RIGOUR *MORTIS*

The recent Court of Appeal of England and Wales decision in *King* v *Dubrey* emphasises the need for strict compliance with the test for making a valid deathbed gift

BY CHARLOTTE JOHN

ABSTRACT

- *The Court of Appeal of England and Wales has recently reviewed the law relating to the doctrine of* donatio mortis causa. *Deathbed gifts, where the necessary requirements are complied with, are treated as an exception to the formal requirements for testamentary gift-making.*
- *The decision, which is binding on the courts of England and Wales, reaffirms the test for a valid deathbed gift and emphasises that the courts will insist on strict compliance with those requirements in the interests of avoiding abuse of the doctrine.*
- *The decision confirms that the earlier High Court case of* Vallee *v* Birchwood *was wrongly decided and brings welcome clarification to the law. However, the decision will make it more difficult for future claimants to successfully establish that a valid deathbed gift has been made.*

You would be forgiven for considering that the doctrine of *donatio mortis causa* (DMC) or deathbed gifts is something of a footnote in succession law. It is a subject that proves popular with law students but seldom gets an airing in practice.

The doctrine has recently been taken off the shelf and dusted down by the Court of Appeal in the case of *King* v *Dubrey and Others*,[1] in which it was decided that not only was the first-instance judgment under appeal wrongly decided, but that the earlier High Court case of *Vallee* v *Birchwood*[2] was also wrongly decided and should not be followed. It is clear from the decision of the Court of Appeal that the doctrine must be applied strictly and that the courts are unlikely to extend the circumstances in which the doctrine will be held to apply.

The facts of *King* v *Dubrey* were that the deceased, June Fairbrother, left the bulk of her estate, aside from a few minor legacies, to a number of animal charities that she had supported throughout her life. It was well known to her family members that she intended to leave her home (valued at around GBP350,000) to the charities that she supported. The claimant, Kenneth King, was her nephew and

1. [2015] EWCA Civ 581, [2016] 2 WLR 1
2. [2014] Ch 271

had something of a chequered past. He had been declared bankrupt twice and had been convicted of acting as a company director while disqualified. From about June 2007, following the breakdown of his marriage, Kenneth came to live with June, and the arrangement was that he would care for her in return for being provided with accommodation. June died in April 2011.

Kenneth contended that, about four months before her death, June had presented him with the deeds to the house (title to which was unregistered), stating: 'This will be yours when I go.' At the date of this discussion, June was in failing health but there was no evidence that she was contemplating her imminent death. On 4 February 2011, June had further written a document, which was witnessed by a friend, stating: 'In the event of my death I leave my house garden car etc and everything to Kenneth Paul King same address in the hope he will care for my animals as long as reasonable.' There was further evidence that purported to be a will (signed but not witnessed), reiterating June's intention that her house and the rest of her estate should pass to Kenneth, and again stating the request that Kenneth should care for her dogs and cats. The court noted, one senses with some disapproval, that Kenneth had not complied with her wishes regarding her animals, and had sent her dogs to a dogs' home.

At first instance, the deputy judge concluded that June's actions, in the words she spoke to Kenneth a few months before her death and in the delivery of the deeds, constituted a valid DMC of her house. In the alternative, if he was wrong about that, he considered that Kenneth would have a good claim to provision under the *Inheritance (Provision for Family and Dependants) Act 1975* (the 1975 Act), which Kenneth had claimed in the alternative, and which the judge hypothetically quantified at GBP75,000.

The charities appealed to the Court of Appeal. Kenneth cross-appealed the decision under the 1975 Act. In a unanimous decision (Jackson, Patten and Sales LJJ), the Court of Appeal upheld the charities' appeal in respect of the DMC and dismissed both appeals against the 1975 Act decision, permitting Kenneth to retain the award of GBP75,000 as reasonable financial provision.

THE BACKGROUND TO THE DOCTRINE OF DMC

The doctrine of DMC is neither fish nor fowl, being a disposition neither of a wholly testamentary character nor of a wholly *inter vivos* character. In essence, a DMC is a gift made in circumstances where death is imminently anticipated, and that is intended to take effect on death. It operates as an exception to the strict requirements of s9 *Wills Act 1837*, to save, in prescribed circumstances, a gift that would otherwise be void for failing to comply with the statutory formalities for a testamentary gift.

For those with a penchant for legal history, Jackson LJ, in giving the lead judgment in *King* v *Dubrey*, gave a short history of the doctrine.[3] DMC is a creature that originated in Roman law, refined and codified under Justinian I, and which made its way into the English common law in a series of decisions by judges in the 18th and 19th centuries.

Despite the apparent strictures of the maxim that 'equity will not perfect an imperfect gift', the law of equity is replete with examples of occasions when the courts have sought to temper the harsh results that may be produced by strict insistence on compliance with statutory formalities. It is no coincidence that the adoption of the doctrine of DMC into English law was contemporaneous with the enactment of the *Statute of Frauds (1677)*, which introduced formal requirements for the making of a will.

