363 F.Supp.2d 306
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United States District Court,
D. Connecticut.
ESTATE OF Rita GENECIN, by Victor GENECIN, Personal Representative, Plaintiff,
v.
Paul GENECIN and Victor Genecin, in his individual capacity, Defendants.

363 F. Supp.2d 306
No. 3:01CV211 (MRK).
March 31, 2005.

MEMORANDUM OF DECISION

KRAVITZ, District Judge.

This lawsuit is the result of an unfortunate and bitter dispute between two brothers, Victor Genecin and Paul Genecin, over the rightful ownership of two assets-a lithograph and an individual retirement account-that once belonged to their mother, Rita Genecin, who is now deceased. Rita Genecin loved her sons very much and undoubtedly was very proud of them. Both are accomplished; one is a doctor and the other a lawyer. But the Court has no doubt that were she alive today, Rita Genecin would be deeply disappointed in her sons. For they have fought each other viciously over these assets when an amicable resolution was always evident, and in the process, they have leveled distressing allegations against each other-charging each other with fraud, falsifying documents and suborning perjury. Worse yet, in their headstrong battle over these assets, it appears that they may have expended more on legal fees than either could possibly hope to recover.

* * *

Rita Genecin died suddenly and unexpectedly on or about August 5, 2000 in her home in Baltimore, Maryland, two years following the death of her husband Abraham. *See* Tr. at 359, 362. Rita Gencin is survived by her two sons-Victor, who resides in New York; and Paul, who resides in Connecticut. *See* Tr. at 359-60. Victor Genecin is the sole personal representative of the Estate of Rita Genecin ("the Estate"). *See* Tr. at 357-58. In her Will, Rita Genecin divided her residuary Estate as follows: 55% to Victor and 45% to Paul. *See* Tr. at 362.

Throughout her life, Rita Genecin loved art. She was an artist herself, and, along with her husband, was an avid collector of art. Over the years, Abraham and Rita Genecin made gifts to their sons of many of the works of art that the Genecins had collected. The most valuable of the art works Rita Genecin owned in the year preceding her death was an 1897 color lithograph by French artist Henri de Toulouse-Lautrec entitled *Partie de campagne (Le chariot anglais*) (the "Lautrec"), which has been appraised as having a value of $150,000. *See* PX 11 (portion of ***310** Rita's insurance policy); Tr. at 373-74. At the time of her death, the Lautrec was hanging in the home in which Rita Genecin lived in Maryland. *See* Tr. at 363-64. Immediately following her death, Paul brought all of the art from the Maryland home to Connecticut for safekeeping while the Estate was beginning its journey through the probate process. *See* Tr. at 370-71.

Thereafter, Paul informed his brother Victor, the Estate's personal representative, and others, including Rita Genecin's personal lawyer and financial advisors, that his mother had given him the Lautrec as Christmas gift during a visit that he and his family made to Rita's Maryland home in late December 1999, approximately six months before her death. *See* Def. Paul Genecin's Post-Trial Br. at 1; Tr. at 375-76 (Victor testified that he first heard of Paul's claim "in early September of 2000 and the person I heard from was Max E. Blumenthal."). Victor Genecin, as personal representative of the Estate, denied that his mother had made a legally valid gift of the Lautrec to Paul, and Victor brought this action on behalf of the Estate in Connecticut federal court to regain possession of the Lautrec for the Estate.[FN2] *See* Compl. [doc. # 1] at 1. Sadly, in pursuing that claim on the Estate's behalf, Victor has also been compelled to deny the effectiveness of a gift of two lithographs by French artist Edouard Vuillard entitled *Maternite* and *Avenue* that his mother appears to have intended to give him in January 2000 in the same manner that she gave Paul the Lautrec. *See* Tr. at 295, 375; Compl. [doc. # 1] at 8, ¶ 39.

FN2. On September 23, 2002, Judge Gar-

finkel granted the Estate's Motion for Prejudgment Replevin [doc. # 12] and ordered Paul to return the Lautrec to the Estate during the pendency of this action. *See* Ruling on Mot. for Prejudgment Replevin [doc. # 43].

Also at issue is this action is the appropriate distribution of funds from an Individual Retirement Account with Charles Schwab & Company, Inc. ("the Schwab IRA") that was held in Rita Genecin's name at the time of her death. *See* Compl. [doc. # 1] at 18. Fueling the controversy over the Schwab IRA are three documents-an IRA application and two IRA beneficiary designations-that appear to have been signed and executed by Rita Genecin. *See* DX 607, DX 608, DX 610. In his individual capacity and principally invoking the IRA application, Victor Genecin argues that he is entitled to 60% of the Schwab IRA. *See* Post-Trial Mem. of Def. Victor Genecin at 2. Paul Genecin contends that the two IRA beneficiary designations signed by his mother require an even 50-50 division of the Schwab IRA. *See* Def. Paul Genecin's Post-Trial Br. at 1. Both seek a declaration of their respective rights, if any, in the Schwab IRA. The Estate takes no position on the matter. Nor has Schwab, which has maintained possession of the IRA funds during the pendency of this action. *See* Letter of 12/20/00, Ex. D to Compl. [doc. # 1] at 1 ("Given this discrepancy ... Schwab is unable to allocate the balance of the IRA without clarification from the parties.").

