SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2019] SCPER101

A70/19

JUDGMENT OF SHERIFF PINO DI EMIDIO

in the cause

MISS SUZANNE MAILER, residing at Ashwood Cottage, Stirling Street, Blackford, Perthshire, PH4 1QA, in her capacity as Executor Nominate of the late Mrs Mary (known as Molly) Mailer in terms of the Will dated 25 February 2015

Pursuer

against

(FIRST) MICHAEL JOHN MAILER AND (SECOND) ANNE-MARIE QUINN, Spouses, both residing at Taigh A Chnuic, Letters, Loch Broom, Ullapool, IV23 2SD

Defender

Act: Thorntons, Solicitors, Dundee
Alt: Anderson Shaw & Gilbert, Solicitors, Inverness

Perth 12 November 2019

The sheriff, having resumed consideration of the cause finds the following facts admitted or proved.

1. The pursuer is the daughter of the late Mrs. Mary (known as Molly) Mailer ("Molly") who resided at Glenmaller, 207 High Street, Auchterarder, Perthshire, PH3 1AF (hereinafter "Glenmaller") and who died on 5 June 2017. She resided at the address in the instance.

2. The first named defender is a brother of the full blood of the pursuer. The second named defender is his partner. They reside together at the address in the instance.

3. On 15 June 2007 Molly granted a Power of Attorney in favour of the pursuer granting her both financial and welfare power. This Power remained in force up to the date of Molly's death. A copy of the Power of Attorney is number 5/2/4 of process.

4. Molly left a Will dated 25 February 2015 in which she appointed the pursuer and the first named defender as executors. A copy of the Will is number 5/1/1 of process.

5. In early 2016 the defenders lived in Cumbria. They were planning to move to Scotland and had acquired a plot of land at the address in the instance. They were having a house built there with the intention to going to live there.

6. On about 7 October 2016 the main contractor of the new house build project at Loch Broom went into administration. This created a major financial difficulty and delay for the defenders if the project was to be completed. The final additional cost ran into many tens of thousands of pounds. The defenders had to take out substantial personal loans to enable the construction project to resume with other contractors.

7. The defenders regularly visited Molly when they were travelling between Cumbria and Loch Broom. Molly became aware that the defenders had significant financial worries as the defenders were very stressed and worried. Some weeks after the insolvency of the main contractor she persuaded the second named defender to tell her what was going on.

8. Molly said to the defenders that she wished to help them with their financial concerns and insisted on paying them the sum of £9,950 for that purpose and said she wished she could do more to help. The defenders discussed with Molly whether the pursuer should be told about the payment that was going to be made. Molly assured them that she would "sort" it with the pursuer.

9. As at 4 December 2016 the moveable estate owned by Molly (aside from personal effects and the like) comprised mainly of sums at credit of her bank accounts and amounted to a sum of between about £40,000 and £50,000.

10. As at 4 December 2016 the sum at credit of her Bank of Scotland account xxxxxxxx was £20,000.

11. On 5 December 2016 Molly visited her local branch of Bank of Scotland along with the second named defender. She transferred the sum of £9,950.00 into an account in the name of the second named defender. Number 5/1/2 of process is a copy of page 2 of a statement for account number xxxxxxxx and shows transactions in the period 12 January 2016 and 5 December 2016.

12. No attempt was made to hide the transfer of money from the pursuer. There was no direct discussion about the transfer prior to Molly's death.

13. In about January 2017 on a visit to the bank with Molly the pursuer found out about the payment of £9,950 to the defenders which had been made on 5 December 2016. She expressed concern to Molly who responded by assuring her that she would "sort" it with the first named defender. The pursuer relied on that assurance and took no further steps in relation to the payment.

14. From about February to May 2017 the defenders lived with Molly.

15. In about May 2017 the construction project was completed and the defenders moved from Molly's house to the new property at Loch Broom.

16. No formal codicil or other testamentary writing has been found following her death on 5 June 2017 that could be interpreted as having been written after the date of execution of her Will and expressive of an intention to vary the pecuniary bequest to the first named defender or any other provisions of Molly's Will.

17. The Will did not make provision for the executors to give effect to any informal testamentary writings made after the date of the Will. In any event no such writing was found.

18. In her Will Molly provided that the first named defender should receive a legacy in the sum of £15,000. That legacy vested on Molly's death. Molly bequeathed the residue of her estate to the pursuer. The effect of the payment out of Molly's estate of the sum of £9,950 was to reduce significantly the amount of money that would fall into residue upon her death if her Will remained unchanged.

