Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

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4. Constitution of Trusts

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https://doi.org/10.1093/he/9780198853213.003.0004

Published in print: 06 August 2020

Published online: September 2020

Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on the constitution of trusts.

Keywords: constitution, constituted trusts, volunteers, consideration, gifts, common law, Strong v Bird, proprietary estoppel, unconscionability, donationes mortis causa

Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Constituting the trust (the requirements for transferring the legal title in the subject-matter of the trust into the hands of the trustee)
- Different modes of transfer for different types of property
- The statutory requirements under **s. 53 of the Law of Property Act 1925**
- The effect of the **Rights of Third Parties Act 1999**
- The rules relating to *donationes mortis causa*
- The rule in ***Re Rose***

Key Debates

Debate: is the issue of unconscionability a ground for perfecting an imperfect gift?

The decision in ***Pennington v Waine [2002] 1 WLR 2075*** where the basis of the decision to allow the perfection of an imperfect gift on the ground of unconscionability has been controversial.

Question 1

Equity will not assist a volunteer.

Explain and discuss.

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Caution!

■ Since constitution of trusts is an aspect of the creation of trusts, this topic may well be combined in an examination question with one or more of the three certainties and with formalities. It would be wise to revise these topics as a single issue.

■ Superficially this may appear a simple question, but there is considerable opportunity for you to draw on your knowledge and understanding of different parts of the subject. The area is vast, but the secret is in selecting the material which most directly addresses the question.

■ Note carefully that you are required not merely to explain the maxim, but to discuss it.

Diagram Answer Plan

Suggested Answer

Introduction to Scope of Maxim[1]

[1] Start with a brief introduction to set the scope.

The quotation is one of the maxims of equity. It is a pithy way of stating that, where a trust is incompletely constituted or a gift is imperfectly made, equity will not give its remedy of specific performance to an intended beneficiary who is a volunteer, or to the intended donee. In the context of gifts, the maxim is often expressed in the form 'equity will not perfect an imperfect gift': see ***Milroy v Lord (1862) 4 De GF & J 264***.

Who is a Volunteer? What is Consideration?[2]

[2] This section sets out the meaning of the terms in use.

A volunteer is a person who has not furnished consideration for the creation of the trust. Consideration in equity consists of both common law consideration (money or money's worth) and (in certain instances) marriage. It is clear that a covenant (although it may be enforceable at common law) does not comprise consideration in equity.

If marriage is to constitute consideration, the trust must be made either before and in consideration of a particular marriage, or (if made after the marriage) in pursuance of an ante-nuptial agreement to make such a trust. Furthermore, only certain persons within ↵ a marriage settlement are treated by equity as providing consideration: these are the spouses to the marriage and their issue. Issue of a former marriage and illegitimate children will prima facie fall outside the marriage consideration: ***Re Cook's Settlement Trusts [1965] Ch 902***. But they may come within it if their interests are so closely intertwined with those of the issue of the marriage in question that they cannot be separated: ***A-G v Jacobs-Smith [1895] 2 QB 341, CA***. Next-of-kin are outside the marriage consideration: ***Re Plumptre [1910] 1 Ch 609***.

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The quotation needs to be treated with care, as equity will protect a beneficiary's interest under a completely constituted trust even if that beneficiary is a volunteer (as in ***Paul v Paul (1882) 20 ChD 742***, where the settlor, having completely constituted the trust, was not permitted to reclaim the property on the ground that the beneficiaries were volunteers).

A gift is perfect in equity when the donor has done everything necessary to be done by him; it is therefore perfect in equity if the donor has put the intended donee into the position of being able to get in the legal title: ***Re Rose [1952] Ch 499, CA***. The effect is that, until the legal title passes, the donor becomes a trustee for the intended donee. Although Arden LJ in ***Pennington v Waine [2002] 1 WLR 2075***, at para. 56, treated ***Re Rose*** as an exception to the maxim, other authorities explain it as an instance in which a gift is in equity already perfect, so equity's assistance is not required: see ***Mascall v Mascall [1984] EWCA Civ 10***; ***T. Choithram International SA v Pagarani [2001] 1 WLR 1 at p. 11, PC***; and Luxton [2012] Conv 70.

Implications for Incompletely Constituted Trust[3]

[3] This next section deals with the main body of the question.

The maxim also means that where a trust is completely constituted in regard to certain items of property, but incompletely constituted in regard to other items, volunteer beneficiaries cannot compel the settlor to transfer the latter into the trust: ***Jefferys v Jefferys (1841) Cr & Ph 138***. However, if some of the would-be beneficiaries under an incompletely constituted trust have provided consideration for its creation, they may obtain specific performance. The consequence will be that the trust becomes completely constituted, thus also benefiting the volunteers, who could not have sued personally: ***Davenport v Bishopp (1843) 2 Y & C Ch Cas 451***.

The modern approach has been expressed as being that 'Although equity will not aid a volunteer, it will not strive officiously to defeat a gift': ***T. Choithram International SA v Pagarani [2001] 1 WLR 1, PC*** at p. 12, per Lord Browne-Wilkinson. However, in some older cases it appears that equity went further than merely not assisting a volunteer, and would frustrate an action brought at common law to aid a

p. 46 ↵ volunteer. Thus, the court has directed covenantees of a voluntary covenant not to sue the covenantor for damages at common law since this would give the volunteers indirectly what they were not entitled to obtain directly: ***Re Kay's Settlement [1939] Ch 329***. In principle, however, such a claim should be denied the covenantees only when they hold the benefit of the covenant on a resulting trust for the covenantor. A claim by them ought to be available if the covenant is itself the subject-matter of the express trust, as it was in ***Fletcher v Fletcher (1844) 4 Hare 67***. In such a case, the trust is completely constituted vis-à-vis the covenant, even though it is incompletely constituted as regards the property to which such covenant relates. Thus, although equity will not give specific performance vis-à-vis such property, it will not frustrate a claim brought by the trustee-covenantees for damages for breach of covenant at common law. Indeed, in such circumstances, equity will (if necessary) at the behest of the beneficiaries compel the covenantee to lend his name to a claim at common law against the covenantor. This problem does not arise in relation to covenants entered

into at least six months after the passing of the **Contracts (Rights of Third Parties) Act 1999**, which enables a third party to enforce a contract in his or her own right, thus enabling the volunteer to sue for damages.