The doctrine of DMC had its heyday in the 18th and 19th centuries – a time when travel, war, childbirth and infectious disease all presented a greater risk of mortality. Our lives are now less risky and more predictable. Better education and ready access to affordable will-writing services tend to mean that the affairs of people today are better ordered, and it is unsurprising that there is less recourse to these sorts of informal arrangements. Prior to *King* v *Dubrey*, *Vallee* v *Birchwood* was the first reported decision in this area for around 20 years.

THE REQUIREMENTS OF A VALID DMC

Before the decision of the Court of Appeal in *King* v *Dubrey*, the doctrine of DMC was given its most recent and authoritative statement in the

3. Paragraphs 34-39

case of *Sen* v *Headley*,[4] in which the doctrine was further decided to apply to a gift of real property, notwithstanding the failure to comply with the formalities of s53(1) *Law of Property Act 1925* for the transfer of an interest in land.

The basic requirements of the doctrine may be summarised as follows:

- the donor must contemplate their imminent death;
- the donor makes a gift that is conditional on death, and that will only take place if and when their death takes place, and that will be revocable until that time; and
- the donor must deliver 'dominion' of the subject matter of the gift to the intended recipient.

Each of these requirements is subject to further qualification and constraint, which Jackson LJ considered necessary to keep the doctrine within its bounds and to prevent abuse.[5]

Of the first requirement stated above, Jackson LJ stressed that the donor must be contemplating their imminent death in the near future from a specific cause, which need not, however, be inevitable – there may be a prospect of survival or recovery. However, if the donor does not succumb to the death that they anticipated, the DMC will lapse and will not run on until their eventual death.

As to the second requirement, that the gift be conditional on death, Jackson LJ noted that it must generally be intended that the gift will be revocable until the date of death. The requirement that the donor should specifically require the property back if they survive may be relaxed in circumstances where early death is inevitable and there is no prospect of recovery.

The final requirement of parting with 'dominion' over the subject matter of the gift is the most difficult and 'slippery' of the three requirements. Since property will not pass until a future date (if ever) and the donor has the right to recover the property whenever they choose, it is not easy to understand what 'dominion' actually means. On reviewing the authorities, Jackson LJ concluded that it 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'.[6]

Those elements must, the Court of Appeal emphasised, be strictly applied – the doctrine being ripe for abuse by, in Jackson LJ's colourful terms, 'unscrupulous treasure hunters' – and the courts should not permit any further expansion of the doctrine.

THE DECISION ON APPEAL

Applying the law to the facts of *King* v *Dubrey*, the Court of Appeal unanimously concluded that Kenneth had failed to establish that June had made a valid DMC of her house to him for the reason that June could not be said to be contemplating her imminent death at the date of the discussions. June had not been suffering at the time from any specific illness, although she was aged 81 at the date of the conversation. Further, her words 'This will be yours when I go' were more consistent with an expression of testamentary intent than a gift that was conditional on her death within a limited period of time. This view was supported by the ineffective documents, which June had subsequently signed, that indicated she was trying to dispose of her estate by will and that were inconsistent with the view that she had already disposed of her estate by a DMC. All three of the Lord Justices expressed doubts about whether the evidence of Kenneth, which was uncorroborated, was sufficient to satisfy the requirement that there be clear and unequivocal evidence of the DMC.

THE DECISION IN *VALLEE* DISAPPROVED

Vallee v *Birchwood* appeared to have heralded a more permissive approach to the strict requirements of the doctrine of DMC. The claimant, Cheryle Vallee, was the daughter of the deceased, Mr Wlodzimierz Bogusz, who died intestate. Cheryle had been fostered and then adopted and consequently it was an agreed fact that she could not inherit upon intestacy. Cheryle had last seen her father in August 2003 and he died in December 2003. In the course of her last visit, Cheryle told her father that she planned to visit him again at Christmas. He replied, as it transpired with remarkable accuracy, that he did not expect to

4. [1991] Ch 425
5. Paragraphs 55–60
6. Paragraph 59

live very much longer and might not be alive by then. He said that he wanted her to have the house when he died. He went into another room and returned with the deeds to the house (to which title was unregistered) and a key, all of which he gave to her.

At first instance, a judge of the Oxford County Court held that these circumstances were sufficient to establish a DMC. That decision was upheld on appeal to the High Court, where the deputy judge hearing the appeal held that the deceased had made the gift in contemplation of impending death. The fact that he thought he might die within five months, and that he did in fact die five months later, was sufficient to fulfil this requirement. The deputy judge held that, in the context of DMC, 'dominion' meant conditional ownership. By handing over the deeds to his daughter, he delivered to her dominion over his house.

