Private Client MAGAZINE

ISSUE 18

PRIVATE CLIENT TRUSTS

NAVIGATING CONTENTIOUS WATERS

INTRODUCTION

"We make a living by what we get, but we make a life by what we give."

- Sir Winston Churchill

In this exclusive Q1 edition of Private Client Magazine, we delve into the evolving landscape of contentious trusts, exploring key legal developments, landmark cases, and emerging trends that are shaping the field. With insights from leading experts, this issue provides valuable perspectives on dispute resolution, fiduciary duties, and the complexities of modern trust structures.

This issue also features exclusive interviews with industry professionals, offering firsthand insights into the challenges and opportunities in contentious trusts today.

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Private Client Contentious Trusts Circle Europe

24-25 April 2025 (Thursday & Friday)

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In its fourth successful year, this event has previously taken place in the UK, and for the first time, we're moving locations to the beautiful mountain setting of Le Mirador Hotel in Vevey, Switzerland.

This event is an exclusive TL4 Circle event and is by invitation only. Curated by our Co-Chairs and Advisory Board, this Circle brings together key practitioners focusing on predominantly contentious private client work. We are currently working with the Co-Chairs and Advisory Board on an interactive and next level agenda for the discussions. There are no set-piece presentations or panel sessions and purely designed to be as interactive and as inclusive as possible.

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60 SECONDS WITH... PENNY COGHER PARTNER IRWIN MITCHELL

Q What Has Been The Best Piece Of Advice You Have Been Given In Your Career?

A Provide written advice in plain English – the law is complicated enough as it is.

Q What Motivated You To Pursue A Career In Law?

A Watching LA Law! So glamourous.

Q What Do You See As The Most Rewarding Thing About Your Job?

A People often come to me for advice when there is no easy solution to their pension problems. I enjoy solving what seem to be insoluble problems.

Q What Was The Last Book You Read?

A Robert Harris Precipice – fascinating and mainly true

Q What Are You Looking Forward To In 2025?

A Well, where to start? There's lots of proposed pension changes to monitor and see how they develop with interest - the IHT and pension changes, using pension scheme assets to kick start growth and finding out the High Court judgment on the biggest pension case this year about The Pensions Trust.

Q Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

A Always difficult but more exercise during the working week. Having 10 minute activity sessions really helps.

Q What Is The One Thing You Could Not Live Without?

A Sami- my golden retriever.

Q What Does The Perfect Weekend Look Like?

A A walk to Blackheath for coffee and croissants with Sami and then down to Greenwich and along River Thames, following by gardening – we have a large wildlife friendly garden, and a quiet dinner at my home with my lovely husband. Then repeat.

Q What Is Something You Think Everyone Should Do At Least Once In Their Lives?

A Making something on a potter's wheel – it's a truly unique experience

Q If You Could Give One Piece Of Advice To Aspiring Practitioners In Your Field, What Would It Be?

A Persistence and enthusiasm get you a long way in life.

Q What Legacy Would You Hope To Leave Behind?

A I feel I am doing my bit to try to shape and improve UK pensions and if I manage this in some small way then I'll be satisfied.

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With, And Why?

A It would have to be Richard III so I could try to find out, once and for all, what happened to the Princes in the Tower.

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ARBITRATION OF TRUST DISPUTES

Authored by: Katherine Pymont (Partner) and James Glaysher (Partner) - Kingsley Napley

Benjamin Franklin is reported to have said

"When will mankind be convinced and agree to settle their difficulties by arbitration".

For the purpose of this article perhaps the more pressing question is will an arbitration provision in a trust deed bind all beneficiaries to resolve disputes through arbitration rather than court litigation.

On the face of it arbitration and trust disputes are a good match.

A reason often cited for a settlor electing to establish a trust is the privacy afforded. If problems arise arbitration provides the comfort that sensitive information about the trust and its beneficiaries will be kept out of the public domain. The proceedings themselves are private and the decision reached by the tribunal is confidential. In contrast proceedings in the court would more often than not be open to the public and any judgments published.

Arbitration can also be faster and less expensive than court proceedings. The procedural steps required are to a degree flexible (parties can agree a timetable that is tailored to the needs of the dispute, for example a curtailed disclosure phase) and the appeal options considerably more limited. The parties have more control over the process, in particular, the selection of arbitrators who have the specialist expertise necessary. They are also able to elect the seat of the arbitration, which determines which country's procedural laws will apply and the courts that have supervisory jurisdiction over the arbitration (potentially different to the governing law of the trust).

However, arbitration requires the consent of the parties and it would be unlikely that beneficiaries under a trust instrument would have agreed to be bound by any arbitration provisions contained therein. And how do you bind minors and unborns? Moreover, there is an obvious friction between arbitration and the Court's supervisory jurisdiction over the administration of trusts including the power to intervene to protect beneficiaries' interests.

The recent case of Grosskopf v Grosskopf [2024] EWHC 291 (Ch) provides insight into the current position in the English courts to trust arbitration.

This was a claim seeking the appointment of a judicial trustee. The claimant, Chaim Grosskopf, and the defendants, Yechiel Grosskopf and Jacob Moshe Grosskopf are all beneficiaries of a trust settled by their father on 22 March 1974. Yechiel and Jacob are also the current trustees of the Trust. A dispute had arisen around allegations that the trustees had acted in breach of their duties and may be dishonest. Chaim had entered into an arbitration agreement with the trustees for the disputes to be determined by the Beth Din of the Federation of Synagogues. However, Chaim was not satisfied with the Beth Din proceedings and subsequently issued the claim in the High Court for the trustees to be replaced by a judicial trustee.

Yechiel and Jacob applied to stay the claim under section 9 of the Arbitration Act 1996 or alternatively to strike out the claim as an abuse of process. Chaim said that the stay should be refused because the power to appoint a judicial trustee only lay with the courts, and not an arbitral tribunal.

