

Memorandum 90-139

Subject: Study L-3034 - Gifts in View of Death (Comments on Tentative Recommendation)

Attached is the *Tentative Recommendation relating to Gifts in View of Death*. We received 20 letters commenting on the TR. These are attached as Exhibits 1 through 20:

Exhibit 1: Wilbur L. Coats
Exhibit 2: Paul Gordon Hoffman
Exhibit 3: Dan L. Kirby, Western Surety Company
Exhibit 4: Alvin G. Buchignani
Exhibit 5: Jerome Sapiro
Exhibit 6: Ruth E. Ratzlaff
Exhibit 7: Richard E. Llewellyn, II
Exhibit 8: Thomas R. Thurmond
Exhibit 9: Robert J. Berton (former CLRC Chairman)
Exhibit 10: Ernest Rusconi
Exhibit 11: Linda A. Moody
Exhibit 12: Henry Angerbauer
Exhibit 13: Jeffrey A. Dennis-Strathmeyer
Exhibit 14: Ruth A. Phelps
Exhibit 15: Michael J. Anderson
Exhibit 16: Alan D. Bonapart
Exhibit 17: Frank M. Swirles
Exhibit 18: David W. Knapp, Sr.
Exhibit 19: Irwin D. Goldring
Exhibit 20: Stuart D. Zimring

Eleven letters support the TR without qualification (Exhibits 1, 3, 4, 6, 8, 9, 10, 12, 16, 18, and 20). Four support it with suggested revisions (Exhibits 2, 5, 13, and 14). One supports it with a question (Exhibit 11). Two have "no objections" to it (Exhibits 15 and 17). Two would repeal the existing statute and not enact a new statute (Exhibits 7 and 19).

REVISIONS RECOMMENDED BY STAFF

Protection of Good Faith Lender

Proposed Section 5704 provides that, when the gift has been delivered to the donee and the donor revokes it, the rights of a bona fide purchaser from the donee before the revocation are not affected by the revocation. This continues a portion of Civil Code Section 1151. Paul Gordon Hoffman (Exhibit 2) would expand this provision to protect a bona fide lender if the loan was made before the revocation and was made in reliance on the security of the asset. The staff agrees, and

would revise subdivision (d) of Section 5704 as follows:

(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, or of a bona fide encumbrancer before the revocation, are not affected by the revocation.

An unsecured lender is protected by Sections 5705 and 9653, under which a creditor may require the personal representative to recover a gift in view of death if the estate is insolvent.

Technical Correction

The staff will make the technical correction suggested by Ruth Phelps (Exhibit 14): The reference in the Comment to Civil Code Section 1149 to Probate Code Section 5502 should read "5702."

REVISIONS NOT RECOMMENDED BY STAFF

Should Existing Statute Be Repealed Without Enacting New Statute?

Two commentators would repeal the present Civil Code provisions on gifts in view of death and not replace them with new Probate Code provisions (Exhibits 7 and 19). Richard Llewellyn (Exhibit 7) prefers "repeal rather than the clarification of the existing old law. Gifts of this nature are largely problematical and they are often impossible to verify with anything other than the donee's testimony." Irwin Goldring (Exhibit 19) prefers repeal without replacing the sections, so we will "have eliminated the entire topic."

The problem with this is that, without a statute on gifts in view of death, general law of gifts will apply. Unless the donor expressly makes the gift revocable, a gift in view of death will be absolute. The statute on gifts in view of death thus qualifies the general law of gifts, and protects the donor by permitting the donor to recover the property given if the donor escapes the peril or recovers from the illness. Special rules of revocation for gifts in view of death are essential to avoid injustice to the donor.

Tax Problems?

Mr. Goldring (Exhibit 19) is concerned that lay donors and donees will not be aware of tax consequences of a gift in view of death. This is equally true for gifts generally. It is not a problem that is limited to gifts in view of death. The revocability of a gift in view of death seems to minimize tax problems. If the gift is revoked, no gift tax return is required. Also, the cases show that in most cases

the value of the property given is probably well below the value requiring a gift tax return.

