

1980

# In the Matter of the Estate of David E. Ross, Deceased : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate )  
of DAVID E. ROSS, )  
Deceased. )

No. 16816

BRIEF OF RESPONDENT

Appeal from the Judgment of the  
Third Judicial District Court, Salt Lake County  
Honorable David B. Dee

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BETSY ROSS RAPPS

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Clerk, Supreme Court, Utah

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## BRIEF OF RESPONDENT

### NATURE OF CASE

This proceeding was initiated by Galen J. Ross, the personal representative of the decedent, to determine the validity of inter vivos gifts of certain shares of corporate stock made by the decedent David E. Ross to his son E. Roderick Ross, respondent herein.

### DISPOSITION IN LOWER COURT

Evidence propounded by respondent and by appellants David E. Ross and Betsy Louise Ross Rapps, the only other heirs of decedent, was heard on August 24, 1979 and August 29, 1979, before the Honorable David B. Dee in the Third Judicial District Court of Salt Lake County. Following that hearing, counsel for both parties briefed and argued relevant legal issues. After thoughtful consideration of both factual and legal issues presented, the lower court held that complete and valid inter vivos gifts of the subject corporate stock were supported by clear and convincing evidence.

### RELIEF SOUGHT ON APPEAL

Respondent E. Roderick Ross seeks an affirmance of the lower court's ruling which held that complete and valid inter vivos gifts were made by decedent to respondent.

### STATEMENT OF FACTS

Appellants' statement fails to recite accurately and completely several critical pieces of evidence which, no doubt,

had significant persuasive impact on the trial court judge. Omitted are five separate incidents showing both the decedent's clear intent and his objective acts in making final and complete gifts to respondent.

Two of these incidents took place between the decedent and Galen Ross in February of 1978. Galen testified that one afternoon the decedent came into Galen's office and stated that he was going to complete the transfer of shares in the family corporations to his son Rod. Around 2:00 a.m. the next morning, the decedent appeared at Galen's house with stock certificates ready for execution to complete a transfer of shares. The certificates were made out in respondent's name and reflected share ownership in Insurance Investment, National Housing and Finance Syndicate, and Equitable Investment. At decedent's request, Galen, as an officer of each of the companies, executed the certificates. Galen recalls that the decedent then said to him,

"Now that I have got this gift to Rod taken care of, the stock transferred to Rod, I want you to make me my will and I want you to do it tomorrow."  
(R. 217, 218, 230, and 231). (Emphasis added).

Another important conversation took place around February 18, 1978 between the decedent and his niece, Dianne Ross Worthen. The decedent told Dianne that on the previous day he had made gifts of stock in Equitable Investment, Insurance Investment, and National Housing and Finance Syndicate to Rod. He then related in some detail the reasons why he had made these gifts. He had worked closely



in the family business with his son Rod and he was proud of Rod's performance. Apparently, so Dianne relates, the decedent also expressed some dismay that this other two children had not visited him in Utah, especially during the period of his final illness.  
(R. 310-311).

Also omitted is the significant testimony of Rod Ross that sometime in February of 1978 he was handed some of the certificates of the shares being given to him. As the transcript reveals:

"Q: (by Mr. Wheeler) Did you have any of the stock except for the Ross Brothers Corporation stock handed to you in person where you actually took the stock?

A: Actually physically held the stock?

Q: Yes.

A: One or two of either Insurance Investment, Equitable Investment or National Housing, I had actual physical contact with, yes.

Q: One or two of those?

A: That's correct.

Q: You don't know which one?

A: No.

Q: And who - from whom did you obtain this stock?

A: From my father.

Q: Do you recall when that occurred?

A: The middle of February, 1978.

(R. 274-275).

Appellants also fail to describe an important portion of the

organization meeting of Ross Brothers Corporation. Both Galen Ross and Dianne Worthen testified that Rod was handed a certificate for 250 shares of the Ross Brothers stock. In response to Dianne's question why Rod was being given so many shares, David Ross replied that it was his intent to give Rod a larger portion of the shares which he held in the family corporations. He also explained his motive as follows: he was giving Rod, by inter vivos gifts, one-fourth of all of his share holdings in the family corporations; he would then leave the balance, or three-fourths of his original holdings, to his three children in equal shares so that each child would take one-third of the remaining shares. The effect of this plan of distribution would be to give Rod, after receipt of both the lifetime gifts and the testamentary distribution, one-half of his father's share holdings in the family corporations. (Testimony of Galen J. Ross, R. 213-214; testimony of Dianne Ross Worthen, R. 308-309).

