

Introduction

Estate Planning, as a wealth management and transfer tool, continues to pose a challenge in practice, for many reasons; ranging from changing life circumstances, to adopting the most efficient tax structure for one's estate.

Recently, more consideration is given to executing a Deed of Gift, when compared to the conventional practice of writing Wills. Parties intending to engage in Gift transactions will however do well to have a more robust understanding of the legal and tax implications of executing a Deed of Gift, in contrast to executing a Will.

Deed of Gift ? Definition and Consequences

A Deed of Gift is a gratuitous arrangement that voluntarily transfers and delivers the legal ownership, with the physical control over an existing real or personal property, by its owner (?the Donor?) to another person (?the Donee?) without any compensation, consideration or payment emanating from the Donee to the Donor, for the Gift.

Generally also, a Deed of Gift, once executed and delivered to a Donee, is irreversible and irrevocable. Note also that a Gift that is not delivered to the Donee is invalid in Law.

Although a Deed of Gift is generally said to be irreversible and irrevocable, it could still be set aside on any of the following grounds: - (i) cases where the Gift was given by fraudulent means; (ii) Gifts given under a misrepresentation or mistake of the surrounding circumstances regarding the Gift; (iii) Gifts transferred with the intention to defraud Creditors or evade Tax; (iv) cases where the Donor lacked the legal capacity to make the Gift.

Types of Gifts

There are three (3) common types of Gifts; namely: - (i) Inter Vivos Gifts; (ii) Gifts Mortis Causa; and (iii) Testamentary Gifts.

An **Inter Vivos Gift** is a gift that is conveyed/transferred during the lifetime of the Donor-not by a Will or in contemplation of the Donor's imminent death - with the sole intention of irrevocably surrendering the physical control of the Gift to a Donee, who must be alive at the time the Gift is delivered to the Donee.

A Gift **Mortis Causa** is a Gift made in contemplation of the Donor's imminent death. The last type of Gift is a **Testamentary Gift** which is a Gift conveyed in a Donor's Will. In Nigeria however, there are legal commentaries which hold the view that a Gift of Landed Property, once delivered and registered during the lifetime of the Donor and the Donee, becomes irreversible and irrevocable by the Donor. Where any condition is imposed on such a Gift, such a Gift of real property may be deemed to be a Tenancy and not a Gift.

In the case of **Anyaegbunam v. Osaka** (2003) 3 S.C.I. 14, the Supreme Court held that: - "A gift inter-vivos is an act whereby something is voluntarily transferred from the possessor to another person, with the full intention that the thing shall not be returned to the donor, and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver ? The essential thing to consider is that the Gift is complete when the Donee has accepted it, if that condition is satisfied, the donor has no right to revoke the gift.?"

Deeds of Gift and Wills Compared

The first and most obvious advantage that a Deed of Gift has over a Will is that a Deed of Gift comes into effect immediately the Gift is delivered to the Donee, during

the lifetime of the Donor. Rules regulating Intestacy and Wills do not therefore apply to Deeds of Gift.

Other advantages that a Deed of Gift have, when compared to a Will, is that a Deed of Gift, especially where it is stamped and registered, is less likely to be challenged by way of a Law Suit on the demise of the Donor. This is as the Donee has already assumed ownership and physical control over the asset or Gift during the lifetime of the Donor.

Registration Requirements

By the provisions of the Land Use Act (?LUA?) and the Lagos State Land Registration of Titles Law 2015 (?LRTL?), any transfer of any interest in Land, by a Donor to a Donee, must be registered at the Lagos State Land Registry, using the Land Information Management System (?LIMS?).

The prior consent of the Governor of the State where the Land is located must however be obtained before any registration is done at the Land Registry. Failure to register any Deed of Gift which transfers any interest in landed or real property will make such an unregistered land instrument inadmissible in any judicial or arbitration proceedings.

Taxation and Deeds of Gift

In many jurisdictions, both the Donor and the Donee to a Deed of Gift are obligated to file Tax Returns disclosing such a gift.

Although there are no direct statutory provisions relating to Deeds of Gifts, the Second and Third Schedules to the Personal Income Tax Act (as amended) (?PITA?) appear to imply that a Gift from a Donor to a Donee is exempted from personal income tax as no gain or profit from any trade, business, profession or vocation has occurred. Where the Donee of the Gift however earns or gains some income, in the hands of the Donee, such subsequent gain or profit will attract Personal Income Tax; and Capital Gains Tax where the Donee sells the Gift.

The above tax exemption does not however apply to Stamp Duties, Registration and Governor?s Consent Fees provisions which any Deed of Gift, with a real estate component, must bear.

Conclusion

In the past, some Donors have utilised Deeds of Gifts as a vehicle to evade Tax, other Governor?s Consent and Registration fees provisions. The recent economic recession has however compelled some State Governments to become more diligent and vigilant in enforcing existing Land Registration and Tax Compliance provisions regarding Deeds of Gifts.

A discerning Donor, working with a Solicitor experienced in Estate and Tax Laws, must carefully consider how the above legal and tax provisions will impact on his or her intentions regarding his or her estate.

Also, the continuing call for amendments to the existing Tax Laws should take cognisance of the lacuna in the current tax laws especially when it comes to the tax treatment of Deeds of Gifts. An option to consider is the practice in some other jurisdictions where a particular value of a gift is deemed tax-free, with any higher value on the same gift bearing some tax assessment on a graduated basis.

Bibliography/Acknowledgments

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