* * *

[11][12] Having resolved these threshold evidentiary issues, the Court now turns to the evidence of donative intent. The admissible evidence presented at trial was overwhelming that Rita Genecin intended to give the Lautrec to Paul as a Christmas gift in December 1999. First, and most importantly, there is a deed of gift, which was undisputedly executed by Rita Genecin on or about December 1999, which states that "I, Rita Genecin, hereby give, grant, convey and transfer all my right, title and interest in and to the item listed below to you, Paul Genecin in fee simple, absolutely, without any reservations whatsoever." *See* DX 501. It is difficult for the Court to conceive of a clearer statement of Rita Genecin's intent than that contained in the deed of gift which she signed. Although there was considerable testimony about defects in the notarization of this document, the Court finds that evidence largely irrelevant given that Rita Genecin's signature on the deed of gift was verified at trial by her sons, Paul, see Tr. at 612-13, and Victor, the personal representative of the Estate, see Tr. at 379.[FN6] *See also* Tr. at 488 (Marion Mulrine, Paul's secretary testified that "[Paul] swore it was his mother's signature.").

FN6. It is well established that handwriting can be authenticated by a lay witness, so long as the witness's familiarity with the handwriting in question was not acquired for purposes of the litigation. *See* Rule 901(b)(2) of the *Federal Rules of Evidence*; *United States v. Tipton*, 964 F.2d 650, 655 (7th Cir.1992) (lay witness familiar with party's handwriting was qualified to identify the handwriting); *Ladson v. Ulltra East Parking Corp.*, 878 F.Supp. 25, 29 (S.D.N.Y.1995) ("non-expert identification of the handwriting on the document satisfies the authentication requirement, assuming competency on the part of the identifier").

The Court finds it significant that the testimony and evidence showed that over the years Rita Genecin had made numerous gifts of art to Paul using deeds of gift nearly identical to the one at issue in this case. *See* DX 503-07. The Estate does not challenge the validity of any of those identical deeds of gift. In particular, the Estate does not challenge the validity of Rita Genecin's deed of gift in which she gave to Paul a wood cut print by Japanese artist Shiko Munakata entitled *Hawk Woman.* The Munakata deed of gift was executed by Rita Genecin on the same date as the identically worded Lautrec deed of gift. *See* DX 507; Tr. at 380. Yet, the Estate does not contest it. In fact, in order to find that the Lautrec deed of gift was invalid, the Court would have to conclude from the evidence that Paul Genecin forged the document and committed fraud ***316** on the Court by presenting the document in this litigation. Sadly, the Estate advanced precisely this claim at oral argument. The Court emphatically rejects this claim as pure speculation that is unsupported by the evidence.

Rita Genecin's intent to give the Lautrec to Paul Genecin was further evidenced by the testimony of three witnesses: Gregory Genecin; Ms. Sherlock, and Victor Genecin himself. The Court found Gregory Genecin to be a credible witness. He testified that after visiting an art museum with his grandmother during a

family trip to Washington in March of 2000, his grandmother told him that "she gave [the Lautrec] to my dad at Christmas." Tr. at 520. Ms. Sherlock-who was the only truly disinterested witness to testify-also testified with great sensitivity and credibility. Ms. Sherlock testified that during a visit with her dear friend Rita Genecin in the spring of 2000, Ms. Sherlock observed that the Lautrec had been moved from its usual place in the Genecin home. When Ms. Sherlock noted the move to Rita, Rita explained that she had "given [the Lautrec] to Paul for Christmas." Tr. at 495. Significantly, Victor Genecin also conceded at trial that it was his view that his mother had intended to gift the Lautrec to Paul and/or his family. Thus, when asked "I take it it's your understanding that your mother wanted Paul to ultimately own 100 percent of the Lautrec, Paul and/or his family?" Victor testified, "It certainly appears that that was her intention in January of 2000 when she executed those documents." Tr. at 383-84.

In the Court's view, the Estate did not present any evidence that successfully negated Rita Genecin's intent as expressed in the deed of gift and as confirmed by the testimony of the other witnesses (though the Court hastens to add that it was not the Estate's burden to negate a gift but rather Paul Genecin's burden to establish the gift). Indeed, absent at trial was any testimony by Victor Genecin regarding a single conversation he had with his mother regarding the Lautrec. Nor did the Court hear any testimony from any other witness indicating that Rita Genecin did not intend to give the Lautrec to Paul Genecin. Instead, the Estate's rebuttal case essentially asked the Court to draw a number of negative inferences from certain evidence in an apparent attempt to defeat Paul's claim on the basis of the clear and convincing standard of proof. The Estate's efforts are unpersuasive.

First, the Estate presented evidence regarding certain fractional deeds of gift, see PX 5-8, that Rita executed in early January after executing the December 1999 deed of gift giving the Lautrec to Paul "in fee simple absolute." *See* DX 501. These fractional gifts, the Estate argues, show that Rita intended to give the Lautrec not to Paul alone, but to Paul and his family members, and that she intended to convey ownership of the Lautrec over time, not in December 1999, an intent that was defeated by her untimely death. Although the Court agrees that the Estate has provided one plausible interpretation for the subsequent fractional deeds, the Court does not find the Estate's theory the most compelling explanation. The explanation that the Court found far more persuasive is that Rita Genecin intended to give Paul full ownership of the Lautrec when she executed the deed of gift in December 1999 and that the subsequent fractional deeds-which were the brainchild of her financial advisor-were executed in order to create documentary evidence that would allow Rita Genecin to avoid paying gift tax on her gift of the Lautrec.

