

DEATH-BED GIFT: NEITHER A GIFT NOR A LEGACY

by

Anu Nivetha. S

ABSTRACT

A Death-Bed Gift is a gift made in the apprehension of death. These gifts are called Donatio Mortis Causa under general law and gifts made during fatal illness or Marz-ul-Maut under Muslim law. A donatio mortis causa is an exemption to the usual position whereby a person makes a gift to another during their lifetime but, that gift is in contemplation of their death, to take effect in the future remains conditional on the Donor's death. Upon death, the gift becomes absolute. Death-bed gift is ambiguous, not exactly a gift, nor a legacy, but partaking the nature of both. The prime objective of this research article is to understand the evolution, nature, and essential requirements of valid 'donatio Mortis causa', and the application of the doctrine in Courts.

Journal of Multi-Disciplinary
Legal Research

INTRODUCTION:

A gift is a gratuitous transfer in favor of another person without consideration. Gifts can be executed by a person generally during the prime of their life or in advanced age. It can be executed by a healthy person or by a sick person. Law does not specify any age or health condition for the execution of the gift, other than primary competency to contract, such as the age of majority or soundness of mind.¹ Chapter VII of the Transfer of Property Act, 1882 consists of eight sections (Section 122 to Section 129) dealing with "gifts". Usually, a gift may be inter vivos or testamentary. Gifts are taxed under Section 56(2)(x) of the Income Tax Act, 1961, after 1 April 2017.²

A gift made in apprehension of death i.e., gift mortis causa does not come within the scope of this Act.³ Section 129 has exempted such gifts from the operation of Chapter VIII of the 1882 Act.⁴ Gifts made in contemplation of death are non-taxable under Section 5 of the Gift-Tax Act.⁵

DONATIO MORTIS CAUSA:

Black's Law Dictionary defines *Donatio mortis causa* as "a gift made in contemplation of the donor's imminent death."⁶ A *Donatio mortis causa* or gift in contemplation of death is defined in section 191 of the Indian Succession Act which runs as follows:-

"A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, delivers, to another the possession of any movable property to keep as a gift in case the donor shall die of that illness. Such a gift may be resumed by the giver and shall not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made."

Such a gift is like a gift inter vivos in pre-supposing an intermediate increase in the potentiality of the donee by the donor and hence sharply distinguishes itself from legacy. But added to this

1 Poonam Pradhan Saxena- Property Law- Lexis Nexis (2017)

2 Gift Deed Format in India, <https://cleartax.in/s/gift-deed-format>

3 Avatar Singh, Prof (Dr) Hardeep Kaur- Textbook on THE TRANSFER OF PROPERTY ACT- Lexis Nexis (2021)

4 The Transfer of Property Act, 1882, Section 129, 4 of 1882

5 Jt. Commissioner Of Gift-Tax, ... vs Shri Shreyans J. Shah, (2005) 95 TTJ Mum 896

6 Black's Law Dictionary "Donatio Mortis Causa" (11th ed. 2018)

distinction made is another which no less sharply distinguishes it from the ordinary *donatio* and approximately to legacy that of being perfected by the death of the giver.⁷

This type of death bed gift has been described, by Buckley J in *Re Beaumont*⁸, “as a gift of an amphibious nature, being neither entirely inter vivos nor testamentary. It is an act inter vivos by which the donee is to have the absolute title to the subject matter of the gift not at once but if the donor dies”.⁹

HISTORICAL EVOLUTION OF *DONATIO MORTIS CAUSA*:

The origin of the law relating to gifts mortis causa can be traced back directly to Roman Law. It was first codified under the reign of Emperor Justinian I and was stated in Justinian’s Institutes.¹⁰ While the original text was in Latin, the English translation can be found in Halsbury’s Laws of England. The definition offered by Justinian is generally agreed to represent accurately the law as it operated in the latter stages of the Roman Empire:¹¹

“A donatio mortis causa is that which is made to meet the case of death, as when anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given. These donations mortis causa are now placed, in all respects, exactly on the footing of legacies....”

