SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 52

B1159/15

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN
[redacted]

In the petition of

X and Y

Petitioners

For the appointment of a new trustee to act under [the insurance company trust] deed of A

Petitioners: Stewart; McNabs
Respondent: Cunningham; MHD Law

Edinburgh, 11 May 2017

The sheriff, having resumed consideration of the petition, puts the matter out by order to determine final orders and matters of expenses; assigns 26 May 2017 at 10 am at the Sheriff Court, 27 Chambers Street, Edinburgh as a diet therefor.

[1] This petition concerns issues arising out of two deeds of trust executed by the late A who died intestate. The petitioners are the parents of the deceased. They were appointed executors dative on the estate of the deceased conform to decree in their favour granted. The petitioners seek to be appointed as trustees in relation to two trusts said to have been created by the deceased.

[2] The third respondent has brought proceedings for financial provision pursuant to section 29 of the Family Law (Scotland) Act 2006 ("the cohabitation proceedings"). These proceedings have been defended by the present petitioners as executors dative. The third respondent opposes the present petition. The third respondent avers that certain funds

which would otherwise fall within the trusts form part of the estate of the deceased. The third respondent opposes the appointment of the petitioners as trustees. In the alternative, the third respondent seeks the appointment of a judicial factor to the trust estates.

[3] I heard evidence from the petitioners and the third respondent. I also heard evidence from Mr B. The evidence of Mr B related to the documentation setting up the trusts. There is no issue as to the honesty and integrity of Mr B who did his best to assist the court. That said, he was limited in the evidence which he could give from his own knowledge as to the creation of the trusts. I did not understand there to be any significant dispute between the parties as to the material circumstances giving rise to the trust documentation. There is also a joint minute of admissions which records agreement as to the relevant documentation. I also heard evidence from the petitioners and from the third respondent. I shall comment separately on their evidence.

[4] The key documents are contained in items 1-4 in the fourth inventory for the petitioners. Although not numbered separately in process, for ease of reference, I shall refer to these documents as 4/1 - 4/4 respectively. Put shortly, the deceased took out two policies of insurance. Numbers 4/1 - 4/4 of process are the relevant documents. Partly from these documents and partly from the evidence of Mr B, the evidential position is that the deceased visited the relevant bank in order to take out the policies of insurance. The bank staff used pro forma documents which they duly completed and submitted to the insurance company. With the exception of the amounts and the relevant numbers ascribed to them, the documents and type of insurance (critical illness with life cover) are identical.

[5] As it is necessary for the determination of this matter I quote from the parts of the documentation. In order to avoid repetition I shall make reference to numbers 4/1 and 4/3 only. 4/2 and 4/4 are, as I have said, largely identical. 4/1 is described as constituting a trust

document for the relevant policy. The document bears to be [an insurance company] document. Page 1 of that document contains information for the customer and, under the heading of "additional trustees", it says that "It is important to appoint at least one additional trustee to act with you as soon as possible so the trust will be effective". On page 2 there is a declaration of trust. The words are "This declaration of trust ("Trust") made on 15 October [year]" by the deceased, designed as "the Settlor". The document goes on to record the establishment of an irrevocable trust and defines the policy by reference to a specific number. Read short, clause 2 refers to the "Main Trust Provisions" which provides that the trustee shall hold the trust fund for the benefit of the beneficiaries. The "default beneficiary" is named as the third respondent and entitlement to the policy is described as "100%". The document goes on to refer to "possible beneficiaries", which includes any issue of the parents of the deceased and the default beneficiaries. The document is signed by the deceased at page 5. His signature is witnessed. There is no date separately identified as being the date of signature but from the opening provisions it is 15 October [year].

[6] From the evidence of Mr B these documents were forwarded to the insurance company. Numbers 4/3 and 4/4 are two letters, each dated 17 October [year], sent by the insurance company to the deceased. Again, each letter is almost identical. The letter states that the application has been accepted "subject to our checks" and that the policy began on 15 October [year]. The letter contains a policy schedule, a document entitled "Your right to change your mind" and policy provisions. The policy schedule confirms that the policy commenced on 15 October [year] and that it is a "Policy effected under trust".

[7] It is a matter of agreement that, as at the date of his death, the deceased remained the sole trustee. No other trustee was assumed or otherwise appointed. It is for that reason the petitioners seek their appointment (or the appointment of others considered suitable by the

court) as trustees pursuant to section 22 of the Trusts (Scotland) Act 1921. The third respondent avers (at answer 1) that the trust deeds do not constitute valid trusts because "the putative sole truster and putative sole trustee are the same person". The insurance company were notified of the deceased's death by agents acting on behalf of the petitioners (as executors). Notification was sent by letter dated 10 September [year] and a copy thereof is document number 2 in the third inventory of productions for petitioners. The insurance company hold the funds pending determination of these proceedings.

