Neutral Citation Number: [2015] EWCA Civ 581

Case No: A3/2014/2704

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
MR HOLLANDER QC, SITTING AS A DEPUTY HIGH COURT JUDGE
HC12E03256

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2015

Before :

LORD JUSTICE JACKSON
LORD JUSTICE PATTEN
and
LORD JUSTICE SALES

- -

Between:

KENNETH PAUL KING	**Claimant/ Respondent**
- and -	
(15) THE CHILTERN DOG RESCUE **(17) REDWINGS HORSE SANCTUARY**	**Defendants/ Appellants**

- -
- -

Ms Penelope Reed QC and **Mr Mark Mullen** (instructed by **Wilsons Solicitors LLP**) for the **Defendants/Appellant**
Mr Edward Rowntree (instructed by **Berry & Berry LLP**) for the **Claimant/Respondent**

Hearing date: Tuesday 28th April 2015

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Approved Judgment

Lord Justice Jackson:

1. This judgment is in eight parts, namely:

Part 1. Introduction

2. This is an appeal by charities who are entitled to inherit under a will against a decision that (a) the deceased transferred her house to her nephew by a *donatio mortis causa*, alternatively (b) the nephew is entitled to recover £75,000 against the estate as reasonable financial provision. The principal issue in the appeal is whether the deceased's words and conduct a few months before her death gave rise to a *donatio mortis causa*. This in turn will involve examining the scope of that doctrine in modern law.

3. In this judgment I shall refer to *donatio mortis causa* as "DMC". I shall refer to the Wills Act 1837 as "the Wills Act". I shall refer to the Law of Property Act 1925 (as amended) as "the Law of Property Act". I shall refer to the Inheritance (Provision for Family and Dependants) Act 1975 as "the 1975 Act".

4. Section 9 of the Wills Act provides:

> "**Signing and attestation of wills**
>
> No will shall be valid unless —

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either —

(i) attests and signs the will; or

(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary."

5. Section 52 (1) of the Law of Property Act provides:

"**Conveyances to be by deed**.

(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed."

6. Section 1 (1) of the 1975 Act provides:

"**Application for financial provision from deceased's estate.**

(1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons:—

….

(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant."

Subsequent provisions of the 1975 Act enable the court to award reasonable financial provision out of the deceased's estate to a claimant falling within section 1 (1).

7. Having set out the relevant statutory provisions, I must now turn to the facts.

Part 2. The facts

8. The two central characters in this story are June Margaret Fairbrother ("June"), who is now deceased, and June's nephew, Kenneth Paul King. Mr King is claimant in the present proceedings and respondent before this court. I shall refer to him as the claimant.

9. June was born on 5th June 1929. She served as a police officer in the Hertfordshire Constabulary throughout her working life. After retiring June lived at 12 Kingcroft Road, Harpenden, of which she was the freehold owner. That property is now worth about £350,000. June was a single woman, having divorced many years earlier. She had no children. June was extremely fond of animals. She kept a number of cats and dogs. She also helped several animal charities with their work. It was common knowledge within the family that she intended to leave her property to the animal charities which she supported.

10. On 20th March 1998 June made a will. By that will she left a number of modest legacies to friends and relatives. She left the rest of her estate, which was the bulk of her property, to the following seven charities:

    1) The Chiltern Dog Rescue

    2) The Blue Cross Animal Shelter

    3) Redwings Horse Sanctuary

    4) The Donkey Sanctuary

    5) The International Fund for Animal Welfare

    6) The PDSA

    7) The World Society for the Protection of Animals

    I shall refer to those seven charities collectively as "the charities".

11. I now turn to the claimant. He followed a somewhat different path in life from his aunt. He worked in the construction industry, but became bankrupt in 1990. In 1996 he was disqualified from acting as a company director for eight years. In 2000 the claimant was made bankrupt again. Undeterred the claimant proceeded to act as a company director, while he was disqualified from doing so. In August 2005 the claimant was convicted of that offence and sentenced to twelve months imprisonment.

12. The claimant was released from prison in December 2005. In October 2006 the claimant separated from his wife and went to stay at the home of his friend, Paul

Whitehead, in Tunbridge Wells. The claimant worked in the construction industry with Mr Whitehead and paid £600 per month for his accommodation.

13. In the summer of 2007 the claimant went to live with his aunt. June was becoming increasingly frail. The arrangement was that the claimant would care for June as necessary. In return June provided a home for the claimant to live in and subsistence. The claimant gradually wound down his business with Mr Whitehead. That process took about a year.

