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A new lease of life for Donatio Mortis Causa?

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Abstract

Coronavirus (COVID-19) has thrown the world into disarray. New developments and contingency measures are being adopted on a daily basis. New legislation has been adopted to regulate people's lives. As every law student learns, equity developed to address the inadequacies of the common law and achieve justice when to deny it would be unconscionable. Ideally all those confronting the possibility of death from this virus would have had the time and resources to draw up a will. The reality is that many will not have had either. This article considers the equitable institution of donatio mortis causa and its relevance in the current crisis.

Introduction

There have recently been news items about people making wills while observing social distancing,¹ but of course not everyone will think about wills and may be reluctant or unable to seek the assistance of a solicitor to draw up such a document. Given we live in uncertain, COVID-19 times perhaps it is appropriate to consider what other legal institutions might be relevant.

¹ For example, by leaving the will signed by the testator on the bonnet of a car for witnesses to sign while observing social distancing.

This short paper considers the well-recognised equitable institution of the Donatio Mortis Causa (DMC), often referred to in the context of ‘saving’ imperfect gifts or incompletely constituted trusts. Basically, the DMC is a gift made in contemplation of and conditional on death. If death does not occur, then the gift does not materialise. A DMC has been described as an anomaly,² and ‘a singular form of gift ... of an amphibious nature’.³ It operates outside the Wills Act 1837, and as an exception to the equitable maxims that ‘equity will not assist a volunteer’ and ‘equity will not perfect an imperfect gift or complete an incompletely constituted trust’. The origins of the DMC seem to be Roman law,⁴ but it finds application in English law cases through the nineteenth century onwards, such as *Cain v Moon* [1896] 2 QB 283, *Wilkes v Allington* [1931] 2 Ch 104, and *In Re Craven’s Estate* [1937] 1 Ch 423.

The Donatio Mortis Causa

Over the years the courts have carefully considered various aspects of the DMC, most recently set out in the case of *Keeling v Keeling* [2017] EWHC 1189 (Ch). The key requirements are that there must be contemplation of death – over and above the general consideration that death is the inevitable end of everyone. The contemplated cause may be recognised – for example terminal cancer; or may be non-specific. For example, a person suffering from an existing medical condition may be identified as being particularly vulnerable to succumbing to COVID-19, but may in fact die of something else, or a combination of factors. It must therefore be apprehension of a present peril which could

² Nourse LJ, *Sen v Headley* [1991] Ch 425, 430.

³ Buckley J, *In Re Beaumont* [1902] 1 Ch 889, 892.

⁴ *King v The Chiltern Dog Rescue and Redwings Horse Sanctuary* [2015] EWCA Civ 581, para 35-37; Peter Sparkes, ‘Death-Bed Gifts of Land’ (1992) 43(1) N. Ireland Legal Quarterly 35. The leading text is Andrew Borkowski, *Deathbed Gifts: The Law of Donatio Mortis Causa* Blackstone, 1999.

include embarking on a perilous journey, going into hospital for surgery, or, arguably, being fearful of contracting COVID-19. The intention to make the 'donatio'/gift must be conditional on death (hence the misleading terms 'deathbed gift'). If death does not materialise as contemplated, then there is no DMC and the right to revoke the gift – express or implied - is a third feature. Finally, there must be some form of delivery of 'dominium' or means whereby the property intended to be transferred can be controlled by the donee.

Firstly, contemplation of death has been clearly explained in *Vallee v Birchwood* [2013] EWHC 1449 (Ch) by Jonathan Gaunt QC sitting as a deputy High Court judge, who stated at para 25:

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 ... The fact that the case law requires only that the gift be made in the *contemplation* and not necessarily the *expectation* of death supports this view.

Secondly the gift must be conditional on death so that if death does not occur the gift is revoked.

