IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 123 OF 2007

BETWEEN

CITALEE DOOKHRAN

Appellant

AND

RAMJAG RAMSAHAI

Respondent

PANEL: **A. Mendonça, J.A.**
P. Jamadar, J.A.
N. Bereaux, J.A

APPEARANCES: **Mr. S Roopnarine and Mr. T. Dassayne instructed by Ms. H. Lochan For the Appellant**
Mr. C. Sinanan and Mr. F. Mohammed for the Respondent

DATE OF DELIVERY: **Dated this 18th day of February 2011**

REASONS

Delivered by A Mendonça, J.A.

1. At the conclusion of the oral arguments in this appeal, it was dismissed with costs to be taxed and paid by the Appellant to the Respondent. This is the Court's full reasons for so doing.

2. This is an appeal from the judgment of the trial Judge dismissing the Appellant's counterclaim that the deceased made a valid donatio mortis causa of his property at No. 13 Top Street, Corinth Village, St. Madeline (the property) to the Appellant. The relevant factual background can be briefly summarized.

3. On the 9th day of January 2001, Roopnarine, the deceased, who was in his seventies attended the office of Mr. Seedansingh, attorney-at-Law, where he placed his thumb print on a will appointing the Appellant, who was his sister-in-law, executrix of his estate and bequeathed all his property real and personal to her.

4. The Respondent contested the validity of the will on the ground that the will had not been executed in the presence of two witnesses. Before the matter was resolved the Respondent passed away and the action was continued by her son Premanand Jaikaran, who was substituted as plaintiff in this action by order dated 31st January, 2007.

5. Although the will bore the signatures of two attesting witnesses, at the time of execution only one named witness, Zorina Nanan, law clerk in the law offices of Seedansingh, attorneys-at-law, was present when Roopnarine placed his thumb print on the will. The second witness, Brenda Harewood, testified that she did not attend the office of any attorney-at-law to sign the will. She also testified that she neither witnessed the attesting of the will by Zorina Nanan nor did she see Roopnarine put his fingerprint on it.

6. The Appellant conceded before the trial Judge that the will was not executed in the presence of two witnesses as required by section 42 of the Wills and Probate Act Chap. 9:03 and was thus invalid.

7. In order to establish her right to the aforementioned property the Appellant relied on her counterclaim that the doctrine of donatio mortis causa applied. The Appellant contended that a valid donatio mortis causa had been created as the gift was made in contemplation of death, conditional on death and the deceased had parted with dominion over the subject matter of the gift.

8. The Judge accepted the evidence of the Appellant that prior to his death she provided household assistance to Roopnarine twice per month. It was also undisputed that the deceased and the Appellant visited the offices of various public utilities including the Water and Sewerage Authority and Trinidad and Tobago Electricity Commission following the execution of the will. The Judge also accepted that Roopnarine had placed the Appellant's name on his two bank accounts for the purpose of withdrawing cash to run his household.

9. It was undisputed that Roopnarine had been engaged in painting his house mere days before his death. It was accepted that on the 17th June, 2001, a few days before his death on June 21st, 2001, Roopnarine gave the Appellant keys to his external gate, his house and wardrobe. According to the evidence, the wardrobe was where the deceased kept all his documents and money. The Appellant did not allege that the delivery of the keys was accompanied by any statement of intention.

10. The Judge stated that for there to be a valid donatio mortis causa three requirements must be satisfied, namely (i) the gift must have been made in contemplation of death, (ii) the gift must be made on the condition that it is to be absolute and perfected only on the donor's death being revocable until that event occurs, and (iii) there must be delivery of the subject matter of the gift or the essential indica of title thereto.

10. As to the first requirement the Judge focused on the keys that were delivered to the Appellant. The Judge noted that there were no words at the time of delivery to indicate the intention of the deceased. However the Judge stated that when it is considered that the deceased was in his 70s at the time of the delivery of the keys, "along with the fact that shortly before that time he had executed his will and the fact that he died a few days later, it is, in my view reasonable to infer, in the absence of evidence to the contrary, that the deceased delivered the keys in contemplation of death".

