

Given it was not in issue, it is perhaps unsurprising that the Supreme Court did not tackle the question of whether the personal disgorgement claim exists. It went so far as to consider the simplicity of a single, proprietary remedy advantageous, but it did not expressly adopt this position.<sup>37</sup> While, in a judgment handed down between *FHR*'s hearing and judgment, the Court of Appeal held in *Novoship (UK) Ltd v Nikitin* that a personal disgorgement remedy *does* exist in equity, it was said to exist as against non-fiduciaries—dishonest assistants and knowing recipients. That no trust and confidence was ever reposed in accessories justifies the lesser remedies against them.<sup>38</sup> This distinction could well turn out to be determinative that the remedies are different vis-à-vis fiduciaries and non-fiduciaries.

## Conclusion

*FHR* must be welcomed for settling the specific issue it set out to settle. It is also, happily, not reliant on legal fictions. Less welcome is its failure to tackle the theoretical justifications for creating a property right. Granted, it must be right to have refused to close the door on the personal disgorgement claim or to have laid down rules without concrete facts upon which to test them. But omitting principled justifications simply puts off taking the first step in answering the big question—precisely how to decide between a personal and a proprietary remedy. *FHR* is a useful fixed point, even if it does not display a signpost to the next stop.

Given the amounts of money at stake (\$150 million in *Novoship*) and this mix of competing and conflicting principles, it is a good probability that we will see future litigation on this point where the breach of fiduciary duty was not accepting a bribe. It would be most preferable to develop a principled way of deciding, instead of flip-flopping as in the past. This may yet be possible, although it is impossible to make concrete predictions—at least until after the next case.

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## *King v Dubrey*—a donatio mortis causa too far?

☞ Donatio mortis causa; Gifts; Houses; Intention; Transfer of land; Wills

The concept of the *donatio mortis causa* (“DMC”) may seem to be, and possibly should be, the preserve of equity examinations, but two recent cases have demonstrated the ability of this doctrine to impact on 21st century lives. This article will consider the judgment in *King v Dubrey*<sup>1</sup> and will argue that the decision in this case, together with the decision in *Vallee v Birchwood*<sup>2</sup> last year, have

<sup>37</sup> *FHR* [2014] UKSC 45; [2014] 3 W.L.R. 535 at [35].

<sup>38</sup> *Novoship (UK) Ltd v Nikitin*; sub nom. *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908; [2014] W.L.R. (D) 297 especially at [104]–[106]. See also *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] 2 W.L.R. 355 at [30].

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<sup>1</sup> *King v Dubrey* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411.

<sup>2</sup> *Vallee v Birchwood* [2013] EWHC 1449 (Ch); [2014] Ch. 271.

(deliberately or inadvertently) extended the DMC requirements, blurring the distinction between the DMC and a nuncupative will to the extent that the doctrine endangers the Wills Act 1837 formalities for testamentary dispositions.

Briefly, the facts of *King* were as follows. Mr King had lived with his aunt (June Fairbrother) from 2007 until her death. June Fairbrother had executed a valid will in 1998 which left various small legacies to family and friends, and the bulk of her estate to animal charities. After Mr King came to live with her she apparently made a number of comments to the effect that the house would be his after her death. June Fairbrother attempted on various occasions to make a new will, each of which left the house (and the rest of her property) to Mr King. Unfortunately, none of these were validly executed. On her death, the 1998 will was therefore admitted to probate.

There was no allegation of detrimental reliance, so no claim for estoppel could be made, but instead Mr King brought a claim against the charities (the minor legatees did not contest the proceedings) to the effect that his aunt had given her house to him by way of a DMC between four and six months prior to her death. At this time, June Fairbrother had handed over the deeds to the house (which was unregistered) and had told Mr King that “this will be yours when I go”. Mr King took the bundle of deeds and placed them in the wardrobe in his room within the house. Mr King had also made an alternative claim under s.1(1)(e) of the Inheritance (Provision for Family and Dependents) Act 1975 as a person maintained by the deceased, although if the DMC claim was successful the claim under the Family Provision legislation would be rendered irrelevant, so the DMC was considered first. The Family Provision claim is not relevant to this article so will not be considered further.

