Family Law Newsletter
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SCHILLER DUCANTO & FLECK LLP

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# Defining and Preserving "Gifts"

Suppose an individual wants to gift assets to a family member as part of an overall estate plan. How can the individual safeguard the gift in the event the recipient thereafter gets divorced? Under the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") there are essentially two (2) forms of property: non-marital property that can only be awarded to the owner of the property; and marital property that can be divided between the parties. The IMDMA strictly defines what constitutes non-marital property. If an asset does not fit within the definition of non-marital property, the asset is, by default, marital property. [1] One of the types of non-marital property is ". . . *property acquired by gift*. . ." [2] An understanding of what constitutes a gift is essential to preserve the gift for the intended recipient.

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Under Illinois law, the elements of a valid gift are *donative* intent and delivery. [3] Some cases have added a third element of *acceptance*. [4] Because the IMDMA places the burden of proof as to alleged non-marital property on the spouse asserting the claim, he or she must prove satisfaction of each element. If the property alleged to be a gift was received during the marriage, the burden of proof is clear and convincing evidence. If the transaction that resulted in the alleged gift was between a parent and child, the transaction is presumed to be a gift. If the gift was made both during the marriage and was between a parent and a child, there are conflicting presumptions. Where conflicting presumptions exist, a court is required to decide the issue without the benefit of any presumption based upon the preponderance of the evidence. [5]

> **If an asset does not fit within the definition of non-marital property, the asset is, by default, marital property.**

To prove the donative intent element, proper documentation is key. It has been recognized that one of the most important pieces of evidence that a court should consider is the testimony of the alleged donor; however, this is not the only relevant evidence of donative intent. [6] Because donors are sometimes unavailable due to death or infirmity, the gift needs to be properly documented showing the intent of the donor at the time of the transaction. The larger the gift, the more important the need for documentation becomes. The preparation and filing of gift tax returns is a good way to create a paper trail. The presence or absence of gift tax returns is cited to in various reported cases as an important factor in the court's determination as to whether a transfer qualifies as a gift. [7] These documents are, or should be, maintained by the accountant or estate planning professionals of the donor in the ordinary course of their business, so that they can then be utilized as evidence to show intent.

The delivery of the gift - *i.e.*, the transfer of ownership - must be absolute and irrevocable. [8] There cannot be "strings attached," such as where the donor maintains control or has the ability to, in essence, take back the gift. Delivery can be proven by the transfer itself. Documents showing the irrevocable transfer should be maintained. All such documents should be kept by the donor as well as the donee.

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## IN THIS ISSUE



## 29 Attorneys Named to 2017 Best Lawyers in America

Schiller DuCanto & Fleck congratulates our 29 lawyers named to Best Lawyers in America 2017. Inclusion in Best Lawyers is based entirely on peer-review.

The attorneys named Best Lawyers are: Leslie S. Arenson, Kimberly A. Cook, Jay P. Dahlin, Timothy M. Daw, Charles J. Fleck, Meighan A. Harmon, Burton S. Hochberg, David H. Hopkins, Jessica Bank Interlandi, Joshua M. Jackson, Michele M. Jochner, Patrick M. Kalscheur, Jennifer Dillon Kotz, Michelle A. Lawless, Benjamin S. Mackoff, Carlton R. Marcyan, Claire R. McKenzie, Eric R. Pfanenstiel, Karen Pinkert-Lieb, Patrick R. Ryan, Donald C. Schiller, Eric L. Schulman, Jason N. Sposeep, Tanya J. Stanish, Arnold B. Stein, Anita M. Ventrelli, Jane D. Waller, Erika N. Chen-Walsh and Evan D. Whitfield.

# Is It A Gift Or A Loan?

Under black-letter law, a gift requires donative intent and delivery. *In re Marriage of Schmidt*, 242 Ill. App. 3d 961, 968 (4th Dist. 1993). It is also essential that the gift be made without any consideration. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 401 (2010). Loans, on the other hand, are defined as "delivery by one party to another of a sum of money upon agreement, express or implied, to repay it with or without interest." *Crabtree v. Illinois Dep't of Agriculture*, 128 Ill. 2d 510, 521 (1989).

