

New York State Department of Taxation and Finance  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-M-80 (2)  
Estate and Gift Tax  
June 30, 1980

Subject: Guidelines for determining gifts causa mortis

A provision of the revised estate tax law, enacted effective July 1, 1978, provides that all transfers (gifts) made within three years of the date of death are includible in the gross estate of the decedent whether or not they are made in contemplation of death. A gift, in whatever form, necessarily alters the state of the title to the property it affects by virtue of the emergence of the donee's interest in it. A "gift causa mortis" is includible in the gross estate if made within three years of death, but is not subject to gift tax. An "inter-vivos gift" is subject to gift tax and includible in the gross estate if made within three years of death.

The purpose of this technical memorandum is to provide information as to the specific characteristics of "gifts causa mortis" and to assist the Department's technical staff in determining the type of gift made and the tax implications thereon. To give a better understanding of this specific type of gift, information has been included relating to gifts in general.

A. Gifts-In general

1. Definition-a gift is a voluntary transfer of property made without consideration or compensation whereby the donor surrenders ownership of the property given and the donee accepts the property being given.
2. Types of gifts
  - a. inter-vivos--a gift between living persons whose effect is both immediate and irrevocable; it is intended to be unaffected by the donor's death or failure to die within a relevant span of time.
  - b. causa mortis--a gift made in subjective apprehension of death from disease or other impending peril; it is defeated if death does not occur.
  - c. testamentary (disposition)--a gift, usually made by Will, which is ineffective until the moment of death of the person making the testamentary gift.

B. Gifts Causa Mortis

1. Essential elements-the elements listed below are essential to ALL types of gifts. However, as presented here, they have been expanded, in some instances, to include a more explicit explanation of their applicability to gifts causa mortis.
  - a. the transfer must be fully executed--there must be complete divestment of all control by the donor. Mere words do not constitute a gift, but only a promise or executory agreement to make a gift of property (in the future).

- b. the donor must have the mental capacity to make a gift
  - (1) a donor who is experiencing periods of irrationality is not necessarily incapable of making a particular gift at a particular time.
  - (2) a habitual drunkard is presumed competent when sober.
- c. the transfer must be a voluntary act and wholly gratuitous (without consideration).
- d. donative intent--a clear and unmistakable intention on the part of the donor to relinquish absolutely the ownership of and to make a present transfer of what is given. The gift must be intended to be affected by the donor's death. Donative intent of the giver (donor) is achieved by delivery and acceptance of the property.
  - (1) intent to transfer both possession and full control but not title is not donative intent
  - (2) intent to transfer in the future is not donative intent
- e. there must be delivery of the property during the lifetime of the donor. The function of delivery is to transfer control and title. Delivery may be
  - (1) actual--physical (delivery of property)
  - (2) constructive--delivery (of property) by means of a suitable document of transfer
  - (3) symbolical--this type of delivery is allowed only if physical delivery is impossible (Re. VanAlystyne 207 N.Y. 298, 100 N.E. 802)

Examples:

- ((a)) delivery of keys to a safe deposit box has been held to be sufficient to consummate the gift of the contents (Re. Sullivan's Estate, 133 Misc. 758, 234 NYS 3) (127 ALR 780)
- ((b)) delivery of keys to a dresser in which bankbooks and an insurance policy were kept was held to be sufficient to consummate a gift causa mortis. (Re. Adler, 107, Misc. 574, 117 NYS 820, affd. 191 A.D.40)
- ((c)) delivery of keys to a shoe repair shop and also to an automobile have been held to be a sufficient element of a gift causa mortis (Re. Arneth's Will, 98 NYS 2d924) (Re. Wernick's Estate, 110 NYS 2d 218)

Title vests conditionally in the donee at the time of delivery and becomes absolute only at the donor's death. (Re. Bedell v. Cavil, 33 NY 581)

- (1) Since title does not vest indefeasibly while the donor lives, a gift causa mortis is, in reality, not a gift at all, but a direction of testamentary character.
- f. There must be acceptance of the property transferred. Formal acceptance is the exception rather than the rule.