This rather loose definition of the scope of the gift mortis causa has been modified by the common law and its boundaries have been construed more strictly. Under Roman Law, *Donatio mortis causa* evolved as an amalgamation of the concept of Legacy and gift inter vivos. *Donatio*

7 Visalatchmi Ammal v Subbu Pillai, (1871) 6 M.H.C.R. 270

8 [1902] 1 Ch 892

9 All Answers Ltd, 'Disposition of Property on Death Has Always Been a Very Complex Issue' (Lawteacher.net, September 2021) <<https://www.lawteacher.net/free-law-essays/equity-law/disposition-of-property-on-death-is-a-very-complex-issue-equity-law-essay.php?vref=1>> accessed 18 September 2021

10 Justinian’s Institutes Book II Title VII

11 Institutes, Lib. II, Title VII. The translated version used here comes from, T.C. Sandars, The Institutes of Justinian, 6th ed., (London, 1878).

mortis causa was absorbed into English law through the ecclesiastical jurisdiction¹² This jurisdiction was more disposed to the acceptance of Roman law principles than others. It first appeared in English Law in Bracton's *On the Laws and Customs of England* (1204) where he defined *Donatio mortis causa* as a form of conditional gift since it was only perfected on the death of the donor.¹³ Over the years it has often been confused with 'legacy' since both have certain characteristics which overlap.

The rationale behind the idea of *Donatio mortis causa* is that when a man is taken with surprising sickness and is in extremity and as a result of which he is unable to make a will, he should be authorized to make such arrangements in the form of gifts which would operate after he dies.¹⁴ Thus, *Donatio mortis causa* has been called a gift of an 'amphibious nature' by Buckley J.¹⁵, not exactly a gift, nor exactly a legacy, but partaking of the nature of both. Over the seventeenth and eighteenth centuries, the English judges adopted the concept of *Donatio mortis causa* into Common Law.¹⁶

In India, gift mortis causa was enshrined in Section 178 of the Succession Act of 1865 by English Jurists. When the Act was updated, the concept of *Donatio mortis causa* was covered by Section 191 in the Indian Succession Act 1925 under a separate chapter (Chapter XXIII – Gifts made in Contemplation of Death). Section 191 enables an Indian, except a Muslim to make a gift in contemplation of death. In India, the death-bed gifts are confined to movable property and takes effect only if the donor dies.¹⁷

Journal of Multi-Disciplinary
Legal Research

ESSENTIAL INGREDIENTS OF *DONATIO MORTIS CAUSA*

The Supreme Court of India has laid down five essentials of *donatio mortis causa*¹⁸:

- i) The gift must be of movable property
- ii) It should have been made in contemplation of the death of the donor

12 Bob Hughes, 'The Exception is the Rule: *Donatio Mortis Causa*' [2003] 7 JSPL 12.

13 H Bracton (trs Thorne), *On the Law and Customs of England* (Cambridge UP, 1968-76), vol 2 178

14 Law Commission of India, *Indian Succession Act, 1925* (Law Com 110, 1985) 177

15 Re Beaumont; *Beaumont v Ewbank* [1902] 1 Ch 889

16 see *Sen v Headley* [1991] EWCA Civ 13 [639]

17 Mohd. Hesabuddin v Hesaneddin, AIR 1984 Goa 41

18 *Commissioner of Gift Tax, Ernakulam v Abdul Karim Mohd.* [1991] AIR SC 1847 [6]

- iii) The donor must be ill and he should expect to die shortly of the illness
- iv) The possession of the property is delivered to the donee
- v) The gift becomes void if the donor recovers from his illness or the donee pre-deceases him.

I. Contemplation of Death:

The donor must make the gift at a time where he is contemplating his death. It is not enough to show that the donor made the gift because he or she was old.¹⁹ Also contemplating death in a vague sense is not enough. At some point in the future, the donor must believe that they are going to die. The question whether the donor was actually suffering from death-illness is a question of fact.²⁰ What is important is that they genuinely believe they will die shortly, even if they are incorrect.