Master Clark stayed the court action and allowed the arbitration to proceed. He noted that Section 9 of the Arbitration Act provides, so far as relevant:

Stay Of Legal Proceedings.

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

…

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

He found that Chaim was bound by the court's previous determination as to the scope of the Tribunal's jurisdiction, and that in any event he was estopped from alleging that the matter in the claim fell outside the jurisdiction of the Tribunal.

As to the submission that the claim was incapable of arbitration because the power to appoint a Judicial Trustees is only exercisable by the court, Master Clark noted that there is no English authority directly on this point but made reference to the Privy Counsel decision in FamilyMart China Holding Co Ltd v Ting Chaun (Cayman Islands) Holding Corporation [2023] UKPC 33 which held that even though the Tribunal had no power to make a winding up order, the question of whether the shareholder relationship had broken down was arbitrable. Thus the fact an arbitrator cannot grant a particular relief does not the make the substance of dispute incapable of arbitration.

Master Clark highlighted the court's supervisory jurisdiction but said that it had to be invoked and that it is not exercised on the court's own initiative. He said that trustees are frequently appointed and replaced outside of court and that where beneficiaries make a complaint about a trustee, this can be addressed by the trustee stepping down without any reference to the court. He said that some of the beneficiaries may never be involved in the dispute.

The current position in this jurisdiction is therefore that a wide range of internal trust disputes are, in principle, capable of being resolved through arbitration. However, that is not to diminish the ongoing supervisory role of the court in the administration of trusts.

Each matter will need to be considered on a case by case basis when seeking to determine if arbitration is a suitable means of seeking to resolve a dispute.

In Grosskopf the parties had already entered into an agreement to arbitrate. The judgment does not deal with the alternative and nor does it look at how beneficiaries that are not party to an agreement will be bound precluding them from pursuing separate legal proceedings.

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FIRESIDE CHAT

Charles Russell Speechlys

Authored by: Jennifer Ronz (Legal Director) and Sarah Moore (Senior Associate) - Charles Russell Speechlys

Jennifer: To open this chat, I will invite Sarah to recap what a data subject access request is and why it can be a powerful tool in trust disputes.

Sarah: Under the UK General Data Protection Regulation (the GDPR) and the Data Protection Act 2018 (the DPA 2018), individuals are entitled to know what personal data is being held on them by a data controller; the purposes for which the data is collated and processed; and who has access to, or is the recipient of, the data. You can request this information through a data subject access request (DSAR). Both trustees and their advisers are data controllers and therefore need to comply with DSARs from a trust beneficiary. This can create a tension with trust law principles because certain types of trust information are generally considered confidential, and not disclosable to beneficiaries as of right. This includes documents and information evidencing trustees' deliberations in exercising their discretion, and the reasons for their decisions (Londonderry documents). Data protection law does not exempt Londonderry documents from disclosure, and so potentially broadens the scope of trust information that a beneficiary can access.

Dawson-Damer was a landmark case in this area. As one of the lawyers who represented the data subjects in that case, can you tell us the main takeaways?

Jen: This involved the prior version of this data protection legislation, the Data Protection Act 1998 (the DPA 1998) and the DSAR was used by the beneficiaries to gain access to information about them held by offshore trustees' UK solicitors (Taylor Wessing). In this case, Taylor Wessing relied at first instance, on the exemption in the DPA 1998 (which is replicated in the DPA 2018) that protects documents which attract legal professional privilege (the LPP Exemption). At first instance, the High Court agreed with Taylor Wessing's argument that the LPP Exemption was intended to encapsulate all the rights of a trustee to resist disclosure, including its rights to withhold documentation under Bahamian law (where the trust was located) and under Londonderry. The Court of Appeal overturned the High Court decision and ordered Taylor Wessing's compliance with the DSAR, interpreting the LPP Exemption more narrowly to include only that which strictly attracts privilege under English law. Thereby establishing that the principles of data protection, to an extent, trump those of trust confidentiality between beneficiaries and trustees, including in respect of Londonderry documents. My main takeaway was that although applying

an exemption may appear a safer path than refusing outright to comply with a DSAR, all decisions to rely on any exemption should be documented, fully understood and informed from a cross jurisdictional perspective, and consistently applied and the trustee / data controller should be prepared to share withheld documentation (in unredacted form) with the Court / Data Protection Regulator if it is asked.

Dawson-Damer paved the way for potential seismic changes in the legal landscape. Can you comment on those and how it effects your practice?

Sarah: Yes, the response to the case has been dynamic and varied in different parts of the trust world, including changes to the law. In the UK, amendments to the DPA 2018 now give trustees' lawyers a strong footing not to disclose confidential information when faced with a DSAR from a beneficiary (cf Dawson-Damer). As for trustees, it has been suggested that they may be able to rely on the amended exemption in Article 15(4) of the GDPR to withhold Londonderry documents. The Article now exempts a person from complying with a DSAR where to do so would "adversely affect the rights and freedoms of others". This may include rights of confidentiality attaching to trustee processes.

I have found that this untested issue opens up dispute when making or responding to DSARs. It can be argued that trustees, as data controllers, are expected to employ systems which allow them to comply with DSARs, rather than relying on exemptions. This does not necessarily require wholesale disclosure of documents (as opposed to information). There is usually a way to address a beneficiary's concern regarding their data, without trampling on a trustee's freedom to exercise the discretionary powers given to them by the settlor, confidentially.

Jen: Interestingly, Bermuda, the British Virgin Islands and the Cayman Islands have each introduced data protection regimes in recent years which align with global data protection standards. These regimes are constantly being updated and penalties for non-compliance include fines and/or imprisonment. It is crucial for trustees (and their advisers) to be aware of the applicable laws and regulations in relation to the collection, use and retention of personal data to ensure compliance. It is also notable that in some offshore jurisdictions, such as Guernsey, beneficiaries making a DSAR under the relevant data protection law, will not in theory obtain anything under data protection law which they cannot obtain under trust law (see for example section 16B of the Data Protection (Bailiwick of Guernsey) Law, 2017 which cross refers directly to section 38 of the Trusts (Guernsey) Law 2007).