14. According to the claimant on a number of occasions June said that the house would be his after her death. On 19th November 2010 June wrote out and signed a short note stating that in the event of her death she left her house and her property to the claimant "in the hope that he will care for my animals until their death".

15. At about this time June collected the title deeds to her property from the bank or the solicitors' office where they were stored. She then had a conversation with the claimant, which the claimant recounts in paragraphs 29 to 31 of his witness statement. The trial judge has held that those three paragraphs are an accurate account of the events. So I will set them out in full:

> "29. On another occasion, about four to six months before she died, June presented me with the deeds to the Property and again said to me that "this will be yours when I go". As the property is unregistered, the documentation included an epitome of title from 1900 to date. From her tone of voice and her seriousness when she gave me the deeds, I had no doubt in my mind at the time, that she thought that she was giving me what she thought I would need when she died, so that the Property would belong to me. She was a smart woman and understood that the deeds represented ownership of the house.
>
> 30. At that time, June's health was deteriorating. She had not yet become bed-ridden, although this did happen shortly afterwards.
>
> 31. June was not prone to using phrases of the sort, "when I go," as she was not the sort of person to spend time morbidly considering the end of her life. Her use of the words and the way she looked at me at that time made clear to me that she knew her health was failing and that her death was approaching. I took the bundle of documents from her and wrapped them in a plastic bag and put them in my wardrobe. Prior to this incident, I had not seen the deeds before."

16. On the 4th February 2011 June wrote a document which reads as follows:

> "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."

June's friend, Mrs Teri Walker, signed this document as a witness.

17. On 24th March 2011 the claimant prepared a so-called "will" for June using a form of words which he had downloaded from the internet. June duly signed the document, but no-one witnessed her signature. This document reads as follows:

> "1. **I REVOKE** all former Wills and other testamentary dispositions made by me and declare this to be my law Will.
>
> 2. **I WISH** my body to be cremated and my ashes to be scattered and **I WISH** my name to be inscribed on the rosebush plaque commemorating my late mother MARGARET RACHEL KING and father HENRY KING.
>
> 3. **I APPOINT** my nephew **KENNETH PAUL KING** of **12 Kingcroft Road, Harpenden, Hertfordshire, AL5 1EU** to be my sole executor.
>
> 4. **SUBJECT** to the payment of my debts funeral and testamentary expenses and my legacies given by this will or an codicil hereto **I GIVE** to my nephew **KENNETH PAUL KING** my property of 12 Kingcroft Road, Harpenden and my entire estate absolutely.
>
> 5. **I REQUEST AND HOPE** that he care for my dogs Tinker, Bonnie and Patch and my cats Blackie and Katie until their death."

18. On 10th April 2011 June died. The claimant did not continue looking after the dogs, as his aunt had wished. He sent them off to a dogs' home.

19. None of the documents which June had signed in the six month period before her death complied with the requirements of section 9 of the Wills Act. In those circumstances June's will dated 20th March 1998 took effect.

20. Not unnaturally, the various legatees and charities named in the will expected to receive payment of the monies which June had bequeathed to them. The claimant took a different view. He maintained that June had effected a DMC, whereby the house at 12 Kingcroft Road became the claimant's property upon June's death. In order to make good that claim, the claimant commenced the present proceedings.

Part 3. The present proceedings

21. By a claim form issued in the Chancery Division of the High Court on 20th August 2012 the claimant applied for a declaration that June had made a DMC whereby 12 Kingcroft Road ("the property") passed to the claimant upon her death. In the alternative, the claimant claimed under the 1975 Act that reasonable financial provision should be made for him out of June's estate.

22. The claimant joined twenty one defendants to his claim. The first and second defendants are two of the executors named in June's will. The third to fourteenth defendants are pecuniary legatees under the will. The fifteenth to twenty first defendants are the charities, listed in the order that they appear in the will.

23. The first to fourteenth defendants have taken no steps to defend the action. They are content to abide by whatever the court may decide. The charities, who stand to receive the bulk of June's estate under the will, have taken a different line. They strongly dispute that June made any DMC. They also challenge the claimant's claim under the 1975 Act. The charities duly served a defence to that effect.

24. The action came on for trial before Mr Charles Hollander QC, sitting as a deputy High Court judge ("the judge"). The claimant gave oral evidence and was vigorously cross-examined as to his account of events in the months leading up to June's death. A number of other witnesses, who knew the family, gave evidence either orally or in writing. The judge regarded those other witnesses as honest, although they could not assist the court about the crucial events upon which the DMC claim turned.

