DEATHBED GIFTS : At a crossroads

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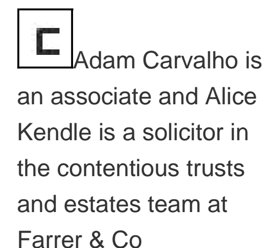
The case of *King v The Chiltern Dog Rescue* [2015] (*King*) has clarified – and restricted – the law relating to ‘deathbed gifts’, or *donatio mortis causa* (DMC). We set out below a summary of the law regarding DMCs, the background to *King*, the judgment and some reflections on the future of the doctrine.

What is a DMC?



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In *Hedges v Hedges* [1708] Lord Cowper described the doctrine of DMC in the following terms:

> Where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him: this, if he dies, shall operate as a legacy; but if he recovers, then does the property thereof revert to him.

The doctrine has been described as an ‘anomaly’, a ‘singular form of gift’, and an exception to the formalities set out in s9 of the Wills Act 1837 (the Wills Act) and s52 (1) of the Law of Property Act 1925 (the Law of Property Act) and to the rule that there is no equity to perfect an imperfect gift. In *Re Beaumont* [1902] Buckley J said a DMC:

> … may be said to be of an amphibious nature being a gift which is neither entirely inter vivos nor testamentary.

In order for a gift to be a valid DMC:

• The gift must be made by the donor in contemplation of ‘death within the near future, what may be called death for some reason believed to be impending’ (*Re Craven’s Estate (No 1)* [1937]). The donor must believe that death is impending for a reason – he or she might, for example, be suffering from a serious illness or about to undergo an operation from which he or she may not recover. Death ‘within the near future’ usually means a matter of days. We return to this point below.
• The gift must be conditional on the death of the donor. For example, the donor might say ‘if I don’t survive my operation, I want you to have my house’. The gift may then be revoked prior to the donor’s death, either because the death does not materialise (in which case the gift is automatically revoked) or because the donor chooses to revoke it before his or her death. Where the donor has not used conditional wording (eg ‘this house is yours, Margaret’ in *Sen v Headley* [1991]) the court is willing to infer conditionality if the donor was seriously ill, and close to death, at the time when the statement was made.
• The donor must part with dominion over the subject matter of the gift. This concept was described in *Vallee v Birchwood* [2013] (*Vallee*) as ‘slippery’. In *Re Craven’s Estate* Farwell J said: ‘the donor must put it out of his power between the date of the donation and the date of his death to alter the subject matter of the gift and substitute other property or chattels for it.’ Parting with dominion may involve actual delivery (eg placing a cash box into the hands of the donee) or constructive delivery (eg giving the donee the key to the cash box). Where the subject matter of the gift is not capable of delivery,

‘Unless the donor revokes the gift before death, when the donor dies their personal representative holds the property on trust for the donee.’

dominion may pass by way of delivery of the 'indicia of title'. For example, the delivery of title deeds may amount to a parting of dominion over unregistered land (*Sen v Headley*).

• The donor must have the requisite mental capacity to make a lifetime gift. The bar is not necessarily as high as for testamentary capacity – for trivial gifts a relatively low degree of understanding might be sufficient – but if a donor is disposing of the bulk of their assets the same high degree will be required as for making a will (as in *Re Beaney* [1978]).

If these requirements are met then, unless the donor revokes the gift before death, when the donor dies their personal representative holds the property on trust for the donee. If not, the legal and beneficial titles remain with the donor.

Vallee v Birchwood

Before we turn to *King* it is necessary to address briefly the case of *Vallee*.

Cheryle Vallee was the daughter of the deceased, Wlodzimierz Bogusz. She lived in France with her two daughters and visited her father at his home in Reading a couple of times a year. On her final visit in August 2003 Ms Vallee found her father 'obviously unwell' and 'coughing badly'.

Mr Bogusz told Ms Vallee that 'he did not expect to live much longer and might not be alive by [Christmas]'. Mr Bogusz gave Ms Vallee the deeds and key to his house, saying he wanted her to have the property on his death.

Mr Bogusz continued to live in the house for another four months, until December 2003, when he died intestate. As Ms Vallee had been adopted, she would not inherit under the intestacy, but she claimed her father had gifted the house to her by DMC.

There were two chief hurdles to overcome. First, the donor had survived for over four months; could his attempted gift be said to have been made in contemplation of 'impending' death? Second, dominion appeared not to have passed because Mr Bogusz continued to occupy and control the house.

Jonathan Gaunt QC, sitting as a deputy High Court judge, found that:

> The question is not whether the donor had good grounds to anticipate his imminent demise or whether his demise proved to be as speedy as he may have feared but whether the motive for the gift was that he subjectively contemplated the possibility of death in the near future.

Mr Bogusz had attempted to give the property to Ms Vallee four months before his death. Mr Gaunt QC thought that:

> … most people would […] consider that a person who anticipated the possibility of his death within five months and accordingly wished to make provision for the transmission of his property, was contemplating his 'impending death'.

Mr Gaunt QC went on to say that the delivery of title deeds (to unregistered land) would usually be sufficient to constitute delivery of dominion unless the donor had reserved to themselves the power to deal with the land in a manner incompatible with a gift that would take effect in the future.

Accordingly, Mr Gaunt QC found that Mr Bogusz had gifted his property to his adopted daughter by DMC.

King v The Chiltern Dog Rescue

The DMC claim

The late June Fairbrother executed her will in March 1998. She left a number of legacies to friends and family and her residuary estate to several animal-related charities which she had supported during her life. Ms Fairbrother died in April 2011 and her will was admitted to probate in February 2012. The bulk of her estate comprised her unregistered property, which was valued at around £350,000.

