The Basics of Gifts and Gifting in Surrogate's Court Litigation

By Gary E. Bashian

"Timeo Danaos et dona ferentes"
("I fear the Danaans [Greeks], even those bearing gifts")

—Virgil

As experience has shown time and again, even the most hotly contested turnover and accounting proceedings involving both the largest and the smallest trusts and estates, quite often come down to the resolution of a single, basic legal issue: did the Decedent make a valid inter vivos gift of an asset, or is the asset in fact property of his or her estate? Indeed, the "gift"—what might at first glance appear to be a relatively benign aspect of contract law—is ubiquitous in the world of trusts and estates practice; a legal concept upon which the rights of countless distributees and beneficiaries turn, which is ripe for closer examination.

Overwhelmingly, the burden is on a donee to establish, by clear and convincing evidence, that the three basic elements of a gift have been satisfied: 1) that the donor had donative intent at the time the gift was made; 2) that delivery of the gift to the donee (constructive, actual, or symbolic) was completed; and 3) that the donee accepted the gift itself.[1] (One of the few exceptions to this initial burden being on the donee arises in the context of an SCPA turnover proceeding where the petitioner seeking turnover must first satisfy a pleading burden by alleging that the gift in question was not valid, a burden that once easily met then shifts to the respondent, who is obligated to establish the elements of the gift).[2]

Based upon practicality more than anything, the elements of both delivery and acceptance are often presumed, as a donee often has possession of the gift in one manner or another, and can confirm acceptance by documentary evidence. Nevertheless, the element of delivery is not subject to this presumption under certain circumstances, such as where the donee does not possess the allegedly gifted property.[3] This situation most often arises where there has been symbolic delivery of the property or it is not immediately apparent that delivery has been made. Typically, this occurs where the gift cannot be easily transported or physically delivered in any practical way, frequently because of physical size, or because the property is in the possession of another individual or entity.

Given the presumptions attached to the elements of delivery and acceptance, the element of a gift that is most frequently litigated is that of donative intent. "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."[4]

Donative intent, or "irrevocable present transfer of ownership," can be established by the words, writings, and/or actions of both the donor and the donee. If the donor retains control of the property, engages in the continued use and/or occupancy of the property in any way, i.e., as though he is still the owner, and/or has made the gift contingent upon an independent event—including death—then this donative intent element will not be met, and the gift will not be deemed completed.

Critically, "intention or mere words cannot supply the place of an actual surrender of control and authority over the thing intended to be given. "[5] Indeed:

> Where a gift is made effective in the lifetime of the decedent and he has divested himself of all power to recall it, such transaction is a gift inter vivos, and not testamentary in its nature. If the gift does not take effect as an executed and completed transfer to the donee, either legally or equitably, during the life of the donor, it is a testamentary disposition, good only when made by a valid will.… The test is whether the maker intended the instrument to have no effect until after the maker's death, or whether he intended it to transfer some present interest.[6]

The gifting analysis changes from the relatively simple three-element test in the event the donee is in a confidential and/or fiduciary relationship with the donor. In such a scenario—which is not at all uncommon—the donee is subject to the heightened burden of proving that the gift was free of fraud and/or undue influence. This leaves the donee in the position of further proving that the gift was the product of a fair, open, and fully voluntary transaction—a burden that in most other situations is upon the party alleging undue influence.

> [W]here there is a confidential relationship between the beneficiary and the grantor, "[a]n inference of undue

> influence" arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction.[7]

A confidential relationship can arise where the donee assists the donor with his daily living needs, finances, healthcare, provides food, medication, transportation, etc. The question is generally focused on that of the donor's dependence on the donee, and if the donee has been in a position to exert undue influence as a result of the relationship enjoyed with the donor.[8]

Similarly, where a fiduciary relationship exists, which is distinct from a confidential relationship and can be created by circumstance or more commonly by the mere appointment under a power of attorney, the presumption of impropriety also attaches. This presumption increases the donee's burden so that he or she must also prove that any transfers between the donor and the donee were not only free of fraud and/or undue influence, but also that the transfer was the best interests of the donor as the principal of the power of attorney. The court will closely scrutinize these transactions, especially where withdrawals from the donor's accounts are made by a donee as agent under a power of attorney.[9] Notably, this heightened burden and fiduciary duty exists even when transactions between the donee and donor are *not* made under the authority of the power of attorney.[10]

The gifting analysis is also applicable to different types of co-tenancies involving bank accounts, such as joint accounts, for convenience accounts, and Totten trusts—all of which are pervasive throughout estate litigation.