Victor Genecin, Daniel Wagner of Wagner Capital Management (Rita Genecin's financial adviser) and Mr. Wagner's associate***317** Marc Hertzberg, each testified that it was their understanding that Rita Genecin made the subsequent fractional gifts in an attempt to avoid paying federal gift tax. Mr. Hertzberg testified that Ms. Genecin came to Wagner's offices wanting to give artwork "to her sons" and that while he could not recall "who came up with" the idea of dividing up the Lautrec among Paul's family into fractional shares, he agreed that "the most likely scenario" was that either he or Mr. Wagner suggested the fractional share method to Rita Genecin. Tr. at 279; 292-93. Similarly, Mr. Wagner testified that "[Rita] wanted to give within the gift tax limitations" and he said to her "you would have to divide up the painting ... We took the $150,000 [appraisal value] and divided by $10,000 per donee per year." Tr. 62-63. *See also* Tr. at 384 (Victor testified affirmatively that the fractional deeds were "an attempt to address" gift tax).

Rita Genecin's desire to avoid gift tax would also explain why, as the Estate points out, she did not tell her lawyer Max Blumenthal, or Mr. Wagner, about her earlier gift of the entire interest in the Lautrec to Paul. Parenthetically, the Court notes that when Mr. Wagner did learn of the prior deed of gift transferring the entire Lautrec to Paul, he expressed his view that the subsequent fractional deeds were a "non-event," because, as he explained "You can't give away something twice." Tr. at 215. The Court agrees. Furthermore, Rita Genecin's conversations with Gregory Genecin and Ms. Sherlock during which she stated that she had given Paul the Lautrec for Christmas, occurred in the Spring of 2000, months after the fractional deeds of gift were executed. *See* Tr. 495, 520; PX 5-8. Had Rita Genecin truly intended to give the Lautrec to Paul and also to his family members and to do so over time, she would not have made those statements to Gregory Genecin and Ms. Sherlock. Finally, Rita Genecin

never delivered the fractional gifts to the donees. Surely she would have done so had she truly intended to make the fractional gifts to the members of Paul's family. That she did not do so further supports this Court's finding that Rita Genecin executed the factional deed of gift as a gift tax avoidance device and that they were not intended to supplant or negate Rita Genecin's December 1999 gift of the entire Lautrec to Paul Genecin.

Second, the Estate presented a typewritten document that appeared to be prepared by Rita Genecin, listing each piece of her artwork and often noting next to it the name of the person to whom she had gifted artwork over the years. *See* PX 27. As the Estate points out, notably absent from this list is any notation indicating that Rita had given Paul the Lautrec. Indeed, the Lautrec is the only art work for which Paul has produced a deed of gift from his mother, but for which there is no confirming notation on the list. *See id;* Post Trial Mem. of Pl. Estate [doc. # 120], at 13. From this the Estate would like the Court to draw the negative inference that absence of Paul's name next to the Lautrec indicates that his mother did not intend to give him the Lautrec.

While the omission of Paul's name next to the Lautrec on this list is indeed perplexing, the Court does not find that this fact undermines the otherwise overwhelming evidence of Rita Genecin's intent. There has been no evidence presented that would establish when this list was created or for what purpose it was created. While the Estate suggests that Rita Genecin's notations served to confirm her past actions, it is equally likely that the notations represented her future intentions and that she had not updated the list since deciding to give the Lautrec to Paul. Of course, that is just one of countless possible theories. ***318** Without more, the Court will not speculate as to when and for what reason the list was created or why Paul Genecin's name was not listed next to the Lautrec, and the Court will certainly not allow such speculation to negate or outweigh the otherwise competent and compelling evidence that Rita Genecin intended in December 1999 to make Paul a gift of the Lautrec.

[13] Third and finally, the Estate argues that Rita Genecin's failure to deliver the Lautrec to Paul also negates her donative intent. The Court agrees that the ultimate purpose of the delivery requirement is to perfect or evidence donative intent. *See, e.g., Billingsley v. Kelly*, 261 Md. 116, 125, 274 A.2d 113 (1971) (stating that the purpose of "[s]tringent requirements of delivery and possession in ... gift cases is to avoid fraud by requiring the best possible evidence of intent."). However, in the interest of clarity, this Court will address the delivery requirement in Part III.C, *infra.*

For the reasons previously stated, therefore, Court finds that Paul Gencin has established by clear and convincing evidence that Rita Gencin intended to give him the Lautrec in its entirety in December 1999.