19. Molly was predeceased by her husband, the father of the pursuer and the first named defender. As at the date of her death, Molly's liferent interest in the heritable property known as Glenmaller came to an end. The pursuer and the first named defender were entitled to the fee along with their brother Mr. George Mailer in terms of valid testamentary dispositions made by their late father.

20. In the period from about 25 February 2015 to the date of her death Molly was a person of independent mind who had a firm grip of her finances.

21. In the period from about 25 February 2015 to the date of Molly's death the pursuer lived nearby and saw her regularly in the course of any given week. She had access to Molly's financial documents including her Bank of Scotland account statements.

22. Molly's funeral took place on about 14 June 2017.

23. On the following day the pursuer and the defenders met in the Costa coffee shop in Perth. The defenders were returning to Loch Broom and the parties had a lengthy and affectionate chat about Molly. Near the end of the visit to the Costa outlet the pursuer raised the question of whether the first named defender accepted that the payment of £9,950 made by Molly on 5 December 2016 should be deducted from his pecuniary legacy under Molly's

Will. The first named defender stated that the payment had been their mother's way of helping the defenders at a time of financial difficulty. He became upset that the subject should be raised so soon after the funeral and left the coffee shop. The pursuer and the second named defender remained talking together for about a further 10 minutes. The second named defender was very upset and they discussed a number of personal difficulties that she was experiencing at that time. The pursuer showed kindness and understanding to the second named defender at that time.

24. Further discussions took place between the pursuer and the first named defender on the topic of treatment of the £9,950 payment. These were mainly on the telephone and the parties continued to disagree.

25. On 1 July 2017 the pursuer expressed her concern in an email to the first named defender (a copy is at 5/3/5 of process). Later that day the first named defender replied in a lengthy email (a copy is at 5/3/5 of process). He insisted that Molly had not "formally registered" the status of the payment made on 5 December 2016. He made a proposal for what he called "an equitable and fair arrangement between us." His proposal involved taking the sum total of the £15,000 pecuniary legacy in his favour in Molly's Will plus the amount of residue that would fall to the pursuer, then adding the sum of £10,000 to produce a total which he proposed would be divided in two. He proceeded to give an illustration of his proposal which assumed that the residue would be £10,000. The total sum to be divided in two would be £35,000 and each of them would get £17,500. The proposal was stated in a somewhat garbled way in his email and was neither understood nor accepted by the pursuer.

26. Following Molly's death the heritable property Glenmaller was put on the market for sale. On 29 May 2018 third party purchasers took entry to Glenmaller. A copy of the State for

Settlement prepared by the solicitors who acted in the sale showing the sums distributed to the pursuer, the first named defender and their brother is number 6/2/2 of process. It was sent to the first named defender on 31 May 2018 by Messrs Miller Hendry, Solicitors, Crieff under cover of a letter dated 31 May 2018 a copy of which is number 6/2/3 of process.

27. As Molly's executors, the pursuer and the first named defender did not require to obtain confirmation to facilitate the administration of the estate passing under her will. Having obtained some advice from solicitors the pursuer was able to uplift the sums at credit of Molly's bank accounts as at the date of her death without being required to exhibit confirmation.

28. The administration of Molly's moveable estate was not carried out by solicitors but principally by the pursuer. Messrs Miller Hendry solicitors were instructed to assist. They drafted and finalised a form IHT400 on behalf of the executors. They also calculated the value of the claim for legal rights made by their brother Mr. George Mailer and were placed in funds by the pursuer and the first named defender as executors to settle that claim.

29. On about 31 May 2018 the pursuer, having ingathered Molly's net moveable estate, was almost in a position to proceed to distribute the estate as she was waiting for clearance of funds.

30. On 31 May 2018 the first named defender sent an email to the pursuer accusing her of delaying the distribution of the estate. A copy is at number 5/3/8 pf process. There was no foundation to the accusation and the pursuer contested it in emails on 31 May 2019 and 1 June 2019, copies of which are at numbers 5/39 and 5/3/10 of process.

31. In an email dated 1 June 2018, a copy of which is at number 5/3/11 of process, the first named defender demanded payment in full of the amount of the pecuniary legacy provided for in Molly's Will.

32. On 1 June 2018 the pursuer advised the first named defender that she had made payment of the sum of £10,000 to his account and protested that the first named defender was due to pay the sum of £9,950 to the estate. She accused him of bullying her. A copy is at 5/3/12.

