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THE THEORY OF DELIVERY IN GIFTS CAUSA MORTIS

The gift *causa mortis* in Anglo-American law is a subject which has caused much perplexity and which has given rise to a great deal of legal controversy. It is usually required by the American courts that the gift shall be made in contemplation of the donor's impending death; that there be a clearly expressed intention to make a present gift; that the subject matter of the gift be delivered to the donee; and that the donor die of the existing peril without revoking the gift.¹

The purpose of this note is to examine the requirement of delivery as it is applied to gifts *causa mortis* and to suggest a rule more in keeping with the true nature of such transfers. Perhaps, this can best be accomplished by summarizing the present positions of the courts on this problem, and by evaluating these modern views against the historical rationalization of the gift *causa mortis*.

It is the general American view that the type of delivery required in gifts of this nature is the same as that required to make a valid gift *inter vivos*.² As one court has aptly expressed it, "It must be a delivery as a gift and such a delivery, as in case of a gift *inter vivos* would invest the donee with the title to the subject of the gift."³ Therefore, it becomes important to understand the doctrine of delivery as it exists in gifts *inter vivos*.

The delivery required in gifts *inter vivos* is usually stated to be an actual, constructive, or symbolical delivery according to the circumstances. It is commonly stated that the delivery must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit. The usual test applied to any *inter vivos* delivery is that it must be such a delivery as will most effectually divest the donor of dominion and control over the subject of the gift. In addition the delivery must be absolute and unqualified, and it must vest the donee with, and divest the donor of, control and dominion over the property.⁴

From the foregoing it may be observed that delivery in gifts *inter vivos* is a technical and sometimes ill-defined requirement, tested primarily by possession and control. Generally, the courts purport to apply the *inter vivos* test to gifts *causa mortis* so that, theoretically at least, the same rules and restrictions apply to both situations. This would seem to imply that these courts regard delivery as an essential element of a gift *causa mortis*.

A good example of this approach is found in the case of *McDonough v. Portland Savings Bank*.⁵ In this case the donor was very ill and upon being informed that she was to be taken to a hospital she called her niece to her bedside and said, "If I am that sick, you had better take that bank book that is in the trunk there and have your name put on it." The niece got the book and took it to the aunt who then said, "Take this and if anything happens to me divide that between yourself and Helen." Later that day the niece took the book to the bank and informed an official of what her aunt had said, whereupon she was given an order to be signed by Miss McDonough as authority for transferring the account. The following morning the donor signed this order which the niece re-

¹ *O'Connell v. Bank for Savings*, 103 Misc. 96, 170 N.Y.S. 566, 567 (1918).
38 C. J. S. 903, n. 92.

² *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S.E. 2d 898, 901 (1941).

³ 48 C. J. S., p. 797.

⁴ 136 Me. 71, 1 A. 2d 768 (1938).

turned to the bank immediately. A new account was opened and a new account book was issued in the joint names of the aunt and the niece. After the aunt's death the niece claimed the money in the account as a gift *causa mortis*. The court refused to uphold the gift on the grounds that the delivery was insufficient. In its decision the court stated, "as in gifts *inter vivos*, so in gifts *causa mortis*. it must appear that the donor intends to and does in fact surrender absolutely all present and future dominion and control over the property."⁷⁶ Since the donor had the right to draw on the account, the court concluded that she had not surrendered dominion and control and therefore the attempted gift was ineffective. In this case the court clearly applied the test of the *inter vivos* delivery and by strictly adhering to that test they found that the delivery was insufficient. This approach might be termed the *inter vivos* test for the *causa mortis* delivery.

In contrast with this strict and arbitrary view, at least one American court has seen fit to relax the requirement of delivery in the *causa mortis* cases and to allow less than a normal *inter vivos* delivery to suffice. In the case of *Begovich v. Kruljac*⁷⁷ the donor was about to undergo a serious operation. He delivered certain money to a third person with directions that the money should belong to the donees in case he should die. It was not to be given to the donees until after his death and was to be returned to him if he survived the operation. The delivery was attacked as being insufficient since no actual delivery was made to the donees until after the donor's death. The court held the delivery to be sufficient, and in the course of its opinion it used the following interesting language:

"It is frequently said that a gift *causa mortis* partakes of a legacy in that it is not fully effective until after the death of the donor, and that it partakes of a gift *inter vivos* in that it must be delivered during the lifetime of the decedent. The intention to give must be clear in either case. In gifts *inter vivos* the primary intent and purpose is to give immediate control of and dominion over the property to the donee. The intent to give is not sufficient. It must be fully and completely carried out. No gift is made, unless it was perfected by actual delivery, fully and completely giving dominion over, and control of, the subject of the gift during the donor's lifetime to the donee.