In circumstances where a joint bank account exists, the court treats the deposit of monies into a joint account as a gift between co-tenants. However, there are statutory considerations that fundamentally influence and shape this analysis. Pursuant to Banking Law § 675, there is a rebuttable presumption that such joint deposits are intended as gifts between the joint tenants of the account.[11] If language of a joint tenancy with rights of survivorship are clearly present and noted on the account, the presumption of a gift is firmly established, and the gift will be considered complete upon the opening of the account itself, or upon the deposit of funds into the account. The burden to disprove that a gift of the funds was intended between the co-tenants shifts to the party challenging the title of the survivor. The challenging party must then establish either the presence of fraud and/or undue influence on behalf of the donee, or a lack of capacity on behalf of the donor, by tendering "direct proof or substantial circumstantial proof, clear and convincing and sufficient to support an inference that the joint account had been opened in that form as a matter of convenience only."[12] To that end, "[i]n the absence of fraud or undue influence, [the deposit of funds into a joint account constitutes] prima facie evidence of the parties' intention to create a joint tenancy,"[13] and thus a completed gift.

Importantly, survivorship language is required on any such account if this presumption is to attach. "The omission of words of survivorship on the signature card precludes application of the presumption."[14] However, "[t]he survivor may…even without the benefit of the presumption, still present evidence to establish a common law joint tenancy with right of survivorship. In that case, however, the survivor must affirmatively introduce evidence of intent."[15]

If the facts support a determination that any such joint account is in fact a "for convenience account," then rights of survivorship—i.e., the gift—will be denied. A "for convenience account" is defined as:

> Any deposit of cash…made in or with any banking organizations…in the name of the depositor and another person or persons and in a form to be paid or delivered to any of them "for the convenience" of the depositor without any right of survivorship in the account existing in favor of the other person or persons so named solely by virtue of such account designation.[16] The owner of a convenience account shall refer only to the depositor and he or she shall be clearly designated as such on the records of the depository.[17]

The test the court employs to determine whether a joint account is actually a for convenience account or in fact a true joint account, considers the following factors—with close attention to the intent of the donor at the time the account(s) were created:

1. Whether the decedent was the sole depositor to the account;[18]
2. Whether the creation of a survivorship interest would deviate significantly from the decedent's testamentary plan;[19]
3. Whether the account was used exclusively by the decedent during his or her lifetime;[20]
4. Whether the decedent retained the right to withdraw the proceeds;[21] and
5. The conduct of the surviving joint tenant.[22]

As one might expect, Totten trusts are susceptible to a gifting analysis as well—i.e., paid on death to a particular individual who has no rights to the account until the passing of the account holder. In the event

that monies are placed into a Totten trust for the benefit of another individual, and there is a challenge to the intent of the donor, a similar analysis must take place—with full consideration of any confidential or fiduciary relationship between the parties and/or the presence of fraud, undue influence, or lack of capacity—so as to determine the validity and donative intent of the account/trust.

Totten trusts are considered as a tentative gifts which are completed upon the death of the donor,[23] wherein "title vests in the beneficiary immediately upon death of the donor."[24] However, the gifting analysis discussed above differs, as the "irrevocable present transfer of ownership," which is essential to the intent element, is fundamentally different; not only can the donor terminate the account and/or remove assets from the account at will, but both the delivery and acceptance elements are more nuanced given the nature of the "gift."

Accordingly, EPTL 7-5.2 was enacted, which is "clear and precise in prescribing the three ways by which a depositor can revoke a Totten trust: withdrawal of the funds, an express direction in a will, and a qualifying writing filed with the bank."[25] Absent revocation pursuant to EPTL 7-5.2, or other credible evidence that would invalidate the "gift," Totten trusts will pass to the named "beneficiary," as there will be little grounds to successfully contest the donative intent of the donor.

Lastly, one of the remaining issues that frequently arises when dealing with "gifting" in Surrogate's Court litigation is the effect of the statute of limitations. This issue emerges in the context of a conversion claim, as what one party claims was a gift, another will allege was the product of conversion. Ordinarily, the statute of limitations for conversion or replevin actions is three years.[26] However, in certain situations the limitations period may be tolled.

