

Neutral Citation Number: [2021] EWHC 445 (Ch)

Case No: PT-2020-CDF-000019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

IN THE ESTATES OF MARGARET BAILEY DECEASED
AND ALAN BAILEY DECEASED

Cardiff Civil Justice Centre

2 Park Street, Cardiff CF10 1ET

26/02/2021

B e f o r e :

HIS HONOUR JUDGE JARMAN QC

Sitting as a judge of the High Court

Between:

(1) WENDY DAVEY

(2) EIRON JONES

Claimants

- and -

(1) DAVID BAILEY

(2) MYFANWY JEFFREYS

(3) LESLIE DAVIES

(4) PAUL DAVIES

(5) MICHAEL DAVIES

Defendants

Mr Richard Fowler (instructed by CCW Law Solicitors Ltd) for the claimants

Mr Alex Troup (instructed by Graham Evans & Partners) for the defendants

Hearing dates: 22 and 23 February 2012

HTML VERSION OF JUDGMENT APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT
TO EDITORIAL CORRECTIONS)

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HH JUDGE JARMAN QC:

These proceedings concern the proper distribution of the estates of a devoted married couple, Alan and Margaret Bailey, who each died at the age of 71 within months of each other in 2019. They had no children. Each left a will dated 28 May 2009 in which each appointed the other as sole executor and sole beneficiary. After his wife died on 20 January 2019 of cancer, Mr Bailey attended the solicitor who had drafted the wills, Eira Rees Jones of Hugh Williams Son & Co in Llandeilo, to make a new will. However, he did not execute a new will before he died of a heart attack on 24 May 2019. As his wife had predeceased him, his gift to her under his 2009 will fails, and his estate, including that which he inherited from his wife, passes under the law of intestacy to his next of kin. His next of kin under section 46 of the Administration of Estates Act 1925 are the defendants, namely his brother David Bailey, his sister Myfanwy Jeffreys, and the children of his sister Ann who predeceased him, Leslie, Paul and Michael Davies.

However, Mrs Bailey's sister and brother, Wendy Davey and Eiron Jones, the claimants in these proceedings, claim that the couple in January 2019 made gifts of a substantial part of their sizeable estates, in contemplation of their respective deaths. Mrs Davey also claims that her brother in law made such a gift to her in February 2019 of the house which he had jointly owned with his wife, known as Troedyrhiw, Talley, a small village a few miles to the east of a larger village in Carmarthenshire called Llangadog.

I read and heard written and oral evidence from the claimants and their respective daughters Caroline Bryant and Nicola Jones, from David Bailey and his nephew Leslie Davies, from Mrs Jones the solicitor, and from an independent financial advisor who had acted for the couple over many years, Colonel Douglas Jones. Mrs Davey lives in Surrey and her daughter in Hampshire. Mr Jones

and his daughter live a few miles to the south of Llangadog near Ammanford, as does Mrs Jeffreys. The other defendants all live in Llangadog.

By the time of the claimed gifts the couple were prosperous. Troedyrhiw was registered in their joint names in 2003. Earlier that year two business properties, both situated in Llangadog were transferred into the late Mr Bailey's sole name, a butchers and a grocers. The latter has three flats above. Both these had been left to him and his brother David by their parents and they ran the businesses for many years. Mrs Bailey, as well as working full time for construction companies, was also responsible, in large part at least, for the administration of these business. Eventually the brothers decided to go their separate ways professionally but remained friendly. David Bailey was bought out of the businesses. Their nephew Leslie Davies then ran the butchers business, which he has now done for some 20 years. After her redundancy at the age of 60, Mrs Bailey helped her husband in the grocers business and continued helping with the administration, which she did up until the last couple of weeks before her death. She and her husband each had pensions and other investments such as ISAs.