33. On 1 June 2019 the first named defender emailed the pursuer demanding the payment of the balance of £5,000 to settle the full amount of the pecuniary legacy made in his favour in Molly's Will. A copy is at 5/3/13. The pursuer acceded to that demand.

Finds in fact and law that

1. the sum of £9,950 paid by Molly on 5 December 2016 into an account in the name of the second named defender was a gift to the first and second named defenders; and
2. the first named defender was not under any legal obligation to allow the payment of said sum of £9,950 to be treated as an advance payment against the pecuniary legacy in his favour in terms of Molly's Will.

INTERLOCUTOR

1. Of consent of the pursuer, Sustains the second named defender's plea in law 3 and grants decree of absolvitor in her favour.
2. Sustains the first named defender's plea in law 3 and grants decree of absolvitor in his favour.
3. Reserves all questions of expenses.

Note

[1] On 23 October 2019 I heard a proof in the above action which concluded that day. It was clear during the evidence that all parties agreed that relations between them had been cordial prior to the death of Molly. It is a matter of regret that that such a bitter dispute has developed between them following her death over a relatively small proportion of the monies to which they became entitled after Molly's death. It was clear to me that the pursuer thought, with some justification, that the first named defender had "dumped" her with the great bulk of the work winding up her mother's estate. One can also be sympathetic that the result of the removal of almost a quarter of the value of her moveable estate some six months prior to Molly's death meant that amount of residue which the pursuer received under the Will was significantly reduced. Both at the lunchtime adjournment and at the end of the day when I made avizandum, I urged parties to seek to reconcile their differences but without success.

[2] At the conclusion of submissions, it was accepted on behalf of the pursuer that decree of absolvitor should be granted in favour of the second named defender. It became clear in the course of the proof that the pursuer's case was based upon an obligation on the part of the first named defender to allow the payment of £9,950 which he had received on 5 December 2016 as requiring to be taken into account as an advance payment against a pecuniary legacy of £15,000 in his favour granted by his late mother in her Will dated 25 February 2015. Although this had not been the precise basis of the claim on record, it was the matter put in issue without objection at the proof. It perhaps ought to have been clear at the outset to those advising the pursuer that any claim ought properly to have been brought against the first named defender only. This Note relates primarily to my reasons for decision in respect of the claim so far as it is brought against the first named defender.

Procedural History

[3] This action was warranted by the court on 4 April 2019.

[4] On 7 August 2019 at the Options Hearing the parties were allowed a proof of their averments on the Record number 10 of process.

[5] On 4 September 2019 the court on the pursuer's opposed motion ordained the defenders to lead at the proof.

[6] On 23 October 2019 this matter called for proof before me. At the start of the hearing I allowed a list of authorities for the pursuer and the joint minute for parties to be lodged at the bar of the court and form numbers 14 and 15 of process respectively. On my raising the issue parties agreed that I should repel the first preliminary plea for the pursuer and first and second preliminary pleas for the defender, all for want of insistence at the Options Hearing on 7 August 2019. The defenders had raised the issue of title and interest to sue in their preliminary pleas but had not lodged a note of basis of these pleas.

Witnesses

The Defenders

[7] Both defenders gave evidence. The first named defender gave evidence in a measured fashion. He is a company director who is versed in financial matters. His email correspondence suggested that he could be rather more irascible than he appeared in court. I thought him credible and, by and large, reliable. I did not think that he had acknowledged to the pursuer at the coffee shop meeting on 15 June 2019 that the payment was a "loan". He had been angered and left the premises abruptly. On 1 June 2018 the pursuer came under a degree of pressure from the first named defender to pay the balance of £5,000 to him. His

email correspondence to the pursuer suggested, in line with the pursuer's evidence, that he was a rather more forceful character than might be thought from his urbane presentation in court. In so far as he seemed to think that "formal registration" of the payment made by Molly to the defenders was required to create a legal obligation on him he was mistaken. That error does not determine the subject matter of the action.

[8] The second named defender was a credible and reliable witness. She was a sensitive person who had obviously been very upset by the death of Molly but had other personal concerns about that time. She was asked in cross whether at the meeting on the day after Molly's funeral she had acknowledged when alone with the pursuer that the payment of £9,950 was a "loan" but she rejected this suggestion. I accept her evidence that she made no such acknowledgment.