Where a person in possession of property acquires it in a lawful manner, i.e, the title owner knowingly and voluntarily allows an individual to take possession of the property, but not title, the three-year statute of limitations will begin to run upon a demand being made for the return of the property, and the refusal by the current possessor (known as the "demand and refusal rule"). Alternatively, where an individual surreptitiously or "unlawfully" comes into possession of the property, i.e., when their possession of the property is unknown to the title owner, then the demand and refusal rule will not apply, and the statute of limitations will begin to run at the time of the "taking." Although these rules may be somewhat counterintuitive, the courts have based this rule on the premise that an overt and positive act of conversion must be made before the statute-of-limitations period can begin. Accordingly, this overt act occurs with either the "demand or refusal" where there is a known "lawful possession," or at the time of the actual taking where there is an unknown "unlawful possession."[27]

Even based in this limited overview, the law governing "gifting" is clearly an integral piece of estate litigation as it underlies much of the practice. As most attorneys who litigate in these areas would agree—at least to the extent that attorneys can agree upon anything—effective advocacy depends upon presenting one's case to both the court and a jury with clarity and simplicity. Presenting clear, unrefuted fact patterns; making simple the technical, often opaque statutes; and applying the ever evolving body of common law to a client's financial transactions is, without question, an art that takes years to develop and to master. Complex Surrogate's Court litigation is no exception, but as highlighted in the above examples regarding "gifts," the law may often be broken down into its simplest elements so that it can then in turn be explained, understood, and built upon in order to be effectively applied a client's facts.

Endnotes

1. *See In re Parisi*, 34 Misc. 3d 1204(A), 946 N.Y.S.2d 68, (Sur. Ct., Queens Co. 2011); *In re Kaminsky*, 17 A.D.2d 690, 230 N.Y.S.2d 954 (3d Dep't 1962); *Gruen v. Gruen*, 68 N.Y.2d 48, 505, N.Y.S.2d 849 (1986).
2. *See In re Kelligrew*, 63 A.D.3d 1064, 882 N.Y.S.2d 221 (2d Dep't 2009).
3. *See generally In re McHale*, 37 Misc. 3d 1204(A), 964 N.Y.S.2d 60 (Sur. Ct., Erie Co. 2012).
4. *Hom v. Hom*, 101 A.D.3d 816, 955 N.Y.S.2d 630 (2d Dep't 2012); *citing Gruen*, 68 N.Y.2d 48.
5. *In re Szabo's Estate*, 10 N.Y.2d 94, 217 N.Y.S.2d 593 (1961).
6. *McCarthy v. Pieret*, 281 N.Y. 407, 24 N.E.2d 102 (1939); *see also Ross v. Ross Metals Corp*., 87 A.D.3d 573, 928 N.Y.S.2d 327 (2d Dep't 2011).
7. *Juliano v. Juliano*, 42 Misc. 3d 1226(A), 984 N.Y.S.2d 632 (Sup. Ct., Kings Co. 2014); *citing In re Gordon v. Bialystoker Ctr. & Bikur Cholim*, 45 N.Y.2d 692, 412 N.Y.S.2d 593 (1978); *In re DelGatto*, 98 A.D.3d 975, 950 N.Y.S.2d 738 (2d Dep't 2012); *In re Neenan*, 35 A.D.3d 475, 827 N.Y.S.2d 164 (2d Dep't 2006).
8. *See generally In re Boatwright*, 114 A.D.3d 856, 980 N.Y.S.2d 554 (2d Dep't 2014); *citing In re Connelly*, 193 A.D.2d 602, 597 N.Y.S.2d 427 (2d Dep't 1993); *Hennessey v. Ecker*, 170 A.D.2d 650, 567 N.Y.S.2d 74 (2d Dep't 1994).
9. *In re Boatwright*, 114 A.D.3d 856; *citing Mantella v. Mantella*, 268 A.D.2d 852, 701 N.Y.S.2d 715 (3d Dep't 2000); *In re Roth*, 283 A.D.2d 504, 724 N.Y.S. 2d 476 (2d Dep't 2001).
10. *In re Cooper*, 6 Misc. 3d 1001(A), 800 N.Y.S.2d 346 (Sur. Ct., Nassau Co. 2004); *citing In re Mazak*, 288 A.D.2d 682, 732 N.Y.S.2d 707 (3d Dep't 2001); *In re Camarda*, 63 A.D.2d 837, 406 N.Y.S.2d 193 (4th Dep't 1978).
11. *See Hom v. Hom*, 101 A.D.3d 816, 955 N.Y.S.2d 630 (2d Dep't 2012).

