

John is a journalist who is about to go on an assignment in Iraq. He is only 30, so he has not made a will, but at the airport he suddenly realizes that Iraq is a dangerous place and he might be killed. So he tells his girlfriend, Carol, who is at the airport with him:

If I die in Iraq I want you to have my property. My house is yours. Here is the key to the front door. The solicitors dealt with the registration of title and the mortgage is kept by the bank. Ask them for the documents that you need. Here is my credit card, use my money if I do not come back.

You are already looking after my car, the Porsche, while I am away. If I die it is yours. Six months later, John has finished his assignment in Iraq and goes on holiday in Turkey, where he is killed in a car crash. John has a brother, David, his only living relative, who claims all John's property.

Carol has applied for administration of John's estate and considers that she is entitled to his house, money and car. Advise Carol.

Suggested Answer

This is a problem about donatio mortis causa or death bed gifts. According to practically all the cases on donatio there are three requirements: *Re Craven*, *Sen v Headley*.

The first is that the gift must be made in contemplation of death, although not necessarily in expectation of death. Most of the cases involve illness, but it does not matter whether the person dies from another cause: *Wilkes v Allington*. The recent Court of Appeal case, *King v Chiltern Dog Rescue* [2015] EWCA Civ 58 states that the "donor must have good reason to anticipate death in the near future from an identified cause." The same case suggested that this could include going on a dangerous journey. John would have good reason to fear a journey to Iraq.

There is a long period in this problem between the attempted donatio and the death of John. This was not thought fatal to the gift, as long as John has not revoked or become completely removed from the dangerous situation: *Wilkes v Allington*. The Court of Appeal, however, suggests in *King* above, that death must be anticipated in the near future.

The idea of a donatio is that the gift only occurs when and if the donor dies. So did John intend these gifts only to take effect upon his death? His words suggest that he did. If a donor recovers from illness the donatio is revoked: *Bunn v Markham*, *Staniland v Willott*. Perhaps the end of John's dangerous assignment and going on holiday is equivalent?

The third requirement is that there must be delivery, or handing over, of the property or the essential indicia of title. The idea is that the donor is relinquishing control or dominion over the property. 'Constructive delivery' or telling the donee where to find the property or document etc is also possible: *Birch v Treasury Solicitor*, *Re Weston*, *Sen v Headley* etc. What is required varies according to the type of property.

Donatio of a house was finally accepted in *Sen v Headley*, overruling the older *Duffield v Elwes*. In that case being told where the title deeds were was enough for delivery.

Margaret Sen already had a front door key.

Bank accounts, savings accounts etc can be delivered by handing over the pass book: *Re Weston, Birch v Treasury Solicitor*. Is a credit card the modern equivalent of a pass book or is it not the means of access to a bank account at all but only the means to run up debt?

A car was the subject of a donatio in *Woodard v Woodard*. There the donee already had the car keys, as in this situation, and the court said that delivery of the subject matter was not essential.

If there is a valid donatio then the donee asks the administrator to perfect the gift, in other words formally to transfer the property: *Birch v Treasury Solicitor*.

If Carol did succeed in becoming administratrix, then she could use the rule in *Strong v Bird* to perfect the imperfect gift. Although doubted by some academic opinion and in *Re Gonin*, the Court of Appeal accepted that the rule could still be used in *Day v Harris*. That case concerned chattels, which a Porsche is, but the rule has also been applied to land in *Re James*.