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

ICOS No 22/2240

Delivered: 15/03/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE TRUSTEES OF FIRST ARMAGH
PRESBYTERIAN CHURCH

WILLIAM LESLEY FARIS (A PATIENT BY HIS ATTORNEY AND NEXT
FRIEND JANICE MILDREN FARIS), THOMAS HENRY McKENNEL,
DAVID GEORGE HARRISON, IAN KYLE, JAMES ALISTAIR MENARY,
MALCOLM SHAW AND HEATHER STEVENSON

Petitioners

McBRIDE J

[1] The trustees of the First Armagh Presbyterian Church, (“the petitioners”) petition the court to remove William Lesley Faris as a trustee of property held in trust for the congregation of First Armagh Presbyterian Church on the grounds that he lacks capacity to exercise his functions as a trustee. There is no proposal to appoint another person in his place as trustee.

[2] The petitioners were represented by Mr Graeme Watt of counsel. As the case involved a charitable trust the Attorney General, although not a named party attended court and was represented by Mr Wimpres, solicitor in the Office of the Attorney General for Northern Ireland. I am grateful to Mr Watt for his very comprehensive and well-researched written and oral submissions and to Mr Wimpres for his oral submissions in reply which were of much assistance to the court.

Background

[3] Mr Faris was appointed as a trustee on 10 June 1990 under the procedure provided for by the Trustee Appointment Act 1850.

[4] The trust property relates to the church manse (“the manse”) which is contained within Folio 299L County Armagh and is situated at Newry Road, Armagh.

[5] The trustees of the trust are William James Armstrong, Lesley Faris, Thomas Henry McKennell, David George Harrison, Ian Kyle, James Alistair Menary, Malcolm Shaw and Heather Stevenson. All the trustees were registered as full owners of the manse on 3 May 2013.

[6] William James Armstrong died on 29 December 2015 and Mr Faris is presently suffering from dementia and is therefore a person under disability.

[7] On 12 January 2016 Mr Faris executed an enduring power of attorney appointing his daughter Janice Mildred Faris as his attorney for the purposes of the Enduring Powers of Attorney (Northern Ireland) Order 1997 with general authority to act on his behalf. The enduring power of attorney was registered on 20 November 2018.

[8] At a congregational committee meeting of First Armagh Presbyterian Church held on 8 June 2021 the congregational committee, cognisant of the need to progress the agreement to sell the church manse and the need for the trustees to be sui juris to sign the necessary documentation to effect sale of the manse, agreed that Mr Lesley Faris be removed as a trustee. The meeting acknowledged that "Mr Faris is held in high regard and this action is being taken only in order for legal requirements to be carried out."

Submissions by the Petitioners

[9] Mr Watt in his detailed skeleton argument and oral submissions set out a number of authorities which he submitted established that the court had an inherent jurisdiction to remove a trustee and further submitted that the court should exercise this jurisdiction in the present circumstances given Mr Faris' incapacity and the fact the application was supported by all the other trustees including Mr Faris' attorney.

Submissions by the Attorney General

[10] Mr Wimpres, whilst indicating that it would have been simpler for the trustees to have replaced Mr Faris as a trustee, accepted that the petitioners had decided not to pursue that route and in the present circumstances he accepted the submissions of the petitioners' counsel that the court had an inherent jurisdiction to remove a trustee on the grounds of incapacity as appeared from the authorities cited by Mr Watt.

Consideration

[11] Before exercising its inherent jurisdiction the court must consider whether there is any power either at common law or under statute which addresses the issue which has arisen as it is generally only when there is a lacuna in the law that the court will then resort to exercising its inherent jurisdiction. Accordingly, it is

necessary to consider whether there are any statutory provisions or common law which would enable Mr Faris to no longer act as a trustee.

Retirement of a Trustee

[12] Under section 38 of the Trustee Act (Northern Ireland) 1958 a trustee who has capacity can resign by means of a deed, if the other co-trustees consent. As Mr Faris lacks capacity to sign such a deed the question arises whether his attorney can act on his behalf and sign the deed.

[13] Section 7(1) and section 7(1)(a) of the Powers of Attorney Act (Northern Ireland) 1971 grant wide powers to the attorney to execute deeds on behalf of the donor. Section 26(1) of the Trustee Act (Northern Ireland) 1958 however limits this power in respect of trustee's powers as it provides:

“A trustee may, by power of attorney, delegate for a period not exceeding 12 months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee ...”

