

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

SAM GLASSCOCK III  
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE  
34 THE CIRCLE  
GEORGETOWN, DELAWARE 19947

Date Submitted: March 3, 2013

Date Decided: April 11, 2013

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Re: *Honaker v. The Estate of Dorothy T. Haas*,  
Civil Action No. 7966-VCG

Dear Counsel:

This case presents a simple and straightforward question. Where an individual presents another with a personal check with donative intent, does that transaction represent a completed gift, even if the donor dies without the money having been withdrawn by the donee and without there being sufficient funds in the account on which the check was drawn? The parties agree that the answer, in general, is no, but the Petitioners argue that the specific factual situation here, which involved an attorney-in-fact for the donor and one of the beneficiaries as the makers of the checks, should produce a different result. I disagree.

Petitioners Debra Honaker and Robert W. Kito are the former caretaker and butler of Dorothy T. Haas (the "Decedent" or the "donor"). Honaker and Kito cared for the Decedent in exchange for room, board, and a salary. To assist the

Decedent in paying her living expenses, the Decedent and Honaker held a joint checking account. Honaker used the funds in this account to pay the Decedent's bills for her as the Decedent's health declined. The bank account was held jointly with right of survivorship (the "Joint Account").

By the summer of 2012, the Decedent had become ill and bedridden. At this time, the Decedent had an existing will, under which Honaker and Kito were each to receive \$25,000 in cash as a specific bequest. The Complaint alleges that, despite this specific bequest in the will, the Decedent formed the intent shortly before her death to make an additional inter vivos gift of \$25,000 each to Honaker and Kito. The Complaint alleges that, from her death bed, the Decedent "directed certain gifts to be given," though the Complaint does not specify to whom such direction was made.<sup>1</sup> Two of these intended "gifts," according to the Complaint, were \$25,000 cash to both Honaker and Kito.

According to the Complaint, to effect the Decedent's desire to give these extra cash gifts, a meeting was held on June 29, 2012. Those present at the meeting were Honaker; Kito; the Decedent's accountant and attorney-in-fact, Charles Curcio; the Decedent's financial advisor, Chris Falvello; and other

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<sup>1</sup> Compl. ¶ 11.

beneficiaries who expected to inherit under the will.<sup>2</sup> Notably absent from this meeting was the Decedent, though she was still alive at the time.

At this meeting, Mr. Curcio, acting as the Decedent's attorney-in-fact, wrote out two checks from the Joint Account to Honaker and Kito in the amount of \$25,000 each.<sup>3</sup> In the memo line of each check, Curcio wrote the word "gift."<sup>4</sup> Then, Curcio handed the checks over to Honaker, an owner of the Joint Account, directing her to sign, which she did. At the time these checks were made, there were insufficient funds in the Joint Account to cover them. The Complaint alleges that an agreement was made between Curcio and Falvello to liquidate some of the Decedent's stock to provide the cash to cover the checks. The proceeds of the stock liquidation would then be deposited into Joint Account.<sup>5</sup> A few days after the meeting, before the stock was sold, the Decedent died, on July 3, 2012. The Joint Account has never been funded.

According to the Petitioners, the gift was complete when Honaker executed the checks, and the Petitioners are due \$50,000 from the estate as a debt, in addition to the \$50,000 bequests. The net proceeds of the estate, following the sale of the Decedent's home, are only \$46,000. Therefore, Honaker and Kito's claims for the gifts would allow them to deplete the estate, rather than be limited to their

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<sup>2</sup> Compl. ¶ 29.

<sup>3</sup> Compl. ¶ 29.

<sup>4</sup> Compl. ¶ 31.

<sup>5</sup> Compl. ¶ 15.

pro-rata share along with the other devisees of specific bequests.<sup>6</sup> The position of the estate is that no inter vivos gift was completed; accordingly, the executor did not list payment of the “gifts” as an obligation of the estate in the Inventory and Account.<sup>7</sup>

The Petitioners filed a Petition for Exceptions to Inventory and Account on October 19, 2012. Relevant to this Motion to Dismiss, the Petitioners contend that the \$25,000 checks were gifts, separate from and in addition to the bequests devised to each Petitioner in the Will.<sup>8</sup> Furthermore, the Petitioners have alleged a conspiracy among Curcio, Falvello, and the Haas Estate (the “Respondent”) under which the parties acted to ensure that the funding of the joint account (via the liquidation of securities) did not occur.<sup>9</sup>

The Respondent has moved to dismiss Count II of the Complaint, which asks the Court to enforce the “gifts” of \$25,000. The Respondent argues that the gifts never occurred because the Decedent did not intend to make the gifts and because no delivery took place.<sup>10</sup> The Executor has proffered facts not included in the Complaint, which I disregard for the purposes of this Motion to Dismiss.<sup>11</sup>

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<sup>6</sup> The executor appears to dispute that the Petitioners are entitled to any distribution; if so, that is an issue for another day. *See* Compl. ¶ 25.

<sup>7</sup> Compl. ¶ 17.

<sup>8</sup> Compl. ¶ 34.

<sup>9</sup> Compl. ¶ 35.

