

IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.167/75

IN THE MATTER of the Declaratory
Judgments Act 1908

A N D

IN THE MATTER of a certain memorandum
addressed from GEORGE
CLIFTON LEWIS to the
DISTRICT PUBLIC TRUSTEE,
Christchurch, and dated
the 25th day of August
1949

BETWEEN

GEORGE CLIFTON LEWIS of
Palmerston North,
Beneficiary

Plaintiff

A N D

THE DISTRICT PUBLIC
TRUSTEE Christchurch as
Trustee of the Estate of
Louisa Rhoda Lewis,
deceased

Defendant

No. 496
—
No.
—
**No Special
Consideration**

Hearing: 23 August 1976

Counsel: C.J. Walshaw for Plaintiff
D.J. Rourke for Defendant
G.T. Mahon for Mrs M.E. Lewis

Judgment: 29 OCT 1976

JUDGMENT OF SOMERS J.

Originating Summons under the Declaratory
Judgments Act 1908 for orders as to the true nature and
construction of a memorandum from plaintiff to defendant
dated 25 August 1949.

The plaintiff, Mr George Clifton Lewis,
is, and was at all material times, a life tenant in the
estate (or some part thereof) of his mother, Mrs L.R.
Lewis, who died on 25 August 1935 and the executor or

administrator and trustee of the will of whom is and was the Public Trustee, the defendant to the summons.

Mr Lewis was married on 29 April 1936 to Mona Elizabeth Lewis. There was one child of that marriage born on 27 April 1940. Mr and Mrs Lewis separated in 1946 and at that time entered into a written separation agreement. The document has been lost. It contained, however, a provision that the plaintiff would pay Mrs Lewis maintenance for herself at the rate of \$4 per week. The marriage was dissolved by decree absolute on 22 October 1952 but the provisions of the separation agreement were expressed to continue despite decree absolute.

Mrs Lewis had difficulty in obtaining payment of maintenance. In the beginning it included, of course, maintenance for the child. Her solicitors prepared and sent to the plaintiff a memorandum. That memorandum Mr Lewis signed on 25 August 1949. It was as follows:-

"The District Public Trustee,
"as Trustee in the Estate of L.R. Lewis,
"CHRISTCHURCH.

"Dear Sir:

" Please pay all income arising from my
"share in the above Estate, or payments on account
"of capital up to the sum of £104.0.0 each year,
"to my wife, Mrs. Mona Lewis, care of Messrs. Bell
" & O'Regan, Solicitors, Wellington, and her receipt
"will be a sufficient discharge to you for same.
"This order is irrevocable without the written
"consent of the said Mona Lewis.

"Dated this 25th day of August, 1949.

"
"

"G. Clifton Lewis"
Beneficiary

"Witness:

"Name: G.A. Nicholls
"Occupation: Hotel Keeper
"Address: Palmerston North."

After signing it Mr Lewis returned it to Mrs Lewis's solicitors. They wrote her on 5 September 1949 reporting that they had forwarded the "authority" in the estate of her husband's mother to the Public Trustee in Christchurch and added that "if this order is accepted you will receive maintenance half-yearly in January and July."

There are no other relevant records. Payment was made by the Public Trustee in accordance with the document. In 1964 the plaintiff sought to revoke the memorandum but was advised by the Public Trustee that without Mrs Lewis's consent he could not terminate "the assignment". In 1974 Mr Lewis wrote to Mrs Lewis seeking her agreement to a termination of the arrangement. Subsequently the plaintiff endeavoured to register a copy of the memorandum in the Magistrate's Court at Palmerston North pursuant to the provisions of s.55 of the Domestic Proceedings Act 1968. The application was declined by the Registrar of that Court who did not consider that it was a maintenance agreement within s.54(1)(a) of that Act.

The narrative I have set out embraces matters disclosed in the affidavits filed together with other matters expressly agreed upon by counsel at the hearing.

The Originating Summons seeks an order

"determining the following questions as to the
 "construction of a memorandum addressed from the
 "plaintiff to the defendant and dated the 25th
 "day of August 1949, namely:-

"1. IS the said memorandum a power or charge and
 " consequently revocable by the plaintiff or is
 " it a declaration of trust?

"2. IF it be declared that the said memorandum is
 " a declaration of trust may the trust be set
 " aside on the grounds that the purpose of the

" trust has failed or on the alternative grounds
 " that the plaintiff made the said declaration of
 " trust through ignorance or mistake of law or
 " fact or both?

"3. IS the said memorandum a "Maintenance
 " Agreement" within the meaning ascribed thereto
 " in and for the purposes of part VII of the
 " Domestic Proceedings Act 1968?"

The interest of the plaintiff in his mother's estate was an equitable interest. The methods of disposing of such an interest are referred to in Timpson's Executors v Yerbury (H.M. Inspector of Taxes) (1936) 1 K.B. 645-664 per Romer L.J. as being four in number, and in Comptroller of Stamps (Victoria) v Howard-Smith (1936) 54 C.L.R. 614, 621-2, by Dixon J., as three. Those means common to both judgments are (i) assignment to a third party; (ii) a direction to trustees to hold property in trust for a third party; (iii) declaring oneself a trustee for the third party of the interest. The fourth, noted in Timpson's case, is a contract for valuable consideration to assign the equitable interest to the third party.

It is common ground that the document in the present case is supported by consideration, namely forbearance to sue, moving from Mrs Lewis. But the document is not in my view a contract to assign the equitable interest, nor do I think it is a declaration by the plaintiff that he thenceforth held his equitable interest pro tanto in trust for Mrs Lewis.

