

First Supplement to Memorandum 90-31

Subject: Study 3034 - Gifts in View of Death

A recently published report of the Scottish Law Commission (published January 24, 1990) includes the following recommendation:

Donations mortis causa should be returnable not only (as under the present law) if the donee fails to survive the donor but also if

- (i) the donee incurs forfeiture as a result of having unlawfully killed the donor, or
- (ii) the donee fails to survive the donor by five days.

If the Commission desires to deal with these matters in the recommended legislation, Section 1151 of the Civil Code (as amended on pages 4 and 5 of the Staff Draft of the Tentative Recommendation attached to Memorandum 90-31) should be further amended to read:

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

- (1) The giver at any time 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 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.

(2) ~~The death of the donee before the death of the giver~~ failure of the donee to survive the giver by 120 hours. If it cannot be established by clear and convincing evidence that the donee has survived the giver by 120 hours, it is deemed that the donee failed to survive for the required period. The requirement of this paragraph that the donee survive the giver by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state.

(c) A gift in view of death is subject to the provisions of Part 7 (commencing with Section 250) of Division 2 of the Probate Code.

(d) 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, are not affected by the revocation.

Paragraph (c) is added to Section 1151 to make clear that the provisions of the Probate Code relating to the effect of homicide apply to a gift in view of death. The staff recommends this addition, since the Probate Code provisions relating to the effect of one person killing another do not clearly apply to a gift in view of death.

Revised paragraph (2) of subdivision (b) tracks the language of Section 6403 (intestate succession). The staff recommends the revised paragraph, although we recognize that it adds some complexity to the statute. Section 1151 of the Tentative Recommendation would add a requirement not found in the existing statute--that the donee survive the death of the giver. This requirement, which is drawn from the case law in a few other states, is based on the likely intent of the giver--that the giver would prefer to benefit his or her heirs or devisees rather than the relatives of the donee. See discussion at page 2 of the Tentative Recommendation attached to Memorandum 90-13. The addition of the 120-hour survival requirement is consistent with this assumption of the likely intent of the giver.

Respectfully submitted,

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