### **The requirements for a donatio mortis causa**

A DMC is one of the equitable exceptions to the otherwise strict formality rules for transfers of property. For a DMC to be valid, it must satisfy the following:

- the gift is made by the donor in contemplation of their death;
- the gift is conditional upon the death of the donor; and
- the donor must part with dominion or control over the property.

Being conditional on the donor’s death, it only takes effect at this time and is revocable at any time prior to death. It is therefore suspiciously similar to a legacy under a will, yet it need not comply with the formalities set out in s.9 of the Wills Act 1837. Likewise, whilst the events which support the DMC occur *inter vivos*, the perfection of the donee’s title does not occur until the donor’s death, and so there is no need for the DMC to comply with any formal requirements for *inter vivos* gifts of property of that nature.<sup>3</sup> Instead, a DMC can be (and often is) merely oral, with the court relying on the evidence of the donee and any other available witnesses.

As with all exceptions to statutory requirements, one would expect the courts to exercise caution, to both guard against fraud and also emphasise the importance

<sup>3</sup> So, for example, there is no need for a s.52 Law of Property Act 1925 compliant deed on the transfer of land.

of the statutory provisions. Indeed, past case law in this area reflects these concerns. As Lord Evershed MR stated in *Birch v Treasury Solicitor*<sup>4</sup>:

“[T]he 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.”

It is this distinction between a DMC and a nuncupative will that is the focus of this article, a distinction which is not always easy to make. A true DMC must be a hybrid beast—part legacy (in order to comply with the first two requirements), and part immediate gift (to comply with the final element).<sup>5</sup> Few gifts would seem capable of such a chameleon-like nature, so one would expect alleged DMCs to arise rarely and for claims to be upheld extremely infrequently. As *King* followed so soon after *Vallee*, the three criteria, and the way in which they were interpreted in these cases, must be considered carefully.

## In contemplation of death

In most previous DMC cases, the events on which the DMC claim were founded happened very close to the death of the donor, yet in *King* the comments made by June Fairbrother occurred some four to six months prior to her death. Luckily for Mr King, the case of *Vallee* had also concerned a DMC for which the relevant events had occurred some time before the death of the donor. In *Vallee*, Jonathan Gaunt QC considered this issue very carefully, and distinguished between being “in contemplation of death” and death being imminent:

“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.”<sup>6</sup>

At the time, the author voiced concerns that such a view could be seen as encouraging a laissez-faire attitude amongst the elderly.<sup>7</sup> Whilst the death of June Fairbrother pre-dated the case of *Vallee*, which cannot therefore have affected her knowledge or beliefs in any way, it would seem likely that *Vallee* did at least prompt Mr King’s solicitors to remember this rarely used exemption, and possibly therefore led to the litigation in question.

What is troubling is the ease with which the judge in *King*, Charles Hollander QC, accepted that the gift in the instant case was in contemplation of death. The various charities who stood to inherit under the 1998 will argued that death is inevitable for anyone, and therefore, as June was not seriously ill, the gift could

<sup>4</sup> *Birch v Treasury Solicitor* [1951] Ch. 298 at 307; [1950] 2 All E.R. 1198 CA at 1205.

<sup>5</sup> See *Re Beaumont* [1902] 1 Ch. 889 Ch D at 892 (per Buckley J): “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.”

<sup>6</sup> *Vallee* [2013] EWHC 1449 (Ch); [2014] Ch. 271 at [25].

<sup>7</sup> J. Brook, “Death bed wills” (2013) 314 P.L.J. 26.

not have really been “in contemplation of death”. However, Charles Hollander QC simply states that

“[t]he recent authority *Vallee v Birchwood* demonstrated that it was not necessary for the death to occur within days of the gift. The contemplation of death within five months there was contemplation of impending death.”<sup>8</sup>

It was held that, given June Fairbrother was “increasingly preoccupied with her impending death”<sup>9</sup> the gift was in contemplation of death.