Thirdly there must be transfer of control (often referred to as dominium). Panesar writing in 2013 explained this as requiring the donor to transfer to the donee 'an element of control on the part of the donee of the gift. For example, in the case of a painting, the donor must transfer physical possession of the painting. In such a case the gift is complete, as the legal

title will have passed to the donee. The donor must have an intention to part with control over the subject matter of the gift.’⁵

Leow has pointed out that rather than legal ownership, dominium is more closely aligned to factual possession, although even here it would seem that this need not be absolute, for example the donor may keep a spare set of keys to a car, deed box or desk, or may remain in occupation of a house. The transfer of control may amount to de lege control, but more usually will require further steps to be taken if and when the gift takes effect on the death of the donor, for example, shares transferred by way of handing over share certificates will require the donee to be registered in the company’s register; keys for a car will require registration of the new owner with the relevant authorities.⁶ Bansal on the other hand argues that dominium is not to be confused with possession, while also appearing to accept Jackson LJ’s view that ‘It is not easy to understand what ‘dominion’ actually means. I take comfort from the fact that even chancery lawyers find the concept difficult.’⁷ Bansal suggests that there must be transfer of some indicia of title but as Roberts points out there is no consistent use of indicia of title in today’s ‘dematerialised world’. Lord Justice Jackson, in *King*, points out that the transfer of dominium is particularly problematic where the donor will not part with ownership until death occurs and where ownership is to revert back to the donor should death not occur. He concludes that, “”dominium” means 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’.⁸

⁵ Sukhinder Panesar, ‘Title deeds to land and donation Mortis Causa, *Vallee v Birchwood* [2013] EWHC 1449 (Ch)’ (2014) 1 *Conveyancer and Property Lawyer*, 69-75, 72.

⁶ Rachel Leow, ‘Donatio Mortis Causa of registered land in the Singapore High Court’ (2011) 25(3) *Trust Law International* 145-149.

⁷ *King v Dubrey* [2016] Ch 221, para 59.

⁸ As above at 59.

The advantage of a DMC is that formalities for transfer are waived provided there is a clear intention to make such a gift with some evidence of actual or constructive transfer of control of the subject matter. The nature of the transfer may vary depending on the property in question. Case law has included transfer of vehicles (*Woodward v Woodward* (1995) 3 All ER 980 CA; Post Office Savings Book (*R Weston* (1902) 1 Ch 680 ChD); shares and monies (*In Re Craven's Estate* [1937] 1 Ch 423; and land (*Sen v Headley* [1991] Ch 425).

For many people their most valuable assets – and those which they may wish to control in terms of successor of title – are the property they live in – either freehold or leasehold, bank accounts or cash savings, and possibly some personal property such as car, jewellery, paintings, furniture etc. The degree of formality required for making gifts of such property may be minimal, for example a hand-written list of jewellery or paintings; or may be achieved by symbolic transfer of possession for example handing over car keys or the DVLC paperwork for a car. While a DMC of land has been recognised in the case of *Sen v Headley* and since followed, the case-law has dealt with unregistered land and actual or constructive control over title deeds. Nevertheless, *Sen v Headley* indicated that the same would apply to registered land where a Land Certificate ‘would amount to a sufficient indicium of title to be the equivalent of the title deeds of unregistered land’.⁹ However, under the Land Registration Act 2002 the register is the title, and while the registered proprietor can obtain an official copy of the register from HM Land Registry, there is no Land Certificate as such.¹⁰ One of the objectives of the Land Registration Act 2002 is that the register should be an accurate

⁹ Nicholas Roberts, ‘Donationes mortis causa in a dematerialised world’ (2013) 2 Conveyancer and Property Lawyer 113-128, 113.

¹⁰ The Land Registration Act 2002 contains the power in Sch 10, para 4 to issue a land certificate but this has not been exercised.

reflection of the title as it stands at any given time and this is supported by HM Land Registry not issuing any indicia of title to a registered proprietor.¹¹ On completion of a registration, HM Land Registry issues the registered proprietor with a 'title information document' which is made up of an official copy of the register but clearly states that it is supplied for information only. The transfer of registered land under a DMC, therefore, poses problems. Clearly control of the register (which exists in a virtual world of electronic data) cannot be transferred.

