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THE REQUIREMENT OF DELIVERY IN GIFTS IN KENTUCKY

A gift *inter-vivos* or *causa mortis* is generally said to consist of: (1) intention of the donor to give, (2) delivery, and (3) acceptance by the donee.¹ Of these three the requirement of delivery gives the greatest difficulty. This difficulty usually arises where the donor wishes to make a gift of certain personal property and fails to meet the time-honored requirements of delivery. In such cases the courts are confronted with the dilemma of wishing to give effect to the donor's express intention to transfer his property and the conflicting desire to adhere to the established rules of law.

The purpose of this note is to examine the Kentucky decisions concerning the doctrine of delivery and to offer a possible solution to the problems raised by the requirement of delivery. Perhaps the examination can be implemented at the outset by (1) a brief discussion of the historical development of the doctrine with its modern variations and (2) an evaluation of the doctrine as to its modern purpose.

The doctrine as it applies to the law of gifts is thought to have had its inception in the common law concept of ownership and the common law's insistence upon a manual "tradition" and livery of seisin. If one wished to transfer title or ownership to property it was necessary that he deliver up possession to the transferee. This was accomplished in the case of real property by livery of seisin and in personal property by a manual "tradition" of the chattel which was an actual transfer of physical possession of the chattel from the transferor to the transferee. This rule applied whether the transfer was a gift or a sale.²

Almost from the beginning this strict rule became subject to two well defined exceptions. The courts early recognized that delivery of an instrument under seal, purporting to pass title would effect a gift of chattels.³ The reason for this exception is obscure and the theory for upholding such transfers today in those jurisdictions which have abolished the seal is in dispute.⁴ The second exception recognized that title could be passed by the delivery of some effective means of acquiring or coming into the use of the chattel. This type of delivery, known as a "constructive delivery," was at first confined to those cases where the physical bulk of the chattel made an actual transfer of possession impracticable or impossible. This exception was gradually broadened and came to include those cases where the subject matter of the gift though capable of an actual delivery was impossible because it was not present or was inaccessible at the time the words of gift were spoken.⁵ Generally speaking, these situations prescribed the field of delivery and from them the courts developed the test, that title by way of gift could pass only where the delivery, whether actual or constructive, was such as to absolutely deprive the donor of dominion and control and confer it

¹ BROWN, PERSONAL PROPERTY sec. 37 (1936).

² POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 180, 181 (2d ed. 1924).

³ WILLISTON, SALES sec. 350 (Rev. ed. 1948).

⁴ *Cochrane v. Moore*, 252 Q.B.D. 57 (1890).

HOLDSWORTH, A HISTORY OF ENGLISH LAW 357, 358 (3d ed. 1927).

⁵ Roberts, *The Necessity of Delivery in Gifts*, 32 W. VA. L. REV. 313, 316 (1926).

⁶ *Ward v. Turner*, 2 Ves. S. R. 441, 443, 24 Eng. Rep. 275, 282 (CH 1752).

⁷ *Rule v. Fleming*, 85 Ind. App. 487, 152 N. E. 181 (1926); *Gilksion v. Third Ave. R. R. Co.* 47 App. Div. 472, 63 N. Y. Supp. 792 (1900). For a discussion of how this rule has been extended in other respects see BROWN, *supra* note 1, sec. 42 and the cases there cited.

upon the donee.⁹ Hence, in those cases where the donor continued to exercise dominion over the gift or where it was subject to his future control the gift would theoretically fail for want of delivery. This classical test for a valid delivery has continued to thread its way through the cases and it is quoted with approval today.¹⁰

The strictness of the classical test has been relaxed in those jurisdictions which recognize the symbolic delivery. In these jurisdictions it is possible for the donor to pass title to a chattel by the delivery of a token which symbolizes or represents the subject of the gift. This differs from an actual delivery in that the possession of the thing is not actually transferred from the donor to the donee. At most, all that passes is title to the chattel with a corresponding right in the donee of taking possession. The symbolic delivery also differs from the constructive delivery since the thing delivered need not be a means of acquiring or coming into the use of the chattel but it is sufficient if it represents or symbolizes the chattel to the donor.¹¹ In these cases it is clear that no possession is actually transferred and that the donor still has it within his power to exercise dominion over the gift. While the exercise of such dominion may be wrongful, the symbolic delivery does not put it beyond his power to do so as an actual or constructive delivery would do.

