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Gift-Bank Deposits-Delivery

RECENT CASE NOTES

GIFT—BANK DEPOSITS—DELIVERY—One, J. Perrish deposited $1,000 in the Tri-State bank of Fort Wayne, Indiana, and caused the deposit slip to be issued payable to one Leo Perrish or Delta Caywood. Thereupon Leo Perrish went to the home of Delta Caywood and told her that upon his death she should get the $1,000 which was on deposit in their joint names at the bank. The bank was also notified of Leo's desires. L. Perrish had the deposit slip among his effects at death and the executor claims the sum by virtue of non-delivery of the slip. In the action D. Caywood contended (1) that the bank held the deposit as trustee for her benefit, (2) and that there was also a valid gift *inter vivos* to her. *Held,* there was not delivery of the deposit slip sufficient to create a gift *inter vivos* nor had the bank been made the agent of the donee. The donor had not parted with title or control of the deposit, essential to a gift. Also the attempted gift did not create a trust. *First & Tri-State National Bank v. Caywood,* Indiana Appellate Court, 1931, 176 N. E. 871.

The decision of the instant case in view of the general principles of the law of gifts is correct. *Turpin Adm. v. Stringer,* 228 Ky. 32, 142 S. W. 189; *Edson v. Lucas,* 40 Fed. (2) 398; *Escher v. Steers,* 10 Fed. (2) 739; *Ross v. Watkins,* 82 Ind. App. 487; *Gammon v. Robbins,* 128 Ind. 85; *Reasne v. Bohne,* 76 Ind. App. 114, 123 N. E. 490.

Granting, as a matter of fact, to facilitate discussion, that a bank deposit is a subject of gift *inter vivos,* were the other requirements present in the instant case to create a legal gift *inter vivos?* The Indiana cases reiterate the accepted rule that before a gift *inter vivos* can be created there must be a *delivery* or *parting with control* over the subject matter coupled with both the *present intention to give control* to the donee and an *acceptance* by the donee. *Daubenspeck v. Briggs,* 71 Ind. 255; *Smith v. Dorsey,* 38 Ind. 451, 10 Am. St. Rep. 118; *Smith v. Ferguson,* 90 Ind. 229; *Bingham v. Stage,* 123 Ind. 281; *Goelz v. People Savings Bank,* 31 Ind. 67.

Consideration of acceptance is unnecessary for as a general rule acceptance by the donee is presumed if the gift is beneficial to the donee; and a refusal to accept amounts to a condition subsequent invalidating the gift. *Dunlop v. Dunlop,* 94 Mich. 11, 53 N. W. 788; *Beaver v. Beaver,* 117 N. Y. 421; *Diefendorf v. Diefendorf,* 132 N. Y. 100, 30 N. E. 375. The donor's proper intent to create a gift *inter vivos* is sometimes rather difficult to define, but, on the whole, there should appear very clearly the desire to give up control immediately, to put the subject matter in control of the donee or some one for him, and to pass the legal title to him. Does this intent appear in the instant case? It can not be disputed that the donor, as is indicated by the evidence, expressed not only that he intended the gift to become effective "at his death" but that he would keep control, as he had in the past, until his death. None of the elements of proper intent is present, so most courts would agree that no gift *inter vivos* was created. *Turpin Adm. v. Stringer,* 228 Ky. 32, 14 (2) S. W. 189, and authorities to paragraph two.

Delivery is the chief requisite of a gift because, first, it carries with it an indication of the donor's intent; second, it presents an objective test by

which the transfer of control and title may be detected; third, it gives the donee something as prima facie evidence of the transaction in his favor.

Assuming again that a bank deposit is a good subject of gift *inter vivos*, can sufficient delivery be found in the principle case to satisfy the legal requirement set out in the accepted definition supra? At the time of his statement the donor did not relinquish his right to the sum on deposit, but instead he remained a joint creditor and intended to so remain until his death. He kept all the rights which he formerly had in connection with the deposits; and, as a consequence, they were so much within his control that it is absurd to say that there was any sort of delivery or relinquishment of control sufficient to create a gift. On the factual situation in the instant case the result relative to delivery at least is with the weight of authority although there is some authority contra. *Castle v. Persons*, 117 Fed. 853, 54 C. C. A. 133; *Ebel v. Piehl*, 134 Mich. 64; *Dinslage v. Stratman*, 105 Neb. 274; *Ogden v. Washington National Bank*, 82 Ind. App. 187, 145 N. E. 514.

Historically, in Brackton's time, delivery of possession was essential to the transfer of ownership of a chattel either by way of gift or of sale. *Pollock & Maitland, History of the English Law* (2 ed.) 180. Williston points out that the tendency toward the strict requirements in the law of gifts is a hangover from the law of property. *Williston on Contracts* (4 ed.) No. 1386. But the strictly formal requirements of physical delivery have been gradually weakened to accommodate cases of symbolic delivery not only where there is in the possession of the donee some incorporeal chattel as evidence of a corporeal chattel, *Williston on Contracts*, (4 ed.) No. 439; but where the donee is already in possession of the chattel, *Allen v. Cowan*, 23 N. Y. 502, 80 Am. Dec. 316, *Tenbrook v. Brown*, 17 Ind. 410, or where physical delivery is impractical or impossible, *Gray v. Barton*, 55 N. Y. 68.