25. The judge handed down his reserved judgment on 1st July 2014. He found in favour of the claimant. He granted a declaration to the effect that June had made a valid *donatio mortis causa*; therefore the claimant had become the legal and beneficial owner of the property on 10th April 2011. I would summarise the judge's findings and reasoning as follows:

    i) The judge had not found it an easy question whether to accept the claimant's evidence. Nevertheless the documents which June signed in the last six months of her life were powerful corroborative evidence. In the end, whilst approaching the claimant's evidence "with a very considerable degree of circumspection", the judge accepted it as accurate on the matters relevant to the DMC.

    ii) The judge reviewed the authorities on DMC, gaining particular assistance from *Sen v Headley* [1991] Ch 425 and *Vallee v Birchwood* [2013] EWHC 1449 (Ch); [2014] Ch 271.

    iii) Applying the principles stated in those authorities, the words spoken by June to the claimant four to six months before her death and the act of handing over the deeds constituted a DMC.

    iv) June had capacity to make the DMC.

    v) June did not subsequently revoke the gift. Accordingly it took effect on her death.

26. In the final section of his judgment the judge held that if he was wrong about the DMC, then the claimant was a dependant of June and he had a good claim against her estate for reasonable financial provision under the 1975 Act. The judge quantified that (on his analysis hypothetical) claim at £75,000.

27. The charities were aggrieved by the judge's decision. Accordingly they appealed to the Court of Appeal.

Part 4. The appeal to the Court of Appeal

28. By an appellant's notice filed on 14th August 2014 the charities appealed to the Court of Appeal on grounds which I would summarise as follows:

    i) The judge erred in his assessment of the evidence. He ought to have rejected the claimant's account of events in the period leading up to June's death.

    ii) Alternatively, on the facts as found June's words and acts did not give rise to a DMC.

    iii) June lacked capacity to make the DMC.

    iv) Alternatively, June revoked the DMC by the ineffective wills which she subsequently prepared.

29. The charities subsequently raised a further challenge to the judge's judgment. This was that the judge's award under the 1975 Act (in the event that he was wrong about the DMC) was excessive.

30. This appeal was argued on 28th April 2015. Ms Penelope Reed QC, leading Mr Mark Mullen, appeared for the appellant charities. Mr Edward Rowntree appeared for the claimant, who is respondent to the appeal. I am grateful to all counsel for their assistance.

31. In dealing with the law on DMC Ms Reed recognised that *Vallee v Birchwood* [2013] EWHC 1449 (Ch); [2014] Ch 271 may present a problem for her case. She submitted that *Vallee* was wrongly decided and invited this court to overrule it. In the alternative, she submitted that *Vallee* should be distinguished.

32. Mr Rowntree supported the judge's decision on DMC, essentially for the reasons which the judge had given. In the event that the DMC is set aside, Mr Rowntree submitted that this court should increase the award under the 1975 Act to £150,000. That argument was properly foreshadowed in a respondent's notice.

33. Before grappling with the issues in this appeal, I must first review the law on *donatio mortis causa*, paying particular attention to whether *Vallee* was rightly decided.

Part 5. The law on *donatio mortis causa*

34. In this Part I shall use the abbreviation "D" for donor and "R" for recipient or donee.

35. *Donatio mortis causa* is a principle of Roman law which emerged in the classical period. It was refined and codified under Justinian. The principle is concisely stated in the *Institutes*, book 2, title 7:

> "*Mortis causa donatio est quae propter mortis fit suspicionem, cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is qui accepit: sin autem supervixisset qui donavit, reciperet, vel si eum donationis poenituisset, aut prior decesserit is cui donatum sit*."

36. In other words, this is a gift with the following characteristics:

i) D makes the gift because he anticipates death (*propter mortis … suspicionem*).

ii) D makes the gift to R on the understanding that if D dies, R will keep it.

iii) If D survives, he shall receive it back.

iv) D may revoke the gift at any time.

v) If R predeceases D, D shall receive it back.

37. Even Roman jurists found the concept of DMC perplexing, since it had some of the characteristics of a legacy and some of the characteristics of a gift *inter vivos*. In those circumstances it was a legal principle which, one might have thought, was unlikely to survive the fall of the Roman Empire. But not so. DMC made its first appearance in English law in Bracton's *De Legibus Et Consuetudinibus Angliæ*. In a series of cases during the eighteenth and nineteenth centuries English judges adopted DMC into the common law: see Holdsworth's *History of English Law*, volume 12, page 280 and volume 13, pages 542 and 580.

