



**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**[2022] CSIH 26**  
P670/21 & P695/21

Lord Malcolm  
Lord Doherty  
Lord Tyre

**OPINION OF THE COURT**

delivered by LORD TYRE

in the Petitions

by

JANUSY DOMINIC JOSEPH PATRICK TOMALA and

GILLESPIE MACANDREW (TRUSTEES) LIMITED

Petitioners

for directions under section 6(vi) of the Court of Session Act 1988 and rules 63.4 and 63.5  
of the Rules of the Court of Session 1994

**Petitioners: Simpson QC; Gillespie Macandrew**

3 May 2022

**Introduction**

[1] Mrs Elizabeth Anne Douglas Don, subsequently Tomala or Williams or Grosvenor, (“Elizabeth”) died intestate on or about 3 November 2016, aged 91. In these petitions under section 6(vi) of the Court of Session Act 1988, her executor dative and the trustees of a trust (“the Trust”) in which she held a life interest seek directions from the court in relation to

the distribution of her estate and the trust fund respectively. The question in both petitions is the same: was a man named Marc Lawrence who died in 2020 the same person as a man named Joseph Grosvenor whom Elizabeth married in 1991?

### **Personal histories**

#### **(i) Elizabeth**

[2] Elizabeth was born on 18 April 1925. In 1945 she married Jan Adam Tomala (“Jan”). Elizabeth and Jan had five children, one of whom died in 1978 without leaving issue. The other four children survive. Jan died in 1982.

[3] Elizabeth re-married in 1983 to William Richard Williams. They divorced in 1991. There were no issue of this marriage.

[4] On 15 July 1991 at Wallasey, when she was aged 66, Elizabeth re-married to a man who at that time went by the name of Joseph Grosvenor (“Mr Grosvenor”). Elizabeth and Mr Grosvenor separated in about 1993. Although an action of divorce may have been raised at around that time, there is no evidence that they divorced and the present petitions proceed on the factual assumption that they did not divorce.

[5] By 2010 Elizabeth was suffering from dementia and incapable of managing her affairs. A guardian was appointed. On 3 November 2016 she was found dead. She died domiciled in Scotland.

#### **(ii) Joseph Grosvenor**

[6] Mr Grosvenor was born on 19 August 1934 at Birkenhead, under the name of Sidney Collins. On Sidney Collins’ birth certificate his father is stated to be Joseph William Collins, Blacksmith. The marriage certificate of Elizabeth and Mr Grosvenor states the name

of Mr Grosvenor's father as "Joseph William Collins (deceased), Blacksmith". It is understood that in the course of his life Mr Grosvenor used a number of other names, including Joseph Gray, Charles Lloyd, Charles Rae and Joseph Rothschild.

[7] In 1994, 1996 and 1997, Mr Grosvenor through various firms of solicitors attempted to obtain money from Elizabeth. In 2003 the then trustees of the Trust received correspondence, purporting to be from Mr Grosvenor, inquiring as to the nature of his interest in the Trust. According to that correspondence, Mr Grosvenor's address was 1A Jane Street, Peterhead, AB42 1DR. That was the last contact between Mr Grosvenor and the trustees. It has been ascertained that there is no such address as 1A Jane Street, Peterhead, although there is a 1A James Street, Peterhead whose postcode is AB42 1DR.

[8] In 2012, agents for the trustees instructed a firm of professional investigators to try to find Mr Grosvenor. They were unsuccessful.

*(iii) Marc Lawrence*

[9] After Elizabeth's death, agents for the trustees instructed another firm of professional investigators, Title Research, to try to ascertain whether Mr Grosvenor was still alive. In 2018 it was discovered that a man named Marc Lawrence had been living alone at 1A James Street, Peterhead at the time of the trustees' 2003 correspondence with Mr Grosvenor. Marc Lawrence had the same date of birth as Sidney Collins. He was traced, via a care home in Aberdeen and an address in Arbroath, to a care home in Liverpool operated by Liverpool City Council. He was suffering from dementia. The care home had no information as to whether he had any family. Marc Lawrence died on 14 April 2020. His death certificate stated that his date and place of birth were 19 August 1934 at Birkenhead.

[10] In the course of their own investigations, agents for the Trust discovered an article dated 11 March 2011 on the BBC news website for NE Scotland, Orkney and Shetland, reporting that a 76 year old man named Marc Lawrence had gone missing in Aberdeen. The article contained a photograph of Marc Lawrence. The man in the photograph bears a resemblance (allowing for ageing) to Mr Grosvenor as seen in two photographs taken in 1991 and 1993 respectively.

### **The entitlements of a surviving spouse of Elizabeth**

[11] As Elizabeth died intestate, her surviving spouse would be entitled to prior and legal rights in her estate. Elizabeth's estate consisted almost entirely of quoted shareholdings and the amount of legal rights is substantial.