11. The Judge however stated that the Appellant encountered greater hurdles in establishing that the deceased intended to impart an absolute inter vivos gift which would be perfected upon his death. The Judge was of the view that delivery of the keys must be viewed in the context of the will which the deceased purported to execute a few months earlier. She stated that "at the time of the execution of the will up to the time of his death, the deceased would have expected his bequest by will to take effect upon his death and upon the grant of probate". The making of the will in this case by the deceased was inconsistent with the principle of donatio mortis causa. The Judge explained that:

> *"The two forms of gift are however distinguishable when one considers the time of parting with dominion over the gift. In the case of a gift by will, the beneficiary does not acquire dominion over the property until there has been a grant of probate following the testator's death and the gift is conveyed to the beneficiary by the personal representative of the testator. In the case of a donatio mortis causa, the donor parts with dominion upon delivery of the gift or the indica of title thereto….*
>
> *The fact that the deceased executed a will indicates that dominion over his property would pass to the defendant upon his death and through the will. In such event, the beneficiary would acquire absolute title under the executor. This is of course inconsistent with an intention to pass dominion over the house by delivery of the keys to the Defendant in contemplation of death. The presence of the will negatives an intention to make a donatio mortis causa, by which the donee acquires absolute title upon the donor's death not under but against the executor."*

12. As regards to the third requirement the Judge stated that:

> *"The presence of a purported will, together with the absence of any statement indicating an intention to pass dominion to the donee, in my view, is consistent with an*

intention to pass possession rather than dominion of the subject property. It is likely that the deceased gave the keys to the defendant, regarding her as the steward rather than the master of his property".

13. The Judge therefore concluded that the Appellant had not established a valid donatio mortis causa and dismissed the counterclaim.

14. The Appellant now appeals to this Court. The Appellant contends that the findings of the Judge are against the weight of the evidence. The Appellant submits that the Judge failed to draw the proper inferences in favour of the Appellant. It is also submitted that the Judge erred in law since she took the erroneous view that for there to be a valid donatio mortis causa the delivery of the gift must be accompanied by contemporaneous words indicating the surrender of dominion to the donee.

15. Counsel for the Respondent on the other hand argued that the Judge's decision was the correct one. He did not challenge the finding by the Judge that the keys were delivered in contemplation of death but contends that the only conclusion that can be drawn from the evidence is that the deceased intended a testamentary gift where dominion over his property would pass through his will.

16. "Donatio mortis causa" is a Latin expression that translates literally as "gift by cause of death." It has been suggested that a rough translation might simply be "death bed gift" (see **Parry v Clark**, **The Law of Succession** (11th edition) (at para. 6-42). The legal nature of the donatio mortis causa was explained by Buckley, J **In re Beaumont** [1902] 1 Ch. 889 (at pp 892-893) where he stated:

"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."

17. A donatio mortis causa is therefore a gift made by the donor to the donee during the lifetime of the donor. It differs from an outright gift made inter vivos in that the donee is to have absolute title to the gift on the death of the donor and not immediately. It is revocable until the death of the donor. It differs from a testamentary gift in two respects which are material to this appeal. First, the title of the donee in the case of a donatio mortis causa takes complete effect on the death of the donor. The gift therefore becomes absolute "not under but as against his executor." Secondly, a donatio mortis causa requires the donor to part with dominion over the subject matter of the gift before his death which is not the case with a will.

18. In **Sen v Headley** [1991] 2 ALL ER 636 Nourse L.J. in giving the judgment of the Court of Appeal stated (at p. 639), that apart from the question of whether a gift is capable of passing by way of a donatio mortis causa there are three requirements of such a gift, namely:

> *"First, the gift must be made in contemplation, although not necessarily in expectation of impending death. Secondly, the gift must be made upon the condition that it is to be absolute and perfected only on the donor's death, being revocable until that event occurs and ineffective if it does not. Thirdly there must be delivery of the subject matter of the gift, or the essential indicia of title thereto, which amounts to a parting with dominion and not mere physical possession over the subject matter of the gift."*