[8] There are no significant evidential disputes as to the documentation surrounding the trusts. There are factual issues which are relevant to the appointment of trustees to the trusts – always assuming the trusts are held to be valid. …

Submissions for the third respondent

[9] I begin with the submissions for the third respondent because it is his position that the petition should be dismissed. Mr Cunningham helpfully lodged a written note of argument. It is not my intention to record in detail all of the submissions. On the question of the constitution of the trusts, I was referred to the following authorities: *Allan's Trustees v Lord Advocate* 1971 SC (HL) 45; *Clark's Trustees v Lord Advocate* 1972 SC 177; *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111; *Kerr's Trustees v Inland Revenue* 1974 SLT 193; *Jarvie's Trustee v Jarvie's Trustees* (1887) 14R 411.

[10] For a person to make himself a trustee of his own property he must do something equivalent to delivery or transfer of the trust subjects or fund to himself as trustee and something to demonstrate the irrevocable character of the trust (*Allan's Trustees*). Intimation of a trust deed to a beneficiary may be equivalent to delivery. The petitioners make no such averments. The petitioners rely upon the declaration of trust, the applications and their

despatch to, and receipt by, the insurance company. Intention is not enough. Knowledge of the insurance company is not enough (*Jarvie's Trustees*). The insurance company is neither a trustee nor a beneficiary but merely the insurer in a contract with the deceased. The petitioners have not produced any authority in support of the proposition that intimation of documents such as the trust deeds to an insurer is equivalent to delivery. *Clark Taylor* is not authority for that proposition. *Clark's Trustees* was similar to the present case but there was no suggestion that intimation to the insurance company was equivalent to delivery. Mr Cunningham went through *Allan's Trustees*, *Clark Taylor* and *Kerr's Trustees* in some detail which I will not record here. The insurance policies need to be in existence on or before the declaration of trust because in order for there to be a trust there has to be property which can be transferred into it. At the time at which it was despatched on or about 15 October, there was only an application. The letter of the 17 October refers to an application having been submitted. It is not until the document was accepted by the insurance company that there was any property which the insured could pass into trust. The deceased had the right to change his mind and cancel the application. There is no evidence that the trust was ever intimated to any beneficiary. The guidance notes given by the insurance company (number 4/1 of process) provide that being a sole trustee is not sufficient. That is consistent with authority.

[11] In relation to the appointment of trustees or the appointment of a judicial factor, …

Submission for the petitioners

[12] Mr Stewart lodged a note of argument, also lodged in process. Mr Stewart submitted that the trusts were validly constituted following intimation of and remitting to the insurance company the properly executed declarations of trust and the commencement of

the policies. The declarations of trust were intimated to the insurance company who had the responsibility to make payment under the trusts in accordance with the terms of the trusts, including those relating to the payment of the trust fund. The declarations of trust were irrevocable. The requirements for the constitution of a valid trust are set out in the case of *Clark Taylor*. If that is not the case then the standard form documentation used by the insurance company would not in law be sufficient to create a valid trust which would have significant consequences for both the insurance company and their policy holders.

[13] Mr Stewart then went through the cases of *Allan's Trustees, Jarvie's Trustees* and *Kerr's Trustees* in detail. In *Allan's Trustees* reference was made, hypothetically, to a trust in which there was an unborn child of the beneficiary. Clearly there could be no intimation to such a beneficiary. *Allan's Trustees* is not authority for the proposition that there must be intimation to a beneficiary. What is required is an irrevocable divestiture of the estate. There is a distinction between means and end. In essence, the policy must be put irrevocably beyond the powers of the settlor. That is the mischief which is being addressed. There was no irrevocable divestiture in *Jarvie*. In the present case the policy began on 15 October and that was the date of the creation of the trust. The documentation says that by signing the trust deed the settlor is giving away the benefits. The letter of 17 October states that the application has been accepted and that the start date is 15 October. It is clear from *Clark Taylor* that intimation to a beneficiary was not the only equivalent to delivery. The test is irrevocable divestiture. Applying the *dicta* of the Lord President in *Clark Taylor*, there was an asset (monies under the policy); there was a declaration of trust; there was a clearly identified beneficiary; and there was the equivalent to delivery in order to achieve irrevocable divestiture (the execution of the trust deed and its delivery to the insurance company). When the deceased signed the trust deed he no longer had rights to the policy.

