**Donationes mortis causa: the recent case of King v Chiltern Dog Rescue [2015] EWCA Civ 581**

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**Abstract**

This article considers the recent decision in *King v Chiltern Dog Rescue* [2015] EWCA Civ 581, in which the doctrine of *donationes mortis causa*, or gifts in contemplation of death, was considered by the Court of Appeal for the first time in over 20 years. The Court held that *Vallée v Birchwood* [2013] EWHC 1449 (Ch) was wrongly decided and emphasised both the strict limits of the doctrine and the rigorous approach that the courts must adopt when considering the evidence in support of a claim.

Mrs Fairbrother loved animals. She had three dogs, a number of cats and, as well as supporting animal charities, would go out in the evening to feed strays near her home. She was divorced, with no children, and it was no surprise that her Will of 20th March 1998, after providing for some modest gifts to friends and relatives, left her residuary estate to seven animal charities. What was more of a surprise was the claim by Mr King that the gift was of no value because the only significant asset in the estate, Mrs Fairbrother’s house in Harpenden, had been the subject of a DMC in his favour. He contended that he had moved in with his aunt in 2007 at her request and had devoted himself to caring for her until her death. Towards the end of her life she had, it was said, signed various informal documents evincing an intention to leave the property to him and also expressing the wish that Mr King would care for her dogs. One day, she had handed him the title deeds to the unregistered property and told him that ‘this will be yours when I go’. According to Mr King, his aunt was not a morbid individual and there was something in the way she spoke to him that made him realise that she knew that her health was failing. He took the documents from her, wrapped them in a plastic bag and put them in a wardrobe in his bedroom. Mrs Fairbrother died several months later, but not before signing a further document, which purported to be a new Will, leaving her estate to Mr King. This document was said to have been typed by Mr King himself at his aunt’s
request, but it was not witnessed and thus was of no effect.

The charities approached this claim with caution. The various expressions of testamentary intent relied upon were unwitnessed, and made against a background of evidence of Mrs Fairbrother’s memory loss and wandering around outdoors half-naked at night, although there was no diagnosis of dementia and Mrs Fairbrother had not visited her doctor for some years.

Cases of DMC are notoriously open to abuse and the courts have consistently emphasised the caution required when approaching the evidence. In Cosnahan v Grice (1862) 15 Moo PC 215 the Privy Council stressed the burden of proof in such cases:

Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these death-bed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation a fraudulent contrivance, it is so easy to mistake the meaning of a person languishing in a mortal illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character.

What is a DMC?

A DMC is a present gift that takes effect in the future and remains conditional until the donor dies. Until that point it may be revoked by the donor, but on his death the gift is absolute. It has its origins in Roman law, and is mentioned in Justinian’s Institutes, but the earliest reported case to consider the doctrine in England is Hedges v Hedges [1708] Prec Ch 269. The report is brief but sets out Cowper LC’s description of a DMC in the following terms at 270:

...where a man lies in extremity, or being surprized 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 lack of opportunity to make a will was not subsequently taken up as an essential element of the doctrine. In Cain v Moon [1896] 2 QB 283, 286 Lord Russell of Killowen CJ formulated three conditions for the doctrine to operate:

three things must combine: first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and, thirdly, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover.
In *In re Beaumont* [1902] 1 Ch 892, 893, Buckley J explained the nature of the gift. A DMC is:

a singular form of gift. It may be said to be of an amphibious nature being a gift which is neither entirely *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor’s death.

**A singular form of gift**

Farwell J clarified what was meant by contemplation of death in *In re Craven’s Estate* [1937] Ch 423, 426:

The conditions which are essential to a *donatio mortis causa* are, firstly, a clear intention to give, but to give only if the donor dies, whereas if the donor does not die then the gift is not to take effect and the donor is to have back the subject-matter of the gift. Secondly, the gift must be made in contemplation of death, by which is meant not the possibility of death at some time or other, but death *within the near future*, what may be called *death for some reason believed to be impending*. Thirdly, the donor must part with dominion over the subject-matter of the *donatio*. (emphasis added)

The condition that the gift must revert if the donor recovers does not always need to be expressed. In *Wilkes v Allington* [1931] 2 Ch 104 Lord Tomlin, sitting as an additional judge of the Chancery Division, was content to infer the conditionality of the gift from the circumstances.

The Court of Appeal had the opportunity to consider the doctrine in *Birch v Treasury Solicitor* [1951] Ch 298. Lord Evershed MR, giving the judgment of the Court, approved the description in *In re Beaumont* and warned, at 307, that, because of the peculiar characteristics of a DMC:

the courts will examine any case of alleged *donatio mortis causa* and reject it if in truth what is alleged

as a *donatio* is an attempt to make a nuncupative will, or a will in other respects not complying with the forms required by the Wills Act.

