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# **EQUITY AND TRUSTS**

**JOHN DUDDINGTON**

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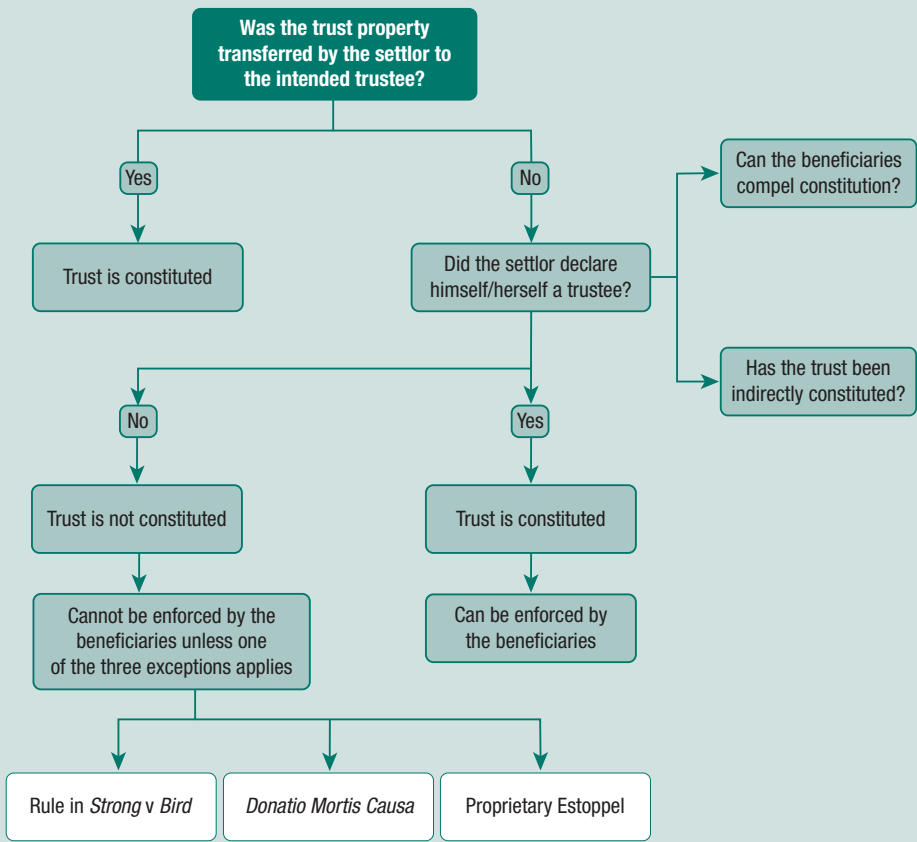
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# Before you begin

It's a good idea to consider the following key themes of constitution of trusts before tackling a question on this topic.



A printable version of this diagram is available from [www.pearsoned.co.uk/lawexpressqa](http://www.pearsoned.co.uk/lawexpressqa)

## ? Question 1

John lived in a nursing home but still owned a cottage, 'Rosemount'. In April 2018, he thought that he had not long to live and so he wrote to his favourite granddaughter, Amanda: 'I would like you to have Rosemount when I die. You have been so kind to me and you have done so much work in helping me to renovate the cottage.' John then took the title deeds of 'Rosemount' and wrote: 'These deeds and all that they refer to I give to Amanda Jones from this time forth.' He then put the deeds back in their box which he kept.

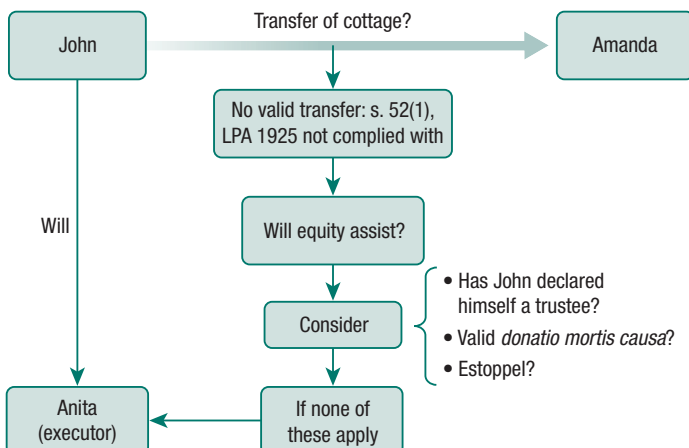
In August 2018, John recovered sufficiently to leave the nursing home and returned to live at 'Rosemount' with live-in carers. In January 2019, still at 'Rosemount', John died from a stroke. John's will appoints Anita, Amanda's mother, as his executor and leaves Anita all his property.

Advise Amanda whether she has any claim to 'Rosemount'.

