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## GIFTS EFFECTED BY WRITTEN INSTRUMENT: FAITH LUTHERAN RETIREMENT HOME v. VEIS

Judson L. Temple

### INTRODUCTION

Under modern law three elements or conditions must be present before a gift<sup>1</sup> is legally binding: (1) intent by the donor to make the gift, (2) delivery by the donor to the donee of the subject of the gift, and (3) acceptance of the gift by the donee.<sup>2</sup> An exception to the requirement of delivery occurs in the case of a gift effected by a written instrument. In this case, delivery of the written instrument containing the words of gift substitutes for the delivery of the subject of the gift.<sup>3</sup>

Montana adopted from California its statutory law on gifts<sup>4</sup> and the doctrine that a gift could be effected by written instrument without delivery of the subject of the gift.<sup>5</sup> In *Faith Lutheran Retirement Home v. Veis*,<sup>6</sup> this doctrine was carried to an unprecedented degree. The purposes of this note are: first, to trace the development of the doctrine that a gift can be effected by written instrument; second, to discuss the

"A gift is a transfer of personal property, made voluntarily and without consideration." REVISED CODES OF MONTANA, § 67-1706 (1947) [hereinafter cited as R.C.M. 1947]; *Patterson v. Halterman*, ..... Mont. ...., 505 P.2d 905, 907 (1973); *Bodine v. Bodine*, 149 Mont. 29, 442 P.2d 650, 656 (1967); *Marans v. Newland*, 141 Mont. 32, 374 P.2d 721, 724 (1962); *In re Brown's Estate*, 122 Mont. 451, 206 P.2d 816, 819 (1949); *Snook v. Blank*, 92 F. Supp. 518 (1948); *Sylvain v. Page*, 84 Mont. 424, 276 P. 16, 20 (1929).

*Patterson v. Halterman*, *supra* note 1 at 907; *Faith Lutheran Retirement Home v. Veis*, 156 Mont. 38, 473 P.2d 503, 504 (1970) [hereinafter cited as *Veis*]; *Simpson v. Simpson*, 153 Mont. 315, 457 P.2d 477, 478 (1969); *Marans v. Newland*, *supra* note 1 at 723, 724; *Baird v. Baird*, 125 Mont. 122, 232 P.2d 348, 356 (1951); *In re Brown's Estate*, *supra* note 1 at 819; *State Board of Equalization v. Cole*, 122 Mont. 9, 195 P.2d 989, 992 (1948); *Sylvain v. Page*, *supra* note 1 at 20; *Fender v. Foust*, 82 Mont. 73, 265 P. 15, 16 (1928); *Nelson v. Wilson*, 81 Mont. 560, 264 P. 679, 682 (1928); *O'Neil v. O'Neil*, 43 Mont. 505, 117 P. 889, 890 (1911).

\**Sylvain v. Page*, *supra* note 1 at 20.

\*The following Montana statutes on gifts have California counterparts.

- (a) R.C.M. 1947, § 67-1508. "A transfer in writing is called a grant, or conveyance or bill of sale. The term 'grant' in this and the next two articles includes all these instruments, unless it is specially applied to real property."
- (b) R.C.M. 1947, § 67-1509. "A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor."
- (c) R.C.M. 1947, § 67-1522. "A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has, unless a different intention is expressed or is necessarily implied."
- (d) R.C.M. 1947, § 67-1706. "A gift is a transfer of personal property, made voluntarily, and without consideration."
- (e) R.C.M. 1947, § 67-1707. "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

\*The California cases establishing this doctrine are *Stone v. Greene*, 181 Cal. 569, 185 P. 670, 671 (1919); *Burkett v. Doty*, 176 Cal. 89, 167 P. 518, 520 (1917); *Francoeur v. Beatty*, 170 Cal. 740, 151 P. 123, 125 (1915); *Fisher v. Ludwig*, 6 Cal. App. 144, 91 P. 658, 659 (1907); *Driscoll v. Driscoll*, 143 Cal. 528, 77 P. 471, 473-474 (1904); and *Ruis v. Dow*, 113 Cal. 490, 45 P. 867, 869 (1896).

\**Veis*, *supra* note 2.

*Veis* case and its unique extension of this law; and third, to consider possible adverse consequences of *Veis*.