This is, however, an over-simplification of the judgment in *Vallee*. There, the donee daughter lived abroad and only saw her father a couple of times a year. When they had parted in August, his acts of handing over the deeds and a set of keys to the house were undertaken in the belief that he was unlikely to be alive at Christmas when she was next due to visit. It is not too great a stretch of the imagination to say that these acts were genuinely “in contemplation of death”—he was presumably contemplating the fact that this could be the last time he would see his daughter.

In contrast, Mr King lived with his aunt. He probably saw her daily. Can a comment to the effect that the house would be his when she died, made some months before her eventual death, really be taken to be in contemplation of death? *King* followed *Vallee* without any critical analysis, or exploration of the particular facts of the case; instead, *Vallee* was cited as authority for the proposition that contemplation of death within the next five months is adequate.

This over-simplifies the DMC requirement and potentially widens its scope to include many comments made by the elderly and the terminally ill. Such comments are usually no more than recognition that they are reaching the end of their lives and ought to put their affairs in order. Are they really contemplating death “in the near future” and worthy of an exemption from statutory provisions? The better analysis is that they are considering to whom they wish to leave their assets and this should be a prompt for a valid will to be made.

## Conditional on death

As the DMC is conditional on death, the donor is able to revoke the DMC at any time up until death, either by making a new will or by re-taking dominion of the property. This means that the status of a recipient of a DMC is almost exactly the same as the status of an intended legatee under a will, which can, of course, also be revoked at any time prior to death—both have a mere *spes* until the death of the donor or testator.

In many earlier DMC cases the donor’s statement was to the effect of “If I do not make it, you are to have this.”<sup>10</sup> However, the courts have been willing to infer conditionality even where the words of the donor might appear to suggest an

<sup>8</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [46].

<sup>9</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [47].

<sup>10</sup> See, for example, *Cain v Moon* [1896] 2 Q.B. 283 QBD, in which the deceased’s statement was: “Everything I possess and the bank-note is for you if I die”; and *Birch* [1951] Ch. 298; [1950] 2 All E.R. 1198, where the deceased stated that: “I want you to take them home and keep them and if anything happens to me I want you and Frank to have the money in the banks.”

immediate gift. Thus in *Sen v Headley*,<sup>11</sup> the donor's comment was "The house is yours, Margaret."

In *King* a similar inference was made. The charities argued that, as June Fairbrother had not said "If I die, the house is yours", but rather "this will be yours when I go" (emphasis added) this was not a conditional gift but rather a statement of testamentary intent. However, this interpretation was rejected without any clear explanation behind the reasoning. Charles Hollander QC stated that "the words used, in context, were indeed suggestive of a gift conditional on death and not consistent with any other interpretation."<sup>12</sup>

On the one hand, it is arguable that a gift of the donor's main residence could only be intended as conditional upon their death as they would need a home during their lifetime. It would seem clear from the facts that the court has interpreted the gift as an (imperfect) inter vivos gift with a condition precedent, namely the death of the donor. However, this willingness to infer conditionality has resulted in this element being of very little practical import in identifying a DMC. As the charities argued, a statement to the effect that something *will* pass to the donee *when* the donor dies is identical in form to a testamentary disposition; if conditionality is inferred without detailed consideration of the semantics of the statement then this requirement would seem to have become superfluous.

Yet it could be argued that a gift should only be deemed conditional on death when it is made by someone who is contemplating death unexpectedly, such as an accident victim. Such donors may genuinely be trying to dispose of their property without an opportunity to make a valid will, but the dispositions are only to take effect *if* they die. If they survive, they would expect to live for many more years. In both *King*, and previously in *Vallee*, the donor was likely to die within the near future simply by virtue of their age and infirmity. It therefore seems inappropriate to describe these gifts as "conditional on death"; instead, they are gifts to be made "on the event of death", as with any testamentary disposition.

## Parting with dominion

The requirement that the donor parts with dominion goes to the heart of why the DMC is seen as a valid exception to the Wills Act 1837 requirements, instead of being viewed as an invalid nuncupative will. It should be noted that whilst the basis for the first two elements of the DMC is in Roman Law, it is this third requirement which was included by the courts in order to provide a degree of evidence and certainty in an otherwise incredibly vague area.<sup>13</sup> If the donor were to keep control of the property until his or her death he or she would be effectively making an oral will. However, by parting with dominion the donor has provided extrinsic evidence of his or her intentions and wishes, and equity will therefore construct a trust over the property and intervene to require the personal representatives to perfect this imperfect gift.