Jeffrey Dennis-Strathmeyer (Exhibit 13) says if we "make all gifts revocable," that will create "serious transfer tax problems for California residents." This is a red herring. We have no intention of making all gifts revocable.

Revocation by Death of Donee Before Donor

Jeffrey Dennis-Strathmeyer (Exhibit 13) does not like the provision that death of the donee before the donor revokes a gift in view of death. He says the assumption the donor would want the gift back if the donee dies "is far too speculative to be embraced by statute." The staff agrees it is speculative, but it is equally speculative to assume the donor would not want the gift back. If the statute is silent, there will be uncertainty, and that will invite litigation. The statute should provide a rule.

One possibility is to apply an anti-lapse rule drawn from the law of wills (Prob. Code § 6147). If a devisee under a will predeceases the testator, the devisee's issue are substituted if the devisee is "kindred" (i.e., a blood relative) of the testator, or is kindred of a surviving, deceased, or former spouse of the testator. This may be unnecessarily complex for a gift in view of death. The issue is not likely to arise often. It can only arise if both donee and donor have died. Only four states have reported decisions on this question -- New Hampshire, New York, North Carolina, and Virginia. 38 Am. Jur.2d *Gifts* § 90, at 889 (1968). This suggests the statute should be kept simple.

The staff prefers the rule of revocation in the TR for two reasons:

(1) It is consistent with the law in the four states that have considered the question.

(2) If the gift is revoked by death of the donee while the donor is living (unlike the will case, where testator is deceased), the donor may make the gift a second time. The donor may give the property to heirs or devisees of the donee or to anyone else. Thus the proposed rule is less likely to frustrate the donor's intent than a rule that the donee's death does not revoke the gift.

Revocation by Giver's Will

Proposed Section 5704 provides that a gift in view of death is revoked by "the giver's will if the will expresses an intention to

revoke the gift." This continues the substance of Civil Code Section 1152. Jerome Sapiro (Exhibit 5) has a problem with this provision:

A will speaks as of the date of death. Revocation should be by events occurring during the donor's lifetime or by revocation by donor during his lifetime, -- not by will, unless the gift document reserves that right expressly. If the donor is able to make and execute a will after the gift, he most certainly would be able to revoke the gift. We should not help the donor commit a fraud on the donee, who may have been of past and continuing help and assistance to the donor.

A donor may revoke a gift in view of death by a writing. *Rosenberg v. Broy*, 190 Cal. App. 2d 591, 596, 12 Cal. Rptr. 103 (1961) (gift of securities revoked by letter). There is no reason why the donor should be precluded from doing so by will. When a donor makes a gift in view of death, there is rarely a "document" in which to reserve a right to revoke by will. The donor usually just hands over the property. It is not fraud on the donee for the donor to exercise a legal right to revoke. If the donee has given services to the donor, the donee may have a contract claim (quantum meruit) against the donor's estate. E.g., *Drvol v. Bant*, 183 Cal. App. 2d 351, 7 Cal. Rptr. 1 (1960). But the donee's potential quantum meruit claim against the estate should not prevent the donor from revoking a particular gift.

Linda Moody (Exhibit 11) asks when a revocation by will is effective, whether on execution, on the testator's death, or when the will is probated. As Mr. Sapiro notes, a will ordinarily speaks as of the date of death. 12 B. Witkin, *Summary of California Law Wills and Probate* § 268, at 299 (9th ed. 1990). But if the will shows the testator's intent that the date of execution governs, this intent will be given effect. *Id.* This question will seldom arise. It assumes an unusual set of facts, which must occur in the following order -- (1) gift in view of death, (2) making of a will by the donor, and (3) death of the donor (usually soon after the first two events).

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

September 25, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

CA LAW REV. COMMISSION

SEP 27 1990

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In Re: Tentative Recommendations relating to:
Recognition of Trustee's Powers;
Recognition of Agent's Authority--Statutory Power of Attorney;
Gifts in View of Death;
Repeal of Civil Code Section 704;
Recognition of Trustees' Powers; and
Access to Decedent's Safe Deposit Box.

Dear Sirs:

I concur in all of the above cited recommendations except the proposal concerning Access to Decedent's Safe Deposit Box.