The deceased had taken advice, signed the trust deed and intimated its creation to the insurance company. Once he had delivered the document to the insurance company, the insurance company would have no choice but to pay out to the beneficiary. Put another way, if after 17 October, the deceased had gone to the insurance company and told them that he changed his mind he would have been informed that the document was irrevocable. Mr Stewart accepted there is no authority for the proposition that intimation to the insurance company is equivalent to delivery. Reference was made to McKenzie Stuart on *Trusts* at pages 8-12.

[14] Turning to the question of the appointment of the petitioners as trustees…

Reply for the third respondent

[15] In Mr Cunningham's submission, *Allan's Trustees* was authority for the proposition that irrevocability is a consequence of intimation to the beneficiary. Intimation is equivalent to delivery. The use of the word "irrevocable" in the documentation is only a factor. More than a mere statement is needed. So far as the hypothetical example of an unborn beneficiary is concerned the simple solution is the appointment of a further trustee. Intimation to the insurance company is not enough. That was made clear in *Allan's Trustees* (at page 51). The consequences to the insurance company and other policy holders are irrelevant. The insurance company were not trustees. Their duty is simply to pay out the proceeds of the policy to whoever is the beneficiary. In relation to the appointment of the petitioners as trustees…

Decision

[16] In relation to the creation of a trust there is no factual dispute as to the events or the

chronology. Although self-evident, the documentation I was referred to constitutes all of the relevant material; the policies and the trusts all arise out of that material. The text of numbers 4/1 and 4/2 of process each record the request of the deceased that the insurance company issue the policy to the "Settlor as Trustee", to hold it irrevocably on trust as further provided. That document was signed on 15 October 2011 and sent by the bank to the insurance company. The insurance company replied by letter dated 17 October [year]. The text of the material sent by the insurance company to the deceased (numbers 4/3 and 4/4 of process) records that, so far as the insurance company were concerned, they were on risk as at 15 October [year]. As I read the documentation the acceptance of risk was subject to further enquiries on the part of the insurance company and also subject to the right of the deceased to cancel the policy in accordance with the letter headed "Your right to change your mind". In the event, neither party sought release of the rights and obligations contained within the policy.

[17] I was referred to some of the notes accompanying the documentation which I read as constituting advice by the insurance company to the deceased as to the operation of the trust, including the appointment of further trustees. I do not take that to be in any way legally binding nor was it suggested that it was. It records the understanding of the insurance company as to the law and practice of trusts at the time the policies were issued.

[18] At the core of this matter is the constitution of an *inter vivos* trust where the truster is the sole trustee. (On an academic level, there are several issues as to the elements necessary to create a trust – *"Constitution of Trust"* 1986 SLT (News) 177, Professor Reid.) Of the authorities referred to the last, in date order, is that of *Clark Taylor*. That case concerned a contract for the supply of bricks by a subcontractor to a main contractor. The terms and conditions of contract purported to establish a trust in circumstances where the buyer did

not pay the price for the goods. Read short, the buyer was to hold in trust the benefit to him of the disposal of the bricks in whatever form the benefit took. On its facts the case is clearly very different but, having been referred to much of the authority to which I was referred, the Lord President (Emslie) summarised the legal position as follows (at page 118):

> "The result of this analysis of the ruling authorities is that in order to complete the successful constitution of a trust recognised as such by our law, where the truster and trustee are the same persons, there must be in existence an asset, be it corporeal or incorporeal or even a right relating to future *acquirenda*; there must be a dedication of the asset or right to define trust purposes; there must be a beneficiary or beneficiaries with defined rights in the trust estate; and there must also be delivery of the trust deed or subject of the trust or a sufficient and satisfactory equivalent to delivery, so as to achieve irrevocable divestiture of the truster and investiture of the trustee in the trust estate".

Of these conditions it is the last which is of particular significance in this case.

[19] It is informative to consider carefully two of the earlier authorities referred to, namely *Allan's Trustees* and *Kerr's Trustees*. The earlier is a decision of the House of Lords; the later a decision of the Second Division. Both cases concern liability to estate duty. The issues arose following the taking out of policies of insurance by the deceased and whether the deceased could be said to have any interest in the policies at the material time. It was agreed the taking out of the insurance policies was a device to reduce liability to estate duty. In *Allan's Trustees* the deceased submitted a proposal on 12 December which was accepted on 13 December. The first premium was paid on 24 December and the policy, written in trust, issued on 31 December, all dates in 1963. The deceased was the only trustee and it was only much later that additional trustees were assumed. There were to be three beneficiaries of these trusts. One of the beneficiaries was aware of the trust scheme; the other two beneficiaries were not. Before the House of Lords the Lord Advocate, on behalf of the Inland Revenue, conceded that intimation had been made to one of the beneficiaries and that such intimation was equivalent to notional delivery. The question for the House of

Lords was whether intimation to one beneficiary was equivalent to intimation to all. By a majority, Lord Guest dissenting, the House of Lords held that it was. In the course of his speech, Lord Reid said (at page 54):

> "I think that we can now accept the position, as a reasonable development of the law, that a person can make himself a trustee of his own property, provided that he does something equivalent to delivery or transfer of the trust fund. I reject the argument for the appellants that mere proved intention to make a trust coupled with the execution of a declaration of trust can suffice. If that was so it would be easy to execute such a declaration, keep it in reserve, use it in case of bankruptcy to defeat the claims of creditors, but, if all went well and the trustee desired to regain control of the fund, simply suppress the declaration of trust".