Kenneth King was Ms Fairbrother's nephew. He had moved into her house around June 2007 to care for her until her death around four years later. Mr King's evidence was that four to six months before her death Ms Fairbrother

had handed him the title deeds to her property saying ‘This will be yours when I go’. On two occasions Ms Fairbrother had purportedly signed documents leaving the property to Mr King after her death, but the documents were not witnessed correctly and so failed as wills.

Mr King’s claim was heard at first instance in 2014 by Mr Charles Hollander QC, sitting as a Deputy Judge. Mr Hollander QC stated:

> … the recent authority of *Vallee v Birchwood* demonstrated that it was not necessary for the death to occur within days of the gift… On the facts I have found, the gift was expressly in contemplation of death at a time when it appears that June was increasingly preoccupied with her impending death, as evidenced by the failed wills.

Accordingly, Mr Hollander QC found Ms Fairbrother had made a valid DMC of the property to Mr King.

The Court of Appeal disagreed. Jackson LJ, giving the leading judgment, found that two of the requirements for a valid DMC had not been satisfied:

• Ms Fairbrother was not contemplating her ‘impending’ death when (according to Mr King) she made the relevant statement. ’She was not suffering from a fatal illness. Nor was she about to undergo a dangerous operation or to undertake a dangerous journey’. Jackson LJ added that ‘if June was dissatisfied with her existing will and suddenly wished to leave everything to the claimant, the obvious thing for her to do was to go to her solicitors and make a new will’. This was an important safeguard in the circumstances: ‘if June had taken that course, the solicitors would have talked to her in the absence of the claimant. They would have ensured that June understood the new will which she was making and that she intended the consequences’.
• The gift was not conditional on Ms Fairbrother’s death within a limited period of time. The words ‘this will be yours when I go’ were more consistent with a statement of testamentary intent. Further, both Ms Fairbrother and Mr King acted as if these words were simply a statement of intent – Ms Fairbrother subsequently attempted to execute wills in those terms.

Accordingly, the Court of Appeal allowed the charities’ appeal against the finding of DMC. The court also expressed concern as to whether Mr King’s evidence was tested with sufficient scrutiny at first instance. Because DMCs will usually be made in a private conversation between donor and donee, the courts require the clearest and most unequivocal evidence that a DMC has been made. Jackson LJ warned ’it is easy for unscrupulous treasure hunters to adjust their recollections in order to gain huge rewards.’ Claimants alleging DMCs in the future can expect that their evidence will be tested rigorously.

The 1975 Act claim

At the outset of the dispute Mr King presented his claim as one arising under s1(I)(e) of the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act) as a dependant. Mr King’s evidence was that he was receiving board and lodging from Ms Fairbrother and his living expenses were to some extent being met.

At first instance Mr Hollander QC said that if he had not allowed Mr King’s DMC claim he would have awarded him a lump sum of £75,000 under the 1975 Act on the basis that Mr King was 58, unlikely to obtain much further employment, had no significant assets and no home apart from Ms Fairbrother’s property. The Deputy Judge resisted making provision for a greater sum which would, he considered, have constituted a windfall.

Both parties had appealed the first instance assessment of what constituted reasonable financial provision for Mr King. Jackson LJ found that Mr Hollander QC had taken into account all of the relevant factors so the court would not intervene. He dismissed the appeal and cross appeal regarding the 1975 Act award. Mr King’s award of £75,000 was maintained.

Conclusion for practitioners

English law has had an uneasy relationship with DMCs; Nourse LJ noted in *Sen v Headley* that two judges (Lords Hardwicke and Eldon) who had expressed regret about the doctrine went on to extend its scope. It has been said that the law regarding DMCs is currently at something of a crossroads.

The doctrine appears to provide legal expression for an instinctive belief on the part of donors that they should be able to make such gifts in their final days; Jonathan Gaunt QC stated in *Vallee* that ‘equity intervenes... to give effect to the intentions of donors sufficiently evidenced by their acts’.

Following *Vallee* there was some concern that by extending the scope of the DMC doctrine the door had been opened to potential abuse and the safeguards in the Wills Act and the Law of Property Act had been weakened. The Court of Appeal’s judgment in *King* has addressed those concerns and introduced some welcome certainty.

Nonetheless, claims for DMCs may become increasingly rare as the number of unregistered titles, premium bonds and building society passbooks decreases over time. The doctrine may in the future become relevant mainly in relation to deathbed gifts of chattels. If the courts are willing to expand the doctrine it may become more relevant to the way that assets are held in the 21st century. For example, in time, might a donor be able validly to make a DMC in relation to internet bank accounts?

In the meantime, a number of commentators have expressed concern about successful applications by adult children under the 1975 Act, and what is seen by some people as the erosion of testamentary freedom. The fact that Mr King, who was presented as an unsympathetic claimant, has obtained financial provision from Ms Fairbrother’s estate despite failing in his DMC claim may cause further concern.

CASE(S) REFERENCED:

Re Beaumont [1902] 1 Ch 892

Re Beaney [1978] 1 WLR 770

Re Craven’s Estate (No 1) [1937] Ch 423

Hedges v Hedges (1708) Prec Ch. 269

King v The Chiltern Dog Rescue & anr [2015] WTLR 1225

Sen v Headley [1991] EWCA Civ 13

Vallee v Birchwood [2013] WTLR 1095