Exceptions[4]

[4] This section deals with the exceptions. Aim to set them out clearly and show how they exemplify the maxim. In other words—don't forget to link back to the question and explain how the exceptions connect to the status of the volunteer in equity.

Equity has for many years recognised three so-called exceptions to the maxim that it will not assist a volunteer. The first[5] is the rule in ***Strong v Bird (1874) LR 18 Eq 315*** whereby, if the intended donee of an *inter vivos* gift becomes the executor, or even the administrator, of the intending donor upon the latter's death, the legal title passes to him. This, together with a continuing intention to make a gift on the deceased's part, perfects the gift. Arguably, however, this is not so much an exception to the maxim as an illustration of the means by which a gift can be perfected. This principle has been extended to trusts: ***Re Ralli's Will Trusts [1964] Ch 288***.

[5] You could number these or indent them for clarity. That says to the examiner—'look, I said there would be three exceptions and here they are'. A favourite of some examiners is to point out there is no 'secondly', or 'thirdly'.

The second exception is *donationes mortis causa*. Equity's assistance is not needed (and therefore the maxim is inapplicable[6]) if the subject-matter of the gift is transferred to the intended donee during the donor's lifetime, albeit subject to the usual conditions to which such gifts are subject. If, however, the intended donee's title remains imperfect at the donor's death, equity's assistance will be required, and this constitutes a genuine exception to the maxim. This will be the case, for instance, if the subject-matter of the *donatio mortis causa* is a chose in action, and the donor hands over merely the indicia of title: ***Birch v Treasury Solicitor [1951] Ch 298***.

[6] Aim for the occasional nod to the question as here.

p. 47 ↵ A third exception is proprietary estoppel. If A encourages, or even acquiesces in, B's acting to his detriment in the belief that he has rights in the property of A, equity may protect B should A act inconsistently with such rights. This is the principle which can be traced back to ***Dillwyn v Llewelyn***

(1862) 4 De GF & J 517. A modern (and perhaps startling[7]) instance is ***Pascoe v Turner [1979] 1 WLR 431***, where the Court of Appeal held that the equity raised by the estoppel could be satisfied only by a conveyance of the fee simple. Equity was there assisting a volunteer by perfecting an imperfect gift. In other cases, however, the equity has been satisfied by a lesser remedy, as by the award of a licence (***Inwards v Baker [1965] 2 QB 29***) or merely monetary compensation: ***Dodsworth v Dodsworth (1973) 228 EG 1115*** and ***Jennings v Rice [2003] 1 P & CR 8, CA***.

[7] This comment might be considered by some to be pejorative or a throwaway remark. But it does suggest you have a view (and the capacity to be startled by a judicial decision).

Conscionability—a Fourth Exception?

A further exception[8] was apparently recognised by the Court of Appeal in the rather unsatisfactory decision in ***Pennington v Waine***.[9] In that case, a purported gift of shares appeared to be imperfect because the intending donor, Ada, had not done everything necessary to be done by her in accordance with the rule in ***Re Rose***. She had merely put the completed share transfer form into the hands of her agent, Mr Pennington (who had retained it): she had not thereby put her nephew, Harold (the intended donee), into the position of being able to take steps to obtain registration. The court nevertheless held that, in the circumstances, it would be unconscionable for Ada to go back on her gift.

[8] This is actually the fourth (see earlier comment about getting your numbering right) but it doesn't sit with the standard three exceptions so has been set out as a 'further' comment here.

[9] Don't be afraid to be critical. The judges don't always get it right and you are entitled to your view. Of course, if you think ***Pennington v Waine*** is the greatest thing since sliced bread, say so.

This decision seems to cast into doubt principles that have been settled since ***Milroy v Lord (1862) 4 De GF & J 264***. Furthermore, the notion of unconscionability is vague, and, with respect, smacks of palm-tree justice. This is why, whilst unconscionability no doubt underlies much equitable intervention, it finds expression only through settled principles. The result in ***Pennington v Waine*** might possibly have been explicable on the basis of proprietary estoppel, if it had been established that, by signing a consent form to act as a director, Harold had acted to his detriment in reliance upon a representation that the necessary qualification share was being transferred to him. The Court of Appeal, however, made no reference to estoppel. The result might also have been better (if rather shakily) founded on Arden LJ's alternative explanation: namely, that, when Mr Pennington wrote to inform Harold of the

gift, Mr Pennington became Harold's agent for the purpose of submitting the transfer to the company. In any event, whilst ***Pennington v Waine*** treats unconscionability as a separate exception to the maxim 'Equity will not assist a volunteer', the Court of Appeal in ***Kaye v Zeital [2010] 2 BCLC 1*** applied traditional principles; and in ***Curtis v Pulbrook [2011] 1 BCLC 638***, Briggs J treated ***Pennington v Waine*** as a case of detrimental reliance.

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Looking For Extra Marks?

■ This topic has produced a welter of academic discussion in articles and elsewhere and incorporating this secondary material into your answers will earn extra marks.

Question 2

In 2014, A secured B's undertaking to hold any property which A might thereafter transfer to B in trust for A's niece, N. In 2015, A showed B a painting which was hanging on the wall in A's home, and told B that this was to be held on the trusts which he (A) had declared. A was owed the sum of £20,000 by C, and in 2016, A wrote to B saying: 'I hereby assign to you the debt owed to me by C.' A was himself a beneficiary under the FGH Trust, and in 2016, A orally directed the trustees of that trust to hold his interest thereunder in trust for B. In 2019, A covenanted with B to transfer to B in trust for N any property which A might receive under the will of D, who was then still alive. D died early in 2020, bequeathing to A shares in XYZ Ltd.