The writers today seem to feel that the doctrine of delivery serves a two fold purpose. First, it impresses upon the donor the significance of his act and prevents him from making a gift in a heedless or unguarded moment. Secondly, it gives the donee at least prima facie evidence that a gift was made and provides the court with clear and convincing proof that the donor intended to pass title to the chattel.¹² The reason most frequently given for requiring delivery is that it tends to prevent the assertion of false and spurious claims.¹³ The courts feel that in gift transactions the opportunity for fraud is great and therefore all such claims are to be viewed with caution, especially where the gift is first asserted after the donor's death.¹⁴ Thus, in requiring a delivery the courts are merely assuring themselves that the donee has a valid claim and that the donor intended his act to pass title to the chattel. If these are the true reasons for continuing to require a delivery it would seem to follow that any other method which achieves these ends should be acceptable to effect a gift. Unfortunately this is not the law.¹⁵ In view of the fact that our legal system clearly recognizes that an individual owner has a right to dispose of his unencumbered property as he sees fit, the general policy of the courts should be to give effect to the intentional exercise of that right. In a great many cases, however, the courts have defeated the

⁹ *Brewer v. Brewer*, 181 Ky. 400, 205 S.W. 393 (1918).

¹⁰ *Pikeville Nat'l Bank v. Shirley*, 281 Ky. 150, 135 S.W. 2d 426 (1939).

¹¹ *Brown*, *supra* note 1, sec. 41 at 92, 93. The language used in some of the cases seems to indicate that some courts fail to make a distinction between constructive and symbolic delivery and treat them as the same thing.

¹² *Gulliver and Tilson, Classification of Gratuitous Transfers*, 51 *YALE L. J.* 1, 3, 4 (1941). *Mechem, The Requirements of Delivery in Action Evidenced by Commercial Instruments*, 21 *ILL. L. REV.* 341, 348, 349 (1926).

¹³ *Gulliver and Tilson, Supra* note 11, at 3. ("The fact that our judicial agencies are remote from the actual or fictitious occurrences relied on by the various claimants to the property, and so must accept second hand information, perhaps ambiguous, perhaps innocently misleading, perhaps deliberately falsified, seems to furnish the chief justification for requirements of transfer beyond evidence of oral statements of intent.")

¹⁴ *Hays v. Patrick*, 266 Ky. 713, 99 S.W. 2d 805 (1936).

¹⁵ *Dickerson v. Snyder*, 209 Ky. 212, 272 S.W. 384 (1925).

donor's undisputed intention to make a gift solely on the grounds that he had not complied with the technical requirements of delivery.¹⁶ The wisdom of such a rule is to be doubted in those situations where there is no danger of fraud and where it is clear that the donor intended to make a present gratuitous transfer of his property.

The early Kentucky decisions almost without exception adhere to the classical formula, and require an absolute surrender of dominion and control.¹⁷ Kentucky also recognizes the symbolic delivery and while most of these cases have dealt with the gift of a chose in action it is reasonable to believe that they might be extended to cover the gift of other personal property. In the leading case of *Stephenson v. Adm. r. v. King*,¹⁸ the court sustained a gift *causa mortis* where the donor delivered to the donee a letter from the donor's attorney describing a note and a bond which the attorney held for the donor and which were the object of the gift. In that case the donor had made repeated statements that she wished the donee to have everything she owned and on the day before her death gave the letter to the donee telling her to get her money on the paper. To defeat the gift in this case would have meant that the entire estate would pass to the donor's son who had disowned the donor as his mother. The court said,

