

## V. GIFTS

**A. Definition of gift:** A gift is the voluntary transfer of property by one person to another without any consideration or compensation.

**1. Present transfer:** A gift is a present transfer of property. If the gift is to take effect only in the future, it is a mere promise to make a gift, and is unenforceable as a contract because of its lack of consideration.

**2. Inter vivos vs. causa mortis gift:** We do not discuss gifts of property by will in this chapter. The gifts that we consider here fall into two categories: (1) gifts “inter vivos” and (2) gifts “causa mortis”. An inter vivos gift is an ordinary one in which the donor is not responding to any threat of death. A gift causa mortis is one made in contemplation of immediate approaching death.

Most of the rules governing the two classes of gifts are the same, but where there are differences, these are noted below.

The principal difference is that an ordinary gift inter vivos is not revocable once made (i.e., the donor cannot “take back” the gift, as a matter of law) but the gift causa mortis is automatically revoked if the donor escapes from the peril of death which prompted the gift.

**3. Requirements:** There are three requirements for the making of a valid gift (whether inter vivos or causa mortis): (1) there must be a delivery from the donor to the donee either of the subject matter of the gift, or of a written instrument embodying the terms of the gift; (2) the donor must possess an intent to make a gift; and (3) the donee must accept the gift.

**B. Delivery:** The essence of the requirement of delivery is that control of the subject matter of the gift must pass from the donor to the donee.

**1. Rationale:** The main rationale for the requirement of delivery is that without such a requirement, gifts would be enforceable even if the only evidence showing they had been made was an oral statement on the part of the alleged donor.

This would leave people open to ill-founded and fraudulent claims of gift. Therefore, courts require delivery as additional proof that a gift was really intended and made.

**2. Symbolic and constructive delivery:** There are some types of personal property which because of their nature cannot be physically delivered (e.g. certain intangibles, such as the right to collect a debt from another person).

There are other types of personal property which, while theoretically capable of manual delivery, would be highly inconvenient to deliver (e.g. heavy furniture.)

Yet to dispense with the requirement of delivery altogether in such cases would leave alleged donors open to false claims that a gift had been made.

Accordingly, the courts have adopted a middle position in such cases, and permit “symbolic” or “constructive” delivery. (A delivery is symbolic if, instead of the thing itself, some other object is handed over in its place.)

A delivery is constructive if the donor delivers the means of obtaining possession and control of the subject matter, rather than making a manual transfer of the subject matter itself. )

**a. *Difficult or impossible to make manual transfer:*** Constructive or symbolic delivery will not be allowed unless delivery of the actual subject matter would be impossible or impractical.

**b. *Dominion must be surrendered:*** Also, a symbolic or constructive delivery will not be effective unless the donor has parted with dominion and control of the property.

**c. *Use of key:*** The delivery of a key to a locked receptacle will often constitute adequate constructive delivery of the receptacle's contents. Use of the key will be upheld whenever the manual transfer of the contents would be impractical or inconvenient.

Example: O is paralyzed and confined to his bed. O gives various keys to P (his housekeeper), telling her that everything in the house is hers. The keys unlock several items of heavy furniture, including a bureau in which a life insurance policy on O's life is found.

Held, the delivery of the keys constituted constructive delivery of the items of furniture themselves, since the weight and bulk of these items made actual manual delivery nearly impossible.

But the keys did not constitute constructive delivery of the insurance policy, because the policy could have been manually delivered (e.g., by O's telling his nurse to hand the policy to O, who could have then handed it to P). *Newman v. Bost*, 29 S.E. 848 (N.C. 1898).

**d. Intangibles:** Often the subject matter of a gift is an intangible, i.e., a claim of some sort against another person. Since the claim itself cannot be physically transferred, the courts are compelled to recognize constructive or symbolic delivery.

i. Document as embodiment of claim: Some types of intangibles have a document so closely associated with them that the document is treated as the embodiment of the claim. The business custom is to assign the obligation by transferring the document, and by surrendering the document to the obligor when the obligation has been satisfied. Any negotiable instrument falls within this class (e.g., promissory notes, bonds, bills of lading, etc.). Also usually considered within this class are stock certificates, insurance policies and savings bank account passbooks. Therefore, as to all these items, courts hold that delivery of the document is sufficient to constitute delivery of the intangible claim represented by it.

ii. Savings accounts: In some situations, a gift of the contents of a savings account may be made even without delivery of physical possession of the savings passbook to the donee; the issue of bank accounts is discussed further *infra*.

**3. Written instrument:** Virtually all courts hold that delivery to the donee of a written instrument under seal stating the particulars of the gift constitutes sufficient delivery.

**a. Unsealed instrument:** Where a written instrument is given to the donee, but it is not under seal, the courts are split. Most courts hold that even an unsealed instrument is a valid substitute for physical delivery of the subject matter of the gift, assuming the instrument is a clear symbol of the right to possess the subject matter.