The distinction between gifts and loans is important because if an asset is deemed to be a "gift," it is non-marital, assigned to the owner and consequently not divided in a dissolution action. However, if the obligations or property acquired during the marriage are deemed ***not*** to be gifts, they are presumed to be marital and will be equitably divided.

Illinois' decisions do not apply a cookie-cutter approach in making these determinations.

For example, real property may be transferred to a grantee by a quit claim deed. Is that a gift? What if the quit claim deed is intended to be security for a debt? Whether the transfer is considered a gift or a loan will depend on all of the surrounding facts. *See Schultz v. McCarty*, 193 Ill. App. 318 (2d Dist. 1915) (finding that the quitclaim deed was a security for the money loaned).

Another example: when a parent pays a legal retainer for a child, is it a gift or a loan? Courts will look to whether a note was executed. If so, does the note bear interest and is it payable at a time certain? From experience, notes that do not bear interest and are payable "when able" are often viewed by our courts as gifts. On the other hand, if the note recites a transfer for consideration, it will most likely be deemed a loan.

*See, In re Marriage of Agazim*, 147 Ill. App. 3d 646, 651 (2d Dist. 1986) (looking only to the four corners of the loan document despite testimony that the money was intended to be a gift).

Another instance where the distinction between a gift and a loan is blurry is where gifts are made between spouses. To illustrate, a husband's transfer of funds into an Individual Retirement Account ("IRA") was found to be intended to be a gift to his wife, and, therefore, to be her nonmarital property. *See In re Marriage of Weiler*, 258 Ill. App. 3d 454 (5th Dist. 1994). Although the husband argued that his motive for funding the IRA was merely for tax purposes, the court made it clear that "intent" and "motive" are distinct, and that a person's "motive" for transferring an asset is immaterial; rather, it is "intent" that is key. The court explained that "[m]otive is what prompts the person to act or fail to act, and intent refers only to the state of mind with which the act is done or omitted." *Id.* at 462-63. Conversely, however, in another case, the husband merely putting his wife's name on the title of real property, without more, was deemed insufficient to characterize the action as a gift and to deem the property as part of the wife's non-marital estate. In order for a gift to occur, "there must be donative intent to pass title and relinquish all present and future dominion over the property." *In re Marriage of Davis*, 215 Ill. App. 3d 763, 771 (1st. Dist. 1991).

A debate regarding gifts and loans is a very fact-sensitive issue. With the two having varying legal implications, it is imperative to talk to your attorney and discuss the best method to achieve your goal.

**Burton Hochberg would like to thank Law Clerk Ishita Saran for her assistance researching this article.*

**Burton S. Hochberg**

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## SDF Congratulates Karen Pinkert-Lieb

Schiller DuCanto & Fleck congratulates Senior Partner, Karen Pinkert-Lieb, on being named 2017 Family Law Lawyer of the Year in Chicago by Best Lawyers in America. "Lawyer of the Year" recognitions are awarded to individual attorneys with the highest overall peer-feedback for a specific Practice Area and geographic location.

## Defining and Preserving "Gifts" *(Continued from cover)*

As to matters of proof, in addition to the possible testimony of the donor and the gift tax returns, it is helpful to have letters prepared in the ordinary course of business from estate planning attorneys or accountants to the donee explaining that a gift has been made and enclosing documents showing the actual transfer. If trusts are involved, helpful language may be added to the trust documents making clear both the intent of the donor and the delivery of the intended gift.

It is critical that the donor consult with an appropriate estate planning professional to ensure that the intended gift is made in a manner that is clearly established. It may also be important for the estate planning attorney to consult with a knowledgeable attorney specializing in family law prior to the gift to avoid pitfalls and protect the ultimate gift with proper and sufficient documentation. The goal should be to ensure that the intended gift be preserved for the intended recipient.

1. 750 ILCS 5/503(a)

2. 750 ILCS 5/503(a)(1)

3. *In Re the Marriage of Hluska*, 2011 IL APP (1st) 092636, ¶78.

4. *In Re the Marriage of Link*, 362 Ill.App.3d 191, 195 (2nd Dist. 2000).

5. *In Re the Marriage of Didier,* 318 Ill.App.3d 253, 258-59 (1st Dist. 2000).

6. *Didier* at 263-64.

