Privy Council Appeal No. 9 of 1988

Luvinia Baird (Legal Personal Representative of the Estate of Milton Baird) *Appellant*

v.

Dickson Baird *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH APRIL 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
SIR ROGER ORMROD

*[Delivered by **Lord Oliver of Aylmerton**]*

The issue raised by this appeal from the Court of Appeal of Trinidad and Tobago is whether the nomination by a member of a company pension scheme of a beneficiary to receive the death benefit payable under the scheme on the member's death before retirement constitutes a testamentary disposition by the member and is thus invalid unless executed in accordance with the provisions of the Wills and Probate Ordinance.

The appellant is the widow of Mr. Milton Baird who was, until his death in February 1972, employed by Texaco Trinidad Inc. That Company had, in January 1965, established an Employees' Benefit Plan ("the Plan") for the provision of retirement and other benefits for employees. This replaced an earlier scheme funded entirely by the Company but the Plan was a contributory scheme funded by the employees out of their basic wages and supplemented by contributions from the Company as and when necessary to enable the benefits of the scheme to be paid. Article VIII(4) of the Rules of the Plan provided for the payment on the death of a member in service of certain sums of a

[21] capital nature to such person or persons as the member

should have nominated and, in default, to his widow, or, failing her, to his estate. The right of a member to nominate a beneficiary was conferred by Article XIII which was in the following terms:-

> "A Member may nominate a beneficiary to whom the benefits described in Sections 4 and 5 of Article VIII are to be payable and, if the beneficiary survives him, the benefits will be so paid. If the Member leaves no nominated beneficiary surviving, the benefits will be payable to the Member's widow or widower. If the Member leaves neither nominated beneficiary nor widow nor widower surviving, the benefits will be paid to the Member's estate. Nominations and revocations or alterations thereto are subject to the consent of the Management Committee and must be made on the appropriate form provided by the Company. Nominations and revocations shall become effective upon registration and validation by the Secretary of the Plan."

On 21st May 1965 Mr. Baird nominated his brother, the respondent, as his beneficiary. The nomination was on a form provided by the Company which identified the beneficiary, was signed by Mr. Baird and was in the following form:-

> "For the purposes of Sections 4 and 5 of Article VIII of the above-mentioned Plan, I hereby nominate the under-mentioned person as my beneficiary in the event of my death in accordance with the Rules of the said Plan. I reserve the right to revoke or alter this nomination at any time subject to the consent of the Management Committee."

The notes which form part of the form read:-

> "(1) For effect of nomination please see Article XIII of the Rules of the Plan.
>
> (2) This Nomination Form should be signed in the presence of and delivered to one of the Company's Labour Officers.
>
> (3) The rights of a nominee may be subject to legal claims of a widow and/or children of the Member."

That nomination was on 31st May 1965 approved by the Company. The Wills and Probate Ordinance of Trinidad and Tobago (Cap. 8 No. 2) follows the provisions of the English Wills Act 1837 in requiring a will to be executed in the presence of two witnesses.

On 27th June 1970 Mr. Baird married the appellant. He died on 1st February 1972 whilst still in the Company's employment without having revoked or varied his nomination. The appellant obtained a grant of letters of administration to her husband's estate on 10th August 1973.

The sum due under the Plan amounted to $11,852.40 which was claimed both by the widow and by the nominated beneficiary. On 14th January 1974 the Company issued an interpleader summons and the sum was subsequently paid into court. A question was directed to be tried as to which of them, the appellant (the widow) or the respondent (the nominated beneficiary) was entitled to the sum in court.

On 7th July 1975 Roopnarine J. decided that question in favour of the respondent and on 27th May 1987 the appellant's appeal against that decision was dismissed by the Court of Appeal (McMillan, Warner and des Iles JJ.A.).

The respondent has not been represented before the Board but their Lordships have had the benefit of the careful and scrupulously fair argument of Mr. White who appeared for the appellant and who has drawn their Lordships' attention to all the relevant authorities in favour of and against his client's contentions. The cases are not altogether easy to reconcile but before considering them it is important to analyse and keep clearly in mind the precise nature of a scheme of this sort and of the member's rights under it. The Texaco Trinidad Scheme is a pension scheme of the conventional type now familiar in most industries and was constituted by a Trust Deed and Rules. In the instant case the Trust Deed has not been included in the Record and does not appear to have been before the Court of Appeal, but it is referred to in the Plan and Mr. White concedes that it must be assumed to be in the normal form vesting the funds from time to time contributed to the Plan in the trustees upon the trusts constituted by the Rules.

