

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 11/04/11

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

LS

Plaintiff/Respondent;

-and-

SK

Defendant/Appellant.

GILLEN J

[1] This is an appeal by the defendant from an Order of the Recorder's Court for the Division of Belfast dated 5 November 2010. The order was in the following terms (sic):

"The County Court judge ordered that the Solicitors in the application set up a fund to be administered by the Official Solicitor on behalf of the minor until the minor reaches the age of 25 years pursuant to a Married Woman's Property Agreement made on 9 day of May 2006. It was further ordered that as the parties cannot agree trustees any administrative fees due to the Official Solicitor are to be paid equally between the parties. It was further ordered that there be liberty to apply. It is further ordered that each party in the application shall bear their own costs."

Background

[2] The background to that Order lies in an agreement dated 9 May 2006 entered into between the parties ("the agreement") by way of settlement of proceedings under the Married Woman's Property Act 1882 (MWPA) in the

wake of the matrimonial break up of the parties in this matter. The relevant terms of that agreement were as follows:

“It is hereby agreed between the parties ... that the above entitled proceedings being the plaintiff’s claim be stayed on the following terms, save for the purposes of enforcing the terms set out in the schedule, and for that purpose the parties have liberty to apply.

Schedule

(1) The parties shall each appoint a valuer forthwith to value the current property value of the property ... which valuations shall be exchanged forthwith In default of agreement between the aforesaid valuers, then the parties hereto agree to the President of the Royal Institute of Chartered Surveyors appointing an independent valuer, whose valuation shall be binding upon both parties.

(2) [*The agreement defines the meaning of ‘net value’.*]

(3) The defendant agrees to pay 15% of the capital net value (hereinafter called ‘the plaintiff’s entitlement’) to the plaintiff’s solicitors on or before 18 August 2006 in respect of the plaintiff’s claims herein.

(4) The defendant agrees to pay a further 15% of the net value (hereinafter called ‘A’s Entitlement’), which sum shall be paid into a joint deposit account held by both the plaintiff’s solicitors and the defendant’s solicitors on or before 18 August 2006 pending the plaintiff purchasing an alternative property on or before Wednesday 9 May 2007 (hereinafter called ‘the purchasing date’).

(5) In the event of the plaintiff not purchasing an alternative property on or before the purchasing date, then A’s entitlement will put into a trust account in A’s sole name and invested for her sole benefit until she attains the age of 25.”

[3] Difficulties arose concerning the implementation of this agreement. In particular no agreement was reached as to the appointment of trustees of the trust account which was to be set up pursuant to paragraph 5 of the

agreement. Ms McDermott, who appeared on behalf of the plaintiff/respondent, agreed with Mr Girvan, who appeared on behalf of the defendant/appellant, that the matter came before the learned County Court Judge on 5 November 2010 on foot of the “liberty to apply” provision in the agreement. Both parties had wished different trustees to be appointed and had been unable to reach any agreement on the matter.

[4] Faced with this lack of agreement, the learned County Court Judge made the order set out at paragraph [1] of this judgment.

[5] It is against this order that the defendant now appeals. No evidence was called before me. Counsel relied on skeleton arguments and oral submissions. I am indebted to counsel for having presented an economical and skilled set of arguments in each case. In addition Ms McDermott put before the Court a number of interim and final non-molestation and occupation orders that the plaintiff/respondent had obtained against the defendant/appellant during 2005 and 2006. There was also a residence and contact order made on 14 February 2006 in favour of the plaintiff in respect of the child A born in 1993 who was the beneficiary named in paragraphs 4 and 5 of the agreement.

[6] Ms McDermott in addition contended that:

- the appellant had not had direct contact with A for four years save for the sending of three cards
- that A did not wish any such contact now due to the history of difficulties in her relationship with her father
- the appellant is in arrears of child support.

The appellant’s case

[7] Mr Girvan in essence made the following points on behalf of the appellant:

- (i) The agreement is simply an agreement to create a trust. The appellant under the terms of the agreement had promised to create a trust on the occurrence of certain conditions set out in the agreement.
- (ii) The appellant is to be the settlor of the trust and can set up the trust as he deems fit within the terms of the agreement. Thus he can appoint himself and/or others as trustees especially where, as here, the parties have been unable to agree the identity of such trustees.
- (iii) The County Court order was defective in that it stepped outside the terms of the agreement and erroneously purported to impose a wholly new agreement contrary to the intention of the parties .

The respondent's case

[8] Ms McDermott in essence made the following points on behalf of the respondent:

- (i) The trust was expressly written into and constituted by the agreement. All the essential elements for the creation of a trust are present.
- (ii) The agreement envisaged the monies to be held by the respective solicitors acting as trustees of the trust. The relevant solicitors and the Official Solicitor under the terms of the order are constructive trustees of the trust
- (iii) The trust being duly constituted, the settlor has no power to appoint trustees unless he has reserved these in the agreement.
- (iii) Alternatively the courts should invoke Section 40 of the Trustee Act 1958 which provides that "the court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee". Given the hostilities between the parties and the alleged disinterest of the respondent in A the appellant/defendant will not act in a fiduciary capacity in the best interests of this child and the court should therefore appoint new trustees. In this context counsel invokes the order of the County Court Judge and requests the appointment of the Official Solicitor as trustee of the trust.