B. Acceptance

[14][15] The Court also finds that Paul Genecin has met his burden of establishing acceptance in this case. To begin with, "[a]cceptance by the donee ... is presumed, barring evidence to the contrary." *Brewer*, 156 Md.App. at 117, 846 A.2d 1 (citing *Dorsey*, 302 Md. at 318, 487 A.2d 1181 (citations omitted)). The Estate presented no evidence to the contrary at trial. And while Maryland's Dead Man's Statute may bar testimony from Paul Gencin regarding what his mother said to him, there is nothing to prevent the Court from crediting the testimony of his assistant, Ms. Mulrine, that she saw the deed of gift in Paul's possession in New Haven in early January 2000. *See* Tr. at 466-67. Nor does the Dead Man's Statute bar Paul's testimony that he did for a time, have the deed of gift in his possession and that he gave it to Ms. Mulrine to notarize in January 2000. *See* Tr. at 613-14. The deed of gift itself was plainly admissible and was in fact admitted into evidence. Under these circumstances, Paul's testimony that he had the deed in his possession does not undermine or frustrate the purpose of the Dead Man's Statute. *See Stacy*, 259 Md. at 406, 269 A.2d 837; *Farah*, 112 Md.App. at 114, 684 A.2d 471 ("The purpose of the dead man's statute is to seal the lips of a party ... about facts *that could be disputed only by the deceased.*") (emphasis added) (citations omitted). In any event even ignoring Paul's testimony in this regard, it is undisputed that the original deed of gift was produced by Paul in this litigation. *See* DX 501. The Court is not prepared to accept the Estate's speculation that Paul obtained possession of the deed of gift only after going through his mother's papers in August 2000 following her death. Therefore, the Court finds that Paul Genecin has satisfied the acceptance requirement.

C. Delivery

In a very real sense, the adequacy of delivery has always been the critical issue in this case. *See* *Schenker v. Moodhe*, 175 Md. 193, 200 A. 727, 728 (1938) ("The validity of the alleged gifts depends upon the legal sufficiency of the deliveries."). Victor Genecin made this point crystal clear at trial when he was asked to explain why the Estate was not pursuing any claim with respect to the Munakata woodcut entitled *Hawk Woman* for which Rita Genecin executed a deed of gift to Paul at the same time as the Lautrec deed of gift. The reason, Victor confirmed, is that "the *Hawk Woman* was actually delivered to ***319** [Paul]; whereas the Lautrec was not." Tr. at 380-81.

[16] The facts supporting delivery in this case are undisputed. As the Court mentioned earlier, although Rita Genecin did not physically deliver the Lautrec lithograph to Paul,[FN7] she did execute and deliver to him (as she had often in the past) a very formal looking deed of gift. It is also undisputed that on the advice of her financial advisor, Mr. Wagner, and shortly after giving Paul a deed of gift for the Lautrec, Rita Gencin transferred ownership of her house into the names of herself and her two sons, apparently in the belief that this additional step would aid in perfecting her gifts of art to her sons. *See* Tr. at 63-64. Thus, Mr. Wagner testified in the context of the fractional deeds of gift, "[W]e talked about moving the title to the house and effectively did it into the name of Paul, Rita and Victor Genecin as owners." Tr. at 63. Similarly, Mr. Hertzberg testified that "I recall Mr. Wagner advising Mrs. Genecin ... that ownership of the house ... should be changed to joint ownership with her two sons" in order to perfect her gift of the Lautrec. Tr. at 281-82. Thus, although the Lautrec lithograph itself never left the home where it had hung before the Christmas 1999 gift to Paul, after January 2000, the Lautrec hung in a home which Paul jointly owned.

> FN7. Paul explained why this was so in his testimony, see Tr. at 643-48 but the Court has now ruled that his testimony was inadmissible. Therefore, the Court has ignored it for purposes of this ruling.

On these facts, there is no question that if the *Restatement (Third) of Property: Wills and Other Donative Transfers* § 6.2 (2003) governed, the delivery requirement for a completed gift would be satisfied. For the *Restatement* explicitly recognizes inter vivos transfers of property through delivery of a written instrument such as the deed of gift executed by Rita Gencin in this case. Section 6.2 of the *Restatement* provides: "The transfer of personal property, necessary to perfect a gift, may be made (1) by delivering the property to the donee *or* (2) by inter vivos donative document." (emphasis added). Recognizing this latter method of effectuating delivery hardly represents a radical departure from existing law by the *Restatement* drafters. To the contrary, that method of satisfying the delivery requirement has long been embraced by courts of many jurisdictions. *See, e.g.*, *Lefrooth v. Prentice*, 202 Cal. 215, 224, 259 P. 947 (1927) ("There is likewise no question but that delivery may be symbolical such as delivery of a written instrument without physical delivery."); *Humphrey v. Ogden*, 53 Colo. 309, 311, 125 P. 110 (1912) ("[A] gift of personal property, evidenced by a written instrument executed and delivered by the donor, is valid, without a manual delivery of the property."); *Lewis v. Burke*, 248 Ind. 297, 304, 226 N.E.2d 332 (1967) ("It is almost universally recognized in all jurisdictions under Anglo-American law that a person may give physical personal property by means of a written instrument expressing a present intent to make a transfer of title immediately" so long as "the written instrument or deed of gift, as it is sometimes called, is delivered to the donee"); *Meyers v. Meyers*, 99 N.J. Eq. 560, 134 A. 95, 96 (1926) ("The gift is valid if made by deed and the deed be delivered with donative intent, though the subject does not accompany the deed. The delivery of the deed is equivalent to a delivery of the subject.").