The Plan, in Article II, describes its main purpose as "the provision of retirement pensions and other benefits for Members". Article III contains a number of definitions, the only relevant ones for present purposes being: "The Funds of the Plan" which are defined as meaning and including "all monies from time to time held by or on account of the Trustee under the Trust Deeds between the Trustees (sic) and the Company;" and "Members" who are defined as meaning and including "all persons who in accordance with the Rules shall become and shall for the time being be contributors to the Plan". Membership is regulated by Article IV which, in Section 2, provides that the persons qualified to be members of the Plan are all employees of the Company over the age of 18 years who have been in employment with the Company for 3 months and who apply in writing on a form to be provided by the Company to become members of the Plan. Section 3 of the same Article recites the existence of a previous non-contributory pension fund and provides that members of that fund who wish to join the Plan must withdraw from the fund and agree to their entitlement

thereunder being transferred to the Plan. It is expressly provided that "no employee shall be compelled to participate in the Plan, but an employee who has applied to become a Member shall not be entitled to withdraw from the Plan while in service, except as provided in these Rules". Under Article V, a member joining the Plan is to contribute 5% of his annual basic wage together with, in the case of a member who was a member of the previous non-contributory fund, the amount standing to his credit under the provisions of that fund. The other source of contributions is the Company which undertakes to contribute such monies by way of supplement of member's contributions as are necessary to provide the benefits conferred by the Plan.

The benefits payable under the Plan are set out in Article VIII. The primary benefit is by way of pension provision with an option to surrender a part of the pension payable in order to provide a pension for a surviving spouse after the death of the member. The material provisions for present purposes are those contained in Section 4 of this Article which, so far as material, is in the following terms:-

> "In the event of death of a Member during his employment with the Company, payment shall be made to such person or persons, as the Member shall have previously nominated in writing according to these Rules, or, in default of nomination, to the Widow of such Member, and, if the Member leaves no widow surviving him, to his estate, the following ..."

What then becomes payable consists of three elements, that is to say, two years' annual basic wage (which may be paid either as a lump sum or, at the discretion of the Management Committee, may be spread over five years), a sum equal to the member's contributions together with compound interest and any sum transferred to the member's account from the previous fund together, again, with compound interest. Section 5 of Article VIII contains somewhat similar provisions in the event of the death of a member who has retired but has been on pension for less than ten years. In that event there is to be paid to his nominee or, in default, to his widow or, if there is no surviving widow, to his estate a pension for the balance of the period of ten years which may, at the member's request and with the approval of the Management Committee, be paid as a lump sum. In addition there is to be paid a sum equal to three months' basic wage at the time of retirement.

The case of a member who leaves the service of the Company before going on pension is covered by Article IX. Such a member receives a deferred pension of an amount appropriate to the pension earned at the date of termination of service, but without the ten year guarantee provided for in Article VIII(5). If an ex-employee dies before receiving his deferred pension, his

estate receives a sum equal to his pension contributions together with compound interest. If he dies after going on pension, his estate receives the amount (if any) by which his contributions with compound interest exceeds the amount of pension actually paid to him.

The only other provisions of the Plan to which reference need be made in the context of this appeal are Article XV, under which the Plan is to be administered by a Management Committee consisting of representatives of the employer and the employee, and Articles XIV and XVI(7) the provisions of which are of some importance. Article XIV is in the following terms:-

> "The pension and other benefits of the Plan are non-assignable and will be forfeited in the event of the bankruptcy of the person entitled thereto or upon the execution of an assignment for the benefit of creditors, or of any attempt to mortgage, charge or otherwise assign the pension. In any of these events and whether the pension has begun to be payable or otherwise, the Management Committee shall have power in its absolute discretion to apply the forfeited pension or any part thereof for the benefit of any one or more of the following persons, viz., the Member, his wife, his children or remoter issue, and any person who may, in the opinion of the Management Committee, be in any way dependent on the Member."

Article XVI(7) provides as follows:-

> "No person whether a Member or otherwise shall have any claim, right or interest upon or in respect of the Plan, or any contributions thereto, or any interest thereon, or any claim upon or against the Trustee, Management Committee or the Company except under and in accordance with the provisions of these Rules."

The form of nomination signed by the deceased has already been referred to.

It will thus be seen that the rights of a member, over and above his personal entitlement to pension and retirement benefit, are of a very limited order. He may terminate his liability to contribute to the Plan by leaving the Company's employment and will thus defeat any rights which a nominated beneficiary or his widow or estate may have in the death benefits payable under Article VIII. But his personal entitlement to any part of the funds vested in the Trustee is limited to a deferred pension, the return, where applicable, of the amount transferred from the pre-1965 non-contributory fund and an interest contingent on death in an amount equal to his contributions plus interest if the death occurs before pension payments commence and, if it occurs thereafter, in the amount (if any) by which those

contributions exceed the aggregate of pension payments received. None of the benefits payable under the scheme is capable of assignment.

