

## ภาคผนวก ข

สำเนาจดหมายอิเล็กทรอนิกส์(บางฉบับ)ระหว่างผู้เขียนกับProf.Gerry W. Beyer\*

1. จดหมายฉบับลงวันที่ 20 พฤษภาคม 2550

**สวัสดิ์** Praty,

I will be pleased to assist you.

1. Yes, the gift causa mortis concept came from Roman law. See the attached document which discusses the history of gifts causa mortis and a little about their civil law background.

2. I think Germany and Switzerland have the gift causa mortis concept BUT I do not know how it works in these countries.

3. In the United States, gifts causa mortis are rarely used and when they are, they are done without legal assistance. Attorneys rarely, if ever, use gifts causa mortis in planning a client's estate. A client who wishes to make a revocable transfer would be better served with a trust or some other formal arrangement. Also see the attached document.

Here is a quick summary of the three techniques you mentioned:

Inter Vivos Gift -- effective now, irrevocable

Gift Causa Mortis -- effective now, automatically revoked if person survives the peril

Will -- effective at death, revocable as long as person is alive and competent

Hope this helps.

Best wishes,

Prof. Beyer

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\* ผู้เขียนเห็นว่าจดหมายที่ท่านศาสตราจารย์ เบเยอร์ ให้คำแนะนำทางวิชาการแก่ผู้เขียน มีคุณค่าทางวิชาการแฝงอยู่ไม่มากนักน้อย จึงคัดเลือกจดหมายบางฉบับของท่านอาจารย์มาลงไว้ในภาคผนวก เพื่อประโยชน์ทางวิชาการด้วย อนึ่ง ปัจจุบันท่านอาจารย์ดำรงตำแหน่งที่ Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law.

## 2. จดหมายฉบับลงวันที่ 30 กรกฎาคม 2550

Dear Professor Beyer

Teacher Beyer I would like to ask you any questions ; 1.What a donation is , is it a contract or a unilateral promise : if a contract ,is it a consensual or a real one? , If not a contract ,when and how does it become binding at all?

**GWB:** Under the common law, a gift (donation) is completely gratuitous and thus is NOT a contract. A promise to make a gift in the future is not enforceable, that is, it is not binding on the person who promises to make the donation. There is an exception if the promise to make a gift is supported by consideration, that is, if the donor is receiving something in exchange for making the gift.

2.How to distinct gift from other transaction?

**GWB:** The donor receives nothing in exchange for the donation.

3.Teacher,I know in common law contract must has consideration ,so I would like to know , Does contract of gift must has consideration ?

**GWB:** Yes, a contract to make a gift (just like all contracts) must be supported by consideration. Otherwise, a promise to make a gift in the future is not enforceable.

4."utendum dare non est donar" what does it mean ? (I have read roman law but I do not know it meaning)

**GWB:** I am not familiar with this exact phrase.

5.Does the US. has provisions to prohibit donation between spouses?

**GWB:** No.

6.In the us ,Can the donor impose a charge on the gift? If the donor can impose a chare a gift, How this type of gift difer from ordinary gift?

**GWB:** If the donor imposes a charge on a transfer of property, then the transfer would not really be a gift. Instead, the transfer would be to

complete a contract.\

Teacher ,How about you ? I hope you and your wife fine.Thank you very much for kindly helping.

**GWB:** Yes, we are doing well, having really enjoyed our vacation. I hope all is going well for you as well.

### **3.จดหมายฉบับลงวันที่ 31 July 2007**

Dear Professor beyer

Teacher beyer ,In this day I would like to ask you...

1.If the united states does not has doctrine of gift causa mortis , How do you think about that?. Teacher I ask you that because I would like to know usefuls of gift causa mortis in the US.

**GWB:** Gifts cause mortis are NOT very useful in the United States. Very little would change if the doctrine did not exist.

2.In the US, Does tax law relate to gift causa mortis? ,Can the testator use gift causa mortis to plane his estates?

**GWB:** A gift causa mortis is used in an emergency situation WITHOUT consultation with an attorney. I doubt that anyone (client or attorney) plans to use a gift causa mortis. Lawyers do not use gifts causa mortis as an estate planning technique.

### **4. จดหมายฉบับลงวันที่ 27 สิงหาคม 2007**

Dear Professor beyer

I have any questions to ask you.

1.What does Anatomical gift mean ? ,Teacher I ask you that because In thai law,A testator can dedicated his dead body to the hospital by wrote this order in his will. Teacher, in the USA. Can a testator do like this ?

**GWB:** Yes, a person may make an anatomical gift of certain organs (likeheart, kidney, lungs, etc.) or the entire body in a will. However, this is not the usual way because the will is read after it is too late for the

organs to be useful. Thus, there is a procedure to sign a card which says you want to be a donor and carry it in your wallet.

2. How difference a oral will from a gift causa mortis in the united states law?

**GWB:** An oral will takes effect upon death. A gift causa mortis takes effect at the time of gift even though the donor is still alive and even though it is automatically revoked if the donor survives the anticipated danger.

3. On Sunday , I read Rood on will, I do not clear about "feudal" , Professor , Could you advice me about feudal word?, and how this word related succession law.

**GWB:** Feudal refers to the social and legal relationships between people in the Middle Ages in Europe. Much of the law in the United States today can still be traced to things that happened hundreds and hundreds of years ago. Here is a link to more information about the feudal system:

<http://en.wikipedia.org/wiki/Feudalism>.

Teacher , I think I have lots of questions to ask you because I do not understand about custom of common law and some rules differ from Thai law. I would like to say thank you for your kindness.