In other words, delivery is just as much a constituent element of such gift as the intention to give. A legacy, on the other hand, passes into the enjoyment of the beneficiary of the gift only upon the death of the giver. Now, a gift *causa mortis*, too, cannot come into the enjoyment of the donee till after the death of the donor. It is in that respect exactly like a testamentary bequest. The requirement as to delivery of the gift, accordingly, cannot be for the purpose of transferring possession and enjoyment, but in the nature of things cannot be for any other purpose than is subserved by the execution of a testament in the manner required by law; namely, to prevent fraud and make the intentions and wishes of the donor certain and definite. Hence while in gifts *inter vivos* delivery is one of the constituent elements thereof, it subserves but the purpose of evidence in gifts *causa mortis*. In the former case it is one of the ends in view; in the latter, it is but a means to an end."⁷⁸ (Italics writer's).

⁷⁶ *Id.* at — 1 A. 2d at 770.

⁷⁷ 38 Wyo. 365, 267 Pac. 426 (1928).

⁷⁸ *Id.* at — 267 Pac. 429.

The court in this case seemed to be moved primarily by the wish to give effect to the donor's last wishes, and so relaxed the rule in order to do equity in the case. This might be termed the *evidentiary test* for the requirement of delivery in gifts *causa mortis*.

In addition to these two clear-cut theories as to the nature of a *causa mortis* delivery there is a third group of cases which fall somewhere in between these two views. These courts usually pay lip-service to the rule that an *inter vivos* delivery is required in the *causa mortis* situation, but in some of the more difficult cases they are wont to relax the *inter vivos* test and in effect apply the evidentiary view. Several decisions from the Kentucky Court will serve to illustrate this anomaly.

In the early case of *Meriwether v. Morrison* the Court used this language, "So far as the act of delivery is necessary to complete the gift, the law is the same as to gifts *causa mortis* and *inter vivos*."⁹ The latest expression of the test of delivery in gifts *inter vivos* is found in the case of *Pikeville Nat'l Bank v. Shurley*.¹⁰ There the Court said:

"to make them valid as gifts *inter vivos* it was necessary that there should be a delivery whereby the donor gave up dominion and control over the subject matter of the gifts and placed same in the donee during their lives. To constitute such a gift the property must be delivered absolutely and the gift go into immediate unconditional effect. *If future control over the property remain in the donor until his death there was no valid gift inter vivos.* It is absolutely essential to the validity of such gifts that there should be a delivery to the donee whereby the thing given should immediately pass and be irrevocable by the donor."¹¹ (Italics writer's).

If the Court means what it says in these two cases the following conclusions may be reached. In a gift *causa mortis* there must be a delivery whereby the donor gives up *all dominion* over the subject of the gift and vest it in the donee. He may not retain any power of future control over the property if the gift is to be effective. This conclusion was not reached in a later Kentucky case. In *Scherzinger v. Scherzinger*¹² the donor was seriously ill with cancer. He knew that he could not live long and desired that all his property should go to his wife after his death. Accordingly, he called in an attorney and deeded all his real property to his wife. In addition he had his wife's name added to his personal checking account at the bank, thus making it a joint account and payable at the order of either. After the husband's death this transfer of the money contained in the account was attacked as a gift *causa mortis* on the ground that the delivery was not complete, since the donor retained the right to draw on the account. The Court in upholding the gift stated:

"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 a 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*, notwith-

⁹ 78 Ky. 572, 576 (1880).

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

¹¹ *Id.* at 155, 135 S.W. 2d at 430.

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

standing the appellants contention that the deceased had the right to write checks on his bank account after the gift was made."¹³ (Italics writer s).

Clearly in this case there was not a complete surrender of dominion and control. Notice the similarity of the fact situation in this case and in the *McDonough* case. In both cases the donor at any time he wished had, not only the power to deplete the account, but also the legal right to take such action. It would appear that in this case the court ignored the test of an *inter vivos* delivery as applied in the *McDonough* case, and in effect adopted the evidentiary view.

