EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 31
P396/21

Lord Malcolm
Lord Doherty
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Petition

of

ANDREW JAMES RONALD LINDSAY & THE RIGHT HONOURABLE ALISTAIR GRANVILLE GORDON, EARL OF ABOYNE
as Trustees of the Aboyne Castle Estate Trust

Petitioners

for

Approval of an Arrangement under section 1(1) of the Trusts (Scotland) Act 1961

Petitioners: M Ross QC; Turcan Connell
Minuter (adult beneficiaries): Welsh; Turcan Connell
Minuter (curator ad litem to child beneficiaries): MacLeod; Turcan Connell

5 July 2022

Introduction

[1] In this application under section 1(1) of the Trusts (Scotland) Act 1961, the petitioners seek the approval by the court, on behalf of minor and unborn beneficiaries, of an arrangement varying trust purposes by extending the class of potential beneficiaries to

include the widow of the current liferenter, restricted to an interest in income only. Minutes were lodged on behalf of the beneficiaries of full age, stating that they consented to the arrangement, and by the curator *ad litem* to the child beneficiaries, stating that he considered that the arrangement would not be prejudicial to them.

The trust provisions

[2] The trust was created by a Deed of Trust by the Most Honourable Granville Charles Gomer Gordon, Marquis of Huntly, executed and registered in the Books of Council and Session in 1987. By a Deed of Appointment executed in 1997, the petitioners exercised a power of appointment in the Deed of Trust to create a fund (the Earl of Aboyne Fund), to be held for the Earl of Aboyne, the truster's son, and his issue. In terms of the Deed of Appointment, the Earl of Aboyne was given a right to the whole income of the fund, with capital vesting on his attainment of age 40. In 2008 this court approved an arrangement varying the terms of the Deed of Trust and the Deed of Appointment to confer upon the trustees a power to postpone vesting of capital in the Earl of Aboyne to a later age no greater than 75. That power was exercised by an irrevocable Deed of Appointment dated 4 September 2008.

[3] The effect of the 1997 appointment, the 2008 arrangement and the 2008 appointment is that the Earl of Aboyne's Fund is currently held by the petitioners in terms of Clause Fourth of the 1997 Deed of Appointment which provides, so far as material, as follows (with the substitution of age 75 shown in brackets):

> "FOURTH – As at the date hereof, we appoint to the Earl of Aboyne, a right, until he attains the age of [seventy-five years] to the income of the whole of the Trust Funds under our management not hereinbefore appointed (which subjects hereinbefore appointed to the Earl of Aboyne are hereinafter referred to as 'The Earl of Aboyne Fund'), and on the Earl of Aboyne attaining the age of [seventy-five years], he shall

> be entitled to have the Earl of Aboyne Fund made over to him irrevocably, declaring that in the event of the Earl of Aboyne failing to attain the age of [seventy-five years], then the Earl of Aboyne Fund shall on his death be held in trust for behoof of the lawful issue of the Earl of Aboyne, in such proportions as and to the exclusion of the other or others as we and our successors in office as Trustees foresaid may appoint by deed or deeds revocable and irrevocable and subject to such conditions as we and our successors in office as Trustees foresaid may in our absolute discretion deem appropriate; and in default of such appointment prior to any of the lawful issue of the Earl of Aboyne attaining the age of twenty-five years, one share shall go to each of the lawful children of the Earl of Aboyne who is alive at that date and one share per stirpes among the lawful issue of any predeceasing lawful child who is represented by lawful issue who are alive at that date; Declaring that so long as a beneficiary in whose favour an appointment has been made or who is entitled, in terms of the default clause (there being no valid appointment then in force), is under the age of twenty-five, we and our successors in office as Trustees foresaid may pay or apply the whole or part of the free income (after meeting all expenses properly attributable to income) of the Earl of Aboyne Fund or of his or her prospective share thereof, whichever is appropriate, for his or her maintenance, education or benefit as we and our successors in office as Trustees foresaid in our absolute discretion may decide… and failing the lawful issue of the Earl of Aboyne taking a vested interest in the Earl of Aboyne Fund, to [two adult siblings of the Earl of Aboyne]; And further declaring that at any time before the Earl of Aboyne attains the age of [seventy-five years], we or our successors in office may advance to him the whole or part of his or her [sic] prospective interest in the fee of the Earl of Aboyne Fund, and such advances shall vest on payment."

