

### EXAMINER'S ANALYSIS OF QUESTION NO. 6

This question involves analysis and application of Michigan law on gifts. If a valid gift occurred, then the diamonds would belong to Mary. If not, then the diamonds would be part of Mike's estate when he died and thus would belong to Dan.

Three elements are necessary to constitute a valid gift: (1) the donor must possess an intent to gratuitously pass title to the donee; (2) there must be actual or constructive delivery; and (3) the donee must accept the gift, although a gift beneficial to the donee will be presumed to have been accepted. See *Brooks v Gillow*, 352 Mich 189, 197-98 (1958); *Osius v Dingell*, 375 Mich 605, 611 (1965); *Lumberg v Commonwealth Bank*, 295 Mich 566 (1940).

Most gifts convey absolute irrevocable title to the donee, but some gifts are conditional. For instance, a gift causa mortis is a gift of personal property "made by a person in the expectation of imminent death, on condition that the donor dies as anticipated, leaving the donee surviving him." *Brooks v Gillow*, 352 Mich 189, 197 (1958). It is the apprehension or expectation of imminent death, and not the actual imminence of death, which is evaluated. See *In re Van Wormer's Estate*, 255 Mich 399, 406 (1931); *Brooks*, 352 Mich at 197; *In re Reh's Estate*, 196 Mich 210, 218 (1917).

Unlike a gift inter vivos, a gift causa mortis does not transfer title to the donee until the death of the donor because it is "revocable during the lifetime of the donor." *In re Reh's Estate*, 196 Mich 210, 218 (1917). Absent an express revocation of a gift causa mortis by a donor during the lifetime of the donor, a gift causa mortis will not be revoked by a subsequent will. *Lumberg v Commonwealth Bank*, 295 Mich 566, 569 (1940).

Under the facts presented, there appears to be a valid gift **causa mortis**.

First, the facts show that Mike intended to gift the diamonds to Mary, as shown by Mike's statements to Mary and the written instructions to the jeweler. One could argue that because Mike later executed a will and the will did not expressly exclude the diamonds, that Mike may have changed his mind about gifting the diamonds to Mary and intended the diamonds to be covered by the will. This counterargument,

however, will likely fail because unless Mike expressly revoked the gift causa mortis, the gift will remain. The facts do not show that Mike expressly revoked the gift to Mary either verbally or in the will.

Second, there is evidence to establish sufficient delivery. "While it is true that a gift causa mortis must be delivered to or for the donee to vest title at the death of the donor this does not mean the subject of the gift must be in the hands of the donee, but it is sufficient delivery if placed in the hands of a third party by the donor, with written instructions from which the third party may not depart and which the donor does not change." *Lumberg*, 295 Mich at 568. In the instance case, Mary was in a foreign country and it was impossible to place the diamonds in her hands and so Mike placed the gift with his regular jeweler to hold for his sister with written instructions for the delivery of the diamonds to his sister upon his death. Further, he never changed his instructions to the jeweler, he segregated the gift from the rest of his estate and the jeweler assumed liability to deliver the diamonds to Mary.

Third, as to the acceptance, "where a gift is beneficial to the donee and imposes no burdens upon the donee, acceptance by him or her is presumed as a matter of law." *Lumberg*, 295 Mich at 569 (1940); *In re Handelsman*, 266 Mich App 433, 438 (2005). Thus, even though Mary did not clearly accept the gift when she said "thank you, but do whatever you want," acceptance by her will likely be presumed as a matter of law since the diamonds may be beneficial to her. On the other hand, Mary did say "do whatever you want," which could be shown that acceptance was not valid. That said, it can be argued that this statement should not rebut the presumption that Mary accepted the diamonds and she clearly did not reject the gift. However, credit will be given for a cogent analysis which concludes that acceptance was not valid.

And fourth, because the gift was made with impending death in mind, the gift must meet the requirements of a gift causa mortis. Mike gifted the diamonds to Mary in view of his apprehension of imminent death. Mike was seriously ill and was aware that his time was limited. Lastly, the gift was expressly conditional on his death. The written instruction provided that the diamonds would only pass in the event of Mike's death.

Since a valid gift causa mortis was made (and never revoked by Mike) the subsequent will did not revoke the gift to Mary. Thus, the jeweler is obligated to deliver the diamonds to Mary.

Alternatively, credit will also be given for a cogent trust analysis. If applying a trust analysis, applicants should (i) identify the trust creation method, (ii) discuss the statutory requirements for creating a trust, (iii) confirm that nothing in the facts support a showing that the purpose of the trust was unlawful, contrary to public policy or impossible to achieve, and (iv) identify the written instructions as the trust instrument.