A good many of the courts which allow a more liberal rule in the *causa mortis* cases do so on the theory that the delivery must be as perfect as the nature of the property and the surroundings and the circumstances of the parties will reasonably permit. This might be termed the *circumstances test* of the *causa mortis* delivery. The same test is often used and applied to sustain a constructive or symbolical delivery in the *inter vivos* cases. When this approach is used in the *causa mortis* situation the courts seemingly reconcile the statement that "the delivery in both *inter vivos* and *causa mortis* gifts is the same." It should be noted, however, that in application of the test to the *causa mortis* transfer some very loose deliveries have been allowed. In the case of *Pushcash v. Dry Dock Savings Institution*¹⁴ the *circumstances test* was employed to sustain a gift *causa mortis* although no delivery was made until after the donor's death. There the donor was near death in a hospital and wished to make a gift of money in a savings account to his best friend and only acquaintance. In the presence of the donee and the staff doctor, the donor expressed his intention to make the gift and attempted to get out of bed and give the bank book to the donee. The doctor informed him that the bank book was locked in the office and could not be obtained until the following morning. He said, however, that if the donee would call for the bank book on the following day he would see that it was delivered to him. The donor made no objection to this arrangement and was apparently satisfied. That night the donor died. On the day following the bank book was delivered to the donee. The court in upholding the gift pointed out that the donor had done all he could to perfect it and stated, "The delivery was as perfect and complete as the circumstances and surroundings of the parties to the gift reasonably permitted, and, thus being so, the gift was consummated."¹⁵

Perhaps, an even stronger case upholding a questionable delivery is that of *Mackenzie v. Steeves*.¹⁶ In that case the court clearly recognized that under proper circumstances the requirement of delivery could be entirely dispensed with. In this case the donor on his death-bed said to his sweetheart, "I give you my automobile, May. " After the donor's death the donee took possession of the automobile and treated it as her own. The court in finding that a valid gift *causa mortis* had been made stated the following,

" where the intent to bestow is obvious and clear, and there is no evidence of fraud or undue influence, and the circumstances show that the donor has done all that in his opinion is neces-

¹³ *Id.* at 50, 132 S.W. 2d at 540.

¹⁴ 140 Misc. 579, 251 N. Y. S. 184 (1931).

¹⁵ *Id.* at — 251 N. Y. S. at 186.

¹⁶ 98 Wash. 17, 167 Pac. 50 (1917).

sary to do to accomplish his purpose, *the intent of the donor will answer for the act of delivery.*

"If the property is of such a character and the circumstances of the parties are such that there can be no delivery, manual or symbolical, there may be a constructive delivery depending upon the intent of the donor and the subsequent conduct of the donee. ¹⁷" (*Italics writer's*)

Certainly, in these two cases it cannot be denied that the court employed a much more liberal rule in regard to delivery than is used in the *inter vivos* cases. The *causa mortis* cases seldom refer to "dominion and control" which are the backbone of the usual *inter vivos* test. It is submitted that while in theory these courts may be requiring the same kind of delivery in both types of cases, in reality, they are applying two different tests which result in a less strict delivery in *causa mortis* cases.

With the present position of the courts on this problem in mind, it might be well to examine the historical background of the gift *causa mortis* in an effort to determine its true function in the law. The concept had its origin in the Civil law and was brought into the English cases after the Statute of Frauds made the nuncupative wills unenforceable.¹⁸ Its purpose was probably to give effect to a death-bed gift which could not be sustained in any other fashion.¹⁹ In the Civil law these donations were looked upon primarily as legacies, and indeed, were declared to be upon the same footing as legacies by a formal constitution passed for the avowed purpose of setting to rest certain doubts which had arisen concerning their exact nature.²⁰ The gift *causa mortis* appeared in the English cases early in the eighteenth century, but the concept was not fully considered until the case of *Ward v. Turner*.²¹ In that landmark decision Lord Hardwicke, although mistaken as to the true nature of the gift *causa mortis* in the Civil law,²² adopted the concept as a part of the English common law and for the first time definitely established that delivery was required. There is little doubt that the type of delivery adopted was the *inter vivos* method. This is borne out by the following two facts: (1) this was the only type of chattel delivery with which the English jurists of that day were familiar, and (2) the later English decisions on the point proceeded on this assumption. For example, in the case of *Bunn v. Markham*²³ the court held that in order to constitute a good *donatio mortis causa* there must be an absolute and unconditional delivery of possession to the donee, or to a third person in trust for him, which possession must continue uninterrupted, to the time of the donor's death. This case leaves little doubt that the *inter vivos* delivery was required, since delivery of possession was usually required to perfect an *inter vivos* gift at the common law.²⁴ Fundamentally, the rule in England is the same today, but in at least one case the hard and fast rule of *inter vivos* delivery was relaxed.²⁵

¹⁷ *Id.* at — 167 Pac. at 52.

¹⁸ Rundell, *Gifts of Choses in Action*, 27 YALE L. J. 642, 646 (1918).

¹⁹ Schouler, *Oral Wills and Death-bed Gifts*, 2 L. Q. REV. 444, 447 (1886).

