

King v Dubrey: Keeping donatio mortis causa ‘within its proper bounds’

Introduction

The doctrine of *donatio mortis causa* has been placed within new parameters by the Court of Appeal in *King v Dubrey*¹. The doctrine is one of a handful that allow a testator to sidestep their will and the statutory safeguards of the Wills Act 1837 and the Law of Property 1925. As such, it comes with it the risk of attracting “unscrupulous treasure hunters”² making fraudulent claims. The Court of Appeal, alert to this risk, sought to revert the doctrine’s expansion over the 19th and 20th centuries and place it within its “proper bounds”.³ This article seeks to analyse these proper bounds and to aid practitioners navigate the doctrine post-*King*.

King v Dubrey

*King v Dubrey*⁴ concerned a claim for a declaration that June Fairbrother (“Fairbrother”) had made a *donatio mortis causa* (“DMC”) of her unregistered freehold property (“the Property”) to Kenneth King (“King”). Fairbrother made a will on 20 March 1998 (“the 1998 Will”), by which she excluded King. King’s claim was based on the assertion that in 2010 Fairbrother began to talk about death, went to the bank to collect the title deeds to the Property (“the Deeds”) and then presented King with the Deeds stating “this will be yours when I go”.⁵ King then stored these deeds in his wardrobe. At this point, while Fairbrother’s health was “deteriorating”, she was not yet bedridden.⁶ In Fairbrother’s last months, she signed three documents all to the effect that King would receive the property upon her death. All three failed

¹ [2015] EWCA Civ 581.

² *King* (n 1), [64].

³ *King* (n 1), [54].

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

to comply with the formalities of section 9 of the Wills Act 1837 for lack of sufficient witnesses. Accordingly, when Fairbrother died on 10 April 2011, the 1998 Will took effect.

Mr Charles Hollander QC (“the Judge”), sitting as a Deputy High Court Judge, concluded that a valid DMC of the Property had been made.⁷ However, the Court of Appeal disagreed finding that King was an untrustworthy claimant and, in any event, he had failed to satisfy the requirements of a DMC. Jackson LJ stated that:

*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.*⁸

Accordingly, he held that “considerable caution is required” since there are “no safeguards during a deathbed conversation”.⁹ Thus, a claim must only be allowed to succeed only when there is “strict proof of compliance” with the requirements after “close scrutiny” of the evidence.¹⁰

Analysis

Giving the leading judgment of the Court, Jackson LJ reviewed the authorities from which he was able to summarise the law as follows:

(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.*¹¹

In doing so Jackson and Patten LJJs, sought to crystallise what is necessary to satisfy these requirements. By pulling together the authorities in this area, this author is able to provide practitioners with a framework to assist them in navigating these cases.

Requirement 1: Contemplation of Impending Death

⁷ *King v Dubrey* [2014] EWHC 2083 (Ch), [68].

⁸ *King* (n 1), [64].

⁹ *King* (n 1), [53].

¹⁰ *King* (n 1), [60].

¹¹ *King* (n 1), [50].

Following *King*, the donor must have, albeit subjectively, a “good reason to anticipate death in the near future from an identified cause”.¹² Although, the contemplated cause and the actual cause of death need not align. While the contemplation of death can be either express or inferred from the circumstances, it cannot be inferred from the attempted execution of wills that fail to comply with the 1837 Act.¹³ When considering this requirement, practitioners should ask two questions.