**GWB:** I am very glad to help!

## 5. จดหมายฉบับลงวันที่ 1 ตุลาคม 2550

Dear Professor Beyer

Professor , In this day I would like to ask you about " THE BIG PICTURE "

1. I do not clear about how difference between nonprobate transfers and probate transfers

**GWB:** Non probate transfers occur outside of probate. That is, the property does not pass under intestacy or under the person's will.

2. I do not clear about "powers of appointment" , I find it meaning in black

law dictionary already , But I do not clear , so I would like to ask you.

**GWB:** A power of appointment is the right to designate the new owner of property. You have this power with respect to the property you own because you may give anything you own to another person. The power to name a new owner of your property is one of the things you take for granted as accompanying property ownership.

**GWB:** You may sever this power of appointment from the ownership of the property itself. When this happens, the following relationships are created. The owner of property (the person who is severing) is the donor of the power, the person with the power to appoint the property is the donee, and the prospective new owners are the objects of the power. When the donee actually exercises the power, the new owners are called the appointees. If the donee fails to exercise the power, the property passes to the default takers. If the donor failed to name default takers, the property reverts to the donor or the donor's estate.

**GWB:** The donor can create a power of appointment in an inter vivos document, such as a deed or trust, or in a separate power of appointment instrument. The donor can also create a power of appointment by will.

**GWB:** Powers of appointment are generally categorized in one of two ways. First, the power of appointment may be general, meaning that there are no restrictions or conditions on the donee's exercise of the power. Thus, the donee could even appoint the donee's own self as the new owner. In many aspects, the donee of a general power of appointment is like the actual owner of the property. Second, the power may be specific, special, or limited, i.e., the donor may specify certain individuals or groups as the objects of the power which do not include the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate. In addition, the donor may make the donee's exercise of the power conditional on whatever factors, within legal bounds, the donor desires, for example, only for the

appointees' health related and educational expenses.

**GWB:** The donee of a power of appointment does not have title, either legal or equitable, to the subject property. Instead, the donee only has a power to appoint. The appointees take title from the donor, not the donee.

**GWB:** The donee has no duty to exercise the power of appointment in favor of the hopeful appointees. Unlike a trustee, a donee is not a fiduciary and has no duty to manage the property or to distribute the property. A power of appointment is also not an agency relationship; the donee is not the donor's agent.

**GWB:** The donor may dictate the method the donee must use to exercise the power of appointment. For example, the power may be an inter vivos power indicating that the donee must exercise it while alive. Alternatively, it may be a testamentary power which the donee may only exercise by will. The donor may also permit the donee to exercise the power in both ways.

3. Could you advise me about "joint tenancies and tenancies by entirety"?

**GWB:** A joint tenancy is a sophisticated type of concurrent property ownership. At common law, co-owners held as joint tenants if four requirements were satisfied. These requirements are called the four unities. **Note** that many jurisdictions have relaxed some of these technical requirements.

**GWB:** (1) Unity of Time. All joint tenants had to take their interests at the same time. Thus, a conveyance from "Owner One" to "Owner One and Owner Two as joint tenants" would not create a joint tenancy because Owner One received Owner One's interest at a prior time. To meet the unity of time requirement, Owner One could convey to a third party, a straw person, who would then convey the property to Owner One and Owner Two.

**GWB:** (2) Unity of Title. All joint tenants were required to obtain their interests from the same instrument, that is, through one deed or under the same will.

**GWB:** (3) Unity of Interest. Each joint tenant must have an equivalent share in the property. Thus, each joint tenant must own the same proportion of the property (e.g., one-half or one-quarter) and each tenant's estate must be of the same duration (e.g., a fee simple interest or a life estate).

**GWB:** (4) Unity of Possession. Each joint tenant must have the right to occupy the entire property. Likewise, each joint tenant has a duty not to interfere with the rights of other joint tenants to occupy the property.

**GWB:** The key characteristic of a joint tenancy for our purpose is the survivorship feature. A joint tenant's rights end at death in favor of the surviving joint tenants. Thus, when a joint tenant dies, the deceased tenant's share is divided equally among the surviving joint tenants. The rights of these surviving joint tenants are superior to the deceased tenant's heirs or beneficiaries. Thus, a joint tenancy is an effective probate avoidance technique.

**GWB:** At common law, the survivorship feature attached automatically to a joint tenancy. The presumption of survivorship often led to unanticipated property distributions as co-owners held as joint tenants when they intended to hold as tenants in common. Non-legally trained individuals did not appreciate the significant difference between these two types of concurrent ownership. Consequently, many states now provide that the survivorship feature does not attach to a joint tenancy unless it is expressly stated in the instrument.

**GWB:** At common law, a tenancy by the entirety was a special type of joint tenancy between spouses. Instead of four unities like a standard joint tenancy, the tenancy by the entirety included a fifth unity, the unity of marriage. Tenancies by the entirety included the survivorship feature. Unlike joint tenancies, a tenancy by the entirety could not be severed by one of the spouses conveying to a third party. Most states no longer make a distinction between joint tenancies and tenancies by the entirety.

4. Could you advise me about "joint with survivorship rights" ?

**GWB:** If two or more people hold property jointly with survivorship rights, then when one of them dies, the surviving joint owners own the property.

The deceased joint owner's share does not pass by intestacy or will.

Instead, the deceased joint owner's share passes to the surviving joint owners.

Teacher , This day is Sunday ,But I do not understand about big picture so I come to my office and use internet to ask you.

**GWB:** Like you, I am working on Sunday. It seems like there is always work to do! But, I am looking forward to February when I will be traveling to teach in Australia.

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