²⁰ BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY sec. 51, n. 77 (1936).

²¹ 2 Ves. Sr. 431, 28 Eng. Rep. 275 (1752).

²² Tate v. Hilbert, 2 Ves. Jun. 111, 119, 30 Eng. Rep. 548, 552 (1793).

²³ 7 Taunt. 224, 129 Eng. Rep. 90 (1816).

²⁴ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 180 (2d ed. 1911).

²⁵ Union of London-Smith's Bank v. Wasserberg, 1 Ch. 195, 112 L. T. Rep. 242, 244 (1915).

The English court from the very beginning seemed to regard the gift *causa mortis* as more like a testamentary disposition than as a gift *inter vivos*. This is indicated by the fact that in England and in a minority of American jurisdictions the title to the gift is not complete until the donor's death.²⁵ Therefore, in England and in the American courts which follow the English view, the gift is spoken of as being made on a condition precedent and title is not completely vested in the donee until the donor's death. By the majority American view the gift *causa mortis* is regarded as a particular type of gift *inter vivos*. The gift is said to be made on a condition subsequent and complete title must vest in the donee during the lifetime of the donor or the gift is invalid.²⁷

Thus difference in approach serves to throw some light on the position of the majority of American courts in demanding that the delivery in *causa mortis* gifts be the same as in *inter vivos* gifts. Since these courts think of the *causa mortis* gift as being fundamentally a mere *inter vivos* gift made on a condition subsequent, it is only natural, therefore, to expect these courts to require the *inter vivos* delivery. This reasoning supported by a long line of English and American decisions requiring an *inter vivos* delivery, give these courts ample authority for their position.

It is more difficult to justify the stand of the English courts in requiring the *inter vivos* delivery. One would suppose that since they regard the title as incomplete until the donor's death that they would be more liberal in applying the rule of a strict *inter vivos* delivery. It would seem that since delivery does not serve to vest the complete title in England as it does in America, that the court should be more lenient in the acts required to make a delivery. In practice, however, the English courts require a more strict delivery than the American courts.²⁸ This is probably true for at least two reasons: (1) a long line of English decisions requiring a strict *inter vivos* delivery, coupled with a strong adherence to *stare decisis*, and (2) a fear that a relaxation of the rule will result in fraudulent claims to property after the principal witness to the transaction is dead.

From the foregoing discussion two things become apparent. (1) A gift *causa mortis* is considered by the courts as something of a hybrid.²⁹ It is like a gift *inter vivos* on the one hand and like a testamentary disposition on the other. It partakes of the nature of both. (2) The courts are not in agreement as to how the problem of delivery should be handled in this type of transfer. As we have seen some of the courts use the strict *inter vivos* test, others use the more lenient *circumstances test*, and at least one court has used the *evidentiary test*. Which of these tests best carries out the function of the gift *causa mortis*? It is the writer's opinion that the *evidentiary* test is the most practical of the three. In support of this proposition the following historical background and reasoning are set forth.

It cannot be doubted that these gifts are an exception to the Statute of Wills.³⁰ They allow the individual to dispose of his personal property by what is in effect a testamentary disposition without the formalities and safeguards usually

²⁵ *Beaumont v. Ewbank*, 1 Ch. 889, 86 L. T. Rep. 410 (1902); *Hatcher v. Buford*, 60 Ark. 169, 29 S.W. 641 (1895).

²⁷ For a collection of cases see *Brown, op. cit. supra* note 21, sec. 55, n. 89.

²⁸ A brief glance at the title *Gifts* in 25 *ENG. & EMP. DIGEST* will convince anyone familiar with the subject that the American decisions are much more liberal in both the *inter vivos* and *causa mortis* cases.

²⁹ "It [gift *causa mortis*] is of an amphibious nature—neither a complete disposition *inter vivos* nor a testamentary gift." *Beaumont v. Ewbank, supra* note 27, 86 L. T. Rep. at 411.

³⁰ *Supra* note 5 at — 1 A. 2d at 769.

reserved for such a transfer. By what reasoning then are they justified in the law? One writer has expressed the answer in these words, "under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power."³¹ This is precisely what the courts seem to be doing in sustaining these gifts, and this attitude is probably the underlying reason why many courts have seen fit to relax the requirement of delivery in the *causa mortis* cases. The *causa mortis* gift was almost unheard of in English law until the Statute of Frauds outlawed the nuncupative will.³² Apparently as a result of this the courts in certain cases began to allow this form of disposition, testamentary in nature, in order to give effect to the wishes of a dying man. Unfortunately, this type of death-bed transfer came to be abused. Many spurious and doubtful claims were being made and the courts began to place certain restrictions upon it in order to prevent fraud. This was probably the original purpose for requiring a delivery, since delivery was not required at the Civil law to make such gifts effective.³³ There is little, if any, indication that the requirement of delivery was meant to take from the individual his right to dispose of his property as he desired. They were obviously formulated only for the purpose of protecting that property from unjust claims. Unfortunately, the courts in many cases seem to have lost sight of these basic ideas and have defeated the attempted donation solely on the ground that no technical *inter vivos* delivery occurred.