Mrs Bailey's net estate in a IHT form completed by Colonel Jones in March 2019 from information provided by her husband was valued at just short of £662,000. He also provided a recommendations report for Mr Bailey on 27 February 2019, based on property valuations assessed by the latter. Those were £350,000 for Troedyrhiw, £400,000 for the grocery shop, £450,000 for the butcher's shop and £200,000 for the flats. Colonel Jones obtained valuations in respect of Mr Bailey's pension, ISA and bank account of around £134,000, £84,000 and £20,000 respectively. When his inheritance from his late wife was added, his total assets were recorded as over £2million. The IHT return relating to his estate records that his net estate is worth just over £1.1 million before IHT. By then, professional valuations had been obtained in respect of the properties, and in particular the valuation of the butchers shop, was lower than thought by Mr Bailey, at £195,000. His brother David, who is now administrator of his estate, accepted in cross examination that his brother had made it clear that £176,000 was earmarked for refurbishment of the upper floors of the shop which are in very poor condition.

Several important factors emerged clearly from the oral evidence which I heard. Not only were the couple devoted to one another, but they were devoted to their respective families, and there was a closeness between these families. A good example is given by the fact that members of both sides of the family met the day after Mr Bailey's funeral at his brother David's house, when the couple's wishes as to what was to happen to their assets after their days was discussed. Mrs Davey said

something to the effect that as the couple had died so close to one another, their estates, apart from the butcher's shop, should be split equally between their respective families as she believed that is what their wishes were.

There was consensus before me that all material times Mr Bailey wanted the butcher's shop to go to his nephew Leslie. Although Mrs Davey raised the issue of splitting the estate of the couple between their respective families, the meeting remained friendly. Members of both sides of the family met again some weeks later to scatter Mr Bailey's ashes.

It was only later when his brother David thought that Mrs Davey had taken more property from Troedyrhiw than he had agreed to, that a dispute arose. Despite that, and despite the adversarial nature of these proceedings, the clear impression I gained during the oral evidence of each member of the family was that he or she was trying his or her best to give straightforward and accurate answers. Each side readily made concessions about the other.

For example, Mrs Davey readily accepted that her late brother in law treated his nephew Leslie like a son. He in turn readily accepted how supportive Mrs Davey in particular had been since her sister was diagnosed with cancer. During 2018 Mrs Davey regularly travelled to Troedyrhiw to be with her sister and to help with the administration. After hope of remission in the autumn was dashed, it was she who brought her sister home from hospital for the last time on New Year's Eve, having been told that the cancer had returned in an aggressive form. She stayed with her sister and brother in law at Troedyrhiw until her sister passed away, and was joined by her daughter Caroline for some of that time. Afterwards she stayed on for a few days to support her brother in law and to help him with the paperwork.

Neither Mr Fowler for the claimants or Mr Troup for the defendants sought to suggest that witnesses for the other side were not witnesses of truth. In my judgment, that was a proper approach. Each witness in my judgment was impressive in his or her own way. At the end of the evidence, it was clear that apart from one issue, there was no substantial dispute about the essential facts in this case. Inevitably there were some differences of recollection on more minor details and some differences of perception or interpretation, but no more than to be expected in the very difficult times which each experienced in 2018 and 2019. Such matters do not impact upon the essential facts.

Another significant factor is that the couple did accept that the survivor would have to make a new will. Mrs Jones says that she advised them of this when taking their instructions on their 2009 wills, which were made in a hurry because of financial advisor's advice, and both acknowledged this.

This is also clearly acknowledged in a checklist for planning ahead which Mrs Davey says she was given by Macmillan Cancer Support on leaving hospital with her sister for the last time. This form is heavily relied upon by the claimants and I shall return to its detail. Mrs Davey says that she completed some of this form on 2 January 2019 with her sister and brother in law around the kitchen table at Troedyrhiw.

The first question on the form asks for details of any will, and in Mrs Davey's writing it is confirmed one was made and was with Mrs Jones the solicitor. Also in Mrs Davey's handwriting in that section are the following words "Leslie-Butcher's." She says that Mr Bailey asked her to put that. These words then followed; "Eiron + Wendy equivalent/ Rest 50/50" and that split is then repeated. Under the reference to the will being with Mrs Jones, Mrs Davey has written "Get Alan to write own will." She says that these words were the wishes expressed by her sister to which her brother in law agreed.