The evidence is clear that the decedent actually did what he said he would do. With each of the five companies, Rod received exactly one-fourth of the shares belonging to his father at the time of each gift. After distribution of the shares still belonging to his father's estate, Rod will own one-half of his father's original share holdings in the family companies. (Findings of Fact 23(c), R. 116-117; Exhibit 38).

## LEGAL ARGUMENT

A. The trial court correctly interpreted the evidence and properly applied Utah law when it held that decedent made valid inter vivos gifts of stock to his son Rod Ross.

The ruling of the trial court was clearly correct on all points of Utah inter vivos gift law which holds that a valid gift requires (1) a clear intent and (2) some demonstrative act showing the donor's relinquishment of ownership in the property being given.<sup>1</sup>

This Court articulated these requirements in Helper State Bank v. Crus, 95 Utah 320, 81 P.2d 359, 365 (1938):

[The donor] must have intended that some title, either legal or equitable, should pass to [the donee] during his lifetime, and in addition to merely having such intention, he must have performed some act or acts which indicated his intention to pass such title to her during his lifetime. (Citations omitted; emphasis added).

To the same effect, Christensen v. Ogden State Bank, 75 Utah 471, 286 P. 638, 643 (1930) stated that the donor must intend that either the legal or equitable title pass to the donee during the donor's lifetime and that "[t]here must be some act performed by the donor which indicates his intention to vest in the donee some right to the property during the life of the donor." (Emphasis added). The Court went on to note, "The courts are not in agreement as to what acts are necessary for a donor to perform in order that

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<sup>1</sup>Acceptance of a gift that is beneficial to the donee is ordinarily presumed. Sims v. George, 24 Utah 2d 102, 466 P.2d 831, 833 n.7 (1970); See also, Annotation, 23 A.L.R. 2d 1171 (1952).

his intention shall be given effect." Id.

In deciding whether the requirements have been met, this Court has not engaged in mechanical analysis of artificial categories, but has focused on all the facts and circumstances presented at trial.

'As pointed out by the courts, each case in which a gift is involved must, to a large extent, be controlled by its own peculiar facts and circumstances. While it is true that certain forms of law must be complied with, yet it is also true that the intention of the donor must also receive due consideration and effect, and if in making a gift he has substantially complied with the latter, and it is clear that he intended to make a gift, his intentions must prevail.'

Helper State Bank v. Crus, 95 Utah 320, 81 P.2d 359, 366 (1938) quoting from Boyle v. Dinsdale, 45 Utah 112, 143 P. 136 (1914). Accord, Holman v. Deseret Savings Bank, 41 Utah 340, 124 P. 765, 768 (1912).

Consistent with the approach in Crus, this Court has held on numerous occasions that delivery itself is essentially a matter of intent. When the Court must determine whether an act is sufficient to constitute "delivery," the intent of the donor in performing the act is critical.

'[Delivery] is the act, however evidenced, by which the instrument takes effect and title thereby passes.'

Mower v. Mower, 93 Utah 390, 288 P. 914 (1924) (citation omitted).

On both the necessary points of Utah law, respondent carried his burden of proof. The evidence on intent was overwhelming, and appellants concede that "this Court could find substantial evi-

dence to support the lower court's conclusion of intent and acceptance." (Brief of Appellants, p. 12).

The record is equally replete with undisputed evidence of clear and demonstrative acts by the decedent showing that he divested himself completely of ownership of the shares being given to Rod.

First, the decedent did everything necessary to make complete transfers of the stock on the corporate books and records of each of the corporations. (Finding of Fact No. 22, R. 116). In each case the decedent surrendered his certificate; the old certificate in the decedent's name was cancelled; a new certificate was issued in Rod's name and another in the name of his father for the balance of the shares; all proper transfers were made in stock record books; and, in those cases where stock ledger sheets were kept for individual share holders, appropriate entries were made. (Findings of Fact Nos. 3,4,5,6,10,14,15,16,17,18,19,20,21,22; R. 111-116).

Appellants suggest that decedent's meticulous completion of the transfers on the stock record books does not prove that the decedent wished to divest himself of ownership of those shares. They argue that decedent could have "undone" all of these transactions.

Their argument is curious. There is no evidence in the record that the decedent ever attempted to "undo" any of these transactions. Moreover, if his father really had only tentative thoughts about making gifts to Rod, why would he have gone to the



trouble of making the transfers complete.

