

Chapter 9: Assessment question

Gloria owns two houses, Hillside House and Mulberry House. She is critically ill and wishes to make a new will.

With respect to Hillside House, she wants to leave it to her son Ramon for life, remainder in fee simple to her grandsons Luis and Julio. 'I am very keen that Luis and Julio should inherit Hillside House after Ramon's death. I don't want the house disposed of during Ramon's lifetime.'

With respect to Mulberry House, she wants to leave it to her cousin Nicolas for life, remainder in fee simple to Nicolas' two children Phil and Philippa. 'Mulberry House is rather large and a long way from the shops. It may prove unsuitable for Nicolas. If that proves to be the case, would it be possible for him, or somebody on his behalf, to sell Mulberry House and buy (say) a lease of a smaller house on the edge of the town centre?'

Advise Gloria as to the drafting of her will.

Specimen answer

Hillside House

Gloria desires to create successive interests in Hillside House by the terms of her will. Her son Ramon is to be the life beneficiary, and after his death her grandsons Luis and Julio are to take the fee simple. She is also eager to keep the house in the family, and to that end wishes to prevent any disposition of the house during Ramon's lifetime.

Successive ownership of the sort envisaged by Gloria can only be effected by means of a trust, and according to the Trusts of Land and Appointment of Trustees Act 1996 (which came into force on 1 January 1997) the trust must take the form of a 'trust of land'.

The trustees of a trust of land are expressly granted, in relation to the land subject to the trust, all the powers of an absolute owner of land (s. 6(1) TOLATA 1996). It follows that, *prima facie*, the trustees' power of sale cannot be qualified to take effect only after Ramon's death. In fact, the picture is not that simple, for a number of reasons.

First, s. 8(1) TOLATA 1996 permits Gloria to expressly provide that the trustees shall have no power of sale during Ramon's lifetime. Gloria should be advised, however, that such an absolute restriction could have potentially disastrous economic consequences. In the future the value of the property might fall or threaten to fall, and in such an event the trustees might wish to sell Hillside House and invest the proceeds in other land. This they would be unable to do if their power to sell has been removed under s. 8(1) TOLATA 1996.

Secondly, s. 8(2) TOLATA 1996 provides for another means of limiting the trustees' power of sale, but one that is significantly less rigid in its result than the power contained in s. 8(1). Section 8(2) TOLATA 1996 provides that the exercise of the trustees' power of sale and the exercise of the trustees' other powers can be made expressly subject to the

consent of any person or persons. Gloria should be advised, therefore, to put a clause in her will trust which will prevent a sale by the trustees without the consent of certain named individuals. She might, for instance, wish to make any sale subject to Ramon's consent, with a view to keeping Hillside House unsold during Ramon's lifetime. However, if she is concerned that Ramon might consent to a sale, she could make the trustees' power of sale subject to the consent of another trusted friend. She should choose a friend whom she is confident will not consent to a sale in Ramon's lifetime unless circumstances are such that a sale becomes necessary for the welfare of the beneficiaries. If a sale is necessary in order to avoid economic catastrophe the trusted friend will no doubt consent to a sale.

Where the power to sell is restricted by s. 8(1) TOLATA 1996 this flexibility to respond to changing economic circumstances *prima facie* does not exist. Gloria should be advised, however, that if she stipulates for the consents of more than two persons to be obtained before any sale can proceed, the trustees are only obliged to obtain the consents of any two of those persons before exercising their power of sale (s. 10(1) TOLATA 1996).

Thirdly, if Gloria includes a clause expressly making Ramon's occupation of Hillside House a purpose of the trust, he will be entitled to occupy the house unless the land becomes unsuitable for him or unavailable to him (s. 12 TOLATA 1996).

Fourthly, if the trustees intend to sell the house against the wishes of Ramon and/or any other person with an interest under the trust, s. 14 of the 1996 Act provides that any such person may apply to court for an order relating to the exercise by the trustees of any of their functions. Having heard such an application the court may make such order as it thinks fit. According to s. 15 TOLATA 1996 the court must consider, *inter alia*, the wishes of Gloria when considering the appropriate order to be made.

Finally, in advising Gloria, one crucial general point should be made. Namely, that if Ramon, Luis and Julio are all adults and have capacity (that is, do not suffer from a legally relevant disability) and together agree, they can bring the trust to an end under the rule in *Saunders v Vautier* (1841) 10 LJ Ch 354. In such a case neither Gloria nor her trustees would have any power to prevent a sale of the house during Ramon's lifetime.

Mulberry House

The issues are whether Gloria can ensure that the house will be sold at Nicolas's request, and whether the proceeds will be reinvested according to Nicolas's wishes. Section 6(1) of the 1996 Act vests the power of sale in the trustees of the 'trust of land' and s. 4(1) grants the trustees the power to postpone sale of the land indefinitely, the length of postponement lying entirely within the trustees' discretion (s. 4(1) TOLATA 1996). This statutory power cannot be excluded by contrary expression in the trust instrument. Thus, the trustees cannot be placed under a duty to sell, and consequently Gloria cannot ensure that the house will be sold at Nicolas's request.

Accordingly, Gloria should be advised to choose trustees who are likely to respond favourably to Nicolas's request. To this end she could, of course, appoint Nicolas himself to be one of the trustees if she so wishes (members of our firm of solicitors could be appointed to be the other trustees).

As to the second issue, Gloria should be advised that the trustees are authorised to reinvest the proceeds of sale in new land (ss. 6(3) and 17(1) TOLATA 1996) even in the acquisition of a lease. Gloria should also be informed that, before reinvesting the proceeds of sale, the trustees will be obliged to consult Nicolas, as the beneficiary in possession, and to give effect to his wishes so far as his wishes are deemed by them to be consistent with the general interests of the trust (s. 11(1) TOLATA 1996).

For completeness we should also advise Gloria that if her trustees refuse to accede to Nicolas's reasonable request for a sale and/or reinvestment in appropriate property, all is not lost. Nicolas could apply under s. 14 TOLATA 1996 for a court order requiring the trustees to reinvest the proceeds of sale in, say, a smaller house nearer to the shops! According to s. 15 the court must have regard to, *inter alia*, the intentions of Gloria, the purposes for which the trust land is held and the welfare of any minors (in this case Philippa and Phil may be minors).