### PROBLEMS CREATED BY THE VEIS DECISION

In *Veis*, where the subject of the gift was \$10,000, delivery of a written instrument constituted a binding gift without delivery of the \$10,000 even though:

(1) The instrument contained no words indicating an immediately effective relinquishment of title, dominion, or control of the subject of the gift by the donor but provided instead that collection of the \$10,000 might be made after the donor's death, if not before,<sup>7</sup> and

(2) The \$10,000 to be given was not definitively earmarked by the instrument, so that delivery to the donee of the instrument could not divest the donor of title, dominion, or control of the \$10,000.<sup>8</sup>

Holding enforceable a gift made by transfer of a written instrument where the instrument contains no words of immediate conveyance and where transfer of the instrument does not divest the donor of title, dominion, or control of the subject of the gift (upon transfer of the instrument from donor to donee) has three serious drawbacks. First, the usual requirement of delivery of the subject of a gift impresses upon the donor that he is forever parting with title, dominion, and control of the subject of the gift.<sup>9</sup> This may prevent ill-considered and hasty gifts on his part. This protection is diminished when the donor delivers only an instrument which does not cause an immediate loss of title, dominion, or control. Second, such an instrument is at most a promise to give, and its enforceability is in derogation of the fundamental principle of contracts that a promise made without consideration is unenforceable. Third, gifts by instrument of this type undermine the Statute of Wills.<sup>10</sup>

<sup>7</sup>*Id.* at 504.

<sup>8</sup>*Id.*

<sup>9</sup>*See, Mechem, The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348-349 (1926). Mechem lists three functions performed by the delivery requirement, one of which constitutes protection to the donor. He states: "In the first place, the delivery makes vivid and concrete to the donor the significance of the act he is doing."

<sup>10</sup>R.C.M. 1947, § 91-107. "Every will, other than a nuncupative will, must be in writing; and every will, other than a holographic will, and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence.

## HISTORICAL DEVELOPMENT

### (A) ENGLISH LAW

The written instrument as a means of gift is an offspring of the deed.<sup>11</sup> A deed, in the context of this note, means an instrument under seal.<sup>12</sup> The Montana law of gifts by written instrument was drawn from the California law<sup>13</sup> which had its genesis in the common law of England.<sup>14</sup> The deed was introduced into England at the time of the Norman conquest,<sup>15</sup> and its vitality as an instrument of conveyance was established in the very early common law of England,<sup>16</sup> long before the general rule of delivery as an element of gifts became settled. The English cases of *Irons v. Smallpiece*<sup>17</sup> and *Cochrane v. Moore*<sup>18</sup> were of principal importance in settling the rule that a gift was not valid without delivery of the subject of the gift.<sup>19</sup> Those cases made it equally clear that that rule had no application where the gift was effected by deed.<sup>20</sup>

In *Irons v. Smallpiece*, the plaintiff claimed a gift of colts from his father. He argued that although no delivery of the colts had been made to him, the gift had been completed by virtue of the statements of his father that he was making a gift of the colts to the plaintiff. Chief Justice Abbott rendered the court's decision:

I am of opinion, that by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.<sup>21</sup>

The plaintiff lost this case since there was no deed and no delivery

<sup>11</sup>See, Mechem, *supra* note 9 (pt. 3) at 576. "The reasons given for sustaining the validity of a gift made by deed become of great importance in determining the efficacy of an unsealed writing for the same purpose. There is no doubt that the doctrine, so far as one exists, that a gift may be made without delivery by an unsealed writing, is a derivative one, that is, an offshoot of the doctrine relative to deeds. All the cases suggesting or admitting the efficacy of such an unsealed writing are recent ones, arising, roughly speaking, within the last century. The word 'deed' is frequently used and cases involving sealed deeds cited, leaving no doubt that the newer doctrine is regarded as similar or kindred to the older one."

<sup>12</sup>A deed in the modern context often refers to an instrument for the conveyance of land, though not under seal. This is not what is meant here. In R. BROWN, *THE LAW OF PERSONAL PROPERTY*, § 46 (2d ed. 1955) it is stated: "In the original and technical sense a deed is a written instrument under the seal of the party executing it. Because, however, of the wide use of such instruments in the conveyance of real estate, it has come to mean in popular acceptance any formal conveyance for the transfer of land or of an interest therein."

<sup>13</sup>*Sylvain v. Page*, *supra* note 1 is the leading Montana case establishing the validity of a gift effected by written instrument. It relies for authority upon the California cases of *Driscoll v. Driscoll*, *Francoeur v. Beatty*, *Burkett v. Doty*, and *Stone v. Greene*, all cited *supra* note 5.

<sup>14</sup>In particular see *Driscoll v. Driscoll*, *supra* note 5 at 474.

