

## Donatio Mortis Causa or “Death Bed Gifts”

### *Davey v Bailey* [2021] EWHC 445 (Ch)

*Donatio Mortis Causa* or “death bed gifts” are a legal anomaly, enabling the disposal of property in a testamentary fashion without the need for adherence to the provisions of the Wills Act 1837 or a range of other statutory formalities, particularly in the case of the disposal of land.

The recent decision in *Davey* has brought the doctrine back into the spotlight in the midst of a pandemic which has rendered many gravely ill and potentially unable to put their affairs in order, despite the provision for the witnessing of wills by video.<sup>1</sup> The decision in *Davey* is explored below and the conditions for a valid DMC are reviewed.<sup>2</sup>

#### I. Facts

*Davey* concerned the estates of a devoted married couple, Mrs and Mr Bailey. After his wife’s death Mr Bailey attended solicitors to draft a revised Will but in the events this process was never completed. Mr Bailey died of a heart attack, the gift to his wife in his will failed due to her prior death and Mr Bailey was therefore wholly intestate.

However, Mrs Bailey's sister and brother, claimed that the couple made gifts of a substantial part of their sizeable estates in January 2019, in contemplation of their respective deaths. It was also claimed that Mr Bailey made such a gift in February 2019 of the house he had owned jointly with his wife.

The Deceased had been advised that the survivor of them would need to make a new will, both were advised of this when their instructions were taken in 2009 for their initial wills. The court determined that Mr Bailey did not live long enough to ensure that his will was changed to bring his testamentary intentions for the substantial benefit of both sides of the family to fruition.

#### The Gifts

The Gifts in question were (1) the transfer of Butcher’s shop to Mrs Davey as agent for her brother; (2) half of the residue of the couple’s estate to Mrs Davey herself and as agent for her brother; (3) a gift of a property by Mr Bailey alone to Mrs Davey in February 2019.

Dominion was said to be “delivered” by the completion of a Macmillan checklist by Mrs Bailey together with Mrs Davey and her brother. In the case of gift (3), dominion was delivered by handing over pre-registration deeds and office copy entries in respect of the Property to Mrs Davey.

#### II. DMC – The Essentials

The statement of Buckley J in *Re Beaumont* [1902] 1 Ch. 889 (approved by the Court of Appeal in the leading decision of *King v Dubrey* [2016] Ch. 221) was approved in *Davey* as follows:

*"A donatio mortis causa 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*

<sup>1</sup> Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020

<sup>2</sup> All attempts have been made to ensure the accuracy of the contents of this note. Specific advice should be sought and obtained in any case and this advice does not attempt to provide more than a summary of the *Davey* decision and the general law on DMCs.

*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. The Court must find that the donor intended it to be absolute if he died, but he need not actually say so."*

The requirements for a valid "death bed gift" were definitively stated in *King*. Such gifts require the following three criteria to be satisfied:

- (i) D contemplates his impending death.
- (ii) D makes a gift which will only take effect if and when his contemplated death occurs. Until then D has the right to revoke the gift.
- (iii) D delivers dominion over the subject matter of the gift to R.

The court will adopt an approach which requires the strictest scrutiny of the factual evidence to establish the three conditions have each been met. Courts will not allow a DMC to be used as a tool to validate an ineffective will.

### **Contemplation**

As to element (i), D must contemplate impending death for a specific reason. Contemplation is subjective. D cannot hold a general looming fear of death for an unspecified reason or at a time in the distant future. D must have a good reason to anticipate death, though death need not be inevitable.

Examples of contemplation include a pending operation which might prove fatal (*Re Craven's Estate* [1937] Ch. 423) or a serious illness or incurable disease (*Wilkes v Allington* [1931] 2 Ch 104). In light of such examples and the widespread and widely known potential prognosis of severe cases of Covid-19 there appears no reason in principle why a valid DMC could not arise in contemplation of impending death from Covid-19.

### **Conditional and Revocable Gift**

As to (ii), D must make what has been described as "*an unusual form of gift*" in that the gift is contingent upon D's death and revocable until that contingency occurs. In this way a deathbed gift is in all terms similar to the testamentary disposition effected by a valid will. The gift is also distinguishable from an immediate inter vivos transfer for the same reason of contingency.

Further, the Court of Appeal in *King* held that "*the gift will lapse automatically if D does not die soon enough.*" The precise timing sufficient to constitute "*soon enough*" for the purposes of a valid DMC will be a question of fact in the particular circumstances and in view of the reason for the contemplation of death.

Death for DMC purposes need not be inevitable, but where early death is inevitable the law relaxes the requirement for D to require the property back if she survives. Precisely when death is "*inevitable*" will also be a medical question of fact.

### **Delivery of Dominion**

Finally, element (iii) requires the delivery of "dominion." Dominion 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.<sup>3</sup>

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<sup>3</sup> *King v Dubrey* at [59]

Difficulties may arise with element (iii) in Covid-related cases given the lack of physical access to relatives and the limited ability to engage with relatives often only via distanced electronic communication. There is a very real question as to whether dominion can be adequately delivered in such cases and whether courts may be persuaded to take a broader view of the delivery of dominion in circumstances where physical delivery is likely to have been rendered impossible by national restrictions. Given the emphasis on a DMC as a gift, the accompanying law of delivery established for gifts and the reluctance to expand DMCs any further such flexibility may not be forthcoming.<sup>4</sup>

### III. The Decision in *Davey*

Requirement (i) was made out in respect of Mrs Bailey who was acting in contemplation of death from diagnosed cancer.

Requirement (ii) was also made out, in that any gift was to be conditional upon Mrs Bailey's death. However, it was considered less clear whether Mrs Bailey's intention was that any gifts would take complete effect on her death, i.e. "when" not "if" the contemplated death occurred.

The particular issue for the court was the desire of both of the Deceased that Mr Bailey would attend a solicitor's office to prepare a new Will after his wife's death. In that way both considered that the disposition in question would be effected by the revised Will.

A final difficulty arising in *Davey* was the unparticularised nature of the gifts in contemplation. The court held that:

*"neither of them were of specific property whether real property, or of a particular pension, investment or bank account. If they were gifts at all, they were of a given value or percentage of assets, whether as equivalent to the value of the butchers or 50 percent of the remainder of their combined assets. It is clear...that there was no delivery of the subject matter of any gift or means of access to it."*

The Claimants' relied heavily upon the Macmillan form, in respect of which the court held:

*"The form relied upon does not amount to a title deed or to a document showing entitlement to possession of any of the assets of Mrs or Mr Bailey. It is a piece of paper on which their testamentary wishes have been written. It does not satisfy the third requirement."*

The final gift by Mr Bailey failed on the evidence due to a lack of qualifying contemplation of death.

A point left open for future decision is how dominion is transferred in the case of land and whether there is a difference between registered and unregistered land. Delivery of deeds of *unregistered* property may constitute delivery of dominion. However, there is no authority in England and Wales that pre-registration deeds or office copy entries in respect of registered property may amount to the same.

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3 March 2021

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<sup>4</sup> If the means of access to the gifted item is already with the donee this may avoid the issue: *Woodard v Woodard* [1995] 3 All E.R. 980.

The position is unlikely to be any easier in the case of choses in action where the donor may not have access to any indicia of title for the purposes of documentary transfer