<sup>10</sup> Resp.’s Op. Br. 4-5.

<sup>11</sup> *See, e.g.*, Executor’s Op. Br. 1 (“The Petitioners were in great need of cash while the Decedent was living.”). The Estate’s characterization of the meeting could ultimately prove more

### *A. Standard of Review*

Under Rule 12(b)(6), this Court will dismiss a complaint if it fails to state a claim on which relief could be granted.<sup>12</sup> In so analyzing, this Court accepts all well-pled facts as true and draws all reasonable inferences in favor of the petitioners.<sup>13</sup> However, the Court is not required to accept conclusory allegations as fact.<sup>14</sup> Only if it is not reasonably conceivable that the petitioners could prevail will a matter be dismissed.

### *B. Analysis*

Under Delaware law, to enforce an inter vivos gift, the plaintiff must establish (1) an intent, manifested by the donor, to make a gift, and (2) an actual or constructive delivery of the subject of the gift to the donee.<sup>15</sup>

#### 1. Donative Intent

The Complaint pleads facts which, if true, demonstrate donative intent. Specifically, the Complaint says that the Decedent “directed certain gifts to be made,” and that Curcio wrote the two checks at the Decedent’s direction. On a motion to dismiss this pleading is sufficient.

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plausible than the Petitioners’ account, if a record is established. At this point, however, I am required to assume the Petitioner’s well-pled facts are true.

<sup>12</sup> Ct. Ch. R. 12(b)(6).

<sup>13</sup> *In re Gen. Motors Inc. S’holders Litig.*, 897 A.2d 162, 167-68 (Del. 2006).

<sup>14</sup> *Id.*

<sup>15</sup> *Wilmington Trust Co. v. Gen. Motors Corp.*, 51 A.2d 584, 591 (Del. Super. 1947).

## 2. Delivery

The Complaint alleges that the delivery of the checks constitutes delivery of the gift. It does not. In Delaware, and in the majority of jurisdictions, when a personal check is given to a donee with the intent to make a gift, there is no delivery of the gift until the funds needed to honor that check are available to be withdrawn from the account and the check is presented and paid.<sup>16</sup> Because checks are revocable until they are cashed, the transfer is not final, and there has been no delivery, until payment. All parties concede the applicability of this general rule.<sup>17</sup>

The account was not funded here. The Decedent died before the stock was liquidated and the account funded. Therefore, there was no delivery in this case. Because there was no delivery, there was no gift, and the Petitioners have no right against the estate for the face amount of the checks.

The Petitioners argue that this case should be an exception to the general rule that delivery of a personal check is not itself delivery of a gift, because here the checks were drawn at the donor's direction by her attorney-in-fact, and because they were signed by one of the beneficiaries who was a co-tenant of the Joint

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<sup>16</sup> See, e.g., *Highfield v. Equitable Trust Co.*, 155 A. 724, 727 (Del. Super. 1931); *Woo v. Smart*, 442 S.E.2d 690, 693 (Va. 1994); *Am. Jur. 2d Gifts* § 54.

<sup>17</sup> See *Pets.' Ans. Br. 7* ("Gifts by check are not ordinarily completed until checks are presented to the drawee bank and paid during drawer's lifetime. . . . Under normal circumstances, the presentation of a personal check alone without obtaining actual payment will not make a valid gift because the donor can stop payment on the check until it is cashed thereby revoking the check.").

Account on which they were drawn.<sup>18</sup> I must confess to being unable to understand the Petitioner's rationale here. Surely directing an agent to act does not make that act a delivery, where it would not be a delivery if made by the principal. Likewise, the making of the check by a beneficiary cannot constitute delivery, if the making of the same check by the donor would not constitute delivery. If the funds had been deposited by the donor into the joint account—regardless of whether a check was drawn—that act might have amounted to delivery to the co-tenant, but such a deposit was never made here. Nothing in the facts alleged here demonstrates a completed inter vivos gift made before the death of the donor.

Citing *Highfield v. Equitable Trust Co.*,<sup>19</sup> the Petitioners attempt to compare this situation to a situation in which a gift was made by certified check. A certified check represents a completed payment from donor to the bank, and a contractual right on behalf of the donee to receive payment from the bank. By contrast, a personal check is simply a revocable direction to the bank to make a payment, funds permitting. The delivery of a certified check may complete a gift, therefore, although delivery of a personal check does not. The Petitioners contend that, because the check here was drawn on a joint checking account in which one of the donees owned an interest, the checks Honaker signed were akin to certified

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<sup>18</sup> *See id.*

<sup>19</sup> *See id.* (citing *Highfield*, 155 A. 724).

checks.<sup>20</sup> That argument is simply unpersuasive. Honaker made a check payable to herself. The gift from the donor could not be complete until the donor's money was placed in the Joint Account with donative intent, during the donor's lifetime. That did not happen.

Therefore, because I find that any gift contemplated by Decedent was not delivered during her lifetime, the Motion to Dismiss Count II of the Complaint is GRANTED.

IT IS SO ORDERED.

Sincerely,

*/s/ Sam Glasscock III*

Sam Glasscock III

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