<sup>15</sup>BROWN, *supra* note 12 at § 46.

<sup>16</sup>*Id.*

<sup>17</sup>*Irons v. Smallpiece*, 106 Eng. Rep. 467 (1819).

<sup>18</sup>*Cochrane v. Moore*, 25 Q.B.D. 57 (1890).

<sup>19</sup>*Irons v. Smallpiece*, *supra* note 17 at 468; *Cochrane v. Moore*, *supra* note 18 at 72-73.

<sup>20</sup>*Id.*

<sup>21</sup>*Irons v. Smallpiece*, *supra* note 17 at 468.

of the colts. The fact that the Chief Justice referred to a gift by "deed or instrument of gift" suggested that a gift might be effected by written instrument other than a deed. But at this early date, that was not the law.<sup>22</sup>

In *Cochrane v. Moore*, Moore received, by words of gift, one-fourth of a horse. No delivery of the horse (or any part of it) was made to him. The court noted that a few cases following *Irons v. Smallpiece* still upheld a gift without a deed or delivery of the subject matter.<sup>23</sup> But, the authorities preceding *Irons v. Smallpiece* favored the delivery rule.<sup>24</sup> Thus, *Irons v. Smallpiece* had been correctly decided. The *Cochrane v. Moore* court, therefore, adhered to the requirement of delivery. *Cochrane v. Moore* put to rest the delivery question in cases of gifts, but the court again stated that the rule did not apply in cases of gifts effected by deed.<sup>25</sup>

#### (B) CALIFORNIA LAW

The legacy of the English cases was that a gift might be effected by deed, i.e., by an instrument under seal, without delivery of the subject of the gift. It had been not yet been established, however, that a gift might be effected by a written instrument not under seal or otherwise less formal than the deed. The role fell to the California courts early in this century.<sup>26</sup>

Before considering these cases, it should be noted that California and Montana at present have laws abolishing the distinction between sealed and unsealed instruments.<sup>27</sup> As was pointed out by P. Mechem in a trio of articles on the role of delivery in gifts, the logical effect of such a statute should be to place the deed and the written instrument not under seal on the same plane.<sup>28</sup> Either should be effective to pass title to a gift without delivery of the subject of the gift, or neither should have that effect.<sup>29</sup> But, the decisions of the courts have rested on other grounds and have ignored such statutes.<sup>30</sup>

<sup>22</sup>The court in *Cochrane v. Moore*, *supra* note 18 at 61 spoke to the question of the language employed by the Chief Justice: "These observations of the Chief Justice have created some difficulty. What did he mean by an instrument as contrasted with a deed? If he meant that an instrument in writing not under seal was different from parol in respect of a gift *inter vivos*, he was probably in error; but if in speaking of the transfer of property by gift, he included gifts by will as well as gifts *inter vivos*, then by instrument he meant testamentary instrument, and his language was correct."

<sup>23</sup>See *Cochrane v. Moore*, *supra*, note 18 at 62-64 and the cases cited therein.

<sup>24</sup>*Id.* at 64-72.

<sup>25</sup>*Id.* at 72-73.

<sup>26</sup>See note 5, *supra*.

<sup>27</sup>The Montana statute is R.C.M. 1947, § 93-1101-4. "There must be no difference hereafter, in this state, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal."

<sup>28</sup>Mechem, *supra* note 9 at 576.

<sup>29</sup>*Id.*

<sup>30</sup>Montana has no cases which interpret R.C.M. 1947, § 93-1101-4.

In *Driscoll v. Driscoll*,<sup>31</sup> John Driscoll was an aging member of a partnership consisting of himself and two others. For consideration, he had drawn up a formal instrument whereby he would "assign, sell, transfer, and deliver" to his daughter his undivided one-third interest in the partnership.<sup>32</sup> The instrument itself specified that it was under seal. Driscoll delivered the instrument to his daughter for one dollar, who placed it with one Heilbron for safekeeping. Neither Driscoll's wife nor the other partners in the firm were informed of the transaction. Driscoll continued working in the firm as a partner. Upon his death a contest ensued between his wife and his daughter for his partnership interest, the daughter claiming by means of the instrument. The court held:

The chief ground upon which the appellant seems to rely for a reversal of the judgment is that there was no delivery of the property to the defendant during the lifetime of her father. A sale of personal property is, however, good as between the parties, whether the possession be delivered or not. Want of delivery renders it void only as to creditors and subsequent purchasers (citing authority). If, however, the transaction between the defendant and her father could be considered as a voluntary transfer or gift from him to her, the same result would follow. The provision in section 1147, Civ. Code,<sup>33</sup> making a delivery essential to the validity of a gift, is limited to "verbal" gifts, and requires an actual delivery only when the thing given 'is capable of delivery.' 'Delivery,' in this as in every other case, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery.<sup>34</sup>

Thus, the court held in favor of the daughter. Although the instrument recited that it was under seal, the opinion of the court does not inform us whether or not it was under seal in fact. The court in support of its decision did, however, rely on *Irons v. Smallpiece*<sup>35</sup> for

<sup>31</sup>*Driscoll v. Driscoll*, *supra* note 5. Two cases which preceded *Driscoll v. Driscoll* in point of time deserve mention. In *Ruiz v. Dow*, *supra* note 5, the donor executed a deed of land in favor of his wife which was duly delivered to the bank with instructions that it be recorded on the donor's death. The court found the deed to effect a valid conveyance of the land. But the deed also contained a conveyance of "all personal property belonging to me, of every description whatsoever, including chattels, stocks, moneys, notes, bonds, mortgages, and any other evidence of indebtedness to me, wherever situated, held, or deposited." (p. 868). The court upheld the conveyance of personal property noting it would be strange to find the deed valid as to the realty but invalid as to the personalty. The court further stated at 869: "It may be further suggested that section 1147 of the Civil Code contemplates that it is only necessary to the validity of verbal gifts that there should be an actual or symbolical delivery to the donee." Section 1147 of the Civil Code was identical to R.C.M. 1947, § 67-1707. This statute is set out in note 4.

The other case which deserves mention here is *Knight v. Tripp*, 121 Cal. 674, 54 P. 267 (1898). There the donor, fearing death from a serious surgical operation, executed a written instrument by which she gave her home and the property in it to the defendant in an attempted gift *causa mortis*. The court invalidated the instrument, however, holding that delivery of the property was necessary. The court feared infringement of the Statute of Wills, stating at 268-269: "A gift *causa mortis* is not aided by the execution of the written instrument except so far as that may contribute to greater certainty in the proofs. Such gifts cannot be effected by formal instruments of conveyance or assignment. They are manifested by, and take their effect from, delivery."

<sup>32</sup>*Driscoll v. Driscoll*, *supra* note 5 at 471.

<sup>33</sup>This is the same statute as R.C.M. 1947, § 67-1707. This statute is set out in note 4.

<sup>34</sup>*Driscoll v. Driscoll*, *supra* note 5 at 473.

<sup>35</sup>*Irons v. Smallpiece*, *supra* note 17.

the proposition that one's own voluntary deed is binding<sup>36</sup> and upon the common law doctrine that a gift effected by deed requires no delivery of the subject of the gift.<sup>37</sup>

*Francoeur v. Beatty*<sup>38</sup> concerned a dispute over ownership of certain stocks and bonds last owned by a deceased person. Plaintiff was an intimate friend of the decedent and had lived with her for many years. Defendant was the decedent's lawyer and claimed the stocks and bonds by virtue of a written instrument executed by the decedent and delivered to the defendant. Under the terms of the written instrument, the decedent unconditionally gave the stocks and bonds to the defendant. The possession of the stocks and bonds, however, remained with the decedent until shortly before her death. The plaintiff claimed that the gift was ineffective for lack of delivery of the stocks and bonds to the defendant. Unlike *Driscoll*,<sup>40</sup> which involved a gift of an interest in a partnership which was not capable of physical delivery and thus could only be given, if at all, by written instrument, the gift of the stocks and bonds in *Francoeur* was easily capable of an actual physical delivery. Furthermore, the instrument in *Francoeur* did not purport to be under seal.<sup>41</sup> Nonetheless, the *Francoeur* court found in favor of the gift.<sup>42</sup> The court relied on *Driscoll* for the proposition that no delivery was necessary where there was an instrument in writing.<sup>43</sup>

This holding was confirmed in *Burkett v. Doty*<sup>44</sup> where a delivery of a written assignment of three promissory notes constituted a valid gift of those notes although no delivery of the notes themselves was made. The court stated:

It must be remembered that, as between donor and donee, it is not necessary to the validity of a gift *inter vivos*, if made by a written instrument transferring the title to the donee, that the pos-

<sup>36</sup>*Driscoll v. Driscoll*, *supra* note 5 at 474.