Later on in his speech Lord Reid said at page 55 "What is required to create an effective trust is some *bona fide* physical act of the truster equivalent to conveyance, transfer or delivery of the subject of the trust". Although there is no suggestion of anything untoward here, it is clear that Lord Reid considered the requirement of delivery to be an important safeguard against manipulation of the trust mechanism in insolvency. It is also clear that the intention of the deceased is not sufficient.

[20] *Kerr's Trustees* involved a similar scheme. In that chronology, the proposal and declaration were submitted to the insurance company by the deceased on 24 September 1963 together with a letter of request for a trust. The first premium was paid on 26 September and the policies delivered to the deceased's solicitors on 23 November 1963. The evidence as to intimation was clearly somewhat unsatisfactory. Put broadly, intimation, if it happened at all, was made at a date prior to September 1963. The Lord Advocate argued that no trust was created because if there was intimation made to the beneficiaries (and even that was not conceded) such intimation took place prior to the establishment of the trust. Put short, as Lord Kissen summarised it, at the point at which intimation was made there was nothing from which the truster could be divested; there could not be the equivalent of delivery by

intimation before there is a trust fund in existence. The trustees argued that a similar analysis applied in the case of *Allan's Trustees*. The short answer was, in that case, the Lord Advocate had made a concession which he did not repeat in *Kerr's Trustees*. One of Mr Cunningham's arguments was that, applying *Kerr's Trustees*, in the present case there was no trust of which the deceased could be divested.

[21] In my opinion, it is clear that in all three cases there is repeated reference to the need for delivery or, as was said by Lord President Emslie, "a sufficient and satisfactory equivalent to delivery, so as to achieve irrevocable divestiture of the truster and investiture of the trustee in the trust estate". In the present case there is no intimation to any beneficiary. The only parties to the transaction are the deceased and the insurance company. Throughout the deceased remained the only trustee. Mr Stewart argued that there had been divestiture by the deceased of whatever interest he may have had in the policy. The insurance company were aware of the trusts and were bound by their terms. However, the issue before me is whether valid trusts were created. I have set out some of the important facts of *Allan's Trustees* and *Kerr's Trustees* because it seems to me that both these cases are factually similar to the present case. In each case the deceased took out the policies of insurance, declaring at the same time that they were to be held on trust and that such trusts were irrevocable. The insurance companies each acknowledged the wishes of the deceased. If that had been sufficient to constitute valid trusts then the search for an equivalent to delivery would have been unnecessary, as such facts would have been sufficient to justify the requisites for the creation of a trust. Clearly they did not. Intimation to the insurance company was not, in itself, held to be sufficient to constitute divestiture. The case of *Jarvie's Trustees* is to similar effect (see the Lord President at page 416). All of the authorities to which I was referred relate to a question of intimation to a beneficiary. It is accepted that

such intimation is equivalent to delivery but there is no authority extending notional delivery or divestiture to the current factual circumstance. In the present case there is no evidence of actual delivery in the sense of divestiture nor is there any evidence of an equivalent thereto. So far the only example of an equivalent to delivery in the authorities is intimation to a beneficiary and that has not occurred here. The authorities to which I was referred are binding upon me. In the factual circumstances, in my opinion I am bound to conclude that no trusts were validly created. On the facts of this case it is difficult to see how Mr Cunningham's point as to the existence of a trust asset at the date of the declaration of trust arises. As there never was delivery or its equivalent, when the asset existed becomes irrelevant because there is no point at which delivery ever took place.

[22] If no valid trusts were created there is no requirement for the appointment of trustees. However, in the event that I am wrong in the conclusion that I have reached, I should say a little more about the appointment of trustees. …

[23] I am minded to sustain the third plea in law for the third respondent and the first plea in law for a third respondent in the counterclaim which would lead to declarator in terms of the third respondent's first crave in the counterclaim. However, there are some minor drafting issues which arise out of the way in which the petition was prepared. There is more than one trust which the pleas and craves do not fully reflect. As I propose to reserve all questions of expenses I shall put the matter out by order so the appropriate interlocutor can be pronounced when parties have had an opportunity to consider the terms hereof.