

Deathbed gifts in rude health: the recent case of Vallée v Birchwood

The law relating to 'deathbed gifts', or the *donatio mortis causa* ("DMC"), is at once fascinating and divisive. The doctrine is an anomaly.

To some it is an ancient and honourable concession to human frailty, to others it is an unwelcome and unprincipled exception to the requirements of formality.

To both camps the anomalous nature of the 'DMC' presents undeniable problems of rationale and application.

It is difficult to disagree with the commentator who, in 1966, observed:

*"In truth, English law's flirtation with d.m.c. has not worked out very well, largely because of illogicality, inconsistency and the absence of clearly propounded principles."*¹

This handout will consider the recent case of Vallée v Birchwood [2013] EWHC 1449 (Ch); [2013] W.T.L.R. 1095; [2013] 2 P. & C.R. DG15, which saw the doctrine applied successfully in relatively extreme circumstances, and take the opportunity to reflect on the state of the law in this area and its possible application in the future.

Basic principles

Origins in Roman Law:

"mortis causa donatio est, quae propter mortis fit suspicionem ..."

(Justinian's Institutes 2.7.1)

Developed in early 18th century to mitigate the perceived hardship of the Statute of Frauds 1677 (various stringent rules for nuncupative wills).

Three requirements:

- 1. the gift must be made in contemplation of the donor's impending death**
- 2. the gift must be conditional upon the death of the donor**
- 3. there must be a parting with dominion over the subject matter of the gift**

To these you could add

- 4. Capacity**

(same test as for a lifetime gift, subject to the application of Re Beaney [1978] 1 WLR 770 in the case of DMC so large as to defeat testamentary provisions).

Also note that potential vitiating features familiar to gifts and wills, such as undue influence, should also apply.

The courts have enjoyed a paradoxical relationship with the DMC. Often bemoaning its existence, and yet have at the same time not only found themselves bound to apply it but also, in the interests of reducing the anomalies of its inconsistent

¹ Samuels 'Donatio Mortis Causa of a share certificate' Conv. 1966, 189.

application, have gradually extended it. Two of its harshest early critics, Lords Eldon and Hardwicke² were responsible for arguably its greatest enlargement.

Of the 3 primary requirements the first two have their precedent in Roman law. The third requirement is the invention of the English courts: it is at once the fundamental, distinguishing characteristic of the modern form of the doctrine (without it there is just an oral will); and also its most problematic aspect.

It will be seen from the foregoing that 'deathbed gifts' (the title of the only modern textbook published on the subject³) is something of a misnomer. There is no requirement that the donor should be on his or her 'deathbed' and although it is a gift it is one of a most unique, hybrid or 'amphibious'⁴ kind, with a present intention to give but only taking effect after death: partly like an inter-vivos gift and like a testamentary gift, but ultimately sitting somewhere between the two.

The DMC relies for its operation upon the imposition of a constructive trust arising upon death to avoid the need for writing (s.53(2) LPA 1925).

Development of the 3 main principles over time

It is fair to observe that the three principal requirements have been interpreted generously by the courts:

The first requirement: contemplation of death

A gift made in contemplation of impending death does not require the donor to be in expectation of death or 'in extremis', although it has been said that this means death not just at some time or other but needs to be "within the near future" Re Craven's Estate (No.1) [1937] Ch. 423.

The tenor of the decided cases is also that whether impending death is contemplated is a matter to be judged *subjectively*. Thus it may apply where a donor has a fear of flying, and believes his plane will crash, however objectively irrational that fear may be. Therefore it is also irrelevant whether or not death occurred from the anticipated cause (e.g. a heart operation) as opposed to an unanticipated cause (e.g. being hit by a bus on the way to the hospital).

A DMC might even be made in contemplation of death by suicide⁵.

Notwithstanding that the earliest reported case of a DMC, that of Hedges v Hedges [1708] Prec Ch. 269, referred to the doctrine as being justified in cases

"where a man lies in extremity, or being surprized with sickness, and not having an opportunity to make his will"
(per Lord Cowper)

this lack of opportunity to make a will has never been adopted as a requirement of the application of the doctrine in subsequent authority.

² In Duffield v Elwes (1827) 1 Bligh (NS) 497 (extension to monies secured by mortgage) and Ward v Turner (1751) 2 Ves. Sen. 431 (extension to monies secured by bond) respectively.