"No other delivery could have been made there is no reason why the intention to give, with the actual delivery of the written evidence of the right to the thing under the belief of the donor that it perfects the gift, should not be held to constitute a valid gift *causa mortis*."¹⁹

The court has also held that the delivery of a book of accounts is a good symbolic delivery of the debt evidenced by the accounts and may be recovered as such.²⁰ In *McCoy v. Adm. r. v. McCoy*,²¹ the court by way of dictum said that delivery of a checking account passbook would effect a gift of the fund on deposit. This holding was approved by later decisions and is now the settled law of this state.²²

In line with these cases it might be well to note that Kentucky allows a gift of personal property to be made by delivering to the donee a written instrument

¹⁶ *Brewer v. Adm. r. v. Brewer*, *supra* note 9.

¹⁷ *Page v. Adm. r. v. Page*, 1 Ky. Op. 385 (1866).

¹⁸ 81 Ky. 425 (1883).

¹⁹ *Id.* at 435.

²⁰ *Jones v. Adm. r. v. Moore*, 102 Ky. 591, 44 S.W. 126 (1898).

²¹ 126 Ky. 783, 104 S.W. 1031 (1907). It might also be noted that the Kentucky court finds a valid gift of a savings account without a delivery of the passbook where the donor deposits money in the donee's name, provided that the donor intended to make a gift of the deposit and that the donee accepted it as a gift. See *Collins v. Collins*, *Adm. r.*, 242 Ky. 5, 45 S.W. 2d 811 (1931). In view of the fact that the passbook must be presented whenever a withdrawal is made, the completeness of such a delivery might be questioned. cf. *Ruffalo v. Savage*, 252 Wis. 175, 31 N.W. 2d 175 (1948).

²² *Gray v. Adm. r. v. Dixon*, 255 Ky. 239, 73 S.W. 2d 6 (1934). It is interesting to note that these decisions upholding a symbolic delivery of a chose in action are in direct conflict with the accepted contract rules of gratuitous assignments. According to RESTATEMENT, CONTRACTS sec. 158 (1) (b) in order to make a gratuitous assignment of a chose in action it is necessary to deliver to the donee a tangible token, which not only evidences the chose but is essential to its enforcement. It is suggested that the delivery of a tangible token is a true constructive delivery, and that the cases cited above are examples of a true symbolic delivery of the chose.

purporting to pass title to the property.²³ It is possible in this situation that the subject of the gift is capable of an actual physical transfer. It would seem that in upholding such a gift the court does so primarily because the donor's intention is clearly expressed and not because he has surrendered all dominion and control.

There are certain other situations where the court has seen fit to sustain a gift where there was in fact no actual, constructive, or symbolic delivery. In *Brown v. Brown's Adms.*,²⁴ the donor was the father of two illegitimate sons and as a service to them became a surety on their promissory note. Before the note was due and without being asked to do so, the father paid the note and took it into his possession. On many occasions both before and after he paid the note, he told several persons that he intended the money as a gift to his sons and that he wished to see them and give them the note for fear they would never get it in case he died. The note was never delivered to the sons and after the father's death the note was found among his papers. The court found there was a valid gift and a good delivery saying,

" the delivery must be according to the nature of the thing, and an actual delivery so far as the subject is capable of delivery. The payment of the money in discharge of the note, we think, constituted the gift; the act was complete when the money was paid, if paid, as we have assumed, as a gift. The donor had parted with the possession of the thing, and with control and dominion over it; he could not recall the money paid nor change the nature of the act. To render the gift perfect, it was not necessary to deliver the note to the donees."²⁵

The court admits that there was no actual delivery in this case and it is difficult to find any sort of a delivery in the usual sense of the word since nothing tangible passed from the donor to the donees or to a third person as agent for them. Neither can it be assumed that the donor put it beyond his dominion and control to enforce a right of action against the donees. The donor continued to hold the note and doubtlessly could have enforced it if he had so wished. Therefore it follows that the donor did not put the money beyond recall since he could have collected a like sum from the donees. The court here has seen fit to disregard the retention of control by the donor and find a valid gift where all the elements of a classical delivery were not met.