12. *In re Stalter*, 270 A.D.2d 594, 703 N.Y.S.2d 600 (3d Dep't 2000). At common law, there was no presumption of joint tenancy in a bank deposit. *See In re Hollweg*, 67 A.D.2d 1001, 413 N.Y.S.2d 735 (2d Dep't 1979); *see also In re Hickmott's Estate*, 256 A.D. 1047, 10 N.Y.S.2d 918 (4th Dep't 1939).
13. *Jacks v. D'Ambrosio*, 69 A.D.3d 574, 892 N.Y.S.2d 503 (2d Dep't 2010); *see also, In re Yaros*, 90 A.D.3d 1063, 1064, 935 N.Y.S.2d 627 (2d Dep't 2011); N.Y. Banking Law §675(a) and (b).
14. *In re Gilman*, 6 Misc. 3d 1001(A), 800 N.Y.S.2d 346 (Sur. Ct., Nassau Co. 2004); *citing In re Schwartz*, N.Y.L.J., May 22, 1991, p. 26, col. 4 (Sur. Ct., Nassau Co.).
15. *Id.*; *In re Thomas*, 43 A.D.2d 446, 352 N.Y.S.2d 524 (3d Dep't 1974); *In re Hamburg*, 151 Misc. 2d 1034, 574 N.Y.S.2d 914 (Sur. Ct., Bronx Co. 1991).
16. 3 N.Y. Codes, Rules and Regulations § 15.1[c].
17. 3 NYCRR §15.1[d].
18. *In re Zorskas*, 20 Misc. 3d 1110(A), 867 N.Y.S.2d 22 (Sur. Ct., Nassau Co. 2008); *citing In re Van Bogelen*, 204 A.D.2d 650, 614 N.Y.S.2d 228 (2d Dep't 1994).
19. *In re Zorskas, supra*; *citing In re Johnson*, 7 A.D.3d 959, 777 N.Y.S.2d 212 (3d Dep't 2004); *In re Camarda*, 63 A.D.2d 837, 406 N.Y.S.2d 193 (4th Dep't 1978).
20. *Zorskas*, 20 Misc. 3d 1110(A); *citing Camarda*, 63 A.D.2d 837.
21. *Zorskas*, 20 Misc. 3d 1110(A); *citing In re Niesz*, N.Y.L.J., Apr. 24, 1996, p. 32, col. 1 (Sur. Ct., Westchester Co. 1996).
22. *Zorskas*, 20 Misc. 3d 1110(A); *citing In re Boyd*, 186 A.D.2d 394, 588 N.Y.S.2d 188 (1st Dep't 1992).
23. *In re Totten*, 179 N.Y. 112, 74 N.E. 748 (1904). *See also* N.Y. Estates, Powers and Trusts Law 7–5.1; EPTL 7-5.2.
24. *Eredics v. Chase Manhattan Bank, N.A.*, 100 N.Y.2d 106, 760 N.Y.S.2d 737 (2003).
25. *Id.*
26. CPLR §214 (3). *See also In re Witbeck*, 245 A.D.2d 848, 666 N.Y.S.2d 315 (3d Dep't 1997); *Matter of Kraus*, 208 A.D.2d 728, 617 N.Y.S.2d 817 (2d Dep't 1994).
27. *See In re Madris*, N.Y.L.J., Mar. 13, 2000, p. 31, col. 3 (Sur. Ct., N.Y. Co. 2000); *In re King*, 305 A.D.2d 683, 759 N.Y.S.2d 895 (2d Dep't 2003); *D'Amico v. First Union Natl. Bank*, 285 A.D.2d 166, 728 N.Y.S.2d 146 (1st Dep't 2001); *Berman v. Goldsmith*, 141 A.D.2d 487, 529 N.Y.S.2d 115 (2d Dep't 1988).

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