Their argument is also logically deficient. Appellants assert that because there is a remote possibility decedent could have done the opposite of what he actually did, one should infer that he intended the opposite of what he did. Without proof, the argument means nothing.

Second, the certificate for the Ross Brothers shares and one or possibly two certificates in National Housing and Finance Syndicate, Equitable Investment, and Insurance Investment were actually physically handed to Rod Ross. The Ross Brothers certificate was handed to Rod by Galen Ross at that company's organization meeting in December of 1977. (R. 213-214). Sometime in February of 1978, Rod's father handed him one or two of the certificates for the Insurance Investment, Equitable Investment, and National Housing and Finance Syndicate shares being given to Rod. (R. 274-275).

Third, while the decedent had physical possession of the certificates representing the disputed shares at the time of his death, the record reveals that such custody was consistent with gifts of the stock having been completed. Under the circumstances, the decedent's custodial care of the certificates does not indicate that he wished to control the shares, to retain ownership, or to revoke the gifts made to Rod. Rather, the nature of the custody demonstrates that the decedent treated those certificates as if

ownership of the shares was vested in Rod Ross. To understand the significance of the decedent's custody of the certificates, it is helpful to briefly review the evidence about the Ross family arrangement for keeping the family stock certificates.

It is important to note, first, that the decedent maintained the certificates for all members of the family. He kept the certificates of his brother Galen; those of his nephews and nieces, the children of his deceased brother, Ray; his own certificates; and those of Rod. (Findings of Fact Nos. 24, 25, R. 118). Thus, he had custody of a large number of family certificates to which he clearly had no claim of ownership or control. His custody of the certificates belonging to, say, Galen did not, of course, mean that the decedent had any claim to the shares represented by these certificates. Indeed, the only fair inference to be drawn is that the decedent kept Rod's certificates because he kept all the family certificates, and not because he either felt he "owned" or controlled the shares or because he wished to revoke the gifts to Rod.

Moreover, nothing distinguished the physical custody of Rod's certificates from custody of certificates belonging to other family members; David Ross followed the same procedure for all certificates in his custody. Certificates of each family member were placed in an envelope with a notation as to the name of the owner, name of the company, the certificate number, and the number of shares. This procedure was followed with Galen's shares, with Dianne's shares,

with Earl's shares; it was also followed with Rod's shares.

Finally, Rod exercised all the prerogatives of ownership and control on the Equitable Life and Casualty shares during his father's lifetime. He received and spent cash dividends. He received a stock dividend. He also attended shareholder's meetings and voted the shares in his name. (See Findings of Fact Nos. 7,8, R. 113-114).

On the basis of the foregoing evidence, together with respondent's evidence of donative intent, the trial court concluded that David Ross' gifts of corporate stock to his son Rod were valid and complete. That decision is entirely consistent with Utah inter vivos gift law discussed earlier in this brief.

B. Appellants' statement of the Utah law of inter vivos gifts is incorrect.

Appellants do not dispute that (1) David Ross had a clear present intent to divest himself of ownership of the shares of stock in question and that (2) he performed numerous acts to carry out his stated intent, including surrender of his own stock certificates, issuance of new certificates in the donee's name, and changing of the corporate books to reflect the change in ownership. Rather, appellants urge this Court to rule as a matter of law that an attempted inter vivos gift of corporate stock fails where the donor neglects to perform a symbolic ritual of manual delivery comparable to the ancient rite of "livery of seisen."



The argument is made in two presumably different ways. Appellants first assert that respondent has failed to establish the validity of the gifts by clear and convincing evidence. Second, appellants contend that the law of a majority of jurisdictions, including Utah, requires actual physical delivery of stock certificates for a valid inter vivos gift of corporate stock.

Both of these arguments fail. The first reveals a misunderstanding of both the nature of the clear and convincing standard and also of the degree of proof necessary to satisfy the standard. The second argument is a misstatement of the law.

(1) Clear and convincing evidence supports the facts found by the lower court.

Appellants correctly point out that under Utah law the donee has the burden of proving an inter vivos gift by "clear and convincing" evidence. Appellants do not, however, support their proposition that respondent failed to meet this burden. Indeed, appellants' argument on the point is unclear and confusing.

Since appellants do not dispute any of the basic facts found by the trial court, their argument on burden of proof can only mean one of two things:

(a) That respondent failed to prove an essential element of his case; or

(b) That as a matter of law respondent did not offer proof adequate to satisfy the "clear and convincing" standard.