A died last month, leaving all his property to E. At the date of his death, he had not transferred either the painting or the shares to B, and he had not notified C of the intended assignment of the debt.

Advise N which of the foregoing items (if any) are held in trust for her, and what steps (if any) she might take to enforce the covenant.

Caution!

■ In this question on volunteers and incompletely constituted trusts you need to identify the requirements for transferring different sorts of property into a trust. To make it manageable, separate out the different types of property into different headed paragraphs.

■

The last section relates to trusts of covenants which is tricky and involves apparently conflicting decisions upon which a variety of academic and judicial views have been expressed. If you are not familiar with this debate then avoid the question—this is too important a part to be given short shrift.

Diagram Answer Plan

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Suggested Answer

Introduction[1]

[1] This intro shows you know there is a trust and have correctly identified the key issue.

Since A intended to create a trust by transferring property to another person, B, as trustee, a trust will arise in favour of the intended beneficiary, N, only if there is a valid declaration of trust and an effective transfer of the property to the trustee: ***Milroy v Lord (1862) 4 De GF & J 264***, per Turner LJ. The terms of the undertaking which A secured from B are a clear declaration of trust. As regards transfer, however, it is necessary to take each item of property in turn.

The Painting[2]

[2] The question is one solid block. Separate out the issues by using headed paragraphs. It makes it more manageable for you and shows you have grasped the points.

The painting is a chattel, which is transferred either by delivery or deed. There is no evidence of a deed here. Delivery requires a physical handing over; merely showing the painting to B does not comprise a delivery: ***Re Cole [1964] Ch 175***. The painting has therefore not been transferred into the trust, and will pass under A's will to E.

The Assignment of the Debt

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The benefit of the debt could not be assigned at common law, but under **s. 136 of the Law of Property Act 1925**,[3] the benefit of a ↵ debt can be assigned so as to enable the assignee to sue the debtor in his own name. For such a legal assignment to occur, the assignment must be in writing under the hand of the assignor, it must be absolute, and written notice must be given to the debtor. In the problem, it appears that the assignment was absolute, in that it was intended to be an unconditional assignment of the entire debt. Furthermore, it appears to have been in writing under the hand of the assignor, since A instructed B in a letter. There can be no statutory assignment, however, unless written notice (whether by A or somebody else) has been given to C. As A gave no such notice, it may be that no such notice has been received by C.

[3] Be aware of this section—it is easily forgotten but awfully useful.

Even if C has not been notified, there will have been an assignment in equity. By executing an absolute assignment in writing, A has done all he needs to do; **s. 136** does not require that notice to the debtor be given by the assignor. The assignment is therefore perfect in equity as soon as A executes the assignment: ***Holt v Heatherfield Trust Ltd [1942] 2 KB 1***. The benefit of the debt in equity is therefore held by B in trust for N. In these circumstances, even after A's death, the assignment can become a statutory assignment if a third party (e.g. B) gives notice to C: ***Walker v Bradford Old Bank Ltd (1884) 12 QBD 511***.

Equitable Interest under the FGH Trust

An instruction by a beneficiary to trustees to hold his interest in trust for a third party comprises a disposition of a subsisting equitable interest for the purposes of **s. 53(1)(c) of the Law of Property Act 1925**: ***Grey v IRC [1960] AC 1***. It must therefore be in writing signed by the disponor or his agent.[4] Since A's direction to the trustees of the FGH Trust was merely oral, the purported assignment is void.[5] A's beneficial interest under that trust will therefore pass to E under A's will.

[4] The rules for transfer of interests are significantly different as between **s. 52(1)(b)** and **(c)**. Know your statute.

[5] Know the difference between void and voidable.

Covenant to Transfer Property to be Received under Will of D[6]

Lastly, as A did not transfer the shares in XYZ Ltd to B, the shares are not subject to the trust in favour of N. Equity does not regard a voluntary covenant as consideration, so B cannot compel A's estate to transfer the shares to him. It might, however, be argued that, by covenanting with B to transfer any property he might acquire under D's will, A has vested the benefit of the covenant in B. If this is so, it would seem to follow that N would be the beneficiary of a fully constituted trust of the benefit of the covenant, so that B would have to sue to enforce the covenant by claiming damages for breach of covenant, or else be liable to compensate N for breach of trust.

[6] This is the most complex part of the problem. If you are not familiar with the cases and arguments—then maybe give this question a miss.

Whether the benefit of a covenant can comprise the subject-matter of a trust has been the subject of some judicial and much academic debate. The courts have shown their unwillingness to permit covenantees to ↵ sue on a covenant for the benefit of volunteers: ***Re Kay's Settlement [1939] Ch 329***; ***Re Cook's Settlement Trusts [1965] Ch 902***. In the latter case, Buckley J suggested that there can be no trust of the benefit of a covenant concerning future property. If this is correct, B cannot be holding the benefit of the covenant on trust for N, and the only possibility would be that B holds the benefit of the covenant on trust for A's estate. On the other hand, it might be argued that the benefit of a covenant will be held on trust for the intended beneficiaries if the covenantor makes it clear that this is his intention. Such an intention might also be inferred, as where all the intended beneficiaries are volunteers, as in ***Fletcher v Fletcher (1844) 4 Hare 67***, since otherwise there would be no point in entering into the covenant in the first place: Hornby (1962) 78 LQR 228.

