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TRUSTS UPDATE

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18 June, 2021

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PQ v RS [2019] EWHC 1643 (Ch)

- Discretionary settlement made for the benefit of the Settlor's children and remoter issue on 11th March 1968
- The fund was held under the terms a Deed of Appointment dated 1st October 1987, which provided for the Settlor's grandchildren, RS and TU, with life interests and subject thereto for *"the children of the Grandchild"*
- The Trustees had the following overriding power of appointment under the terms of the 1987 Appointment: *"The Trustees may revoke the trusts of the Share (wholly or in part) for the purpose only of appointing (and so that the Trustees do by the same deed appoint) such new trusts* ***for the benefit of all or such one or more of the Beneficiaries*** *exclusive of the other or others of them in such shares and with and subject to such trusts powers provisions and generally in such manner for their or any of their benefit as the Trustees shall without infringing the rule against perpetuities think fit"*

PQ v RS [2019] EWHC 1643 (Ch)

- The 1987 Appointment did not define the term *"children of the Grandchildren"* or contain any provisions concerning illegitimate or adopted children.
- RS was married and had three children at the date of the hearing, namely V (born about one month before her parents married), W and X. TU was unmarried and had no children.
- According to the common law rules of construction, a child is legitimate only if the child born or conceived in wedlock. Section 15(1)(a) of the Family Law Reform Act 1969 came into force on 1 January 1970 and changed the law so far as it relates to dispositions made after that date, but otherwise left the law unchanged.
- *Re Hand's Will Trusts* [2017] Ch 449

PQ v RS [2019] EWHC 1643 (Ch)

"I express no view about whether Re Hand *was correctly decided. However, in light of the analysis provided by Mr Barlow, which I have summarised, there must be doubt about whether it will be followed. I am therefore content to proceed on the basis that there is appreciable uncertainly about whether the decision in* Re Hand *will be followed in other cases and will be approved in due course by the Court of Appeal."*

Lewin on Trusts (20th Ed.), 30-019

"A power to appoint in favour of one or both of A and B is plainly not well exercised by an appointment in favour of C or of A, B, and C. A slip of that kind may occur when the objects of the power are the children of a given person but do not include illegitimate, legitimated or adopted children; if the power is purportedly exercised in favour of children in a wider sense there is an excessive execution…"

Thomas on Powers (2nd Ed.), 9.58

"…none of these decisions (not even the post-Pilkington ones) is actually a clear authority to the effect that what is of 'benefit' to an advanced beneficiary or appointee (as the case may be) should continue to be construed differently. It is suggested that, while acknowledging the differences between the two kinds of power – their core purposes, the circumstances in which they are likely to be exercised and, of course, the fact that often a power of appointment may be conferred on a non-trustee whereas a power of advancement is seldom conferred – there may be little logic or sense in distinguishing between them on the basis of a narrow point of construction."

PQ v RS [2019] EWHC 1643 (Ch)

"35.…It seems to me that an appropriate synonym for "appointing" in the context of this settlement is "creating". The language is much wider than merely a power that permits only a limited and closely constrained exercise. Indeed, it is difficult to see how the power could have been drafted more widely. The language used allows the Trustees to revoke the existing trusts and create of new ones. Providing that this is for the benefit of RS and TU, it is permitted under the power.

36. I am satisfied that the Trustees have power to make the appointment."

In the matter of the May Trust [2021] JRC 137

- Discretionary trust governed by Jersey law was established by a Deed of Appointment dated 22nd May 2000.
- By the time the application came to be heard, the class of beneficiaries consisted of the so-called principal beneficiary (he was not defined as such), his wife, his three daughters and four grandchildren, their issue and a UK charitable foundation established by the principal beneficiary and administered by him, his wife and an independent trustee.
- The trustees had wide powers of appointment and advancement exercisable for the beneficiaries' benefit.