If then Mr Lewis disposed of part of his interest rather than merely giving a revocable mandate or order to the Public Trustee it must be by way of assignment or by means of a direction requiring the Public Trustee thenceforth to hold the property upon trust for Mrs Lewis. The locus classicus on the latter point is

In re Chrimes (1917) 1 Ch. 30. Although in that case Sargant J. referred to the deed poll as constituting a complete assignment ((1917) 1 Ch. 30, 36) and that is undoubtedly its effect vis-a-vis the settler, yet the later authorities suggest the divesting is by way of trust rather than assignment. See the categories of disposition in Timpson's case (supra) and Howard-Smith's case (supra); Grey v I.R.C. (1958) Ch. 375, 381 per Upjohn J.; (1958) Ch. 690, 710-1 per Lord Evershed M.R., and 722 per Ormerod L.J.; (1960) A.C. 1, 16 per Lord Radcliffe; and Re Tyler's Fund Trusts, Graves v King (1967) 1 W.L.R. 1269. The distinction in substance is between a transfer of an existing interest and the creation of a new interest in place of that which had hitherto existed. In the present case I think the issue is between mandate and assignment although the apposite test between mandate on the one hand and assignment or trust direction on the other ~~are~~^{is} not I think materially different; Howard-Smith's case (supra) per Dixon J. at 623-4.

No formality (save the writing required by s.9 of the Statute of Frauds 1677 and satisfied in the present case) is required for an assignment. What is needed is "a clear expression of an intention to make an "immediate disposition": Norman v Federal Commissioner of Taxation (1963) 109, C.L.R. 9, 30 per Windeyer J.; William Brandt's Sons & Co. v Dunlop Rubber Co. Ltd (1905) A.C. 454, 462 per Lord Macnaghten. In the case of a direction of the type with which I am concerned it must be plain that the person giving the direction intended to transfer his rights to the third party - a divestment of himself and a vesting in the transferee. If that is not the case it is a mandate only. The intention is to be gathered from the language used.

I think the document is an assignment at least to the extent it relates to the life interest of the plaintiff. I have not seen the will of his mother and I do not know to what the words "or payments on account of capital" refer. I do not think anything turns on that for I understand the life interest produces more than \$208 per annum. In reaching the view the document is an assignment I have considered the fact that it commences by words of apparent request - "Please pay" which are suggestive of mandate; the nature and description of that which is to be paid (inferring as most favourable to the plaintiff that capital payments are the fruit of the exercise of a discretionary power); and the direction as to receipt. The sentence "This order is irrevocable without the written consent of the said Mona Lewis" is not without difficulty. The use of the word "order" may be thought to suggest something less than outright disposition. But the reference to irrevocability is I think indicative of assignment. Such an expression is in the case of an assignment unnecessary, but in the case of a mandate contrary to its nature. To regard it as emphasis or even as surplusage, rather than to ignore it altogether, must, I think, go closer to the intention of the maker: cf. Knill v Prowse (1884) 33 W.R. 163; In re Kent and Sussex Sawmills Ltd (1947) 1 Ch. 177, 180-181.

The suggestion implicit in the first question in the originating summons that the document might be a revocable charge was not supported by argument. An assignment may be absolute or by way of charge. Assignments under s.130 of the Property Law Act 1952 must be absolute. If by way of charge it can only operate as an equitable assignment. See generally 6 Halsbury, 4th Ed., para 28. For the purposes of the present point the distinction is not material. The subject matter of the present assignment will, of course, determine on the death of Mr Lewis and will

terminate if Mrs Lewis consents to its revocation. I do not think that consent could be withheld if her right to receive maintenance at the rate of \$208 per annum ceased. That suggests the assignment is in the nature of a security.

The next question is whether the assignment is a maintenance agreement within the meaning of s.154(1)(a) of the Domestic Proceedings Act 1968. If it is, it is registrable under s.55(1), and accordingly variable by reason of the provisions of ss.55(2) and 85(3) (as the latter is enacted by s.17(1) of the Domestic Proceedings Amendment Act 1971). Section 54(1)(a) defines a maintenance agreement as -

"Any written agreement made between a husband and his wife and providing for the periodical payment by either party of sums of money towards the maintenance of the other party."

I have in the end come to the view that the assignment in the present case is not an agreement as so defined. There was, at the date of the assignment, already in existence just such an agreement as is referred to in s.54(1)(a). That agreement is still in force although parol evidence has had to be given of its content because the paper itself is lost. No doubt there are occasions when more than one agreement may be registered under s.55(1) as for example, in the case of an agreement followed by a supplementary agreement varying the original. But, treating the assignment as an agreement, it was I think merely a method of securing payment of maintenance, the provision of which had been agreed in a different document altogether. In short, the assignment was not, I think, an agreement providing for the payment of maintenance by the husband but a document in aid of such an agreement.

The assignment is not ex facie such an agreement as is contemplated by s.54(1)(b). I have considered whether, registration being a ministerial act (Hudson v Hudson (1959) N.Z.L.R. 348, 350), only something

which is in form an agreement providing for maintenance may be registered. I expressly refrain from determining that point.

I think the formal orders of the Court ought therefore to be:

- (1) The memorandum is an assignment;
- (2) The memorandum is not a maintenance agreement within the meaning of s.54(1)(a) of the Domestic Proceedings Act 1968.

Both parties are on legal aid and an order for costs was not sought by either.

Solicitors:

Rowe, McBride & Partners, Palmerston North, for Plaintiff
Public Trust Office, Christchurch, for Defendant
Bell, Dunphy & Co., Wellington, for Mrs M.E. Lewis