Section 4(7) of the Enduring Powers of Attorney (Northern Ireland) Order 1987 further restricts the ability of a trustee to delegate his powers as a trustee by providing:

“A power of attorney under section 26 of the Trustee Act (Northern Ireland) 1958 (Power to Delegate Trusts etc by Power of Attorney) cannot be an enduring power.”

[14] Consequently a trustee may not delegate any trust or power of discretion for more than 12 months and he may not do so at all by an enduring power of attorney.

[15] Two issues therefore arise for consideration:

- (a) Does the power to resign fall within the provisions of section 26 of the 1958 Act?
- (b) Notwithstanding the creation of an enduring power did Mr Faris nonetheless delegate the execution or exercise of all or any of the trust's powers and discretions vested in him as trustee for a period not exceeding 12 months?

[16] Mr Watt acknowledged that the petitioners could have sought a declaration that Mr Faris's attorney had power to resign on his behalf. Such a declaration would of necessity have involved the court making a determination regarding the meaning of section 26 of the 1958 Act namely whether the power to resign came within the ambit of section 26 and if so, whether the granting of an enduring power of attorney included a delegation of execution or exercise of all or any of the trust's powers and

discretions vested in him as trustee for a period not exceeding 12 months or whether the fact an enduring power of attorney was granted meant there was no delegation of the section 26 powers to an attorney.

[17] Mr Watt conceded, and in the court's view this was a proper concession, that the court would be reluctant to make a declaration in circumstances where there was no respondent to the proceedings and where the other trustees were consenting to the application. In such circumstances the court would not have the benefit of full argument on the question upon which the determination is sought. In *Metzger v Department of Health and Social Security* [1977] 3 All ER 444 at 451 Sir Robert Megarry VC stated:

“The Court does not make declarations just because the parties to litigation have chosen to admit something. The Court declares what it has found to be the law after proper argument, not merely after admission by the parties. There are no declarations without arguments; that is quite plain.”

Accordingly, it was submitted on behalf of the petitioners that resignation by Mr Faris was not an option which could be pursued in this case. That is a submission with which this court agrees.

Removal of Trustee under Section 43 of the Trustee Act (NI) 1958

[18] Under section 43 the court can in certain defined circumstances make a vesting order vesting trust land in any such person as the court may direct. Section 44 of the England and Wales Trustee Act contains a similar provision.

[19] I do not however consider that section 43 provides a statutory basis for the removal of Mr Faris. Notwithstanding the power of the court to vest land in another person it remains a moot question whether section 43 contains a power to remove a trustee without replacement. In *Re Harrison's Settlement Trusts* [1965] 1 WLR 1492 Cross J when considering the effect of section 44 (England and Wales equivalent provision to section 43) doubted whether it gave him power to remove a trustee without replacement. Although the reasoning of Cross J has been questioned, section 43, the equivalent provision in the Trustee Act (NI) 1958, while otherwise identical to section 44, does not permit re-vesting in the case of a person under disability. Accordingly, the question whether the court's power to re-vest includes a power to remove a trustee without replacement is academic as section 43 (unlike section 44) does not apply to a person under a disability. Accordingly, I consider section 43 does not provide a statutory basis for the removal of Mr Faris as trustee.

Section 35 of the Trustee Act (Northern Ireland) 2001

[20] Section 35 permits the beneficiaries under a trust, who are of full age and capacity and who, taken together are absolutely entitled to the property subject to the trust, to give to an attorney acting for the trustee under an enduring power of attorney, a written direction to appoint a replacement trustee or trustees in place of the incapable trustee. I do not however consider that this provision assists as there is no replacement for Mr Faris as trustee. Further, the trust is a charitable trust and therefore I do not consider it is capable of being terminated and its property divided among the beneficiaries. If I am wrong about that I further consider that it is impossible to identify and therefore achieve the consent of all the relevant beneficiaries to use the section 35 procedure.

[21] I am therefore satisfied there is no statutory provision for the removal of a trustee without a replacement in this jurisdiction.

Inherent jurisdiction of the Court

[22] In such circumstances the question arises whether the court has an inherent jurisdiction and whether it ought to exercise it in the present circumstances.