Often individuals place the original of an inter vivos trust in their safe deposit box. Therefore, it may be just as important to remove a trust document as it is to remove a Will.

I suggest an additional paragraph (5) be added to Section 331. (d) which would read:

(5) Permit the person given access to remove any trust documents.

Very truly yours,


Wilbur L. Coats

Study L-3034
CA LAW REV. COMM'N
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September 25, 1990

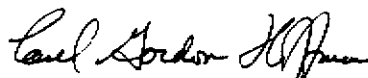
California Law Revision Commission
4000 Middlefield Rd
Suite D-2
Palo Alto, CA 94303-4739

Re: Study L-3034-Tentative Recommendation Relating to
Gifts in View of Death

Ladies and Gentlemen:

I suggest that you consider amending proposed section 5704(d) to protect the rights of a bona fide lender to the donee, when the loan was made before revocation and was based on the asset. For example, assume that the donor gave the donee stock, which the donee deposited with his broker, and the broker then made a loan secured by the stock, or possibly just on the basis of the stock. A revocation might defeat the legitimate interest and expectation of the creditor.

Very truly yours,



Paul Gordon Hoffman

PGH:mem

PGH1001\LAUREV1.LTR



Office of General Counsel

September 25, 1990

California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

CA LAW REV. COMM'N

SEP 27 1990

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Dear Sir/Madam:

Re: Tentative Recommendations #L-3022, #L-3046, #L-644,
#L-3034
Our Special File CA-3949

Thank you for furnishing us with copies of these Tentative Recommendations. This Company is in agreement with each of these recommendations, and would appreciate being kept on your mailing list.

Sincerely,

A handwritten signature in cursive script that reads 'Dan L. Kirby'.

Dan L. Kirby

DLK:gm

SEP 28 1990

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September 25, 1990

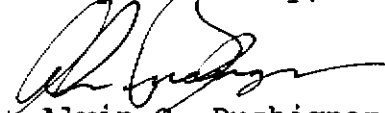
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Gifts in View of Death

Ladies & Gentlemen,

I am in agreement with the tentative recommendation of September 1990 relating to Gifts in View of Death, as it is now written.

Very sincerely,



Alvin G. Buchignani

AGB/pzg

JEROME SAPIRO
ATTORNEY AT LAW
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CA LAW REV. COMM'N

SEP 27 1990

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Sept. 26, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA, 94303-4739

Re: Tentative Recommendation
relating to Gifts in View of Death,
September, 1990 - #L-3034

Hon. Commission:

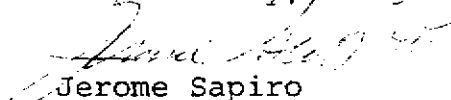
Your recommendation is approved, except for the following,
which gives me some problem.

Proposed §5740 (b) (2) allows for revocation if the will
of the donor expresses an intention to revoke the gift.

A will speaks as of the date of death. Revocation
should be by events occurring during the donor's lifetime or by
revocation by donor during his lifetime, - not by will, unless
the gift document reserves that right expressly. If the donor
is able to make and execute a will after the gift, he most
certainly would be able to revoke the gift. We should not help
the donor commit a fraud on the donee, who may have been of past
and continuing help and assistance to donor.

Hence I think that (b) (2) should be removed from
your recommendation.

Respectfully,


Jerome Sapiro

JS:mes

OCT 01 1990

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RUTH E. RATZLAFF
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September 28, 1990

California Law Revision Commission
4000 Middlefield Road Suite D-2
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RE: Gifts In View of Death

Dear Law Revision Commission:

I have reviewed a tentative recommendation relating to Gifts In View of Death.

I agree that it is a good idea that the statutory provisions relating to Gifts In View of Death be contained in the Probate Code rather than the Civil Code. I think the recommendations are good and necessary to round out this obscure area of law.

Sincerely,


Ruth E. Ratzlaff

RER:pp

ALBERT J. GALEN
W. MICHAEL JOHNSON
RICHARD E. LLEWELLYN II
A. STEVEN BROWN
MICHAEL A. DUCKWORTH
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October 2, 1990

CA LAW REV. COMM'N

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California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

Re: Recent Tentative Recommendations

Dear Commission:

In response to your request for comment on the Commission's Tentative Conclusions, I strongly support and am in agreement with the Commission's recommendations relating to (1) Recognition of Agent's Authority Under Statutory Form Power of Attorney, and (2) Access to Decedent's Safe Deposit Box.