38. For present purposes two examples from the eighteenth century will suffice. In *Jones v Selby* (1710) Prec. Chanc. 300 D told R that he was giving her his trunk and handed over the key. He subsequently made a will which included a legacy of £1000 to R but made no mention of the trunk. After D's death the trunk was opened and found to contain items of value. The Master of the Rolls allowed R's claim based on DMC. The Lord Chancellor reversed that decision, holding that by making a will with a legacy to R, D had "satisfied" his gift. The Lord Chancellor stressed the need for strict proof in DMC cases. He said that "these sorts of donations … ought to be fully proved in all their circumstances". Otherwise the regime would be open to abuse.

39. In *Tate v Hilbert* (1793) 2 Ves 111 D, who was aged 83 and infirm but had no particular illness, gave a cheque for £200 to Mary and a promissory note for £1,000 to Jane. He died five days later. Mary and Jane brought proceedings to establish that this was a valid DMC. Lord Loughborough LC dismissed the claim. In a scholarly judgment the Lord Chancellor cited the relevant passages from Justinian's *Digest* and *Institutes.* He applied them as propositions of English law. Mary and Jane failed because they could not satisfy the requirements formulated by Justinian's jurists.

40. In *Cosnahan v Grice* (1862) 15 Moo. P.C. 215 a claim for a DMC failed because of the "looseness" of the language used by D when handing over the relevant items to R. Lord Chelmsford stressed the need for strict proof. He stated at 223:

> "Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these deathbed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons 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."

41. In *In Re Beaumont* [1902] 1 Ch. 889 six days before his death D drew a cheque for £300 in favour of R, which was duly handed over to R. R's claim based on DMC failed. Buckley J summarised the law 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 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."

42. *Wilkes v Allington* [1931] 2 Ch. 104 concerned a farm belonging to two ladies, which was mortgaged to their uncle as security for a loan of £1,000. The uncle, who knew that he was dying, gave an envelope to his nieces marked "Deeds relating to X farm to be given up at death". The uncle died six weeks later. The nieces opened the envelope and found the mortgage deed inside. The uncle's executors claimed that the mortgage was subsisting and sought to enforce it. Lord Tomlin rejected the claim, holding that the uncle had made a valid DMC to his nieces. Lord Tomlin, adopting the language of the Lord Chief Justice in *Cain v Moon* [1896] 2 QB 283 at 286, set out the requirements of a DMC as follows at 109:

> "For an effectual donatio mortis causa three things must combine: first, the gift or donation must have been 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 to show that the thing is to revert to the donor in case he should recover."

43. In *In re Craven's Estate* [1937] 1 Ch. 423 D was about to undergo an operation which might prove fatal. D gave a power of attorney to R (her son). She told R that she wanted him to have certain shares and monies in her bank account if she died. R notified the bank, which responded that it was now holding the shares and monies on his behalf. D died during the operation. Farwell J held that D had made a valid DMC. He stated the principles as follows:

> "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 they 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."

Farwell J regarded parting with dominion as the crux of the case. He found that D's conduct amounted to parting with dominion.

44. In *Birch v Treasury Solicitor* [1951] 1 Ch. 298 D, who was near to death, gave to Rs her post office savings book and two bank books, saying that she wanted Rs to have the money in the banks if she died. D died soon afterwards. The Court of Appeal held that she had made a valid DMC. Lord Evershed MR, giving the judgment of the court, held that there had been an effective delivery to Rs. He also held that the post office savings book and the two bank books were sufficient indicia of title.

45. Although the Court of Appeal allowed the claim for DMC in that case, Lord Evershed made an important statement as to the limits of the doctrine at 307 – 8:

> "Because of these peculiar characteristics 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."

46. All of the cases which I have referred to so far concerned chattels or choses in action. The question whether real property could be the subject of a DMC arose in *Sen v Headley* [1991] Ch. 425. In that case D, who was in hospital and near death, said to R (his former partner):

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

After D's death R discovered that D had put had put into her bag the only key to a steel box holding the deeds. The Court of Appeal held on these facts that D had made a valid DMC of his house to R.

47. Nourse LJ, delivering the judgment of the court, noted that DMC was an anomaly in English law for two reasons. First, it was immune to the Statute of Frauds 1677 and the Wills Act 1837. Secondly, it was an exception to the rule that there was no equity to perfect an imperfect gift. Nourse LJ conducted an extensive review of the authorities. He noted that D must make the gift in contemplation of impending death. That was satisfied here. He noted that the gift must be conditional upon death. That was satisfied in the present case. Thirdly, there must be a delivery of the subject matter of the gift, which amounted to a parting with dominion. Nourse LJ concluded

that, by giving R the keys to the box holding the deeds, D had parted with dominion over his house. Accordingly, all the elements of DMC were satisfied.