What are your hot tips to secure the most informative response to a DSAR, when acting for a beneficiary?

Sarah: My top tips are:

1. Where possible be targeted in scoping your DSAR as this will make it more difficult for a data controller to refuse. For example, consider defining your timeframe, categories of data and search terms.
2. Beneficiaries and their advisers will benefit from a good understanding of where and how data is located and used, to identify opportunities to employ DSARs. This includes being aware of the increasing application of artificial intelligence so you can ask the right questions.
3. If a response to a DSAR is unsatisfactory, interrogate it further with reference to legal principles in the GDPR. If information appears to be missing, has the search covered all bases? Were call recordings included as well as document archives for example? The Information Commissioner's Office can review complaints and tell a data controller to take action. Beneficiaries also have recourse to the Court.

And what would you say on the trustee's behalf?

Jen:

4. Trustees should in general be aware of the applicable laws and regulations in relation to the collection, use and retention of personal data to ensure compliance and what that means in practice (i.e. practically consider how files are organised and retained, whether documents also contain details of third parties so is 'mixed data') and hold in their minds when making decisions in the first place, the knowledge that beneficiaries have greater potential to access the trust's records, to help ensure their actions are not the subject of litigation and DSARs.
5. Take steps to fully understand what a DSAR is, when it can be used, how it should be responded to and the timeframe for any response, including an assessment of whether it is manifestly excessive or unfounded, and apply exemptions with care.
6. Consider Parliamentary / political discussions and industry guidance in relevant jurisdictions (i.e. in the Hansard debates on the Data Protection Bill in the UK, the Government took the view that information subject to the Londonderry non-disclosure principle cannot be obtained via a DSAR).

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WHAT DOES THE ASSISTED DYING BILL MEAN FOR THE RULE ON FORFEITURE?

AN EXAMINATION OF CASE LAW AND STATUTORY DEVELOPMENTS FROM 2024

Authored by: Henrietta Mason (Senior Counsel) and Meabh Kirby (Associate) - Farrer & Co

Whether terminally ill people should have the right to medical assistance to end their lives has long been debated in the UK. Assisted dying is once again up for public discussion, with the introduction of Kim Leadbeater's Private Member's Bill, The Terminally Ill Adults (End of Life) Bill, more commonly known as the Assisted Dying Bill (the Bill).

The Bill proposes to legalise assisted suicide for "terminally ill adults" in prescribed circumstances.

Although suicide was decriminalised in 1961, the current position, unless and until the Bill is enacted, is that assisting someone in taking their own life is an offence under s2 of the Suicide Act 1961 ("the 1961 Act"), carrying a maximum prison sentence of 14 years. The operation of s2 is mitigated by s2(4), whereby a prosecution under this section cannot take place without the consent of the Director of Public Prosecutions (DPP).

The Bill passed its second reading in the House of Commons on 29 November 2024. This is just the first hurdle, and it will face many more months of scrutiny in order to become law.

Forfeiture Rule

A lesser-known facet of the laws on assisted dying is the operation of the forfeiture rule. The Forfeiture Act 1982 (the Forfeiture Act) applies to offences under the 1961 Act s.2(1). It provides that any person who has "unlawfully killed" another person is barred from acquiring a benefit from that person's death. This includes any kind of financial or proprietary benefit obtained under a will (or intestacy).

This year, for example, we saw the Leeson v McPherson case. In this case, a husband was blocked from inheriting his deceased wife's estate of £4.4 million, following her death by drowning in the swimming pool of a Danish holiday cottage where they were staying. There was not enough evidence in the criminal trial of the case for Donald McPherson to be convicted of Paula Leeson's unlawful killing. In the civil trial, however, Mr Justice Smith was satisfied that on the balance of probabilities Donald McPherson was guilty. He was therefore barred from acquiring any benefit under Paula Leeson's will, intestacy or any property held by her under a joint tenancy.

This case perfectly demonstrates the need for such a rule.

And in most cases the public policy need is clear. However, the rule on forfeiture can give rise to difficult and emotionally charged situations when applied to relatives helping terminally ill family members access assisted dying. Unless relief is granted by the court, the surviving relative can be prevented from receiving any benefit from the deceased's estate.

Reported cases under the forfeiture rule are very rare, even more so where they interrelate with the issues being addressed by the Bill. Despite this, we have seen not one but two reported judgments on this issue in the past year.

Morris v Morris, Shmuel and White [2024] EWHC 2554 (Ch)

Background

The claimant's wife, Myra Morris (Myra), suffered from Multiple System Atrophy. As a result of her condition, Myra made the decision to end her life at a clinic in Switzerland. Myra's husband Philip Morris (Philip) reluctantly helped her carry out the necessary arrangements for this. Philip also took advice on the administrative actions that he would be taking to assist Myra, which included witness statements from Myra and her solicitor as to her settled intention, and accompanying her to Switzerland, in order to ensure that he was unlikely to be prosecuted under s2 of the 1961 Act.

When Phillip returned from Switzerland to England, he reported Myra's assisted death to the police, where he was informed that there was "nothing to report" and that he would not face prosecution. Unfortunately, however, Philip had not been made aware of the existence of the rule on forfeiture.

It was not until February 2024, when arranging for the administration of Myra's estate, that Philip learned that he would need to apply for relief from forfeiture in order to inherit Myra's residuary estate under her will.

Decision

The High Court granted Philip's application for relief in full. Having analysed each of the sixteen factors listed in the DPP's "Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide", the judge found that Philip made a clear and compelling case for relief, taking into account both his conduct and that of Myra.

In particular, the judge placed weight on Myra's determination to end her own life. In contrast, Philip's reluctant assistance was found to be "wholly motivated by compassion".

