

NEW STUDENT ORIENTATION MOCK CLASS READING ASSIGNMENT

Please read these materials *prior to* Orientation.

During Orientation, instructors will introduce you to legal case reading and briefing skills based on the following information:

Materials from: Dukeminier, Krier, Alexander, Schill, PROPERTY (6th ed Aspen). The assignment is as follows:

Acquisition by Gift

READ

P. 157-159: Introductory Notes and Problems

BRIEF*

P. 166-171: Gruen v. Gruen

ANSWER

P. 172: Notes and Questions

DO NOT READ

P. 159-165: Newman v. Bost

P. 165-166: Notes and Problems

*Instructions will be given in the Case Briefing session.

Reprinted from Dukeminier, Kriar, Alexander and Schill

PROPERTY
(6th ed., Aspen)

C. Acquisition by Gift

To complete our study of possession, we turn to gifts of personal property, where possession plays a very important role. The law has long required that, to make a gift of personal property, the donor must transfer possession ("hand over the property") to the donee with the manifested intention to make a gift to the donee. Both "intention" and "delivery" must be present.³⁰ Intention to make a gift may be shown by oral evidence; delivery requires objective acts.

The requirement of transfer of possession is feudal in origin. In feudal times, when few could read or write, a symbolic ceremony transferring possession was an important ritual signifying the transfer. Land could be transferred only by delivering a clod of dirt or a branch to the grantee on the land itself. The ceremony was called "livery of seisin" (see page 205); chattels had to be handed over. In 1677 the Statute of Frauds abolished livery of seisin and initiated the requirement of a deed to pass title to land. However, the visual ceremony of transferring possession still survives if the object transferred is on top of the land. In a famous article, Professor Mechem suggested the following reasons for the survival of the delivery requirement in gifts of personal property:

1. Handing over the object makes vivid and concrete to the donor the significance of the act performed. By feeling the "wrench of delivery," the donor realizes an irrevocable gift has been made.

2. The act is unequivocal evidence of a gift to the actual witnesses of the transaction.

3. Delivery of the object to the donee gives the donee, after the act, prima facie

evidence in favor of the alleged gift. [Philip Mechem, Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments, 21 Ill. L. Rev. 341, 348-349 (1926).]

If manual delivery is not practicable because of the size or weight of the object, or its inaccessibility, constructive or symbolic delivery may be permitted. *Constructive* delivery is handing over a key or some object that will open up access to the subject matter of the gift. *Symbolic* delivery is handing over something symbolic of the property given. The usual case of symbolic delivery involves handing over a written instrument declaring a gift of the subject matter; for example, Joe hands to Marilyn a paper reading, "I give my grand piano to Marilyn. s/ Joe." The traditional rule

³⁰ Acceptance by the donee is also required but seldom an issue. Courts presume acceptance upon delivery, unless a donee expressly refuses a gift.

of gifts is: If an object can be handed over, it must be. But there are indications that the rule is eroding. For example, one court found valid *constructive* delivery where a donor who had received a check from another endorsed the check in blank and put it on a table in her apartment, which she shared with the donee, along with a note giving the check to the donee, and then left with the intention of committing suicide (which she did). *Scherer v. Hyland*, 380 A.2d 698 (N.J. 1977). Under the traditional rule, constructive delivery would not be recognized here. (Do you see why?) However, the court stated that it would find a constructive delivery adequate “when the evidence of donative intent is concrete and undisputed, when there is every indication that the donor intended to make a present transfer of the subject matter of the gift, and when the steps taken by the donor to effect such a transfer must have been deemed by the donor as sufficient to pass the donor’s interest to the donee.”

The restriction on *symbolic* delivery has also been relaxed somewhat. Some states have statutes providing that symbolic delivery by a writing is always permitted. E.g., Cal. Civ. Code §1147 (West 1982).

With only three requirements, gift law is beguilingly simple, and we shall see that the requirements of donative intent and delivery are far more complex than meets the eye. In studying the materials that follow, it will be helpful to keep in mind this observation from a recent commentator: “[A] close examination of the cases leaves a reader with a sense that ad hoc considerations of fairness and justice or propriety do much of the work in leading judges to decisions.” Roy Kreitner, *The Gift Beyond the Grave: Revising the Question of Consideration*, 101 Colum. L. Rev. 1876, 1906 (2001).

PROBLEMS

1. *O* owns a pearl ring. While visiting her daughter *A*, *O* leaves the ring on the bathroom sink. After *O* leaves, *A* discovers the ring. When *A* telephones *O* to tell her of the discovery, *O* tells *A* to keep the ring as a gift. Has *O* made a gift to *A*? If so, can *O* change her mind the next day and require *A* to return the ring?

Suppose that *A* does not telephone *O* to tell her the ring has been found. A week later, at a dinner with friends, *A* surprises *O* by producing the ring. *O* takes the ring, looks at it, then gives it back to *A*, saying, “I want you to have it. It’s yours.” *A* tries the ring on, but it is too large for *A*’s finger. *O* then says, “Let me wear it until you can get it cut down to fit you.” *O* leaves the dinner wearing the ring, is struck by a car, and is killed. *A* sues *O*’s executor for the ring. What result? *Garrison v. Union Trust Co.*, 129 N.W. 691 (Mich. 1910).