In the historic case of Wilkes v Allington²¹, when the donor knew that he had cancer and believed himself to be destined to die soon, he made a gift to the donee. A month later, he died from pneumonia, an unrelated illness. The court held that *the gift was valid because it was not conditional on his death from the particular cause contemplated by him. It, therefore, does not matter whether the cause of death that the Donor anticipates is actually what kills them.*

Where the deceased, a few hours before his death, and in contemplation of death, caused certain Government papers to be fetched and himself gave them into the hands of the plaintiff with the intention of passing the property to him, but could not make the endorsement because he was too weak to do so, held that under the circumstances the gift amounted to a valid *donatio mortis causa*.²²

However, a gift in expectation of suicide cannot be said to be that made in contemplation of death.²³

II. Conditional upon donor's death

19 Smallcombe v Elders Trustee Co. Ltd. [1963] WAR 3.

20 Rashid v Sherbanoo ILR Bom 264 (266); Muhammad Sayeed v Muhammad Ismail ILR 33 All 233 (234)

21 [1931] 2 Ch 104; 100 LJ Ch 262.

22 Kumar Upendra Krishna v Nabin Krishna, 3 BLR OC 113

23 Re, Dudman [1925] Ch 553 (555).

The donor must intend for the gift to be conditional upon his death. It must be clear that he intends to give the gift only if he dies. The donee succeeds on the property only on the death of the donor unless revoked by the donor before his death.²⁴ Similarly, if the donor makes the gift and then recovers so that their reason for contemplating death is no more the gift is revoked.

In *Gardner v Parker*,²⁵ the donor was gravely ill and confined to his bed. Two days before he died he gave to the donee a bond for £1,800 stating ‘There, take that and keep it.’ This was held to be a valid DMC as it was inferred from the circumstances that they intended the gift to be conditional upon their death.

III. Delivery of Property

To complete a gift of movable property in contemplation of death, there must be sufficient delivery of possession of the property to the donee by the donor.²⁶ There are two elements in the delivery of possession of a property- the donor’s intention and the actual physical transfer. Initially, the donor must intend to part with possession over the subject matter.

A mere intention to part with the property gift prior to death is not sufficient to constitute a valid *donatio mortis causa*.²⁷ This means that there must be an actual physical delivery of the subject matter. In *Cain v Moon*²⁸, it was held that the donor must deliver the subject matter in his lifetime, though it does not matter whether the delivery is made before or after the intention to make the *donatio mortis causa* is expressed.

In the case of *Re Lillingston*, [1952] the donor told the donee to find the jewelry in various locations upon her death and the key was hers to keep. This was considered as a valid *donatio mortis causa*.

By the way, the actual delivery does not have to be done by the donor and can be done by their authorized agent. Similarly, the delivery can be made either to the donee or to their agent. The method of delivery required varies depending on the nature of the asset that is subject to the *donatio mortis causa*. It may not always be necessary to hand over the asset itself, as long as

24 *Silva v Mackakin* AIR 1943 All 95; ILR (1943) All 198.

25 (1818) 3 Madd. 184

26 *Reddel v Dobree* 10 Sim 244.

27 *Trimmor v Danby* 25 LJ Ch 424

28 [1896] 2 Q.B 283

control of the asset is parted with. A symbolic delivery is not enough as the donor is not actually parting with possession over the asset. So, handing over an item that represents the subject matter of the gift as a placeholder is not sufficient.

In the case of *Birch v Treasury Solicitor*,²⁹ the donor handed to the donee their Post Office Savings Bank book, along with various other savings and deposit bank books, intending that the money in these accounts should belong to the donee if the donor died. This was held to be a sufficient *donatio mortis causa*.

IV. Non Recovery of the Donor

Such gifts are easily revocable. Even if one of the above conditions remains unfulfilled, this gift remains invalid. The donor who makes the gift has the power to revoke the same at any time before death by taking back control of the subject matter of the gift *Mortis causa*, defeating the requirement of parting with possession. Similarly, if the donor who makes a *Donatio Mortis Causa* recovers from the illness contemplating his death, then the gift is automatically revoked.