In the matter of the May Trust [2021] JRC 137

- The trust had a history of charitable donations, with sums in excess of £8 million having been paid to charity by the time of the application while not more than £100,000 had been paid to the family.
- It was now proposed to distribute £75 million (almost half the trust fund) to the principal beneficiary for him to transfer to the foundation.
- Although the trustee could have distributed this amount directly to the Foundation without incurring liability to tax, the principal beneficiary sought the distribution to himself as a UK taxpayer so that he could make transfers to the Foundation in such a manner (by electing and not electing gift aid relief on different tranches of the sum transferred) that an effective tax rate of 25% would be incurred on the total sum transferred.
- The adult beneficiaries and wider family believed that the payment of tax would enable the government to provide a broader social benefit.

X v A [2006] 1 WLR 741

"That passage [in Re Clore] *emphasised the potentially limiting effect of the* ***requirement (from which none of the authorities have departed) that there be some sense in which the beneficiary's material situation can be said to be improved by the situation****….in the present case I find it impossible to see how this requirement can be satisfied.* ***It cannot be said that the proposed advance is relieving the wife of an obligation she would otherwise have to discharge out of her own resources if only because the amount proposed to be advanced exceeds the amount of her own free resources****. In any event the Court has no reason to suppose that, in relation to her free assets, she will regard the advance as having discharged her moral obligation….*

In the matter of the May Trust [2021] JRC 137

56. In our judgment X v A is not an authority which the Courts of Jersey should follow in this respect…We agree that X v A was much influenced by the particular facts of that case. We can also have regard to the nature of what we may call the trust industry in Jersey…Flexibility has been the key in all such arrangements. The trust has become the modern vehicle by which very wealthy people have managed to avoid what they perceive to be the undesirable consequences of a tax regime, restrictions on succession by their own personal law, or the protection of their assets in the case of business disaster or the threat of kidnapping. This is a development which it is neither necessary to approve or disapprove: it is a fact and it would be artificial to ignore it…

In the matter of the May Trust [2021] JRC 137

60. It seems to us to follow from this analysis that to consider the question of benefit against a test of whether the moral obligation was one that could have been met out of the personal assets of the beneficiary is to ask the wrong question: it asks the wrong question because it has its genesis in cases where it has been thought necessary to find some financial benefit for justifying an appointment which on a standalone basis creates no such benefit. It is unclear to us as to why this should be necessary…

WBD (TRUST CORP) LTD v GLENN

- The 7th Earl of Lonsdale created a settlement on 6th March 1992 ("the Settlement") under which five funds were held for the benefit of his children and remoter issue.
- Clause 9(2) of the Settlement provided as follows in respect of a fund known as "the Remaining Fund" of which "the Beneficiaries" were defined to include the Settlor's present and future grandchildren: *"the Trustees shall hold the Remaining Fund and the income thereof in trust for all or any one or more of the Beneficiaries who shall attain the age of twenty five years or shall be living and under that age at the end of the Trust Period in such shares as the Trustees shall at any time or times during the Trust Period … by any deed or deeds revocable or irrevocable appoint…"*
- Clause 10 of the Settlement provided as follows (emphasis added): *"**Provided always** that the share (hereinafter called "the Allotted Share") taken by any of the Beneficiaries (in this clause referred to individually as "the Beneficiary") under the trusts declared by Clause 9 … shall not vest in him or her absolutely but shall be retained by the Trustees and held on the following trusts: (1) The Trustees shall hold the Allotted Share and the income thereof in trust for the Beneficiary during his or her life* (2) *Subject as aforesaid, the Trustees shall hold the Allotted Share and the income thereof … upon trust- (a) for the first and other sons of the Beneficiary successively according to seniority in tail male with remainder* (b) *for the first and other sons of the Beneficiary successively according to seniority in tail with remainder (c) **for the Beneficiary absolutely**…"*