Suppose that at the dinner above, *O* had not said the words quoted, but instead had said, “I promise to leave you this ring when I die.” What result? For criticism of the distinction between gifts and gift promises, see Jane B. Baron, *Gifts, Bargains, and Form*, 64 Ind. L.J. 155 (1989). The traditional rule that gift promises are legally unenforceable for lack of consideration is defended in Melvin Eisenberg, *The World of Contract and the World of Gift*, 85 Calif. L. Rev. 821 (1997).

Suppose *A* gives *B* a \$21,000 engagement ring. Later the engagement is broken. Does it matter who broke the engagement in determining who now owns the

ring? See *Lindh v. Surman*, 742 A.2d 643 (Pa. 1999) (4 to 3, adopting a no-fault approach, holding that the ring must be returned to the donor regardless of who broke the engagement, in an opinion by “Madame Justice Newman,” dissent by “Mr. Justice Cappy in which Messrs. Justice Castillo and Saylor join” [Law French resurrected?]). The traditional rule is that the donor cannot recover the ring if the donor is at fault. See Annot. 44 A.L.R. 5th 1 (1996).

2. *O* writes a check to *B* on her checking account and hands it to *B*. Before *B* can cash the check, *O* dies. What result? See *Woo v. Smart*, 442 S.E.2d 690 (Va. 1994) (holding no gift until check paid, because donor retains dominion and control of funds; donor could stop payment or die, revoking command to bank to pay the money). But see *In re Estate of Smith*, 694 A.2d 1099 (Pa. Super. Ct. 1997) (holding valid gifts of checks on facts similar to those in *Woo*).

3. Suppose that *O*, while wearing a wristwatch, hands *A* a signed writing saying: “I hereby give *A* the wristwatch I am wearing.” Is this a valid gift? The traditional rule is that the watch must be handed over, if practicable. Restatement (Second) of Property, Donative Transfers, §32.2, Illustration 3 (1992), says that a gift of a watch by a document is valid; even though it would be easy to take it off and hand it over. Although without case support at present, the Restatement rule may be the rule of the future. Which is the better rule? Should the donor be made to feel the “wrench of manual delivery”? Would the average person know the difference between a paper reading, “I give you my watch,” which the Restatement says should be a good gift, and a paper reading, “I will give you my watch,” which is an unenforceable gratuitous promise?

4. Robert Hocks rented a safe deposit box jointly with his sister Joan. He planned to give her everything he put in the box. At a restaurant, Robert handed Joan four \$5,000 bearer bonds, saying, “I want to give these to you.” Joan put the bonds in the safe deposit box. Subsequently, Robert clipped the coupons and collected the interest on the bonds.

During the next several years, Robert added 22 more bonds to the box, as well as a diamond ring. Only Robert, not Joan, went into the box, though Joan had a right to do so. To avoid “a lot of hassle” from Robert’s wife, Joan suggested to Robert that he should leave a note in the box indicating her interest. Robert placed a handwritten note in the box: “Upon my death, the contents of this safety deposit box #7069 will belong to and are to be removed only by my sister Joan Jeremiah.” Upon Robert’s death, is Joan entitled to the contents of the box? See *Hocks v. Jeremiah*, 759 P.2d 312 (Or. App. 1988) (holding Joan entitled only to the first four bonds that were hand delivered to her; the remaining contents were not delivered even though Joan was a joint tenant of the box).

Newman v. Bost

Supreme Court of North Carolina,

1898

29 S.E. 848

Action tried before COBLE, J., and a jury....

The plaintiff alleged in her complaint that the intestate of the defendant, while in his last sickness, gave her all the furniture and other property in his dwelling house as a gift *causa mortis*. Among other things claimed, there was a

policy of insurance of \$3,000 on the life of intestate and other valuable papers, which she alleged were in a certain bureau drawer in intestate's bedroom. She alleged that defendant administrator has collected the policy of life insurance and sold the household and kitchen furniture, and this suit is against *defendant as administrator* to recover the value of the property alleged to have been converted by him. There are other matters involved, claims for services, claim for fire insurance collected by intestate in his lifetime, etc.

