EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 38
P642/23

Lord Malcolm
Lord Doherty
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Petition

of

JAMES COBB AND ANDREW GEMMELL

Petitioners

for

Directions in respect of the estate of the late Robert Pollock Crawford

Petitioners: L McCabe (sol adv); Anderson Strathern LLP

3 November 2023

Introduction

[1] Robert Pollock Crawford (the deceased) died on 19 April 2021. He left a will dated 10 November 2020 appointing the petitioners as his executors. The first petitioner was a friend of the deceased; the second petitioner is his nephew. The will was drafted by the deceased's former solicitor who had recently ceased to practise. It contains various specific and pecuniary legacies and provides for the residue of the deceased's estate to be divided (subject to certain conditions) equally among a health board and two charities. The will was

witnessed by a witness whose name and address appear in the will. It was not signed on the first page, but by interlocutor dated 13 August 2021 the will was certified by the sheriff at Ayr, in terms of section 4(1) of the Requirements of Writing (Scotland) Act 1995, as having been subscribed by the deceased. At that time it was believed by the petitioners that the will was the last testamentary writing of the deceased. The value of the estate is substantial.

[2] A second will was subsequently delivered by post to the second petitioner on 5 November 2021 and to the petitioners' solicitors in Stewarton on 6 November 2021 (the document delivered to the solicitors being believed to be the principal). The petitioners do not know who arranged for these documents to be so delivered.

[3] The second will is dated 10 January 2021. It was not drafted by the deceased's former solicitor (nor, it would seem, by any other solicitor). It consists of a single page and bears to be signed by the deceased. There is a witness signature but it is illegible and there are no details to identify the witness. The second will appoints the deceased's daughter, Alison Stanley, and the second petitioner as his executors. It contains a number of pecuniary legacies, mostly different from those in the first will, and provides for the residue of the estate to be made over to Alison Stanley. It revokes all previous wills and testamentary writings. No steps have as yet been taken by any person under section 4 of the 1995 Act to set it up as the deceased's last will.

[4] The terms of the second will, and the circumstances in which it came to their attention, have raised doubts in the minds of the petitioners regarding its authenticity. They understood the deceased to have had a difficult relationship with his daughter. They obtained an affidavit from the deceased's carer that on 10 January 2021 the deceased had just been released from hospital, that he was housebound, and that no-one other than the second petitioner visited him that day. They instructed an independent forensic document

examiner to provide an opinion as to whether the signature on the second will was written by the deceased. The examiner's conclusion was that it was "probable" that the signature was that of the deceased. The deceased had made other wills before 2020. The wills dated 10 November 2020 and 10 January 2021 both contain elements of the deceased's testamentary intentions as expressed in the earlier wills.

[5] In these circumstances the petitioners aver that they are uncertain as to whether the first will, appointing them as executors, was the last testamentary writing of the deceased. They consider that they cannot, in good faith, proceed to obtain confirmation under the first will while such uncertainty subsists. The second petitioner is also uncertain as to whether he has been validly appointed under the second will. The petitioners state that they believe that they are unlikely to receive any more relevant evidence. They have accordingly petitioned the court for directions.

[6] The questions upon which the petitioners seek directions from the court are as follows:

1. Whether the first will was the last will made by the deceased.

2. If the answer to the specific question 1 is in the affirmative, whether the second will can be disregarded as a testamentary writing of the deceased.

3. If the answer to the specific question 1 is in the negative, whether the second will is a valid testamentary writing given there is no identifiable witness and there is ambiguity regarding the date of signing.

4. If the answer to specific question 3 is in the affirmative, whether the first will is to be disregarded as the last testamentary writing of the deceased, therefore meaning the petitioners have no duties as executors nominate.

[7] When a motion was enrolled for orders for intimation and service of the petition, the court indicated that it wished to be addressed on the competency of a petition for directions in the circumstances just described.

Submissions for the petitioners

[8] It was submitted on behalf of the petitioners that the competency test as set out in case law was met. The petitioners could not carry out their duties unless they were confident that they were indeed executors. The powers conferred upon the court by the former section 6(vi) of the Court of Session (Scotland) Act 1988 were wide. The case raised questions relating to the administration of an estate and the exercise of powers vested in executors which required an immediate decision. The questions related to distribution of a trust estate and were thus within the scope of section 6(vi). As regards alternative procedure, a special case could not be presented because the facts were not agreed. The petitioners were unable to discern, in the circumstances, whether they ought to raise an action for declarator that they were entitled to apply for confirmation as executors appointed by the first will. Equally, it would not be appropriate for the petitioners to raise an action seeking either reduction or proof of the tenor of the second will.

[9] In her oral submission to the court, the solicitor advocate for the petitioners explained that it was envisaged by the petitioners that the court would answer the questions on the basis of the facts and circumstances as stated in the petition, without any need to carry out further enquiry.

