

Memorandum 90-31

Subject: Study L-3034 - Gifts in View of Death

Attached is a staff draft of a *Tentative Recommendation Relating to Gifts in View of Death*. A gift in view of death is a gift of personal property made in contemplation, fear, or peril of death, and with intent that it shall take effect only if the donor dies. See generally Civ. Code §§ 1146, 1149-1153, set out in Exhibit 1. The staff draft makes four recommendations:

(1) That the archaic language of Civil Code Section 1153 be replaced by a cross-reference to the new Probate Code provision relating to rights of creditors of a deceased giver to reach a gift in view of death if other assets of the estate are insufficient.

(2) That California adopt the general U. S. rule that a gift in view of death is revoked if the donee dies before the giver.

(3) That the provision that a gift in view of death is revoked by any event which would revoke the giver's will be deleted.

(4) That the requirement that the giver must intend the gift to take effect only in case of his or her death (condition precedent) be revised to say the giver must intend the gift to take immediate effect, subject to revocation if he or she survives the peril (condition subsequent).

Historical Background

A gift in view of death may be revoked by the donor for any reason during his or her lifetime, and is revoked by recovery of the donor from the illness or escape from the peril that prompted the gift. Civ. Code § 1151. If the donor dies, the gift is valid even though it does not satisfy the requirements for a will.

Gifts in view of death have been recognized and upheld by the courts from an early period. 38 Am. Jur. 2d *Gifts* § 7, at 810 n.13 (1968). They "had their origin in the civil law, and were adopted with slight modifications into the common law." *Noble v. Garden*, 146 Cal. 225, 228, 79 P. 883 (1905). They are recognized by all U. S. jurisdictions except Louisiana, and have been called "a fixed principle

of jurisprudence in all civilized countries." 38 Am. Jur. 2d, *supra*.

But gifts in view of death have also been criticized: Because they evade the statutory requirements for a will, they are "not regarded with favor," and must be established by clear and convincing evidence. *Barham v. Khoury*, 78 Cal. App. 2d 204, 211, 177 P.2d 579 (1947). Courts scrutinize these gifts closely "because of the greater opportunity for fraud" than in case of an inter vivos gift. J. Cribbitt & C. Johnson, *Principles of the Law of Property* 155-56 (3d ed. 1989).

A gift in view of death is not affected by a previous will of the donor; it is not affected by a later will unless the will expresses an intention to revoke the gift. Civ. Code § 1152. Because a gift in view of death may upset the donor's estate plan as expressed in the will, it has been said to be "clearly of a dangerous nature." 38 Am. Jur. 2d *Gifts* § 7, at 811 n.17 (1968).

Abolition of Nuncupative Wills

A gift in view of death is similar to a nuncupative (oral) will. In 1982, nuncupative wills were abolished in California on recommendation of the Law Revision Commission. Professor Russell Niles recommended abolishing them and the Uniform Probate Code does not permit them. 16 Cal. L. Revision Comm'n Reports, at 309 (1982). The Commission gave two reasons for its recommendation:

(1) Nuncupative wills afforded too great an opportunity for fraud and perjury.

(2) Nuncupative wills were seldom used because of legal limitations (only for \$1,000 or less of personal property, only usable by person in expectation of immediate death from injury received the same day or by person in military service, two witnesses required, must be reduced to writing within 30 days and probated within six months).

Neither of these two reasons apply with the same force to gifts in view of death. First, unlike property given by nuncupative will, property given in view of death must be delivered to the donee. 4 B. Witkin, *Summary of California Law Personal Property* § 109, at 101 (9th ed. 1987). The delivery requirement protects the donor "from ill-founded and fraudulent claims of gift by requiring strong concrete evidence that he really intended to part with his property. Such a

precaution is especially desirable when, as is frequently the case, the alleged donor is dead at the time the claim is asserted." Gordon v. Barr, 13 Cal. 2d 596, 601, 91 P.2d 101 (1939).

Second, judging from the volume of appellate cases, gifts in view of death are used far more frequently than were nuncupative wills before their abolition.

So, despite some criticism of gifts in view of death, the staff thinks they should continue to be recognized in California. The rules which make them conditional are an important protection to the donor who survives the peril under which the gift was made. The rule which validates the gift against a claim that it did not satisfy the requirements for a will is sound, because the delivery requirement minimizes the opportunity for fraud.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Exhibit 1

CIVIL CODE PROVISIONS RELATING TO
GIFTS IN VIEW OF DEATH

1146. A gift is a transfer of personal property, made voluntarily, and without consideration.

. . . .