Mrs Jones and Colonel Jones each say that after Mrs Bailey's death at meetings with her husband, he made clear that he wanted to make a new will but, apart from being clear that the butcher's shop was to go to his nephew Leslie, was finding it difficult to decide precisely who was to inherit. He did indicate to Mrs Jones that he wanted his nephew Leslie and Mrs Davey's daughter Caroline to be executors.

The strong likelihood from this part of the evidence of Mrs Davey, Mrs Jones, and Colonel Jones, which was not substantially challenged and which I accept, is that the couple did intend, at least from 2 January 2019 onwards, that both sides of the family should benefit substantially from their estates. The claimants are deserving of sympathy as in the event, Mr Bailey did not live long enough to ensure that his will was changed to bring this about. If the law permits a way to "put things right" in the words of Mr Fowler, then in my judgment the court would not need to strive very hard to do so.

On the other hand, such sympathy cannot justify the court attempting to fit the facts into strict legal requirements if objectively those requirements are not made out. As was observed by Jackson LJ giving the lead judgment of the Court of Appeal in the recent authoritative case of *King v The Chiltern Dog Rescue & Anor* [2016] Ch 221, the principle of such gifts (also known, which may sometimes be

misleading, as deathbed gifts or by the original Roman Law name of *donatio mortis causa* or by the abbreviation DMC) is an anomaly which enables the transfer of property upon death without complying with any of the formalities of section 9 of the Wills Act 1837 or section 52 of the Law of Property Act 1925.

Jackson LJ carried out an extensive review of the authorities. This included *In Re Beaumont* [1902] 1 Ch 889 where Buckley J summarised the law as follows:

"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. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor's death. The Court must find that the donor intended it to be absolute if he died, but he need not actually say so."

Reference was also made to *In Birch v Treasury Solicitor* [1951] 1 Ch. 298, and to what Jackson LJ regarded as an important statement by Lord Evershed MR, as to the limits of the principle, at pages 307-8 as follows:

"Because of these peculiar characteristics the 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."

After reviewing the authorities, Jackson LJ said this at paragraph 50, referring to the donor of the gift as D:

"Let me now stand back and summarise the legal principles which emerge from the case law. I have enumerated all the authorities which counsel have cited. I have also taken into account the numerous other authorities which are discussed in those judgments. It is clear that there are three requirements to constitute a valid DMC. They are:"

- i) D contemplates his impending death.
- ii) D makes a gift which will only take effect if and when his contemplated death occurs. Until then D has the right to revoke the gift.
- iii) D delivers dominion over the subject matter of the gift to R.

At paragraph 52, he drew from the various authorities the need for the strictest scrutiny of the factual evidence and emphasised that the courts must not allow the principle to be used as a device in order to validate ineffective wills.

In paragraphs 55 to 59, he went into further details as to the three requirements for a valid deathbed gift. There is no dispute about the requirements before me, although there is as to the application to the facts of this case. As to the first requirement, Jackson LJ said this:

"The first requirement is that D should be contemplating his impending death. That means D should be contemplating death in the near future for a specific reason: see the dictum of Farwell J in *In re Craven's Estate* [1937] Ch 423... I do not say that DMC is only available when D is on his deathbed, even though that is the situation in which the doctrine might be said to serve a useful social purpose (provided that no one is taking advantage of D's dire situation). Nevertheless it is clear, on the authorities, that D must have good reason to anticipate death in the near future from an identified cause. It is also clear, on the authorities, that the death which D is anticipating need not be inevitable."

The second requirement is as to the form of gift:

"This is that D should make an unusual form of gift. It will only take effect if his contemplated death occurs. D reserves the right to revoke the gift at will...In cases where early death is inevitable the law relaxes the requirement that D should specifically require the property if he survives."