Indeed, Illustration 19 from the *Restatement* presents facts that are virtually identical to this case:

> G mails a letter to her son S. The letter signed by G states: "This is to let ***320** you know that you now own the painting that hangs in my living room. You can pick it up at your convenience." This letter is an inter vivos donative document, effective when mailed.

Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2, cmt. u, illus. 19 (2003). In fact, the present case is even stronger than the Illustration in view of Rita Genecin's gift to Paul of an ownership interest in the home in which the lithograph would hang until her untimely death.

Of course, the question in this case is whether a

valid delivery has been effected under Maryland law. While the Estate argues that Maryland does not recognize transfer of moveable personal property through delivery of a donative writing, a more accurate assessment of the state of Maryland law is that Maryland courts have not yet had occasion to decide this issue presented by this case. Indeed, neither the parties nor the Court have been able to identify a Maryland case directly on point. Therefore, the Court must make an " *Erie* guess" as to whether Maryland courts would adopt the approach espoused by the *Restatement.* Although the Court candidly admits that the answer to that question is not entirely clear, the Court is nonetheless satisfied that Maryland courts would look to the *Restatement* for guidance in resolving this case and that they would adopt the *Restatement* 's approach of recognizing that the delivery requirement can be met by inter vivos delivery of a donative document. The Court reaches this conclusion for several reasons.

[17][18] First, delivery by donative instrument is simply a natural application of the doctrine of constructive delivery that has long been recognized by Maryland courts. Maryland law requires "a delivery transferring the donor's dominion over the property without power of revocation or retention of dominion over the subject of the gift." *Brewer,* 156 Md.App. at 116-117, 846 A.2d 1 (quotation marks and citations omitted); *Rogers v. Rogers,* 271 Md. 603, 607, 319 A.2d 119 (1974) ("[T]he delivery must transfer the donor's dominion over the property."). However, Maryland courts recognize that delivery may be "actual or constructive." *Schenker,* 200 A. at 728. "[T]he concept of constructive delivery evolved from the gift of items too difficult to deliver physically, such that the only practicable way to deliver the item was symbolically." *Hamilton v. Caplan,* 69 Md.App. 566, 574-75, 518 A.2d 1087 (1987). Therefore, the rule governing constructive delivery in Maryland is often stated to be "subject to this qualification, that, while the delivery may be constructive, 'it must be as nearly perfect and complete as the nature of the property and the attendant circumstances and conditions will permit.' " *Id.* (citing *Brooks v. Mitchell,* 163 Md. 1, 12, 161 A. 261 (1932)); *Merriken v. Merriken,* 87 Md.App. 522, 541-42, 590 A.2d 566 (1991) (same).

Maryland courts have acknowledged a wide variety of acts as constituting constructive delivery. Thus, over the years, Maryland courts have embraced constructive delivery of a bank account by transfer of a bankbook, constructive delivery of the contents of a trunk by transfer of a key to the trunk, and constructive delivery of the proceeds of an insurance policy by delivery of the policy documents. *See Hamilton,* 69 Md.App. at 574, 518 A.2d 1087 (collecting cases). These cases demonstrate that Maryland has rejected unduly rigid manual delivery requirements in favor of constructive delivery rules that serve to effectuate the donor's intent and prevent fraud. For example, there clearly are many "practicable" ways to deliver the contents of a cupboard or trunk-the items can simply be taken out and given to the donee.***321** Yet, Maryland courts have said that in those circumstances, giving the donee the key to the cupboard or the trunk will suffice. *See Goulding v. Horbury,* 85 Me. 227, 27 A. 127 (1892) (cited approvingly in *Hamilton,* 69 Md.App. at 574, 518 A.2d 1087). The Court therefore concludes that the oft-quoted standard that constructive delivery must be "as nearly perfect and complete as the nature of the property and the attendant circumstances and conditions will permit" is a flexible one, and that "[w]hat constitutes delivery depends largely on the intent of the parties." *Hamilton,* 69 Md.App. at 575, 518 A.2d 1087. Indeed, Maryland's highest court has cautioned that "hard and fast" rules of delivery "are to be applied in a manner which will not frustrate a clear manifestation of intent." *Malloy,* 265 Md. at 465, 290 A.2d 486. Yet, that is precisely what would happen if the Court rejected Rita Genecin's gift of the Lautrec because Paul did not immediately take the lithograph to Connecticut, as he did the Munakata.

Second, the Court believes (as do the *Restatement* drafters) that delivery by transfer of a clearly worded donative writing can satisfy the concerns underlying Maryland's delivery requirement. The chief concern of the courts in the case of a purported inter vivos gift where the donee has not taken possession of the gifted property is that the donee is simply committing fraud in asserting that a gift was made at all. As Maryland's Court of Appeals has long noted, "the requirement of actual delivery is the only substantial protection [against fraud], and the courts should not weaken it by permitting the substitution of convenient and easily proven devices." *Schenker,* 200 A. at 730 (quotation marks and citations omitted). Indeed, many Maryland cases in which courts have found gifts to fail for lack of physical delivery address situations in which evidence of the alleged gift is purely oral and the putative donor has done nothing at all to memorialize or evidence his or her donative intent. For example in *Mer-*

riken v. Merriken, supra, the court held that testimony that a purported donee's father-in-law had built a house as a gift for her family alone did not establish that a gift had been made. *Merriken,* 87 Md.App. at 541, 590 A.2d 566. Similarly, in *Pomerantz v. Pomerantz, supra,* the court refused to find that a father had given his daughter the balance of a bank account based on her testimony alone, where the father had failed to transfer his passbook to his daughter. *See Pomerantz,* 179 Md. at 439-41, 19 A.2d 713. *See also, Schenker,* 200 A. at 730 (putative donee's testimony alone was insufficient to establish that donor had made an oral gift where she never took any of the gifted items into her possession).