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Much of the significance of this argument would now appear to have been rendered obsolete by the **Contracts (Rights of Third Parties) Act 1999**,[7] which applies to contracts entered into (like the covenant in the problem) at least six months after its enactment. Even a purely voluntary covenant (such as that in the problem) is a contract, and, under **s. 1**, a person who is not a party to a contract (N) may enforce a term of the contract in her own right if the contract expressly provides that she may, or if the term purports to confer a benefit on her (unless it appears that the parties did not intend the term to be enforceable by the third party). For the purpose of enforcing a term of the contract, the third party has the same remedies as would have been available to her in an action for breach of contract had she been a party to the contract: **s. 1(5)**. Since the covenant was purely voluntary, N could not obtain specific performance to compel A's estate to transfer the shares to B, so that the shares would pass to E under A's will. However, N could sue A's estate for damages, the measure of the damages being the value of the shares that A failed to transfer.

[7] A tricky point really as we have no case authority on it.

Against this it might be argued that, even if N had been a party to the covenant, if the court were to follow the approach of Eve J in ***Re Kay's Settlement***, she would not be entitled to damages. In that case, it appears that the court held that the benefit of a voluntary covenant was held on a resulting trust for the covenantor's estate. If the court took the same view in the problem, so that the benefit of the covenant was held in trust for A's estate, this circumstance might indicate that the parties to the covenant did not intend it to be enforceable by the third party. This would effectively remove purely voluntary covenants for the benefit of third parties from the scope of the **Contracts (Rights of Third Parties) Act 1999**, since the Act would be available only in the very circumstance in which it is not needed, i.e. when equity treats the third party as a beneficiary under a trust of the covenant.

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While this is a tenable argument,[8] it is more likely that the courts will reject it and will use the opportunity afforded by the 1999 Act to abandon these refinements of equity, which were essentially designed for the now outmoded era of marriage settlements. The modern approach was expressed by Lord Browne-Wilkinson (albeit in a different context), when he said 'Although equity will not aid a volunteer, it will not strive officiously to defeat a gift': ***T. Choithram International SA v Pagarani [2001] 1 WLR 1, PC*** at p. 12. Long before the 1999 Act was passed, it was held that where the third party volunteer was herself a party to the covenant, she could recover substantial damages for breach of covenant in respect of her own loss: ***Cannon v Hartley [1949] Ch 213***. It would therefore appear that, unless the covenantor indicates otherwise, the effect of the 1999 Act is to put every intended beneficiary under a voluntary covenant into the position of the covenantee in that case. On this footing, N could sue A's estate for damages to the value of the shares.[9]

[8] Here you are making an argument—don't be dogmatic about it though.

[9] No conclusion because each part contains its own concluding remarks.

Looking For Extra Marks?

■ To be honest this is such a complex and tricky question that if you got all the points contained in this suggested answer which has been written with the benefit of a calm, clear head—you would be doing really well!

Question 3

In 2019, Acute handed his share certificate in respect of his shareholding in Diacritical Ltd to Cedilla, together with a share transfer form which Acute had completed in favour of Cedilla. As he handed these documents over, Acute instructed Cedilla to hold the shares in trust for Acute's nephew, Grave. Cedilla agreed. Shortly after, Cedilla attempted to obtain registration of the shares in her own name, but was defeated by the exercise by the directors of Diacritical Ltd of a power contained in the company's articles to refuse registration.

In 2020, Acute received back the share certificate from Cedilla. He handed it to his cousin, Umlaut, informing him that the shares were a gift to him.

Last month, Acute died with the shares still standing in his name. In his will he appointed Umlaut his executor and gave all his property to Cedilla.

Discuss who is entitled to the shares.

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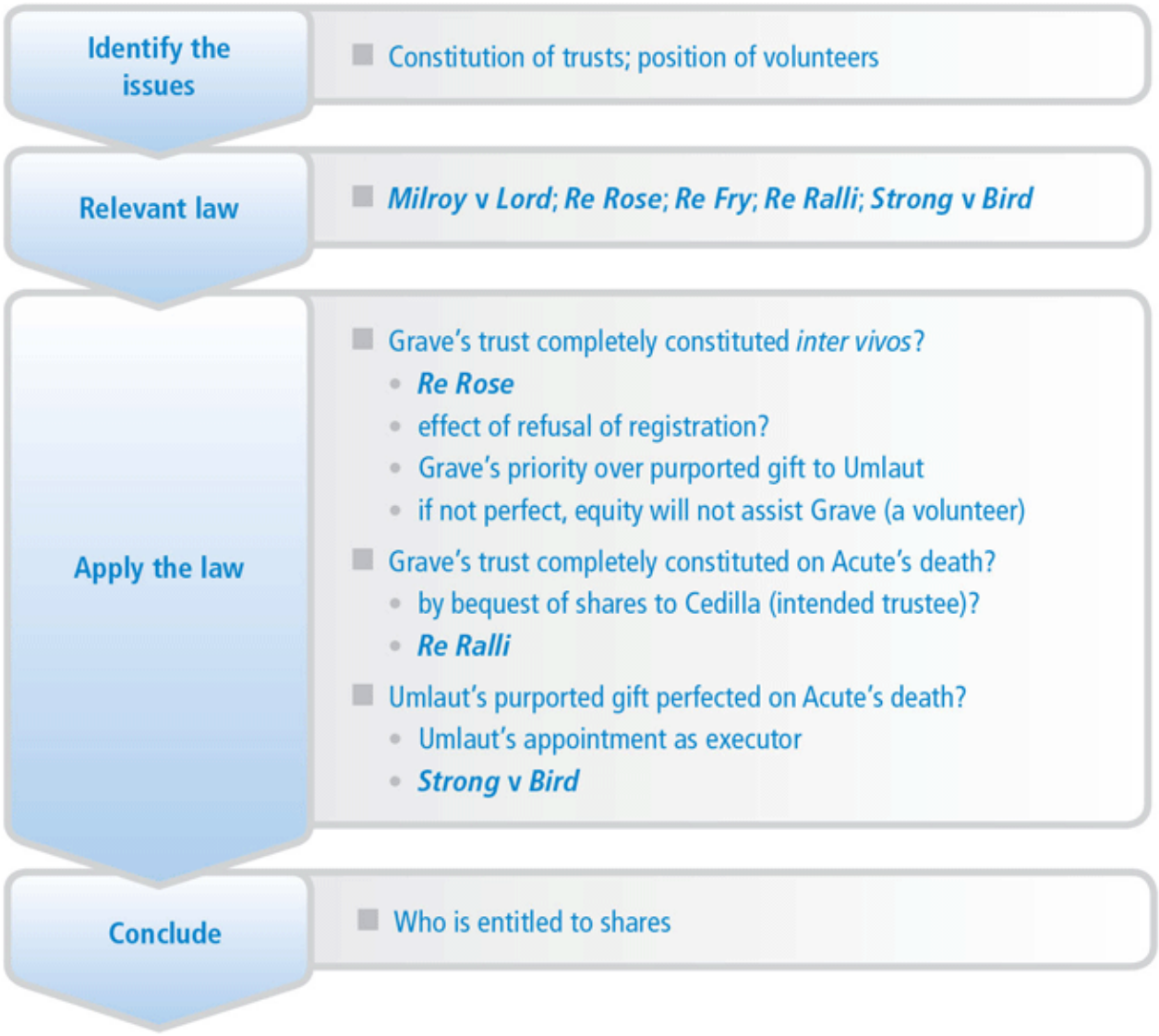
Caution!