Could an official copy of the register handed over by the donor, perhaps together with the keys to the property and/or a written note explaining the donor's intention, amount to a DMC? The Singapore High Court in *Koh Cheong Heng v Ho Yee Fong* [2011] SGHC 48 suggested that a DMC of registered land could take place, but this point was not considered in *King v Dubrey* [2015] EWCA Civ 581, which dealt only with unregistered land. Roberts and Bernal both rule out a DMC of registered land, but to date the courts have not been asked to address the issue.

The Land Registration Act 2002 provides that an official copy of the register is admissible in evidence to the same extent as the original.¹² Could this assist in a DMC claim? It is agreed amongst commentators that there are no indicia of title outside the register, but if an official copy of the register is admissible as if it were the original register why cannot an official copy handed over by a registered proprietor not amount to an indicium of title, especially if supported by the only set of keys and/or a note of intention? Support for this would come from the 9th edn of Oakley, Parker & Mellows which 'opines that, since the LRA 2002,

¹¹ See 'Land Registration for the Twenty-First Century: A Conveyancing Revolution' (2001) Law Com No 271, para 1.5.

¹² Section 67(1) of the Land Registration Act 2002.

handing over official copies of the Land Registry entries will suffice'.¹³ Should registered proprietors, therefore, be making sure that they obtain official copies of the register – which might be easier than arranging to see or consult a solicitor about a will?¹⁴ Alternatively, should practitioners make sure that they send clients a copy of the register?¹⁵

A further consideration is whether, in the current climate of waiving or deferring official requirements,¹⁶ the ‘title information document’ together with a set of keys, would be sufficient transfer of dominium? The top sheet which states ‘for information only’, to which the copy of the register (entitled Official Copy) is attached, is essentially an administrative document. What weight should currently be attached to this in the circumstances of a DMC?

Lord Justice Patel in *King* stated:

The paramount principle established by the earlier authorities is that the law’s recognition of a DMC as a valid means of transferring property on death operates as an exception rather than an alternative to the requirements of the Wills Act **or any other statutory provisions governing the valid transmission of interests in property.**¹⁷

Could this include the Land Registration Act?

¹³ Cited in a footnote by Roberts above, 114, note 7.

¹⁴ Although it should be pointed out that anyone can obtain copies of the register on application and payment of a fee.

¹⁵ Limited empirical research among solicitors, suggests that on completion of registration this is usual practice.

¹⁶ For example, vehicles may be on the road without valid MOTs because there is now a period of grace due to COVID-19.

¹⁷ *King v Dubrey* [2015] EWCA Civ 581, para 90. Emphasis added.

The replacement of hard-copy indicia of title to various forms of property - including those in action, has been extensively explored by Nicolas Roberts and clearly presents challenges for the continued application of DMCs in a number of circumstances in normal times.¹⁸ In the current COVID-19 climate, however, one might argue that the DMC deserves a ‘new lease of life’. Of course, it might be the case that those who are most vulnerable to the virus (especially the elderly) may still be living in unregistered property and have intangible property in the form of savings books, heirlooms etc which still have physical indicia of title. Here, then a DMC would still be possible.

Where does a DMC ‘fit’ into the law?

The DMC is often regarded as being *sui generis*, something of anathema, sitting awkwardly alongside other legal institutions. It is clear that a DMC does not take effect until death yet it operates outside any will and indeed would be interpreted as removing property from the estate of the deceased during his or her lifetime.¹⁹ In the interim between the DMC and death, what is the position of the donor *viz a viz* donee? Clearly the donor does not forfeit all rights to the property as should the donor not die the DMC does not take effect. Is this therefore a form of trust? In other words, either the donor holds the property on trust for the donee until death – and indeed may continue to enjoy the property, as in *King v Dubrey* [2025] EWCA Civ 581, or does the donee hold the property on a resulting trust for the donor should the donor not die? The problem here is that any evidence of ‘donatio’ ie a gift, could rebut a resulting trust.

¹⁸ Nicholas Roberts, ‘Donationes mortis causa in a dematerialised world’ (2013) 2 Conveyancer and Property Lawyer 113-128.

