



Do you really need a will – or can you just make the gift when your time has come?

A DMC requires clear evidence of the donor's intention that the recipient should have the gifted asset on his death – but does not require him to have followed the usual legal formalities – there remains scope for misunderstanding or abuse.

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GOOD PLANNING INVOLVES PREPARING FOR the unexpected, which is why advisers always tell clients that they should make a Will, even when they are young and in good health. It is estimated, however, that over 60% of British people die without a Will. Both in the UK and in other countries, dying without a Will is not a disaster, as the law will divide your assets among your closest family members. But - whether or not they have made a Will - clients sometimes also want to make 'deathbed gifts', or to use its Latin term "donatio mortis causa" (DMC).

In the UK, when a person dies, assets in his own name are collected by the individuals (executors) he identifies in his Will, who will pay any debts and taxes, and pass what is left to his chosen heirs. If he has no Will (he is intestate), this role falls to one or more close family members (identified by the intestacy rules), and what is left passes to family members in the proportions set out in the same intestacy rules. Whether or not he has a Will, there are certain other assets which pass automatically to another person, not under his Will or the intestacy rules. Assets where the ownership passes in this way include assets held jointly with another person (for example, real estate, if owned jointly), and gifts that the deceased has made in his final illness. Deathbed giving can therefore be used to override the express provisions of a Will, or divert assets away from those who would inherit if there is no Will.

But what exactly is a DMC? It is easy for a donor to make an immediate gift of money or movable assets at any time in his life (a lifetime gift). What is unique about a DMC (and makes it different from any other kind of lifetime gift) is that it enables the donor to make gifts of larger, more valuable assets (such as UK real estate) with fewer formalities. To make a lifetime gift of such an asset, certain specific documents usually need to be signed to pass ownership to another as legislation is in place specifically to prevent abuses in relation to the transfer of property. For a 'true' DMC, the donor needs to take clear steps to show that he intends the asset to belong to the donee following his death, but does not need to sign any documents.

The requirements to constitute a valid DMC were recently confirmed by Lord Justice Jackson in *King v Chiltern Dog Rescue and Redwings Horse Sanctuary* [2015] EWCA Civ581 as follows:

- the donor contemplates his impending death;
- the donor makes a gift which will **only take effect if and when his contemplated death occurs, and until then the donor has the right to revoke the gift, and;**
- the donor must part with the asset in some way, either by actually delivering it (money, jewellery or other small items) or by giving the donee something which gives him control of the gift, for example the key to a safe containing valuables, or the title deeds to a property.





It is not hard to see why deathbed giving could seem appealing. Validly executing a Will is subject to a number of strict requirements. For example, English law requires that it must be signed in the presence of two adult independent witnesses who should not benefit under the Will and are not married to people who benefit under the Will, otherwise they forfeit their benefit; in other countries, a Will must be signed in the presence of a notary. Then there are the ‘human’ aspects: making a Will requires an individual to consider his own mortality and how his assets should be divided, and some testators

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may want to avoid having a difficult conversation about who should inherit a valuable or emotionally significant asset. Finally, it is natural for individuals to change their minds over time, and a Will may not be reviewed often enough to keep pace with the testator’s wishes. It is not surprising, then, that many people think of deathbed giving as the equivalent of – or perhaps easier than – making a Will.

So what is all the fuss around deathbed giving? While it is rare for the English courts to hear cases about DMCs, some gifts do cause controversy, and there may be disagreements about what the deceased said or did, and whether that was enough to make a valid gift (particularly if the asset would otherwise have passed to someone else).

Because a DMC requires clear evidence of the donor’s intention that the recipient should have the gifted asset on his death – but does not require him to have followed the usual legal formalities – there remains scope for misunderstanding or abuse.