■ This is a complex question, both because the relevant law itself is difficult, and also because you need to sort out in your mind the priorities of several claimants—never the easiest thing in the examination room.

■ There is a lot to write so you will need to be economical with the facts of the cases. Cases should be cited to support legal principle; facts can be given sparingly in order to distinguish one case from another. See, for instance, the treatment in the suggested answer of the authorities which support, or which appear to conflict with, the principle of ***Re Rose [1952] Ch 499, CA***. If you have a good understanding and keep a clear head, this is the sort of question where you could score very heavily.

Diagram Answer Plan



Suggested Answer

Grave is beneficially entitled to the shares if he can establish that he is a beneficiary under a fully constituted trust of them.[1] A trust is completely constituted only if there is compliance with the requirements laid down in ***Milroy v Lord (1862) 4 De GF & J 264***.[2] Where, as here, ↵ the settlor seeks to confer the benefit of property on a person by vesting it in a trustee, two things must be done. First, there must be a clear declaration by the settlor of the terms of the trust. Here, the instructions to Cedilla suffice. Secondly, the settlor must do all he can to vest the property in the intended trustee. The legal title to the shares will not pass to Cedilla unless and until the company registers Cedilla's

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name in its register of members. Since this has not been done, the legal title to the shares has not passed. The share transfer may nevertheless be perfect in equity if, in accordance with ***Milroy v Lord***, the settlor has done everything necessary to be done by him to transfer the shares. In ***Re Rose [1952] Ch 499***, the Court of Appeal held that a gift of shares was perfect in equity as soon as the donor had put the donee into the position of being able to take steps to complete the transfer: i.e. when the donor had handed to the donee the share certificate and executed share transfer form. On this basis, the trust in favour of Grave would have been completely constituted from the date in 2019 when these documents were delivered to Cedilla. If so, from that date, Acute would have held the legal title to the shares in trust for Cedilla, who would herself have held the equitable interest thereunder on a sub-trust for Grave.[3] This makes Cedilla a trustee of a completely constituted trust for Grave. She is therefore under a duty to ensure that the trust property is safeguarded—by taking steps to bring in the legal title to the shares (as she did attempt to do), and (if necessary) by compelling Acute to transfer to her any dividends he receives in respect of that holding.

[1] This is sufficient as an introduction showing the issue in the problem.

[2] This second sentence sets out the law.

[3] This point is often missed but it is an inevitable consequence of the decision in ***Re Rose***.

The transfers in ***Re Rose*** were registered, but there is nothing in the case to suggest a different result where registration is refused. The principle in ***Re Rose*** has been attacked for thus saddling an intended donor with an unintended and potentially permanent trusteeship: see McKay (1976) 40 Conv (NS) 139. This objection carries some force; moreover, a permanent trusteeship in this context contrasts sharply with a contract for the sale of shares where (if the company refuses to register the purchaser) the vendor cannot be fixed with a permanent trusteeship: see ***Stevenson v Wilson 1907 SC 445***, considered (without criticism) by the House of Lords in ***Scott Ltd v Scott's Trustees [1959] AC 763***.

A case difficult to reconcile with ***Re Rose*** is ***Re Fry***[4] ***[1946] Ch 312***; but that case may be considered, perhaps, to turn on the effect of relevant defence regulations. Apart from that decision, the principle of ***Re Rose*** is consistent with a range of authorities: see, particularly, ***Mallott v Wilson [1903] 2 Ch 494*** and ***Mascall v Mascall [1984] EWCA Civ 10***. The principle was assumed correct by the House of Lords in ***Vandervell v IRC [1967] 2 AC 291, HL*** and it also operates in the case of equitable assignments of legal choses in action: ***Holt v Heatherfield Trust Ltd [1942] 2 KB 1***.

[4] Don't be afraid to point out a difficulty in reconciling cases. It shows your analytical ability.

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If ***Re Rose*** applies, Grave is a beneficiary under a trust of the shares, and is entitled to the dividends which Diacritical Ltd will continue to pay to Acute (and, after Acute's death, to Acute's personal representative). On this basis, the purported gift of the shares to Umlaut, even if ultimately perfected (as discussed in relation to the rule in ***Strong v Bird (1874) LR 18 Eq 315***) is later in time, and is therefore subject to the rights of Grave. Similarly, Acute cannot by his will give to Cedilla property which he does not own beneficially. Thus the gift of all his property to Cedilla does not include the shares.

