How do *Ilott* and *King* affect the current law?

Richard McDermott and **Adam Carvalho** consider the fallout from two significant recent cases and review the law on challenges to wills and 'deathbed gifts'

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For a gift to be a valid 'deathbed gift', or *donatio mortis causa* (DMC), it must meet the following criteria:

- It must be made 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] Ch 423). The donor might, for example, be suffering from a serious illness or about to undergo an operation from which they may not recover. They must believe that death is impending for a reason and for these purposes the phrase 'within the near future' usually means a matter of days;
- The gift should be expressed as conditional on the donor's death. So it would be enough for the donor to say, 'If I don't survive my operation, I want you to have my house.' However, if the donor has not used conditional wording (e.g. 'This house is yours, Margaret' in *Sen v Headley* [1991] Ch 425), the court is willing to infer conditionality if the donor was seriously ill and close to death when the statement was made;
- The donor must 'part with dominion' over the subject matter of the gift. This may involve actual delivery (e.g. placing a cash box into the hands of the donee) or constructive delivery (e.g. giving the donee the key to the cash box).
- When referring to this condition in *Re Craven's Estate*, the court held that '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'; and
- The donor must have the requisite mental capacity. The threshold for making a DMC is not necessarily as high as the threshold for testamentary capacity, so for trivial gifts a relatively low degree of understanding might be sufficient.

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.

King v The Chiltern Dog Rescue

The facts of *King v The Chiltern Dog Rescue* [2015] EWCA Civ 581 are as follows: June Fairbrother died in April 2011, having executed her will in March 1998. The bulk of her estate comprised her unregistered property, which was worth around £350,000. After a number of legacies to friends and family, the residuary estate was left to several animal-related charities which Fairbrother had supported during her life.

Fairbrother's nephew, Kenneth King, had moved into her house in June 2007 and cared for her in the months before her death. On two occasions, Fairbrother purported to sign documents leaving the property to King after her death, but these were not witnessed correctly and so failed as wills. King told the court that, four to six months before her death, Fairbrother gave him the title deeds to the property and said: 'This will be yours when I go.'

The High Court found that there had been a valid DMC of the property to King. Mr Hollander QC (sitting as a deputy judge) stated 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 [Fairbrother] was increasingly preoccupied with her impending death, as evidenced by the failed wills'.

The Court of Appeal overturned the earlier decision, with Lord Justice Jackson stating that two of the requirements for a valid DMC had not been satisfied:

1. The gift was not conditional on 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 Fairbrother and King acted as if these words were simply a statement of intent – Fairbrother subsequently attempted to execute wills in those terms; and
2. Fairbrother was not contemplating her 'impending' death when she made the relevant statement. Further, if Fairbrother was dissatisfied with her will, 'the obvious thing for her to do was to go to her solicitors and make a new will'. This would have provided an important safeguard, as the solicitors 'would have ensured that [she] understood the new will which she was making and that she intended the consequences'.

As an aside, it should also be noted that because DMCs will usually be made in a private conversation between donor and donee, the courts will require the clearest and most unequivocal evidence that a DMC has been made. Otherwise, as noted by the Court of Appeal, it would be 'easy for unscrupulous treasure hunters to adjust their recollections in order to gain huge rewards'.

1975 Act claim

King initially presented his claim under the Inheritance (Provision for Family and Dependants) Act 1975 on the basis that he was dependent on Fairbrother for board, lodging, and other living expenses.

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

Both parties appealed the first instance assessment of what constituted reasonable financial provision for King. The Court of Appeal found that the lower court had taken into account all of the relevant factors so did not intervene. King's award of £75,000 was therefore maintained.

Ilott v Mitson

Readers will be aware of the facts of *Ilott v Mitson* [2015] EWCA Civ 797 and the subsequent media commentary. For current purposes we would simply note that the law has not drastically changed as a result of *Ilott*, but that if there is a risk of a challenge to a client's will by an adult child, then practitioners should consider some or all of the following:

- Instead of disinheriting an adult child (or other beneficiary), the client may wish to consider leaving them a modest legacy, which may discourage them from making a challenge;
- If the client wishes to benefit people or charities at the expense of family members, it is sensible to choose beneficiaries with whom the client has established a connection during their lifetime and to ensure that the solicitor's file records all the details of the connection;
- Clients may leave a statement (or letter of wishes), which should explain their choices by reference to facts and avoid airing accusations or old grievances;
- The client may wish to leave their estate in a discretionary trust, which would give their executors flexibility to decide how their estate should be distributed in light of all the circumstances at the time of death;
- Commentators have suggested using non-contest clauses in wills. These state (in general terms) that if any beneficiary contests the will then the estate will pass to different beneficiaries. It would be necessary to provide some benefit to the relevant individual under the will (so that they have an incentive not to raise a challenge). This may enflame the situation, and such clauses cannot oust the court's jurisdiction to make financial provision for an applicant under the 1975 Act;
- When drafting the will, practitioners should always take a detailed note setting out the client's reasons for their testamentary choices, as the file notes are likely to provide a large proportion of the evidence as to why the client chose to make a will in those terms;
- The client should keep their will under regular review and update it if and when their circumstances change. The client's professional advisers should, of course, be alive to any changes to the client's situation and be proactive in suggesting solutions;
- Lifetime gifts made on purpose to defeat post-death claims can be set aside by the court, so this is not a solution; and
- A final point is that the 1975 Act only applies if the client was domiciled in England or Wales on their death.

As we have said, *Ilott* and *King* do little to change the current law on claims under the 1975 Act. More interesting are the issues raised over the law on DMCs. 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, without going to the trouble and expense of updating their wills. Nonetheless, successful claims for DMCs may become increasingly rare as clients hold fewer assets over which dominion may be easily transferred (for example unregistered land or bearer shares). The doctrine may in the future become relevant mainly in relation to deathbed gifts of chattels. SJ

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