<sup>37</sup>*Id.* "Under the common law a gift of personalty effected by a deed operated proprio vigore to vest the donee with the title to the property upon the delivery of the deed without a delivery of the thing given."

<sup>38</sup>*Francoeur v. Beatty*, *supra* note 5.

<sup>39</sup>Following *Driscoll* but before *Francoeur v. Beatty*, *supra* note 38 came the cases *Fisher v. Ludwig*, *supra* note 5 and *In re Hall's Estate*, 154 Cal. 527, 98 P. 269 (1908). In *Fisher*, a valid transfer of a bank account was effected by delivery of the passbook to the defendant and by delivery of a formal instrument to the bank authorizing the bank to pay the funds in the account to the defendant. The court seemed to say that delivery of either the instrument alone or the passbook alone would have been sufficient. But in *In re Hall's Estate*, the written instrument, by which Hall conveyed to his wife all his personal property, further provided that the conveyance would be null and void during Hall's lifetime and become effective only upon his death. The court found that the gift failed because at the time of delivery of the instrument there was a failure of intent, i.e., Hall did not intend to relinquish the right to dominion and control of his property at the time he delivered the instrument.

<sup>40</sup>*Driscoll v. Driscoll*, *supra* note 5.

<sup>41</sup>The instrument did not state that it was under seal nor does the court's opinion indicate that the written instrument was a sealed one.

<sup>42</sup>*Francoeur v. Beatty*, *supra* note 5 at 127.

<sup>43</sup>*Id.* at 125-126.

<sup>44</sup>*Burkett v. Doty*, *supra* note 5.

session of the thing given be passed to the donee. The transfer of the right to its immediate possession and control, the title thereto, is sufficient, and the gift then takes effect, although the donor retains all the power of control that can arise from such possession. *Driscoll v. Driscoll*, *supra*; *Francoeur v. Beatty*, *supra*.<sup>46</sup>

### (C) MONTANA LAW

Only one Montana case before *Veis*<sup>46</sup> squarely faced the problem of the validity of a gift effected by written instrument. That case was *Sylvain v. Page*.<sup>47</sup> The written instrument was a bill of sale drawn up by an attorney at the request of John Page when he and his wife Lulu Page visited the attorney's office. By means of the instrument, John Page conveyed to his wife:

. . . all household goods, furniture, and fixtures and furnishings of every kind and nature, also all jewelry, and diamonds owned by me, together with all my interest in and to that certain Cole-eight automobile and all parts and accessories thereunto belonging. And any and all other personal property of whatsoever nature or description owned by or belonging to me.<sup>48</sup>

The bill of sale was signed by both John and Lulu Page and then handed to Lulu Page by John Page in the presence of the attorney. The attorney filed the bill of sale in his safe for safekeeping, at the request of Lulu Page. The Montana supreme court found that the bill of sale was effective to transfer the property mentioned within the instrument:

Under identical statutes the Supreme Court of California has held 'that, as between donor and donee, it is not necessary to the validity of a gift *inter vivos*, if made by a written instrument transferring the title to the donee, that the possession of the thing given be passed to the donee.' *Burkett v. Doty*, 176 Cal. 89, 167 P. 518; *Driscoll v. Driscoll*, 143 Cal. 528, 77 P. 471; *Francoeur v. Beatty*, 170 Cal. 740, 151 P. 123; *Stone v. Greene*, 181 Cal. 569, 185 P. 670. While a verbal gift is not valid, unless there is actual or symbolical delivery to the donee of the thing given (section 6883, Rev. Codes 1921), this rule has no application when the gift is effected by an instrument in writing. *Francoeur v. Beatty*, *supra*; *Driscoll v. Driscoll*, *supra*.<sup>49</sup>

<sup>46</sup>*Id.* at 520. The court also limited the holdings of *Knight v. Tripp*, 121 Cal. 674, 54 P. 267 (1898), (discussed in note 31) and *In re Hall's Estate*, 154 Cal. 527, 98 P. 269 (1908), (discussed in note 39). "The evidence considered in the [Knight and Hall cases], to the effect that there was no intent to make a complete delivery of the written transfers there involved, was of much greater force than the evidence here presented. Those cases go to the extreme limits that can be allowed in holding transfers in the hands of the transferee ineffectual, and we do not think it necessary or advisable to enlarge further the opportunities of attacking contracts deliberately and ceremoniously executed by applying those cases as precedents here."