In *King* v *Dubrey*, the judgment of the High Court in *Vallee* was subjected to further scrutiny. Mr Bogusz, like many elderly people, was approaching the end of his natural lifespan. However, the Court of Appeal did not consider that he had reason to anticipate death in the near future from a known cause. If Mr Bogusz wished to leave his house to his daughter, he had ample opportunity to take advice and make a will. Accordingly, the decision in *Vallee* was wrongly decided and should not be followed.

POINTS FOR PRACTITIONERS

It is quite clear that the Lord Justices constituting the bench in *King* v *Dubrey* do not much care for the doctrine of DMC, Jackson LJ stating: 'I must confess to some mystification as to why the common law has adopted the doctrine of DMC at all. The doctrine obviously served a useful purpose in the social conditions prevailing under the later Roman empire. But it serves little useful purpose today, save possibly as a means of validating deathbed gifts.'[7] The scope for the doctrine to be abused was of particular concern (no doubt a reflection of their reservations concerning the credibility of Kenneth King's evidence). The doctrine subsists but is unlikely to be applied more flexibly.

> 'The requirements of the doctrine are unlikely to be relaxed and "unequivocal evidence" is said to be required before a purported *donatio mortis causa* will be upheld'

The following points should be noted:

- The requirements of the doctrine are unlikely to be relaxed and 'unequivocal evidence' is said to be required before a purported DMC will be upheld.
- The donor must contemplate imminent death from a known cause – e.g. an illness or risky impending operation. It is not enough that they have a general sense that they do not have long to live.
- Subsequent attempts to make a will disposing of the subject matter of the DMC are likely to support the view that no DMC had been made (since, if the testator believed that they had already made an effective DMC of the property in question, there would be no need to make a will).
- The question of whether or not the doctrine may apply to registered land is yet to be resolved. Many commentators consider that the doctrine will not apply to registered land due to the requirement stated in *Birch* v *Treasury Solicitor*[8] that the donor must pass the '*indicia*' of title to the donee where the asset in question is one that cannot be physically delivered to the donee – namely the document that must be produced to establish ownership of the asset. In the case of unregistered land, that document is the title

7. Paragraph 53

8. [1951] Ch 298

deed; in the case of registered land, no such document exists.
- Does the view of Jackson LJ – that the requirement that the donor parts with dominion over the asset may be established by evidence that the donor had delivered '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' – leave open the possibility that the doctrine could apply to registered land? Do these alternative means of establishing that dominion has passed apply to all assets or does the permissible method strictly depend on the nature of the asset? Could mere physical possession, by permitting the donee into occupation, be enough? The passing of title deeds to unregistered land has no legal effect as such and is a symbolic act; might some other form of symbolic act suffice in the case of registered land? It remains to be seen whether some other form of symbolic *indicia*, such as historic deeds, other conveyancing documents or Land Registry printouts could suffice if coupled with the means of accessing the property. While the Court of Appeal has strongly indicated that the doctrine should not be extended, it is difficult to see why there should be a difference in approach between registered and unregistered land.

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DONATIO MORTIS CAUSA: THE APPLICATION IN AUSTRALIA

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In Australia, the recent decision of White J in *Hobbes* v *NSW Trustee & Guardian* [2014] NSWSC 570 is a rare example of judicial consideration of the doctrine of *donatio mortis causa* (gifts made in contemplation of death). This has been described as 'a curious doctrine', neither entirely *inter vivos* nor testamentary (Dal Pont and Mackie, *Law of Succession* (LexisNexis, 2013), at [1.15]).

In *Hobbes*, White J referred to the three essential requirements, as outlined in *Public Trustee* v *Bussell* (1993) 30 NSWLR 111:
- The gift must be made in contemplation of death.
- There must be delivery of the subject matter to the donee or a transfer of the means or part of the means of getting at the property, or the essential *indicia* of title.
- The gift must be conditional on it taking effect on the death of the donor, being revocable until then.

The following items were given by the deceased to Ms Hobbes:
- A passbook for his passbook account, and a card containing details of his fixed-term investment account. The deceased said: 'Take these. I don't need anymore' and 'Plenty there for you. Look after you'.
- The keys to his apartment. The keys were later returned to him by Ms Hobbes.
- A council-rates notice, the deceased saying 'You live here when I go' and that the unit was 'now yours'.
- The keys (again), the deceased saying: 'All yours now. Not coming back. Look after Shorty.' Shorty was the deceased's pet bird.

The first and third requirements were found to be satisfied in relation to each of the gifts. The second requirement was met in relation to the passbook account and the fixed-term investment account, but not in relation to the unit. White J considered the question of whether an absolute interest in land could be the subject of a valid *donatio mortis causa*, but did not need to decide the point, since he found that the delivery of the certificate of title would have been a delivery of the essential *indicium* of title, but delivery of the keys and rates notice was not.

The judgment is accessible at bit.ly/HobbesvNSW