TRUSTS AND ESTATES LAW

Recent developments in trusts and estates

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In this issue, I write about a number of recent developments.

Court approves withholding financial information from a beneficiary
Trust practitioners know the destructive impact that information about trust wealth can have on beneficiaries.

The Royal Court of Jersey has recently said that trustees can withhold information about trust wealth from a 20 year-old beneficiary. In its words: "If he knew of the wealth to come, the beneficiary may not complete his tertiary education, or may not bother to seek employment. He or she may decide instead upon a life of party-going or riotous living, or become reliant upon alcohol or toxic substances, or cause difficulties with siblings or other members of his family not benefiting under the trust in question." (See *In the matter of C Settlement* [2017] JRC 035A.)

In short, it was held that "it is not in [the son's] interests to learn at this stage of the enormously substantial trust of which he is a principle beneficiary". "To have such knowledge might upset the balance of his life at a time when he is still maturing. This Court has every sympathy with that approach and considers that the view of the trustee and [the son's] mother should be respected."

It is an enlightened decision and should be followed in this country.

Varying a trust in ways that a settlor would disapprove
In *Representation of Y Trust and Z Trust* [2017] JRC 100, the Royal Court of Jersey has enlarged the definition of beneficiaries to include children of same sex relationships, children who are born out of wedlock, people who are treated as children, and some adopted persons.

In making this decision, the Court ignored the wishes of the settlor.

The adult beneficiaries of the trust were united in making the application, being aware of the divisiveness that the trust wealth could bring and they did not want the family to fall prey to it.

It is another enlightened decision from the Jersey Royal Court.

"Trustees" whose term has expired can be paid for their services
In *Butterfield & Others v Public Trust & Another* [2017] NZCA 367, "trustees" whose terms had expired applied to the Court for the trust's affairs to be regularised. Kós P held they were "trustees de son tort", i.e. people who had taken it upon themselves to act as trustees and to discharge the trustees' duties on behalf of others (see para [17]). His Honour held that "it is one of the fundamental rights of an honest express trustee that costs and expenses properly incurred in the administration of the trust are compensable out of the assets of the trust" (para [20]), and that the "trustees" should therefore have their costs paid from the trust.

Because the term "trustee de son tort" is generally negative in character, the Court thought it more appropriate to characterise the "trustees" as constructive trustees who were acting reasonably and in good faith, and who ought fairly to have been compensated for their good intentions.

The case shows a refreshing willingness by the Court of Appeal to ensure that those who act with good intentions to try to rectify trust deficiencies ought not to go unrewarded.

Justice Kós is helping the law of trusts to reconnect with some of its fundamental principles. When section 66 of the *Trustee Act 1956* (which empowers trustees to seek guidance from the courts), got bogged down in threats that trustees should be personally liable to pay the costs of such applications, he took away much of that intimidation and encouraged trustees to seek the courts' guidance (see *NZ Maori Council v Foulkes* [2014] NZHC 1777).

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How to avoid "bundle of rights" claims
In *Clayton v Clayton (Vaughan Road Property Trust)* [2016] 1 NZLR 551, the Supreme Court held that some trust powers should be classified as "property" for the purposes of the *Property (Relationships) Act 1976* (PRA). In *Goldie v Campbell & Others* [2017] NZHC 1692, Moore J has held that some powers were not to be treated as "property". His Honour's reasoning was that "the fetters constraining [the trustee] are derived largely from the no self-benefit clause". "Without this clause, it would be arguable the powers he enjoys under the deed are sufficiently similar to that in *Clayton v Clayton* that they could constitute property under the PRA." (see para [73])

The "bundle of rights" doctrine was not killed off in the *Clayton* litigation. It was parked to the side to be used in less common situations. Trust lawyers need to understand that the bundle of rights doctrine is alive and well, and trusts need to be carefully structured so that trust powers will not be classified as items of property that can be taken by others.

The unpredictability of family protection litigation
In *Courteney v Pratley* [2017] NZHC 1761 (28 July 2017), a mother with failing mental capacity excluded a son from any participation in her estate.

The parents had agreed "in happier times" that their estate should be left to their sons on the terms set out in their mirror wills. Under these arrangements, the favoured son was to have overseas funds, and the excluded son was to have the New Zealand assets.

And that is what the Court did. It awarded the New Zealand assets to the son who got nothing under the will.

Claims under the *Family Proceedings Act 1980* are notoriously unpredictable. In the absence of bright lines, it can be very difficult to predict what a court will do.

The uncertainty can be seen from the fact that the excluded son, who was supposed to get nothing, ended up with more than half of the entire estate.

The *Wills Act* – can a court cut and paste a new will?
In *O'Carroll v McCutcheon* [2017] NZHC 1797, Dunningham J has held that some testamentary documentation should be admitted to probate pursuant to section 14 of the *Wills Act 2007*. Her Honour was satisfied that, with the exception of clause 5.1, a 2011 will reflected Mrs O'Carroll's testamentary intention and should be validated under section 14 of the *Wills Act*. If the High Court is satisfied a will does not carry out the will-maker's intention, it can make appropriate changes, which is what it did. It allowed the 2011 will to go to probate, but without clause 5.1.