

Gravely ill people frequently mention such things as the forgiveness of debts or the gift of various assets. These declarations are so frequently at odds with the contents of the Will...

to the defendant. This debt was secured by an unregistered mortgage. Payments were made on the loan; the deceased, however, was heard to tell the defendant to tear up the loan agreement and that she no longer owed the deceased any money.

The deceased specifically said that he was dying and the money wasn't any good to him. The deceased directed witnesses to this conversation to find the loan agreement and destroy it; they were, however, unable to carry out these instructions because they could not find it.

The deceased's executors brought an action claiming the balance owing on the loan. The defendant successfully argued that the deceased had forgiven the loan as a *donatio mortis causa*. The court ruled the deceased knew he was dying when the gift was made and it was so close to the time of the death that the gift was conditional upon that death. The court also found delivery had occurred when the deceased instructed the witness to find and destroy the agreement.

5. Real Property

As noted above in the *Costiniuk* case, it appears that delivery of the state of title certificate was not sufficient delivery to be a valid *donatio mortis causa*.

Similarly, in *Dyck v. Cardon* 17 E. T. R. 54, the Alberta Court of Appeal held that delivery of keys to a house was not sufficient to complete a gift.

In fact, it would appear that the weight of Canadian judicial opinion is that real property cannot be the subject of a *donatio mortis causa*.

The English Court of Appeal, however, has ruled otherwise. In *Sen*

v. *Headley* (1991) 2 All ER 636, the deceased handed over the keys of a steel box containing the title deeds to the deceased's real property.

The court found that in doing so, the deceased had indisputably made a gift of the house to the plaintiff in contemplation of his death to be effective on his death and his parting with the dominion over the title deeds to the house was sufficient to satisfy the third of the requirements necessary to establish a valid *donatio mortis causa*.

Conclusion

From a review of the caselaw, it is clear that the courts are open to upholding *donatio mortis causa* in appropriate circumstances where they are satisfied, by credible witnesses, that the three essential criteria have been proven.

Gravely ill people frequently mention such things as the forgiveness of debts or the gift of various assets. These declarations are so frequently at odds with the contents of the Will, it is surprising there is so little litigation involving claims of *donatio mortis causa*. ▲

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 32 years and is a past chair of the Wills and Trusts (Vancouver) Subsection, BC Branch of the Canadian Bar Association, and a past president of the Trial Lawyers Association of BC. Trevor frequently lectures to the Trial Lawyers, CLE, and the BC Notaries and also teaches estate law to new Notaries. His Website includes 30 articles on various topics of estate law.

Judith Milliken QC has practised law for 31 years in the areas of commercial law, criminal law, and most recently estate litigation. She teaches legal English and assists her husband Trevor Todd in his estate litigation practice.

Voice: 604 264-8470
Fax: 604 264-8490
rtodd@disinherited.com
www.disinherited.com

BOOKS



Voracious reader Wayne Braid recommends these two titles.

Bill Bennett, A Mandarin's View by Bob Plecas

I was extremely interested in the author's insight into the life and times of Bill Bennett. This was the time when I was establishing my career and my business; the economic health of our province was important to me. The politics of the day were always exciting and eventful. Of course Bill Bennett, the leader, was the main focus. The book is not well written in a literary sense and the story "jumps" around on many occasions; the reader needs to know the characters and the issues from that time—or at least that would be helpful.

Flowers for Mei-ling by Lorraine Lachs

This is an intricate story of the life of a woman who, as a young teenager, was a refugee from Mainland China. Despite being exploited into the sex trade, she manages to emigrate to Canada where she finally finds love and hones her entrepreneurial skills into a small fortune. "A moving story—well worth the read."

Worldview Skills by Jessie Sutherland

This compelling book is about a new and workable way to transform cycles of deep-rooted conflict and create conditions for genuine reconciliation. Drawing on inspiring stories from around the world, mediators will find a fresh way to tackle tough issues—from interpersonal to cross-cultural, as well as local to international. "A fresh and insightful contribution to the field," says John Paul Lederach, Professor of International Peacebuilding at the Joan B. Kroc Institute for International Peace Studies and author of *Building Peace: Sustainable Reconciliation in Divided Societies*.

What are YOU reading?

Tell us at scrivener@notaries.bc.ca.