If, however, a court were to distinguish or overrule ***Re Rose*** and hold that the trust was incompletely constituted, then, unless Grave had provided consideration for the creation of the trust, he could not (as a volunteer) gain the assistance of equity: ***Re Plumptre [1910] 1 Ch 609***. Since, however, Acute gave all his property in his will to Cedilla, the intended trustee of the shares, it is arguable that the trust in favour of Grave is completely constituted on Acute's death, as Cedilla then has a right as beneficiary under the will to see that the property is properly distributed: ***Re Diplock [1948] Ch 465, CA***. She will ultimately obtain the legal title to the shares when the executor, Umlaut, transfers the shares into her name. It makes no difference that the legal title comes to Cedilla, the intended trustee, in a different capacity: ***Re Ralli's Will Trusts [1964] Ch 288***.

Umlaut's Appointment as Executor[5]

[5] Taking each point in turn, as here, stops you getting in a muddle.

There is, however, one further twist: Umlaut's appointment as executor. If it can be shown that Acute had a continuing intention to give the shares to Umlaut from 2020 until his death, the imperfect gift to Umlaut might be perfected under what is known as the rule in ***Strong v Bird (1874) LR 18 Eq 315*** (i.e. by the acquisition by Umlaut of the legal title to the shares as executor). In principle, this would seem to postpone the equity of the beneficiaries under the will to that of the executor. It was upon this basis that Walton J in ***Re Gonin [1979] Ch 16*** objected to the decision in ***Re James [1935] Ch 449***, which had extended the rule to administrators.[6] This objection may carry less weight where the intended donee becomes executor, since such appointment results from the testator's own voluntary act. The objection may not be entirely overcome, however, since an executor does stand in a fiduciary relationship to the beneficiaries under the will, and to permit him to have a prior claim seems to fly in the face of normal equitable principles designed to prevent a conflict of interest: cf. ***Holder v Holder [1968] Ch 353, CA***. Nevertheless, the application of the rule to executors is well established: ***Re Stewart [1908] 2 Ch 251***. Umlaut will therefore be permitted to bring evidence outside the will that Acute

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intended to give him the shares. Since such evidence ↵ derives from the intended donee, however, it will need to be treated with caution: cf. cases involving secret trusts: ***Re Rees [1950] Ch 204, CA***, and ***Re Tyler [1967] 1 WLR 1269***.

[6] This is an 'extra marks' point.

If, therefore, the intended trust in favour of Grave was not perfected in 2019, Umlaut may be able to satisfy the court that he is entitled to the shares under the rule in ***Strong v Bird*** in priority to both Cedilla and Grave.

Looking For Extra Marks?

■ Discussion and critique of a rule such as that in ***Strong v Bird*** will earn extra marks (see earlier comment).

■ Clarifying the way in which the legal title is held on trust by the intended donor when ***Re Rose*** applies is a point which will earn extra marks (see earlier comment). Although this is a problem question and such questions do not normally lend themselves to a theoretical discussion, reference to academic commentary such as Ollikainen-Read (2018) (see 'Taking Things Further') would be a good addition to show the origins of the rule in ***Re Rose***.

Question 4

Three months ago, Lear, a keen rambler, caught a chill after spending a stormy winter's night wandering lost on the moors. He was taken to hospital suffering from pneumonia. When his eldest daughter, Goneril, visited him, he handed her the key to a deed box which was in his study at home. Lear told Goneril that he did not expect to live much longer and that, if anything were to happen to him, Goneril was to have the contents of the box.

Shortly after, when Lear's middle daughter, Regan, was by his bedside, Lear handed to her the Land Certificate that he had been sent by the Land Registry in 1980 when he acquired the freehold title to his country cottage in Gloucestershire. He advised Regan that, if he did not pull through, Regan was to have the cottage.

Last month, during a visit by his youngest daughter, Cordelia, Lear wrote a cheque for £10,000 in her favour. He informed her that this was to be her share of his property on his death.

Last week Lear, who remained seriously ill in hospital, deliberately took an overdose of sleeping pills, from which he died.

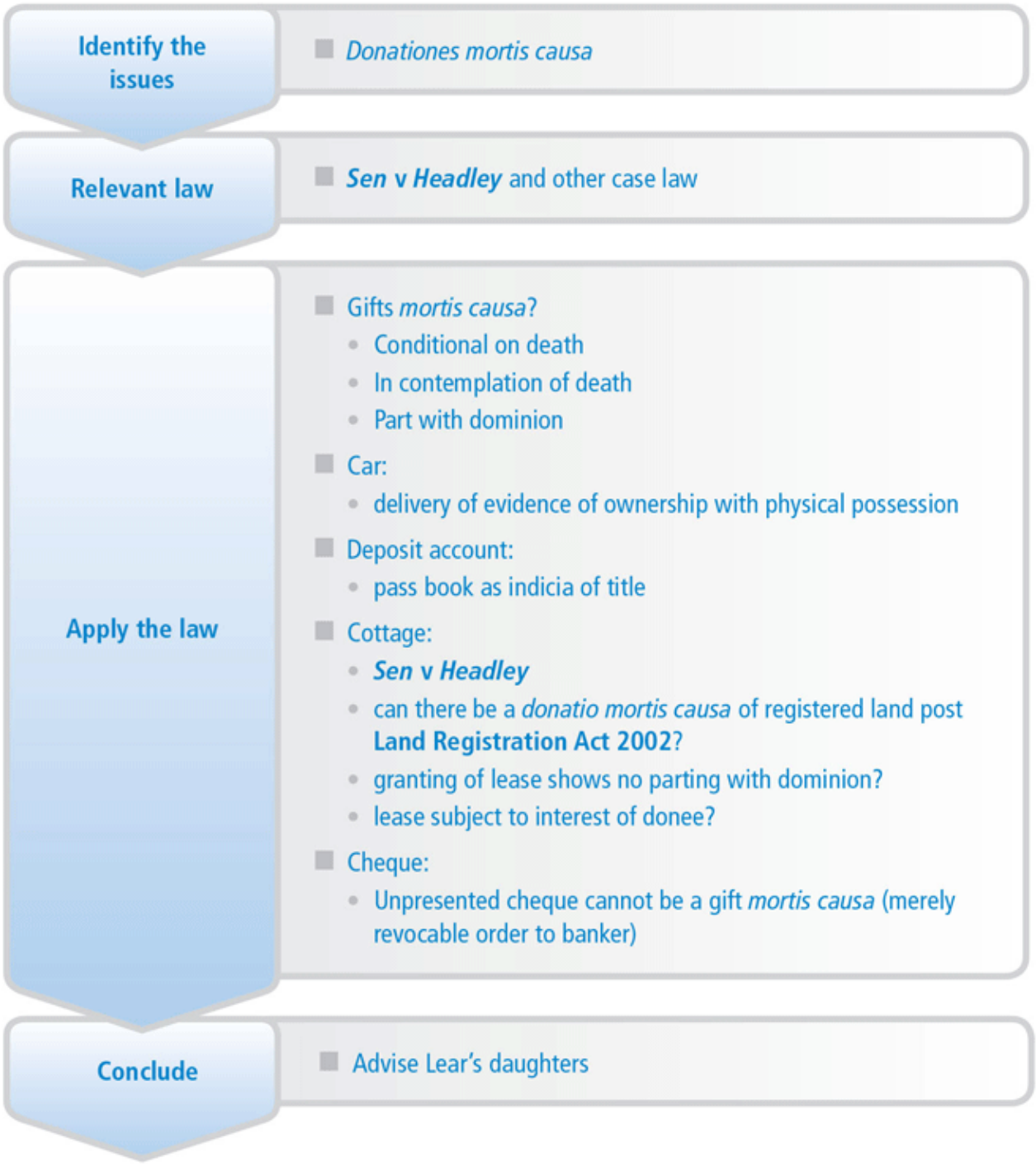
Goneril has now opened the deed box, and finds that it contains the keys and vehicle registration document to Lear's car, and a bank pass book relating to Lear's deposit account with the Serpent's Tooth Bank plc. It is discovered that, a couple of weeks before his death, Lear had leased the country cottage to Edmund for a term of 21 years. In his will, Lear gave all his property to charity.

