

GIFTING PRIOR TO DEATH

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If you have ever thought about giving something, make certain that the gift is either memorized in a Will, delivered directly or symbolically to the person receiving such gift. The problem in gifting is whether the gift was actually delivered and all ties to it were relinquished by the former owner during life or at death. Imagine the following set of facts: a person who is on their death bed and knows that because of his or her medical problems their life is in fact terminal. The person says to their friend, Sally, that they can have the brand new car they just purchased. The person then passes.

The estate then goes into probate and, Sally who was to receive the car, makes a claim for it. The court is now faced with the question of whether there was a bona fide transfer of the car to Sally. In this situation the court would likely not find in favor of Sally because no transfer of the car keys, title or written instrument stating that the decedent gifted the vehicle to Sally prior to death.

Sally could make a claim under the doctrine of Causa Mortis. The Causa Mortis doctrine comes from the old common law meaning a gift made while on one's death bed where death was imminent. The doctrine also utilizes the gift doctrine from the common law where there must be some physical transfer. In this case that would have to be the car keys as evidence of a transfer.

Suppose in our set of facts, the person dying has a miraculous recovery, could Sally still state that she is the owner of the car given the oral gift or delivery of the keys. Under the doctrine of Causa Mortis, the answer is no. The basis of the gift was based on the condition of death, which did not occur.

Can a person (regardless of imminent death) still gift property? The answer is yes; provided, that full relinquishment of control over the gifted property occurs. Symbolic forms of relinquishing control include giving the key to a drawer where the gift resides or placement of the object (e.g. an heirloom) in the hands of the individual; or, delivery of the gifted item to a person's home. There can be no conditions put upon the gift for its return should some future event occur.

To insure that a gift was intended to be made, it is helpful to write down the item you are giving away and the name of the person to whom it is gifted. The reason for this is that families sometimes start squabbling following the death of a relative regarding items removed from the decedent's home as gifts. Even more daunting is a charge of undue influence against the person who now holds possession of an item. Imagine the situation where the gifted item is a painting by a famous painter. No doubt the beneficiaries who did not receive the gift or its value when sold will be suspicious.

A recent case involving an oral gift of \$25,000.00 to an aide who was caring for an elderly person was initially struck down by the trial court. However, the appellant court reversed the trial court's decision because the right to the gift was not dependent upon the gift's delivery during life. The court reasoned that the delivery of the gift was to occur at the death of the elderly person (sounds like the Causa Mortis doctrine). What was even more important was the agreement for the gift was overheard by others including an order from the trial court made approximately 2 months prior to the person's death granting the gift. The issue turned on whether the gift had to be made during life or following death. In this case, it did not matter, the symbolic nature of the order from the court combined with testimony of witnesses was enough to overrule the trial court.

Keep in mind that Florida has in place a form of Causa Mortis found in Section 732.515, Fla. Stat., whereby a person can write down tangible personal property that they want to give to a specific person following death. However, the decedent must have in place a Will incorporating the fact that a separate writing is to be honored following death.

If you are contemplating gifting property during life, make sure you relinquish control of the article. Alternatively, if you are contemplating gifting specific property to an individual following death, specify the item to be gifted in your Will. If you are not sure of how to gift your property, see the attorney of your choice and inform him or her of what you want to do. He or she can provide you with the steps and methods needed to make certain that such gift goes to the intended individual of your choice.

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