On the trial it appeared that the intestate's wife died about ten years before he died, and without issue; that the intestate lived in his dwelling, after his wife's death, in Statesville until his death, and died without issue; that about the last day of March, 1896, he was stricken with paralysis and was confined to his bed in his house and was never able to be out again till he died on 12 April, 1896; that shortly after he was stricken he sent for Enos Houston to nurse him in his last illness; that while helpless in his bed soon after his confinement and *in extremis* he told Houston he had to go — could not stay here—and asked Houston to call plaintiff into his room; he then asked the plaintiff to hand him his private keys, which plaintiff did, she having gotten them from a place over the mantel in intestate's bedroom in his presence and by his direction; he then handed plaintiff the bunch of keys and told her to take them and keep them, that he desired her to have them and everything in the house; he then pointed out the bureau, the clock and other articles of furniture in the house and asked his chamber door to be opened and pointed in the direction of the hall and other rooms and repeated that everything in the house was hers — he wanted her to have everything in the house; his voice failed him soon after the delivery of the keys and these declarations, so that he could never talk again to be understood, except to indicate yes and no, and this generally by a motion of the head; the bunch of keys delivered to the plaintiff, amongst others, included one which unlocked the bureau pointed out to plaintiff as hers (and other furniture in the room), and the bureau drawer which this key unlocked, contained in it a life insurance policy, payable to intestate's estate, and a few small notes, a large number of papers, receipts, etc., etc., and there was no other key that unlocked this bureau drawer; this bureau drawer was the place where intestate kept all his valuable papers; plaintiff kept the keys as directed from time given her and still has them; at the death of intestate's wife he employed plaintiff, then an orphan about eighteen years old, to become his housekeeper, and she remained in his service for ten years and till his death, and occupied rooms assigned her in intestate's residence; in 1895 the intestate declared his purpose to marry plaintiff within twelve months; nobody resided in the house with them; immediately after the death of intestate, Houston told of the donation to Mr. Burke, and the plaintiff informed her attorney, Mr. Burke, of it, and she made known her claim to the property in the house and kept the keys and forbade the defendant from interfering with it in any way, both before and after he qualified as administrator.

Other facts in relation to the plaintiffs claim appear in the opinion. There was a verdict, followed by judgment for the plaintiff, and defendant appealed.

FURCHES, J. The plaintiff in her complaint demands \$3,000 collected by defendant, as the administrator of J.F. Van Pelt,³¹ on a life insurance policy, and

³¹ J.F. Van Pelt was a man of some standing in Statesville, North Carolina. He moved there in 1859 and entered the grocery business. When the Civil War broke out, his partner joined the Confederate army, and Van Pelt stayed at home to run their business. He was mayor of the town from 1873 to 1877 and from 1883 to 1885. He was also manager of Statesville's Opera Hall. His obituary in the Statesville Semi-Weekly

now in his hands; \$300, the value of a piano upon which said Van Pelt collected that amount of insurance money; \$200.94, the value of household property sold by defendant as belonging to the estate of his intestate, and \$45, the value of property in the plaintiffs bedroom and sold by the defendant as a part of the property belonging to the intestate's estate.

The \$3,000, money collected on the life insurance policy, and the \$200.94, the price for which the household property sold, plaintiff claims belonged to her by reason of a donatio causa mortis from said Van Pelt. The \$45, the price for which her bedroom property sold, and the \$300 insurance money on the piano, belonged to her also by reason of gifts inter vivos.

The rules of law governing all of these claims of the plaintiff are in many respects the same, and the discussion of one will be to a considerable extent a discussion of all.

To constitute a donatio causa mortis, two things are indispensably necessary: an intention to make the gift, and a delivery of the thing given. Without both of these requisites, there can be no gift causa mortis. And both these are matters of fact to be determined by the jury, where there is evidence tending to prove them.

The intention to make the gift need not be announced by the donor in express terms, but may be inferred from the facts attending the delivery — that is, what the donor said and did. But it must always clearly appear that he knew *what he was doing*, and that he intended a gift. So far, there was but little diversity of authority, if any.

As to what constitutes or may constitute delivery, has been the subject of discussion and adjudication in most or all the courts of the Union and of England, and they have by no means been uniform—some of them holding that a symbolical delivery—that is, some other article delivered in the name and stead of the thing intended to be given, is sufficient; others holding that a symbolical delivery is not sufficient, but that a constructive delivery — that is, the delivery of a key to a locked house, trunk or other receptacle is sufficient. They distinguish this from

Landmark, April 14, 1896, printed under the heading "Called to Account," noted:

With limited education, he was possessed of splendid business judgment and had, by judicious management, accumulated a good property. He had been retired from active business for several years.

Van Pelt was 62 years old when he died in his home on Front Street, having moved there when his Walnut Street residence burned. (In the Walnut Street house was a piano, which the plaintiff, Julia Newman, claimed had been given her and on which Van Pelt had collected the fire insurance proceeds.) Van Pelt died intestate. His heirs were a sister living in China Grove, North Carolina, and a brother living in Alabama.

The trial in *Newman v. Bost* occupied four days. The attorneys for the parties took over one day making their closing arguments to the jury. Julia Newman's lawyer, in closing, "spoke for about two and a half hours, finishing at 2 o'clock, when court adjourned for dinner." *Id.*, January 18, 1898. (O, for the days when eloquent lawyering could produce a hungry jury!) After dinner and lengthy deliberation, the jury unanimously found for Julia.

Sometime after the trial Julia Newman left Statesville. About a month before Van Pelt's death, Julia had bought 36 acres of land from him. She sold the land in 1907, at a nice profit. The deed listed Julia, sell unmarried, as living in Maryland. The information in this footnote was furnished the editors by Bill Moose of Mitchell Community College, Statesville, N.C. The photograph of Van Pelt is from the collection of Steve Hill in Statesville.—EDS.

a symbolical delivery, and say that this is in *substance* a delivery of the thing, as it is the means of using and enjoying the thing given; while others hold that there must be an actual manual delivery to perfect a gift causa mortis.

This doctrine of donatio causa mortis was borrowed from the Roman Civil Law by our English ancestors. There was much greater need for such a law at the time it was incorporated into the civil law and into the English law than there is now. Learning was not so general, nor the facilities for making wills so great then as now....