What amounts to parting with dominion differs according to the nature of the property. Early DMC cases related to gifts of chattels: for such items, the donor

<sup>11</sup> *Sen v Headley* [1991] Ch. 425; [1991] 2 W.L.R. 1308 CA (Civ Div).

<sup>12</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [43].

<sup>13</sup> See *Ward v Turner* (1752) 2 Ves. Sen. 431 at 441; 28 E.R. 275 Ct of Ch. at 281 (per Lord Hardwicke): "The civil law has been received in England in respect of such donations only so far as attended with delivery."

parted with dominion simply by handing the object to the recipient. The doctrine was then extended to choses in action, such as bonds and bank accounts, for which the donor parts with dominion by giving the donee whatever documentation was required to evidence ownership, the so-called “indicia of title”.<sup>14</sup>

Prior to the 1991 Court of Appeal case of *Sen*<sup>15</sup> it was not thought possible for a testator to part with dominion of a house, but the judgment in this case held that the indicia of title were the deeds and, by parting with possession of a set of keys (even though the deceased also retained a set) and parting with possession of the title deeds the deceased had parted with dominion of the house.

However, in *Sen* the donor was hospitalised when the deeds were handed over, and had not in fact returned to his house prior to his death. In contrast, in *Vallee* the deceased had continued to live in the house between the date of the DMC and his eventual death. Jonathan Gaunt QC considered this in detail and concluded that it was possible to part with dominion and remain in residence, therefore in *King* no further analysis of this aspect was undertaken. Instead, the various charities submitted that because the title deeds remained in June Fairbrother’s house (albeit in Mr King’s wardrobe) they were still within her control. This argument was rejected, first because the wardrobe was in the part of the house over which Mr King had exclusive use, and secondly because the conversation between Mr King and June Fairbrother “indicated that June did indeed intend to part with dominion over the property, but that was to be conditional on her death.”<sup>16</sup> Thus instead of requiring the parting of dominion to be independently supported by the evidence, it was dependent on the previous conclusions that the gift was conditional on death and, as has been discussed, this was already an inference barely supported by the facts.

Very few DMC cases in the past have involved real property, yet both *King* and *Vallee* before it concerned DMCs of the deceased’s home. Whilst it seems as though DMCs should be increasingly rare, in many ways this is to be expected. If, as in these cases, the estate consists of a freehold property and very little else, a DMC of the house itself will affect the whole of the will or intestacy, and litigation is much more likely.

Despite the relaxation of DMCs to cover land in *Sen*, it has been noted that a DMC may not be possible over registered land since dematerialisation of title in 2003.<sup>17</sup> Whilst this should prevent DMCs from becoming a common occurrence, most of the remaining unregistered land is likely to be owned by the elderly, who have not moved house in the past 25 years. There is therefore scope for more similar cases in the near future.

### **Should the DMC exception be allowed to flourish?**

As can be seen from the discussion above, the delicate lines between a DMC and a testamentary disposition have become increasingly blurred. Yet if such an

<sup>14</sup> *Birch* [1951] Ch. 298 at 308; [1950] 2 All E.R. 1198 at 1205.

<sup>15</sup> *Sen* [1991] Ch. 425; [1991] 2 W.L.R. 1308.

<sup>16</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [49].

<sup>17</sup> See, for example, N. Roberts, “Donationes mortis causa in a dematerialised world” [2013] 77 Conv. 113. It is possible that a future decision may find that the keys to the house are the sole indicia of title, but given the above comments about the importance of parting with dominion to the whole concept of the DMC, then the author would be extremely concerned if subsequent case law were to take this route.

exception is to be permitted, the court must be clear as to what the distinguishing hallmarks of a DMC are, because these are the elements which mark it out as being worthy of protection under equitable principles. From the discussion above, it would appear that both the requirements that the gift be conditional on death, and in contemplation of death, are now practically identical to testamentary dispositions. Therefore it is the requirement that the donor part with dominion which is the unique characteristic of a DMC, but is this sufficiently defined?