And finally:

"I turn now to the third requirement. This is that D should deliver "dominion" over the subject matter. Since property will not pass until a future date (if ever) and D has the right to recover the property whenever he chooses, it is not easy to understand what "dominion" actually means. I take comfort from the fact that even chancery lawyers find the concept difficult. Buckley J in *In re Beaumont* [1902] 1 Ch 889 said that it was "amphibious". The deputy judge in *Vallee v Birchwood* [2014] Ch 271 said that the concept was "slippery". I agree. From a review of the cases I conclude that "dominion" means physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter."

Those requirements must be applied to each of the three gifts which the claimants rely upon in the present case. The first two arise out of the Macmillan form. The way Mr Fowler puts the claimed gift of an equivalent amount to the butchers shop is that this was a gift made by Mrs Bailey jointly to Mrs Davey for herself and as agent for her brother in contemplation of impending death from cancer. It was conditional and to become final and irrevocable on Mrs Bailey's death. Delivery of dominion over the gift was effected by Mrs Bailey instructing her sister to complete the Macmillan form in the way she did.

As for the gift of half of the residue of the couple's estate, Mr Fowler submits that that was either a joint deathbed gift by them, or a gift by Mr Bailey alone, on the basis that it was not to take effect on Mrs Bailey's death. It was made by the couple (or by Mr Bailey alone) jointly to Mrs Davey for herself and as agent for to her brother in contemplation of their respective impending deaths, that of Mrs Bailey's from cancer and that of Mr Bailey's by reason of chest pains or grief at his wife's condition or general ill health or a combination of these reasons. This gift was conditional and to become final on Mr Bailey's death. Delivery of dominion over the gift was effected by the couple instructing Mrs Davey to complete the Macmillan form as she did.

Mr Troup conceded that as to those gifts, the first requirement was made out so far as Mrs Bailey was concerned. In my judgment that was a proper concession. It is clear that upon her discharge on New Year's Eve the cancer had returned in an aggressive form. Mrs Davey said that she did not know if her sister had been told that her condition was terminal and that even by 2 January 2019 she was still hoping for treatment. However, in my judgment it is clear that in discussing her wishes with her husband and sister that day, and in letting her sister know during the following days of details of her funeral arrangements with which to complete the form, she was contemplating her death from her cancer, even if hoping for treatment.

As to the second requirement, it is also clear that any gift was to be conditional upon Mrs Bailey's death. However, it is less clear whether her intention was that any gifts would take complete effect on her death, in the words of Buckley in *In Re Beamont*, or in the words of Jackson LJ in *King v Chiltern* should take place not only if but "when" the contemplated death occurred.

When cross-examined about this, Mrs Davey said that in the discussion on 2 January 2019, her brother in law said that the gift of the butchers to his nephew Leslie should take effect right away, not necessarily on his wife's death. Mrs Davey's impression was that this would be effected in her brother in law's lifetime. However, she also said that the reason her sister wanted her husband to

make a new will was to carry out both their wishes and that what they both agreed then was that Mr Bailey would make a new will to carry this out. Her sister knew that her husband would carry out their joint wishes as set out in the new form, by making a new will. She added that one of the last things her sister made her promise was to ensure that her husband visited a solicitor to make a new will to carry out the wishes on the form. She trusted him completely and was content to leave it to him to make a new will.

In my judgment that evidence, which I accept, strongly indicates that the intention of each of the couple was not to make gifts to take effect on the death of one or other of them, but to express wishes which Mr Bailey would incorporate into a new will after the death of his wife. This is what the form itself, on an objective reading, indicates. This also ties in with the background to the 2009 wills set out in paragraphs 11-13 above and the couple's realisation from then on that the survivor would have to make a new will to benefit both sides of the family. In my judgment it is likely that this is how Mrs Bailey and her husband both intended matters to proceed after her death.

If further support were needed for that conclusion, Mr Troup relies upon other matters. The reference on the form to "butchers" does not make it clear whether this includes the business as well as the property and it is not clear which of Mr Bailey's relatives were to inherit. These were matters to be finalised when he made a new will. When he gave details for his wife's IHT form in answer to a question whether she had made gifts he replied no.