It seems to us that,... after the statute of fraud and of wills, this doctrine of causa mortis is in direct conflict with the spirit and purpose of those statutes — the prevention of fraud. It is a doctrine, in our opinion, not to be extended but to be strictly construed and confined within the bounds of our adjudged cases. We were at first disposed to confine it to cases of actual *manual* delivery, and are only prevented from doing so by our loyalty to our own adjudications....

Many of the cases cited by the plaintiff are distinguishable from ours, if not all of them. *Thomas v. Lewis* (a Virginia case), 37 Am. St., 878, was probably more relied on by the plaintiff than any other case cited, and for that reason we mention it by name. This case, in its essential facts, is distinguishable from the case under consideration. There, the articles present were taken out of the bureau drawer, handed to the donor, and then delivered by him to the donee. According to all the authorities, this was a good gift causa mortis. The box and safe, the key to which the donor delivered to the donee, were not present but were deposited in the vault of the bank; and so far as shown by the case it will be presumed, from the place where they were and the purpose for which things are usually deposited in a bank vault, that they were only valuable as a depository for such purposes, as holding and preserving money and valuable papers, bonds, stocks and the like. This box and safe would have been of little value to the donee for any other purpose. But more than this, the donor expressly stated that all you find *in this box and this safe is yours*. There is no mistake that it was the intention of the donor to give what was contained in the box and in the safe.

As my Lord Coke would say: "Note the diversity" between that case and the case at bar. There, the evidence of debt contained in the bureau, which was present, was taken out, given to the donor, and by him delivered to the donee. This was an actual manual delivery, good under all the authorities. But no such thing was done in this case as to the life insurance policy. It was neither taken out of the drawer nor mentioned by the donor, unless it is included in the testimony of Enos Houston who, at one time, in giving his testimony says that Van Pelt gave her the keys, saying "what is in this house is yours," and at another time on cross-examination, he said to Julia, "I intend to give you this furniture in this house," and at another time, "What property is in this house is yours." The bureau in which was found the life insurance policy, after the death of Van Pelt, was present in the room where the keys were handed to Julia, and the life insurance policy could easily have been taken out and handed to Van Pelt, and by him delivered to Julia, as was done in the case of *Thomas v. Lewis*, supra. But this was not done. The safe and box, in *Thomas v. Lewis*, were not present, so that the contents could not have been taken out and delivered to the donee by the donor. The ordinary use of a stand of bureaus is not for the purpose of holding and securing such things as a life insurance policy, though they may be often used for that purpose, while a safe and a box deposited

in the vault of a bank are. A bureau is an article of household furniture, used for domestic purposes, and generally belongs to the ladies' department of the household government, while the safe and box, in *Thomas v. Lewis*, are not. The bureau itself, mentioned in this case, was such property as would be valuable to the plaintiff....

It is held that the law of delivery in this State is the same in gifts *inter vivos* and *causa mortis*. *Adams v. Hayes*, 24 N.C. 361.... [T]here can be no gift of either kind without both the intention to give and the delivery....

The leading case in this State is *Adams v. Hayes*....

Following this case, . . . we feel bound to give effect to *constructive delivery*, where it plainly appears that it was the intention of the donor to make the gift, and where the things intended to be given are *not* present, or, where present, are incapable of *manual* delivery from their size or weight. But where the articles are present and are capable of manual delivery, *this must be had*. This is as far as we can go. It may be thought by some that this is a hard rule—that a dying man cannot dispose of his own. But we are satisfied that when properly considered, it will be found to be a just rule. But it is not a hard rule. The law provides how a man can dispose of all his property, both real and personal. To do this, it is only necessary for him to observe and conform to the requirements of these laws.... The law provides that every man may dispose of all of his property by will, when made in writing. And it is most singular how guarded the law is to protect the testator against fraud and impositions by requiring that every word of the will must be written and signed by the testator, or, if written by someone else, it must be attested by at least *two* subscribing witnesses who shall sign the same in his presence and at his request, or the will is void....

In gifts *causa mortis* it requires but one witness, probably one servant as a witness to a gift of all the estate a man has; no publicity is to be given that the gift has been made, and no probate or registration is required.

The statute of wills is a statute against fraud, considered in England and in this State to be demanded by public policy. And yet, if symbolical deliveries of gifts *causa mortis* are to be allowed, or if constructive deliveries be allowed to the extent claimed by the plaintiff, the statute of wills may prove to be of little value. For such considerations, we see every reason for restricting and none for extending the rules heretofore established as applicable to gifts *causa mortis*.

It being claimed and admitted that the life insurance policy was present in the bureau drawer in the room where it is claimed the gift was made, and being capable of actual manual delivery, we are of the opinion that the title of the insurance policy did not pass to the plaintiff, but remained the property of the intestate of the defendant.

But we are of the opinion that the bureau and any other article of furniture, locked and unlocked by any of the keys given to the plaintiff, did pass and she became the owner thereof. This is upon the ground that while these articles were present, from their size and weight they were incapable of actual manual delivery; and that the delivery of the keys was a constructive delivery of these articles, equivalent to an actual delivery if the articles had been capable of manual delivery.