In *Vallee* Jonathan Gaunt QC noted the fact that the concept of dominion is “a slippery one”.<sup>18</sup> It was acknowledged that it would be permissible for the donor to carry out various acts (such as maintenance of the property) having parted with dominion, provided that it was out of the donor’s power to change the property for something else.

If, after the DMC, the donor is still altering and changing his or her will then it is difficult to see how the donor can be said to have parted with dominion, unless each attempted alteration is viewed as a revocation of the DMC. Conversely, if the requirement that the donor part with dominion is applied strictly, with all control over the property put out of his or her reach, this might impinge on the donor’s ability to revoke the gift prior to his or her death. The donor could ask the donee to return the gift, but what power would the donor have over the donee were the donee to refuse? The acts required for parting with dominion seem to have been re-interpreted throughout the history of the DMC, in order to ensure that an alleged DMC fits (or fails to meet) the criteria. Slippery indeed.

The author has set out above her concerns about the weakening of the “contemplation of death” requirement, but the scope of the whole concept also needs to be considered further. Jonathan Gaunt QC commented in *Vallee*:

“I do not consider that Equity intervenes in such cases only out of sympathy for those caught out in extremis but rather to give effect to the intentions of donors sufficiently evidenced by their acts such that the conscience of the donor’s personal representative is affected.”<sup>19</sup>

This sets an extremely low threshold. Unlike with a case of estoppel, there is no need for the recipient to have acted to his or her detriment in any way. This is arguably creating a new unconscionability requirement which seems to imply that a donor must adhere to whatever wishes he or she enunciates during his or her latter days and months, even if the donor does not consider them seriously enough to take formal steps to reflect them in a will. This would be contrary to the revocability requirement of both DMCs and testamentary dispositions: if the equitable peg on which DMCs are hung is that the conscience of the donor is pricked this would imply that, having created the DMC, the donor is no longer free to execute a new will, which may or may not accord with the intentions demonstrated a few weeks or months earlier.

Between the date of the DMC statement and her death, June Fairbrother had made at least two failed attempts to make a new will in Mr King’s favour. It was argued by the various charities which stood to inherit under the 1998 will that these attempted wills were sufficient to show that she had revoked the DMC; the

<sup>18</sup> *Vallee* [2013] EWHC 1449 (Ch); [2014] Ch. 271 at [42].

<sup>19</sup> *Vallee* [2013] EWHC 1449 (Ch); [2014] Ch. 271 at [27].

argument being that she would only have made a will bequeathing the property to her nephew if she did not believe that she had already validly disposed of it to him. This argument was rejected, on the basis that there is nothing inconsistent about having an attempted imperfect gift, conditional on death, and then trying to perfect it by executing a valid will.<sup>20</sup>

Clearly, if June Fairbrother had executed a valid will, leaving the house to Mr King or to another, then the DMC would have been either unnecessary or revoked. But the draft wills that had been written by her show an awareness of the need to make a formal will, and her failure to take steps to execute the will would indicate that she may still have been deliberating who should receive her property on her death. If June Fairbrother was not certain enough to formally execute the will, then the use of a DMC to perfect the failed gift potentially imparts sentiments onto the donor which she did not herself hold.

The only corroboration of a DMC is, often, the parting with dominion, and the less that this can be evidenced, the more the DMC must be doubted. Mr King's integrity is beyond doubt, but the facts can be used to illustrate the difficulties. In an equivalent case, it is possible that entirely different conversations had taken place. The party in Mr King's position may have gained possession of the title deeds by, for example, reminding his aunt that they would be needed by the executor on her death, and offering to look after them for her until that time. Throughout the judgment in *King* the draft wills were used to support the DMC, and by doing so the invalid wills were effectively "rescued".

The author's concern is that this seems to be using the principle of the DMC in a similar manner to the rule in *Strong v Bird*<sup>21</sup>—June Fairbrother decided that she wanted Mr King to have the house, but never formalised this legacy. However, the Court concluded that this intention continued until her death (as evidenced by the repeated failed wills) and therefore the legacy was "perfected" by using the DMC mechanism.