³ Andrew Borkowski, 'Deathbed Gifts' 1999.

⁴ Re Beaumont [1902] 1 Ch. 889 at 892, per Buckley J.

⁵ Now that suicide has been decriminalised, although the question has yet to be tested: see Williams Mortimer and Sunnucks at 42-06.

The second requirement: conditional upon death

The courts have been willing to infer the conditionality of the gift, which might otherwise appear to be expressed in absolute and immediate terms, from the circumstances of the case.

“The house is yours, Margaret.” Sen v Headley [1991] Ch 425

“There, take that, and keep it.” Gardner v Parker (1818) 3 Madd. 184.

“You can keep the keys, I won’t be driving it any more.” Woodard v Woodard [1995] 3 All ER 980, a case about a car⁶.

The third requirement: dominion, and the significance of ‘indicia’ of title

Legal transfer will suffice, but is not necessary.

The courts have accepted both actual physical delivery (e.g. placing a cash box into the hands of the donee) and constructive delivery (giving the key to box, or to the cupboard in which it is kept).

Perhaps most problematic of all, in cases where the subject-matter of the gift is not capable of delivery (because it is intangible, like a chose in action) the doctrine has been extended to allow dominion to pass by delivery of the ‘indicia of title’ thereto. The leading modern authority on ‘indicia’ is Birch v Treasury Solicitor [1951] Ch 298, a case which concerned the handing over of various Post Office and Bank deposit books. A DMC of the monies in those accounts was found. In the Court of Appeal Evershed MR reiterated that symbolic delivery of mere tokens was not enough, there must be transfer of the subject matter of the gift or of ‘something amounting to that’ (citing Ward v Turner (1751) 2 Ves. Sen. 431). He went on to define the ‘indicia’ in this way:

“... the indicia of title, as distinct from mere evidence of title, the document or thing the possession or production of which entitles the possessor to the money or property purported to be given.”

This definition of ‘indicia’ might be refined further, as the document or thing which ‘normally’ must be produced (the evidence in Birch was that bank employees might in practice occasionally waive the requirement to produce the deposit books, which did not contain the full terms of the contract between bank and customer in any event).

The concepts of ‘dominion’ and ‘indicia’ continue to present considerable challenges to the practitioner, not least in the recent case of Vallée v Birchwood, as will be seen below.

Extension of the DMC to land

Until 1990 it was universally assumed that a DMC could never apply to land, although the only authority for the proposition was Lord Eldon’s comments in Duffield v Elwes (1827) 1 Bligh (NS) 497 (a case concerning a mortgage, and therefore strictly obiter with regard to title to land).

The DMC was extended to real property in the landmark Court of Appeal decision in Sen v Headley [1991] Ch 425, undoubtedly the most significant DMC case in the last 50 years, and arguably since the earliest authorities of the 18th century.

⁶ a curious dispute between mother and son concerning the deceased father’s Austin Metro motorcar, coming on for appeal over 2 years after trial since when the car had long since been sold and the money spent. Both sides were legally aided and the son had no prospect of paying the money even if the mother won. “*It is now about the most sterile appeal I have ever come across.*” Dillon LJ. Words held to be of gift - just about – and moreover a DMC because the son accepted that if father had recovered he would have reclaimed the vehicle.

The case concerned a gift by a Mr Hewett to his long-time companion Mrs Sen. Three days before his death Mr Hewett told Mrs Sen “The house is yours, Margaret”. Unknown to her he had slipped keys to a steel box (containing the title deeds to his home, which was unregistered land) into her bag. She already had the keys to the house, and day-to-day control of it, because she was looking after it during Mr Hewett’s absence in hospital.

At first instance Mummery J expressed the view that he could not see a DMC ever applying to land. He reasoned thus: Mr Hewett had retained the entire legal and equitable interest in the house and therefore could declare a trust of it or purport to sell it by contract. He had not parted with dominion.

On appeal to the Court of Appeal Nourse LJ disagreed. The title deeds were the ‘indicia’ of title, and had been constructively passed to Mrs Sen. Mummery J’s objections could also be made of choses in action, where the possibilities of DMCs had long since been established. If gifts could be made of other property, then why not land? As Nourse LJ put it, the DMC was indeed an anomaly but:

“anomalies do not justify anomalous exceptions.” [p.440 at B].

The case was closely analysed in Vallée v Birchwood, and will be discussed further below.