[We are of the opinion that the other articles of household furniture (except those in the plaintiff's private bed chamber) did not pass to the plaintiff, but remained the property of the defendant's intestate.



Residence of Mr. J.F. Van Pelt, Walnut Street
from *The (Statesville, N.C.) Landmark Trade Edition*, May 22, 1890

This house, and with it "Miss Julia's piano," burned between 1890 and 1896.

We do not think the articles in the plaintiff's bed chamber passed by the *donatio causa mortis* for the same reason that the other articles of household furniture did not pass—want of delivery—either constructive or manual. But as to the furniture in the plaintiffs bedroom (\$45) it seems to us that there was sufficient evidence of both gift and delivery to support the finding of the jury, as a gift *inter vivos*. The intention to give this property is shown by a number of witnesses and contradicted by none.

The only debatable ground is as to the sufficiency of the delivery. But when we recall the express terms in which he repeatedly declared that it was hers; that he had bought it for her and had given it to her; that it was placed in her private chamber, her bedroom, where we must suppose that she had the entire use and control of the same, it would seem that this was sufficient to constitute a delivery. There was no evidence, that we remember, disputing these facts. But, if there was, the jury have found for the plaintiff, upon sufficient evidence at least to go to the jury, as to this gift and its delivery. As to the piano there was much evidence tending to show the intention of Van Pelt to give it to the plaintiff, and that he had given it to her, and we remember no evidence to the contrary. And as to this, like the bedroom furniture, the debatable ground, if there is any debatable ground, is the question of delivery. It was placed in the intestate's parlor where it remained until it was burned. The intestate insured it as his property, collected and used the insurance money as his own, often saying that he intended to buy the plaintiff another piano, which he never did. It must be presumed that the parlor was under the dominion of the intestate, and not of his cook, housekeeper, and hired servant. And unless there is something more shown than the fact that the piano was bought by the intestate, placed in his parlor, and called by him "Miss Julia's piano," we cannot think this constituted a delivery. But, as the case goes back for a new trial, if the plaintiff thinks she can show a delivery she will have an opportunity of doing so. But she will

understand that she must do so according to the rules laid down in this opinion — that she must show actual or constructive delivery equivalent to actual manual delivery. We see no ground upon which the plaintiff can recover the insurance money, if the piano was not hers.

We do not understand that there was any controversy as to the plaintiff's right to recover her services, which the jury have estimated to be \$125. The view of the case we have taken has relieved us from a discussion of the exceptions to evidence, and as to the charge of the Court. There is no such thing in this State as *symbolical delivery* in gifts either inter vivos or causa mortis....

New trial.

NOTES AND PROBLEMS

1. A gift *causa mortis*, that is, a gift made in contemplation of and in expectation of immediate approaching death,³² is a substitute for a will. If the donor lives, the gift is revoked, although some courts may hold that revocation occurs only if the donor elects to revoke upon recovering. Because the courts see upholding gifts causa mortis as undercutting the safeguards of the Statute of Wills, traditionally they have more strictly applied the requirements for a valid gift causa mortis than for a gift inter vivos. They also have placed restrictions on gifts causa mortis not applicable to inter vivos gifts. For example, if the donee already is in possession of the property, there must be a redelivery to effect a valid gift causa mortis but not if the gift is inter vivos. If Van Pelt had put a small cinnabar box in Julia's bedroom, he could during his lifetime, before death drew near, declare that he was giving the box to Julia. But if he waited until he was on his deathbed, he would have to deliver the box to her again.

Given changes in the law of wills, the strict approach to gifts *causa mortis* may no longer be justified. The modern trend is to enforce the decedent's intent even if there is evidence of some failure to comply with the wills act formalities, so long as there is clear and convincing evidence of donative intent. See, e.g., Uniform Probate Code §2-503 (1990).

2. Suppose that Van Pelt had said to Julia, "I want to give you my insurance policy in that bureau over there, so Enos please get it and give it to her." Enos, however, leaves the policy where it was. Is there a valid gift? See *Wilcox v. Matteson*, 9 N.W. 814 (Wis. 1881). What if Van Pelt instead had said, "I want to give you my bureau there. Enos, move it into her room." Enos does so. The bureau contains the life insurance policy. On the reasoning of *Newman v. Bost*, is there a valid gift?

3. Suppose that Van Pelt had called Julia in and said, "I want to give you my bureau and the insurance policy locked in it. Here is the key." Julia takes the key but the bureau stays where it is. On the reasoning of *Newman v. Bost*, has a valid gift been made?

³² 32. Although older cases have been to the contrary, recent ones tend to find that the "contemplation of imminent death" requirement is met where a person made gifts in anticipation of suicide which subsequently occurred. See, e.g., *In re Estate of Smith*, 694 A.2d 1099 (Pa. Super. Ct. 1997); *Scherer v. Hyland*, 380 A.2d 698 (N.J. 1977).

4. Suppose that Van Pelt had called Julia in and said, "I want to give you my little strong box here and the insurance policy locked in it. Here is the key." Julia takes the key but the box stays where it is. On the reasoning of *Newman v. Bost*, has a valid gift been made? See *Bynum v. Fidelity Bank of Durham*, 19 S.E.2d 121 (N.C. 1942).