These were the criteria recognized by the Judge to be applicable for a valid donatio mortis causa and as we have mentioned she found that the first requirement to be satisfied in that she found the keys to have been delivered in contemplation of death. We will return to the significance of delivery of the keys later in these reasons, but as there has been no appeal from that finding I need not dwell on the first requirement. The Judge however, as has been stated, found that the other two requirements were not satisfied. Put simply, the Judge was of the opinion that the deceased intended that dominion over his property would not pass during his lifetime to the Appellant, but rather it would pass upon his death and though his will. Further, the Judge concluded that the deceased had not parted with dominion and that the keys were given to the Appellant in her capacity as a steward and not master of the property. They were not given with the intention to pass dominion over the subject property.

19. The first question that we will address is whether the Judge was correct in finding on the evidence that the deceased did not intend to part with dominion during his lifetime. It is correct to say that in order to create a valid donatio mortis causa, the donor must part with dominion over the assets in his lifetime. This involves a mental element on his part to do so.

20. According to the evidence the deceased repeatedly promised to leave all his property to the Appellant. This was in recognition of what she had done for him and his deceased wife who was the Appellant's sister. It is however clear on the evidence that certainly up to the Saturday before he died, the way the deceased chose to do this was by way of a will. According to the Appellant, on January 9th, 2001 the deceased told her he was going to his lawyer to make a will and that he would leave everything for her. Indeed, he went to his attorney-at-law and purported to make a will in which he left all his property to the Appellant. Although the will was found to be invalid there is no evidence that the deceased knew it to be such and must have had every confidence it was a valid will. As the Judge correctly said, the making of the will is inconsistent with a donatio mortis causa. It shows the intention on the part of the deceased to leave his property to the Appellant under his will and upon the grant of probate. It does not show an intention in the deceased to part with dominion over his property during his lifetime.

21. As we mentioned there is also evidence that on the day the deceased went to his lawyer to have the will prepared, he took the Appellant to visit the offices of Water and Sewerage Authority and Trinidad and Tobago Electricity Commission. According to the Appellant he visited those offices in order to instruct her where the bills were to be paid. This evidence, however, cannot support an intention on the part of the deceased to part with dominion over his property during his lifetime. It is entirely consistent with an intention that the deceased's property would pass under his will.

22. However, according to Counsel for the Appellant, the deceased's intention changed just prior to his death. This occurred on the Saturday (approximately two days) before he died. The evidence of the Appellant as to what occurred on the Saturday is as follows:

> *"The Saturday before he died he was very weak. He showed me an envelope containing his will and other papers including a land deed, tax receipts. He also gave me three keys for the gate, door and wardrobe."*

23. In our judgment however this evidence does not advance the Appellant's case. It is necessary to consider the evidence carefully. The Appellant says that on the Saturday before he died, the deceased was very weak and showed her an envelope containing his will and other papers including a land deed and tax receipts. There is no evidence that the land deed and tax receipts related to the subject property nor does the evidence say that she was given these documents. It is therefore difficult to accept that evidence as showing that the deceased intended to part with dominion over the property. However even if it is assumed that the documents related to the property and the Appellant was given, and not merely shown, them, together with the will we cannot accept that that evinces an intention on the part of the deceased to part with the dominion over his property. In the context that the deceased made a will in favour of the Appellant appointing her as his executrix, the act of showing or giving the will and the documents cannot be construed as an intention on the part of the Appellant to part with dominion over the property during his lifetime. The fact that he showed, or even if he gave, the will to the deceased together with the documents relating to the property is consistent with his intention to benefit to the Appellant under the will.

24. The evidence that he gave the Appellant the keys to the property and the wardrobe does not improve the position of the Appellant. There is evidence that the deceased kept all his documents in the wardrobe but there is no evidence that any of the documents to which reference was made or anything of any relevance was found in the wardrobe. In any event, in view of what we have said above relating to the showing or giving of the documents, even if the documents were in the wardrobe it would make no difference to the Appellant's case.

