Institution: University of Portsmouth		
Unit of Assessment: UoA 18: Law		
Title of case study: Clarifying the Law of Donatio Mortis Causa and Reform of the Law of Wills		
Period when the underpinning research was undertaken: 2014-2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	**Role(s) (e.g. job title):**	**Period(s) employed by submitting HEI:**
Juliet Brook	Principal Lecturer	16/12/2013 - date
Period when the claimed impact occurred: 2015 - ongoing		
Is this case study continued from a case study submitted in 2014? N		

1. Summary of the impact

This case study demonstrates how Juliet Brook has influenced, and is continuing to influence, reform of the law of wills. The Law Commission has consulted on the reform of the Wills Act 1837, which is seen by many as in need of modernisation. The restrictions on contact due to the Covid-19 pandemic has drawn attention to the practical difficulties some face in making a valid will, and has increased the urgency of this reform.

The research underpinning this case study has influenced the clarification by the Court of Appeal of the common law doctrine of donatio mortis causa, which governs oral "death bed wills" that do not comply the formal testamentary requirements (and could thus be important in future litigation involving Covid victims or people in a like situation). **(Impact 1)**

In addition, it has informed the Law Commission's Family, Property and Trusts Law team in the preparation of their consultation paper on reforming the law of wills, and has assisted in their on-going development of policy in this area, in particular the proposed introduction of a dispensing power. **(Impact 2)**

2. Underpinning research

The law of wills and succession sets out who inherits our property when we die, and more than 500,000 deaths are registered in England and Wales in any normal (i.e. non-pandemic) year. In England and Wales we also have testamentary freedom (the right to choose who inherits), and a key component of this is that the testamentary wishes of individuals should be upheld. However, strict rules also exist around the formalities for the creation of a will. These are designed to reduce the risk of fraud or undue influence, and if these are not complied with, then the document is not a valid will. If someone dies without a valid will, then the laws of intestacy determine who inherits.

The Law Commission's project to reform the law of wills has three aims:

(A1) Supporting testamentary freedom, including reform aimed at encouraging and facilitating will-making and reform aimed at supporting testators' intentions.
(A2) Protecting the testator from fraud and undue influence.
(A3) Increasing the clarity and certainty of the law in this area, in so far as this is possible.

The underpinning research set out below focused on particular aspects of these issues as follows:

Brook first analysed the historical basis for the donatio mortis causa and used this analysis to criticise a first instance decision (**R1**). In particular, her research focused on the meaning of 'contemplation of death', and emphasised the need to differentiate between an invalid nuncupative will (a will declared orally as opposed to in writing) and a valid donatio mortis causa. It argued that the decision in *King v Dubrey* had expanded the donatio mortis causa doctrine beyond its original bounds, in a way that could not be justified, and which would lead to uncertainty for testators and their families (strand (A3) above).

Brook then used theories of property to explain why challenges to wills are inevitable and explored why wills may be challenged on the grounds of lack of capacity rather than alternative grounds such as undue influence (**R2**). She argued that simple tests for capacity (and presumptions of capacity) put vulnerable testators at risk, so simplification should not be the main objective for reform.

Her research then analysed the differing legislative framework of dispensing powers (specifically in the Australian states and New Zealand), and used these differences to provide insights into four key questions (**R3**):

1. What must be intended for a dispensing power to operate?
2. How is this intention proved?
3. What is the appropriate standard of proof?
4. When must the deceased have held this intention?

This research also included consideration of the harmless error provisions that exist in some states in the USA, Scottish subscribed wills, and the South African condonation principle, ensuring that the practical application of a broad range of dispensing powers and similar provisions were surveyed. This research demonstrated the wide variety of intention-based dispensing powers, all of which operate in different circumstances and admit different types of documents as wills. Consequently, in **R3** she argued that dispensing powers operate more effectively when they require specific testamentary intent (as opposed to general testamentary intent) and that it is imperative that the intention be assessed at the date of death of the testator, instead of any earlier time. This is particularly important because the testator may not appreciate that the document they have created could be a valid will, and so may not be aware of the need to revoke it if their intentions change.

Her research concluded by summarising the main considerations that the Law Commission should take into account if, as proposed, dispensing powers are introduced in the UK. She also urged caution before doing so, especially as dispensing powers could amplify concerns (raised in both **R1** and **R2**) that vulnerable testators could be at risk of undue influence (strand (A2) above), and there could be increased uncertainty for testators and their families (strand (A3) above).

3. References to the research

(R1) **Brook**, J. (2014). King v Dubrey: a Donatio Mortis Causa too far? *Conveyancer and Property Lawyer*, 6, 525-534 (available at https://core.ac.uk/reader/29588657)

(R2) **Brook**, J. (2017). The neighbour, the carer and the old friend – the complex world of testamentary capacity in Hickey, R. & Conway, H. Hart Publishing, p. 117-134 (*Modern Studies in Property Law; vol. 9*) (the output is listed in REF2)

(R3) **Brook**, J. (2018). To dispense or not to dispense? A comparison of dispensing powers and their judicial application (Parts 1-3) *Private Client Business*, 205-212; (2019) *Private Client Business*, 9-16 and 50-56 (can be supplied by the HEI on request).

The references above contain one book chapter (R2), one peer-reviewed journal article (R1) and one three-part professional journal article (R3). The book chapter (R2) has been externally judged as 3* REF2021 quality. R1 was published in an ARC ERA A rated journal and was subsequently reviewed as 2*.

4. Details of the impact

The research described in Section 2 has produced two strands of impact.