I have no approval or disapproval as to the tentative recommendation concerning Recognition of Trustee's Powers, since although I have occasionally had problems with persons or institutions acknowledging a trustee's authority, I have found that most of such problems are easily remedied by simply providing an abstract or a full copy of the trust instrument.

Lastly, with regard to the Commission's tentative recommendation relating to Gifts in View Of Death, I would prefer to see the repeal rather than the clarification of the existing old law. Gifts of this nature are largely problematical and they are often impossible to verify with anything other than the donee's testimony.

Very truly yours,

HOLLEY & GALEN

By 
Richard E. Llewellyn, II

REL:art
0000004EL.REL

EXHIBIT 8

THOMAS R. THURMOND

ATTORNEY AT LAW

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Study L-3034

CALIF. REV. COMM'N

OCT 04 1990

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October 3, 1990

California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations

The following comments are in response to the tentative recommendations dated June and September 1990.

Repeal of Civil Code section 704

I concur with this recommendation, which comports with Federal supremacy concepts.

L-3034 - Gifts In View of Death

I concur with this recommendation, which clarifies the nature of such gifts and establishes the concept of a condition subsequent. Moving these sections to the Probate Code makes sense.

L-644 - Recognition of Trustees' Powers

I concur with this recommendation. It is another step toward resolving the continuing problem with third parties' recognition of trustees' powers. This provides another arrow in the attorney's quiver to encourage out-of-state and other institutions to cooperate in trust matters.

L-3046 - Recognition of Agent's Authority Under Statutory Form Power of Attorney

I concur with this recommendation. This should be an effective measure to counter the tendency of banks and other financial institutions to insist on the use of their own form powers of attorney. While this situation has improved considerably in recent years, there still are many institutions that are reluctant to accept attorney-drafted documents.

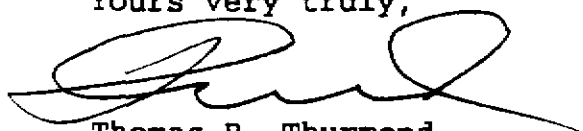
Page 2
California Law Revision Commission
October 3, 1990

L-3022 - Access to Decedent's Safe Deposit Box

I concur with this recommendation. The previous requirement that the institution directly file any will discovered in the safe deposit box created inefficiencies and delays in the establishment of probate estates. From an attorney's standpoint, this procedure is better.

Thank you for the opportunity to comment on these proposed revisions to the law.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Thurmond', with a large, stylized flourish at the end.

Thomas R. Thurmond
Attorney at Law

TT/sr

LAW OFFICES OF

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CALIF. LAW REV. COMMISSION

OCT 05 1990

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J. MARCUS DAY
THOMAS J. HARRON

October 3, 1990

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear John:

Recently I have received and reviewed the Tentative Recommendations of the California Law Revision Commission relating to the following subjects:

1. Repeal of Civil Code Section 704 (passage on death of ownership of U.S. Bonds);
2. Gifts in View of Death;
3. Access to Decedent's Safe Deposit Box;
4. Recognition of Agent's Authority under Statutory Form Power of Attorney;
5. Recognition of Trustees' Powers.

It has been almost a decade since I commenced to serve on the Law Revision Commission. As you will well remember, it was during that time that we first addressed ourselves to an overhaul of the California Probate Code. It is interesting to note that many of the Tentative Recommendations now being recommended are the result of determining the practical application of the Probate Code reforms that were enacted.

In any event, I am in favor of all of the above referenced Tentative Recommendations. I am particularly pleased with respect to the recommendations involving recognition of an

Mr. John H. DeMouilly
October 3, 1990
Page 2

agent's authority under a Statutory Form Power of Attorney, the matter of access to a decedent's safe deposit box, and recognition of a trustee's powers. Like many other attorneys, I have, from time to time, commiserated with clients who are unable to convince third parties, often banks or similar institutions, of their authority to act. The Tentative Recommendations, in that regard, appropriately address the practical aspects of obtaining recognition for authority to act.