The judge also considered the question of whether Myra's children could fall within scope of the forfeiture rule, through the action of accompanying Myra to the Swiss clinic. The judge acknowledged that while such actions could in theory be capable of amounting to "assistance" or "encouragement" under s2 of the 1961 Act, the children's actions did not meet the threshold in this case; the children were found to act merely as "comforters" rather than providing tangible assistance.

The decision is Morris shows that:

- Accompanying a person abroad in circumstances where that person seeks to end their life does not necessarily amount to an offence.
- Nevertheless, persons who have accompanied the deceased abroad for that purpose may need to be joined as parties to the proceedings.

Withers Trust Corporation v Estate of Goodman [2023] EHC 2780 (Ch)

Withers Trust Corporation v Estate of Goodman provided another important example on the forfeiture rule's operation in the context of a "mercy killing".

Facts

Hannah Goodman (Hannah) suffered from terminal lung cancer. After several unsuccessful rounds of treatment, Hannah developed a settled and clear intention to end her life. Unlike in Morris, however, the pandemic prevented Hannah from travelling to Switzerland. Hannah's husband Adrian Berry (Adrian) therefore assisted her with carrying out her decision.

Following Hannah's death, Adrian was appointed as executor of her estate, under which he was also sole beneficiary. Adrian passed away two years after Hannah and before the administration had finished, leaving Wither's Trust Corporation (the Claimant) appointed as executor of his estate.

Subject to Adrian's interest, Hannah had provided for her residuary estate to be held on a discretionary charitable trust. Adrian's will also left his estate to a charitable trust with a similar charitable purpose to that of Hannah's.

Due to the ambiguous drafting of Hannah's will however, her charitable gift failed to qualify for the charitable tax exemption.

On the other hand, no such issue arose in Adrian's will, meaning it would attract the relevant exemption. Therefore, if Adrian was able to inherit Hannah's estate under her will, both couple's estates would pass to their preferred charity free of Inheritance Tax.

The role that Adrian played in Hannah's death meant that, without relief, the forfeiture rule would operate to bar him from inheriting anything. If Adrian did not inherit, Hannah's estate would be subject to a large Inheritance Tax bill, which would correspondingly detract from the value of the couple's intended charitable gifts.

Withers Trust Corporation brought Part 8 proceedings for relief from forfeiture, in an attempt to avoid the significant tax consequences for the charitable legacies. Recognising Adrian's minimal moral culpability and compassionate motivations, the High Court granted the application for relief and the spouses' gifts to charity were made, free of Inheritance Tax.

Assisted Dying Bill

Recent public discourse suggests that the laws in this area are ripe for reform. As currently drafted, the Bill will allow for certain terminally ill persons (with six months or less to live) to legally end their lives, if they meet the following requirements:

- The person must make two declarations, which are both witnessed and signed, confirming their settled and informed wish to die.
- The person must undergo assessments by two independent doctors who are both satisfied the person is eligible under the Bill.
- A High Court judge must then make a declaration to confirm they are satisfied that the legislative requirements have been met. The High Court may also choose to hear from and question the person who has made the application, as well as either of the two doctors, before making a decision.

Kim Leadbeater has described the Bill as having some of the strictest protections and safeguards of any "assisted dying" legislation found anywhere in the world.

Under the Bill, provisions are inserted into the Suicide Act 1961 at new section 2AA which provides relief from liability, or alternatively a defence, for a person who assists someone in ending their life in accordance with the Bill's provisions. If there is no offence under the Suicide Act 1961, it follows that there is no unlawful killing under the Forfeiture Act and therefore no debarment from inheriting under the deceased's estate.

However, the Bill is still in its early stages and is liable to undergo further amendments before becoming law. The interaction between the Bill and the Forfeiture Act will likely require further consideration. It is worth noting that those who do not meet the very high threshold in terms of legislative criteria and prescriptive inbuilt safeguards within the Bill risk falling foul of the rules on forfeiture.

Conclusion

For now, and until implementation of the Bill, the laws on forfeiture continue to apply to all cases of assisted dying.

Those considering assisting relatives in accessing assisted dying should therefore take legal advice on the terms of the Suicide Act 1961 and the financial consequences of the forfeiture rule, and act promptly when making an application for relief to the court.

This publication is a general summary of the law. It should not replace legal advice tailored to your specific circumstances.

This article was first published by Farrer & Co. in December 2024 at farrer.co.uk

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A CAUTIONARY TALE

PAYNE HICKS BEACH

SETTLEMENT, BUT NOT AT ANY PRICE

Authored by: Charlotte Henshall (Legal Director) - Payne Hicks Beach

Reaching a settlement in any type of dispute is often the result of a long, arduous mediation that stretches well into the small hours of the morning. However, whilst a lot of effort has been made by clients and their advisors alike to reach this point, the hard work does not stop there. On the contrary, documenting the settlement is a crucial yet often overlooked step in the process and it is here that many settlements can unravel.

Contentious trusts claims are notoriously complex and involve a number of parties whose views need to be represented.

In haste to document the settlement, failing to consider important factors including tax, binding all necessary parties, and seeking any required Court orders can lead to future costly issues and disputes.

The recently decided case of Blower v GH Canfields LLP [2024] EWHC 2763 is a cautionary example of the importance of identifying such key considerations. Mrs Blower brought a professional negligence claim against solicitors, GH Canfields LLP. In 2015, the firm had acted for Mrs Blower, her husband, Mr Blower, and their two adult children. Mr Blower had been declared bankrupt and his trustee in bankruptcy had issued claims against all four members of the Blower family, alleging that they had made transactions at an undervalue. At a mediation, GH Canfields took instructions from Mr Blower on behalf of the family, as a result of which a settlement agreement was entered into whereby the family was to pay £1.5 million in settlement of all the trustee's claims including Mr Blower's immediate discharge from bankruptcy. The settlement was secured partially by charges on properties.