[23] *Underhill and Hayton, Law of Trusts and Trustees* (19th Edition) states at para 70.1 as follows:

“A trustee may be removed from his office ... by the court appointing a new trustee in his place (or, exceptionally, under its inherent jurisdiction by simply removing the trustee without replacing him if sufficient trustees remain), at the instance of any trustee or beneficiary, where he has behaved improperly, or is incapable of acting properly, or from faults of temper or want of tact is in a permanent condition of hostility with his co-trustees and beneficiaries or has been convicted of an offence involving dishonesty or is a recent bankrupt, or is residing permanently, or for a long or indefinite period, abroad, or cannot be heard of, or where any other good reason exists.”

[24] The authorities supporting this statement of the law include *Re Harrison Settlement Trusts* [1965] 1 WLR 1492 and *Re Chetwynd's Settlement* [1902] 1 CH 692.

[25] In *Re Harrison* there were four trustees. One had become incapacitated. Two trustees brought a summons asking for the trust assets to be vested in themselves and the other sui juris trustee. In his judgment Cross J accepted at p 1497:

“Although there is no power under the statute simply to remove a trustee without appointing a new trustee in his place, that can be done by the court in its inherent jurisdiction in executing the trusts of the settlement.”

[26] Similarly in *Re Chetwynd's Settlement* a case involving an aging trustee, being no longer in good health who wished to retire, Farwell J held at p 693:

“In an action to administer a trust, the court always had inherent jurisdiction to discharge a trustee without appointing a new trustee in its place.”

And further stated at p 694:

“As regards the propriety of discharging a trustee without appointing a new trustee, I may observe that there is a quasi-legislative sanction for it under Section 11 of the Trustee, Act 1893, which enables the co-trustees and the person in power to appoint trustees to effect such a discharge by deed.”

[27] Although *Re Chetwynd's Settlement* is a first instance decision it has never been doubted or been the subject of academic criticism. Indeed, I consider that it accords with established principle and logic especially when one considers the statutory power to resign as a trustee. I am therefore satisfied that the authorities establish that this court has an inherent power to remove a trustee without replacement, in certain circumstances.

[28] The petitioners seek Mr Faris' removal on the grounds that he lacks capacity.

[29] Whilst most of the existing case law relates to removal of trustees on the grounds of improper behaviour, hostility with co-trustees and/or beneficiaries, conviction or bankruptcy, there is ample authority including *Re Chetwynd's Settlement* where removal was ordered in circumstances where a trustee was incapable.

[30] In the case of Mr Faris there is no question of any improper conduct, criminality or hostility with the other co-trustees. As appears from the minutes of the congregational committee meeting Mr Faris is held in high regard and the sole basis for seeking his removal is based on his capacity.

[31] I am satisfied that his incapacity on the grounds of ill-health renders him incapable of participating in decision-making and more particularly in signing the necessary documents required to effect the sale of the church manse and therefore his removal is required to enable the other trustees to deal with the trust property.

Conclusion

[32] In all the circumstances I am satisfied the court has an inherent power to remove a trustee without replacement and in the circumstances of the present case I order Mr Faris' removal as a trustee on the grounds of his incapacity.

Court Order

[33] The parties provided an agreed draft order to the court which I approve and schedule to this judgment.

[34] I make no order as to costs.



IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Before THE HONOURABLE MADAM JUSTICE MCBRIDE

ON Tuesday the 15th day of March 2022

**RE: WILLIAM LESLIE FARIS A PATIENT BY HIS FATHER AND NEXT FRIEND
JANICE MILDRED FARIS**

Plaintiff

**IN THE MATTER OF THE TRUSTEES OF FIRST ARMAGH
PRESBYTERIAN CHURCH**

**UPON HEARING counsel for the petitioners and a representative of the
Attorney General for Northern Ireland;**

AND UPON READING the affidavit and other papers filed in court;

AND IT APPEARING to the satisfaction of the court that William Leslie Faris being one trustee of First Armagh Presbyterian Church lacks capacity to exercise his functions as a trustee and that William James Armstrong being also a trustee died on 29th December 2015;

IT IS HEREBY ORDERED this [*date*] that the said William Leslie Faris be discharged and removed from the trusteeship of the trusts and that the property scheduled hereto do hereby vest in Thomas Henry McKennell, David George Harrison, Ian Kyle, Malcolm Shaw, Heather Stevenson and James Alistair Menary on the same trusts subject to which the property was heretofore held by them.

SCHEDULE

The property known as 57 Newry Road, Armagh being the premises comprised in folio 299L Co Armagh.

**Fiona Swail
Proper Officer**