Firstly, is there a “good reason to anticipate death”? Post *King*, this is now a “high hurdle”.¹⁴ *King* and subsequently *Davey v Bailey*¹⁵ provided the following good illustrations: aggressive cancer,¹⁶ seriously ill in hospital,¹⁷ incurable disease,¹⁸ undergoing a potentially fatal operation,¹⁹ when frail and elderly being hospitalised after a serious accident,²⁰ inoperable pancreatic cancer,²¹ and undergoing a dangerous journey.²² However, reasons such as old age, frailty, a broken heart, contemplated suicide and mild health issues without a diagnosis of likely death are all insufficient.²³

Secondly, was death contemplated “in the near future”? The Court of Appeal provided no guidance on the time period necessary; however, it is clear from *King* and *Keeling* that four to six months is too distant.²⁴ It has been averred that *King* indicates near future should be measured in “days rather than weeks”,²⁵ however, Jackson LJ cited *Wilkes* (a case in which a valid DMC was made six weeks before the donor’s death) with approval.²⁶ Therefore, this author believes that the outer-time limit is six weeks prior to death. However, a longer period of time would likely be satisfactory if, shortly after the DMC, the donor fell into a coma and died some months later.²⁷ Nevertheless, owing to DMC’s heavy reliance on judicial discretion,

¹² *King* (n 1), [55].

¹³ J McGhee QC and S Elliot QC, *Snell’s Equity* (1st supp, 34th edn, Sweet & Maxwell 2021), 24-109.

¹⁴ M Mullen, ‘*Donationes mortis causa*: the recent case of *King v Chiltern Dog Rescue* [2015] EWCA Civ 581’ (2016) 22 (4), 443, 449.

¹⁵ [2021] EWHC 445 (Ch).

¹⁶ *ibid*.

¹⁷ *In Re Beaumont* [1902] 1 Ch 889.

¹⁸ *Wilkes v Allington* [1931] 2 Ch. 104.

¹⁹ *In Re Craven’s Estate* [1937] 1 Ch. 423 D.

²⁰ *Birch v Treasury Solicitor* [1951] 1 Ch. 298.

²¹ *Sen v Headley* [1991] Ch 425.

²² *King* (n 1), [68].

²³ *Davey* (n 16), [42]; M Mullen, ‘*Donationes mortis causa*: the recent case of *King v Chiltern Dog Rescue* [2015] EWCA Civ 581’ (2016) 22 (4), 443, 449; See Chapter 3.6: *King* Analysed, page 13.

²⁴ Law Commission (n 87), para 13.15; E Rowntree, ‘Restricting an anomaly’ (2015) 165 (7674) NLJ, 21.

²⁵ C Butcher, *Probate Practice Manual* (51st edn, Sweet & Maxwell 2022), 13-091.

²⁶ *King* (n 1), [55].

²⁷ Law Commission (n 87), para 13.15.

it is very likely that the opportunity, or lack of, to make a will be probative of whether death was contemplated death “in the near future”.²⁸

Requirement 2: Conditional and Revocable Gift

The Court of Appeal held that it was necessary for the donee to make gift that was conditional and revocable until death. In respect of this requirement, practitioners must ask themselves three questions.

Firstly, was the donor “smitten with a mortal disease” such that he knows “that there cannot be any recovery”?²⁹ If this is the case, there is no requirement for the gift to be conditional. However, if the answer is no, practitioners must ask the second question.

Secondly, did the donor’s words amount to a conditional gift or a statement of testamentary intent? An example of the former is “if anything happens to me, I want you to have the money in the banks”,³⁰ and an example of the latter is “this will be yours when I go”.³¹ While this distinction appears artificial, the statement’s context is critical since a DMC cannot be used to validate ineffective wills since they are indicative of a statement of testamentary intent.³² Furthermore, if, after the purported DMC, the donor continues to treat the property as his own – for example, by discussing selling the subject matter with a professional advisor, this again strongly suggests that the donor’s words were actually a statement of testamentary intent.³³

Thirdly, has the gift been revoked? Jackson LJ held that failed wills do not revoke the DMC; thus, *prima facie*, only an express revocation will suffice.³⁴

Requirement 3: Delivery of the Subject Matter

²⁸ *King* (n 1), [55]

²⁹ *Wilkes* (n 18), [111].

³⁰ *Birch* (n 20), [299].

³¹ *King* (n 1), [71].