In the *King* case, Jackson LJ said “*I must confess to some mystification as to why the common law has adopted the doctrine of DMC at all... The Will may have been prepared with the assistance of a solicitor and in the absence of 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 the donor said to those visiting or caring for him in the last hours of his life.*”

Cases on DMCs often, but not always, occur where the donor is otherwise intestate, and simply hands the deeds to his property (or some other valuable asset) to the donee before his death, triggering a dispute with other potential heirs. However, deathbed gifts (whether DMCs or not) are just as complex where there is a valid Will. Where the donee of a gift is also named as a beneficiary in the Will, one area of difficulty can be to decide whether the gift was intended to be a part-payment (or full payment) of the gift in the Will, or was an additional/replacement gift.



Under English law, where a parent makes a substantial gift (either by will or in lifetime) to or for the benefit of one of his children (a portion), and later the parent makes or binds themselves to make a second gift for the benefit of the same child which also fits the characteristics of a portion, the rule raises a presumption that the parent did not intend the child to have the benefit of both gifts. Unless the presumption is rebutted by evidence that this was the intended outcome, the gift made by will is either deemed (fully or partially) by the lifetime gift or is satisfied by the lifetime gift (either fully or partially).

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Lifetime gifts of any kind - whether a 'simple' gift of money or movable assets, or a 'true' DMC which is not intended to take effect until the donor's death - give rise to practical tax problems. A person who makes a Will can state whether the recipient of each specific gift (of money, or property, or personal items) should pay the tax on that

gift, or whether the estate pays. In contrast, if a person has received a gift within 7 years before the death of an individual, he is automatically liable to pay tax on the value of his gift. This can lead to an unexpected and unfair result. In the case of a 'true' DMC, it still forms part of the deceased's estate (because the gift only takes its full effect on his death), and therefore the executors or personal representatives may find that they (on behalf of the estate) are liable to pay tax on an asset which has already been transferred to the donee. In some, rare cases this may mean that the personal representatives need to claim the tax from the donee, who may perhaps even need to sell it to raise money for the tax.

Example

Kenneth, hoping to avoid a family argument, tells his children that he has made a Will leaving everything to them equally. In the last year of his life, he gifts some family jewellery to his favourite daughter Anna without telling the others. A few days before his death, Kenneth gives the deeds and keys of a property to his younger son Ben, telling Ben that he has been less fortunate than the other children and he wants him to have the property as his own home after his (Kenneth's) death. After Kenneth's death, the other children find out about the gifts and dispute their validity. Anna must pay tax on the jewellery (an 'ordinary' lifetime gift). Assuming Ben proves the validity of the gift, the estate must pay the tax on the

property he has been given (but he may have to pay it if the estate has insufficient assets).

The case for making a valid will, and avoiding the risk of disagreements about when or whether a lifetime gift or a DMC was made, and who pays the tax, is therefore a strong one. In addition, there are many practical advantages to having a will, not least the ability to choose who pays the tax on each gift.

In many countries, a person's close family members are entitled to fixed shares of his estate, whether he

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makes a Will or not, leaving only a fraction of which he is free to dispose as he wishes under his Will (if he makes one). Under English law (and similar legal systems), the principle of testamentary freedom is paramount. A person may choose not to make a Will, in which event the law will of course share out his estate between his family members.

If he chooses to make a Will, he can give his assets to whomever he wants (or to a charity, if he does not wish to give them to any family or friends). The only requirement is that anyone who was financially dependent on the testator (a spouse, or child, or any other recipient of regular sums of money) may claim that insufficient or no financial provision was made for him or her under the Will, and the Court may order money to be paid to that person before the estate is distributed in accordance with the Will.

English law Wills can, therefore, be used to help testators achieve some of the flexibility that they perceive in deathbed giving, but without the legal or tax disadvantages of a DMC. It is common for a client to specify in his Will that money or assets should be held on discretionary trusts which can be used to benefit his spouse, children, grandchildren and perhaps other individuals, and charities. When a Will contains this type of trust, the testator leaves a letter with his Will, asking the trustees to give each beneficiary a specific share of capital, or only some income, and at what ages or dates; the division between the family can be unequal, and can even completely exclude some family members. Such an

arrangement can, for example, give a second wife income during her life, while protecting the capital for children of an earlier marriage; or it may ask the trustees to give more money to one child (like Ben, in the example above). It can also be used to deal with the testator's personal belongings, so that art or jewellery passes as he wishes (in our example, to Anna). The testator is free to change his letter at any time (including on his deathbed). While the letter is not legally binding – the trustees alone have the ultimate power to decide what to give and to whom – the testator is likely to have chosen trustees who he confidently believes will follow his wishes. The practical planning options are wide-ranging and for many clients, very useful.