If appellants mean the former, they are merely restating their assertion that Utah law requires a manual deliver of stock certificates being given by decedent. This argument raises a question of law. Appellants' position, as discussed in other parts of this brief, is incorrect.

If appellants mean the second alternative, they suggest that the "clear and convincing" standard is more burdensome than it really is. Appellants obliquely suggest that the clear and convincing evidence standard approximates the standard of beyond a reasonable doubt. This is, of course, an inaccurate statement of the matter.

The clear and convincing standard requires that the proponent of disputed facts convince the trier of fact "that the existence of the disputed facts are very highly probable . . . ." Lovett v. Continental Bank and Trust Company, 4 Utah 2d 701, 286 P.2d 1065 (1955). This standard is a comparative degree of certainty higher than the "preponderance of evidence" standard, yet lower than the "beyond a reasonable doubt" standard. Id.<sup>2</sup>

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<sup>2</sup>Cf. Justice Wolfe in Greener v. Greener, 116 Utah 571, 212 P.2d 194, 204 (1949):

That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact is purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might otherwise be only probable to the mind.

Significantly, while defining the comparative degrees of certainty of proof, this Court has recognized that whenever facts are disputed, findings of fact must be based on probabilities rather than on absolute certainties. Id.

The duty to determine whether evidence is clear and convincing rests with the trial court. After hearing the evidence in this matter, the lower court determined that respondent had met the requisite degree of proof of the facts enumerated in the findings. On appeal, the test of the sufficiency of the evidence to support the lower court's findings is whether the evidence is reasonably sufficient. Lovett v. Continental Bank and Trust Company, 4 Utah 2d 76, 286 P.2d 1065, 1068 (1955). See also, Holman v. Deseret Savings Bank, 41 Utah 340, 124 P. 765 (1912).

(2) Actual physical delivery of the certificates is not required for a valid inter vivos gift of stock.

Appellants argue that Utah and a majority of other jurisdictions require manual delivery of certificates to complete a valid inter vivos gift of stock. As their brief states at page 20:

"Thus the overwhelming majority of states require an actual transfer and delivery of the stock certificate itself before a gift of stock is deemed to have occurred. Utah is numbered among the majority of states which have adopted this requirement."

The Utah cases cited by appellants simply do not support their proposition. Rasmussen v. Sevier Valley Canal Company, 40 Utah 371, 121 P. 741 (1912) held that an oral order by the decedent to the corporation to transfer his stock ownership on the corporate records to his son's name was sufficient for a valid transfer

of the stock where no certificates of stock were ever issued. Appellants' version of the holding of Rasmussen is obviously incorrect since no certificates were ever issued.

The two remaining cases cited by appellants do not even deal with inter vivos gifts. Both Brown v. Wright, 48 Utah 633, 161 P. 448 (1916) and Gowans v. Rockport Irrigation Company, 77 Utah 198, 293 P. 4 (1930) hold that in a commercial setting, actual physical delivery of certificates presenting shares of stock is sufficient to transfer title.

Contrary to appellants' assertion, a majority of jurisdiction hold that a complete gift of stock can be made without an actual manual delivery of the certificates. Annotation, 23 A.L.R.2d 1171, 1174 (1952). At least thirty states, as well as several federal courts, have adopted this view. Id.

38 Am.Jur.2d, Gifts, Section 51 (1968), states the majority rule:

Generally, there is a complete gift of corporate stock where, by the direction of its owner, it has been transferred to the donee on the books of the corporation and a new certificate issued in the name of the donee, or where a certificate is issued in the first instance in the name of the donee, even though the certificate so issued is retained by the donor or the corporation, and not delivered to the donee. Thus, where a donor causes a certificate of stock to be issued in the name of the donee, retaining possession thereof himself, but at all times regarding the certificate as the property of the donee and his own possession as that of a trustee of the donee, the delivery to himself as trustee of the donee is sufficient to complete the gift. Similarly,

a completed gift of corporate stock is made by causing it to be issued in the name of another, even though the certificates are not detached from the stock book and are not delivered to the donee, but remain in the custody of the corporation, and the donee is ignorant of the transaction at the time. (Citations omitted.)

Accord, Annotation, 99 A.L.R. 1077 (1935).