Advise Lear's daughters.

Caution!

■ Note that *donatio* is a noun meaning gift, so one can refer either to a '*donatio mortis causa*', or to a gift '*mortis causa*'. The plural is *donationes mortis causa*. (Comfort may be sought from remarks of Lord Simon of Glaisdale in ***Brumby v Milner [1976] 1 WLR 1096***, a tax case, where his Lordship deprecated the unnecessary use by lawyers of Latin terms. In the present case, however, the English equivalent is slightly more of a mouthful, and the Latin reminds us of the Roman Law origins of this principle, which finds its modern counterpart in the Civil Law.)

Diagram Answer Plan



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Suggested Answer

Lear evidently intended the gifts to the daughters to take effect only in the event of his death.[1] Such gifts would normally be testamentary in nature and valid only if made in accordance with the **Wills Act 1837** (as amended). Such formalities are absent here. Nevertheless, Lear's daughters will be able to take the property concerned if they can establish a valid *donatio mortis causa* in respect of each item.

[1] This introduction sets the scene by establishing the issue and the application to the facts.

To constitute a gift *mortis causa*, three elements must be satisfied.[2] These have been affirmed by the courts many times (e.g. in ***Cain v Moon [1896] 2 QB 283***, and, most recently, in ***Sen v Headley [1991] Ch 425***).

[2] Here comes the law.

First,[3] the gift must be intended to be conditional upon death, so that it is not perfect until death, before which time it can be revoked by the donor. The gift must also be intended to be automatically revoked in the event of the donor's survival. Such conditions will be readily inferred where the gift is made in contemplation of death, which appears to be the case here.

[3] Great to enumerate your points—as long as there is a second, third ...

Secondly, the gift must be made in contemplation of impending death, which must be more than a contemplation that the donor, like all living things, must some day die. This requirement is met where the donor is suffering from a life-threatening illness (***Saulnier v Anderson (1987) 43 DLR (4th) 19***). In ***King v Chiltern Dog Rescue [2015] EWCA Civ 581*** (overruling ***Vallee v Birchwood [2013] EWHC 1449 (Ch)***) it was held that imminent death for a particular reason must be actually anticipated at the time of the gift and the gift will fail if the donor does not die as he anticipated. As Lear, in the problem, was suffering from pneumonia, the requirement that the gift be in contemplation of death would seem to be satisfied. In ***Re Dudman [1925] 1 Ch 553***, however, it was held that a *donatio mortis causa* made in contemplation of suicide (at that time a crime) was not valid. Suicide is no longer a crime (**Suicide Act 1961**) and the present position is unclear. Such a purported *donatio* might still be invalid today on the ground that the requisite contemplation of death imports an element of uncertainty as to whether and when death will ensue. Such uncertainty is absent if the donor has the intention of taking his own life. In the problem, however, at the time he made the *donationes mortis causa*, Lear

may have contemplated death by pneumonia, not by suicide. In ***Wilkes v Allington [1931] 2 Ch 104***, it was held that it does not matter if death occurs from a disease other than that contemplated. A *donatio* might therefore not be invalidated if death occurs by suicide not contemplated at the time the *donatio* was made: see ***Mills v Shields [1948] IR 367***.

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↲ Thirdly, the donor must part with dominion over the subject-matter of the *donatio*. Delivery to the intended donee of the only key to a locked receptacle which contains the subject-matter suffices, even if the subject-matter could have been handed over: ***Re Mustapha (1891) 8 TLR 160***. It has, however, been stated obiter that there is no sufficient parting with dominion if the donor retains a duplicate key: ***Re Craven's Estate [1937] Ch 423***. The statement in the question that 'the key' was handed over to Goneril implies that it was the only key, in which case this requirement is satisfied. Moreover, it does not matter if the box itself contains another key which opens a further box: ***Re Lillingston [1952] 2 All ER 184***.