The Court further confirmed, at 311, that, in cases of property that was not capable of physical delivery, it was sufficient to part with dominion over the:

essential indicia or evidence of title, possession or production of which entitles the possessor to the money or property purported to be given.

The Court of Appeal considered the doctrine once again in *Sen v Headley* [1991] Ch 425. Until then, it had been assumed that the doctrine could not apply to land. ‘Dominion’ over land, after all, does not lend itself to informal disposition, not least because of the long-standing statutory restrictions. At first instance, Mummery J (as he then was) thought that land could not be transmitted by DMC. While dying in hospital, the deceased had slipped into his partner’s handbag the key to a strong box containing the deeds to his house, saying:

The house is yours, Margaret. You have the keys. They are in your bag. The deeds are in the steel box.

Mummery J held that he nonetheless had retained the legal and equitable interest in the house and therefore could, for example, declare a trust of it, or contract to sell it. He had not parted with dominion over it.

The Court of Appeal disagreed. The title deeds in the strong box were the ‘essential indicia’ of title, and had been given to Mrs Sen. While the deceased might have granted a tenancy, he did not do so, and, although he had retained a set of keys, these were of no benefit to him in the last days of his life. The objections raised by Mummery J in the case of land could equally apply to choses in action. There was no reason why the doctrine should not extend to land. The doctrine of DMC was anomalous but, noted Nourse LJ at 440, ‘anomalies do not justify anomalous exceptions’.
Nourse LJ also restated the requirements of a valid DMC at 431:

First, the gift must be made in contemplation, although not necessarily in expectation, of impending death. Secondly, the gift must be made upon the condition that it is to be absolute and perfected only on the donor’s death, being revocable until that event occurs and ineffective if it does not. Thirdly, there must be a delivery of the subject matter of the gift, or the essential indicia of title therto, which amounts to a parting with dominion and not mere physical possession over the subject matter of the gift.

The law was thus thought relatively settled following Sen, although a court has not yet ruled on whether the DMC doctrine is applicable to registered land, but that seems unlikely. It is difficult to see what would constitute the essential indicia of title now that title is conferred by the fact of registration and land certificates have been abolished by the Land Registration Act 2002.

New life was breathed into the doctrine by the decision on appeal from the Oxford County Court in Vallée v Birchwood [2013] EWHC 1449 (Ch). Until that decision, the interval between the gift and the death was very short, usually when the donor was gravely ill. By way of example, in In re Craven the interval was only five days. In Sen it was three. DMCs were colloquially referred to as ‘deathbed gifts’ and the doctrine appeared to be confined to those cases where the donor had little chance to order his affairs in the conventional way. The limited application of the anomalous doctrine satisfactorily softened the rigors of the Wills Act 1837 and offered those in the last moments of their lives a chance to give effect to their last wishes.

In Vallée however, the donor, Mr Bogusz, was not on his deathbed. He was ill when his daughter visited him August 2003 and was coughing badly. When his daughter, who lived abroad, told him that she would next see him at Christmas he said that he might not be alive by then and that he wanted her to have his house. He then gave her the title deeds and a key that she took away. He continued to live at the house after his daughter’s visit and, true to his prediction, he died intestate on the 9th December 2003.

At trial, the county court judge had held that a DMC had been effected, and this was upheld on appeal. It was contended by the appellant that the contemplated interval of five months between gift and death was too long to found a valid DMC. The deputy judge, Jonathan Gaunt QC, however said:

- It is submitted, however, that the contemplation of death within five months is not to be regarded as ‘impending’ death, when one has regard to what it is suggested is the policy behind the doctrine of donatio mortis causa. That is said to be to give effect to the intentions of a donor who does not have the time or opportunity to make a proper will. Counsel fairly accepted that the modern case law does not make such lack of opportunity something the donee must prove. To adopt it as the temporal measure of ‘impending’ would be, in my judgment, to introduce a further condition by the back door. Most people would, I think, 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’.

Similarly, he rejected the argument that Mr Bogusz had not parted with dominion over his house by continuing to live in it. He said that the delivery of the title deeds and key was sufficient unless there was something to show that the donor had reserved a power to deal with the land in a manner incompatible with the gift. He did not see that Mr Bogusz’s continued occupation was incompatible, noting at 283:

- A gift by way of donatio does not become effective until the death of the donor, so the property remains both in law and in equity the property of the donor. There seems to be no reason why acts of continued enjoyment of his own property should be regarded as incompatible with his intention to make a gift
effective on his death. Suppose, by way of example, that the subject matter of the gift was land already subject to a tenancy. Would the donor not be entitled to enjoy the rent while he lived? It seems to me that he would. He has not given it away. That would seem to be no different in principle from the donor continuing to enjoy his own house by living in it. The delivery of the deeds would have put it out of his power to transfer it and the handing over of the key as well would give the donee access to the house and diminish to some extent the donor’s control.