The Pursuer

[9] The pursuer was also credible and, in the main, reliable. As regards the meeting in the coffee shop her position was that she did not discuss money with the second named defender after the first named defender walked out. This was not the position put to the second named defender in cross. Most importantly, in response to a question from the bench asked to seek clarification near the end of her chief just prior to the lunch adjournment, her position was that she had discussed the payment with Molly on more than one occasion in the early part of 2017. Molly had given her some reassurance that matters would be "sorted" but the word "promise" had not been used to describe any obligation imposed on the first named defender to have the payment taken into account when the Will came into effect after her death. Thinking back she had proceeded on a sense of trust and loyalty. This passage of evidence on its own might have caused some parties to concede. At the end of the proof I

was left in no real doubt that this was the truth of the matter and the pursuer had not been led to understand by Molly that the first named defender had an obligation to treat the £9,950 as an advance payment against the legacy in the Will.

[10] The only other evidence for the pursuer was in the form of an Affidavit from the solicitor who had dealt with the administration of Molly's estate. This was factual evidence that was not contested and has been incorporated in the findings in fact.

Submissions of the parties

[11] The defender's agent did not make reference to any authorities. His position was that there was no presumption against donation in a case of this kind where the parent had made a payment to assist her son who was in financial difficulty. He urged me to grant decree of absolvitor to both defenders. Molly may have given contradictory assurances to her daughter and her son but the undisputed financial difficulty in which the defenders found themselves in the latter part of 2016 was the reason for the gift which Molly insisted on giving to the defenders.

[12] The pursuer's agent made reference to a number of authorities in urging me to grant decree in favour of her client. *British Linen Co.* v *Martin, &c* (1849) 11 D. 1004 demonstrated that it was necessary for there to be clear demonstration of intention to gift money. There was no contemporaneous writing in this case to evidence the purpose of the payment. In *Little* v *Little* (1856) 18 D. 701 the Lord Justice Clerk at page 703 had stated that he could not hold that mere conversational expressions giving money to some members of the family to the exclusion of others should be effectual. She acknowledged that in *Malcolm* v *Campbell* (1899) 17 R. 255 there were certain dicta in the opinions of Lord Lee and Lord Kyllachy that suggested that the usual presumption against donation did not apply in the case of a

payment at the time of the daughter's marriage. She sought to distinguish that situation from the present one on the basis that in the case of *Malcolm* the daughter was relatively young at the time of the payment by the father in contemplation of her marriage.

[13] The evidence did not support the conclusion that Molly intended to make a gift of the £9,950 and decree should be granted in favour of the pursuer.

Reasons for decision

[14] No issue was taken with the entitlement of the pursuer to sue on her own even though she was a joint executor nominate along with the first named defender. Similarly no issue of personal bar or waiver was taken by the defenders even though the action was by one of two executors nominate seeking to receiver a sum of money that had already been paid out to the first named defender as a beneficiary under the Will of the deceased. The case was presented on the basis that there was a binding obligation requiring repayment.

[15] In my discussion of the pursuer's evidence I have made reference to her having accepted that she had proceeded on "trust and integrity". There is no evidence in this case that can found a legal basis for there being an obligation on the first named defender to treat the £9,950 payment as an advance against the pecuniary legacy in Molly's Will.

[16] The case for the pursuer rests on exceedingly thin foundations –

a. the discussion with Molly after a visit to the bank;

b. the discussion at a coffee shop the day after the funeral;

c. The email "proposal" made by the first named defender on 1 July 2017 which the pursuer did not understand and did not accept.

In relation to a. the pursuer's own evidence was that she was not told that her brother had promised Molly that the payment would be taken into account as an

advance payment when the Will came into effect. In relation to b. there was no admission to such an effect in the coffee shop discussions. In relation to c. the email proposal was difficult to follow but it did not amount to an acknowledgement that the first named defender accepted that the £9,950 was an advance payment. It follows that there is no evidential foundation for the claim pursued in this action.

[17] The evidence led for the pursuer does not allow me to conclude that the first named defender received the sum of £9,950 from the deceased under an obligation to treat it as an advance payment against the pecuniary legacy provided for in the 2015 Will. It is easy to have a considerable degree of sympathy for the pursuer that she has not been well treated by the first named defender. I would go so far as to suggest that the email "proposal" suggested that the first named defender may have felt under a degree of moral obligation to seek to reach a more equitable distribution of Molly's estate. However the evidence was that the deceased was a lady of firm views. All parties agreed in their evidence that Molly was a person of independent mind even as she grew frailer with advancing age. She does not appear to have been easily swayed by either of her children. She gave them both similar sounding but vague assurances that she would "sort" matters out with the other sibling. I am unable to conclude that the first named defender was under such a legally enforceable obligation that the payment on 5 December 2016 required to be treated as an advance against the pecuniary legacy he was due to receive under Molly's Will.

