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# A new lease of life for Donatio Mortis Causa in a time of Coronavirus?



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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. 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 have had, and will have, neither. One possibility is the equitable institution of donatio mortis causa, but it is not without its problems.



## 1. Introduction

The equitable institution of the Donatio Mortis Causa (DMC), is a gift made in contemplation of and conditional on death. If death does not occur then the gift does not materialise and there is no transfer of ownership.

The key requirements are:

1. **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 maybe identified as being particularly vulnerable to succumbing to Covid-19, but may in fact die of something else, or a combination of factors;
2. **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 is a third feature;
3. **there must be some form of delivery of 'dominium'** or means whereby the property intended to be transferred can be controlled by the donee.

**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. Vallee v Birchwood [2013] EWHC 1449 (Ch), para 25.**

## 2. Potential Problems

It is the third element, the transfer of control (often referred to as dominium) that may cause problems.

The transfer of control may be actual or symbolic – such as the keys to a car, and may 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 registration of the new owner in the company's register.



### 3. Advantages of a DMC

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.

For personal property (jewellery, furniture etc) the formality required for making gifts may be minimal. The property gifted does not fall into the estate of the giver if she or he dies, but if death does not occur then the giver retains the property (and may in future have time to consult a solicitor to make a will).

### 4. Disadvantages of a DMC

We live in an increasingly 'dematerialised' world where our rights to certain property, e.g. savings accounts, insurance policies, certain types of shares/ investments, and most importantly land/ houses are not evidenced by paper documents but exist in the virtual/electronic world.

To date only a DMC of unregistered land, where there are hard copy documents of title, have been recognised by the courts. Most title to land today is registered. Although it has been suggested that a Land Certificate (obtained from the Land Registry) would amount to a sufficient indication of title, this had not yet been tested. The Land Registry does not issue any evidence of title as such. On completion of a registration, it issues the registered proprietor with a 'title information document' which is made up of an official copy of the register but clearly states on the covering page that it is supplied 'for information only'.

### 5. Key Message

The Land Registration Act 2002 (s67(1)) provides that an official copy of the register is admissible in evidence to the same extent as the original. If this is the case, while it is generally agreed that there are no indicia of title outside the register, could, or should, an official copy handed over by a registered proprietor amount to an indicium of title, especially if supported by the only set of keys and/or a note of intention?

The courts have already recognised that there can be a DMC of all sorts of property including land.

Writing two years ago, Bansal concluded '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.' (Bansal 2018; 672).

We are currently in a situation of great emergency. Many people are confronted with deathbed situations.



## RECOMMENDATIONS

The DMC is a legal institution created by equity to address the problem of gifts/trusts that do not comply with the necessary formalities. In a time of crisis one would hope that the courts would adopt an approach that gave effect to the intention not the form, and to remember Lady Justice Arden's statement in Pennington v Waine [2002] EWCA Civ 227 that 'equity would strive to perfect an imperfect gift in circumstances where not do so would be unconscionable'.

In the interim and more immediately the Land Registry should simply remove the words 'for information only' from the cover sheet of a copy of the register, and allow that the copy is an authentic copy of the register.

Lawyers should facilitate this process by ensuring that conveyancing clients are sent this copy

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