

Memorandum 90-97

Subject: Study L-3034 - Gifts in View of Death (Delivery Requirement)

Attached is a staff draft of a *Tentative Recommendation relating to Gifts in View of Death*. The Commission considered this draft at the May-June meeting.

Delivery Requirement

Team 3 of the State Bar Probate Section opposed including intangible personal property as property that may be given in view of death because it might lead to fraud. The Commission noted that existing law permits intangibles to be given in view of death, such as stock certificates, promissory notes, bank deposit books, and bonds. The Commission thought the law should continue to permit this. Gifts in view of death are useful as a kind of "poor man's will."

To address the concern of Team 3, the Commission asked the staff to consider adding a provision that there must be physical delivery of the property or of written evidence of title for a gift in view of death to be valid. The staff thinks the problem is satisfactorily covered by proposed Section 5701 (application of general law of gifts), but would add a statement to the Comment to make this clear as set out below.

Proposed Section 5701 provides: "Except as provided in this part, a gift in view of death is subject to the law relating to gifts of personal property." This provision would incorporate Civil Code Section 1147: "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

The simplest method of delivery is where the donor hands the property to the donee. 4 B. Witkin, *Summary of California Law Personal Property* § 103, at 97 (9th ed. 1987). Valid delivery may also be made by delivering a written instrument of gift. *Id.* § 106, at 99.

If the property is already in the donee's possession, it is sufficient if the donor clearly relinquishes all dominion over it. The donee need not hand it back to the donor for redelivery. *Id.* § 104, at 98. In *Estate of Raphael*, 115 Cal. App. 2d 525, 252 P.2d 979 (1953),

decedent orally gave furniture to her son without moving it. The court held the gift valid: "[A]s between members of the same family living in a common home it is not necessary that bulky articles given be removed from the common home to constitute delivery, but only that dominion and control be given by the donor to the donee."

The donor may make a valid delivery through a third person such as the agent of the donor or donee or a bailee. The donor's agent must make actual delivery to the donee before the agency terminates -- possession of the donor's agent is that of the donor. Securities in possession of a third person, such as a broker, may be delivered by written instructions delivered to that person. 4 B. Witkin, *supra*, § 105, at 98-99.

If actual delivery is impossible or impracticable, such as where the property is not immediately available to the donor, there may be valid delivery if the donor gives the means of obtaining possession (constructive delivery) or some symbol in place of the property (symbolical delivery). *Id.* § 106, at 99. Thus if the donor delivers the key to the donor's safe deposit box with a written order to the bank to allow the donee to have access to the box, that is a valid gift. *In re Estate of Escolle*, 134 Cal. App. 473, 25 P.2d 860 (1933); 6 B. Witkin, *supra*, §§ 106, 109, at 99, 101.

Delivery must be as complete as possible. Constructive or symbolical delivery is not sufficient if actual delivery is practicable. Thus in *Knight v. Tripp*, 121 Cal. 674, 54 P. 267, the donor gave her friend the key to a strong box. The box itself could easily have been delivered. The court held delivery of the key was insufficient. 6 B. Witkin, *supra*, § 106.

These general gift rules seem entirely satisfactory for gifts in view of death, and will be incorporated by Section 5701. The staff proposes to make this abundantly clear by adding the following to the Comment to Section 5701:

The same essentials of intent, delivery, and acceptance apply to a gift in view of death as to gifts of personal property generally. 4 B. Witkin, *supra*. Thus, for example, a verbal gift is not valid unless the means of obtaining possession and control of the property are given, or, if the property is capable of delivery, unless there is actual, constructive, or symbolic delivery of the property to the donee. See Civ. Code § 1147.

Gift in Contemplation of "Impending" Death

Professor Jerry Kasner, consultant to the Commission on family law, wrote in a memorandum to Nat Sterling:

I also think the reference to gifts in "contemplation" of death should be removed from the statute. In interpreting similar language in the Internal Revenue Code, the United States Supreme Court, in United States v. Wells, 283 U.S. 102, indicated that "contemplation" of death is not limited to anticipation of impending death, but any transfer motivated by death, which could include saving death taxes or avoiding probate. While this is not precedent under this statute, I believe this needs clarification.

The staff proposes to deal with Professor Kasner's problem by revising Section 5702 as follows:

§ 5702. Gift in view of death defined

5702. A gift in view of death is one which is made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with intent that it shall be revoked if the giver recovers from the illness or escapes from the peril.

Comment. Section 5702 continues the substance of former Section 1149 of the Civil Code, with two exceptions:

(1) Section 5702 is phrased in terms of condition subsequent rather than 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 (condition precedent), the gift is testamentary. J. Cribbett & 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. Cribbett & C. Johnson, *supra*; see *Yates v. Dundas*, *supra*.

(2) Section 5702 defines a gift in view of death as one made in contemplation, fear, or peril of "impending" death. This codifies case law. See, e.g., *Rosenberg v. Broy*, 190 Cal. App. 2d 591, 598, 12 Cal. Rptr. 103 (1961); 4 B. Witkin, *Summary of California Law Personal Property* § 108, at 100 (9th ed. 1987). This negates a possible construction that a gift in view of death is any gift made in contemplation of death, whether imminent or remote, such as a gift to reduce estate taxes or to avoid probate. Cf. *In re Estate of Pauson*, 186 Cal. 358, 199 P. 331 (1921) (construing inheritance tax law).