Days later, however, Mr Blower telephoned GH Canfields explaining that he needed to renege on the settlement agreement because of family members who considered that the charge on the properties belonging to them would affect their income.

In her later claim against GH Canfields, Mrs Blower alleged that (i) the firm was negligent in the conduct of its retainer, in particular with regard to entering into the settlement, and had accordingly caused her and her daughter loss, and (ii) if they had been properly advised, they would never have agreed to the settlement agreement signed on their behalf.

Mrs Blower's claims ultimately failed on liability and causation. The Court found that GH Canfields acted reasonably in taking Mr Blower's instructions as those of the family, and the advice provided with regard to settlement was in line with that of a "reasonably competent and diligent solicitor".

Nevertheless, this case serves as a cautionary tale to legal advisors seeking to settle matters on behalf of their clients and the importance of taking a proactive approach to settlements.

In the lead up to a potential settlement of contentious trusts matters, it is imperative to prepare for settlement and there are a number of factors to consider.

Are All Parties Bound?

Although a simple point, trusts often involve a number of beneficiaries who will need to be bound by the terms of the settlement reached, and it is important to consider whether those parties are adequately represented and/or have the capacity to be bound.

If not, it may be necessary to seek representation orders under Part 19 of the Civil Procedure Rules. This provision allows the Court to appoint an individual to represent a person/persons including those who (a) are unborn; (b) cannot be found; and/or (c) cannot be easily ascertained. It is common for "issue and remoter issue" to be included within a class of beneficiaries, such that representation orders are frequently required in order to settle these types of disputes.

Similarly, in any dispute that involves a child or a protected party (meaning a party who lacks capacity within the definition under section 2(1) of the Mental Capacity Act 2005), it may also be necessary to apply to the Court under Part 21 of the Civil Procedure Rules to appoint a litigation friend in order to bind that individual to the terms of the settlement.

The court's approval is required to settle a claim involving any party who is acting as a representative under CPR 19 or as a litigation friend under CPR 21.

An application will therefore be required, usually in the form of a blessing application by the trustees (by way of Part 8 claim) under CPR 64. The court may approve a settlement where it is satisfied that it is for the benefit of all of the represented parties, and bind all of the represented parties to that settlement.

It is also common for charities to be included within a class of beneficiaries under a discretionary trust. If this is the case, in order to settle a matter, it may be necessary to write to the Attorney General's Office (representing the public interest in a charity and in charities generally) ahead of any blessing application to ascertain whether the Attorney General wishes to participate in the proceedings to represent the interests of the charities. In most cases, the Attorney General will not wish to be joined but will be asked to be kept apprised of the proceedings.

Tax Considerations: Planning Ahead

Tax implications frequently form a central part of trust disputes but are often an afterthought when it comes to settlement, with the potential for significant adverse financial consequences. It may be that the settlement reached requires a restructuring of the trust(s) involved and/or that the trust assets include shares or properties that are being transferred. It is therefore prudent to ensure that tax colleagues are on standby and available to advise both before a settlement in principle is reached and during the drafting of the settlement terms.

Draft Settlement Agreement

Although it may seem optimistic at the time, it is often prudent to prepare a draft settlement agreement ahead of any mediation.

This has the advantage of focussing the mind on what the key areas of settlement and mechanics are likely to be and can pre-empt potential stumbling blocks prior to settlement so that a proactive approach can be taken.

Conclusion

There is often significant pressure on the parties and their advisors to bring an end to the financial and emotional cost of a dispute at the earliest opportunity. As the Blower case illustrates, however, it is imperative not to allow the promise of settlement to cloud a calm, cautious assessment of what is required to ensure that further disputes will not arise in the future.

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60 SECONDS WITH... EMMA PARKER FOUNDER AND MANAGING DIRECTOR SIDEKICK

Q What Has Been The Best Piece Of Advice You Have Been Given In Your Career?

A "Your network is everything".
Networking has been the single biggest driver of my career and life choices. Every single opportunity I've had, whether it's winning new clients, launching my business, or hiring the right team members has come from the people I've met and the relationships I've built. For me, networking isn't about collecting business cards, adding names to a CRM database or making small talk at events. It's about creating genuine connections, finding people I trust, and surrounding myself with people who interest, inspire and challenge me and then just trusting that process. The right conversation at the right time has opened doors I didn't even know existed. It's about being open and curious and finding your tribe - then enjoying the ride.

Q What Motivated You To Pursue A Career In Law?

A Much like Jonathan Reynolds MP, I was not a solicitor. My mum wanted me to be a lawyer, but I had other ideas. However, she might have been onto something, as I have worked with lawyers and law firms for more than 20 years now. I stumbled into my first law firm marketing job, after a few lively years working in advertising and PR agencies, and soon realised that it was a good place to be. Reasonably well paid and secure; I was surrounded by brilliant, clever people; and crucially I could bring my personality, creativity and love of networking to the table and make a real impact. It never felt difficult, I felt at home in the law firm environment, and people seemed to appreciate and admire what I brought to the party.

Q What Do You See As The Most Rewarding Thing About Your Job?

A Working with brilliant talented people who make me laugh – I'm lucky that I have chosen my Sidekick team carefully– Lisa and Kelly are both exceptionally loyal, talented, hardworking and hilarious. They both bring something very different to the party, and we have created a stellar trio of marketing mastery. Then we have our trusty team of creatives, developers and strategists who surround us with their magic and make our clients shine.

Q What Was The Last Book You Read?

A I'd love to say it was an amazing Japanese novel that challenged my thinking. In reality, it was probably something by Marianne Keyes that made me feel good and was an easy read and a bit of escapism. Either that or something about the latest A-Level study skills techniques to help my daughter, Jess, with her exams this year.

Q What Are You Looking Forward To In 2025?