48. Finally in this review of authorities I come to *Vallee v Birchwood* [2013] EWHC 1449 (Ch); [2014] Ch 271. On 6th August 2003 R visited D, her elderly father. He appeared to be in poor health and was coughing. R said that she would next visit him at Christmas. D said that he did not expect to live very much longer and that he might not be alive at Christmas. D said that he wanted R to have the house when he died. He handed over to her the deeds and a key. D died intestate on 11th December 2003. Mr Jonathan Gaunt QC, sitting as a deputy High Court judge, granted a declaration that D had made a valid DMC of his house to R.

49. The deputy judge held that D had made the gift in contemplation of impending death. The fact that D thought that 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 in the circumstances described above D delivered to her dominion over his house.

50. Let me now stand back and summarise the legal principles which emerge from the case law. I have enumerated all the authorities which counsel have cited. I have also taken into account the numerous other authorities which are discussed in those judgments. It is clear that there are three requirements to constitute a valid DMC. They are:

    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.

51. As many judges have observed, the doctrine of DMC in the context of English law is an anomaly. It enables D to transfer property upon his death without complying with any of the formalities of section 9 of the Wills Act or section 52 of the Law of Property Act. Thus the doctrine paves the way for all of the abuses which those statutes are intended to prevent.

52. The Lord Chancellor in *Jones v Selby* and Lord Chelmsford in *Cosnahan* drew attention to this risk. They stressed the need for the strictest scrutiny of the factual evidence. The Court of Appeal rightly stressed in *Birch* that the courts must not allow DMC to be used as a device in order to validate ineffective wills.

53. I see much force in all of these observations. Indeed 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. Even then considerable caution is required. What D says to those who are ministering to him in the last hours of his/her life may be a less reliable expression of his/her wishes than a carefully drawn will. The will may have been prepared with the assistance of a solicitor and in the absence of the

beneficiaries. There are no such safeguards during a deathbed conversation. The words contained in a will are there for all to see. There may be much scope for disagreement about what D said to those visiting or caring for him in the last hours of his life.

54. 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.

55. Let me now consider what those proper bounds are. The first requirement is that D should be contemplating his impending death. That means D should be contemplating death in the near future for a specific reason: see the dictum of Farwell J in *Craven*. *Beaumont, Wilkes v Allington, Craven's Estate, Birch* and *Sen* are all good illustrations of such contemplation. In *Beaumont* D was in hospital and seriously ill. In *Wilkes v Allington* D had an incurable disease and knew that he could not live long. In *Craven* D was about to undergo an operation which might (and in the event did) prove fatal. In *Birch* D was a frail elderly woman, who was in hospital after suffering a serious accident. In *Sen* D was in hospital suffering from pancreatic cancer. His condition was inoperable and he knew that he was dying. I do not say that DMC is only available when D is on his deathbed, even though that is the situation in which the doctrine might be said to serve a useful social purpose (provided that no-one is taking advantage of D's dire situation). Nevertheless it is clear on the authorities that D must have good reason to anticipate death in the near future from an identified cause. It is also clear on the authorities that the death which D is anticipating need not be inevitable. The illness or event which D faces can be one which D may survive. In *Craven*, for example, if the operation had been successful D would have recovered.

56. I now come to *Vallee v Birchwood*. In that case I do not think that the first requirement of DMC was satisfied. D, like many elderly people, was approaching the end of his natural life span. But he did not have a reason to anticipate death in the near future from a known cause. If D wished to leave his house to his daughter, he had ample opportunity to take advice and make a will.

57. It is an essential feature of DMC, articulated in Justinian and later sources, that the gift lapses if D recovers or survives. Obviously D will die at some later date, but the DMC does not run on until that happens. It comes to an end if D fails to succumb to the death which was anticipated when he made the DMC.

58. I turn now to the second requirement. This is that D should make an unusual form of gift. It will only take effect if his contemplated death occurs. D reserves the right to revoke the gift at will. In any event the gift will lapse automatically if D does not die soon enough. Of course it is possible to make a conditional gift of that nature. *Craven* is a good example. The monies and shares would have reverted to D, if she had survived the operation. In cases where early death is inevitable the law relaxes the requirement that D should specifically require the property back if he survives. As Lord Tomlin said in *Wilkes* at 111:

> "Of course, the line is rather fine, because when a man is smitten with a mortal disease, he may know, in fact, that there cannot be any recovery; yet I apprehend that a man in that

> situation in point of law, is capable of creating a good donatio mortis causa."

In my view, subject to that qualification, the Court should treat proper compliance with the second requirement as an essential element of DMC.