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.

To make an effective gift in view of death, the giver must have legal capacity. LaMar v. Bank of America Nat'l Trust & Sav. Ass'n, 218 Cal. 252, 22 P.2d 689 (1933); see Larsen v. Van Dieken, 34 Cal. App. 2d 352, 93 P.2d 563 (1939).

A gift in view of death is not nullified because the giver dies by suicide. Berl v. Rosenberg, 169 Cal. App. 2d 125, 130, 336 P.2d 975 (1959).

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

STAFF DRAFT

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Gifts in View of Death

September 1990

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **DECEMBER 1, 1990.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

EDWIN K. MARZEC
CHAIRPERSON
ROGER ARNEBERGH
VICE CHAIRPERSON
BION M. GREGORY
ASSEMBLYMAN ELIHU M. HARRIS
BRADLEY R. HILL
SENATOR BILL LOCKYER
ARTHUR K. MARSHALL
FORREST A. PLANT
SANFORD M. SKAGGS
ANN E. STODDEN

Letter of Transmittal

This recommendation recodifies the Civil Code provisions relating to gifts in view of death in the Probate Code, and makes the following revisions:

- (1) Codifies the common law rule that death of the donee before the death of the giver revokes a gift in view of death.
- (2) Does not continue the confusing provision 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 question of whether the giver intends to revoke the gift is treated as a question of fact.
- (3) Defines a gift in view of death as one which the giver intends to take immediate effect, subject to revocation if the giver recovers from the illness or survives the peril, rather than one given "with intent that it shall take effect only in case of the death of the giver."
- (4) Replaces the archaic language that a "gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver," with a cross-reference to the modern provision in Section 9653 of the Probate Code.

This recommendation is made pursuant to Resolution Chapter 37 of the Statutes of 1980.

RECOMMENDATION

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 giver dies.¹ The gift is revoked by the giver's recovery from the illness or escape from the peril that prompted the gift.²

Moving Provisions into Probate Code

The provisions for gifts in view of death are in the Civil Code.³ But a gift in view of death is a kind of nonprobate transfer, essentially testamentary in character.⁴ It would be more logical to locate these provisions in the Probate Code, in the division relating to nonprobate transfers.⁵ The Commission recommends that the provisions for gifts in view of death be moved from the Civil Code into the Probate Code.

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.⁶ This question has not been addressed in California.⁷ 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

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 any event which would operate as a revocation of a will made at the same time. *Id.* § 1151.

3. Civ. Code §§ 1149-1153.

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

5. Prob. Code §§ 5100-5407.

6. 38 Am. Jur. 2d *Gifts* § 90, at 889 (1968) (citing cases from New Hampshire, New York, North Carolina, and Virginia).

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

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

Under existing law, 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."⁸ Although this language dates from 1872, it has not been construed by the courts. Its meaning is not clear.⁹

The Commission recommends not continuing the provision that a gift in view of death is revoked by any event which would revoke the giver's will. The question of whether the giver intends to revoke the gift should be treated as a question of fact.¹⁰

Gift on Condition Precedent or Condition Subsequent

Existing law 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."¹¹ 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.¹² In such a case, the courts hold the attempted gift to be ineffective, and the property must be restored to the decedent's estate.¹³ If the condition is subsequent, with the

8. Civ. Code § 1151.

9. It may refer, among other things, to the giver's marriage: Sections 1299 and 1300 of the 1872 Civil Code provided that, if the testator married after making a will, the will "is revoked." It seems far-fetched to imagine that a person may make a gift in view of death and then marry before the gift is revoked by the giver's escape from the peril. Moreover, existing law no longer uses language of revocation: The testator's marriage after the will is made gives the new spouse a statutory share of the estate. Prob. Code §§ 6560-6561. (The testator's divorce "revokes" a devise to the former spouse. *Id.* § 6122.)

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

11. Civ. Code § 1149.

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

13. 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).

donee's title vesting immediately on delivery, subject to revocation if the giver recovers from the illness or survives the peril, the gift is not testamentary and can be sustained.¹⁴

The Commission recommends defining a gift in view of death as one which the giver intends to take immediate effect, subject to revocation if the giver recovers from the illness or survives the peril.

Rights of Creditors of a Deceased Giver

Existing law 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."¹⁵ This means that the property may be subjected to claims of creditors of a deceased giver if other assets of the estate are insufficient.¹⁶ This rule is stated in more modern language in Section 9653 of the Probate Code. The Commission recommends replacing the archaic language of existing law with a cross-reference to the new Probate Code provision.

PROPOSED LEGISLATION

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

An act to repeal Sections 1149, 1150, 1151, 1152, and 1153 of the Civil Code, to amend Section 250 of, and to add Part 5 (commencing with Section 5700) to Division 5 of, the Probate Code, relating to gifts in view of death.

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

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

SECTION 1. Section 1149 of the Civil Code is repealed.

14. 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).