However, is this appropriate? The stringent requirements of the Wills Act 1837 are designed to prevent fraud, and without those safeguards any DMC is open to allegations of fraud. This has been considered in the past in *Re Dillon*, where it was made clear that the burden of proof was on the donee,<sup>22</sup> although in that particular case there was also extrinsic evidence of the donor's intention as they had signed the cheque. It was specifically noted in *King* that there were no witnesses to corroborate the crucial conversation between Mr King and his aunt.<sup>23</sup> Although Charles Hollander QC acknowledged that he had "not found it an easy question whether to accept Mr King's evidence",<sup>24</sup> he viewed the various unsuccessful attempts by June Fairbrother to make a new will as "powerful corroborative evidence"<sup>25</sup> to support the assertion that June Fairbrother intended to leave her property to Mr King. There is a danger that failure to comply with statutory requirements has become the evidence which renders those requirements redundant.

<sup>20</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [51].

<sup>21</sup> *Strong v Bird* (1874) L.R. 18 Eq. 315 Ct of Ch.

<sup>22</sup> See *Re Dillon* (1890) 44 Ch. D. 76 CA at 80.

<sup>23</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [29.3].

<sup>24</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [31].

<sup>25</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [33].



There were also concerns about the capacity of Mr King's aunt. Had she been an elderly testatrix executing a will, one would hope that the "golden rule" of *Kenward v Adams*<sup>26</sup> would have been followed, to provide evidence of her capacity to execute a will. The greater leniency there is in permitting DMCs, particularly by the elderly, the greater the chances are of fraud and undue influence. Strict scrutiny is necessary to prevent "valid" DMCs being made by people who lack the capacity for the decision with which they have been credited.

The comment by Lord Evershed MR in *Birch*<sup>27</sup> quoted above is the one to which we repeatedly return—the courts must examine the facts to determine whether what is alleged to be a DMC is actually an attempt to make a will which does not comply with the Wills Act 1837. In this author's opinion the acts of June Fairbrother were the acts of a person trying to make a new will, but failing. No matter how much the Court wanted to carry out June Fairbrother's wishes, it has put the ethos of the Wills Act 1837 at risk by trying to do so.

## Conclusions

*King*, and *Vallee* before it, have potentially combined to expand DMCs to cover numerous acts by the elderly and terminally ill, which should really be interpreted as statements of intent to make a will to formalise the testator's wishes. The original justifications for the DMC, where perhaps the testator is illiterate or unable to seek legal advice in sufficient time prior to their death, are not relevant in the 21st century. It is undeniable that those who die intestate or without a recent will reflecting their intentions often cause upset to their family, but the use of the DMC to rectify the situation is worrying and, arguably, unnecessary given the relative ease of making a valid will. This could encourage litigation in an area where contentious work rarely has any real winners.

It is worthy of comment that in both of these recent cases the deprived legatees were not close to the deceased. In *Vallee* the residuary legatee was a long-estranged brother, and in *King* they were various animal charities. As was noted by Charles Hollander QC when considering whether Mr King could successfully claim under the Inheritance (Provision for Family and Dependants) Act 1975, the charities do not have "financial needs" which can be assessed.<sup>28</sup> This raises the question of whether the decisions in each case would have been the same had the residuary legatee been, for example, a cousin with whom the deceased was in regular contact? If so, then this is allowing the facts to determine the law, which is surely not in the best interests of future litigants.

Whilst the requirements for a DMC seem clear, greater scrutiny reveals problems around distinguishing "true" contemplation of death, and differentiating it from the usual awareness of the elderly that they are nearing the end of their lives. One

<sup>26</sup> *Kenward v Adams*, The Times, November 29, 1975. The "golden rule" is that where there is any doubt as to a testator's capacity, the professional instructed should ask a medical practitioner to witness the will or give their opinion on capacity.

<sup>27</sup> *Birch* [1951] Ch. 298 at 307; [1950] 2 All E.R. 1198 at 1205.

<sup>28</sup> *King* [2014] EWHC 2083 (Ch); [2014] W.T.L.R. 1411 at [66].

has sympathy for the litigants, but cannot help but conclude that sympathy is not a sound basis for a legal principle.

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