59. I turn now to the third requirement. This is that D should deliver "dominion" over the subject matter. Since property will not pass until a future date (if ever) and D has the right to recover the property whenever he chooses, it is not easy to understand what "dominion" actually means. I take comfort from the fact that even chancery lawyers find the concept difficult. Buckley J in *Beaumont* said that it was "amphibious". The deputy judge in *Vallee* said that the concept was "slippery". I agree. From a review of the cases I conclude that "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.

60. Let me now draw the threads together. The doctrine of DMC is only applicable if the three requirements set out above are met. Because the doctrine is open to abuse, courts should require strict proof of compliance with those requirements. The courts should not permit any further expansion of the doctrine. Finally, and with genuine respect for the distinguished deputy judge, in my view *Vallee* was wrongly decided. In that case the first requirement, namely contemplation of impending death, was not proved to have been met.

61. Having reviewed the relevant legal principles, I must now consider whether a *donatio mortis causa* has been established in this case.

Part 6. Has a *donatio mortis causa* been established?

62. Ms Reed, on behalf of the charities, is strongly critical of the judge's findings of fact. She points out that the claimant was a man with a criminal record for dishonesty. She points to evidence (not mentioned by the judge) suggesting that the claimant had forged a letter to buttress his case. She relies on other instances of dishonesty by the claimant, as mentioned in the judgment. Ms Reed submits that the documents which June signed in the months before her death are not, on analysis, consistent with June having already made a DMC of the property to the claimant. She therefore argues that the judge ought not to have accepted the claimant's evidence concerning the crucial events in the months before June died.

63. I see the force of these arguments. Indeed the judge acknowledged the strength of the attacks on the claimant's credibility. At paragraph 31 he said that he "had not found it an easy question whether to accept Mr King's evidence". At paragraph 32 he said that there was "further cause to be cautious as to Mr King's evidence". In paragraph 35 he said that he approached the claimant's evidence "with a very considerable degree of circumspection". Yet still he accepted that evidence.

64. The authorities stress the need to subject R's evidence to close scrutiny in cases such as this. See, for example, the judgment of Lord Chelmsford in *Cosnahan*, quoted in Part 5 above. It is easy for unscrupulous treasure hunters to adjust their recollections

in order to gain huge rewards. Even people who are honest may remember conversations and events in a manner favourable to themselves.

65. I am bound to confess some doubt as to whether the judge subjected the claimant's evidence to the requisite degree of scrutiny. On the other hand this court is always reluctant to interfere with findings of fact made by judges who have heard and seen the witnesses. Mr Rowntree submitted that we should not do so in this case. He cited *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1WLR 577, *E I Dupont de Nemours v ST Dupont* [2003] EWCA Civ 1368; [2006] 1WLR 2793 at [94] and *Cook v Thomas* [2010] EWCA Civ 227 at [48]. In the end I have come to the conclusion that it is not necessary to decide this issue. For reasons which will become apparent, no party will be prejudiced if I proceed on the assumption that the judge's findings of fact are unassailable. I shall therefore make that assumption.

66. I must now consider whether, on the facts as found by the judge, the three requirements of DMC are satisfied in this case.

67. The first requirement is that June was contemplating her impending death when she had the crucial conversation with the claimant. That conversation took place between 10th October and 10th December 2010. By then June was aged 81. Obviously most of her life span was behind her, but there is no evidence that she was suffering from any specific illness. She had not visited a doctor for some time.

68. In my view, it cannot be said that June was contemplating her impending death (in the sense in which that phrase is used in the authorities) at the relevant time. She was not suffering from a fatal illness. Nor was she about to undergo a dangerous operation or to undertake a dangerous journey. If June was dissatisfied with her existing will and suddenly wished to leave everything to the claimant, the obvious thing for her to do was to go to her solicitors and make a new will. June was an intelligent retired police officer. There is not the slightest reason why she should not have taken that course.

69. If June had taken that course, the solicitors would have talked to her in the absence of the claimant. They would have ensured that June understood the new will which she was making and that she intended the consequences. One of those consequences was that the animal charities, which June had supported for many years, would inherit nothing on her death. If the DMC claim is upheld, the effect will be that June's will is largely superseded and the bulk of her estate will pass to the claimant, who is not even named as a beneficiary in the will. This would bypass all of the safeguards provided by the Wills Act and the Law of Property Act.

70. I conclude that the first requirement of the DMC doctrine is not satisfied. Accordingly the charities' appeal must succeed on that ground alone. I do not criticise the judge for reaching a different conclusion on this issue. The judge followed *Vallee*. It is now clear, however, that *Vallee* was wrongly decided on this issue. I decline to follow the approach adopted in that case.