The charities’ arguments in King and the decision at first instance

Against that background, the charities’ case was that, whatever view the court formed of Mr King’s credibility or of Mrs Fairbrother’s capacity to make the gift, the acts and words alleged could not amount to a DMC. First, there was no contemplation of impending death. The fact that she did, in fact, die four to six months after the alleged conversation was no clue as to what was in her contemplation at the time. She was not thought to be unwell, she was merely of advanced years. Her death could have been 12 months, 18 months, or several years away. Considering the injunction that such claims could only be supported by the strongest and most unequivocal evidence there was no such evidence of a gift in contemplation of death in the near future.

Secondly, the gift was not conditional on death. Death in this context cannot mean death in the ordinary course. Death is inevitable for everyone so the references in the case law to a gift being ineffective if death does not occur must indicate that there must be an event or period in which there is believed to be a risk of death, other than inevitable death from old age, after which, if death does not occur, one can say that the gift is ineffective. Even in Vallée conditionality could be inferred from the fact that the deceased, plainly ill, told his daughter that he might not be alive by the time she next visited at Christmas. That was the long-stop of the gift. Had Mrs Vallée returned to visit her father at Christmas to find him recovered and in good health the gift would clearly have been ineffective. In King, by contrast, there was no conditionality or words of gift used. The deceased did not say words to the effect of ‘If I die in the next few months, the house is yours’ or ‘This is yours if I should die’ or even ‘I might not live until Christmas’ when giving the title deeds to Mr King, but rather ‘this will be yours when I go’. Properly construed, the statement was, at most, a statement of her intention to give him the property on her inevitable death as some point in the future, consistent with the documents which she signed, both before and after the alleged DMC. Again, observing the injunction that the court must be alive to and reject an attempt to ‘make a nuncupative will, or a will in other respects not complying with the forms required by the Wills Act’ the claim could not succeed. To hold otherwise would simply mean anyone of advancing years, thinking about their inevitable end, could bypass the safeguards of the Wills Act and the Law of Property Act and dispose of their property informally.

Thirdly, there was no parting with dominion with the title deeds. Unlike in Vallée the title deeds remained in the house, in Mr King’s bedroom cupboard. Mrs Fairbrother and Mr King continued to live there as before. Had Mrs Fairbrother wished to grant an interest in the property which would have required the production of the title deeds, she had easy access to them.

Finally, even if a DMC had been effected, it was revoked by the attempt to make a will after the event. Given that Mrs Fairbrother was said to have asked Mr King to draw up a will, both parties were proceeding on the basis that the property would now pass under the terms of a will, rather than pursuant to a conditional gift in Mrs Fairbrother’s lifetime. As such Mrs Fairbrother had resumed dominion and revoked the gift by notice to the donee.

The deputy judge, Charles Hollander QC, held that the various documents signed by Mrs Fairbrother evidenced her desire to leave the property to her nephew at a time when she had capacity. He accepted Mr
King’s account of the conversation he said he had with his aunt and concluded that a valid DMC had been effected. In doing so he brushed aside doubts about Mr King’s credibility, noting:

there were several matters going to credit on which Mr King’s evidence was not consistent with documents he had signed or created. It was also apparent that Mr King engendered strong feelings, and there were a number of people, both within his family and elsewhere, who regarded him as untrustworthy and unreliable and in some cases dishonest.

He noted that he himself had ‘not found it an easy question whether to accept Mr King’s evidence’ but that there was nothing to lead him to conclude that he could not rely upon it. He concluded that ‘his evidence on the crucial matters was entirely unshaken’. Accepting that Mrs Fairbrother had capacity¹ to make the gift he said that the words used by the deceased ‘in context, were indeed suggestive of a gift conditional on death and not consistent with any other interpretation’. Noting that Vallée was authority for the proposition that death need not occur within days he considered that the gift had been made at a time when the deceased was becoming increasingly occupied with her impending death. Similarly, following Vallée, he found that there had been a parting with dominion and rejected the submission that the gift had been revoked.

The appeal and the state of the law now

The Court of Appeal (Jackson, Patten and Sales LJJ) reversed the deputy judge’s decision, Patten LJ noting that the evidence ‘even if credible, comes nowhere near to satisfying the requirement that the gift should be made in contemplation of death’. Vallée was held to have been wrongly decided. Giving the leading judgment Jackson LJ emphasised that considerable caution was required when considering a DMC claim. The doctrine had to be kept within proper bounds. The evidence should be subjected to the strictest scrutiny and the courts must not allow DMC to be used to validate ineffective wills. The safeguards surrounding the execution of a valid will were not present. He expressed doubts as to whether the deputy judge had subjected Mr King’s evidence to the degree of scrutiny enjoined by the authorities but, in light of his findings on the effect of the evidence, he proceeded on the assumption that the findings of fact were unassailable.