Following *Burkett v. Doty*, *supra* note 5 the case of *Stone v. Greene*, *supra* note 5 uphold the validity of a deed to lands which also transferred the contents of a private box. The case is notable because after the plaintiff Stone delivered the deed—and thus lost title to the property it represented—she was given possession of the deed again for the purposes of safekeeping. Her custody of the deed did not render it ineffective.

<sup>46</sup>*Veis*, *supra* note 2.

<sup>47</sup>*Sylvain v. Page*, *supra* note 1.

<sup>48</sup>*Id.* at 17.

<sup>49</sup>*Id.* at 20.

Thus, the *Sylvain* court adopted the California doctrine that a written instrument could effect a gift without delivery of the subject of the gift. This was the law before the Montana supreme court's decision in *Veis*.

#### *FAITH LUTHERAN RETIREMENT HOME v. VEIS—THE DECISION*

John E. Thorson was an unmarried man of 81, a retired farmer in failing health. He applied for admission to the Faith Lutheran Retirement Home and was accepted. The administrator of the Home, Rev. Thomas Boe, was a long-time acquaintance of Thorson. In prior years, Thorson had contributed substantial sums of money for the benefit of the Home.<sup>50</sup>

After Thorson's admission to the Home, he was invited into Rev. Boe's office to complete the formal papers. These papers included usual payment agreements for board, room, and services. Rev. Boe was aware that Thorson did not have a will<sup>51</sup> and was desirous that he obtain one so that the Home might be a beneficiary under the will.<sup>52</sup> Thorson, however, had an aversion toward lawyers and did not want to draw up a will. Following a discussion between Rev. Boe and Thorson, Thorson dictated into the formal papers the following language:

I made most of my money in Montana. The Church through Faith Lutheran Home has been doing a wonderful piece of work among my old friends. For the comfort, care, happiness I have while I am here be it short or long I wish to pay for these values the sum of \$10,000 on demand. This may however be collectible against my estate if not demanded sooner, or paid by me.<sup>53</sup>

Thorson left the Home after only 17 days and moved to Minnesota where he died the following year. Following his death, the Home filed a claim with the administrator of Thorson's estate for \$10,000. The claim was rejected, and the Home filed suit in district court. The district court held in favor of the Home on the grounds that a gift of \$10,000 to the Home had been completed. The administrator appealed to the Montana supreme court which affirmed. The Montana court held that the words "I wish to pay" appearing in the formal papers indicated the requisite donative intent.<sup>54</sup> The court relied on *Sylvain*<sup>55</sup> for the proposition that in the case of a gift effected by written instrument, delivery of the subject of the gift—in this case the \$10,000—was

<sup>50</sup>The opinion of the court in *Veis* does not indicate what are "substantial sums" of money.

<sup>51</sup>Rev. Boe, in testimony taken by deposition in the district court proceedings, stated that he learned that Thorson was testate. *Veis*, *supra* note 1 at 45. It is clear that Rev. Boe meant that he learned that Thorson was not testate.

<sup>52</sup>This fact does not appear directly from the *Veis* decision but is clear from a reading of the briefs filed by appellant and respondent with the Montana supreme court. *See e.g.* Brief of Appellant, at 14.

<sup>53</sup>*Veis*, *supra* note 2 at 504.

<sup>54</sup>*Veis*, *supra* note 2 at 506-507.

not necessary to validate the gift.<sup>56</sup> Here, the formal paper containing Thorson's dictation was the written instrument. It had been delivered to the Home and accepted by the Home, and that was all the law required.<sup>57</sup>

FAITH LUTHERAN RETIREMENT HOME V. VEIS—  
A CHANGE FROM PRIOR LAW

The reasoning of the Montana supreme court is only superficially persuasive. The court does not purport to be breaking new ground or making new law but merely to be applying principles established on the basis of Montana statutes<sup>58</sup> and prior case law. The most serious distinction between *Veis* and the cases previously considered, on which the decision in *Veis* is based, is that in *Veis* the written instrument transferring title to the \$10,000 is only an informal memorandum<sup>59</sup> expressing a desire to convey *at some time*, whereas in the cases previously considered, the written instruments of conveyance contained clear, unmistakable words of immediate transfer and divestment by the donor of title to the subject of the gift.<sup>61</sup> This distinction is important as will be considered subsequently.

It is submitted that the precedents upon which the *Veis* decision is based would not support the gift even if the dictation in the formal papers read: "For the comfort, care and happiness I have while I am here be it short or long, I hereby grant to the Home the sum of \$10,000." That such a provision would have any more vitality than a promissory note is doubtful. But, a gift of a promissory note is not enforceable by the donee against the donor because it is a mere promise to pay in the future and the promise lacks consideration to make it binding.<sup>62</sup> The difficulty seems to be that a written assignment of money of this type

<sup>56</sup>*Veis*, *supra* note 2 at 505. "It would appear from *Sylvain* that the matter of delivery is not at issue as the instant case involves an instrument in writing."