[12] It is unnecessary for present purposes to set out at length the terms of the Trust, which was a deed of antenuptial contract of marriage between Jan and Elizabeth, executed and registered in 1945. It provided *inter alia* that if Elizabeth died survived by a husband, such husband would be entitled to receive an alimentary liferent provision of a one-half share of the free income of the "Wife's Fund", so long as he did not re-marry. As regards capital, a power of appointment was conferred upon Elizabeth which was exercised on her behalf by her guardian in 2013, appointing the capital of the Wife's Fund in various shares among her children. Since Elizabeth's death, the trustees have been accumulating the income to which a surviving husband would be entitled, and the amount is again substantial.

## Questions for the court

[13] In the petition by Elizabeth's executor dative, the question for the court is stated as follows:

"The question for the Court is whether, in administering and distributing Elizabeth's intestate estate, the Petitioner shall proceed on the footing (i) that Elizabeth was predeceased by Mr Gray [ie Mr Grosvenor] and/or is divorced from Mr Gray before her death or instead (ii) that Marc Lawrence is Mr Gray, and was, at the date of Elizabeth's death, still married to her. This involves the specific questions:

1. whether Mr Gray has died;
2. if the answer to specific question 1 is in the affirmative, whether Mr Gray predeceased Elizabeth,
3. if the answer to specific question 1 is in the negative, whether Mr Gray and Elizabeth were divorced prior to Elizabeth's death."

The question for the court in the trustees' petition is the same, except for the substitution of the words "the Wife's Fund" for the words "Elizabeth's intestate estate".

[14] As already noted, however, it was not contended that there was any evidence that Elizabeth and Mr Grosvenor/Gray had been divorced. The main question that the court is asked to determine is whether Marc Lawrence was the same person as Mr Grosvenor/Gray. Certain issues of competency were also, however, raised. We will address these before returning to that question.

## Competency

### *Question of fact*

[15] The first issue is whether the subject-matter of these petitions, which raise a question of pure fact, may competently be determined in an application for directions. Section 6 of the Court of Session Act 1988, reproducing the terms of section 17 of the Administration of Justice (Scotland) Act 1933, provided inter alia as follows:

“6. With a view to securing that causes coming before the Court may be heard and determined with as little delay as is possible, and to the simplifying of procedure and the reduction of expense in causes before the Court, the Court shall, in the exercise of the powers conferred on it by section 5 of this Act, provide by Act of Sederunt—

...

(vi) for enabling trustees under any trust deed to obtain the direction of the Court on questions relating to the investment, distribution, management or administration of the trust estate, or the exercise of any power vested in, or the performance of any duty imposed on, the trustees notwithstanding that such direction may affect contingent interests in the trust estate, whether of persons in existence at, or of persons who may be born after, the date of the direction...”

(Section 6 of the 1988 Act was repealed by paragraph 30(3) of schedule 5 to the Courts Reform (Scotland) Act 2014. However, by article 7(1) and (2)(e)(iii) of the Courts Reform (Scotland) Act 2014 (Commencement No 2, Transitional and Saving Provisions) Order 2015 (SSI 2015 No 77), any subordinate legislation made under section 6 of the 1988 Act remained in force. That included Rules of Court 63.4–63.6A.)

[16] The Court initially took a cautious approach to the scope of section 17(vi) of the 1933 Act. In *Andrew’s Trs v Maddeford* 1935 SC 857, Lord President Normand observed at page 863 that it could not have been the intention of the legislature that it be used to decide “the most complex questions of trust law without full representation at the bar of conflicting interests and under conditions of summary procedure”. It was acknowledged, however, that proceedings under section 17(vi) were competent whether the trustees appeared alone or whether they were opposed at the bar by parties with an interest in the trust estate. It was also recognised that the relevant rules of court permitted the Court (as do the current rules) to order inquiry by proof, remit to a reporter, or affidavit. In *Andrew’s Trs* itself, the Court declined to order inquiry into disputed facts because the parties’ averments were not framed with a view to a proof upon them; all that the Court could do was direct the trustees

to retain the trust capital in their hands until it had been determined in a competent judicial process how it was to be distributed.

[17] In *Peel's Trs v Drummond* 1936 SC 786, Lord President Normand (at page 794) expressed the view that in a petition for directions the Court ought not to refuse to entertain any question of law, if the following conditions were satisfied: (1) that the petition was competent as raising a question relating to the investment, distribution, management or administration of the trust estate, or as to the exercise of any power vested in, or as to the performance of any duty imposed on, the trustees, and requiring an immediate decision by the trustees (subject of course to the directions which they sought from the Court); and (2) that when the petition came before the Court for debate, all the parties were represented who would have had to be represented if the question had been submitted in a competent special case. Neither in this nor in any subsequent case was express consideration given to the question of entertaining a question of fact.

[18] We are, however, satisfied that an application by trustees for directions is not excluded from this procedure merely because the question in respect of which the directions are sought is one of fact. It may be that there will be cases of such complexity that only another form or process, such as an ordinary action, could appropriately address them. Such cases could not be brought before the court by special case under section 27 of the Court of Session Act 1988 because that procedure is available only for questions of law where the facts are agreed. In contrast, the rules of court applicable to petitions for directions provide, and have always provided, for factual inquiry by a variety of methods. So long as all parties with an interest have an opportunity to participate in the process, including any form of inquiry that the Court may order, we see no reason why the current

procedure should not be used to determine straightforward issues of fact relating to the matters narrated in the former section 6(vi) set out above.