The true function of the gift *causa mortis* is to provide a method by which an individual in peril of death may dispose of his property as he sees fit. It is an emergency measure available to those tardy persons who have failed to make a proper will, and to those who wish to revoke or alter a regretted bequest. Surely, no man should be denied the right to dispose of his property as he chooses solely because he has not made a will. This basic premise is supported by the fact that gifts *causa mortis* are recognized in our law. By the same token no man should be denied this right because he has failed to perform some technical requirement of the law of which he was probably ignorant in the beginning. These gifts are usually made without the advice of an attorney and a layman cannot be expected to know the intricate, technical, requirements of the law, which puzzle even the learned jurists.

If these assumptions are correct, it follows that the gift *causa mortis* is a unique and peculiar method of transferring personal property reserved for one particular situation, i.e. in peril of death. It is of itself a separate and distinct concept, and as such it should be accorded the rules appropriate to its function. If the gift *causa mortis* is once regarded as a separate legal concept, it becomes apparent that neither the rules of gifts nor of legacies are binding on such a transfer. True, it resembles both in some respects, but this does not prevent it from having its own rules which will more faithfully execute its function.

For these reasons the writer has concluded that the *evidentiary test* of delivery is more in harmony with the real nature of the gift *causa mortis* than the other tests which the courts apply. It recognizes that the purpose of the gift is

³¹ Gulliver and Tilson, *Classification of Gratuitous Transfers*, 51 YALE L. J. 1, 2 (1941).

³² *Supra* note 20, at 447.

³³ *Gifts in View of Death*, 1 AM. L. REG. 1, 7 (1852); *Waugh v. Richardson*, 107 W. Va. 43, 147 S.E. 17, 20 (1929).

to allow the donor to dispose of his property as he desires. In addition, it guards against fraud by requiring that the donor's intention be shown with reasonable certainty. It is honest and to the point, in that it does not deal in the confusing *inter vivos* language so often employed by most courts. It provides the individual with a relatively simple and safe method of making a death-bed donation, and above all it allows him to die with a reasonable hope that his last wishes will be respected.

JAMES V. MARCUM

DELEGATION OF POWER TO FIX PREVAILING WAGES
WITH COLLECTIVE BARGAINING AGREEMENT AS
THE STANDARD

Fear that the economic power of the State as employer and contractor might be utilized to undermine hard-fought-for wage scales has caused labor leaders to press for legislation to prevent such a threat. In response to this influence the Kentucky legislature has enacted a statute which regulates the wages of workmen engaged in construction work of a public nature in Kentucky. This so-called "prevailing wage" statute is as follows:

"Before advertising for bids or entering into any contract for construction of public works, every public authority shall ascertain the prevailing rates of wages of laborers, workmen, mechanics, helpers, assistants and apprentices for the class of work called for in the construction of such public works in the locality where the work is to be performed. This schedule of wages shall be attached to and made a part of the specifications for the work and shall be printed on the bidding blanks and made a part of every contract for the construction of public works."

"The wages paid for a legal day's work to laborers, workmen, mechanics, helpers, assistants and apprentices upon public works shall not be less than the prevailing wages paid in the same trade or occupation in the locality. The public authority shall establish prevailing wages at the same rate that prevails in the locality under collective agreements or understandings between bona fide organizations of labor and their employers at the date the contract for public works is made if there are such agreements or understandings in the locality applying to a sufficient number of employees to furnish a reasonable basis for considering those rates to be the prevailing rates in the locality."

In the recent case of *Baughn v. Gorrell & Riley* these two sections of this act were held constitutional by the Kentucky Court of Appeals in the face of an attack that the act made an unlawful delegation of legislative power to a private interest to regulate or fix wages.³ This note will make an examination of this decision and analogous cases in the light of a general consideration of the problem of delegation of legislative power in an effort to determine the soundness of this holding of the Kentucky Court.

¹ KY. REV. STAT. sec. 337.510 (1948).

² KY. REV. STAT. sec. 337.520 (1948).

³ *Baughn v. Gorrell & Riley*, 311 Ky. 537, 224 S.W. 2d 436 (1949).