Turning to the Tentative Recommendation relating to recognition of trustees' powers, I call the following to your attention. It has been my experience that banks and other institutions often cause difficulties for trustees because of their refusal to proceed with the trust unless and until they have adequate proof of the existence of the trust and the identification of the trustee, as well as the authority of the trustee. Many a trustee client has requested that I prepare something akin to certified letters testamentary in a probate estate. To my knowledge, the closest one can come to such documentation is Probate Code Section 15603. That section allows the Clerk of the Court to issue a certificate showing that the trustee is duly appointed and acting, but only if there is some proceeding before the Court which would evidence those facts. Obviously, with most living trust situations, it is the desire of the trustee not to be involved with any Court proceedings. It is also true that in the case of a trust involving real property, the trust can be recorded pursuant to the provisions of Probate Code Section 15210. None of the cited sections truly address the desire of the typical trustee of a living trust with respect to having the ability to present proof of the trusteeship without the necessity of submitting the entire trust document. Your proposed Probate Code Section 18100.5 should go a long way towards providing a simple affidavit by virtue of which the trustee can satisfy third persons as to the trustee's authority without the necessity of presenting the entire trust document to the third person. In the context of the wording of proposed Section 18100.5 of the Probate Code, I recommend an additional sentence be added at the end of subsection (a) of Probate Code Section 18100.5. That additional sentence should read essentially as follows:

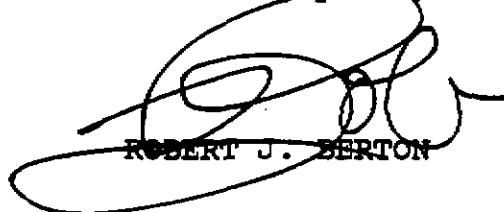
"The affidavit shall also state the name or other designation of the trust sufficient to identify it, that the trust is valid, and that the trust is in effect."

LAW OFFICES OF
PROCOPIO, CORY, HARGREAVES AND SAVITCH

Mr. John H. DeMouilly
October 3, 1990
Page 3

It has been a while since I have talked with you, or corresponded with you or with other members of the staff. Therefore, please give my best regards to Nat, Bob and Stan. Hoping this letter finds you all well, I am

Sincerely yours,



ROBERT J. BERTON

RJB:jhc

OCT 09 1990

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RUSCONI, FOSTER, THOMAS & PIPAL

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October 5, 1990

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

Re: Civil Code §704
Gifts in View of Death - Agent's Authority
Under Statutory Power of Attorney - Recognition
of Trustee's Powers

Gentlemen:

I have read the recommendations mailed to me recently by your office on the above subject matters. I cannot visualize anyone objecting to the repeal of Civil Code §704, and transferring that law to the Probate Code.

As to recognizing the power of an agent and that of a trustee as set forth above, these are much needed additions to the law. In fact, as to a power of attorney, we once had to threaten a bank with a suit for any damages caused our principal by the bank's failure to recognize the agent's authority.

If these provisions are enacted, we can simply point to these provisions in the law that require third parties to honor these documents.

In summary, I concur in your recommendations for each of the above proposed legislations.

Very truly yours,

RUSCONI, FOSTER, THOMAS & PIPAL

E. Rusconi

ERNEST RUSCONI

ER/bbr

MOODY & MOODY
ATTORNEYS AT LAW
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LINDA A. MOODY
GRAHAM B. MOODY

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October 10, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation: Gifts in View of Death
(September 1990)

Ladies and Gentlemen:

Moody & Moody supports the Commission's recommendations relating to Gifts in View of Death. We raise only one point for clarification.

Draft Section 5704(b)(2) provides: "A gift in view of death may be revoked by: . . . (2) The giver's will if the will expresses an intention to revoke the gift."

At what point is the gift deemed to be revoked? Upon execution of the will? Upon the testator's date of death? Upon the probate of the will? Would probate be required in order to establish the effective date of the revocation?