However, as the *Restatement* drafters recognize, the evidentiary function of the delivery requirement can be equally well served by an effective donative instrument. The New York Supreme Court, Appellate Division persuasively made this point in *Gruen v. Gruen,* 104 A.D.2d 171, 488 N.Y.S.2d 401, 403-04 (N.Y.A.D.1984), a case with facts strikingly similar to this one. The court in *Gruen* held that a father had successfully given a painting by artist Gustav Klimt to his son by sending him a gift letter, stating that "it is the delivery of the [written] instrument itself which fulfills the 'delivery' requirement of a gift *inter vivos,* and duplicative manual delivery is therefore unnecessary." *Id.* at 403. As the court explained, "in the case of an oral gift, the fact of delivery serves to assist, in an evidentiary manner, to confirm the intent of the donor, and to prevent the assertion of fraudulent claims.... No such policy considerations are applicable to a gift made in writing." *Id.* at 404; *see also* ***322***Lewis,* 248 Ind. at 304, 226 N.E.2d 332 ("To us it appears the [gift by delivery of writing] in this case is one to prevent any question of fraud. On the other hand, the physical possession of property, which must be explained by oral testimony of witnesses after the death of an individual, opens the door to more possibilities than does the written instrument in the present case.").

Here, the Court finds that there has been no fraud and that Rita Genecin made her intent to give the Lautrec to Paul clear and unmistakable in numerous ways, including taking the rather extraordinary action of transferring ownership of her home to her two sons (to whom she had gifted art that remained hanging in the home). Like the drafters of the *Restatement,* the Court does not believe that it will encourage fraud to recognize that when a donor signs an instrument that clearly gives absolute ownership of a painting to a donee, delivers that instrument to the donee and (in this case at least) conveys to the donee a joint interest in the home in which the painting hangs, the donor has done more than enough to confirm an intent to make a gift.

Another reason to insist on physical delivery is to impress upon the donor that the gift now belongs to the donee and to ensure that the donor intended the gift to be irrevocable. *See Rogers,* 271 Md. at 607, 319 A.2d 119 ("There cannot be reserved a locus potentiae which is a power to revoke the gift or a dominion over the subject of the gift."); *Pomerantz,* 179 Md. at 439-440, 19 A.2d 713 (refusing to recognize "a gift where there is reserved to the donor ... a power of revocation ... over the subject of the gift."). However, a donative writing is certainly capable of serving a similar function. As the court recognized in *Gruen,* "the delivery of a written conveyance ... requires a high degree of deliberation on the part of the donor, substantially higher than a manual delivery, and affords the clearest and most convincing evidence of the fact that the gift has taken place." *Gruen,* 488 N.Y.S.2d at 404 (quotation marks and citations omitted). Similarly, the *Restatement* explains that, once a donee has a deed of gift in his possession, the gift is complete and irrevocable, and he may demand physical possession of the gifted property at any time. *See Restatement (Third) of Property, Wills and other Donative Transfers* § 6.2 cmt. w, illus. 22 (2003). Here, the language of the deed of gift could not have been clearer: " I, Rita Genecin, hereby give, grant, convey and transfer all my right, title and interest in an to the item listed below to you, Paul Genecin, in fee simple, absolutely without any reservations whatsoever." DX 501. That language was more than sufficient to underscore the nature and extent of Rita Genecin's act.

Third, Maryland courts have also recognized that once a valid delivery takes place, a donor's physical retention of gifted property does not necessarily invalidate the gift. *See Hamilton,* 69 Md.App. at 578, 518 A.2d 1087 ("[i]f there is a proper delivery, the donor of a gift can relinquish title to a vested remainder and at the same time retain a present interest in the property ...") (quotation marks and citations omitted). For example, in *Smith v. Acorn,* 32 A.2d 252 (D.C.App.1943), the court, when called upon to in-

terpret Maryland law, stated that "the delivery of a bill of sale or written evidence of title, with a donative intent, is a sufficient delivery of the property, although it may be the intent of the parties that the property itself is to be retained in the possession of or enjoyed by the donor during his life." *Id.* at 254 (holding that delivery of certificate of title was sufficient to establish delivery of an automobile). *See also Tierney v. Corbett*, 13 D.C. (2 Mackey) 264 (1883) (sustaining gift of a horse where the donor delivered a ***323** bill of sale to the donee, but retained the horses in his possession until his death) (cited approvingly in *Smith*, 32 A.2d at 255).