More rarely, there can be circumstances in which deathbed giving might be helpful or practical. In some cases, a testator might want control of a family business (or some other asset) to pass immediately to family members, rather than waiting for it to go through the probate process.

Providing arrangements are in place to pay the resulting tax, he could transfer the shares to the intended recipients during his final illness – but it would be sensible to avoid the risk of disharmony by ensuring everyone knows and understands why this is happening. This probably means making a lifetime gift (with proper documentation), rather than a 'true' DMC, although a DMC could also give the donees immediate control.

It's also worth considering other possible reasons for deathbed giving (openly and by family agreement). In

WHILE THE LAW RECOGNISES LIFETIME GIFTS, AND WILL GIVE EFFECT TO DMCS WHERE A PERSON HAS DONE HIS BEST TO MAKE A VALID GIFT IN HIS FINAL ILLNESS, A PERSON MAY DIE UNEXPECTEDLY SOON, LEAVING THE INTENDED GIFTS UNGIVEN.

early 2017, the UK government proposed an increase in probate court fees. Currently the court fee for obtaining a grant of representation for estates worth more than GBP 5,000 is GBP 215 (or GBP 155 where the application is prepared by a solicitor) irrespective of the value of assets passing under the terms of the will.

Under the 2017 proposals, the government intended to introduce fee bands in line with the value of the estate, up to a maximum fee of GBP 20,000. However, a lifetime

gift would not pass under the terms of the Will (or intestacy rules) and its value would not have been relevant in calculating the court fee. A DMC, because it is not a complete gift until the donor dies, remains part of the donor's estate at the moment of his death, and would be part of the court fee calculation.

Fortuitously, the government has (for now) shelved this unpopular proposal, but if similar proposals were reintroduced in future, lifetime gifts (but not DMCs) might see a surge in popularity.

There are other possible tax planning opportunities where it is important to distinguish between a lifetime gift and a DMC. In the UK, inheritance tax is charged on a person's death at the rate of 40% based on the value of the estate, except for the first GBP 325,000. From 6 April 2017, an additional tax-free sum (the "residence nil rate band" or "RNRB") applies when a family home is left to direct descendants of the deceased.

The RNRB is an additional GBP 125,000 at the time of writing (rising to GBP 150,000 next year and GBP 175,000 the following year, with no current plans to increase it further). For a couple who die after 6 April 2020, this means that they could in principle pass a home worth up to GBP 1 million to their descendants (GBP 325,000+GBP 175,000 each).

The RNRB can only apply if the estate is valued at less than GBP 2 million. The RNRB is tapered down for estates worth more than this, so an estate of GBP 2.35m cannot use the RNRB at all (but still benefits from the GBP 325,000 tax-free sum). But the estate is valued at the date of death, and the way in which the legislation on the RNRB is written means that gifts made before death are not counted towards the GBP 2million threshold.

Therefore, depending on the circumstances of each individual and their estate, deathbed planning (of cash or other liquid assets) could help to bring their estate below GBP 2 million in order to qualify for a full RNRB - but a DMC taking effect only on death would not reduce the value of the estate.

Note, too, that the RNRB cannot be used to reduce/remove the tax payable on a lifetime gift of the property itself. So, in our example above, Kenneth might have done better to avoid giving Ben the property by DMC - if Kenneth's total estate is less than GBP 2 million, Ben could receive the property under Kenneth's Will, and benefit from the RNRB.

While the law recognises lifetime gifts, and will give effect to DMCs where a person has done his best to make a valid gift in his final illness, a person may die unexpectedly soon, leaving the intended gifts ungiven. For all these reasons, the case for a valid Will remains as strong as ever. ■