Impact 1: Clarifying the Law of Donatio Mortis Causa

The first is clarification of the law on donatio mortis causa. Following the first instance decision of *King v Dubrey* in 2014, (**R1**) was published in the Conveyancer and Property Lawyer. The first instance decision was subsequently overturned on appeal, with many of the reasons advanced for this decision reflecting analysis and arguments made in this article. [Text removed for publication]. Further, the arguments made in **R1** featured prominently in the arguments presented by counsel (*King v Dubrey* [2016] Ch 221, 223-224) and the Court of Appeal judgment itself (*King v Dubrey* paras [50]-[60] and [62]-[65]). The Law Commission has since described this as the 'leading case' on Donatio Mortis Causa (see para 13.4 in **S2**) and suggested that the Court of Appeal decision has stated the law sufficiently clearly to not need further reform. This research was therefore instrumental in this clarification of the law, which provides greater certainty for all as to who will be entitled to their property on death.

Impact 2: Reform of the Law of Wills

The second strand of impact is a broader contribution to the reform of the law of wills. Brook's ongoing research and published outputs in the realm of wills/dispensing powers saw her invited, along with other leading academics in this field, to meet with the Law Commissioner for Property, Family and Trust Law (Professor Nicholas Hopkins) in October 2016 (**S1**). The purpose of this meeting was to gain insights from academics who were specialists in certain key aspects of the reform project. This meeting helped to shape the subsequent Consultation Paper, which was published in July 2017 (**S2**; also **S9**), and directly cited **R2**.

In October 2017, Brook helped to facilitate a meeting of a team of seven academics from the Society of Legal Scholars (SLS) Trusts section to prepare an SLS response to the consultation paper. Brook's contribution to this response extended to four pages and focused on privileged wills, dispensing powers, and donatio mortis causa; this response was submitted to the Law Commission in December 2017 and is also publicly available (**S3**) so that it can inform and influence the proposed changes to the law of wills.

In this SLS response, Brook argued that more research was needed to be carried out into the operation of dispensing powers in other jurisdictions to avoid the concerns that had been raised in response to a recent Australian case (*Nichol v Nichol* [2017] QSC 220) in which an unsent text message had been admitted as the deceased's will.

This prompted Brook to undertake individual comparative research on the nature and scope of dispensing powers in other jurisdictions (published as **R3**). Brook met with the Law Commission's Wills team to report these findings in August 2018. As the only UK-based scholar to have engaged in comparative research on this area, these articles made a significant contribution to the critical debate surrounding the proposed introduction of dispensing powers. [Text removed for publication] (**S9**).

Although the Wills project was put on hold when the Law Commission was asked to prioritise reform of marriage law 'in light of the pressing need for reform in relation to how and where people can marry', the current Covid-19 pandemic has served to underline the need for urgent reform of the law of wills on two counts. First of all, there has been an increased public focus on the importance of making a will. Secondly, as a consequence of lockdown, there has been a greater awareness of the strict formalities for doing so. Prior to lockdown, the requirement that a will be signed in the presence of two witnesses had not been regarded as overly onerous. The need for self-isolation, however, has made this difficult for many people. As a result, there was pressure from various commentators (such as Gina Miller and Baroness Helena Kennedy QC) to relax the formalities for making a will, and to prioritise reform of the law of wills more generally.

Throughout the summer of 2020, Brook was engaged in active discussion regarding the temporary introduction of video witnessing and the potential future introduction of a dispensing power with other specialists in the field (**S5-S7**). The points raised in these blog posts and articles that followed these discussions will be highly pertinent both to future reform, and in any litigation over wills that were witnessed by video link during the pandemic. Barrister [text removed for publication], who specialises in this area, has said "Juliet's examination of the different forms of power in force in other jurisdictions and the manner in which they have been applied is a very useful and important contribution to the debate around this subject. Her research has greatly enhanced my own understanding of this subject area and will be of tremendous benefit to practitioners if and when a statutory dispensing power is introduced." (**S10**). The Ministry of Justice confirmed in July 2020 that the Government will consider reforms of the law of wills once the forthcoming Law Commission report has been published.

These discussions coincided with Brook being appointed to serve for a three-year term (commencing September 2020) on the Law Society's Wills & Equity Committee, a period in which the Law Commission is likely to publish its report on reform of wills, and the government's response will also be known. In her role on this committee, Brook assisted in the development of a new Guidance Note on Video Witnessing of Wills (October 2020). The published version, which was circulated to all members of the Law Society, (**S8**) embedded some suggestions by Brook as to how the video-witnessing process could best be managed to ensure that a will executed by

video link would comply with the new regulations in the event of a technical problem at the moment of signing.

Brook's research, representations to the Law Commission and, latterly, her role on the Law Society's Wills and Equity committee will ensure that the forthcoming modernisation of the law has the potential to improve the inheritance process for a very wide range of people beyond those simply affected by the donatio mortis causa rules.

5. Sources to corroborate the impact

(S1) Agenda of Law Commission Meeting, 26 October 2016

(S2) Consultation Paper 321 Making a Will, Law Commission, 2017

(S3) Response to Law Commission Consultation Paper 321 Making a Will, Society of Legal Scholars, Property and Trusts Law Section, 10 November 2017

(S4) Email from [text removed for publication], September 2018

(S5) Blog post by Charlotte John, barrister, citing Brook's research, 10 September 2020

(S6) Blog post by Barbara Rich, barrister, citing Brook's research, 11 September 2020

(S7) Blog post by Brian Sloan, lecturer at Robinson College, Cambridge, citing Brook's research, 4 Oct 2020

(S8) Law Society Guidance on Video Witnessing of Wills, published 6 November 2020

(S9) Letter from [text removed for publication], 16 November 2020

(S10) Email from [text removed for publication], 16 November 2020