### Answer plan

- Examine why the actual transfer by John was invalid.
- Explain methods one and two of constitution of a trust/gift.
- Apply these to the question to see if the gift by John of 'Rosemount' can be upheld.
- Look at possible ways in which equity may intervene even though the methods of constitution were not complied with: *donatio mortis causa* and estoppel.

### Diagram plan



### Answer

<sup>1</sup> Always start a problem question on constitution in this way. It is likely that the correct formalities will not have been followed, which is precisely why you are being asked the question, but this is the logical way to start.

<sup>2</sup> A good, extra, relevant point for an extra mark. Note that we have picked up the point that we do not know if title is registered or not.

<sup>3</sup> Look for this point: there is no contract and so no question of Amanda seeking contractual remedies.

<sup>4</sup> This classification of the methods of constitution really does help to clarify your thoughts, so do remember it.

<sup>5</sup> It is worth mentioning that this is what appears to lie behind many of the cases in this area.

The first question is whether there has been a valid transfer, using the correct formalities, of 'Rosemount' from John to Amanda.<sup>1</sup> Legal estates in land must be transferred by deed (section 52(1), LPA 1925) and, if title is registrable, then the requirements of the Land Registration Act 2002 must be observed.<sup>2</sup> It is clear that this has not happened and so we must ask if equity will assist.

John appears to have made an attempted gift<sup>3</sup> of the cottage to Amanda and, as Lord Eldon put it in **Ellison v Ellison** [1802] 31 ER 1243 HC, 'Equity will not assist a volunteer.' Thus in principle Amanda cannot compel John, by the equitable remedy of specific performance, to transfer the cottage to her nor can she seek damages at common law as she has not provided consideration.

However, Amanda may try to argue that John has, by his words and actions, made himself a trustee of the cottage for her. A trust of land requires written evidence (section 53(1)(b), LPA 1925) and John has written that he would like Amanda to have the house when he dies although he has kept the keys to the deed box. Thus there is written evidence of what John has done but, and this is the crucial question, is it written evidence of a trust?

In **Milroy v Lord** [1862] 4 De GF & J 264 HC, Turner LJ indicated that a trust will be completely constituted when either:

- (a) the settlor has vested the legal title to the trust property in the trustee(s) (Method One); or
- (b) the settlor has declared that he now holds the property as trustee (Method Two).<sup>4</sup> Clearly, John did not transfer the cottage to a trustee to hold on trust for Amanda but Amanda may argue that John has made himself a trustee of the cottage for her and so constituted a trust. In effect, a transfer which has failed to comply with the statutory formalities will be rescued by a finding that there is a trust.<sup>5</sup> But is there a trust?

In fact the courts have not been willing to impose the duties of a trustee on a person such as John without clear evidence that a trust was intended.

A decision which is very similar on its facts to this one is **Richards v Delbridge** [1874] LR 18 Eq 11 HC: Delbridge was tenant of premises and, shortly before his death, he wrote and signed the following memorandum on the lease: 'This deed and all thereto belonging I give to Edward Bennetto Richards, from this time forth, with all the stock-in-trade.' Edward was his grandson. Delbridge then gave the document to Edward's mother to hold for him. On Delbridge's death there was no mention of the property.

<sup>6</sup>This is an example of a useful quote which will add to your marks.

<sup>7</sup>Note the close comparison between the facts of the case and those of the problem: always the sign of a good answer.

<sup>8</sup>As a general rule, you should go through all three conditions for a valid *donatio* as it is likely that the answer as to whether there is a valid *donatio* will not be certain.

The court held that there was no effective transfer of the lease because there was no declaration of trust. Jessell MR observed that 'for a man to make himself trustee there must be an expression of intention to become a trustee'.<sup>6</sup> This was not so as an outright gift was intended and here it is suggested that the same will apply. John put the deeds in a box, whereas in **Richards v Delbridge** they were given to the intended donee's mother, and John's actions seem even stronger evidence that no trust was intended.<sup>7</sup>

There are two other possibilities. One is whether there is a valid *donatio mortis causa* of the cottage. In **Sen v Headley** [1991] 2 WLR 1308 CA, it was held that there can be a valid *donatio* of land but are the conditions for one fulfilled?<sup>8</sup>

The first is that the donor must have contemplated death in the near future. In **Vallee v Birchwood** [2013] EWHC 1449 (Ch), it was held: 'the gift must be made in contemplation, although not necessarily in expectation, of impending death'. When he made the gift John thought that he had not long to live and, although he does not seem to have been terminally ill at this point, it is suggested that he clearly contemplated death and this is sufficient.