Does this mean that in the continuation of the development in the law of gifts delivery will approach the point of being disregarded? If such were the trend of the law, a gift could be created by the mere expression of intention; but the question arises whether or not the law should for expediency or practical purposes ever reach this state. It is not disputed that at common law a promise to give under seal was enforceable. *Mitchel v. Williamson*, 6 Md. 210; *Hanna v. McKenue*, 5 Mon. B. 314, 43 Am. Dec. 122; *Storm v. United States*, 94 U. S. 576, 548; *Wing v. Chase*, 35 Me. 265.

But it never has been the law that there would be enforcement of a mere promise to give in the future, whether oral or in writing, not under seal. *Harmon v. James*, 7 Ind. 263; *Johnson v. Griest*, 85 Ind. 503; *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. Rep. 517; *Heffersteins Estate*, 77 Pa. St. 328, 18 Am. Rep. 449; *Powell v. Steward*, 17 Ala. 772; *Freeman v. Robinson*, 38 N. J. L. 383, 20 Am. St. Rep. 399; *Cox v. Sprigg*, 6 Md. 274. The effect of the seal has been abrogated considerably either by statute or interpretation of the courts. In view of this fact it has been urged that if a promise, sealed and delivered, is given full legal effect, and if the effect of the seal has been reduced to insignificance, then, in effect, the enforcement of a promise under seal is the same as enforcing a promise in writing. Others argue that it was intended, in reducing the seal to unimportance, to make all enforceable writings comply with the strict requirements set out in the law of writings not under seal, instead of the less strict law of sealed writings with which it has always been easier for the parties to

comply. The advocates of this latter reasoning conclude that promises in writing, whether under seal or otherwise, should not be given effect unless they comply with the requirements set out in the law of writings not under seal. See 72 U. of Pa. L. Rev. 391, 395-96; *Pound, An Introduction to the Philosophy of the Law*, 276, 282. The Restatement by the American Law Institute has accepted the doctrine that a mere promise alone without something more will not be given legal effect. *Restatement of the Law of Contracts*, Ch. 3, Sec. 75. Since the present status of the law seems to be that a naked promise will not be enforced in the law of contracts, does it necessarily follow by analogy that there should be no enforcement of an oral or written promise to give in the law of gifts?

Evidence of oral conversations or contemporaneous acts were always admissible to establish a gift. *Bragg v. Massie*, 38 Ala. 39, 79 Am. Dec. 82. If such oral evidence were alone sufficient to establish a gift *inter vivos* without some tangible transfer of the property, there would be opened a gateway for the perjuring of witnesses, our courts will be filled with unnecessary litigation between parties one of whom thinks he can prove a promise to himself from the other, and the judicial system will be embarrassed with a chaotic and unworkable law of gifts. To enforce a written promise to give would not be so objectionable, because, in a written promise, there would be some tangible evidence of the donor's desire; but as a matter of law, disregarding the statute of Frauds, there has never been given greater effect to a written promise than to an oral one, *Restatement of Contracts*, Ch. 7, 157, so the writer sees no necessity in the present law of gifts to justify greater effect to a written promise to give than to an oral one. There should be some objective transfer of relinquishment of control by the donor to insure that the donor desired to give, and there should be some objective receipt of that delivery or control by the donee, or some one for him, to insure that the donee is entitled to the gift. Thus each party has the guarantee that his right will be more fully protected because an objective test, as used in the instant case, affords an easier way of determining that the donor's rights ended and that the donee's arose. The present requirements of delivery, it would seem, are founded not only on the grounds of public policy and convenience, but also to prevent fraud, mistake, perjury, and imposition on the courts. See 18 Ky. L. Rev. 80.

It might be contended that there was a gift on condition in the principle case, but for the purposes of this note it is sufficient to say that the phrase "at my death" would appear to be a condition precedent and the authorities generally agree that there can never be a gift created on a condition precedent, although valid gifts may be created on a condition subsequent. *Irish v. Nutting*, 47 Barb. (N. Y.) 370; *In Re Humphreys Estate*, 191 App. Div. 291, 181 N. Y. S. 169; *Edson v. Lucas*, 40 Fed. (2d) 398.

Heretofore it has been assumed that a general bank deposit like the one in the instant case is a good subject of gift but the deposit admittedly sets up a debtor creditor relationship, which debt is not a subject of gift *inter vivos*. 2 Ind. L. J. 178-79. This being true, the instant case is again given support. While the bank deposit is not a subject of gift, it is pointed out that a trust, assignment (if power to reduce to possession is exercised before death of the assignor), or contract in favor of the donee as a beneficiary

will accomplish the same result as was intended to be accomplished in the instant case by the invalid gift. 2 Ind. L. J. 178 and authorities cited.

The decision of the instant case with the considerations here mentioned would indicate that the case of *Ogden v. Washington National Bank, supra,* which can not be distinguished on its facts, is incorrect, which conclusion vindicates the sharp criticism of that case in a former issue of this Journal. See 2 Ind. L. J. 178. J. B. E.