A We have big plans at Sidekick this year – we are launching three new service lines.
A Fractional CMO service – where one of our team goes into firms that don't have C-suite marketing leadership and we give them access to that level of knowledge and expertise without the costs associated with a full time employee.
A LinkedIn management solution – we do this already for retained clients, but are widening the net to other firms that just want our support with LinkedIn. We are focused on individuals within firms who want help growing their personal brand in the market. Our Head of Content, Kelly, is taking the lead on this and she is a fountain of knowledge.
Finally, we are launching an awards and legal directories solution for firms who are tired of losing hours of time and effort on this process – we will take the load and project manage everything for you from beginning to end using our many years of experience writing submissions for law firms, trust companies, banks and wealth management firms.

Q Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

A I don't make new year's resolutions – I make plans. Resolutions can be vague and quickly fade, but plans involve more intention and action. This year I'm planning to bring my long-term and "the OG" Sidekick, Lisa Thornton, into the business ownership. She will become a shareholder and take on more responsibility for client services and the future direction of the business. This is in recognition of the role she's played over the last 4 years in growing the business and cementing some important client relationships… and because she works harder than anyone I know!

Q What Is The One Thing You Could Not Live Without?

A There is definitely more than one!
My family, my dog (Dave), my tribe (my old friends from Newcastle who know everything about me), my BVI and Cayman friends who became family… and finally my home and the feeling I get when I walk through the front gate and my shoulders drop.

Q What Does The Perfect Weekend Look Like?

A Being at home in Cheltenham with my family. Making coffee and going in our hot tub, pottering in the garden, taking our dog for a walk on Cleeve Hill, having dinner out with our friends and ordering cocktails, Sunday lunch in our dining room with the fire on, a trip to the shops with my daughter, a coffee in Montpellier or a trip to the Everyman Cinema with my husband Marcus.

Q What is something you think everyone should do at least once in their lives?

A Go to India. I went to India just before COVID and it completely changed my perspective on life and what mattered to me. It's such a mid-life cliché, but it changed the way I thought about everything and it gave me such clarity on what I wanted to do next. So, if we are stuck in a rut, go to India!

Q If You Could Give One Piece Of Advice To Aspiring Practitioners In Your Field, What Would It Be?

A "Are you sure you don't want to be a lawyer?!" Joke.
Think carefully about who you work for. The people you work for are far more important than the roles you take in your early career. The right mentor, the right boss, the right team can be transformative and propel your career. Work hard on building your network and be nice. It will take time to pay off, but in time you will have a network that means you have everything you and your employer could need at your fingertips – a text or a call away. It's invaluable.
Be memorable – be known for something. Quite early in my career I became the B2B marketing expert who specialised in law firm marketing. I stuck with that niche and it made it easier for people in the professional services industry to understand what I did and say yes to hiring me.

Q What Legacy Would You Hope To Leave Behind?

A I wouldn't. I mean, I've done marketing. It's not rocket science.
I'd just like people to think I did a good job, was a proper person, a fair boss and a good colleague.

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With, And Why?

A He's not famous, but he's the person I'd most like the have dinner with. My dad, who died 18 years ago, which was far too soon. I'd love to have dinner with him one more time.

OFFSHORE TRUST DISPUTES 2024

THE YEAR THAT WAS

Authored by: James Sheedy (Partner), Andrew Peedom (Counsel) and Emma Taylor (Senior Associate) - Collas Crill

2024 was another lively year for offshore and onshore contentious trust practitioners.

Supervisory Jurisdiction

In Cayman the Grand Court in AA v JTC (FSD 12/2024 (IKJ)) has, for the first time, set down the principles applicable to an application by an enforcer under Cayman's STAR trust regime for the Court's approval of a 'momentous' decision in relation to the proposed exercise of the enforcer's fiduciary powers.

The Court will consider whether:

- the trustee and enforcer have the power to enter into the proposed transaction;
- the trustee and enforcer have genuinely concluded that the proposed transaction is in the interests of the trust and the objects of the trust;
- a reasonable trustee or enforcer would arrive at the relevant conclusion; and
- the trustee and enforcer have any operative conflict of interest in the proposed transaction.

The Guernsey decision in BX v T [2024] GRC 036 involved testing the principles established by the Privy Council in Schmidt v Rosewood concerning the rights of non-beneficiaries (who are so proximate to the beneficial class as to effectively make them beneficiaries in all but name) to invoke the supervisory jurisdiction of the court to require a trustee to make disclosure of certain documents.

Ultimately, the Guernsey Royal Court dismissed the applications on the basis that:

(i) the applicant non-beneficiaries' prospects of success to require disclosure had to be 'overwhelmingly strong', and were judged not to be; and

(ii) in any event, the purpose for which the disclosure was sought was not sufficiently connected with the administration of the Trust to justify disclosure to 'outsiders'.

The BX v T decision also includes some interesting commentary on the approach of the Guernsey Royal Court to the recoverability of the costs of foreign lawyers in Guernsey proceedings. If that approach is replicated elsewhere, we may see costs having a greater prominence in the offshore jurisprudence.

This case was followed by a decision in Jersey, Judge v CSC [2024]JRC233 concerning whether objects of a discretionary power to add to a class of beneficiaries could bring proceedings against a trustee for its failure to add them, with leave being granted to pursue the claim. Both cases explore the latitude and limits of the supervisory jurisdiction following the Privy Council in Schmidt.

Trust Documents

In G Trust (FSD 270/2023 (IKJ)) the trustee of a Cayman STAR Trust applied to the Cayman Grand Court for Beddoe relief. That followed an application by hostile beneficiaries to the Hong Kong Court, which challenged the validity of a change of appointor and the transfer of trust assets from a Hong Kong discretionary trust to a Cayman STAR Trust.

Although it was a STAR Trust and information and documents relating to it usually only had to be provided to an enforcer (who was the only person with standing to enforce the trust), the trustee chose to join the beneficiaries and provide them with all information relating to the application.