The Car[4]

[4] Next sub-part.

On this principle, since the deed box contains the key to Lear's car, it would appear that (unless Lear retained a duplicate key) a valid *donatio* has been made of the car. Although the passing of dominion over a chattel is usually effected by physical delivery, delivery of the key both enables Goneril to take possession of the car and (together with the delivery of the vehicle registration document, which evidences Lear's ownership) effectively puts it out of Lear's power to deal with it.

The Pass Book

Parting with dominion over a chose in action requires the donor to part with the essential evidence or indicia of title: ***Birch v Treasury Solicitor [1951] Ch 298***.[5] There, the Court of Appeal held (*inter alia*) that a *donatio mortis causa* of a chose in action represented by a deposit pass book to Barclay's Bank was effected by delivery to the donee of the pass book. In such instances, equity will perfect the imperfect gift by treating the deceased's personal representatives as trustees of the chose in action for the donee: ***Duffield v Elwes (1827) 1 Bli NS 497***. This principle would therefore apply to Lear's deposit account with the Serpent's Tooth Bank plc.

[5] Setting out the law here.

The Country Cottage

Lear's country cottage is land and it used to be doubted, on the basis of dicta in ***Duffield v Elwes***,[6] whether land could ever be the subject-matter of a *donatio mortis causa*. In ***Sen v Headley***, however, the Court of Appeal held that it could. There was no difference in substance between the principle applicable to choses in action established in ***Birch v Treasury Solicitor*** and the parting with dominion over land by the delivery of the title deeds. Although the doctrine of *donationes mortis causa* is anomalous, it was preferable to avoid creating anomalies of anomalies.

[6] Nice extra marks point here but could go straight to ***Sen v Headley***.

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↵ ***Sen v Headley*** concerned unregistered land,[7] but at the time that case was decided it might have been argued that the same principle would appear to apply to the delivery of the Land Certificate in registered land. The problem, however, is that the **Land Registration Act 2002** made no provision for Land Certificates, which were therefore effectively abolished. Instead, the Land Registry now issues the registered proprietor only with a 'Title information document', which (unlike the former Land Certificate) is not a document of title, and should not be sent to the Land Registry on any subsequent application. Even though Lear still retained the Land Certificate that had been issued to him in 1980, it ceased to be a document of title on 13 October 2003, when the **Land Registration Act 2002** came into force. It is the case that a decision in the Singapore High Court, ***Koh Cheong Heng v Ho Yee Fong [2011] SGHC 48*** suggests that a *donatio* of registered land can take place but, although ***King*** only deals with unregistered land and does not consider this point, it now seems unlikely that such a document would be treated as the indicia of title for the purpose of making a *donatio mortis causa*. If this is correct, it is difficult to see how there can now be a *donatio mortis causa* of a registered title:[8] see Roberts [2013] Conv 113.[9]

[7] Good not to miss this point.

[8] You cannot be more definitive than this.

[9] Citing a secondary reference can be an 'extra marks' point.

Even if Lear could be treated as having handed over the indicia of his title to the cottage,[10] whether he has parted with dominion over the cottage is less clear. He did after all subsequently lease it out. Such a situation was hypothesised in ***Sen v Headley*** by the Court of Appeal, which opined that a retention by the donor of a power to deal with the subject-matter did not invariably preclude a parting with dominion. It was a matter of fact in each case. Although the donor in ***Sen v Headley*** retained a key to the premises, the donee had her own set and was in *de facto* control. The problem does not state how many sets of keys there are, or who has possession of them. If Regan has the only set of keys to the cottage, that might, in accordance with ***Sen v Headley***, be a sufficient parting with dominion by Lear. Nevertheless, the legal principle is obscure. Mummery J at first instance could not see how the equitable interest of the donee, which arises only on the death of the donor, can be binding upon a tenant of a lease granted during the donor's lifetime. The Court of Appeal did not provide a satisfactory answer to this.

10 Here you go on to deal with the next point having discussed this problematic point.

The Cheque

It is well established[11] that delivery of the donor's own cheque to the intended donee cannot constitute a valid *donatio mortis causa*: ***Re Beaumont [1902] 1 Ch 889***, ***Re Leaper [1916] 1 Ch 579***. A cheque is merely a revocable order to a banker to pay a sum of money. ↵ The position may be otherwise if the cheque is presented and the donor's account credited during the donor's lifetime or before the bank has been informed of his death. Subject to these qualifications, Cordelia can derive no benefit from the cheque, which is mere waste paper.[12]

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11 This last section covers the law and its application to the problem—and the conclusion to this part.

12 No need for a conclusion—each item has been dealt with in the clearly labelled preceding paragraphs.

Looking For Extra Marks?

■ The Court of Appeal in ***King*** has clarified and narrowed the boundaries of *donationes* so further discussion of the way in which it has limited the doctrine overruling ***Vallee*** would be worthwhile for extra marks. You could refer to the interesting article by Charles Towl on this case and its implications (see 'Taking Things Further') where he argues that *donationes* are a necessary evil.

Taking Things Further

■ Edelman, J., 'Two fundamental questions for the law of trusts', paper presented at the Western Australian Bar Association CPD Conference, 15 October 2011 (available online).

■ Luxton, P., 'In search of perfection: the *Re Rose* rule rationale' [2012] Conv 70.

■ Ollikainen-Read, A., 'Assignments of equitable interests and the origins of *Re Rose*' [2018] Conv 63–73.

Three papers on the rule in **Re Rose**.

■ Hornby, J., 'Covenants in favour of volunteers' (1962) 78 LQR 228.

A useful article on this tricky topic of covenants.

■ Roberts, N., '*Donationes mortis causa* in a dematerialised world' [2013] Conv 113.

■ Towls, C., '*Donatio mortis causa* and suicide—an anomaly within an anomaly?' [2018] Conv 367–374.

Perhaps surprisingly donationes *are popular exam topics and these two articles discuss the latest case law.*

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