25. With respect to the keys to the property the position is no different. It must be viewed in the context of the other evidence before the Judge. This was to the effect that the Appellant took care of the deceased and on the Saturday, according to the Appellant, he was weak. The evidence seems to point to the position that it was to facilitate the Appellant's entry into the premises to look after the deceased and the property. It does not show a contrary intention to benefit the Appellant other than under his will. As the Judge put it, the deceased gave the keys to the Appellant regarding her as the steward of the property rather than master.

26. The Judge also noted the absence of any statement by the deceased when the keys were given to the Appellant to indicate his intention. This has been criticized by Counsel for the Appellant. He has contended that the Judge was of the view that there must be contemporaneous words indicating a surrender of dominion but that is not the law. Counsel is, of course, correct to say that the donor need not express his intention in words. His intention may be inferred from the circumstances in which the gift was made. But there is, however, nothing in the judgment to suggest that the Judge was of the opinion that the law was otherwise. What the Judge was saying is that in the absence of words of intention she could not conclude on the evidence that the intention of the deceased was to part with dominion over the property in his lifetime.

27. We agree with the Judge. On the evidence the proper inference on a balance of probabilities is that the deceased did not intend to part with dominion over the property in his lifetime but rather to benefit the Appellant under his will. The position, as regards the intention to part with dominion, might have been different if there was a statement of intent. Two recent examples of this are **Sen v Headley** supra, and **Woodard v Woodard** [1995] 3 ALL E.R. 980. In both cases it was held that a valid donatio mortis causa had been affected. In **Sen v Headley** the deceased said to the donee "the house is yours, Margaret. You have the keys. They are in your bag. The deeds are in the steel box." In **Woodard** there were also words spoken by the deceased which were accepted as evidence of intention to part with dominion over the motor vehicle in his lifetime. In this case there is no evidence that any words of intent were spoken. On the evidence we cannot accept that there was any intention by the Appellant to part with

dominion over the property during his lifetime, and in our judgment the inference drawn by the Judge that the deceased did not intend to do so but rather to benefit the Appellant under his will is one which ought not to be interfered with by an appellate court and, in any event, is one with which we agree.

28. The next question is whether the deceased in fact parted with dominion over the property or the essential indicia of title thereto. There is also in our judgment no evidence to show that the deceased parted with dominion over the property or the essential indicia of title thereto which amounts to a "parting with dominion and not mere physical possession over the subject matter of the gift." It was not suggested that the keys are indicia of title. If the delivery of the keys to the Appellant is of any relevance to this question, it might be that it amounts to a parting with dominion over the property, but like the Judge we do not see it that way. The same considerations seem to us to be relevant as when considering the intention of the deceased. Simply put, the context cannot be ignored. The fact is that the deceased remained in possession. Further, the Appellant was the executrix of his will and the person who took care of him. In those circumstances the giving of the keys to the Appellant, without any statement of intention, cannot be construed as parting with dominion over the property. As the Judge concluded, it is more likely that the keys were given to the Appellant as steward rather than master.

29. As regards the documents, it is relevant to emphasize that the evidence is that they were shown to the Appellant. They were not given to her. Nor does the evidence establish that the documents were found in the wardrobe, the keys to which were given to the Appellant. Further, there is no evidence that the land deed and tax receipts related to the property. On this evidence it simply cannot be concluded that there was a delivery of the essential indicia of title to the property.

30. In any event, even if it is assumed that the land deed and tax receipts related to the property, and were given to the Appellant along with the will, that would not amount to a

delivery of or parting with dominion over the essential indicia to the property. We say so for essentially two reasons. The first is the evidential context. The observations here are the same as those that relate to the delivery of the keys. Given the fact that the Appellant was the executrix of the will of the deceased and looked after the deceased, it is difficult in the absence of any statement of intention to construe the giving of the documents to her as a parting with dominion over the essential indicia of title. Secondly, in our judgment, none of the documents should be regarded as essential indicia of title.