4. If Van Pelt had said to his wife before she died, "Dear, I give you the piano," would there be a gift? See Restatement (Second) of Property, Donative Transfers, §31.1, Illustration 2 (1992). Would this be sufficient for a gift to Julia? If not, how could Van Pelt give the piano to Julia?

Gruen v. Gruen

Court of Appeals of New York, 1986
496 N.E.2d 869

SIMONS, J. Plaintiff commenced this action seeking a declaration that he is the rightful owner of a painting which he alleges his father, now deceased, gave to him. He concedes that he has never had possession of the painting but asserts that his father made a valid gift of the title in 1963 reserving a life estate for himself. His father retained possession of the painting until he died in 1980. Defendant, plaintiff's stepmother, has the painting now and has refused plaintiff's requests that she turn it over to him. She contends that the purported gift was testamentary in nature and invalid insofar as the formalities of a will were not met or, alternatively, that a donor may not make a valid inter vivos gift of a chattel and retain a life estate with a complete right of possession. Following a seven day nonjury trial, Special Term found that plaintiff had failed to establish any of the elements of an inter vivos gift and that in any event an attempt by a donor to retain a present possessory life estate in a chattel invalidated a purported gift of it. The Appellate Division held that a valid gift may be made reserving a life estate and, finding the elements of a gift established in this case, it reversed and remitted the matter for a determination of value (104 A.D.2d 171, 488 N.Y.S.2d 401). That determination has now been made and defendant appeals directly to this court, pursuant to CPLR 5601(d), from the subsequent final judgment entered in Supreme Court awarding plaintiff \$2,500,000 in damages representing the value of the painting, plus interest. We now affirm.

The subject of the dispute is a work entitled "Schloss Kammer am Attersee II" painted by a noted Austrian modernist, Gustav Klimt.³³ It was purchased by plaintiff's father, Victor Gruen, in 1959 for \$8,000. On April 1, 1963 the elder Gruen, a successful architect with offices and residences in both New York City and Los

³³ Gustav Klimt (1862-1918) was one of the founders of the Vienna Secession, a group of young *fin-de-siècle* Viennese artists who sought to liberate Viennese art from the dominance of naturalist style, opening it to such contemporary European influences as *art nouveau*. He created many murals for public buildings, both in Vienna and elsewhere, but perhaps his greatest fame was as a painter of portraits and landscapes which exhibited an exotic and often erotic style. See Gerbert Frodl, *Klimt* (trans. Alexandra Campbell, 1990).

Schloss Kammer, the subject of the painting in dispute, was Klimt's favorite vacation spot. It is located in the Salzkanimergut, a beautiful lake district outside of Salzburg, Austria. We owe this information to Professor Susan French, who has told the whole (and fascinating story) of the case in her essay, Susan F. French, *Gruen v. Gruen: A Tale of Two Stories*, in *Property Stories* 71 (Gerald Korngold & Andrew P. Morriss eds.)—EDS.

Angeles during most of the time involved in this action,³⁴ wrote a letter to plaintiff, then an undergraduate student at Harvard, stating that he was giving him the Klimt painting for his birthday but that he wished to retain the possession of it for his lifetime. This letter is not in evidence, apparently because plaintiff destroyed it on instructions from his father. Two other letters were received, however, one dated May 22, 1963 and the other April 1, 1963. Both had been dictated by Victor Gruen and sent together to plaintiff on or about May 22, 1963. The letter dated May 22, 1963 reads as follows:

Dear Michael:

I wrote you at the time of your birthday about the gift of the painting by Klimt. Now my lawyer tells me that because of the existing tax laws, it was wrong to mention in that letter that I want to use the painting as long as I live. Though I still want to use it, this should not appear in the letter. I am enclosing, therefore, a new letter and I ask you to send the old one back to me so that it can be destroyed.

I know this is all very silly, but the lawyer and our accountant insist that they must have in their possession copies of a letter which will serve the purpose of making it possible for you, once I die, to get this picture without having to pay inheritance taxes on it.

Love,
s/Victor

Enclosed with this letter was a substitute gift letter, dated April 1, 1963, which stated:

Dear Michael:

The 21st birthday, being an important event in life, should be celebrated accordingly. I therefore wish to give you as a present the oil painting by Gustav Klimt of Schloss Kammer which now hangs in the New York living room. You know that Lazette and I bought it some 5 or 6 years ago, and you always told us how much you liked it.

Happy birthday
again.

Love

s/Victor

³⁴ Victor Gruen, born in Vienna, was an urban designer and architect who came to this country in 1933. His firm, Victor Gruen Associates, has been one of the most influential in shaping the urban environment since World War II. It designed the first regional shopping center, Northland near Detroit, which inspired similar plans for enormous enclosed shopping malls in other cities. Gruen was the author of several books on urban planning, in which he said his main aim was to design cities that were worthwhile to live in as well as functional. "Some say there is no need for a city, a center," Gruen once said. "They say you can communicate in the future with television phones. You may be able eventually to talk to your girl friend by television, but you can't kiss her that way." His best book is *The Heart of Our Cities* (1964). Gruen viewed Vienna as the most livable of cities, largely because the automobile—which he disliked—had been banned from downtown. In the last years of his life he returned to live in Vienna, where he died in 1980.—EDS.