In a frequently cited case, Phillips v. Plastridge, 107 Vt. 267, 179 A. 157 (1935), a widow sought to compel an alleged donee to account for proceeds from stocks the widow claimed to be part of the decedent's estate. The facts showed that decedent had conveyed property to a granite company in exchange for 121 shares of its initial capital stock. He directed that 100 of those shares be issued in the name of his daughter. The certificates were so issued, but remained in the possession of the corporation until after the donor's death. The lower court found that there was a completed gift from the decedent, Phillips, to his daughter. Affirming on appeal, the Vermont court reasoned:

So there was [a completed gift]. Phillips had divested himself of all right and title to the stock and the complete ownership had passed to his daughter. It was his voluntary act, affording an inference of the existence of a donative intent. Under the circumstances, a manual delivery of the certificates was not necessary. In Roberts' Appeal, 85 Pa. 84, 86, it is said: "The gift is complete by the delivery of the thing itself, for transferring the shares to her upon the books of the company is putting her in complete possession of the thing assigned, and clothing her with the complete legal title. It stands in the place of a delivery. Such an act performs precisely the



office which an actual delivery would perform if it were a chattel. It is as complete a delivery as the nature of the thing will admit of. There can be no clearer evidence of a design to part with the right of property in favor of another than an absolute transfer of the legal title to her for her own use. . . . The certificates were but secondary evidence of her ownership, and only useful for purposes of transfer. They were nothing more than the official declaration by the company of what already appeared on their books. There was here no locus poenitentiae. He [the donor] could not have used the certificates, nor could any one have used them except Miss Foster [the donee].

179 A. at 158.

Similarly, McClements v. McClements, 411 Pa. 257, 191 A.2d 814 (1963), was an action by a widow seeking to have a constructive trust for her benefit charged on seventy-five shares of corporate stock held by her sons. The evidence showed that the father had transferred the ownership of the stock on the books of the family corporation from himself to one of his sons and had directed that son to distribute the shares equally among the three sons. There was no evidence of actual delivery of the certificates. On appeal from a judgment for defendants, the plaintiff argued that lack of physical delivery was decisive on the issue of validity of the gift. The Pennsylvania court held that transfer on the corporate books was a delivery sufficient to divest the owner of all dominion over the property. The gift was, therefore, upheld.

Simonton v. Dwyer, 167 Ore. 50, 115 P.2d 316 (1941), presents a fact situation strikingly similar to the facts before this Court. There, in suits brought by two daughters of the

decendent for declaratory judgment of ownership of shares of stock in a family corporation, the daughters presented evidence showing that their father had surrendered his certificates to the corporation, had them canceled, and directed issuance of new stock certificates in the name of the daughters. Further, the evidence showed that although the father kept possession of the certificates representing the disputed shares, he had told several witnesses that he had made gifts of the shares to his daughters. One daughter had no knowledge of the gift until after her father's death. The lower court found the gifts valid and complete.

On appeal, opponents of the gifts argued that the father's failure to deliver the certificates and his custody of them during his lifetime rendered the gifts ineffectual. Addressing this issue, the Oregon court stated:

The contention that the manual delivery of these stock certificates by the donor to the donee was necessary to constitute a valid gift is not well taken.

It must be remembered that the usual and ordinary way of making a gift of corporate stock is for the holder of a certificate to indorse the same and to deliver it to the donee. In that case, the delivery of the indorsed certificate is essential to the validity of the gift. Here, the transfer was made by delivering up his own certificates and having new certificates issued to the donees in lieu thereof. Therefore, the transfer of the stock was rightfully made and completed, and vested in the transferees the legal title to the stock. For that reason, a manual delivery of the newly issued stock was not necessary to complete the gift.

115 P.2d at 318.

After reviewing numerous cases supporting the law quoted above, the court affirmed the lower court's decision.

In Fesmire v. First Union National Bank of North Carolina, 267 N.C. 589, 148 S.E.2d 589 (1966), a donor brought suit to recover possession of stock she claimed by reason of inter vivos gift. The facts were undisputed. The donor had endorsed stock certificates issued to him and placed them in an envelope bearing the donee's name which was then placed in a safety deposit box in his bank. Moreover, a brother of the deceased donor testified that in a conversation with the deceased, the deceased stated that he "had given" the disputed shares to the donee, his long time secretary and fiancée.

On this evidence, the trial court upheld the gift. The North Carolina court affirmed, noting:

It is not essential, however, that the article be placed beyond the physical power of the donor to retake it, as is illustrated by the case of a gift of coins to a child by dropping them in a container recognized as the property of the child though the container, itself, remains in the home of the donor and thus subject to his physical control. Furthermore, when there has been an actual transfer of possession with the requisite intent, the gift is not defeated by the subsequent return of the article to the possession of the donor for safekeeping, or its return to a container or place of deposit owned and controlled by the donor.