The recent case of Vallée v Birchwood [2013] EWHC 1449

The facts

Background:

- Wrodimierz 'Johnny' Bogusz born Ukraine 1920
- Post-war immigrant to UK
- Imperfect English and literacy
- Worked as a labourer
- Married 1948 divorced 1958
- One child, Cheryle Vallée - foster care
- Foster carers formally adopted Cheryle age 13
- 1962 Mr Bogusz purchases 2 Eldon Street, Reading. Unregistered land.
- Ms Vallée marries French national, moves to China then settles in France
- Sees father 'occasionally' – Christmas visits
- Mr Bogusz increasingly mistrustful and isolated. Dressed 'like a tramp'. Fear of burglary. Lived downstairs in dilapidated surroundings. No telephone.
- No evidence kept in contact with any family in Ukraine

Facts giving rise to DMC

- Visit of Ms Vallée 6 August 2003
- Found Mr Bogusz "*quite unwell*" and "*coughing*" but no diagnosis discussed
- Reference to next visit at Christmas "*He said he did not expect to live very much longer and may not be alive then*".
- "*He told me he wanted me to have his house when he died.*"
- "*Gave me the title deeds to the house and the keys*" [later corrected to 'one key' – key not retained]
- Also gave a plastic bag containing war medals and photo album
- Mr Bogusz continued to live in the property as before, Ms Vallée did not visit or have access or any involvement with it.

Therafter:

- Mr Bogusz survives more than 4 months after that visit, died on 9 December 2003 of causes including bronchopneumonia
- Initially thought to create intestacy (Ms Vallée adopted), and *bona vacantia*
- 2007 Ms Vallée intimates claim to TSol
- TSol reject Ms Vallée's assertion of a DMC
- Defendant involved as genealogists or 'heir hunters', traces a brother and other relatives in the Ukraine
- 2009 TSol accept entitlement of brother
- 2012 Ms Vallée issues claim
- Circuit judge decides in her favour at trial in Oxford County Court "*without delving into any academic analysis*". Ms Vallée not cross-examined. The Defendant 'neutral' but made submissions on dominion.
- On appeal to a single judge of the High Court

The decision in Vallée

Thorough, written judgment of Jonathan Gaunt QC, sitting as a deputy judge of the Chancery Division.

Two main grounds of appeal:

1. Appellant contended not impending death if survived for more than 4 months (*a fortiori* if the original mischief the doctrine was devised to address was inability to make a formal will *in extremis*)
2. Appellant contended that dominion had not passed because donor continued to occupy and control the subject matter of the gift.

Addressing each in turn:

1. Impending death in Vallée

Review of the cases cited before the court, the interval between gift and death was usually only a few days. For example:

Re Craven's Estate – 5 days

Sen v Headley – 3 days

Woodard v Woodard - 3 days

Held by the Deputy Judge in Vallée:

The test of 'impending death' is subjective

"The question is not whether the donor had good grounds to anticipate his imminent demise or whether his demise proved 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." [§ 25]

As to length of time, that is a matter of impression:

"Most people would, I think, consider that a person who anticipated death within 5 months ... was contemplating his 'impending death.'" [§ 26]

Context: death before next visit of daughter at Christmas = near future. To which might be added: Mr Bogusz's prediction of demise was, after all, very accurate.

Lack of opportunity to make a will is not a requirement.

Additional reasoning of the Deputy Judge:

"I do not consider that Equity intervenes in such cases only out of sympathy for those caught out in extremis but rather to give effect to the intentions of donors sufficiently evidenced by their acts such that the conscience of the donor's personal representative is affected." [§ 27]

Difficulties with this additional reasoning: A new test of unconscionability? Akin to an estoppel? Taking the role of the constructive trust too far?

If so, why would the same reasoning not apply to the maker of a nuncupative will, or a will invalid for inadvertent want of some compliance with formality? There too, the personal representative will know that he/she is administering an estate against the

testator's wishes. Ultimately, the point made by the Deputy Judge, which lacks authority, was unnecessary to the decision. It is suggested this additional reasoning should be treated with caution.

2. Dominion in Vallée

Passing "dominion" a very difficult concept: long established in authority as a requirement but not defined.

Something more than mere possession, something less than ownership. It:

"lies somewhere in between title on the one hand and de facto possession on the other hand, and can best be defined as the right to possess or control the subject-matter of the gift". Borkowski 'Deathbed gifts', page 79.