71. In those circumstances I can deal more briefly with the other requirements of DMC. The second requirement is that D makes a gift to R, which will only take effect if his contemplated death occurs and will otherwise revert to D. In my view that requirement has not been satisfied. The words "this will be yours when I go" are

more consistent with a statement of testamentary intent, than a gift which was conditional upon June's death within a limited period of time. Furthermore both the claimant and his aunt acted as if the conversation had constituted a statement of testamentary intent. The ineffective documents which June signed on 4th February and 24th March 2011 indicated that she was trying to dispose of her assets by means of a will. (She was doing this with the active assistance of the proposed beneficiary, rather than someone independent.) Those actions were inconsistent with the proposition that June had already disposed of her assets by means of a DMC.

72. The charities suggest that those actions constituted a revocation of the DMC, if previously made. I doubt that that is the correct analysis. June prepared and signed the two invalid wills with the assistance of the claimant. The steps which they were both taking were based upon the shared assumption that June had the ability to dispose of her house by will. That would not be the case if June had made a DMC.

73. The third requirement of a DMC is that D delivers dominion over the subject matter of the gift to R. In the present case June's house was unregistered real property. She handed the title deeds relating to her house to the claimant. On the authority of *Sen*, that constituted delivering dominion over the property. The fact that the claimant kept the title deeds in his bedroom at June's house, rather than depositing them at a bank or a solicitor's office, does not affect the position. Therefore the third requirement of DMC has been satisfied.

74. Finally, there is no basis for disturbing the judge's finding that June had capacity to make a DMC. The charities, relying upon *In re Key, deceased* [2010] EWHC 408 (Ch); [2010] 1 WLR 2020, say that the judge applied the wrong burden of proof. This argument cannot succeed, because the position on the evidence was clear. The present case was not a finely balanced one which turned upon the burden of proof.

75. Let me now draw the threads together. I shall assume in the claimant's favour that the judge's findings of fact are unassailable. In late 2010 June had the capacity to make either a fresh will or DMC. She did not in fact take either of those steps. On the judge's findings of fact, June's conversation with the claimant on an unknown date between October and December 2010 did not give rise to a DMC.

76. My answer to the question posed in this part of the judgment is no. I must now turn to the claimant's claim for reasonable financial provision.

Part 7. The claimant's claim for reasonable financial provision

77. The claimant contends that he is a person falling within section 1 (1) (e) of the 1975 Act. Accordingly, if the DMC is ineffective, then his aunt has failed to make reasonable financial provision for him.

78. The judge helpfully dealt with this head of claim, in case he should be wrong about the DMC. He upheld the claim in principle and assessed reasonable financial provision in the sum of £75,000.

79. Both parties contend that the judge fell into error in his assessment of what constituted reasonable financial provision. Ms Reed argues that the judgment is not properly reasoned. The most that could be justified is £40,000. That would constitute support

for two years at the rate of £20,000 per annum. Mr Rowntree, on the other hand, argues that £75,000 is too little. The claimant is now aged 60. He gave up his previous accommodation and his business, in order to live with June and care for her. In those circumstances a proper award would be £150,000.

80. Neither party wants this case remitted to the judge for the purpose of carrying out a further assessment. Both parties invite the court to carry out any necessary fresh assessment of "reasonable financial provision" under the 1975 Act.

81. In my view, on this issue both the parties are wrong and the judge was right. The judge took into account all of the relevant factors. No-one suggests that the judge ignored any relevant factor or took into account some factor which was irrelevant. The evaluation of those factors was a matter for the first instance court. This court will not intervene unless the judge has made some error of law or has arrived at a figure outside the permissible bracket. That is not the case here.

82. Accordingly I would dismiss both the appeal and cross-appeal in respect of the judge's award under the 1975 Act.

Part 8. Executive summary and conclusion

83. The claimant lived with his aunt ("June") in the last four years of her life. On a date between 10th October and 10th December 2010 June gave to the claimant the title deeds to her house and said "this will be yours when I go". Subsequently, with the claimant's active assistance, June attempted to make wills leaving her assets to the claimant. The documents which June signed were not valid wills.

84. June's previous and effective will left a number of modest legacies to friends and relatives, but the bulk of her assets to seven charities concerned with the welfare of animals. She had actively supported those charities for many years. June died on 10th April 2011.

85. The claimant brought proceedings against the executors of June's will and the named beneficiaries, in order to establish his rights against the estate. The trial judge held that June had made an effective *donatio mortis causa* ("DMC") of the house to the claimant. If that was wrong, the judge awarded to the claimant a lump sum of £75,000 out of June's estate under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act").