On 15 March 2019 Mr Bailey went to see Mrs Jones, to give instructions for a new will. He made it clear that he wanted to leave the butcher's shop to his nephew Leslie, but could not decide who the beneficiaries of the rest of his estate should be. Ms Jones' attendance note states that when she suggested that he may wish to give some of his estate to his wife's relatives he started to cry and said that he would have to give the matter some further thought and would come to see her again when his emotions were better under control. There was another such meeting a fortnight later when he said in respect of this decision that he was "nearly there." Mrs Jones told him that it was imperative that he should make a will to make sure that his estate did not pass on intestacy.

Mr Troup continued that the instructions to Mrs Jones that the butcher's shop was to go to his nephew is not consistent with a gift having already been made. There is the added complication that the grocer's shop and the flats were registered in the sole name of Mr Bailey, and it is unclear that his wife had sufficient of her own assets to make a gift equivalent to the value of the butchers shop.

Those included her pension worth some £272,000 of which the nominated beneficiary was her husband, and although this could have been amended this was not done.

Taking these other matters together, they do provide some further support, but in my judgment this is relatively small compared to those which found the clear conclusion which I have reached above irrespective of these further matters. Mr Fowler emphasised that it is possible to make a joint deathbed gift and that there is a difference between an effective gift and putting into place the legal requirements to finalise the gift. I take those matters into account, but in my judgment they do not provide an answer to the evidential difficulties referred to above. I am not satisfied that the second requirement is made out in either of these two gifts.

There is in any event further difficulty in establishing the third requirement in respect of these two claimed gifts. Neither of them were of specific property whether real property, or of a particular pension, investment or bank account. If they were gifts at all, they were of a given value or percentage of assets, whether as equivalent to the value of the butchers or 50 percent of the remainder of their combined assets. It is clear in my view that there was no delivery of the subject matter of any gift or means of access to it.

Mr Fowler put this on the basis that the Macmillan form amounted to documentary evidence of an entitlement to possession of the subject matter, and emphasised that in Mrs Bailey's weakened position this was all she was capable of in terms of delivery of dominion of the subject matter.

In my judgment this is a classic example of how the principle is not to be used as a device to validate an ineffective will. The form relied upon does not amount to a title deed or to a document showing entitlement to possession of any of the assets of Mrs or Mr Bailey. It is a piece of paper on which their testamentary wishes have been written. It does not satisfy the third requirement.

Insofar as Mr Bailey is concerned, there is the added difficulty that there is nothing to show that until the death of his wife he was contemplating his own impending death for a specific reason. I shall need to come on to deal in detail with the evidence as to how he was affected by his wife's death, and this is the main factual dispute between the parties. However, in my judgment it is clear that there was no such contemplation before then.

It follows that the claim in respect of these two gifts fails.

The third claimed gift is of Troedyrhiw by Mr Bailey to Mrs Davey in February 2019 when she was helping him to sort out documentation after the death of her sister. She came across a metal box file which then contained the pre-registration deeds of Troedyrhiw and two parcels of adjacent land, as well as office copy entries in respect of the subsequent registration and confirmation of such registration by the Land Registry to a building society. She asked her brother in law what he wanted done with the file and he replied that his wife wanted her to have the house and that is what he wanted too, so she should take the file as it was for her. She says she hugged him and told him how sweet he was.

Although it is accepted on behalf of the claimants that there was no medical diagnosis in respect of Mr Bailey to give him cause to contemplate his impending death and that he died unexpectedly from a heart attack, two matters in particular are relied upon as evidence of such contemplation, which of course is subjective. The first is that the day after his wife's funeral he had such severe chest pains that he could not move off the settee. Mrs Davey and Nicola Jones were so concerned that they encouraged him to see a doctor, and Caroline Bryant said she had never seen her uncle as bad as that before. The preponderance of the evidence was that he was a quiet, discreet man who didn't like to make a fuss and tended to laugh off his ailments.