Conclusions

[9] I am satisfied that the resolution of this matter must be looked at in the context of the agreement which the parties have drawn up under the MWPA. Any shortcomings in that agreement must lie at the feet of the draughtsmen and cannot be cured by me. Whilst I recognise the commendable motivations of the County Court Order in attempting to resolve this whole vexing issue, I am driven to hold that the court cannot rewrite the terms of the agreement. In particular I do not consider that the court can substitute for this agreement to create a trust a wholly different scheme namely to set up a fund to be administered by the Official Solicitor in terms which are clearly outwith the proposed trust proposed in the agreement. Thus a fund to administer the relevant sum cannot be set up by court order. It should not restrict payments out of the fund in breach of the terms of the agreement or place the costs of the administration of that trust fund on the parties. Mr Girvan is correct to

remind me that a trustee is entitled to be reimbursed out of the trust funds (see Re Earl of Winchilsea's Policy Trusts (1888) 39 Ch. D. 168). Consequently on those grounds alone I feel constrained to reverse the County Court order.

[10] I am satisfied that this agreement amounted no more and no less than a binding agreement to create a trust on the terms set out therein. Either party can be sued if he/she fails to perform. Thus I am not persuaded that the agreement created the trust. A settlor cannot create a trust for a beneficiary when owning a large number of assets until he has identified those assets which are to be part of the trust by segregating them from the other assets. (see London Wine Co. Shippers Ltd 1986 PCC 121 and Re Goldcorp Exchange Limited (1995) 1 AC 74).

[11] In the present case the beneficiary was to benefit from 15% of the net value of the property but the value of that property was yet to be ascertained. Until that was completed her share remained mixed in with the rest of the money which amounted to the value of the asset. There was therefore no property capable of being transferred to the trust at that time.

[12] Moreover 2 conditions had to crystallise before the trust could be created under the terms of the agreement. The plaintiff had to fail to purchase an alternative property before 9 May 2007, and the value of the net property had to be ascertained. Given these conditions, this agreement can amount to nothing other than an agreement to create a trust in the event that these two matters were resolved. Accordingly I do not accept the submission by Ms McDermott that there was sufficient essential certainty in the agreement to intentionally create the trust.

[13] I do not accept that because the monies were to be held initially by the solicitors referred to in the agreement that they were thus acting as trustees of the trust. A trustee holds an office for the duration of the trust, such office being subject to onerous fiduciary proscriptive duties and to equitable prescriptive duties in default of contrary provision in the terms of the trust. I am satisfied that there is nothing in this agreement which indicates that the solicitors named therein have undertaken these onerous duties to be trustees. It certainly does not expressly identify them as trustees and I find nothing by way of implication to suggest that they have been so appointed. Needless to say no reference whatsoever is made in the agreement to the Official Solicitor being a trustee.

[14] A settlor of property is the person who creates a trust of that particular property whether, as normal, by transferring – or doing everything necessary to be done by him to transfer – title to that property to a trustee and declaring trusts thereof. He is any person who has power to hold and dispose of any legal or equitable estate or interest in assets in order to create a trust and of course can himself be a trustee of that trust. It seems to me that the appellants

is incontestably the settlor of this proposed trust for the express reasons set out by Mr Girvan in his skeleton argument i.e. the monies are referable to the value of the property owned by him and to be provided by him and in which he holds the legal and equitable title.

[15] At the time the agreement was drawn up the parties must have been aware of the troubling matters referred to by Ms McDermott in paragraphs 5 and 6 of this judgment. Yet no provision was made to the effect that the appellant was unfit to be a trustee, that the appellant had to agree the terms of the trust with the respondent or that there had to be agreement between the parties as to the trustees to be appointed. I have no power at this stage to make it otherwise. That was the remit of those who drew up this agreement.

[16] The position is that adumbrated by Underhill and Hayton "Law of Trusts and Trustees" 17th Edition at paragraph 9.1

"A trust is completely constituted by the settlor ---
either

- (a) declaring that certain property vested in him --
--is to be held henceforth by him --- on certain trusts or
- (b) effectively transferring certain property to trustees and declaring the trusts upon which the trustees are to hold such property "

[17] As such I consider that the appellant is entitled to appoint the trustees of this trust and that the failure on the part of the appellant and the respondent to come to an agreement on this matter cannot deflect this court from recognising his right to do so. To that extent therefore it seems to me that the application by the plaintiff for liberty to apply is misplaced and the Order cannot be upheld.

[18] I pause however to make it clear that trustees stand in a fiduciary relationship to the beneficiary who in this instance is the child A. If a trustee does not so act, the court would not hesitate to invoke its powers under Section 40 of the 1958 Act. However for that Act to be invoked a trust has to be created. It cannot be invoked at this time because the trust has not yet been created. Once it is created, any act or neglect on the part of a trustee which is not authorised by the terms of the trust instrument or by law amounts to a breach of trust. The beneficiary of the trust can sue the trustee for such breach. The fundamental duty of the trustee is to act exclusively in the best interests of the beneficiary and to act with undivided loyalty in her best interests. Thus it seems to me that if this appellant, in the event he makes himself a trustee, should fail to exercise his duties as a trustee in the

absolute interests of the beneficiary he can immediately be made subject to further application before the court for a breach of trust and if necessary be removed as a trustee under the terms of Section 40 of the Trustee Act 1958. Depending on the circumstances of the breach, the history of his relationship with the respondent and the beneficiary could well be highly significant background factors in the court determining whether he has acted in the best interests of the beneficiary and with undivided loyalty to her best interest. However until a trust is constituted the Court cannot act under section 40 to the Trustee Act 1958.

[19] I have come to the conclusion therefore that I must reverse the decision of the County Court Judge and order that the Official Solicitor should release the monies held pursuant to that court order forthwith to enable the appellant to set up the trust account pursuant to paragraph 5 of the agreement and direct that the parties should now comply strictly with the terms of the agreement. A return to the court with a fresh claim for breach can be mounted if those terms are not complied with.

[20] In the circumstances of the family background I intend to make no order as to costs in this case.