The argument advanced on behalf of the appellant founds upon three propositions, that is to say, first, that the nomination of a beneficiary to receive the "death-in-employment" benefit is a disposition of the member's property; secondly, that it is a disposition which is limited to take effect only upon the death of the disponer; and, thirdly, that it is a disposition which is ambulatory in the sense of being capable of revocation at any time. It is, therefore, the argument proceeds, a testamentary disposition and as such can be valid only if it complies with the formalities of the Wills and Probate Ordinance by being subscribed or acknowledged in the presence of two witnesses.

The argument is, in their Lordships' view, unsound at each stage. "A will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during his life" (Jarman on Wills, 8th Edition, page 26). It is not, however, the case that every revocable instrument which creates interests taking effect on the death of the person executing the instrument is necessarily a will. The most obvious example of such a revocable but non-testamentary instrument is the exercise of a revocable power of appointment under a settlement *inter vivos*. Essentially, a pension scheme of the type with which this appeal is concerned is no different from any other *inter vivos* declaration of trust or settlement containing provisions for the destination of the Trust Fund after the death of the principal beneficiary. By becoming party to the scheme, each employee constitutes himself both a beneficiary and (quoad his contributions to the Trust Fund from which the benefits are payable) a settlor. He retains no proprietary interests in his contributions but receives instead such rights, including the right to appoint interests in the fund to take effect on the occurrence of specified contingencies, as the trusts of the fund confer upon him.

In essence, the power to appoint the "death-in-employment benefit" is no different from any other power of appointment. It disposes of no property of the appointor, for the proprietary interest of the estate of the appointor is one which arises only in default of appointment and in the event of there being no surviving widow. The appellant seeks to argue for the necessity of a testamentary instrument in order to render effective a power of appointment conferred by the trust instrument constituted by the rules of the Plan by analogy from cases decided in relation to nominations under statutory provisions such as the Industrial and Provident Societies Acts and the

Friendly Societies Act of 1896. Under Section 25 of the Industrial and Provident Societies Act 1893, for instance, a member of a society registered under the Act was empowered to nominate a person to receive the amount standing to his credit at his death provided that that sum did not, at the date of nomination, exceed £100. In *The Goods of Joseph Baxter* [1903] P.12, it was held, not surprisingly, that such a nomination was a document of a testamentary character. Thus, a nomination paper which failed as a statutory nomination because the amount standing to the nominator's credit exceeded £100 but which was nevertheless executed in the presence of two witnesses was admitted to probate as a will. These cases are, however, of an entirely different character. They concern the post-mortuary disposition of funds which were, throughout, the absolute property of the disponer and capable of being dealt with by him during his lifetime entirely without reference to any nomination which he might have signed. Such a case bears little or no resemblance to the designation of the ultimate beneficiary under a trust the provisions of which exclude any power of *inter vivos* disposition and which confer on the appointor an interest of a capital nature only in default or on failure of the prior limitations.

Much reliance was placed by Mr. White, in the course of his helpful argument, upon the revocable nature of the nomination and upon the ability of the member to defeat any nominated interest by terminating his employment. So far as the latter is concerned, this is to say no more than that the "death-in-employment benefit" is contingent upon the employment continuing. It is not indicative of a continuing proprietary interest in the capital of the fund, the only interest of a capital nature being represented, where applicable, by the return of such credit as was transferred from the previous non-contributory scheme.

So far as revocability is concerned, it is, of course, axiomatic that an essential characteristic of a will is that, during the lifetime of the testator, it is a mere declaration of his present intention and may be freely revoked or altered. It does not follow that every document intended to operate on death and containing a power of revocation is necessarily testamentary in character. But, in any event, in the instant case, the nomination lacks the essential character of being freely revocable. It can be made and it can be revoked and altered only with the consent of the Management Committee. At the stage, therefore, when a member's nomination has been accepted and approved by the Management Committee, there comes immediately into being a trust in favour of the nominated beneficiary, a trust which is limited, it is true, to take effect only after the death of the member and contingent upon the survival of the nominated beneficiary, but defeasible only in two events, the first of which is the revocation

of the nomination. That is a matter which does not lie within the member's sole control and can be effected only with the approval of the Management Committee, so that the document lacks an essential characteristic of a truly ambulatory disposition. The other method of termination is by leaving the Company's employment so that the "death-in-employment benefit" never takes effect at all. But in that event the member's entitlement is to something quite different and distinct from that which would have been the entitlement of his estate under Article VIII in default of nomination on his death without leaving a surviving widow.