<sup>57</sup>*Id.* at 507.

<sup>58</sup>See note 4, *supra*.

<sup>59</sup>In all of the cases which are precedents for the decision in *Veis*, the written instrument of conveyance is an instrument formally drawn. In the cases of *Ruiz v. Dow*, *supra* note 5, *Knight v. Tripp*, *supra* note 31, *Driscoll v. Driscoll*, *supra* note 5, and *Fisher v. Ludwig*, *supra* note 5 the words of the instrument are present in the opinions of the court, and inspection reveals that they are formally drawn. This is also true of *Sylvain v. Page*, *supra* note 1. The circumstances of *In re Hall's Estate*, *supra* note 38, *Francoeur v. Beatty*, *supra* note 5, *Burkett v. Doty*, *supra* note 5 and *Stone v. Greene*, *supra* note 5, indicate clearly that the instruments of those cases were formal ones. Those instruments contrast sharply with the informal memorandum in *Veis*.

<sup>60</sup>The Montana supreme court in *Veis* takes the position that the words "I wish to pay" appearing in Thorson's dictation are equivalent to the words "I hereby grant" and are indicative of Thorson's intent to make a present and immediate gift. *Veis*, *supra* note 2 at 506. This position is not really defensible upon a reading of the case and the briefs filed by appellant and respondent. It seems clear that Thorson was expressing a willingness to make a gift but intended that the gift would take place sometime in the future, likely after his death, and that he had no present donative intent.

<sup>61</sup>See note 59, *supra*.

<sup>62</sup>*Meyer v. Meyer*, 279 Ill. 97, 29 N.E.2d 311, 314 (1942).

does not identify which stocks, bonds, or bank accounts are being transferred. Since no identification of the transferred money is made, there is insufficient earmarking to divest the donor of title to any of his funds upon delivery of the written instrument. Since the donor retains title to all his funds, with the corresponding right to spend any of them, the written instrument does not effect a present transfer of title but can only operate as a promise to pay in the future. Such a promise would be unenforceable on the basis of the precedents relied upon in the *Veis* decision. Note by way of comparison that the cases upon which the *Veis* decision relied did not suffer from a lack of identity of the subject, the title to which was transferred.<sup>63</sup>

Of course, the difficulty mentioned here could be resolved by finding that the words: "I hereby grant to the Home the sum of \$10,000" constitute a gift of an undivided interest in the donor's property. But, the *Veis* court did not speak of undivided interests, did not base its decision upon that reasoning, and did not supply the precedents in support of that rationale.

### CONSEQUENCES OF THE VEIS DECISION

In Montana, as a result of the *Veis* decision, a written instrument may convey title to property even though the language of the instrument does not evince a present intent of the donor to divest himself immediately of title to the property. This result is troubling. Under the modern law of gifts, the requirement of delivery of the subject of the gift fulfills two functions:<sup>64</sup> (1) It impresses upon the donor the irrevocability of his action thus preventing ill-considered and hasty donations, and (2) it provides the donee with basic evidence of the gift. A substitute for the requirement of delivery of the subject of the gift should fulfill the same functions.<sup>65</sup> A written instrument is a satisfactory substitute if it contains clear and express language of immediate gift. It requires as much deliberation by the donor to express a presently operative donation in writing as it does for him to pick up a chattel and physically deliver it. Also, the writing serves to prove the gift as effectively as the chattel given. But, if a gift can be held against the donor even though the writing does not contain clear and unmistakable language of presently

<sup>63</sup>The cases previously considered involved the following gifts: *Ruiz v. Dow*, *supra* note 5 (all personal property of the donor); *Knight v. Tripp*, *supra* note 31 (all personal property in donor's house plus certain specified bank books and stock certificates); *Driscoll v. Driscoll*, *supra* note 5 at (the donor's entire 1/3 interest in his partnership); *Fisher v. Ludwig*, *supra* note 5 (the donor's bank account); *In re Hall's Estate*, *supra* note 38 (all personal property of the donor); *Francoeur v. Beatty*, *supra* note 5 (all of the donor's stocks and bonds); *Burkett v. Doty*, *supra* note 5 (three promissory notes and the mortgage securing them); *Stone v. Greene*, *supra* note 5 (the entire contents of the specified private box of the donor); *Sylvain v. Page*, *supra* note 1 (all personal property of the donor).