¹⁹ *Lord Advocate v M’Court* (1893) 20 R. (Ct of Session) 488.

Clearly this cannot be an express trust, because once created such a trust would be unrevokable,²⁰ thereby defeating one of the distinguishing features of a DMC. While any such express trust would in any case fail in respect of land – whether registered or unregistered, leasehold or freehold, unless there was compliance with the formalities of the 1925 Law of Property Act, it could be upheld in respect of chattels. However, the intention behind the DMC and an express trust are fundamentally different, and while a person facing death may certainly create a trust this is an entirely different legal creature.

The trust concept was considered in a Singapore case *Koh Cheong Heng v Ho Yee Fong* [2011] SGHC 48 (HC (Sing)), in which the judge considered the proposition ‘that legal title of the property passes to the donee while equitable title remains with the donor under the trust conception of *donatio mortis causa*. The donee then holds the property on trust for the donor, subject to a condition subsequent which extinguishes the trust on the donor's death.’²¹

As Rachel Leow points out in her comment on this case, ‘The main difficulty with the so-called trust conception of *donatio mortis causa* is that it is dependent on the legal transfer of the property to the donee, ie a transfer in accordance with the formalities necessary to pass legal title’.²² This as pointed out above, becomes problematic in the case of land and/or chose in action.

If a DMC is based alternatively on a conditional gift, this difficulty might be avoided; an approach preferred by the judge in the Singapore case:

²⁰ *Paul v Paul* (1882) 20 Ch D 742.

²¹ *Koh Cheong Heng v Ho Yee Fong* [2011] SGHC 48 (HC (Sing)) para 29. The Singapore law of succession draws heavily on the English law.

²² See Leow, above.

Under the Gift Conception, at the time of delivery, the donee obtains a "gift" of *at least* equitable title to the subject matter. He may also obtain legal title, depending on the precise subject matter being transferred and the donor's compliance with the necessary formalities. However, although the "gift" vests in the donee immediately, it is subject to a condition that it may be revoked.²³

Alternatively could this be a situation where equity needs to step in drawing on a range of equitable foundations such as a focus on intention rather than form, the question of what is conscionable (or unconscionable) in the circumstances, or to draw on an old adage 'equity is not past the age of child-bearing'.²⁴

In the Singapore case above, the Judge held that 'the best explanation for the power of revocation in a situation where legal title has been vested in the donee is that a *remedial constructive trust* ("RCT") arises upon revocation.'²⁵ It was recognised that the RCT has not been accepted in English law, but her Honour reasoned that:

"[T]he English reluctance to adopt RCT reasoning stems from the fear that the RCT would result in wide-ranging general judicial discretion to declare property rights ... While the professed fears of the English courts are certainly understandable, in my view, it would not be overly extending the law or generating uncertainty in proprietary rights to utilise the RCT analysis as the theoretical basis for the power of

²³ *Koh Cheong Heng v Ho Yee Fong* [2011] SGHC 48 (HC (Sing)) para 38.

²⁴ A question considered by Mark Pawlowski, 'Is Equity past the age of childbearing?' (2016) 22(8) *Trusts and Trustees* 892-897, and answered in the negative.

²⁵ *Koh Cheong Heng v Ho Yee Fong* [2011] SGHC 48 (HC (Sing)) para 43.

revocation in a *donatio mortis causa* situation. The conditions required for a valid *donatio mortis causa* are stringent, and there is no fear that adopting RCT analysis to explain part of the doctrine would result in the widespread uncertainty feared by English judges.²⁶

Unfortunately, the reluctance of English law to embrace the remedial constructive trusts leaves the DMC as a *sui generis* legal concept falling somewhere not only between life and death but also gifts and trusts. It remains valid for certain forms of personal property and may apply to land in certain circumstances. The Supreme Court has yet to address the matter and before it does so no doubt many more people will have died from COVID-19. Much therefore depends on what can be done now.