The appellant's argument derives, at first sight, some support from the decision of the Supreme Court of Canada in *Re MacInnes* (1935) 1 D.L.R. 401. That case concerned a contributory savings fund established by an employer from which the employee was entitled to withdraw at any time and which provided that the balance standing to the employee's credit at his death should be paid to such beneficiary as he should have designated either by will or by writing lodged with the trustees. An employee who withdrew after less than ten years' service received back his contributions together with interest. On withdrawal after ten years he was entitled to the full sum standing to his credit. There appears to have been no restriction on assignment and in fact the deceased employee with whose estate the case was concerned had assigned his share as security for a loan. The question which the Supreme Court was called upon to decide was whether the deceased's share of the fund passed to his widow, whom he had designated as his beneficiary in a document signed by him and lodged with the trustees, or whether it became subject to the trusts of his will. Having regard to the trusts of the scheme, under which it was perfectly clear that the deceased had an absolute beneficial interest in his share of the fund during his lifetime, it is not altogether surprising that the court held that the nomination was ineffective and that the share of the fund passed under the trusts of the deceased's will.

Re MacInnes was followed by the Queen's Bench Division of the High Court of Saskatchewan in *Re Shirley* (1965) 49 D.L.R. (2nd) 474, a case which concerned an investor's certificate having annexed to it a revocable declaration of trust which had been executed by the deceased in favour of his wife. Under the terms of the certificate, the full power of disposition remained in the deceased during his lifetime, so that he was entirely free to deal with the fund as his own absolute property. Again, not surprisingly, it was held that a declaration nominating the deceased's wife as beneficiary on his death required, in order to be valid, to be executed as a will.

The only English authority in point concerns a pension scheme much more akin to that with which this appeal is concerned than were the trusts in *Re MacInnes* and *Re Shirley*. In *Re Danish Bacon Co. Ltd Staff Pension Fund Trusts* [1971] 1 W.L.R. 248 the rules of a staff pension fund provided for the payment to a member who had left the company's service without becoming entitled to a pension under the rules or to the personal representatives of a member who died in service of the amount of his contributions together with compound interest. One of the rules of the fund provided that the member might, and must if required by the trustees, appoint a beneficiary to receive that which would otherwise become due to his personal representatives on his death in service. If the nomination was in favour of an infant, it required the consent of the trustees and a nomination required to be in a form approved by the trustees. The rules enabled the member to cancel a nomination but, on their proper construction, only for the purpose of appointing a new nominee. One issue raised by the proceedings was whether a nomination signed in the presence of a single witness was effective or whether it was a testamentary disposition which required to be attested in the same way as a will. Megarry J. held that the nomination was effective. In describing the member's interest, he observed (at page 255):-

> "What I am concerned with is a transaction whereby the deceased dealt with something which ex hypothesi could never be his. He was not disposing of his pension, nor of his right to the contributions and interest if he left the company's service. He was dealing merely with a state of affairs that would arise if he died while in the company's pensionable service, or after he had left it without becoming entitled to a pension. If he did this, then the contributions and interest would, by force of the rules, go either to his nominee, if he had made a valid nomination, or to his personal representatives, if he had not. If he made a nomination, it was revocable at any time before his death."

In summarising counsel's argument and stating his conclusions on this point the judge continued (page 256 and 257):-

> "First, although a nomination had certain testamentary characteristics, and not least that of being ambulatory, it took effect as a contractual arrangement and not as a disposition by the deceased. The contributions and interest did not come to the deceased and then pass on from him by force of his will or the nomination: they went directly from the fund to the nominee, and formed no part of the estate of the deceased. I may say that I think *Bennett v. Slater*, [1899] 1 Q.B. 45 and *Eccles Provident Industrial Co-operative Society*

Ltd. v. Griffiths [1912] A.C. 483, 490 support this view. Despite certain testamentary characteristics, the nomination takes effect under the trust deed and rules, and the nominee in no way claims through the deceased. Secondly, there is a vast difference, it was said, between a testamentary paper and a disposition of a testamentary nature. A testamentary paper must satisfy the Wills Act 1837; but a disposition might have certain testamentary characteristics without the paper containing it being a testamentary paper. Indeed, Mr. Godfrey urged that a nomination was sui generis, with some of the characteristics of an appointment under a power, some of the characteristics of a will, and some of the characteristics of a donatio mortis causa. As Alice said, curiouser and curiouser.