86. The charities, who are the main beneficiaries under the will, appeal against the finding of DMC and challenge the amount of the lump sum awarded under the 1975 Act. The claimant cross-appeals on the ground that the amount of the award under the 1975 Act was too low.

87. In my view the charities' appeal should be allowed on the main issue. The facts as found by the judge do not give rise to a DMC. In relation to the award under the 1975 Act, the judge's assessment of £75,000 cannot be faulted.

88. If my Lords agree, the charities' appeal will be allowed and the DMC will be set aside. In relation to the judge's alternative award under the 1975 Act, the challenges advanced by both parties will be dismissed.

Lord Justice Patten:

89. I agree that the appeal against the judge's order based on there having been an effective *donatio mortis causa* of the property at 12, Kingcroft Road should be allowed for the reasons given by Jackson LJ but that the respondent, Mr King, should receive the £75,000 which the judge calculated would provide him with reasonable financial provision under s.3 of the 1975 Act. I add a few observations of my own on the first issue.

90. 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. The requirement that a will must be signed by the testator in the presence of two witnesses is intended to provide protection for the testator and his estate against abuse. They are not therefore unnecessary formalities. The testator's execution of the will and his capacity to make it can be proved objectively by those who witnessed it being done. By contrast, the making of a DMC, as in this case, will usually occur privately between the donor and the donee in circumstances where the potential for fabrication and invention by the donee is high and the prospect of disproving an alleged DMC correspondingly low.

91. This provides the obvious justification for two well-established principles. The first is that the court will require clear and unequivocal evidence of the gift and will subject that evidence to the strictest scrutiny: see *Cosnahan v Grice (*1862*)* 15 Moo PC 215. The second is that the only circumstances in which the law will permit such a gift to take effect is when it is made in contemplation of death. That means impending death within the near future. Not the mere possibility that it may occur at some future date weeks or even months away: see *Re Craven's Estate* [1937] 1 Ch 423 at p.426.

92. In *Sen v Headley* [1991] Ch 425 the donor was in hospital on his deathbed and died three days after making the gift. In *Re Craven's Estate*, death occurred five days after the gift and in *Birch v Treasury Solicitor* [1951] Ch 298, four days after the gift. In the present case, Mr King's evidence was that the gift was made four to six months before death on 10 April 2011 at a time when Mrs Fairbrother was still fit enough to go and collect the deeds to the house from the bank. Her alleged contemplation of death is not based on anything she said or did other than the words "*This will be yours when I go*" and the way she is supposed to have looked at Mr King when she said it.

93. In my view, that evidence, even if credible, comes nowhere near to satisfying the requirement that the gift should be made in contemplation of death. It does not demonstrate that Mrs Fairbrother thought that her death was impending, let alone imminent. I accept that she was probably conscious of her generally failing health and wanted to arrange her affairs. But she did so by attempting to make wills on 4 February and 24 March 2011 which failed for want of attestation.

94. The deputy judge referred to the authorities and the conditions I have mentioned but did not apply them. Instead, he based his decision on *Vallée v Birchwood* [2013] EWHC 1449 (Ch) which is inconsistent with the earlier authorities and, as my Lord has said, is wrongly decided.

95. But the evidence of the subsequent wills is also, in my view, destructive of Mr King's case that there ever was a DMC. Mr Rowntree accepts that one should consider all the relevant events in the round and the fact that Mrs Fairbrother attempted to make wills leaving the house to Mr King is strong evidence that she did not believe she had already given him the property or had any donative intent at the time of the conversation in late 2010 recorded in Mr King's witness statement. The words "*This will be yours when I go*" are consistent with her intention to make a will of the property in his favour. She did not say that she was giving the property to him there and then (subject only to the condition that she should die) nor, in my view, did she mean that. Subsequent events show that she believed that to achieve this she needed to make a will.

96. For these reasons and those given by Jackson LJ, I agree that the appeal against the judge's finding that there was an effective DMC must be allowed and his order set aside. For my part, I would also question whether the judge was right to accept the uncorroborated evidence of Mr King about the circumstances giving rise to the alleged gift. Having set out the criticisms of Mr King's evidence and the attacks upon his honesty, the judge said (at [31]) that he had not found it an easy question whether to accept Mr King's evidence. Given that there must be unequivocal evidence of a DMC, the doubts expressed by the judge should, in my view, have led him to find that the gift had not been proved.

Lord Justice Sales:

97. I agree with both judgments. Like Jackson LJ, I prefer to leave open the question whether the judge's approach to assessment of the evidence of Mr King satisfied the strict and rigorous standards which are required in this sort of case.