After reviewing the authorities Jackson LJ concluded that the essential elements of a DMC were that:

i. The donor contemplates his impending death.

ii. The donor makes a gift which will only take effect if and when his contemplated death occurs. Until then the donor has the right to revoke the gift.

iii. The donor delivers dominion over the subject matter of the gift to the donee.

Expanding on the requirements, Jackson LJ decided that:

First, in contemplating his impending death, it was clear from the authorities that the donor must have ‘good reason to anticipate death in the near future from an identified cause’. In neither Vallée nor King had that requirement been met. In Vallée Mr Bogusz was approaching the end of his natural lifespan, but he did not have reason to anticipate his death in the near future from a known cause. In neither Vallée nor King had that requirement been met. In Vallée Mr Bogusz was approaching the end of his natural lifespan, but he did not have reason to anticipate his death in the near future from a known cause. Similarly, while most of Mrs Fairbrother’s life was behind her, she was not anticipating her impending death in the sense used in the authorities. She was not suffering from a fatal illness or shortly to undergo an operation or to undertake a dangerous journey.

¹. As to which, see In re Beaney [1978] 1 WLR 770 and also In Re Key [2010] 1 WLR 2020 as to the burden of proof.
Secondly, it was essential that the gift was conditional on the contemplated death and in any event the gift would lapse if that death did not occur soon enough. In cases where early death is inevitable the court relaxes the requirement that the donor should specifically require the return of the property if he should recover. In the instant case Mrs Fairbrother’s words were no more than a statement of testamentary intent and both Mr King and Mrs Fairbrother had proceeded on that basis, rather than on the basis that a gift had been made.

Thirdly, ‘dominion’ meant physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter.

The doctrine of DMC is only applicable if the three requirements set out above are met. As the doctrine is open to abuse, Jackson LJ noted that the courts should require strict proof of compliance with those requirements.

Patten LJ was of the same opinion, again emphasising the safeguards imposed by statute in respect of the making of wills and the conveyance of land and that DMC cases were to be subjected to the strictest scrutiny. The contemplated death had to be death in the near future, not the mere possibility of death months or weeks away. He considered that the doubts expressed by the deputy judge should have led him to find that the gift had not been proved. Sales LJ agreed with both judgments, save that he preferred to leave open the question of whether the deputy judge had been right to accept Mr King’s evidence.

The law as it stands, therefore, confines the doctrine of DMC to strict limits. The possibility of death weeks or months away is insufficient and, while not introducing the lack of opportunity to make a will as a requirement, it is notable that Jackson LJ did refer to Mrs Fairbrother’s opportunity to make a will and the lack of a reason why she could not have done so. It may be that the opportunity to make a will may, in future, be regarded as probative of whether or not the deceased in fact intended to make a DMC and at least relevant to the question of whether the contemplated death is impending, or is merely the possibility of death in the future. The donor must have ‘good reason’ to anticipate their death in the near future from a known cause and the inevitable contemplation of death that follows from having most of one’s life span behind one will not be sufficient, whether or not accompanied by generally failing health. Arguably the requirement for a ‘good reason’ represents a higher hurdle than ‘some reason’ set out in In re Craven, but Jackson LJ also referred to the requirement that there be a ‘specific reason’ and the court does not appear to have imposed an objective test. What is essential is that there is some clear reason for anticipating death other than in the ordinary course. The court is unlikely to probe into whether a donor’s fear of impending death was reasonable. The conceptual contortions involved in the notion of parting with ‘dominion’ in respect of unregistered land have been simplified. Parting with possession of the title deeds will be sufficient. It is unlikely that Jackson LJ intended his reference to ‘some means of accessing the subject matter (such as the key to a box)’ to mean that it would be sufficient for a donor to hand over the key to his house rather than its title deeds. Given that he was considering the concept of the passing of dominion generally, rather than dominion over land specifically, it is likely that he was referring to the various cases in which the handing over of a key to a chattel was held to be sufficient to effect a parting with dominion over the chattel itself.

The decision can be of comfort to testators, who can be more certain that their wills are unlikely to be overridden by a casual conversation with a third party, perhaps imperfectly remembered, towards the end of their lives or by the deliberate invention of a person who has come into possession of property or its indicia of title. It will be of greater comfort to beneficiaries, particularly charities. Charities are uniquely vulnerable to claims by family members aggrieved by being excluded from a testator’s bounty. They will often have little means of gainsaying the account given by a claimant. The Court of
Appeal has emphasised that claimants alleging a DMC will be required strictly to prove that the essential elements of the gift are made out and their evidence will be approached with caution.

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