Distinction between tangible and intangible property.

- Chattels and tangible property: actual or constructive delivery.
- Intangible property, such as a chose in action: 'indicia of title' will usually suffice.

But how should land be categorised? Arguably both intangible (title to land, equitable interests) and tangible (the land itself, including fixtures). Appellant submitted land should fall into a third category that required both a conceptual passing of *indicia* and physical possession and control.

Like the unsuccessful defendant in Sen v Headley, the appellant in Vallée relied upon Re Craven's Estate (Farwell J):

"the donor must put it out of his power between the date of the donatio and the date of his death to alter the subject matter of the gift and substitute other property or chattels for it."

Ultimately the decision in Vallée on this limb of the appeal depended upon a close analysis of Sen v Headley:

Nourse LJ did accept a distinction between dominion "over the deeds" and dominion "over the house". Seemed to indicate some physical control of bricks and mortar. Nourse LJ considered whether there might be a case where *indicia* were handed over, but dominion did not pass.

"We do not suggest that there might never be a state of facts where there was a parting with dominion over the essential indicia of title to a chose in action but nevertheless a retention of dominion over the chose itself. And it is just possible to conceive of someone, who, in contemplation of impending death, had parted with dominion over the title deeds of his house to an alleged donee, nevertheless granting a tenancy of it to a third party ... On facts such as those there might be a case for saying that the alleged donor had not parted with dominion over the house. But nothing comparable happened here. It is true that in the eyes of the law Mr. Hewett, by keeping his own set of keys to the house, retained possession of it. But the benefits which thereby accrued to him were wholly theoretical. ... there could have been no practical possibility of his ever returning home. He had parted with dominion over the title deeds. Mrs. Sen had her own set of keys to the house and was in effective control of it." [438F to 439A].

The appellant in Vallée contended that the opposite was true of Mr Bogusz's house. Ms Vallée had had no effective control of it. The benefits retained by Mr Bogusz were more than wholly theoretical because he still lived there and could do as he wished with it.

Deputy Judge conceded the concept of dominion was a "slippery" one [§ 42].

He dealt with the passage of Sen above by describing the features of the Sen case as 'sufficient' but not 'necessary' to the DMC.

The chances that Mr Bogusz might have made physical alternations to the house were wholly unrealistic given his health. The Court should look at practical not theoretical possibilities.

The retention of possession was consistent with a gift that took effect in the future. The Deputy Judge gave the example of the freehold reversion. Would not defeat the DMC if the donor continued to receive rent. However this proposition is perhaps not without controversy: would the same be said of control of bank account passbooks where the donor still went into the bank to collect interest on savings?

Lessons from Vallée and the future of the DMC

Causes for alarm for those who do not favour the DMC, and prefer certainty in the administration of estates?

- long interval between gift and death
- gift was effectively the entire value of the estate
- lack of physical control of the subject property by the donee
- dominion less easy to define than ever
- the risk of abuse:
consider the difficulty, especially for (say) charity legatees, to gainsay evidence of alleged donee.
Note that a donee can succeed on own evidence alone, uncorroborated.
Although the court will subject such evidence to considerable scrutiny⁷ (arguably even more so where donee is person best placed to obtain deeds after death), that may be of little practical assistance where the burden of proof remains on the balance of probabilities.

However, whilst deathbed gifts seem in rude health following Vallée it could prove to be the high water mark.

- a. the risk of abuse may be overstated. The DMC has not really entered into public consciousness (contrast it to, say, 'squatters' rights' of adverse possession).
- b. Difficult to conceive of many circumstances in which over 4 months is likely to be "impending" – the facts of Vallée were, after all, very unusual
- c. Possibly limited to unsophisticated donors such as Mr Bogusz (it is not clear what, if anything, he knew about making wills) or others who, perhaps for cultural

⁷ see Birch v Treasury Solicitor [1951] Ch 298, at 301 (evidence approached "rigorously") and Cosnahan v Grice [1862] 15 Moo PC 205 ("clearest and most unequivocal nature" of evidence required).

reasons, are not familiar with the requirements of testamentary formality in this jurisdiction

d. Explicable by judicial sympathy for claimant over defendant⁸? What more could Mr Bogusz have done, short of moving out of his home in order to effect the DMC?

e. But no doubt the greatest limitation on the future of the DMC is the ever-dwindling number of assets to which, in practice, it would seem to apply. There must be 'indicia of title' for the land / choses in action in question. Something you would 'normally' require to prove ownership. Probably means limited to Unregistered Land. Registered Land – no Land Certificate since LRA 2002.