The purpose of the proposed arrangement

[4] The Earl of Aboyne is currently aged 48. He and the Countess of Aboyne have four children aged between 10 and 15 years. The value of the fund is substantial. As matters stand, in the event of the death of the Earl of Aboyne prior to the date of vesting at age 75, the trust capital would vest in his children. Were he to die prematurely and while his children were still young, it would not, in the view of the petitioners, be to their advantage for the fund to be distributed immediately. They would have no immediate need of the substantial sums which they would inherit and the distribution would be subject to a charge to inheritance tax ("IHT"). The value of the Trust fund would be diminished. The Trustees

wish to put in place an option that would avoid this risk and also give them the flexibility to implement future tax planning measures.

[5] The petitioners have been advised that, in the event of the Earl's premature death, it would be in the interests of the whole beneficiaries of the trust for the fund to pass in liferent to his widow, the Countess of Aboyne. The effect of the proposed variation would be to introduce the Countess as a potential beneficiary, but to a restricted extent. The power to create an interest in her favour would only arise if the Earl were to die survived by her, and could be exercised only to create an interest in income, and not in the capital of the fund.

[6] The petitioners do not envisage that, in the event of the early death of the Earl of Aboyne and the widow's life interest taking effect, the children would be kept out of the trust assets for an extended period. Rather, in that event and in the period following the death, the Trustees would have an opportunity to put tax planning measures in place. At an appropriate time, when the children have sufficient maturity, it would be possible for substantial sums to be transferred to them. The petitioners do not consider that it would be in the children's interests for no assets to be transferred to them until they were in their middle age.

[7] The potential tax benefits identified by the petitioners may be summarised as follows. The Earl's life interest began before 2006 and is therefore a qualifying interest in possession for IHT purposes. The trust property subject to his interest does not fall within the special tax regime for trusts, and on his death its value would be aggregated with his personal estate and charged to IHT. If, however, on his death the property became subject to an interest in possession in favour of his widow, that interest would be a transitional serial interest in terms of section 49D of the Inheritance Tax Act 1984. The value of the fund would remain outside the special tax regime for trusts and the transfer on the Earl's death

would attract the exemption from IHT for transfers between spouses. There would also be an uplift in the base value of the trust assets for capital gains tax purposes, without a charge to tax arising. Subsequent appointments of capital in favour of the children would be potentially exempt transfers, attracting no IHT if the Earl's widow were to survive for at least seven years after they were made. Capital gains tax would be chargeable only on gains accruing during the period after the Earl's death.

The statutory power of the court

[8] The power of the court under section 1(1) of the 1961 Act is subject to the proviso "that the court shall not approve an arrangement on behalf of any person unless it is of the opinion that the carrying out thereof would not be prejudicial to that person". The question to be addressed in this application is whether the addition of the Earl's widow as a potential beneficiary with rights restricted to income is prejudicial to the minor and unborn beneficiaries with an interest in the fund.

Argument for the petitioners

[9] On behalf of the petitioners it was acknowledged that there was Scottish authority that introducing a new beneficiary prejudiced the existing beneficiaries. In *Pollok-Morris and others*, *Petitioners* 1969 SLT (Notes) 60, the court refused to approve an arrangement which would have added adopted children as potential beneficiaries. There was, however, more recent English authority (*Re RGST Settlement* [2007] EWHC 2666 (Ch); [2008] STC 1883) in which the court had approved a variation under the corresponding English legislation in circumstances similar to those of the present case. There was no material difference between the English provision, which requires the court to be satisfied that the proposed

arrangement would be for the benefit of the person in question, and the proviso to section 1(1) which refers to the arrangement not being prejudicial to that person.

[10] In the present case, any postponement of vesting of capital in the members of the next generation would be for a specific purpose, namely to allow tax planning measures to be carried out, thereby increasing the value of the estate which would, in time, be transferred to them. Such postponement was ultimately in their interests because it would allow the sums to be passed to them in due course to be maximised. The purpose of the proposed variation was to protect the interests of the beneficiaries, having regard to the current tax regime. It might also have the effect of giving the trustees a greater degree of flexibility when responding to any future policy and legislative changes in relation to taxation.

[11] It was important to bear in mind that the introduction of a new beneficiary would only happen in the event of the early death of the Earl. His widow would not have a competing interest with those of her children. She would not have an interest in the trust capital, and the trustees would not have to choose between the interests of the Earl's widow and the interests of his children. Her introduction as a beneficiary in this way was consistent with the interests of the existing beneficiaries.