In the rather unique case of *Simmons v. Simmons*,²⁶ the donor had been cared for by her son for many years. As a token of her appreciation she desired to make her son a gift of a promissory note which he had previously made to her. On many occasions she expressed this intention and frequently said that all she had belonged to him. The note in question was not in the donor's possession, but was in the hands of her daughter who refused to surrender it although asked to do so. After the donor's death the daughter turned the note over to the administrator who attempted to enforce it against the son. The court held that there had been a valid gift of the note, since the donor had done all that she could do. The court said that to defeat the gift, " would be to exalt form above substance

²³ *Taylor v. Purdy*, 151 Ky. 82, 151 S.W. 45 (1912) (notes); *Weber v. Salisbury*, 149 Ky. 327, 148 S.W. 34 (1912) (gift of bank deposit by delivery of a written order); *Gordon v. Young's Adm'r.* 10 Ky. L. R. 681 (188) (livestock).

²⁴ 43 Ky. (4 B. Mon.) 535 (1844).

²⁵ *Id.* at 537.

²⁶ 133 Ky. 493, 118 S.W. 304 (1909).

and to prostitute a rule of law to defeat the purpose for which it was intended."²⁷ Clearly, this case demonstrates that under certain conditions where intention is undisputed the court will disregard delivery as an element of the gift and look entirely to the evidence of the donor's intention.

In *Farris v. Farris*,²⁸ the donor expressed his intention to his nephew to make him a gift of certain stock which was in his safety deposit box. The keys to the box were in the possession of the donor's attorney and the nephew informed the attorney of his uncle's intention. The attorney took the stock from the box with the intention of turning it over to the nephew when told to do so by the donor. By inadvertence the certificate was placed back in the vault and could not be obtained until the next day. Upon being informed of this fact and asked if he still wished his nephew to have the stock the donor nodded his head. A short time later he provided for this disposition of the stock in his will. Although the will was effective, the stock would not have passed to the nephew under it since the estate was subject to an antenuptial agreement which would have depleted the estate and left nothing to pass by the will. The court found that there was a valid gift *inter vivos* saying that the donor had parted with all dominion and control and that the attorney took as trustee for the nephew. While it is true that delivery may be made to a third party for the donee, it is equally true in this case that the attorney is also the agent of the donor and subject to his direction and control. Since as a general rule possession of the agent is possession of the principal, it is difficult to see how the donor has surrendered control in this case.

Another instance of relaxed delivery may be observed in *Scherzinger v. Scherzinger*.²⁹ In that case the donor being near death wished to give his wife his property before he died. He called an attorney and deeded his real property to his wife and expressed the intention to give her certain money which was on deposit in his name in a checking account and a savings account. A few days later he had his wife's name added to the checking account and attempted to add her name to the savings account. The bank informed him that it was necessary for his wife to sign a certificate of deposit before this step could be taken. After repeating his intention to make the gift in the presence of his daughter the donor handed his wife the certificate of deposit and said, "Mother, I am giving you this certificate of deposit, I want you to take it to the bank and have your name added." The court said,

"Furthermore, it has been pointed out that the proof shows his intention to make such a gift. We think also that the circumstances heretofore reviewed show clearly that there was delivery of the money in the two accounts in the bank from the deceased to his wife. These conditions and circumstances are ample, in our opinion, to support the gift as a gift *causa mortis*, notwithstanding the appellant's contention that the deceased had the right to write checks on his bank account after the gift was made."³⁰

Clearly, these actions by the donor do not fit the classical test for a valid delivery. This was not the best delivery under the circumstances since the donor could have made a gift of the entire account by delivering the passbooks or by

²⁷ *Id.* at 499, 118 S.W. at 306.