148 S.E.2d at 592 (citations omitted).

Moore v. Van Tassell, 58 Wyo. 121, 126 P.2d 9 (1942), dealt with yet another similar fact situation. There, plaintiff



brought suit for declaratory judgment that he held ownership in certain stocks allegedly given to him by his stepfather. The evidence showed that the deceased stepfather during his lifetime had directed cancellation of his certificate for shares in a family corporation of which he was president and majority shareholder and issuance of a new certificate made out in the plaintiff's name. The new certificate was signed by both the deceased donor and the secretary of the corporation as officers, but the stepfather allowed the certificate to remain in the secretary's safety deposit box throughout his lifetime. As in the cases discussed earlier, there was no evidence of physical delivery of the certificate to the donee. The lower court found for the plaintiff donee.

On appeal, the Wyoming court reviewed numerous cases from other jurisdictions and secondary authorities that had directly addressed the issue of whether manual delivery of certificates is necessary to complete a gift of stock. It then affirmed the trial court's decision, adopting the rule that:

There is a complete gift of corporate stock where, by the direction of its owner, it has been transferred to the donee on the books of the corporation, and a new certificate issued in the name of the donee, or a certificate is issued in the first instance in the name of the donee, although the certificate so issued is retained by the donor or the corporation, and not delivered to the donee.

126 P.2d at 14, quoting from 99 A.L.R. 1077, at 1080.

Applying the principles announced in cases discussed and the rule quoted above, the court ruled:

It is plain that Mr. Van Tassell [the donor] did all he could to place the legal title to the shares of stock evidenced by Certificate No. 8, aforesaid, in Granville Moore [the donee] when the result Mr. Van Tassell desire to accomplish is considered.

126 P.2d at 14.

Likewise, in Owens v. Sun Oil Company, 482 F.2d 564 (10th Cir. 1973), the Tenth Circuit ruled that under Arkansas law physical delivery of a stock certificate was not a prerequisite to consummation of the gift of stock. In Owens, the administratrix of the donee's estate brought action against the corporation for conversion when the corporation canceled stock in decedent's name and reissued it to the donor, an aunt of the deceased. Prior to the death of her nephew, the aunt had directed the corporation to cancel a certain stock certificate in her name and to reissue a certificate in her nephew's name. On the same day that the new certificate arrived at the aunt's bank, the nephew was killed.

The corporation appealed from a jury verdict sustaining the validity of the gift, claiming that physical delivery is a prerequisite to consummation of a gift of stock. The Tenth Circuit affirmed the validity of the gift, holding that "issuance of the stock in the name of [the donee] along with evidence of [the aunt's] intent, was sufficient to sustain the burden of showing intent to

make a present gift and effective delivery." 482 F.2d at 568.

(3) Commercial statutes do not preempt the law of inter vivos gifts.

Appellants' argument that the Uniform Stock Transfer Act and the Uniform Commercial Code require that a donor make actual manual delivery of certificates of stock to his donee to effectuate a valid inter vivos gift is equally unpersuasive. Although cases cited by appellants in support of their proposition do mention the commercial statute in their reasoning, those statutes do not appear to have been decisive. In each instance, both donative intent and delivery were found lacking.

Most jurisdictions that have directly considered the applicability of commercial statutes to the law of gifts have concluded that such statutes are not controlling on the issue of what acts are sufficient for delivery of a gift.

For example, the Illinois Court in Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E. 2d 850 (1962), disapproved the application of the Uniform Stock Transfer Act in Shinsaku Nagano v. McGrath, 187 F.2d 753 (7th Cir. 1951), a case cited in Brief of Appellants at page 22. The issue in Frey was whether the act of placing title to corporate stocks in joint tenancy was a sufficient act to constitute delivery necessary for a gift of the shares of stock. The donees, daughters of decedent, relied on Chicago Title and Trust Co. v. Ward, 332 Ill. 126, 163 N.E. 319 (1928), which held that transfer of registration of stocks on the corporate books was sufficient to effectuate a gift where a father had delivered the certificates to the corporation for reissue to his daughter but had thereafter retained the new certificates.

On the other hand, the widow of decedent relied on Shinsaku and the Uniform Commercial Code to defeat the gifts for want of actual delivery of the certificates.