Decision

[12] There is limited Scottish authority on the proper interpretation of the requirement in the proviso to section 1(1) that the arrangement must "not be prejudicial" to the beneficiaries on whose behalf the court's approval is sought. As already noted, the court in *Pollok-Morris* (above) held that it was prejudicial to the existing beneficiaries to add adopted children as new potential beneficiaries, Lord Guthrie noting that it would enable the trustees, in the

exercise of their discretion, to give the whole fund to one or more of the new beneficiaries. In *Young's Trs, Petitioners* 1962 SC 293, the court refused to approve an arrangement that would have removed a cap on the trustees' power to make payments to beneficiaries' parents for their maintenance and education, on the ground that this would diminish the capital to which the children would later become entitled. At page 301, Lord President Clyde observed:

> "Before we could approve of this variation in the present petition, we would require to be satisfied that the carrying out of the variation would not be prejudicial to the unborn issue of the two named beneficiaries. In a large number of the cases that have come before us it has been relatively easy to satisfy the Court upon that matter, because many of these variations involve substantial savings in death duties and a consequent substantial increase in the capital of the trust in which these unborn issue have an interest. Such an increase has in many of the cases removed any prejudice which the unborn beneficiary might otherwise suffer from the variation. But, in the present case, there is no such compensating consequence…
> …
>
> It was contended that, although the proposed variation was a disadvantage to the issue, it was not prejudicial to them. I must confess that I am quite unable to follow that contention…"

[13] In these cases and more generally, it appears to have been the approach of the court to construe "prejudice" as referring only to economic prejudice. There is no reported instance in which the court has considered that an economic disadvantage to a minor beneficiary was outweighed by non-economic considerations such as a perceived desirability of withholding capital from a beneficiary until he or she was older and more mature.

[14] In England and Wales the courts have adopted a somewhat broader approach in determining whether a variation was "for the benefit" of a person. For example, in *Re T's Settlement Trusts* [1964] Ch 158, the court approved a variation which postponed vesting indefinitely in a child who was said to be "alarmingly irresponsible and immature as

regards money", payment of capital to whom at age 21 was considered to be detrimental. Conversely, in *Re Weston's Settlements* [1969] 1 Ch 223, the court refused to approve an arrangement that was clearly to the financial benefit of a minor beneficiary because an ingredient of the tax planning strategy of which the arrangement formed part was that the family would become resident in Jersey, Lord Denning MR famously observing (at page 245):

> "The court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit. There are many things in life more worthwhile than money. One of these things is to be brought up in this our England, which is still 'the envy of less happier lands'."

[15] The draft Bill annexed to the Scottish Law Commission's Report on Trust Law (Report no 239, 2016) which is currently under consideration by the Scottish Government would expressly allow the court to take account of, *inter alia*, "any economic *or other* benefit which the person is likely to receive from the arrangement". For the time being we proceed on the basis that the court must be satisfied that the person upon whose behalf approval is sought would not be economically prejudiced by the proposed variation.

[16] In our opinion, however, the question of absence of prejudice should not be considered too narrowly, but rather against the whole circumstances of the trust. It is theoretically possible that the insertion of the proposed power could, if exercised, postpone vesting of capital in the minor beneficiaries for a long period of time, were the Earl unfortunately to die young and be survived by his widow for many years without the trustees exercising their power to appoint capital. Taken in isolation, the creation of such a possibility would be prejudicial. That would not, however, be a reasonable approach to interpretation of the proviso to section 1(1). A similar possibility was considered by the English court in *Re RGST Settlement Trust* (above) in which, as here, the proposed variation

inserted a life interest in favour of a surviving spouse. Judge Behrens (sitting as a judge of the High Court) concluded (paragraph 36):

> "I reserved judgment in this case because I was concerned that the postponement of the children's interests might not be for their benefit. However, [Counsel] have persuaded me that the greater flexibility that the variation gives to the Trustees in the timing of making advances to effect Inheritance Tax savings, taken together with the potential savings in Capital Gains Tax, and the possibility of cheaper life insurance amount to a benefit to the children and unborn children which outweigh the theoretical disadvantage of the postponement of their interest in remainder."