1149. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.

1150. A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

1151. A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time, but when the gift has been delivered to the donee, the rights of a bona fide purchaser from the donee before the revocation, shall not be affected by the revocation.

1152. A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.

1153. A gift in view of death must be treated as a legacy, so far as it relates only to the creditors of the giver.

Staff Draft

TENTATIVE RECOMMENDATION
relating to
GIFTS IN VIEW OF DEATH

A gift in view of death is a gift of personal property made in contemplation, fear, or peril of death, and with intent that it shall take effect only if the donor dies.¹ The gift is revoked by the giver's recovery from the illness or escape from the peril that prompted the gift.² Gifts in view of death are provided for in Sections 1146 and 1149-1153 of the Civil Code.

Rights of Creditors of a Deceased Giver

Civil Code Section 1153 provides that a "gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver." This means that the property may be subjected to claims of creditors of a deceased giver if other assets of the estate are insufficient.³ This rule is stated in more modern language in Section 9653 of the Probate Code. The Commission recommends replacing the archaic language of Section 1153 of the Civil Code with a cross-reference to the new Probate Code provision.

Revocation by Death of the Donee Before the Giver

In the four U. S. jurisdictions that have considered the question, death of the donee before the death of the giver revokes the gift.⁴

1. Civ. Code §§ 1146, 1149.

2. Civ. Code § 1151. A gift in view of death may be revoked by the giver during his or her lifetime for any reason, and by a later will of the giver which expresses an intention to revoke the gift. *Id.* §§ 1151, 1152. A gift in view of death is revoked by the occurrence of of any event which would operate as a revocation of a will made at the same time. *Id.* § 1151.

3. *Adams v. Prather*, 176 Cal. 33, 41, 167 P. 534 (1917).

4. 38 Am. Jur. 2d *Gifts* § 90, at 889 (1968) (citing cases from New Hampshire, New York, North Carolina, and Virginia).

This question has not been addressed in California.⁵ Death of the donee before the giver should revoke the gift, because as long as the giver is living the gift retains its conditional character. Also, if the donee dies before the giver, it is likely that the giver would prefer to benefit his or her heirs or devisees rather than relatives of the donee. The Commission recommends codifying the rule that death of the donee before the giver revokes the gift.

Revocation by Event Which Would Revoke Will

Civil Code Section 1151 provides that a gift in view of death is revoked "by the occurrence of any event which would operate as a revocation of a will made at the same time." The testator may revoke a will by destroying it or by making another will.⁶ Divorce revokes a devise to the former spouse,⁷ and marriage or birth of a child after the will is made gives the spouse or child a statutory share of the estate.⁸

There is no sound reason why revocation of a will of one who makes a gift in view of death should revoke the gift as a matter of law. The question of whether the giver intended to revoke the gift should be treated as a question of fact.⁹

The Commission recommends deleting the provision that a gift in view of death is revoked by any event which would revoke the giver's will.

5. See 4 B. Witkin, *Summary of California Law Personal Property* §§ 108-109, at 100-101 (9th ed. 1987).

6. Prob. Code § 6120; 4 B. Witkin, *Summary of California Law Wills and Probate* § 150, at 5666 (8th ed. 1974).

7. Prob. Code § 6122; 4 B. Witkin, *Summary of California Law Wills and Probate* § 741A, at 524 (8th ed. Supp. 1984).

8. Prob. Code §§ 6560-6561 (omitted spouse); 6570-6571 (omitted child). Cases in other jurisdictions are split on whether birth of a child to the donor after making a gift in view of death revokes the gift. 38 Am. Jur. 2d *Gifts* § 88, at 888 (1968); Annot., 49 A.L.R. 1445 (1927).