Fourth and finally, a review of Maryland case law shows that Maryland courts generally look favorably upon the *Restatement* and that they have adopted the *Restatement's* position in many other areas of the law. For example, Maryland courts have adopted the *Restatement (Second) of Conflict of Laws* § 187 (1971), see *Tomran, Inc. v. Passano*, 159 Md.App. 706, 720, 862 A.2d 453 (2004), the *Restatement (Second) of Torts* § 314A (1965), see *Patton v. United States of America Rugby Football*, 381 Md. 627, 639, 851 A.2d 566 (2004), and many portions of the *Restatement of Property*. *See, e.g., Benik v. Hatcher*, 358 Md. 507, 526-27, 750 A.2d 10 (2000) (citing with approval *Restatement (Second) of Property, Landlord and Tenant* § 17.6 (1977)); *Boucher Inv., L.P. v. Annapolis-West Ltd. P'ship*, 141 Md.App. 1, 18, 784 A.2d 39 (2001) (citing with approval the *Restatement (Third) of Property: Mortgages* § 4.6 cmt. a, at 264 (1996) on permissive waste); *Schovee v. Mikolasko*, 356 Md. 93, 107, 737 A.2d 578 (1999) (citing with approval *Restatement (Third) of Property: Servitudes* § 2.14 cmt. b (Tentative Draft No. 1, 1989) on implied negative reciprocal easements). *But see*, *Arundel Corp. v. Marie*, 383 Md. 489, 503-04, 860 A.2d 886 (2004) (declining to adopt the "wait and see" approach to the Rule Against Perpetuities advocated by *Restatement (Second) of Property, Donative Transfers* § 1.4 (1977) because Maryland's legislature had expressly spoken on the subject). Therefore, there is no basis in Maryland case law or statutory law to believe that Maryland courts would reject the approach of the *Restatement* and other jurisdictions on the validity of delivery by a donative document.

For the foregoing reasons, the Court concludes that Maryland courts would adopt the *Restatement's* position on delivery and would recognize that Rita Genecin's delivery of a deed of gift to Paul Gencin (combined with the virtually immediate conveyance of joint ownership to her home) would satisfy the delivery requirements for a valid inter vivos gift. Accordingly, the Court finds that Paul has established by clear and convincing evidence that his mother made him a valid gift of the Lautrec.

IV.

[19] Unlike the Lautrec, the parties agree that the sole issue regarding the distribution of Rita Genecin's IRA account is Rita Genecin's intent. The question for the Court is whether Rita Genecin intended her Schwab IRA to be distributed evenly between her two sons with each receiving fifty percent, or whether she intended Victor to receive sixty percent of the IRA with Paul receiving forty percent.

The evidence relating to the Schwab IRA is rather thin. First, there are three documents, all signed executed by Rita Genecin within a three day period and which paradoxically bear conflicting beneficiary designations. One document is an IRA application bearing Rita Genecin's signature and dated October 8, 1998 ("the IRA application"). *See* DX 607. The application, which appears to have been filled out using blue ink, names Victor and Paul as the beneficiaries of the Schwab IRA and also bears pencil marks next to the "% Benefits" line for each beneficiary that indicates a 60/40 distribution of the IRA. *Id;* Tr. at 252. This document also has other information that has been obliterated or erased on the same page as the 60/40 designation.

Also presented at trial were two typewritten IRA documents entitled "IRA ***324** Beneficiary Designation,", which also name Victor and Paul as beneficiaries of the IRA and provide for the IRA to be "distributed to my descendants who survive me, *per stirpes.*" See DX 608 and DX 610 (emphasis in original). The first such document is dated October 8, 1998 (the "October 8 designation") and was witnessed by Carol Sullivan, an administrator who works for Mr. Wagner at Wagner Capitol. *See* DX 608; Tr. at 240. Both the October 8 designation and IRA application were sent by Mr. Wagner's office to Schwab on or about October 8, 1998. Tr. at 241-42. The other IRA Beneficiary Designation is identical in all respects to the October 8 designation except that it is dated on October 6, 1998 (the "October 6 designation") and was witnessed by Rita Genecin's long time attorney, Max Blumenthal.

See DX 610. The October 6 designation was sent to Mr. Wagner's office by Mr. Blumenthal on October 18, 1998, with the request that it be filed with the IRA Administrator. *See* DX 513. However, the October 6 designation apparently and inexplicably remained in Rita Genecin's file at Mr. Wagner's office until about October 25, 1999, when Mr. Hertzberg discovered it and sent it along to Schwab in accordance with Mr. Blumenthal's request. *See* Tr. at 286; DX 612.

The Court also received testimony from three employees of Wagner Capital regarding the IRA: Mr. Wagner, Ms. Sullivan, and Mr. Hertzberg. Ms. Sullivan was involved in preparing Rita Genecin's IRA application and she witnessed Rita's signature on one of the IRA beneficiary designation documents. *See* Tr. at 238-52. Mr. Wagner was present with Rita Genecin in his office while she filled out the IRA application. *See* Tr. at 28, 252. And Mr. Hertzberg transmitted the beneficiary designation documents he found in Rita Genecin's file to Schwab. Tr. at 285-89. The Court also received in evidence a letter from Mr. Blumenthal who apparently prepared the IRA beneficiary designation documents. *See* DX 510.