Very truly yours,


Linda A. Moody

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

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10/12/90

California Law Revision Commission

I have reviewed your recommendations as follows:

- (1) Access to Decedent's Safe Deposit Box,
- (2) Repeal of Civil Code Section 704,
- (3) Gifts in View of Death,
- (4) Recognition of Agent's Authority under Statutory Form Power of attorney,
- (5) Recognition of Trustees' Powers.

I agree with your recommendations and proposed conclusions related to the above mentioned items.

I suggest you implement your powers to recommend them to The legislature to be enacted

into law. Thanks for letting me make my views known

JEFFREY A. DENNIS-STRATHMEYER
ATTORNEY AT LAW

CA LAW REV. COMMISSION
Study L-3034
OCT 19 1990
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POST OFFICE BOX 593 - BERKELEY, CALIFORNIA 94701
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October 16, 1990

California Law Revision Commission
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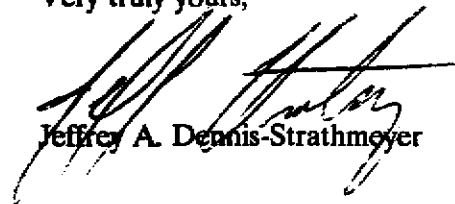
Re: Study L-3034. Tentative Recommendation relating to Gifts in
View of Death.

Sirs:

I do not agree that death of the donee before the donor should revoke a gift in view of death. The assumption regarding the donor's intent is far too speculative to be embraced by statute and we could just as easily hypothesize that donors who are not about to die would also like their gifts back whenever a donee dies before they do. Are we going to make all gifts revocable (thereby creating serious transfer tax problems for California residents?)

In view of the fact that the contemplated situation will almost never arise, there is no need for a statutory rule. The courts can deal with the matter of the donor's actual intent if the situation actually arises.

Very truly yours,


Jeffrey A. Dennis-Strathmeyer

OCT 25 1990

RECEIVED

Edward M. Phelps
Deborah Ballins Schwarz
Ruth A. Phelps
Of Counsel
Barbara E. Dunn

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October 23, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

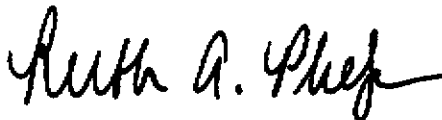
Re: Tentative Recommendation Relating to
Gifts in View of Death

Dear Sir/Madam:

I have read this recommendation. I approve it. You need to correct one reference. At page 5 under Civil Code Section 1149, the Comment refers to Section 5502 of the Probate Code. This reference should be Section 5702 of the Probate Code.

You did a good job on this section.

Very truly yours,



Ruth A. Phelps
PHELPS, SCHWARZ & PHELPS

RAP:sp

Law Offices of
Michael J. Anderson, Inc.
77 Cadillac Drive, Suite 260
Sacramento, California 95825
(916) 921-6921
FAX (916) 921-9697

CA LAW REV. COMM'N

OCT 25 1990

R E C E I V E D

Michael J. Anderson

October 24, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

To whom it may concern:

I favor without comment the following:

In respect to the Repeal of Code Section 704 I am in agreement with it. I am also in favor of Recognition of Trustees' Powers and Access to Descendant's Safe Deposit Box.

In respect to Recognition of Agent's Authority Under Statutory Form Power of Attorney, I would request that it be expanded to include any Power of Attorney drafted by an Attorney.

I have no objections to Gifts in View of Death.

Sincerely,


MICHAEL J. ANDERSON

MJA/fa



CA LAW REV. COMMISSION

OCT 26 1990

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OUR FILE NUMBER

October 25, 1990

P900.05-1d

Attorneys at Law

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San Francisco, CA 94111

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500 Ygnacio Valley Road
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Walnut Creek, CA 94596

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ROBERT L. MILLER
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RONALD S. KRAVITZ
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MICHAEL G. SCHINNER
LEONARD W. ROTHSCHILD, JR.

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303-4739

Tentative Recommendations

I have reviewed the following tentative recommendations and I concur in the recommendations:

#L-644 Relating to Recognition of Trustees' Powers - September 1990,

#L-3034 Relating to Gifts in View of Death - September 1990,

#L-3046 Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney - September 1990 and

Relating to Repeal of Civil Code Section 704 (Passage on Death of Ownership of U.S. Bonds) - June 1990.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Alan D. Bonapart", is written over a faint, larger signature.