The second is that the subject matter of the gift must be delivered to the donee in the lifetime of the donor with the intention of parting with dominion over it. In **Sen v Hedley** dominion of land was parted with when the donor handed the donee the keys to the house and a key to a box containing the title deeds. Here John did not hand over the deeds to Amanda but kept them himself in a box. It is doubtful if this would suffice. Moreover there was a gap of nine months between the statement by John that he would leave Amanda the house and his death and in that time he had moved back to the house. In **Vallee v Birchwood** the fact that the donor continued to live in the house for

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<sup>9</sup> Make it a habit to check for this point in questions on *donationes* of land. If you are in doubt about whether title is registered or not then do not worry – this is not a land law exam – but answer on the basis of both.

<sup>10</sup> Estoppel is of course a topic on its own, so in this type of question concentrate on the essential conditions for estoppel to apply.

<sup>11</sup> The reference to a decision of the House of Lords will boost your marks rather than the alternative of a bald mention of the need for a representation.

<sup>12</sup> Notice that this conclusion sums up the process by which we arrived at the answer: first the lack of a valid transfer; then an examination of how equity might assist; and finally, on the basis that equity could not assist, the identification of a destination for the property.

four months after the *donatio* was not, surprisingly, held to affect the fact that he had parted with dominion over it, but here John actually moves back into the cottage after the purported gift to Amanda. It seems that title to 'Rosemount' was unregistered as John has the title deeds.<sup>9</sup> As title appears to be unregistered, then as in **Sen v Hedley** and **Vallee v Birchwood** a *donatio* is possible although as dominion of the land was not parted with then it is suggested that there is in fact no *donatio*.

The final condition is that the gift must be conditional on death but John may have intended Amanda to have the cottage as an outright gift, as it is not clear whether at the time of the gift John intended to return there. In any event, as there was no parting with dominion there is no valid *donatio*.

The other possibility is estoppel.<sup>10</sup> John says to Amanda that he would like to give her the cottage for two reasons: she has been kind to him; and she has helped him to renovate it. Helping to renovate the cottage may amount to detrimental reliance by Amanda on a representation by John that he would leave her the cottage but, although in **Thorner v Major** [2009] UKHL 18<sup>11</sup> the House of Lords was prepared to accept various hints and remarks made by one party to the other over the years as amounting to an estoppel, there is no evidence of even these here. Nor do we know the extent to which Amanda did help John: trivial acts will not be enough.

In conclusion, as there was no valid transfer of the cottage by John to Amanda and as none of the ways in which equity might assist Amanda apply, when John died the cottage formed part of his estate and so will pass to Anita.<sup>12</sup>



### Make your answer stand out

- Make reference to academic discussion, e.g. Baker (1993) on *donationes* where the decision in *Sen v Headley* is considered.
- Refer to the article on *Vallee v Birchwood*: Panesar (2013) and mention the apparent relaxation of the 'contemplation of death' rule in this case and in *King v Dubrey* [2014] EWHC 2083 (Ch).
- Include further discussion of *Thorner v Major* – see e.g. Dixon (2009).

- Consider other cases on constitution, e.g. *Jones v Lock* [1865] 1 Ch App 25 HC, which you can compare with *Richards v Delbridge*.
- Mention that if title to land is registered, then the Singapore High Court held in *Koh Cheong Heng v Ho Yee Fong* [2011] SGHC 48 that a *donatio* is possible.



### Don't be tempted to . . .

- Start the answer without checking first whether there has been an invalid transfer. It is very likely that there will have been, but you will lose marks if you miss this out.
- Forget to distinguish between the two methods of constitution.
- Mention *donationes* or estoppel unless you have first satisfied yourself that the trust/gift has not been constituted.
- Go into great detail on estoppel.



## Question 2

Luke died intestate last month. He was not married and had no children. His niece and nephew, Babs and Norman, are his administrators and, together with 26 other nieces and nephews, are entitled to all the estate. You are asked to advise on the following claims against the estate:

- Babs tells you that Luke allowed her to borrow his car while she was a student at Newtown University. At the time, he said that he would transfer the car into her name but later, after Babs went to study for a year abroad, Luke started using the car again himself. Babs now finds that, whilst Luke filled out the vehicle registration documents, he did not send them off to the Vehicle Licensing Authority.
- Dan tells you that the day before Luke's death, he visited him and Luke said, 'I'm done for and will never leave this room again. Take this key to my strong box and you will have a nice surprise.' Dan took the key and, on opening the strong box, he found a jewellery box containing a diamond ring, Luke's car keys and a cheque for £1,000 made out to Dan.

## Answer plan

- ➔ Consider the possible application of *Strong v Bird* to the intended gift of the car.
- ➔ If *Strong v Bird* is inapplicable then move on to consider the *Re Rose* principle and how the law stands now in view of *Pennington v Waine* to see if this can validate the transfer.