³² *ibid.*

³³ *Davey* (n 16), [46].

³⁴ *King* (n 1), [72].

The final requirement is that the donor delivers “dominion over the subject”. Upon considering this condition, practitioners should ask themselves two questions.

Firstly, can the subject matter be transferred by a DMC? Precedent dictates that chattels, unregistered property, money held in bank accounts and shares can be transferred; however, registered property and a percentage of a company or residuary estate cannot.³⁵ Although, it should be noted that the courts have acknowledged that the question of whether registered property can be transferred by a DMC ought to be considered in a future case.³⁶

Secondly, has there been delivery of the “dominion” over the subject matter?³⁷ *King* stipulated that only the following will suffice:

*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.*³⁸

For example, the deeds to an unregistered property would fall under category (c); however, a MacMillan draft will form would not since it is merely an expression of testamentary intention.³⁹

Evidence

The Court of Appeal has stipulated that all DMC claims must be subject to the “strictest scrutiny”.⁴⁰ As a result, if a case is based solely upon the Claimant’s evidence, only “clear and unequivocal evidence” will suffice.⁴¹ *King* demonstrates that, in such cases, a viable strategy for defendants is to point to a history of dishonesty to cast sufficient doubt over the claimant’s evidence.⁴² Thus, the importance of any form of corroboration – for example, an independent witness or an audio or video recording of the conversation, cannot be overstated.⁴³ If there is

³⁵ *Davey* (n 16), [34]; *King* (n 1), [44], [46].

³⁶ *Davey* (n 16), [50]; *Koh Cheonh Heng v Ho Yee Fong* [2011] 3 SLR 125; *Cooper and Madonald v Seversen* (1956) 1DLR (2d) 161.

³⁷ *King* (n 1), [59].

³⁸ *ibid.*

³⁹ *Davey* (n 16), [36].

⁴⁰ *King* (n 1), [52].

⁴¹ *King* (n 1), [91].

⁴² *King* (n 1), [53].

⁴³ A Learmonth QC, C Ford, J Clark and J R Martyn, *Williams, Mortimer & Sunnucks – Executor, Administrators and Probate* (21st edn, Sweet & Maxwell 2018), 36-06; Law Commission, *Making a Will* (Law Com No 231, 2017) para 13.89.

no corroboration, practitioners should meticulously probe clients for potential evidential weaknesses when advising on merits, and thereafter, draft comprehensive witness statements addressing these weaknesses to support any claim.

Is a Claim Worth the Hassle?

The doctrine is now tightly policed and the Court of Appeal has sent a strong warning to claimants that DMC will be hard to prove – as exemplified by both *Keeling v Keeling*⁴⁴ and *Davey* falling far short. Thus, practitioners should warn clients that only cases which fall within the “proper bounds” and are supported by “clear and unequivocal evidence” are likely to succeed.⁴⁵ Consequently, whether a claim is worth pursuing depends on the strength of the evidence and the claim’s value since the costs of litigation are high and the chances of success are comparatively low. Therefore, the best advice for practitioners to give donors is that they make a will in a timely fashion, regularly review the same and treat DMCs as the last resort.

Conclusion

The once expanding doctrine of *donatio mortis causa* (“DMC”) has been narrowed by *King v Dubrey*.⁴⁶ While certain questions remain hanging over the future of DMCs – for example, whether registered property is capable of being the subject matter of a DMC, *King* has provided an ostensibly workable framework with clear boundaries. Despite the consequent uncertainty, it is certainly correct that the judiciary holds a firm grip on the doctrine so that it acts as an exception rather than as an alternative to the Wills Act 1837. Whether this grip is too tight, it will be interesting to see. Nevertheless, what is clear is that DMC must be treated as a last resort.

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⁴⁴ [2017] EWHC 1189 (Ch).

⁴⁵ *King* (n 1), [91].

⁴⁶ [2015] EWCA Civ 581.

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