[17] In the present case a saving in the cost of life insurance was not advanced as contributing to the absence of prejudice. The petitioners had not investigated the cost of insurance of the Earl's life against the tax charges that would occur on his death because that would not address the perceived disadvantages to the minor beneficiaries of untimely and unplanned vesting of the trust capital. It is, nevertheless, a cost whose saving may be taken into account by the court when assessing whether the statutory requirement is met.

[18] The introduction of a new beneficiary to whom some or all of the trust capital might be distributed in due course (as in *Pollok-Morris*) would normally be prejudicial to the existing beneficiaries. However, that is not what is proposed in the present case. The entitlement of the class of beneficiaries to share in the distribution of trust capital is unaffected except to the extent that it might, depending on circumstances, be postponed from the time when it would otherwise have occurred. Such postponement would only happen in the event of the untimely death of the Earl, who is said to be in good health. As matters stand, the children have no immediate expectation of receiving a share of capital, although the trustees' powers of advancement of capital would be unaffected by the variation. Senior counsel submitted that the proposed variation was clearly not prejudicial to them, and that no balancing exercise required to be undertaken. In our view, however, the proposal does involve weighing the potential disadvantage of postponement of vesting

against the economic benefits of facilitating the distribution of the trust estate in a tax-efficient manner. Such an exercise was indeed envisaged by the court in *Young's Trs*, where Lord President Clyde referred to "substantial savings in death duties and a consequent substantial increase in the capital of the trust" as removing "any prejudice which the unborn beneficiary might otherwise suffer from the variation".

[19] In the circumstances of the present case, we are satisfied that the statutory requirement is met. We take into account the following factors:

- The proposed new interest is restricted to an entitlement to income, arising only in the event of the death of the Earl prior to any vesting of capital. Moreover it will take effect only if the interest acquired by the Earl's widow is a transitional serial interest attracting the favourable tax treatment currently accorded by the IHT legislation.
- Given the trustees' express intention to distribute trust capital to the beneficiaries when they attain an appropriate age, regardless of the introduction of the widow as an income beneficiary, it is likely that the variation will make little or no difference to the time at which they acquire entitlements to their respective capital shares. Unless the Earl were to die before that time, appointments of capital can be expected to take place in the manner envisaged by the 1997 Deed of Appointment.
- The arrangement will facilitate the distribution of the estate in a manner which maximises the availability of tax reliefs, thereby increasing the value of the estate to the benefit of the capital beneficiaries.
- The cost and inflexibility associated with dealing with the issue by way of life insurance are avoided.

We accept also that the primary underlying purpose of the proposed arrangement is to protect and maximise the financial benefit ultimately obtained by the beneficiaries upon whose behalf approval is sought, rather than the person introduced.

[20] For these reasons we approve the arrangement on behalf of the four existing children of the Earl and Countess of Aboyne, and on behalf of the issue of whatever degree of the Earl who may be born after the date of approval, and we grant the prayer of the petition.

Postscript

[21] At the close of the hearing, when it was announced that the case would be taken to avizandum, a question was raised by the petitioners regarding the anonymisation of the court's opinion. We have been referred to two recent English cases, *V* v *T and A* [2014] EWHC 3432 (Ch) and *MN* v *OP and others* [2019] EWCA Civ 679, in which anonymisation of decisions in applications under the Variation of Trusts Act 1958 received detailed consideration, with regard in particular to derogation from the principle of open justice on the one hand and protection of children on the other. In *MN*, the Court of Appeal made an order prohibiting the identification by name of minor beneficiaries, but not prohibiting the identification of any other party to the application, the trust with which it was concerned, or the general nature of the trust property and provisions.

[22] In Scotland, the principle of open justice has been stated as having two key elements: that proceedings are heard and determined in public, and that the public has access to judicial determinations, including any reasons for them and the identity of the parties: *MH* v *Mental Health Tribunal for Scotland* 2019 SC 432, Lord President Carloway at paragraph 18. As Lord President Carloway observed at paragraph 20, the need to identify the parties was

comprehensively explained by Lord Rodger of Earlsferry in *In re Guardian News and Media* [2010] 2 AC 697.

[23] In relation to this application we have adopted broadly the same approach as the Court of Appeal in *MN*. The children are not identified except as a class of beneficiaries of a trust. No identifying details are given of the trust assets, and it is not necessary in this case (although it may be in others) to detail the value of the fund or the amount of the potential tax liabilities. Identification of the truster, the trustees and the principal adult beneficiary accords with the principle of open justice as stated above.