[18] Molly could have made it clear in a variety of ways that the sum that she gave to the first and second named defenders on 5 December 2016 was to be treated as an advance against the first named defender's future pecuniary provision under her Will or otherwise to be taken into account so as to preserve the relative balance of benefits to be acquired by the pursuer and the first named defender under the Will. She could have had the first named

defender sign a written acknowledgment that this was the agreed arrangement. There were other means of achieving the same effect that did not involve the first named defender at all. She could have executed a new will or even a relatively short Codicil reducing the size of the legacy or otherwise adjusting the provisions for the pursuer and the first named defender in a way that took account of the payment made on 5 December 2016. She did not do any of these things in the period of exactly six months between the date of the payment and the date of Molly's death. On the evidence, until shortly prior to her death, she was well capable of making such arrangements. I am unable to reach the conclusion that that the first named defender had agreed to a legally enforceable arrangement of the kind that the pursuer contends for. Therefore the court cannot supply the remedy that the pursuer seeks.

Donation - evidential presumptions.

[19] The pursuer's solicitor submitted that this was a case in which the normal presumption against donation applied. In *Malcom* v *Campbell*, cited above, Lord Lee said the following at page 257:

> "If the balance of evidence be equal, much will depend on the question on whom the *onus* lies. On that question of *onus* we have heard an argument, and have had authorities cited to us. Now I assent to the doctrine in the Sheriff's note that donation is not presumed, but where the person said to have made it is under a natural obligation to provide for the person to whom it is said to be made there is no *onus* on the person receiving. The presumption rather is that it may have been a gift *ex pietate*. That is the principle of the case of *Nisbet's Trustees* v *Nisbet* in 1868. [(1868 6 Macp 567]"

The phrase "*ex pietate"* may be taken to mean arising "from natural affection and duty" – J Trayner – *Latin Maxims and Phrases* (4th ed. 1894 at page 204).

In *Malcolm* v *Campbell* Lord Kyllachy at page 258 said the following:

> "But the question is, what—looking to the relations of the parties—is the legal presumption as to the footing on which this took place? In the general case it is clear

> that the presumption would be for repayment. A mandatary is in general entitled to reimbursement of his authorised outlays. But the presumption is the other way where, as here, the case is one between parent and child, and especially where the occasion of the advance is the marriage of a daughter, and the advance is made to her husband at the time of the marriage."

[20] Had the question of onus been a live one in this case because the issue in dispute was finely balanced I would have been inclined to the view that this was a payment made by Molly out of a sense of natural affection and duty. She was obviously concerned at the sudden onset of financial difficulties that had befallen the defenders in late 2016 and insisted that she wished to help. She even expressed regret that she could not do more. In the absence of some other form of acknowledgement that Molly had proceeded on the basis of a promise by the first named defender to treat the payment as an advance on his prospective pecuniary legacy, it can be inferred that Molly was prepared to let the estate passing on her death be depleted so that she could help her son in an hour of need. She did act out of a sense of natural obligation. I do not consider that the fact that the first named defender was no longer in the first flush of youth would prevent the case being one in which the mother had acted "*ex pietate*". Accordingly had the matter been a finely balanced one this consideration would have favoured the first named defender.

Concluding observations

[21] At proof the parties appeared to be proceeding on a tacit understanding that the only issue they wished to be determined was whether the deceased had extracted a binding legal commitment from the first named defender to have the sum paid taken into account after death. On that issue my decision is clear that there was no such binding legal commitment made. I have not discussed the other difficulties that might have been identified and put in issue. In particular nothing was made at proof of the legal consequences of the pursuer as

executor having acceded to the first named defender's insistence that the full amount of the pecuniary legacy should be paid to him in about 1 July 2018. Hence questions of unjust enrichment and personal bar have not featured in this Judgment.

Disposal

[22] Part 2 of the interlocutor above is intended to reflect the findings made and the conclusions reached as explained in this Note.

Expenses

[23] I have reserved all questions of expenses. For the moment I have not fixed a hearing but, if this is required by the parties, they should contact the sheriff clerk at Perth who will make the necessary arrangements.