The underlying concern around the DMC in English law is the possibility of fraud, perjury and abuse of process. These would normally be valid concerns. However, in the current climate a number of usual formalities and procedures are being waived or relaxations considered. For example, the requirements under s9 Wills Act 1837 for making a valid will are being relaxed in so far as being in the presence of the testator may be at a distance; courts may (although this has yet to be tested) exercise dispensing power in respect of invalidly drafted wills – a recommendation made by the Law Commission some time ago; and the equivalent of soldier or sailor wills (nuncupative wills) may be permitted. These latter, permit those in the field of battle or in action to make wills without any formalities.²⁷ Referred to as ‘privileged testators’ the law recognises three categories: a soldier in actual military service; a mariner or seaman being at sea; any member of her Majesty’s naval or marine forces so

²⁶ *Koh Cheong Heng v Ho Yee Fong* [2011] SGHC 48 (HC (Sing)) para 46.

²⁷ Section 11 of the Wills Act 1837.

circumstanced that, if they were a soldier, they would be in actual military service. Over time the categories of those covered have expanded as have the circumstances in which such wills are valid. Although it may be stretching the law, given that ‘actual military service’ is not confined to the theatre of war, one might wonder whether those servicemen and women called on to assist in ‘fighting’ the coronavirus can rely on such wills. Would for example, an army doctor serving in a hospital – even a field hospital such as that constructed in the Excel Arena, be covered? Would the language of war that is being used in the context of this ‘invisible and deadly enemy’ extend to encompass others, such as NHS staff, in the ‘frontline’, dying serving their country?

Daniel Bansal has argued that the DMC is of ‘limited social utility’. He quotes with approval Jackson LJ in *King v Dubrey* [2016] Ch 221 who held:

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 death bed gifts. ... In my view therefore it is important to keep DMC within its proper bounds. The court should resist the temptation to extend the doctrine to an ever wider range of situations (53).

It is our suggestion that in fact the DMC could today serve a very useful purpose. It is not suggested that the doctrine be extended to ‘an ever wider range of situations’ as it has already been recognised by the courts that there can be a DMC of all sorts of property including land. Indeed, in extending the law in the case of *Sen*, Lord Justice Nourse asked:

Has any sound reason been advanced for not making the necessary extension? ... we do not think that there has ... it is notable that the two previous authorities in this court, *In re Dillon* (1890) 44 Ch.D. 76 and *Birch v. Treasury Solicitor* [1951] Ch. 298, have extended rather than restricted the application of the doctrine ... Moreover, certainty of precedent, while in general most desirable, is not of as great an importance in relation to a doctrine which is as infrequently invoked as this. Finally, while we certainly agree that the policy of the law in regard to the formalities for the creation and transmission of interests in land should be upheld, we have to acknowledge that that policy has been substantially modified by the developments to which we have referred.²⁸

Nor are we suggesting that the DMC be ‘used as a device in order to validate ineffective wills’.²⁹ Indeed, developments in the law relating to wills, especially when considered in the current climate of COVID-19, suggest a relaxation of formalities and a greater willingness to give effect to the intention of those facing dying. Writing two years ago, Bansal concludes ‘If the law is conceding to human weakness and frailty when faced with impending death, it ought not to discriminate against different types of property ... the doctrine could be extended to include intangible registered interests, such as (registered) land. This could be achieved by either restricting the doctrine ... to only include true deathbed situations in the context of greater emergency, and justify deviation from statutory formalities; or, to relax the ‘dominion’ requirement.’³⁰ Either of these approaches would make sense in the current climate.

²⁸ *Sen v Headley* [1991] Ch 425, 440.

²⁹ A fear expressed in *Birch v Treasury Solicitor* [1951] 1 Ch 298.

³⁰ Daniel Bansal, ‘Donatio Mortis Causa in a System of Registration’ (2018) 24(7) *Trusts and Trustees* 667-672, 672.

Returning to the point made at the outset of this article, that a DMC is most often called on to try and save an imperfect gift or incompletely constituted trust, perhaps it is time to revisit Lady Justice Arden's statement in *Pennington v Waine* that 'equity would strive to perfect an imperfect gift in circumstances where not do so would be unconscionable'.³¹

³¹ *Pennington v Waine* [2002] EWCA Civ 227.