9. See, e.g., *Adams v. Atherton*, 132 Cal. 164, 64 P. 283 (1901).

Gift on Condition Precedent or Condition Subsequent

Civil Code Section 1149 defines a gift in view of death as one given "with intent that it shall take effect only in case of the death of the giver." There is a problem with this language because it is stated in terms of a condition precedent: If the giver intends the gift to become absolute only upon the giver's death, with title passing at the instant of death, the gift is clearly testamentary.¹⁰ In such a case, the courts hold the attempted gift to be ineffective, and the property must be restored to the decedent's estate.¹¹ If the condition is subsequent, with the donee's title vesting immediately on delivery, subject to revocation if the giver survives the peril, the gift is not testamentary and can be sustained.¹²

The Commission recommends revising Civil Code Section 1149 so the giver must intend the gift to take immediate effect, subject to revocation if the giver survives the peril.

10. J. Cribbitt & C. Johnson, Principles of the Law of Property 156 (3d ed. 1989).

11. See *Hart v. Ketchum*, 121 Cal. 426, 429, 53 P. 931 (1898); *Yates v. Dundas*, 80 Cal. App. 2d 468, 182 P.2d 305 (1947).

12. J. Cribbitt & C. Johnson, Principles of the Law of Property 156 (3d ed. 1989); see *Yates v. Dundas*, 80 Cal. App. 2d 468, 473, 182 P.2d 305 (1947).

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 1149, 1151, 1152, and 1153 of the Civil Code, relating to gifts in view of death.

The people of the State of California do enact as follows:

Civil Code § 1149 (amended). Gift in view of death defined

SECTION 1. Section 1149 of the Civil Code is amended to read:

1149. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall ~~take effect only in case of the death of~~ be revocable if the giver recovers from the illness or escapes from the peril .

Comment. Section 1149 is amended to phrase the last clause in terms of condition subsequent rather than condition precedent, and to add subdivision (b). If the giver intends the gift to become absolute only upon the giver's death, with title passing at the instant of death (condition precedent), the gift is testamentary. J. Cribbitt & C. Johnson, Principles of the Law of Property 156 (3d ed. 1989). In such cases, the courts hold the attempted gift in view of death to be ineffective, and the property must be restored to the decedent's estate. See *Yates v. Dundas*, 80 Cal. App. 2d 468, 182 P.2d 305 (1947). If the condition is subsequent, with the donee's title vesting immediately on delivery, subject to revocation if the giver survives the peril, the gift is not testamentary and can be sustained. J. Cribbitt & C. Johnson, *supra*; see *Yates v. Dundas*, *supra*.

A gift in view of death of community or quasi-community property is subject to the rights of the giver's spouse. See Civ. Code § 5125; Prob. Code §§ 100-102.

Civil Code § 1151 (amended). Revocation of gift in view of death

SEC. 2. Section 1151 of the Civil Code is amended to read:

1151. (a) A gift in view of death may be revoked by the :

(1) The giver at any time, and during the giver's lifetime.

(2) The giver's will if the will expresses an intention to revoke the gift.

(b) A gift in view of death is revoked by his either of the following:

(1) The giver's recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the

~~same time, but~~

(2) The death of the donee before the death of the giver.

(c) Notwithstanding subdivisions (a) and (b), when the gift has been delivered to the donee, the rights of a bona fide purchaser from the donee before the revocation, ~~shall not be~~ are not affected by the revocation.

Comment. Section 1151 is amended to make a more complete statement of the methods of revoking a gift in view of death, and to repeal the former rule that a gift in view of death is revoked by the occurrence of an event which would operate as a revocation of a will made at the same time.

Paragraph (2) of subdivision (a) continues the substance of the former last clause of Section 1152 (revocation by subsequent will). Paragraph (2) of subdivision (b) is new and codifies the case law rule of other U. S. jurisdictions. See 38 Am. Jur. 2d *Gifts* § 90, at 889 (1968).

Civil Code § 1152 (amended). Effect of previous will

SEC. 3. Section 1152 of the Civil Code is amended to read:

1152. A gift in view of death is not affected by a previous will ~~nor by a subsequent will, unless it expresses an intention to revoke the gift.~~

Comment. Section 1152 is amended to delete the last clause, which is continued in paragraph (2) of subdivision (a) of Section 1151.

Civil Code § 1153 (amended). Rights of creditors of the giver

SEC. 4. Section 1153 of the Civil Code is amended to read:

1153. ~~A gift in view of death must be treated as a legacy, so far as it relates only to the creditors of the giver~~ A gift in view of death is subject to Section 9653 of the Probate Code.

Comment. Section 1153 is amended to pick up the new provisions of Probate Code Section 9653 relating to rights of creditors of the giver.