Plaintiff never took possession of the painting nor did he seek to do so. Except for a brief period between 1964 and 1965 when it was on loan to art exhibits and when restoration work was performed on it, the painting remained in his father's possession, moving with him from New York City to Beverly Hills and finally to Vienna, Austria, where Victor Gruen died on February 14, 1980. Following Victor's death plaintiff requested possession of the Klimt painting and when defendant refused, he commenced this action.

The issues framed for appeal are whether a valid inter vivos gift of a chattel may be made where the donor has reserved a life estate in the chattel and the donee never has had physical possession of it before the donor's death and, if it may, which factual findings on the elements of a valid inter vivos gift more nearly comport with the weight of the evidence in this case, those of Special Term or those of the Appellate Division. The latter issue requires application of two general rules. First, to make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee (*Matter of Szabo*, 10 N.Y.2d 94, 98, 217 N.Y.S.2d 593, 176 N.E.2d 395; *Matter of Kelly*, 285 N.Y. 139, 150, 33 N.E.2d 62 [dissenting in part opn.]). Second, the proponent of a gift has the burden of proving each of these elements by clear and convincing evidence.

Donative Intent

There is an important distinction between the intent with which an inter vivos gift is made and the intent to make a gift by will. An inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership; if the intention is to make a testamentary disposition effective only after death, the gift is invalid unless made by will.

Defendant contends that the trial court was correct in finding that Victor did not intend to transfer any present interest in the painting to plaintiff in 1963 but only expressed an intention that plaintiff was to get the painting upon his death. The evidence is all but conclusive, however, that Victor intended to transfer ownership of the painting to plaintiff in 1963 but to retain a life estate in it and that he did, therefore, effectively transfer a remainder interest in the painting to plaintiff at that time. Although the original letter was not in evidence, testimony of its contents was received along with the substitute gift letter and its covering letter dated May 22, 1963. The three letters should be considered together as a single instrument (see *Matter of Brandreth*, 169 N.Y. 437, 440, 62 N.E. 563) and when they are they unambiguously establish that Victor Gruen intended to make a present gift of title to the painting at that time. But there was other evidence for after 1963 Victor made several statements orally and in writing indicating that he had previously given plaintiff the painting and that plaintiff owned it. Victor Gruen retained possession of the property, insured it, allowed others to exhibit it and made necessary repairs to it but those acts are not inconsistent with his retention of a life estate.... Victor's failure to file a gift tax return on the transaction was partially explained by allegedly erroneous legal advice he received, and while that omission sometimes may indicate that the donor had no intention of making a present gift, it does not necessarily do so and it is not dispositive in this case.



Gustav Klimt
Schloss Kammer am Attersee II
Courtesy The Galerie St. Etienne, New York

Defendant contends that even if a present gift was intended, Victor's reservation of a lifetime interest in the painting defeated it..

Defendant recognizes that a valid inter vivos gift of a remainder interest can be made not only of real property but also of such intangibles as stocks and bonds. Indeed, several of the cases she cites so hold. That being so, it is difficult to perceive any legal basis for the distinction she urges which would permit gifts of remainder interests in those properties but not of remainder interests in chattels such as the Klimt painting here. The only reason suggested is that the gift of a chattel must include a present right to possession. The application of *Brandreth* to permit a gift of the remainder in this case, however, is consistent with the distinction, well recognized in the law of gifts as well as in real property law, between ownership and possession or enjoyment. Insofar as some of our cases purport to require that the donor intend to transfer both title and possession immediately to have a valid inter vivos gift (see *Gannon v. McGuire*, 160 N.Y. 476, 481, 55 N.E. 7; *Young v. Young*, 80 N.Y. 422, 430), they state the rule too broadly and confuse the effectiveness of a gift with the transfer of the possession of the subject of that gift. The correct test is “whether the maker intended the [gift] to have *no effect* until after the maker's death, or whether he intended it to transfer *some present interest*” (*McCarthy v. Pieret*, 281 N.Y. 407, 409, 24 N.E.2d 102 [emphasis added]; see also 25 N.Y. Jur., Gifts, §14, at 156-157). As long as the evidence establishes an intent to make a present and irrevocable transfer of title or the right of ownership, there is a present transfer of some interest and the gift is effective immediately. Thus, in *Speelman v. Pascal*, [10 N.Y.2d 313, 222 N.Y.S.2d 324, 178 N.E.2d 723], we held valid a gift of a percentage of the future royalties to the play “My Fair Lady” before the play even existed. There, as in this case, the donee received title or the right of ownership to some property immediately upon the making of the gift but possession or enjoyment of the subject of the gift was postponed to some future time.

Defendant suggests that allowing a donor to make a present gift of a remainder with the reservation of a life estate will lead courts to effectuate otherwise invalid testamentary dispositions of property. The two have entirely different characteristics, however, which make them distinguishable. Once the gift is made it is irrevocable and the donor is limited to the rights of a life tenant not an owner. Moreover, with the gift of a remainder title vests immediately in the donee and any possession is postponed until the donor's death whereas under a will neither title nor possession vests immediately. Finally, the postponement of enjoyment of the gift is produced by the express terms of the gift not by the nature of the instrument as it is with a will (see *Robb v. Washington & Jefferson Coll.*, 185 N.Y. 485, 493, 78 N.E. 359).