Consider also uncertificated shares. Or deposit accounts without 'passbooks', accessed by password. Would giving a password be enough? Perhaps one 'shares' rather than 'gives' a password?

If one draws up a list of choses in action with 'indicia', it produces anomalous results: e.g. only deposit and current accounts operated by a deposit book

And there are other anomalies too:

e.g. Chq drawn by third party yes, because it is a chose in action, but a chq drawn on the donor's own account not a chose in action just a mandate to the bank (lapses on death).

What is left in practice? Assets with 'indicia' (in addition to unregistered land). The list is rather arbitrary⁹.

Mostly the assets identified that have 'indicia' are 'old fashioned', e.g. premium bonds, building society passbook accounts, a handful of others. But potentially they are those most likely to be owned by a person most likely to attempt a DMC?

Consider the problem of handing over a 'mixed bag' of documents. Would the court really find that some were capable of forming a DMC but not others where the donor's intention towards them was the same?

The justification for the DMC?

It is suggested that the future of the DMC depends upon its justification. What is it for and do we want it? (the million dollar question studiously avoided in the authorities).

The case for:

- It fulfils a human need for the donor. People seem naturally to believe it should work. No evidence of donors invoking the DMC because they know of the doctrine. Uncontrived and instinctive.
- The law should follow such moral impulses, and honour a person's last wishes wherever possible, rather than setting itself in opposition to that sense of natural justice
- Creates an expectation for the donee: proprietary estoppel of 1975 Act claims cannot assist in all cases
- It is generally desirable that estates should pass to those who the deceased truly intended to benefit
- It has stood the test of time

⁸ As at least one commentator has thought: see M. Bar 'Judicial Sympathy' S.J. 2013, 157(29), 14-15.

⁹ See the admirable attempts to compile such lists in Roberts 'Donationes Mortis Causa in a dematerialised world' Conv. 2013, 2, 113-128; and *Williams Mortimer & Sunnucks* on Executors Administrators and Probate, 20th edn. 2013 at 42-016 et seq.

- Concessions are already made in other circumstances, arguably no more deserving:
By statute - oral wills of military personnel on active duty (Wills Act 1837, s.11).
By intervention of equity – e.g. secret trusts

The case against:

- Counteracts the requirements of section 9 Wills Act 1837 as to due formality
- Risk of abuse (as above)
- Why should the law come to the aid of those who have time to make a will but do not do so, but not to the aid of those who attempt a will but unwittingly fail to execute it properly?
- Lack of immediacy undermines its moral justification, no need to be *in extremis*
- These days knowledge of, and access to, will-making is almost universal
- Anomalous result that, other than chattels, potentially it can only apply to a small and arbitrary list of property
- Uncertain meaning of 'dominion', and in identifying 'indicia'
- Simply too untidy, cases difficult to predict

The DMC is at a cross-roads, a cross-roads at which it has been parked for some time. Eventually a case will come along to test it (e.g. a DMC of registered land without a land certificate, or a DMC of a 'mixed bag' of certificated and uncertificated savings bonds). When that happens it seems impossible that the need to address the justification of the DMC, and its long-term future, can be avoided any longer.

Potential future approaches:

1. leave the DMC as it is, dwindling in relevance and eventually restricted almost entirely to chattels
2. abolition, whole or in part (e.g. in its application to land)
3. extension, to include all forms of property, perhaps by allowing dominion to include the passing of 'symbolic' indicia, contrary to current authority, perhaps counterbalanced by revisiting the meaning of 'impending' death to require a context of greater emergency.

It is suggested that Option 1 is the least defensible intellectually, but perhaps the most likely course in practice.

Option 2 seems unlikely, where the curtailing of the impact of the DMC could more conveniently be achieved by the status quo (Option 1).

Option 3 is the boldest, but arguably the most academically defensible. It follows most logically from the proposition that DMCs are a welcome feature of the law, and continues the approach of Nourse LJ in ridding the anomalous doctrine of internal anomalies. But this returns us to the paradox: the justification for the DMC is at best questionable, but if it is to survive in a coherent form perhaps it must be extended?

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