31. The documents which have been identified are the will, the land deed and the tax receipts. It has not been contended that wills are essential indicia of title and they cannot be particularly in the context of a donatio mortis causa. With respect to the tax receipts it is not stated as to what taxes they relate. If the assumption is made that they were receipts for land and building taxes and that they were in respect of the property they cannot be indicia of title since such taxes may be paid by persons other than the owner. They are no more than evidence that land and building taxes had been paid. As Wooding, C. J. stated, in words that are relevant here, in **Richardson v Lawrence** (1966), 10 W.I.R. 234, 238:

> *"Put another way, rates are not a yield from, but an imposition upon the land. They are not payable necessarily by an owner or even by an occupier; anybody who chooses to pay, officiously or otherwise may do so and on its acceptance by the authority entitled to the rates, whether the government or a local authority, a receipt is given for the payment in the name of the person who is recorded in the Rate Book as owner of the land. But the fact that somebody's name appears as owner in the Rate Book does not in any sense mean that that person is the owner"*

32. With respect to the land deed the evidence leaves a lot to be desired. Apart from the fact already alluded to that the evidence does not establish that the deed related to the property, the evidence also does not say whether it is a copy or an original of the deed. We however think it more probable that the Appellant was referring to a copy of the deed and we do not believe that copies of deeds can be regarded as indicia of title.

33. We say that it is more probable that the Appellant was referring to a copy of a land deed for the following reasons. In this jurisdiction lands are held under the Real Property Act or may be, what are commonly referred to as, common law lands. In the case of lands held under the Real Property Act, they are transferred by a memorandum of transfer whereas common law lands are transferred by deed. If it is assumed that the land deed to which the Appellant referred relates to the property then the appropriate inference is that the property is common law lands. Such lands are transferable by deed, but there is a registration system. The Registration of Deeds Act requires that every deed, whereby any lands in Trinidad and Tobago may in any way be affected in law or equity, be registered (see section 16(1)). The original deeds so registered are kept by the Registrar General. The original deeds may be inspected or examined by the general public, notes or extracts may also be taken from the deeds and copies obtained by the general public.

34. Although, registration, except in the case of a deed of gift or settlement, is not essential to pass title as between the immediate parties to the deed, section 16(2) of the Registration of Deeds Act provides:

> *"(2) Every such Deed that it not duly registered shall be adjudged fraudulent and void as to lands affected by such Deed against any subsequent purchase of a value or mortgagee without notice of the same lands or any part thereof, whose conveyance shall be first registered."*

The result is that deeds affecting lands are generally registered and it is a very rare thing indeed to encounter an unregistered deed. The reference therefore to a land deed seems, in all probability, to refer to a copy of a deed.

35. In **Sen v Headley**, supra, title deeds relating to the land in question in that case were said to be indicia of title. The lands were unregistered lands and it was not in issue that title deeds are essential indicia of title to unregistered land in England. That is understandable given the significance of original title deeds to the conveyance of unregistered land in England. The purchaser is entitled to the title deeds on payment of the purchase money and the vendor is under an obligation to produce them. They are proof of the vendor's title and are an integral part of the

conveyancing process. In this case such considerations do not apply because the original deed or deeds is or are registered and kept by the Registrar General. A copy of the registered deed plays no part in the conveyance of the lands. The copy is worth nothing more than the paper on which it is printed. The original deed may be accessed by the general public and copies obtained. To be in possession of a copy of the registered deed is not to be in possession of any indicia of title.

36. It should be noted that it has not been argued in this appeal whether or not land is capable of forming the subject matter of a donatio mortis causa in this jurisdiction. The parties have proceeded on the basis that it does. It is therefore not a point for decision in this appeal. If the doctrine does apply to land, what amounts to essential indicia of title is a question that remains to be decided. We are however confident that, even if it is assumed that the documents to which reference was made by the Appellant in her evidence, in fact related to the property, that they do not amount to essential indicia of title.

37. For these reasons this appeal was dismissed at the hearing of same with costs to be taxed and paid by the Appellant to the Respondent.

Dated the 18th day of February, 2011

A. Mendonça
Justice of Appeal

P. Jamadar,
Justice of Appeal

N. Bereaux,
Justice of Appeal