[19] In the present case the persons upon whom the petitions were served as respondents were Elizabeth's surviving children, Joseph Grosvenor at his last known address in Peterhead, and Liverpool City Council as deputy for Marc Lawrence. No answers were lodged. Having regard to the Crown's interest as *ultimus haeres*, the petitions ought also to have been served on the Lord Advocate, and it is regrettable that this was not done. In the light of our conclusion in relation to the answer to the question, however, we have proceeded to address it without inviting representations on behalf of the Crown.

#### *Executors dative*

[20] The second issue is whether a petition for directions may competently be presented by an executor dative. In *Chisholm, Petitioners* 2006 SLT 394, it was held that the expression "trustees" in section 6(vi) could properly be read as including executors nominate, but the Court (at paragraph 9), having heard no argument on the point, reserved its opinion on whether a petition for directions could be presented by an executor dative.

[21] On behalf of Elizabeth's executor dative, it was submitted that he had the same power to apply to the court for directions as a gratuitous trustee or executor nominate. Section 20 of the Succession (Scotland) Act 1964 provided that an executor dative had "the whole powers, privileges and immunities" which gratuitous trustees had "under any enactment or under common law". The power to apply for directions is a power under an enactment, namely section 6(vi) and the rules of court. On a straightforward reading of section 20, the power to apply for directions was extended to executors dative. This was consistent with the general legislative intention of extending the powers of executors to



correspond to those of trustees. The nature of the issues that an executor dative might have to decide were the same as those a trustee or executor nominate might have to decide in connection with the investment, distribution, management or administration of the estate with which they were entrusted or the exercise of a power or performance of a duty. The present petitions afforded a good example of this: the question facing Elizabeth's executor dative was exactly the same as the one facing the trustees of the Trust.

[22] We agree with these submissions. Section 20 of the 1964 Act provides as follows:

“An executor dative appointed to administer the estate of a deceased person shall have in his administration of such estate the whole powers, privileges and immunities, and be subject to the same obligations, limitations and restrictions, which gratuitous trustees have, or are subject to, under any enactment or under common law, and the Trusts (Scotland) Acts 1921 and 1961 shall have effect as if any reference therein to a trustee included a reference to such an executor dative:

Provided that nothing in this section shall exempt an executor dative from finding caution for his intromissions or confer upon him any power to resign or to assume new trustees.”

Subject to the three specific exceptions in the proviso, the effect of section 20 was to assimilate the status of an executor dative to that of gratuitous trustees including executors nominate. There is no reason in principle to apply the section restrictively. On a proper construction, the entitlement of a trustee to apply to the court for directions is a power or privilege under an enactment which was accorded to executors dative by section 20. The petition at the instance of Elizabeth's executor dative is therefore competent.

### **Answer to the question**

[23] Senior counsel for the petitioners submitted that the Court ought to conclude, on balance of probabilities, that Mr Grosvenor had not been known to be alive since 2003 and should therefore find, in accordance with section 2 of the Presumption of Death (Scotland)

Act 1977, that he died on 31 December 2010, survived by Elizabeth. The 2003 correspondence appeared to have been a continuation of earlier attempts by Mr Grosvenor to obtain money from Elizabeth. If he had survived, it was likely that he would have continued to seek payment, yet nothing had been heard from him since 2003. Subsequent investigations had produced no clear evidence that he was still alive. The evidence that Marc Lawrence was Mr Grosvenor was limited and circumstantial.

[24] We are unable to accept this submission. In our opinion the evidence placed before the Court amounts to a compelling case that Marc Lawrence was indeed Mr Grosvenor. The difference in name is of little significance given the number of names used by Mr Grosvenor during his lifetime. On the other hand:

- Marc Lawrence had the same date and place of birth as Sidney Collins *alias* Mr Grosvenor, and both had connections with the Liverpool/Wirral area;
- The letter written by Mr Grosvenor in 2003 from “1A Jane Street, Peterhead AB42 1DR” was written at a time when the only resident of 1A James Street, Peterhead AB42 1DR was Marc Lawrence;
- The photograph of Marc Lawrence at the time of his disappearance in 2011 bears what appears to us to be a striking resemblance to the two photographs of Mr Grosvenor as a younger man.

We do not regard the absence of continuing contact between Mr Grosvenor/Marc Lawrence and the trustees after 2003 as carrying significant weight, especially when it is recalled that Marc Lawrence suffered from dementia for an unknown period prior to his death.

[25] We accordingly direct the petitioners that in administering and distributing Elizabeth’s intestate estate or the Wife’s Fund (as the case may be), they should proceed on the footing that Marc Lawrence was Mr Grosvenor/Gray, and that he was, at the date of

Elizabeth's death, still married to her. We answer the first specific question in the affirmative and the second in the negative. For clarity's sake, we also think it appropriate to answer the third specific question in the negative, notwithstanding that Mr Gray is now dead. We find the expenses of these applications to be a proper charge on the funds of the executry estate and the Trust, to be paid out of the executry and Trust assets respectively.