In the recent case of *Keeling v Keeling*,³⁰ the Defendant of this matter and the donee alleged that a valid *Donatio mortis causa* was made because the donor suffered a heart attack and told him that she wanted him to have the house. The donor passed the donee the keys and the title deeds to the house. The court decided that there was no *Donatio mortis causa* because the requirements had not been satisfied concerning the donor's contemplation of death. The judge said, "*In May 2012 Ellen [the donor] had just had her first heart attack but was not hospitalized. She survived a further six months. She did not in, May 2012, 'have good reason to anticipate death from an identified cause.' In any event, any 'contemplated' death in May did not occur: she recovered, so any gift would have lapsed.*"

V. Subject Matter of *Donatio mortis causa*

The majority of personal assets can pass by *donatio mortis causa*. Personal chattels, bonds, insurance policies, and cash have all been held to be capable of passing by *donatio mortis causa*.

29 [1951] 1 CH 298

30 [2017] EWHC 1189 (Ch)

Cheques, company shares, and land may also pass by *donatio mortis causa* but there are additional points to consider on each.

For example, A, being ill, and in expectation of death, delivers to B, to be retained by him in case of A's death,— a watch; a bond granted by C to A; a bank-note; a promissory note of the Central Government endorsed in blank; a bill of exchange endorsed in blank; certain mortgage-deeds. A dies of the illness during which he delivered these articles. B is entitled to— the watch; the debt secured by C's bond; the bank-note; the promissory note of the Central Government; the bill of exchange; the money secured by the mortgage deeds.³¹

In *Darlow v. Sparks*,³² Bennett, J., said that “it seemed difficult to ascertain whether there was any clear principle on which the courts had acted in deciding whether a document was or was not the subject of a *donatio mortis causa*”

However, it is not possible for a cheque written by the donor to pass by the *donatio mortis causa*. This is because such a cheque does not constitute property of the donor, but merely an instruction to his bank which is revoked on the donor's death.³³ Similarly, a promissory note drawn by the donor pass by *donatio mortis causa* as it is only a promise to pay money.

Immovable property i.e. real estate also became a subject matter of gifts mortis causa through the famous case of *Sen v. Headley*.³⁴

APPLICATION OF THE DOCTRINE

Donatio Mortis Causa is a retrospective concept to be followed in the present day. Though Courts in many countries adopt this law, the judges think this exceptional doctrine is an abomination to the property law and the concept of wills. The rationale behind the judicial dislike of the gift mortis causa is that this type of gift lacks all those formalities and safeguards which the law throws around wills and creates a strong temptation to the commission of fraud and perjury.

31 Illustration (i), Section 191 of the Transfer of property Act, 1882

32 1938, 54 T.L.R.627

33 Re Beaumont [1902] 1 Ch.886

34 [1991] 2 WLR 1308

In a recent case of *King v Chiltern Dog Rescue*,³⁵ a donatio mortis causa was initially upheld, where the only evidence of it came from the beneficiary who was a convicted fraudster. In his judgment for the King case, Jackson LJ made statements that were particularly damning of the doctrine. At 53 he said: “I must confess to some mystification as to why the common law has adopted the doctrine of DMC at all... it serves little useful purpose today, save possibly as a means of validating death bed gifts. The will may have been prepared with the assistance of a solicitor and in the absence of the 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 D said to those visiting or caring for him in the last hours of his life.”

The Indian judicial system gives more weightage to intestate succession and testamentary succession. Therefore the Courts in India come across the gifts mortis causa very rarely. Yet this doctrine has been misused from time to time to prevent gift tax payments and to invalidate ineffective wills.

CONCLUSION

While India is a country where most people rely upon testamentary and intestate succession, the current spread of the Covid-19 pandemic has caused an increasing number of people to return to the old doctrine of donatio mortis causa. The situation prevails not only in India but in many countries across the world. It's probably fair to call this doctrine an anomaly in succession law due to its unique, almost limbo-like position somewhere between inter vivos gifts and testamentary legacies. Making a Donatio Mortis Causa is a controversial and risky procedure and should be considered only as a last resort. The burden, therefore, falls on the Courts as they are now likely to use a cautious approach while dealing with such cases due to the risks of fraud, perjury, and abuse. Courts need to keep donatio mortis causa within their proper bounds and resist extending the doctrine any further. Optimistically, except for the Mohammedan law, our country's law recognizes death-bed gifts only to the extent of movable property to avoid further complications.

35 [2015] WTLR 1225