Decision

[9] A preliminary issue arises regarding the petitioners' title to apply to the court for directions. In *Chisholm Petrs* 2006 SLT 394, it was held that the expression "trustees" in section 6(vi) could properly be read as including executors nominate. Although the petitioners were nominated by the deceased as his executors, they have not yet applied for confirmation. On behalf of the petitioners it was submitted that the expression "trustees" in section 6(vi) should be interpreted as including unconfirmed executors nominate.

[10] As has been noted in previous decisions of the court, section 6(vi) was repealed in 2014, but subordinate legislation including rules of court made under that section remain in force. In our view the question whether the petitioners *qua* unconfirmed executors nominate have title to seek directions for the court remains one of interpretation of the expression "trustees" in the former legislation and in the extant rules of court (part II of chapter 63). We are unable to accept the submission that the expression can be construed as including persons who have been nominated to act as executors but who have not yet been confirmed as such and, indeed, may never be. In *Chisholm Petrs*, the court stated (paragraph 8):

> "… (W)e are satisfied that the expression ''trustees'', as used in s 6(vi) of the latter statute and in the relative rule of court, can properly be read as including executors nominate. We are also satisfied that the deed by which such executors are nominated, together with any associated testamentary writing *and the relative confirmation of such executors*, can properly be regarded as a 'trust deed' for the purposes of s 6(vi), notwithstanding that such deeds may not make provision for any continuing purposes." (Emphasis added.)

[11] Confirmation is thus a necessary ingredient of the equiparation of executors with trustees for the purposes of the rules applicable to petitions for directions. Until confirmed as executors, the individuals nominated by the deceased lack the fiduciary capacity which would entitle them to seek directions from the court. In the present case, depending upon

the resolution of the issue of the authenticity of the second will, the nomination under the first will may never have been effective at all. Without confirmation, the petitioners have no status different from any other individuals, and do not fall within the scope of persons entitled to apply for directions. For that reason alone the petition cannot proceed.

[12] In any event we are not persuaded that the questions to which the petitioners seek answers fall within the scope of petition for directions procedure. We do not agree that they can be answered on the basis only of the averments in the petition. In essence the court is being asked to decide whether the second will was a valid expression of the deceased's final testamentary instructions. Within the information provided by the petitioners there is conflict between the handwriting examiner's opinion that the signature is that of the deceased, and the affidavit evidence that no will was executed by him on the date which the document bears. That conflict would necessitate enquiry, as would the curious circumstances in which the second will came to light. It is far from clear how such enquiry, which may have to address issues of credibility, would be conducted. The petitioners assert neutrality and the second petitioner is nominated as an executor in both documents. It is not obvious who, if anyone, would present the competing cases for and against the authenticity of the second will. A petition for directions is not an inquisitorial process, and it is not for the court to direct what evidence is to be led, or by whom.

[13] The criterion for the availability of what was then a new procedure was considered by the court in *Andrew's Trs* v *Maddeford* 1935 SC 857, where Lord President Normand observed at page 864:

> "The difficulty of finding a criterion for practical purposes will arise most frequently when the question relates to distribution, and I shall confine the remainder of my observations to that type of case. I think the criterion must be a practical test rather than a theoretical principle. If what has to be determined is really the rights of

> parties who have an interest in the trust-estate, and the question of distribution is subordinate, then a petition for directions can rarely be appropriate."

In *Peel's Trs* v *Drummond* 1936 SC 786, the court revisited the scope of the new procedure. On that occasion Lord President Normand stated (page 794):

> "… (I)n a petition for directions, as in any other proceeding, the Court may not be satisfied that the pleadings afford a satisfactory basis for answering the question put. In that event the Court may of course refuse to entertain the question, and it may also direct proceedings in another form."

Finally, in *Henderson's Trs* v *Henderson* 1938 SC 461, Lord President Normand observed (page 464):

> "The petition for directions can scarcely play a useful part in our procedure if it is to be used as a means of throwing into Court, without due consideration and preparation, questions which ought to be dealt with formally by special case or by other existing procedure."

[14] In our view these observations are apposite to the present case. The court is being asked to determine the rights of parties in the deceased's estate, as opposed to a question relating to the administration or distribution of the estate. The pleadings in the petition do not of themselves afford a sufficient basis for the enquiry that would have to be made into the circumstances of the case. If there is to be a dispute as to which will prevails, that is a matter best determined by a form of adversarial procedure in the usual way.

[15] As regards appropriate procedure, we see no reason why any issue as to the authenticity of the second will cannot be raised and resolved in the context of an application, which may on current information be a contested application, for confirmation by the executors nominated under one or other will. If thought appropriate, such an application could be sisted pending resolution of the issue by other means such as an action for declarator. The petitioners' neutrality need not prevent them from taking steps that would at least bring the matter before the court in adversarial proceedings.

[16] For these reasons we do not consider that it is either competent or necessary for the petitioners to seek directions from the court on the questions in the petition. The motion for first orders is refused. We find the petitioners entitled to the expenses of this petition out of the deceased's estate.