In refusing to apply the commercial statutes to a gift question, the court stated:

We have read with interest the case of Shinsaku Nagano v. McGrath, (7th Cir.) 187 F.2d 753, which adopts the view that the doctrine of the Ward case is no longer the law in Illinois because of the effect of the Uniform Stock Transfer Act (Ill. Rev. Stat. 1961, chap. 32, par. 416) which has since been replaced by the Uniform Commercial Code (Ill. Rev. Stat. 1961, chap. 26, par. 8 -- 309) effective July 1, 1962. We do not regard the act as being intended to govern a gift situation such as that presented in Ward or here.

185 N.E.2d at 857 (emphasis added).

The Iowa Court in Kintzinger v. Millin, 254 Iowa 173, 117 N.W.2d 68, (1962), took a similar position. That case was a probate proceeding contesting the validity of a testator's inter vivos gift of 3,700 shares of corporate stock to his son. The trial court based its decision that the gift was void on the sole ground that delivery was ineffective where the testator had endorsed certificates representing the stock, had directed that the certificates be sent to the corporation and reissued in the name of his son, and had executed an assignment; but where the certificates had not been reissued, the book change had not been made, and actual delivery of the certificates to the son had not been made by

the donor.

Appellees argued that prior case law holding actual delivery not essential to a gift of corporate stock had been overruled by the adoption of the Uniform Stock Transfer Act. In response to this argument, the court reasoned:

[A]lthough some decisions are to the contrary by what we think is the weight of authority which we are persuaded to follow, the rights of the parties as between themselves are not affected by the provisions of the Uniform Act. They were enacted for the protection of the corporation, so it might safely deal in payment of dividends or otherwise with the person in whose name the stock was registered. Hausfelder v. Security-First National Bank, 77 Cal.App.2d 478, 176 P.2d 84, 88; In re Antkowski's Estates, supra, 286 Ill. App. 184, 3 N.E.2d 132, 137; In re Hill's Estate, 30 Ill.App.2d 243, 174 N.E.2d 233, 235; State v. Schofield, 136 La. 702, 76 So. 557, 564; Bolles v. Toledo Trust Co., supra, 132 Ohio St. 21, 4 N.E.2d 917, 920; Gugle v. Gugle, Ohio App., 78 N.E.2d 585, 587; In re Connell's Estate, 282 Pa. 555, 128 A. 503, 38 A.L.R. 1362, 1365.

117 N.W.2d at 76.

The court also noted that, even if applicable, the Uniform Act does not require manual delivery to the donee personally and nor does the law independent of the statute. Therefore, relinquishment of the certificates to the corporation with the intent to vest ownership in the donee was as effectual as manual delivery. The trial court decision was reversed on this basis.

Henderson v. Tagg, 68 Wash.2d 188, 412 P.2d 112 (1966), is another case which held the Uniform Stock Transfer Act inapplic-

able in a gift case. In an action by the donee of a gift against the executors of the estate, the parties stipulated at trial that the donor intended to make a gift of the corporate stock to the donee and that he had delivered stock certificates representing 300 shares of stock to the corporation with instructions to transfer ownership to the donee. The trial court entered judgment for the plaintiff-donee, ruling that the donor had done all that was necessary for the transfer of the stock.

On appeal, the executors relied on the Uniform Stock Transfer Act provisions requiring delivery of stock certificates to effectuate a transfer of ownership of stock. After noting that a strict reading of the Act would require some sort of manual transfer of the certificates, the Washington court stated:

It seems to us that such a rule is unduly restrictive in its interpretation of the underlying purpose of the Uniform Stock Transfer Act, and unnecessarily rigid in the application of its pertinent provisions. In this respect, the reasoning of the Iowa Supreme Court in the recent case of Kintzinger v. Millin is persuasive. . . .

412 P.2d at 115 (citation omitted).

The court concluded:

We are, therefore, persuaded to apply the more flexible rules of personal property law in ascertaining whether or not a gift was consummated. . . .

Id.

The trial court decision finding the gifts valid was affirmed.



In McClements v. McClements, 411 Pa. 257, 191 A.2d 814 (1963), a case discussed earlier in this brief, appellant relied on the Uniform Stock Transfer Act to support her argument that the actual delivery of certificates of ownership is essential to effectuate a gift of stock.