In the Court's view, the evidence presented in support of Victor Genecin's position that his mother intended a 60/40 distribution of her Schwab IRA was inconclusive. First, physical irregularities on the face of the IRA application itself raise questions in the Court's mind as to the source and validity of the "60%" and "40%" marks that appear on the application. As Ms. Sullivan testified and as the Court had an opportunity to observe, the majority of the application, including Rita's signature on the fourth and final page of the application, appear to have been written in blue ink, whereas the percentage figures in question on the third page of the application appear to have been made in pencil and appear to be the only matter pencilled in on the form. *See* DX 607; Tr. at 250. The Court also found it significant that Rita Genecin's signature does appear anywhere on page three of the application where the percentages are found. In addition, Ms. Sullivan testified that while she witnessed Rita Genecin's signature on the final sheet of the four-page application, she was not physically present in the room when Rita completed and signed the application and that she did not observe who wrote the percentages in pencil next to Victor and Paul's names on the third page of the document. Tr. at 240-42, 252, 256. Ms. Sullivan did testify, however, that the percentage marks were not consistent with the manner in which those who worked in the Wagner office typically wrote percentages. *See* Tr. at 257. In sum, the Court cannot conclude based on the IRA application itself, see DX 607, and Ms. Sullivan's testimony that the "60%" and "40%" markings on the IRA application were made by Rita Genecin or ***325** that they represent her intent as to the Schwab IRA.

As for Mr. Wagner's testimony, the Court found his testimony on the subject of the Schwab IRA to be false and entirely incredible. The Court therefore does not credit Mr. Wagner's testimony about the IRA at all. Mr. Wagner testified at trial that he observed Rita Genecin place the "60%" and "40%" designations on the IRA application and that she told him that her purpose in designating an unequal distribution was to account for the fact that Victor had three children whereas Paul had only two. *See* Tr. at 52-54. However, as Paul Genecin points out at length in his post-trial brief, this testimony is starkly inconsistent with Mr. Wagner's previous actions and testimony on the subject of the Schwab IRA. Mr. Wagner had never uttered such a story to anyone prior to the trial. *See* Def. Paul Genecin's Post-Trial Br. [doc. # 115] at 13-16. The Court sees no point in repeating the numerous reasons for discrediting Mr. Wagner's testimony recited in Paul Genecin's brief, in which the Court fully concurs. Suffice it to say that the Court finds that Mr. Wagner gave untruthful testimony regarding the Schwab IRA at trial, and as a result, the Court did not rely on his testimony in reaching its decision as to Rita Genecin's intent.

It is difficult for the Court to understand why Mr. Wagner would lie on the stand, though the Court has no doubt that he did. Perhaps he felt guilty over causing this mix-up regarding the IRA designations and saw his testimony as a way to try to solve a problem that he created. In any event, for whatever the reason, Mr. Wagner chose to provide false testimony on the issue and as a consequence, the Court feels justified in disregarding it.

By contrast, there was considerable credible and persuasive evidence presented indicating that Rita Genecin intended a "per stirpes" distribution, and that the understanding of Rita Genecin, her attorney and her financial advisors at the time was that a "per stirpes" division would result in an even 50-50 split between Paul and Victor. Significantly, the two IRA

designations executed by Rita Genecin do not suffer from the infirmities in the IRA application. *See* DX 608 and DX 610. Both IRA designations are one-page documents clearly bearing Rita's signature at the bottom. Furthermore, Ms. Sullivan testified that she witnessed Rita's signature on the October 8 designation, see Tr. at 240; DX 608, and the October 6 designation was witnessed by Rita Genecin's long-time attorney Mr. Blumenthal as evidenced by his signature on the document. *See* DX 610. No one has suggested that there were any irregularities in the signing or witnessing of these documents. In fact, when asked, "And [the October 6 designation] was witnessed by Mr. Blumenthal who was [Rita's] attorney at that point in time?," Victor Genecin responded, "I believe that to be true." Tr. at 387. As a result, the Court concludes that these designations are valid and are persuasive evidence of Rita Genecin's intent.

Not only do the beneficiary designation documents have stronger indicia of reliability than the pencilled notations on the IRA application, but one of the beneficiary designation documents, the October 6 designation, see DX 610, would be the operative document in any event. The IRA agreement with Schwab provides that "any change or revocation [of a beneficiary designation] must be given in writing to Schwab" suggesting that the writing transmitted to Schwab latest in time would be the operative document. *See* DX 607. In this case, there is no dispute that the October 6 beneficiary designation was sent to Schwab by Mr. Hertzberg in late October***326** 1999, see Tr. at 286, and that it was the last document that Schwab received that addressed the distribution of Rita's Schwab IRA account to her beneficiaries. *See* Tr. at 396-97. Because the Court concludes, as explained below, that Rita Genecin understood "per stirpes" to mean an even division of assets between her two sons, the October 6 beneficiary designation would conflict with the IRA application and thereby revoke it. *See* *Garner v. Garner*, 167 Md. 423, 173 A. 386, 388 (1934) (revocation "need not be an explicit revocation, ... revocation may ... be implied, from a disposition of the property in a second will inconsistent with that in the first").

* * *

V.

In conclusion, the Court finds and declares that Rita Genecin did make a valid gift of the Lautrec lithograph to her son Paul Genecin in December 1999 and the Lautrec is therefore the lawful property of Paul Genecin. The Court also finds and declares that Paul Genecin and Victor Genecin are each entitled to receive a fifty percent share of Rita Genecin's Schwab IRA. **The Clerk is directed to enter final judgment and close this file.**

IT IS SO ORDERED.

D.Conn.,2005.
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