That way, the beneficiaries could be heard and it would ensure they were bound by any decision of the Cayman Court.

Family Provision

In a rare intervention, the Jersey Court of Appeal in Mauger v Mauger [2024] JCA 197 has set out the principles applicable to the defence of rester sur ses avances in respect of a claim for rapport à la masse to uphold Jersey's forced heirship regime.

Jersey's succession law operates a forced heirship regime known as légitime in respect of a testator's moveable estate, under which there is only testamentary freedom to dispose of 1/3 of the moveable estate, the remaining 2/3 being reserved for the testator's heirs at law. The Court of Appeal has resolved an ambiguity in the law, confirming that where lifetime gifts to the heirs exceed the 2/3rs – that excess to be accounted for to the other heirs.

Unlike in England, where the court can resolve disputes about whether a will makes reasonable provision under the Inheritance (Provision for Family and Dependants) Act 1975 after death, Jersey's approach is to fix the entitlement in advance of death and uses the principles of rapport à la masse to allow the heirs to police the distribution of the estate to protect their légitime rights.

The major development in respect of 1975 Act claims for 2024 was the long-awaited UK Supreme Court's decision in Hirachand [2024] UKSC 43, confirming that uplifts and success fees charged under CFAs are not an expense that the court should have regard to when making reasonable provision under the Act.

Mauger has direct application only in Jersey but is potentially also relevant to Guernsey inheritance disputes which, for wills that pre-date 2012, are subject to similar Norman customary law principles. Having since moved to a regime similar to England's 1975 Act arrangements, Guernsey's Royal Court has yet to rule on a contested application for reasonable provision.

Forfeiture And Assisted Dying

A lively area of public policy and law reform in the coming years is likely to include the impact of assisted dying on estate planning and inheritance disputes – particularly around issues of forfeiture.

Legislation to bring about assisted dying is making its way through the UK Parliament and Jersey's government has indicated it will likely propose a legislative framework towards the end of 2025 following extensive consultation.

Privacy

Many types of trust proceedings conducted offshore are heard in private which is widely regarded as a positive for many clients involved in private wealth disputes.

A number of offshore cases have touched on the issue of privacy:

In Guernsey, the Court of Appeal in Salem v Sequent [2024] GCA064 (an appeal from private trust proceedings concerning recusal) has made clear that while first instance proceedings may be in private, there is no guarantee privacy will be extended to the appeal and material which the party might prefer remain behind that veil of privacy (like failing to obtain a blessing as a professional trustee) might be made public.

In Jersey, a decision of the Royal Court arising from conjoined variation and blessing application has made clear that where the effect of the variation (and in this case blessing) was to deprive HMRC of tax that would otherwise fall due in the future (even if no tax was due

at the point of the application), HMRC should nevertheless be put on notice of the proceedings. While HMRC rarely intervenes, this represents an extension of the well established principle that HMRC is notified in Mistake/Hastings Bass-type applications where the mistake sought to be reversed has in fact generated a tax charge or tax consequence.

Perpetuities

2024 has seen the somewhat dry topic of perpetuity in the spotlight; Cayman having abolished its rule against perpetuities and Jersey having discovered what it's rules of perpetuity were before 1984.

The groundbreaking decision of the Jersey Royal Court in Mattas [2024] JRC068 has revealed that before the enactment of Jersey's modern trust legislation, Jersey law trusts were subject to the old common law rule against perpetuities (unamended by the UK's 1964 legislation).

This is a decision likely limited to its unusual facts but the applicability of an unreformed and highly technical 'rule against the remoteness of vesting' will remain a potential trap for the unwary for those dealing with old Jersey structures.

Looking Ahead To 2025

As well as legislative developments on assisted dying in both the UK and Jersey, Jersey is also likely to amend the Trust (Jersey) Law for a nineth time following a 2024 consultation to address, among other things, the impact in Jersey of the 2020 Guernsey decisions in Rusnano concerning the 'rule in Saunders v Vautier.

Onshore there appears to be no let-up in the frequency of Inheritance Act 1975 challenges before the English courts which have been enjoying a renaissance in recent years.

Issues concerning capacity and its impact upon the administration of trusts (both onshore and offshore) are expected only increase in number and frequency.

The impact of the Privy Council's decision in Wong v Grand View (concerning challenges to the exercise of trustee powers on the basis of improper purpose) continue to be felt as such challenges appear with greater frequency in litigation brought against trustees.

Lastly, we look forward to a hearing (and decision) from the Privy Council in the long running X Trust litigation from Bermuda on the 'wide vs narrow view' concerning the role and powers of protectors, which is expected this year.

In summary 2025 promises to be no less busy for private wealth litigators.

PROBATE UNDER PRESSURE

CORPORATE PARTNER

HOWARD KENNEDY

EMERGING CHALLENGES AND THE EXECUTOR'S ROLE IN 2025

Authored by: Emily Mailer (Consultant) and Brendan Udokoro (Associate) - Howard Kennedy

In 2025, the probate landscape is poised to face continued challenges as disputes show no sign of slowing down. The steady rise in contentious probate cases underscores the growing complexities of estate administration.

Claims against executors in the High Court increased by 21% in 2023, reaching 87 cases compared to 72 the previous year[1], while the total number of contentious probate disputes rose to 122 in 2023, up from 116 in 2022[2].

These statistics reveal that, what should often be a straightforward process of administering a loved one's estate is increasingly giving rise to disputes, delays, and rising costs. As 2025 unfolds, the challenges for executors and their advisers are likely to intensify. This article examines the key factors that can cause a straightforward probate process to escalate into a contentious matter and the strategies legal advisers can employ to effectively navigate these challenges on behalf of their clients.

The Rising Tide Of Probate Disputes: Our Predictions

In our view, the increase in contentious probate cases may be attributed to a combination of financial and social factors that have made estate administration more challenging and, as a result, prone to conflict. There are several factors that we consider will have an impact on contentious probate cases.