The Pennsylvania Supreme Court rejected this appeal in the following language:

While it is true that the Pennsylvania Uniform Stock Transfer Act of May 5, 1911, P.L. 126, §21, 15 P.S. §321, (Repealed 1953), provided that a person to whom a certificate of stock is issued was to be regarded as the real owner, this was not conclusive of the rights between a donor and a donee: Connell's Estate, 282 Pa. 555, 128 A. 503, 38 A.L.R. 1362 (1925). See also, Chapple's Estate, 332 Pa. 168 2 A.2d 719, 121 A.L.R. 422 (1938).

191 A.2d at 816.

The court ruled that the evidence was sufficient to sustain the lower court's conclusion that the deceased had intended to make the gift of stock to his sons and that transfer of ownership on the corporate books was sufficient delivery notwithstanding the lack of evidence of actual delivery of the certificates.

While this Court has never directly considered whether or not the Uniform Stock Transfer Act or the Uniform Commercial Code should govern gift situations, Jackson v. James, 97 Utah 41, 89 P.2d 235 (1939), decided a similar issue and is instructive here.

In Jackson, the trial court upheld an inter vivos gift of an automobile claimed by plaintiff to have been given to her as a wedding present by defendant's intestate. On appeal, defendant argued that the gift was void as a matter of law because the ownership registration had not been transferred in accordance with a motor vehicle registration statute which provided that "delivery of any vehicle . . . shall be deemed not to have been made and title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid" unless the registration was transferred in the office of the State Tax Commission.

In affirming the lower court's decision, the Utah Supreme Court looked to the purpose and scope of the motor vehicle statute to determine that it did not govern the gift question presented in that case:

In the light of the whole chapter it is evident that its provisions were written to protect innocent purchasers and third parties from fraud but was not intended to be controlling as between the parties to the transaction. It may well be doubted that the legislature could make mandatory any such formalities as a prerequisite to transfer of title as between the parties. It can of course prescribe such rules to be effective as to third parties . . . .

89 P.2d at 237.

Jackson and the preceding cases from other jurisdictions are consistent with the scope and purpose of the Utah Uniform Commercial Code and with Utah inter vivos gift law. The Commercial Code was intended to govern commercial transactions only and



ownership and transfer provisions were enacted to protect corporations. There is no indication that the Legislature intended that the Code preempt the common law of inter vivos gifts which does not specify that particular acts be performed to consummate a gift of stock. Rather, gift law looks to all the facts and circumstances surrounding a gift to determine whether the donor has performed acts to carry out his intent to transfer ownership from himself to the donee.

Of course, even if the commercial statutes were applicable to gifts of stock, provisions requiring "delivery" are not necessarily limited to actual manual delivery of certificates from the donor to the donee. "Delivery" means voluntary transfer of possession. Utah Code Annotated, Section 70A-1-201(14)(1953). Delivery occurs when a purchaser or a person designated by him acquires possession of a security. Id., Section 70A-8-313. Thus, delivery can occur where the donor voluntarily transfers possession from himself to the donee, even where the donee is not in actual possession of the certificates of stock.

### CONCLUSION

Respondent, Rod Ross respectfully submits that this Court should affirm the judgment of the trial court for the following reasons:

1. Each of the gifts of stock made by the decedent to Rod Ross was valid and complete;

2. All of the disputed shares are the property of Rod Ross;

3. Respondent met his burden of proving these inter vivos gifts by clear and convincing evidence; and

4. Appellants have offered no persuasive reason to reverse the trial court's judgment.

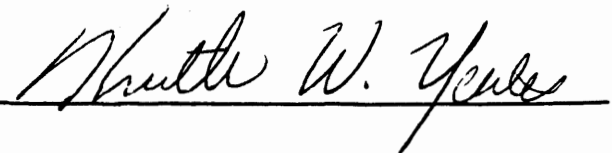
This result would, no doubt, be the result intended by the decedent. Without a compelling reason to void these gifts, this Court should give full effect to the decedent's intent.

DATED this 31 day of July, 1980.

Respectfully submitted,

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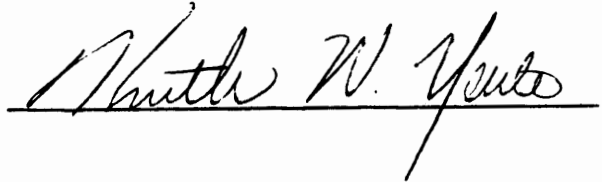
CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondent, E. Roderick Ross, was mailed, postage prepaid, this 31 day of July, 1980, to the following:

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