Alan D. Bonapart

ADB:ah

CA LAW REV. COMMISSION
Study L-3034
OCT 27 1990
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FRANK M. SWIRLES
LAW CORPORATION

October 26, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

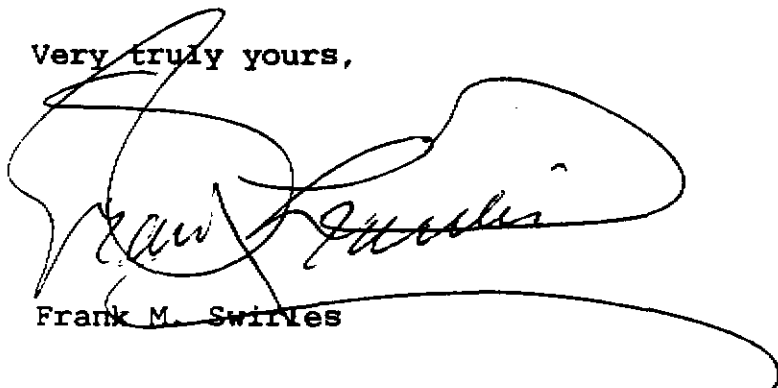
Re: Tentative Recommendations - re

1. Repeal of CC Section 704
2. Access to decedent's safe deposit box
3. Recognition of Trustee's powers
4. Recognition of agent under statutory power
5. Gifts in view of death —

Gentlemen:

I have no objections to your recommendations in the above matters.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read "Frank M. Swirles". The signature is written over the typed name and extends across the width of the letter.

Frank M. Swirles

P.O. BOX 1470
RANCHO SANTA FE, CALIFORNIA 92067
(619) 750-0060

DAVID W. KNAPP, SR.
DAVID W. KNAPP, JR.

LAW OFFICES
KNAPP & KNAPP
1093 LINCOLN AVENUE
SAN JOSE, CALIFORNIA 95126
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October 5, 1990

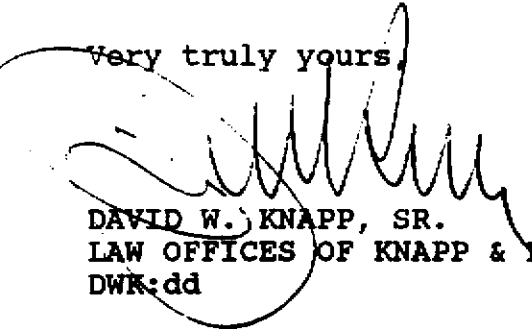
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: YOUR TENTATIVE RECOMMENDATIONS CONCERNING THE FOLLOWING
REVISIONS:

1. ASSESS TO DECEDENT'S SAFE DEPOSIT BOX:
I highly approve the recommendation and it is long overdue;
2. RECOGNITION OF TRUSTEE'S POWERS:
I highly approve as it will be a great help;
3. RECOGNITION OF AGENTS AUTHORITY UNDER STATUTORY FORM POWER OF ATTORNEY:
Since the inception of the law (1982) I have had many difficult sessions with both Bank of America (who insists on the use of their own forms) and the local Wells Fargo who at first refused entirely to honor the same. Your recommendation, if only accepted, will be of great service to we probate lawyers and will possibly "educate" the institutions of the protection they have in honoring the powers of attorney. It's a great idea;
4. GIFTS IN VIEW OF DEATH:
I approve. It puts the law where it should be;
5. REPEAL OF CIVIL CODE SECTION 704:
I approve.

Your Commission should be congratulated on the fine work you are doing in straightening out many misunderstand sections of the law.