WBD (TRUST CORP) LTD v GLENN

- Issue 1:
  - Whether, on the proper construction of the Trust Deed, the rule in Hancock v Watson (reported at [1902] AC 14) applied, i.e. whether:
    - the Grandchildren were absolutely entitled to their Allotted Shares, albeit that their interests were defeasible on the birth of a tenant in tail in remainder; or
    - the interest of the Grandchildren is not absolute, but subject to the entailed interests;
  - If the relevant provisions in the Trust Deed did engage the rule in Hancock v Watson, whether the Grandchildren had an interest in capital within the meaning of TA 1925, section 32;
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  - If so, whether the interests of the Unborns were “prior life or other interests” to those of the Grandchildren within the meaning of section 32(1)(c).

Hancock v Watson [1902] AC 14

"Where there is an absolute gift to a legatee in the first instance and trusts are engrafted or imposed on that interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of- kin as the case may be".

WBD (TRUST CORP) LTD v GLENN

"35. First, there is the structure of the Trust Deed: the initial absolute gift in clause 9, followed by the separate clause 10 commencing "Provided always that…". The drafter of the Trust Deed is using a structure expressly identified in the cases concerning the rule and, it is to be inferred, with the intention that it should apply.

36. Secondly, this structure is to be contrasted with the provisions in clauses 5, 6 and 7 of the Trust Deed. These provisions create 3 funds for 3 children of the settlor…in terms that unequivocally create life interests, followed by trusts in remainder. They do not contain an absolute gift in the terms of clause 9, and this, in my judgment, is indicative of a different intention on the part of the drafter from their intention in clauses 9 and 10."

WBD (TRUST CORP) LTD v GLENN

"37. Thirdly, the use of words "the share", "the Allotted Share" and "taken" in clause 10 are indicative of ownership of the share by the Beneficiary.

38. Fourthly, the fact that clause 10 provides that the Allotted Shares shall not vest absolutely in the Beneficiary is not sufficient to prevent the rule from applying. In AG v Lloyds Bank, the rule was held to apply, even though the deed of appointment included such a provision."

WBD (TRUST CORP) LTD v GLENN

"44. As to the final gift being to the Grandchild, this does not, in my judgment, prevent the rule from applying. If the initial gift is absolute, then this provision is strictly unnecessary to ensure that the gift returns to the Grandchild if the trusts fail. However, this is not sufficient to displace the inference to be drawn from the other features of the Trust Deed set out above. In the light of those features, it is, in my judgment, a "belt and braces" provision by the drafter, seeking to draft provisions falling within the rule in Hancock v Watson. An alternative way of putting it is that of the Trustees' counsel, namely, that by including the Beneficiary as ultimate beneficiary, the drafter is acknowledging that Hancock v Watson is intended to apply."

TA 1925, section 32

"(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of ***any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently*** *on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:*

Provided that—

...(c) no such payment or application shall be made so as to prejudice any person entitled to a ***prior*** *life or other interest, whether vested or contingent, in the money paid or applied* ***unless such person is in existence and of full age and consents in writing to such payment or application.***"

WBD (TRUST CORP) LTD v GLENN

"56. …In my judgment, "prior" refers to the order in which the trust property is enjoyed, a life interest being enjoyed before the interest in remainder. It follows, in my judgment, that the consent of persons with interests subsequent to the capital beneficiary is not required. The trustees are not of course entitled to disregard the interests of those persons. They must exercise their powers as fiduciaries, and are bound to consider those interests. But provided they have done so, and made a balanced decision, the power is there to be used.

57. In this case, my starting point is the position if a son is born to a Grandchild. This would cause the Grandchild's absolute interest to become a life interest, limiting their entitlement to the income of the trust property. That interest is a "prior life interest" to that of the son. It follows that the son's interest, even when unborn, is not prior, but subsequent to that of the Grandchild, and falls outside para (c) of the proviso.

58. In my judgment, therefore, the interests of the Unborns under the Trust Deed are not a "prior life or other interest", and the Trustees are accordingly entitled to exercise the Power unfettered by s.32(c)."

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