7. Cases where the failure to file gift tax returns was cited to as evidence that no gift was proven are as follows: *In Re the Marriage of Rosen*, 126 Ill.App.3d 766, 773-74 (1st Dist. 1984); *In Re the Marriage of Walker*, 203 Ill.App.3d 632, 634-35 (4th Dist. 1991); *In Re the Marriage of Davis*, 215 Ill.App.3d 763, 773 (1st Dist. 1991); *In re Marriage of Agazim*, 147 Ill.App.3d 646, 651 (2nd Dist. 1986). Cases where the filing of gift tax returns was cited as evidence that a gift was proven are as follows: *In Re the Marriage of Dann*, 2012 IL App (2nd) 100343, ¶135; *In Re the Marriage of Romano*, 2012 IL App (2nd) 091339, ¶58; *In Re the Marriage of Blunda*, 299 Ill.App.3d 855, 867 (2nd Dist. 1998).

8. *In re Marriage of Agazim*, 147 Ill.App.3d 646, 648-49 (2nd Dist. 1986) ("*A gift is a voluntary, gratuitous transfer of property by one to another where the donor evidences an intent to make such a gift and absolutely and irrevocably delivers the property to the donee.*")

# Considerations For Gifts From Parents to Children

During the holiday season, it is commonplace for parents to make gifts to their minor and/or adult children. When such gifts become more financially significant than the average holiday-wrapped present, special consideration should be given to both the immediate tax implications of making such gifts, as well as to the long-term view of how those gifts may be treated in the event of a divorce.

First, a substantial financial gift may be planned so that it qualifies as an exclusion from the gift tax rules, and is therefore tax-free. Generally, when a gift is made, the donor is responsible for paying the gift tax. However, our present tax code allows a $14,000 annual exclusion from gift tax liability. Thus, each person may give $14,000 per year tax-free to each beneficiary. If a married couple gives the gift, the annual exclusion increases to $28,000 a year to each beneficiary.

Michele M. Jochner

Partner

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In order for a gift to qualify for the $14,000 annual exclusion, the recipient must have a "present interest" in the gifted property, meaning that he or she has the immediate right to use and benefit from the gift. It is important to note, however, that to qualify for the exclusion, the gift need not be cash; it can also be an interest in other investments, such as stocks and real property.

In addition, parents should utilize the unlimited gift tax exclusion for education and medical payments. To qualify, these payments must be paid directly to the educational or medical institution/service provider, and must meet certain criteria defining appropriate education or medical expenses.

Along these lines, parents may also contribute to qualified tuition programs (also known as "529 plans") to meet a child's future higher education expenses. These contributions are also eligible for the annual gift tax exclusion.

Thus, a couple, by making gifts to each of their children – and also grandchildren - can reduce their estate by a significant amount each year without tax consequence.

In making gifts to children, however, it is also important to consider how such gifts will be treated if a divorce later occurs. Gifts made to a child while that child is married may be characterized as his or her "non-marital property" – and therefore not subject to equitable distribution at divorce – where the donee proves that the transfer was a "gift," *i.e.*, made with donative intent and delivery. In making this determination, the court will analyze all the facts surrounding the transfer.

In addition, gifts made by parents to children who are married may affect child support obligations if the couple were to divorce. In determining the amount of child support, our courts begin the calculation by looking to the payor's "total income from all sources." In doing so, courts have held that annual gifts received from parents are considered "income" for purposes of calculating child support.

Because most people receive gifts on special occasions and the value is not especially high, such gifts will likely not count as "income" for purposes of child support.

However, if you make large monetary gifts to a married child on a regular basis, it is likely that those gifts will be counted as part of his or her income for child support purposes.

Because the gifting of significant amounts can have important tax and family law implications, contact your attorney to discuss the best options to accomplish your objectives.

## SDF Congratulates Jason N. Sposeep

Schiller DuCanto & Fleck congratulates Partner, Jason N. Sposeep on being named to the Chicago Daily Law Bulletin's 40 Attorneys Under 40 to Watch. The 40 Under Forty Committee at Law Bulletin Publishing Company sifts through stacks of nominations to annually select 40 of the most talented young attorneys practicing in Illinois.

# IN THE NEWS

**Eric R. Pfanenstiel** was elected Vice President of the DuPage Children's Museum Next Gen Board for 2016-2017.

**Gregory C. Maksimuk** was voted onto the DuPage Children's Museum Next Gen Board.

**Anita M. Ventrelli** was recognized as Distinguished Alumni by the DePaul University College of Law Latino Law Student Association 2016.