Very truly yours,


DAVID W. KNAPP, SR.
LAW OFFICES OF KNAPP & KNAPP
DWK:dd

Study L-3034
NOV 01 1990
RECEIVED

IRWIN D. GOLDRING
ATTORNEY AT LAW
1925 CENTURY PARK EAST, SUITE 950
LOS ANGELES, CALIFORNIA 90067
TELEPHONE (213) 201-0304
TELECOPIER (213) 277-7994

October 29, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Gifts in View of Death

Gentlemen:

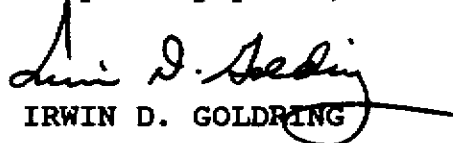
I find this whole topic not to my liking and would have preferred the Commission to have not only removed these provisions from the Civil Code but also to have omitted to place them elsewhere and have eliminated the entire topic.

I frankly find the whole concept somewhat bizarre and fraught with opportunities for undue influence and tax fraud.

I find it particularly surprising that in other respects the Code and the Courts go to great length to protect those who are in extremis from the wiles and pressures of others, and then turn around and open an avenue for such abuse. Even the Code sections proposed seem to be schizophrenic in that at one instance they appear to take these gifts out of the testamentary cycle and in the other, Section 5705, put them right back in.

The tax fraud area is perhaps more inadvertent than advertent. I suspect those receiving gifts will be more likely to fail to advise the proper parties that the gifts were received than the person giving it failing to understand that the gifts may well be subject to transfer taxes. Having said that, however, based upon conversations I have had with lay persons, I am sure that many will believe that such gifts take things out of their estate since most clients really do not understand the fact that there is a total transfer tax system which includes gifts as well as transfers upon death.

Very truly yours,


IRWIN D. GOLDRING

IDG:hs

LAW OFFICES OF

NOV 13 1990

LEVIN, BALLIN, PLOTKIN, ZIMRING & GOFFIN

RECEIVED

HARMON R. BALLIN (1938-1988)

WILLIAM LEVIN
JAY J. PLOTKIN
STUART D. ZIMRING
NANCY C. MARUTANI
GEORGE M. GOFFIN
D G KYRIACOU
LOAN H. OTSU
RUTH E. GRAF
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TELECOPIER (818) 508-0181

OF COUNSEL
MANVA BERTRAM
JUSTIN GRAF
STEVEN CERVERIS
LEGAL ASSISTANTS
PATRICIA D. FULLERTON
KIRSTEN HELWEG

November 8, 1990

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303-4739

Re: Recommendations L-3022, L-644, L-3046, L-3034, L-3025

Gentlemen:

I have reviewed the latest set of tentative recommendations and am in favor of all of them. However, I do wish to express my concern that it appears necessary to provide for a cause of action of "specific performance" as regards Statutory Form Powers of Attorney and Recognition of Trustee Powers. It is regrettable that such useful estate planning tools are not accepted willingly within the business and economic community.

On the other hand, as I read proposed Civil Code Section 2480.5, it only applies to a Statutory Form Power of Attorney. I think it would be more useful (especially since I never use the Statutory Form) to enlarge the enforcement power to apply to any duly executed Durable Power of Attorney.

Lastly, I seem to have misplaced my copy of the Law Revision Commission's Report on the new probate code with commentary. I would appreciate it if you could forward a copy to me. If there is any cost involved, give me a call and I will send you a check.

Sincerely,

LEVIN, BALLIN, PLOTKIN, ZIMRING & GOFFIN
A Professional Corporation

By: 

STUART D. ZIMRING

SDZ:rs

#L-3034

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 OCTOBER 31, 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

THE CALIFORNIA LAW REVISION COMMISSION

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Letter of Transmittal

This recommendation proposes that the existing Civil Code provisions relating to gifts in view of death be recodified in the Probate Code with technical and clarifying revisions.

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 or her heirs or devisees rather than relatives of the donee. The

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. Cribbett & 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 100-01 (9th ed. 1987).

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 donee's title vesting immediately on delivery, subject to

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).

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 amendments, additions, and repeals.

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

~~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

~~1150. A gift made during the last illness of the giver, or under circumstances which would naturally impress him with~~

14. J. Cribbett & 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).

~~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

~~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

~~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

~~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

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

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 100-01 (9th ed. 1987). See also Civ. Code §§ 1146-1148 (gifts of personal property).

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.

§ 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. 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*.

(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).

§ 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.