15. Civ. Code § 1153.

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

~~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.~~

Comment. Former Section 1149 is superseded by Section 5502 of the Probate Code.

Civil Code § 1150 (repealed). Presumption of gift in view of death

SEC. 2. Section 1150 of the Civil Code is repealed.

~~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.~~

Comment. Former Section 1150 is continued in substance in Section 5703 of the Probate Code.

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

SEC. 3. Section 1151 of the Civil Code is repealed.

~~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.~~

Comment. Former Section 1151 is superseded by Section 5704 of the Probate Code.

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

SEC. 4. Section 1152 of the Civil Code is repealed.

~~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. Former Section 1152 is continued in substance in Section 5704 of the Probate Code.

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

SEC. 5. Section 1153 of the Civil Code is repealed.

~~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.~~

Comment. Former Section 1153 is continued in substance in Section 5705 of the Probate Code.

Probate Code § 250 (amended). Effect of homicide

SEC. 6. Section 250 of the Probate Code is amended to read:

250. (a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following:

(1) Any property, interest, or benefit under the will of the decedent, including any general or special power of appointment conferred by the will on the killer and any nomination of the killer as executor, trustee, or guardian made by the will.

(2) Any property of the decedent by intestate succession.

(3) Any of the decedent's quasi-community property the killer would otherwise acquire under Section 101 or 102 upon the death of the decedent.

(4) Any property of the decedent under Part 5 (commencing with Section 5700) of Division 5.

~~(4)~~ (5) Any property of the decedent under Part 3 (commencing with Section 6500) of Division 6.

(b) In the cases covered by subdivision (a):

(1) The estate of the decedent passes as if the killer had predeceased the decedent and Section 6147 does not apply.

(2) Property appointed by the will of the decedent to, or for the benefit of, the killer passes as if the killer had predeceased the decedent, and Section 1389.4 of the Civil Code does not apply.

(3) Provisions of the will of the decedent nominating the killer as executor, trustee, or guardian shall be interpreted as if the killer had predeceased the decedent.

Comment. Section 250 is amended to add a reference in subdivision (a) to the provisions relating to gifts in view of death (Prob. Code §§ 5700-5705). This is consistent with Section 253.

Probate Code §§ 5700-5705 (added). Gifts in view of death

SEC. 7. Part 5 (commencing with Section 5700) is added to Division 5 of the Probate Code, to read:

PART 5. GIFTS IN VIEW OF DEATH

§ 5700. Gift defined

5700. As used in this part, "gift" means a transfer of personal property made voluntarily and without consideration.

Comment. Section 5700 continues the effect of prior law, when the gift in view of death provisions were located in the Civil Code. As defined in Section 5700, "gift" has the same meaning as defined in Section 1146 of the Civil Code.

§ 5701. Application of general law of gifts

5701. Except as provided in this part, a gift in view of death is subject to the general law relating to gifts of personal property.

Comment. Section 5701 codifies case law. See 4 B. Witkin, *Summary of California Law Personal Property* § 109, at 100-101 (9th ed. 1987). See also Civ. Code §§ 1146-1148 (gifts of personal property).

§ 5702. Gift in view of death defined

5702. A gift in view of death is one which is made in contemplation, fear, or peril of death, whether from illness or other cause, and with intent that it shall be revoked if the giver recovers from the illness or escapes from the peril.

Comment. Section 5702 continues the substance of former Section 1149 of the Civil Code, except that Section 5702 is phrased in terms of condition subsequent rather than 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 (condition precedent), the gift is testamentary. J. Cribbett & 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.

To make an effective gift in view of death, the giver must have legal capacity. *LaMar v. Bank of America Nat'l Trust & Sav. Ass'n*, 218 Cal. 252, 22 P.2d 689 (1933); see *Larsen v. Van Dieken*, 34 Cal. App. 2d 352, 93 P.2d 563 (1939).

A gift in view of death is not nullified because the giver dies by suicide. *Berl v. Rosenberg*, 169 Cal. App. 2d 125, 130, 336 P.2d 975 (1959).

§ 5703. Presumption of gift in view of death

5703. A gift made during the last illness of the giver, or under circumstances which would naturally impress the giver with an expectation of speedy death, is presumed to be a gift in view of death.

Comment. Section 5703 continues the substance of former Section 1150 of the Civil Code.

§ 5704. Revocation of gift in view of death

5704. (a) A gift in view of death is revoked by:

(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.

(b) A gift in view of death may be revoked by:

(1) The giver at any time.

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

(c) A gift in view of death is not affected by a previous will of the giver.

(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.

Comment. Section 5704 continues the substance of former Sections 1151 and 1152 of the Civil Code, with two exceptions:

(1) The provision in former Section 1151 of the Civil Code 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 is not continued.

(2) Paragraph (2) of subdivision (a) (revocation by death of donee) is new and codifies the case law rule of other U. S. jurisdictions. See 38 Am. Jur. 2d *Gifts* § 90, at 889 (1968).

§ 5705. Rights of creditors of the giver

5705. A gift in view of death is subject to Section 9653.

Comment. Section 5705 continues the substance of former Section 1153 of the Civil Code.