<sup>64</sup>*Mechem*, *supra* note 9 at 348-349 lists three functions performed by the delivery requirement. In addition to the two functions listed above, he states that the delivery requirement makes clear to witnesses the act of gift.

<sup>65</sup>*Id.* at 353-354. This is the basic premise of *Mechem's* article.

operative donation, then the protection to the donor is lost and the opportunities for fraudulent claims of gift greatly enhanced.

A second consequence of the *Veis* decision relates to contract law. A basic principle of contracts is that a promise to perform an act is not enforceable by the promisee unless there is consideration for the promise.<sup>66</sup> In *Veis*, the written instrument is most fairly viewed as a memorandum of a promise to pay \$10,000.<sup>67</sup> There was no consideration for the promise.<sup>68</sup> The enforceability of the instrument against Thorson's estate in the absence of consideration was in derogation of this principle of contracts.

A third consequence of *Veis* relates to the Statute of Wills. Under the *Veis* decision, a written instrument not only need not contain presently operative words of divestment, but the instrument may provide that the subject of the gift need not be collected until after the death of the donor. The *Veis* decision renders such instruments effective. Since they need not be signed or witnessed, however, they appear to run afoul of the Statute of Wills.<sup>69</sup> Testamentary dispositions have no operative effect whatsoever until the death of the testator.<sup>70</sup> To prevent fraudulent distribution of the decedent's property through wills which are not authentic, the legislature has provided that the will must be executed with strict formalities.<sup>71</sup> The courts have required strict observance of these formalities.<sup>72</sup> It is difficult to distinguish between wills which have no

<sup>66</sup>R.C.M. 1947, § 13-102. "It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and
4. A sufficient cause or consideration."

<sup>67</sup>See note 60, *supra*.

<sup>68</sup>The language of the memorandum suggests that the promise to pay \$10,000 was in consideration for the comfort, care, and happiness that Thorson would receive while at the Home. It seems clear, however, that the parties intended no such contract; and the care given Thorson while he was at the Home was contingent only upon his making the usual payments for board and room.

<sup>69</sup>See note 10, *supra*.

<sup>70</sup>*McReynolds v. McReynolds*, 147 Mont. 476, 414 P.2d 531, 533 (1966).

<sup>71</sup>*In re Noyes' Estate*, 40 Mont. 178, 105 P. 1013, 1016 (1909). "The purpose of the formalities prescribed is to prevent simulated and fraudulent writings from being probated and used as genuine. While the application of the strict rule of construction may sometimes defeat the intention of the testator as manifested by an imperfectly executed and authenticated writing, yet in the long run such statutes tend to promote justice, by lessening, so far as possible, the opportunity for fraud, which history and experience have demonstrated to be feasible and measurably safe in the absence of them."

<sup>72</sup>Ironically, Montana requires strict observance of the formalities of R.C.M. 1947, § 91-107. An illustrative case is *In re Estate of Rudd*, 140 Mont. 170, 369 P.2d 526 (1962). There the will of John Rudd offered for probate was executed when he was seriously ill. The will revoked a previous will which had benefitted certain relatives of Rudd. Under the later will, Rudd gave a large benefit to a brother of the person with whom Rudd was staying just before his death. The later will was signed by Rudd and witnessed. However, at the time the witnesses arrived to witness the signing of the will, Rudd had already signed the will. One of the witnesses was a doctor who discovered that Rudd had suffered a stroke and needed immediate hospitalization. 1

effect until the testator's death and written instruments of gift which may have no observable effect until the death of the donor. Thus, if no equivalent restrictions surround the execution of these written instruments of gift, then the Statute of Wills would appear to be seriously undermined.

### CONCLUSION

*Faith Lutheran Retirement Home v. Veis* is an unfortunate and unwelcome extension of the doctrine that a gift may be effected by written instrument. The extension upholds such gifts even though the instrument contains no words of immediate conveyance and title to the gift need not pass until after the death of the donor. The decision increases the opportunities for fraudulent gifts and fraudulent testamentary dispositions and renders enforceable promises unsupported by consideration. Hopefully, the Montana supreme court will decline to follow the *Veis* precedent in future decisions.

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In the commotion, other formalities of R.C.M. 1947, § 91-107 were not observed. Rudd was transferred to the hospital where he died 3 days later. The Montana supreme court held that the will was not entitled to probate.