²⁸ 269 Ky. 466, 107 S.W. 2d 299 (1937).

²⁹ 280 Ky. 44, 132 S.W. 2d 537 (1939).

³⁰ *Id.* at 50, 132 S.W. 2d at 540.

having the account transferred to his wife in her own name. The donor had not surrendered all control since he could write checks on the accounts without invading the legal rights of the donee. This case might be explained on the grounds that a delivery in a *causa mortis* situation is less strict than in an *inter vivos* transfer, but if this is true then the court seems to be admitting that delivery in a *causa mortis* gift is merely additional evidence of the donor's intention and not an absolute requisite to this type of transfer.³¹

The classical rule of delivery is still followed in Kentucky except in the situations above noted, and the harsh results which strict adherence to such a rule produce may be illustrated by the latest Kentucky case in which the doctrine was considered. In *Pikeville National Bank v. Shurley*³² the donor, contemplating suicide, mailed his savings account passbook to the bank with instructions to transfer the account to his sister. The passbook was not received by the bank until several hours after the donor's death. The court ruled that since the donor had the power to remove the letters from the mails upon application to the proper authorities, that he had not surrendered complete control before his death and therefore delivery was incomplete. The result in this case would seem unjust. The donor had a right to dispose of his money as he wished. His intention to dispose of it was clearly expressed. He attempted to give effect to this intention and in his own mind the act was complete and the gift made. There was no danger of fraud. Yet the court here usurped his right to deal with his property as he wished and substituted the law of statutory descent, solely on the grounds that no technical delivery was made.

The following is suggested as a possible solution to the dilemma which the courts face in these cases. The classical doctrine of delivery should be replaced by a more flexible and reasonable standard based on the donor's intention. The courts, instead of applying the test of a technical delivery with its requirements of absolute surrender of control and dominion, might well substitute the rule: *where the evidence is clear and convincing that the donor intended to make a present, gratuitous, and absolute transfer of the chattel, and where there is no reliable evidence of fraud or undue influence, the gift should be sustained.* This rule would embrace those cases in which either an actual, constructive or symbolic delivery did in fact occur for in those cases the delivery itself is clear and convincing evidence of the donor's intention. In addition the rule is broad enough to include those cases in which the donor did some act short of a delivery but consistent with his express intention to make a gift.

Under this rule the fact that the donor had the power of exercising some control and dominion over the property may be properly considered as evidence that the donor did not intend to make a present and absolute transfer, but these

³¹ This view has been rationalized by some courts on the theory that in gifts *inter vivos* the purpose of delivery is to confer possession and enjoyment of the gift upon the donee and is for that reason an essential element of the gift. In gifts *causa mortis* the purpose of delivery cannot be to give possession or enjoyment since the gift, being testamentary in character, is not complete until the donor's death and so the only reason for requiring delivery is to prevent fraud and to more fully show the donor's intention to give. Hence, delivery in *causa mortis* gifts is not a constituent element of the gift, but merely evidence of the donor's testamentary intention. It follows, therefore, that such delivery is less strict than in gifts *inter vivos*. See *Begovich v. Kruljac*, 38 Wyo. 365, 267 Pac. 426 (1928); 59 P.A. L. REV. 98 (1910).

³² 281 Ky. 150, 135 S.W. 2d 426 (1939).

facts would not be controlling, as they are in a classical delivery, but would merely be considered in relation to the other evidence in the case and weighed accordingly. The donor is also protected from doing a heedless act because the evidence must clearly show that his intention was to make an absolute gift. Where the evidence shows the act was not meant to effect a gift the gift would fail. The rule in addition demands that there be no evidence of fraud or undue influence and so preserves within it the only valid reasons for continuing to require a delivery.

This suggestion should have special significance to a jurisdiction such as Kentucky where the decisions in some of the cases have gone beyond the orthodox theories of constructive and symbolic delivery.

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