Acceptance may be--

(1) implied-

((a)) the mere fact that the gift is beneficial to the donee is sufficient to raise the implication of acceptance (Re. Kaufman's Estate, 201 Misc. 905, 107 NYS 2d 681)

((b)) even if the donee learned of the gift after the death of the donor. In the case of a gift causa mortis, it has been held that acceptance need not take place during the lifetime of the donor (Re. Schulsinger's Estate, 187 Misc. 818, 65 NYS 2d 701)

(2) made by a third party or trustee (appointed by the donor or donee) acting on behalf of the donee even though the donee had no knowledge of the transaction. (Martin v. Funk, 75 NY 134) (Re. Wilson's Estate, 26 Misc. 2d 839, 206 NYS 2d 323)

2. Special characteristics of gifts causa mortis-

a. the donor's apprehension of death is a basic criteria of a gift causa mortis

(1) it is not necessary that the gift be made while the donor is "in extremis", or confined to his bed or room. However, the mere realization that one is old and feeble and cannot have long to live does not constitute the "apprehension of death" under which a gift causa mortis is permitted to be made (Re. Spaulding, 49 AD 541, 63 NYS 694, affd. 163 N.Y. 607).

(2) no particular time interval between the making of the gift and the occurrence of death (of donor) affects the validity of a gift causa mortis (Williams v. Guile, 117 NY 343, 22 NE 1071, 6 LRA366). However, the longest time interval where the gift was held valid was a period of five months. (Butler v. Sherwood 114 Misc. 483, 186 NYS 712, affd. 196 AD 603, 188 NYS 242, affd. 233 NY 655, 135 NE957).

b. the gift causa mortis is defeated if the donor survives the impending possibility of death or peril (Re. Grymes v. Hone, 49 NY 17).

(1) temporary recover, if for a substantial length of time, is sufficient to defeat the gift, even though the donor may later die of the same illness that prompted the gift (Butler v. Sherwood, supra).

c. the gift causa mortis is revocable by the donor

(1) death of the donee before the donor revokes the gift and restores ownership to the donor (Ridden v. Thrall, 125 NY 572)

d. the imposition of a trust duty (ex. a direction to pay funeral expenses and keep what is left) is a fairly common characteristic of a gift causa mortis and will not defeat its validity. (Dickinson v. Hoes, 84 NYS 152)

3. Limitations-property not transferable by gift causa mortis

a. Real Property-

(1) gifts causa mortis are strictly confined to personal property

b. Postal savings certificates-(Re. Bokos Estate, 163 Misc. 940, 298 NYS 866, affd. 262 A.D. 801, 29 NYS 2d 135)--(these certificates are no longer issued by the U.S. Postal Savings System)

- (1) U.S. Government Savings Bonds, which are generally not transferable by their owner, have been held to be transferable by gifts causa mortis (Re. Presender's Estate, 285 A.D 109, 135 NYS 2d 418), but not by gift inter-vivos (Re. Hackett's Estate, 113 NYS 2d 688).
- c. A donor's check, prior to payment by the bank (Curry v. Powers, 70 NY 212)
  - (1) a check which has not been paid has been described as the voluntary and unenforceable promise of an executory gift-(Re. Bloch's Estate, 186, Misc. 705, 54 NYS 2d 57).
  - (2) an unpaid check is merely an "order to pay" (Re. Ludlam's Estate, 158 Misc. 283, 285 NYS 597).
  - (3) a gift of money requires that the money be actually paid over to the donee (Re. Mills 172 AD 530, 158 NYS 1100, affd. 219 NY 642).
- d. A donor's own note, if it is a promise to make a gift of money at a future time (Harris v. Clark, 3 NY 93)

4. Proof--evidence of gifts causa mortis-

If the essential elements of a gift are proven, New York courts have upheld gifts causa mortis. However, the courts are cautious in these matters in order to insure against the perpetration of fraud.

In a relatively early case, it was held that where a gift is made by the donor during his last illness, it is presumed to be made causa mortis even though not expressly so stated (Williams v. Guild, supra)

Proof of the necessary requirements to establish a gift causa mortis must be clear, convincing and satisfactory, but need not be by more than a fair preponderance of the evidence (Re. Malysiaki's Estate, 15 AD 586, 221NYS 2d 911).

In Re. Crook's Estate, 190 NYS 285, it was held that "there is no presumption of law against a gift made by a decedent immediately before his death, and it is not necessary that it should be proved beyond suspicion, but only by a fair preponderance of the evidence, as in other civil cases \_\_\_\_"

In Re. Korman's Estate 36 AD 2d 709,319 NYS 2d 577, affd. 30 NY 2d 769, 333 NYS 2d 427, it was held that "a gift causa mortis need not be established beyond all suspicion".

It should be noted that gifts causa mortis have been recognized by the United States Supreme Court (in United States v. Wells, 283 U.S. 102, Ct. D. 340, X-1 C.B. 475(1931) and in Revenue Ruling 74-365(CB 1974-2, 324).