Delivery

In order to have a valid inter vivos gift, there must be a delivery of the gift, either by a physical delivery of the subject of the gift or a constructive or symbolic delivery such as by an instrument of gift, sufficient to divest the donor of dominion and control over the property. As the statement of the rule suggests, the requirement of delivery is not rigid or inflexible, but is to be applied in light of its purpose to avoid mistakes by donors and fraudulent claims by donees. Accordingly, what is sufficient

to constitute delivery “must be tailored to suit the circumstances of the case” (Matter of Szabo, supra, 10 N.Y.2d at p.98, 217 N.Y.S.2d 593, 176 N.E.2d 395). The rule requires that “[t]he delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit” (id.).

Defendant contends that when a tangible piece of personal property such as a painting is the subject of a gift, physical delivery of the painting itself is the best form of delivery and should be required. Here, of course, we have only delivery of Victor Gruen’s letters which serve as instruments of gift. Defendant’s statement of the rule as applied may be generally true, but it ignores the fact that what Victor Gruen gave plaintiff was not all rights to the Klimt painting, but only title to it with no right of possession until his death. Under these circumstances, it would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain.

Nor is there any reason to require a donor making a gift of a remainder interest in a chattel to physically deliver the chattel into the donee’s hands only to have the donee redeliver it to the donor. As the facts of this case demonstrate, such a requirement could impose practical burdens on the parties to the gift while serving the delivery requirement poorly. Thus, in order to accomplish this type of delivery the parties would have been required to travel to New York for the symbolic transfer and redelivery of the Klimt painting which was hanging on the wall of Victor Gruen’s Manhattan apartment. Defendant suggests that such a requirement would be stronger evidence of a completed gift, but in the absence of witnesses to the event or any written confirmation of the gift it would provide less protection against fraudulent claims than have the written instruments of gift delivered in this case.

Acceptance

Acceptance by the donee is essential to the validity of an inter vivos gift, but when a gift is of value to the donee, as it is here, the law will presume an acceptance on his part. Plaintiff did not rely on this presumption alone but also presented clear and convincing proof of his acceptance of a remainder interest in the Klimt painting by evidence that he had made several contemporaneous statements acknowledging the gift to his friends and associates, even showing some of them his father’s gift letter, and that he had retained both letters for over 17 years to verify the gift after his father died. Defendant relied exclusively on affidavits filed by plaintiff in a matrimonial action with his former wife, in which plaintiff failed to list his interest in the painting as an asset. These affidavits were made over 10 years after acceptance was complete and they do not even approach the evidence in Matter of Kelly (285 N.Y. 139, 148-149, 33 N.E.2d 62 [dissenting in part opn.], supra) where the donee, immediately upon delivery of a diamond ring, rejected it as “too flashy.” We agree with the Appellate Division that interpretation of the affidavit was too speculative to support a finding of rejection and overcome the substantial showing of acceptance by plaintiff.

Accordingly, the judgment appealed from and the order of the Appellate Division brought up for review should be affirmed, with costs.

NOTES AND QUESTIONS

1. If Victor Gruen had wanted to give Michael the complete ownership or the painting and not reserve a life estate, could he have done so by a letter sent to Michael at Harvard?

2. Suppose that Victor Gruen had typed and signed a letter to Michael: "I give you the Klimt painting when I die." Would this be a valid lifetime gift? It would not. The letter is a will. It shows no intention to give Michael any rights now, but only when Victor dies. As a will, the instrument is not valid unless properly executed as a will, with witnesses.

Carefully distinguish a will from what Victor actually did. He wrote: "I give you the Klimt painting, reserving possession for my life." This gives Michael a *present* ownership interest in the painting, with possession postponed until Victor's death.

Gruen v. Gruen introduces you to the concept of a life estate (in Victor) and a remainder (in Michael). Each of these estates is a separate interest in the same property, entitling first the life tenant to possession, and then, after his death, the remainderman. We will closely examine these estates in Chapters 3 and 4.

3. Should Victor's widow, Kamija, have had any rights with respect to the painting? If Victor had retained it until death and devised it to Michael; Kamija might have been able to claim a portion of the value of the painting as part of her statutory elective share, a subject that we will study in Chapter 5. See pages 336-338. Should the result be different if Victor had transferred a remainder interest during his life, retaining a life interest in the painting? See Uniform Probate Code §2-205(2)(i) (1990) (value of assets transferred during decedent's life with retained lifetime possessory interest is subject to surviving spouse's elective share).

4. When Michael finally received the painting from Kamija, he immediately arranged for Sotheby's to auction it in London. Sotheby's sold the painting on June 30, 1987, for \$5.3 million, then a record price for Klimt's work. Ten years later, the buyer sold the painting at auction for \$23.5 million. The painting ended up in Galleria Nazionale d'Arte Moderna, in Rome, Italy. See French, *A Tale of Two Stories*, *supra*, at 95.