8 See In re Roosevelt's Will, 190 Misc. 341, 73 N.Y.S. (2d) 821 (1947); Matter of Cohn, 187 App. Div. 392, 176 N.Y.S. 225 (1919); Francoeur v. Beatty, 170 Cal. 740, 151 P. 123 (1915); Cal. Civ. Code Ann. (Deering, 1949) §1147. See also Roberts, "The Necessity of Delivery in Making Gifts," 32 W. VA. L. Q. 313 (1926).

9 This point was made in the principal case at 53.

10 Gidden v. Gidden, 176 Miss. 98, 167 S. 785 (1936); Smith v. Downey, 38 N.C. 268 (1844). See also Knight v. Tripp, 121 Cal. 674, 54 P. 267 (1898).

11 For the majority view upholding the gift, see, e.g.: Meyers v. Meyers, 99 N.J. Eq. 560, 134 A. 95 (1926); Powell v. Leonard, 9 Fla. 359 (1861).

12 In re Hughes, 59 L.T.R. (n.s.) 586 (1888). See also Yates v. Dundas, 80 Cal. App. (2d) 468, 182 P. (2d) 305 (1947); Knight v. Tripp, note 10 supra; 63 A.L.R. 537 at 555 (1929). *Contra:* Baskett v. Hassell, 107 U.S. 602, 2 S.Ct. 415 (1882); Goldsworthy v. Johnson, 45 Nev. 355, 204 P. 505 (1922); Smith v. Acorn, (D.C. Mun. App. 1943) 32 A. (2d) 252. See also Ellis v. Secor, 31 Mich. 185 (1875).

13 Tarbox v. Grant, note 5 supra. See also Connor v. Trawick's Admr., 37 Ala. 289 (1861).

A few courts have given effect to such instruments on the basis that the instrument operates *proprio vigore* (by its own force) to vest the title in the donee,[14] while the majority of the courts are of the opinion that the deed operates as a symbolic delivery to complete the gift.[15] Where the instrument is informal (a note or letter) and the court is willing to let it plug the gap left by lack of manual delivery, it will invariably do so on this latter ground, symbolic delivery.[16] The symbolic delivery concept, however, is subject to several limitations. It has been held, for example, that symbolic delivery can be perfected only by delivery of the writing,[17] that it is permitted only where manual delivery is impossible or impractical,[18] and that the writing must be such that by its terms it controls the fund it represents,[19] an obvious legal barrier in the case of an informal note. While the theory that the writing operates *proprio vigore* to perfect the gift would seem to offer the courts a sounder basis for permitting such a gift to stand, the cases have not adopted that theory for informal writings. The facts of the principal case are unique in this respect. The Supreme Court could not have affirmed the appellate division without implicitly adopting the *proprio vigore* theory. The gift could not have been supported on the basis of symbolic delivery because the writing in question was not delivered to the husband while the wife still had legal capacity.[20] The traditional policies underlying the mechanical and formalistic rules that comprise the delivery requirement for gifts causa mortis have been the prevention of fraud and the restriction of transfers that circumvent the statutes of wills. Admitting that both of these policies are worthy, their applicability to cases where there is both an admitted absence of fraud and an unequivocal expression of donative intent is to be doubted.

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[14] E.g., Jaggers v. Estes, 3 Strob. (S.C. Eq.) 379 (1849).

[15] E.g., Meyers v. Meyers, note 11 supra.

[16] Goldsworthy v. Johnson, note 12 supra; Matter of Cohn, note 8 supra; Stephenson's Admr. v. King, 91 Ky. 425 (1883).

[17] See BROWN, PERSONAL PROPERTY 126 (1955).

[18] See Matter of Van Alystyne, 207 N.Y. 298 at 310, 100 N.E. 802 (1913).

[19] See Baskett v. Hassell, note 12 supra; Brophy v. Haeberle, 220 App. Div. 511, 221 N.Y.S. 698 (1927).

[20] The appellate division did not expressly adopt this theory; it found a "constructive" delivery. As courts have so often done, it confused the terms "constructive delivery" and "symbolic delivery."