**Evan D. Whitfield** will be a speaker at the S3 Summit Panel hosted by Prudential and PRO2CEO on October 20th, 2016. The S3 Summit is a leadership event designed to discuss and provide solutions to the challenges faced by high-achieving professionals in sports, entertainment and business.

**Donald C. Schiller** was an honoree and the featured speaker at the Illinois State Bar Association's Distinguished Counsellors Class of 1966 Recognition Ceremony.

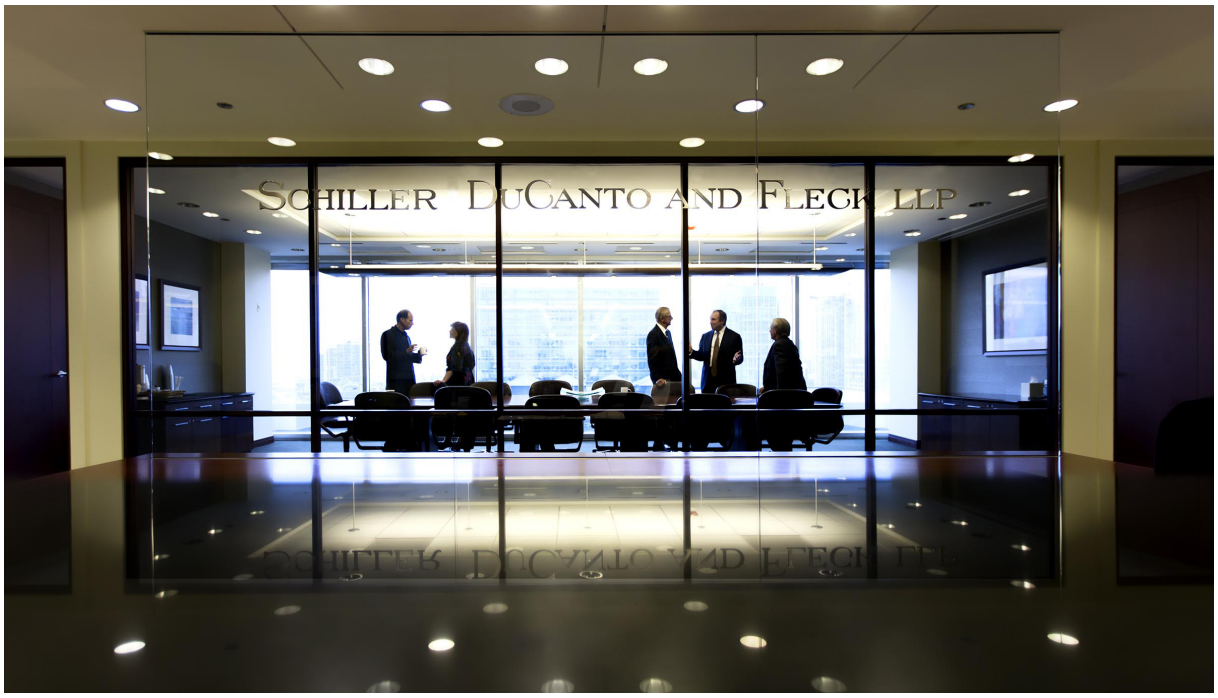
**Schiller DuCanto & Fleck's** Lake Forest office has moved to One Conway Park, 100 North Field Drive, Suite 160, Lake Forest, Illinois 60045. The firm is also sponsoring the salon series at the Lake Forest Symphony.

**Michele M. Jochner** was profiled in the 2016 Consumer Edition of Leading Lawyers Magazine. She also was named as the Vice-Chair of the Dean's Advisory Council of the DePaul University College of Law.

**Tanya J. Stanish** was interviewed on NBC 5 Chicago regarding the allegations of abuse against Brad Pitt.

**Jay P. Dahlin** has been placed on Cook County's approved list of attorneys who may represent minor children as a Guardian Ad Litem/Attorney for Minor Child/Child Representative in the Domestic Relations Division.

**Burton S. Hochburg** received mention from LAF Chicago for his excellent work on a pro bono case involving domestic abuse.



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