His medical notes show that he suffered from ongoing back hip and feet trouble for which he had been referred to the department for spinal surgery at Morriston Hospital. They also show that he was prescribed Lansoprazole tablets for stomach acid.

The second matter relied upon is that, unsurprisingly, he was distraught at the loss of his wife and it is said that he had lost interest in his businesses and indeed in life. This was accepted to some extent by his brother David in cross-examination. Mr Fowler submitted that although he put a brave face on it he was contemplating his death from heart disease or from a broken heart.

His nephew Leslie also accepted how distraught his uncle was, but did not accept that he had given up on the businesses or his life. He said that although he did not see his uncle the day after his aunt's funeral, Mrs Davey phoned to say how concerned she was, to which he asked whether his uncle had taken his tablets for heartburn. He explained that strong spirits set this off and that people had been buying him whisky at the wake for his wife the day before. He added that despite his loss, his uncle

in the following weeks was looking forward to a golf trip abroad, and a nephew's wedding. He also bought a new Mercedes car. He told his nephew that he was thinking of selling Troedyrhiw, as although it had very happy memories there was nothing in Talley for him anymore, and he was thinking of downsizing and buying a place in Llangadog near his relatives.

That part of Mr Davies' evidence came across as vivid and genuine, as might be expected from one so close to his uncle, and I accept it. It is supported by the evidence of Colonel Jones, who in compiling his financial recommendations to Mr Bailey in February 2019 had to inquire into his health as this informed the recommendation, so it was no idle inquiry. He reported as being in good health with no serious issues and was a non-smoker. The recommendation included Troedyrhiw as part of his assets. It also has some support from the medical records, and I accept Mr Davies' evidence in this respect.

In my judgment on a strict analysis of all of the evidence, there is no justification for a conclusion that prior to his unexpected heart attack Mr Bailey was contemplating his death for a specific reason.

As the first requirement in respect of the claimed gift of Troedyrhiw is not made out, then that claim fails also. There are difficulties with the other requirements in respect of this gift too. The fact that Mr Bailey regarded the house as still part of his assets in discussing his finances with Colonel Jones and in considering downsizing with his nephew strongly suggests that what he said to Mrs Davey about the metal file was a statement of testamentary intention rather than a gift, albeit revocable, conditional upon his death.

Whilst it is clear from authority that delivery of deeds of unregistered property may constitute delivery of dominion, there is no authority in England and Wales that pre-registration deeds or office copy entries in respect of registered property may amount to the same thing. Since the Land Registration Act 2002 office copy entries are not required to be produced on any dealing with the property.

It would certainly be odd if the requirements of deathbed gifts altered depending upon whether the property is registered or unregistered, but that is the conclusion of an academic article relied upon by Mr Troup (see "Donationes mortis causa in a dematerialised world" by N. Roberts, Conv. 2013, 2, 113- 128).

As Mr Fowler submitted, such a gift of registered land can be made in certain circumstances, where for example a transfer is executed by the donor to the donee to take effect only on the former's death. The High Court of Singapore has held that this is sufficient delivery of dominion (see *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125). Mr Troup referred to a Canadian authority to similar effect (*Cooper and Madonald v Seversen* (1956) 1 DLR (2d) 161), but submitted that no transfer has been executed in this case.

In my judgment this interesting question deserves detailed consideration as and when a case depends on its resolution, which is not the case here on the conclusions I have come to.

Accordingly, although I have sympathy for the claimants, I must heed the warnings given in *King v Chiltern* and must consequently conclude that the strict requirements for a valid deathbed gift are not all met in any of the three claimed gifts, and that the claim fails. I will add, as an observation only, that failure to meet strict legal requirements does not prevent the defendants from making voluntary gifts to the claimants from Mr Bailey's estate, including as it does his late wife's estate, should they feel so inclined.

I am grateful to counsel for their respective clear, thorough and professional presentations in this somewhat sad case.