Example: O writes to his son, P, that O wishes to give P his valuable Klimt painting, but that O wishes to retain possession of the painting for his lifetime. Held, this letter (together with other correspondence between O and P) sufficed to meet the delivery requirement, and physical delivery of the painting itself was therefore not required. *Gruen v. Gruen*, 496 N.E.2d 869 (N.Y. 1986), discussed more extensively.

**4. Gifts causa mortis:** Courts are generally hostile to gifts causa mortis, i.e., made in contemplation of the donor's death. Therefore, they frequently impose stricter requirements for delivery in such cases than where the gift is made inter vivos with no expectation of death.

Courts have been more likely to require actual physical delivery in such cases, at least if the property is capable of readily physical delivery.

**a. Revocation:** One essential feature of a gift that's determined to be causa mortis is that if the donor does not die of the contemplated peril, the gift may be revoked. In fact, most courts hold that the failure of the donor to die from the contemplated peril automatically revokes the gift, even if the donor indicates a desire that the gift remain valid.

**b. Contemplation of death:** The gift causa mortis, as noted, is one made in contemplation of death. In any case where the donor dies shortly after making the gift, the court will presume that the gift is causa mortis, unless the donee comes forward with evidence that the donor was not acting in contemplation of death.

And, as noted, once the court decides the gift is causa mortis, the court is likely to impose strict physical delivery requirements.

i. Rationale: Why do courts impose stricter delivery requirements for gifts causa mortis than other gifts?

Because courts worry that if they don't do this, such gifts will interfere with statutes requiring that wills meet certain formalities (e.g., attestation) to reduce fraud.

That is, the fear is that a claimant will falsely say, "He gave me a gift of [item X] just before he died, but he told me I couldn't take possession until after his death." Since oral gifts (unlike oral wills) are valid, if there's no requirement of physical delivery the opportunity for false claims is large.

ii. Portable: Courts are especially skeptical of the validity of a gift causa mortis without physical delivery where the item is portable (e.g., a document), so that the donor/decedent could easily have made physical delivery if she had wanted to.

**C. Donor's intent to give:** In addition to a delivery, there must be an intent on the part of the donor to make a gift. Obviously, if A hands B A's diamond ring and says "Take care of this for me until I ask for it back," there has been no gift even though there has been a delivery.

**1. Intent to make present gift:** Furthermore, the intent must be to make a present transfer, not one to take effect in the future.

**2. Present gift of future enjoyment:** However, courts generally go out of their way to find that there has been a present gift of the right to the subject matter, with only the enjoyment postponed to a later date. In the case of personal property (as with real property), there may be a present transfer of title, with the right of enjoyment postponed until a future date.

**a. Gift subject to life estate:** For instance, most courts hold that a donor may make a valid gift of a future interest in personal property, subject to the donor's life estate.

In this situation, even though the donor does not immediately deliver the subject matter of the gift to the donee, the intent to make a present gift will usually be found to have been satisfied.

Example: In 1963, O writes a letter to his son, P, saying that O is giving P his valuable Gustav Klimt painting for P's birthday. The letter says, however, that O wishes to retain possession of the painting for O's lifetime. A subsequent letter by O to P similarly refers to O's intent to make a present gift of the painting to P, subject to O's right to lifetime possession.

The painting remains in O's possession until his death in 1980, at which time D, P's stepmother, refuses to turn the painting over to P. D contends that:

(1) O never intended to make an ownership transfer in 1963, but only expressed the intent that P would get the painting on O's death; and

(2) if physical delivery of the subject of the gift is possible, such delivery (rather than delivery of a written instrument) must take place for the gift to be valid.

Held, for P. As to argument (1), it is true that the donor must intend a present gift (not a future gift), but here there was clear evidence of O's intent to make a present transfer of a remainder interest in the painting (subject to O's life interest).

As to argument (2), the very purpose of the remainder-subject-to-a-life-interest structure used by O was to permit O to keep possession of the painting during his lifetime, so it would be illogical (and therefore not required) for O to deliver the painting to P; therefore, a written instrument was enough to meet the delivery requirement. *Gruen v. Gruen*, 496 N.E.2d 869 (N.Y. 1986).

**D. Acceptance:** Courts usually hold that the giving of a gift is a bilateral transaction requiring an acceptance of the gift on the part of the donee.

However, at least if the gift is a beneficial one, the court will presume that the donee intended to accept.

**1. Donee unaware:** The issue usually arises where the donor gives the property to a third person to be held until it is given to the donee; if the donor dies before the donee ever learns of the gift, it can be argued that the gift was invalid for lack of acceptance (since the gift could obviously not have been made after the donor died.)

However, the courts have usually held that the gift took effect immediately upon its execution by the donor, subject to the donee's right to repudiate it subsequently.

So long as no repudiation occurs after the donor's death, the gift is valid.