

Summative Assessment Exercise - Outline Answer

The original nominee trustees have executed a deed disclaiming the trust. The deed would be ineffective if they had already acted upon the trust, but the facts make it clear that they disclaimed the trust at the first opportunity. The disclaimer can, therefore, be assumed to have been valid. Does this mean, then, that the trust has failed? The rule is that a trust will not fail for want of a trustee—in other words, a trust without trustees is still valid. However, it has been argued that an *inter vivos* trust can be rendered void if it is disclaimed before it has been properly constituted (P. Matthews [1981] Conv 141). If this argument is correct it does not offend against the rule that a trust does not fail for want of a trustee. On the contrary, where a trust is disclaimed before constitution, the trust would have failed *ab initio*. In other words, no trust would ever have come into existence. However, attractive though this argument is, the orthodox view remains that trusts have a notional validity until they are disclaimed (*Mallott v Wilson* [1903] 2 Ch 494).

The disclaimer has left the trust without trustees, and so a number of questions arise: can new trustees be appointed? Who may appoint them? Who may be appointed? How should the appointments be made? According to s. 36(1), appointments should be made by the person nominated in the trust instrument to appoint new trustees (The Trusts of Land and Appointment of Trustees Act 1996 does not alter this). Albert answers this description, although the particular wording of his power must be scrutinised. If, for instance, he is empowered to appoint new trustees only when the current trustees ‘die’, he will not be able to appoint new trustees when the current trustees ‘disclaim’ (*Re Wheeler* [1896] 1 Ch 315 and *Re Sichel* [1916] 1 Ch 358). There is nothing in the facts of the present scenario to suggest that his power is limited in any way. However, because he is a minor (only 17 years old) any imprudent appointment he makes will be liable to be set aside. The fact that Tabitha is his friend might suggest that her appointment was not in the best interest of the trust—the court would set aside her appointment if this proved to be the case. This all assumes, of course, that her appointment was technically valid in the first place. There is a hint that it may not have been. New trustees must be appointed ‘in writing’. Tabitha will not be a trustee if she has merely been ‘told’ of her ‘appointment’, as it appears on the facts.

Next, Albert decided to appoint himself as a trustee. This appointment will only be valid if Albert is now eighteen years old (trustees must be adults). There is nothing wrong, in principle, with Albert appointing himself as he is filling a genuine vacancy in the trust.

Finally, Tabitha claimed to have retired from the trust. We have already noted doubts about the correctness of her appointment, but, assuming that she has been validly appointed, the next question is whether she has validly retired. If she has not, she will not have been discharged from her obligations under the trust, and will continue to be liable, with Albert, to the beneficiaries (*Head v Gould* [1898] 2 Ch 250). She cannot have retired under s. 36 of the Trustee Act 1925 because no new trustee has been appointed in her place. This leaves retirement under s. 39. To retire under this section she must retire by deed, Albert's consent to her retirement must also be given by deed, and at least two trustees or a trust corporation must remain after her retirement. It is clear, therefore, that Tabitha has not been validly discharged from the trust. The potentially disastrous consequence of this for trustees is that they remain liable in their capacity as trustee even after they think that they have retired (see the case of *Jasmine Trustees v Wells & Hinds* [2007] EWHC 38). In conclusion, the current trustees are Albert and Tabitha, on the assumption that the appointments of Albert and Tabitha were valid.