I appreciate the force of these arguments. Non-statutory nominations are odd creatures, and the cases provide little help on their nature. I do not, however, think that a nomination under the trust deed and rules in the present case requires execution as a will. It seems to me that such a nomination operates by force of the provisions of those rules, and not as a testamentary disposition by the deceased. Further, although the nomination has certain testamentary characteristics, I do not think that these suffice to make the paper on which it is written a testamentary paper. Accordingly, in my judgment the requirements of the Wills Act 1837 have no application."

This decision has been criticised, but on grounds which, in their Lordships' opinion, attach insufficient importance to the limited nature of the member's rights under the trusts of a scheme of this type and which largely ignore the contractual obligations arising from the scheme on both sides. Contracts and trusts are not mutually exclusive concepts and it does not follow that, because a member has a right (whether in terms contractual or fiduciary) to have a payment made to his estate after his death in certain events in default or on failure of prior interests limited by the terms of the contract, the designation of those prior interests in accordance with the terms of the contract necessarily constitutes a testamentary disposition of trust property which is freely disposable by him during his lifetime. In the instant case, for example, if no beneficiary is nominated or if a nominated beneficiary predeceases a member who leaves a surviving widow, no purported testamentary disposition by the member of the "death-in-service benefit" could defeat the widow's interest under the trusts of the scheme; and that position is entirely unaffected by the fact that the member could defeat her rights entirely by leaving his employment before going on pension. That position in fact arose out of the very scheme with which this appeal is

concerned in a case decided in the High Court of Trinidad and Tobago a few months prior to Megarry J.'s decision in the *Danish Bacon Co.* case. In *Wilson v. Nash* (1970) 16 WIR 372, a member of the Texaco Trinidad Inc. Employees' Benefit Plan had died leaving a surviving widow but having, by his will, purported to bequeath his benefits under the Plan to five named persons, including the widow. Rees J. held that the fund passed to the widow under the provisions of the Plan.

Their Lordships have also been referred to a decision of Williams J. in the High Court of Barbados in a case of *Norris v. Norris* (1977) 29 WIR at 22, which concerned the nomination under a group insurance taken out by an employer for the benefit of his employees. The trusts of the scheme were set out in the policies themselves but are not recited in the report so that it is not possible to determine what interest the deceased had in them during his lifetime. The only provision referred to was one which enabled an employee to nominate a beneficiary to receive the sums due under the policy in the event of his death and to revoke any such nomination. In default, the benefit was payable to his estate. The argument before the court seems to have been confined to a submission, which was rightly rejected, that the policy, by reason of a nomination in favour of the lady who was at the time the member's wife, was one effected under the Married Women Act section 25(2). Williams J. considered both the *Danish Bacon Co.* case and *Re MacInnes*. He declined to follow Megarry J.'s decision and held that the nomination was invalid for want of compliance with the Wills Act, apparently because the nomination was freely revocable and because, as he put it, "all his interests in the policy remained vested in him while he lived and the beneficiary only became entitled to an interest on the death of the deceased". This is somewhat cryptic for it tells one nothing about what the deceased's interest in the policies was. In fact it appears to have been an interest which, under the terms of the trust, was contingent upon there being no beneficiary. That, of course, was also the case in *Re MacInnes* but there, as already mentioned, the fund was at the entire disposal of the deceased during his lifetime and had, in fact, been assigned by him by way of security. In the absence of clear indications that the policy in *Norris v. Norris* was similarly within the deceased's control during his lifetime, their Lordships entertain some reservations about whether the case was correctly decided. But in any event, it seems to have been an entirely different case from the present.

Although limitations such as the ones under consideration are a familiar feature of modern pension schemes, it would, of course, be putting it too high to say that there is a universally negative answer to the question whether the provisions of the Wills Act 1837

apply to nominations made under such schemes. The question must depend in each case on the provisions of the individual scheme. No doubt, where the effect of the particular scheme is, as it was in *Re MacInnes*, to confer upon a member a full power of disposition during his lifetime over the amount standing to his credit under the scheme, a disposition of that interest upon his death would normally constitute a testamentary disposition requiring attestation in accordance with the statutory requirements for the execution of a will. But in what is now the normal case of non-assignable interests such as that in the present case and, *a fortiori*, where the power of nomination and revocation requires the prior approval of the trustees or of a Management Committee, their Lordships see no reason to doubt the correctness of Megarry J.'s decision in the *Danish Bacon Co.* case. The relevant authorities were carefully considered by the Court of Appeal in the instant case and that court unanimously expressed the conclusion that, in a case at least in which the funds covered by the nomination were never within the deceased's control, Megarry J.'s decision was applicable and should be followed. Their Lordships agree. The appeal will accordingly be dismissed.