- Economic downturns, financial pressures, and rising redundancies have historically correlated with an increase in probate disputes, as individuals facing financial difficulty are more likely to rely on anticipated inheritances. We anticipate that the ongoing cost-of-living crisis is likely to contribute to a sustained rise in the number of challenges over the administration and distribution of estates.
- The increasing financial reliance of younger generations on their parents—often referred to as the "Bank of Mum and Dad"- may significantly shape the future of estate and probate disputes. Without clear documentation and communication, we may see family members dispute whether parental financial contributions were outright gifts or loans expected to be repaid to an estate on the death of a parent, for example. If a significant proportion of parental wealth is distributed during their lifetime to fund adult children's needs, there may be limited assets left in the estate, which we consider is likely to trigger disputes among heirs who expected a larger inheritance.
- The recent Supreme Court decision in Hirachand[3] which ruled that success fees under Conditional Fee Agreements cannot be included in awards for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 is likely to have significant implications for these claims. By removing the possibility of recovering success fees as part of the award, the judgment effectively increases the financial risk for claimants considering litigation under the 1975 Act and may encourage earlier settlement of cases to risk averse claimants. We expect the

1 IFA Magazine 2024: https://ifamagazine.com/21-rise-in-executors-of-wills-being-sued-in-the-high-court-87-cases-in-past-year/

2 Family Court Quarterly Statistics, 2024: https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2023

3 Hirachand (Appellant) v Hirachand and another (Respondents) [2024] UKSC 43

decision in Hirachand is likely to influence how 1975 Act claims are approached and resolved.

- Addictions, whether related to substance abuse, gambling or other dependencies, can significantly impact contentious probate cases. For example, the rise in gambling addiction, reflected in the doubling of referrals to NHS gambling clinics in recent years, adds to the executors' dilemmas. Testators may choose to exclude family members who would ordinarily expect to inherit from their estate because of concerns about financial misuse, leading to likely claims from disappointed beneficiaries.

Recent Tax Changes In Probate: What Challenges To Expect In 2025

Recent changes to inheritance tax (IHT) and tax reliefs may become a flashpoint for conflict. Notably, reforms to agricultural property relief (APR) and business property relief (BPR) are scheduled to come into effect from 6 April 2026. Under the new rules, the full 100% relief for APR and BPR will be capped at £1 million of the combined value of agricultural and business property within an estate. Assets exceeding this threshold will be eligible for a reduced relief rate of 50%, resulting in an effective IHT rate of up to 20% on the excess value.

These changes have raised concerns within the farming community, with estimates from the National Farmers' Union (NFU) suggesting that approximately 75% of UK commercial family farms could be affected[4]. Farmers argue that, while they may hold valuable assets, they often lack liquidity, potentially forcing the restructure or sale of farmland to meet tax obligations. This situation has led to widespread protests, reflecting fears that the reforms could threaten the viability of family-run farms.

Additionally, from April 2027, most unused pension funds and death benefits will be included within the value of a person's estate for IHT purposes. This change could result in significant tax liabilities for beneficiaries, with combined income tax and IHT rates potentially reaching up to 76% on inherited pension funds[5].

These changes introduce new challenges in estate planning and administration. Executors must navigate these complexities carefully, as mismanagement or misunderstandings related to tax liabilities can become significant sources of contention among beneficiaries. in our view, proactive communication with beneficiaries and taking professional advice are essential to mitigate potential disputes arising from these developments.

Executors In The Spotlight

The growing number of claims against executors and the rise in probate disputes generally in our view highlight a clear trend: executors are increasingly finding themselves under the spotlight and at the centre of probate disputes. Many executors, particularly those without professional legal experience, underestimate the complexity of the executor role and the potential for conflict.

As the role of executors becomes increasingly complex, disputes between executors and/or beneficiaries are emerging as a growing trend in contentious probate matters. Looking ahead, it is our view that we are likely to see a rise in applications for independent administrators, particularly in estates involving high-value or complex assets.

For executors, this highlights the importance of clear communication and collaboration, as well as the need to seek early professional advice to avoid reaching an impasse.

The executor's role, once largely administrative, has now evolved into one requiring acute diplomacy, financial acumen, and a clear understanding of legal obligations and fiduciary duties.

Preserving Harmony In Probate: Prevention And Resolution

To navigate these challenges, executors must take a proactive approach to their duties in our view, executors should consider the following steps to help minimise the risk of disputes:

- **Seek Professional Advice Early:** Executors should not hesitate to consult solicitors or tax advisers where needed. This proactive step can help ensure compliance with legal and tax obligations and reduces the risk of errors by executors that could trigger disputes.
- **Teaming up:** In today's increasingly complex probate landscape, executors are often faced with administering estates that include unusual or specialised assets, such as cryptocurrency, fine art and intellectual property. Managing these types of assets requires expertise making it crucial for executors to assemble a team of specialists to guide them. Building an appropriate advisory team not only protects executors from potential liability but also fosters transparency and confidence among beneficiaries.
- **Communicate Transparently:** Keeping beneficiaries informed about the progress of the estate administration is critical. Clear and regular updates about valuations, distributions, costs and timelines can prevent misunderstandings and build trust.

Closing Reflections For 2025 And Beyond

Looking ahead, 2025 represents both a challenge and an opportunity. The evolving inheritance tax landscape has introduced new financial and administrative complexities. These challenges, coupled with rising estate values and increasingly intricate family dynamics, mean that the potential for disputes continues to grow.

However, advisers have an opportunity to provide proactive, solutions-oriented strategic guidance, helping executors anticipate and address potential issues before they escalate.

4 https://www.nfuonline.com/updates-and-information/an-impact-analysis-of-apr-reforms-on-commercial-family-farms/
5 https://www.ft.com/content/ca4ffbeb-7437-4cbf-97d4-96633615e75c

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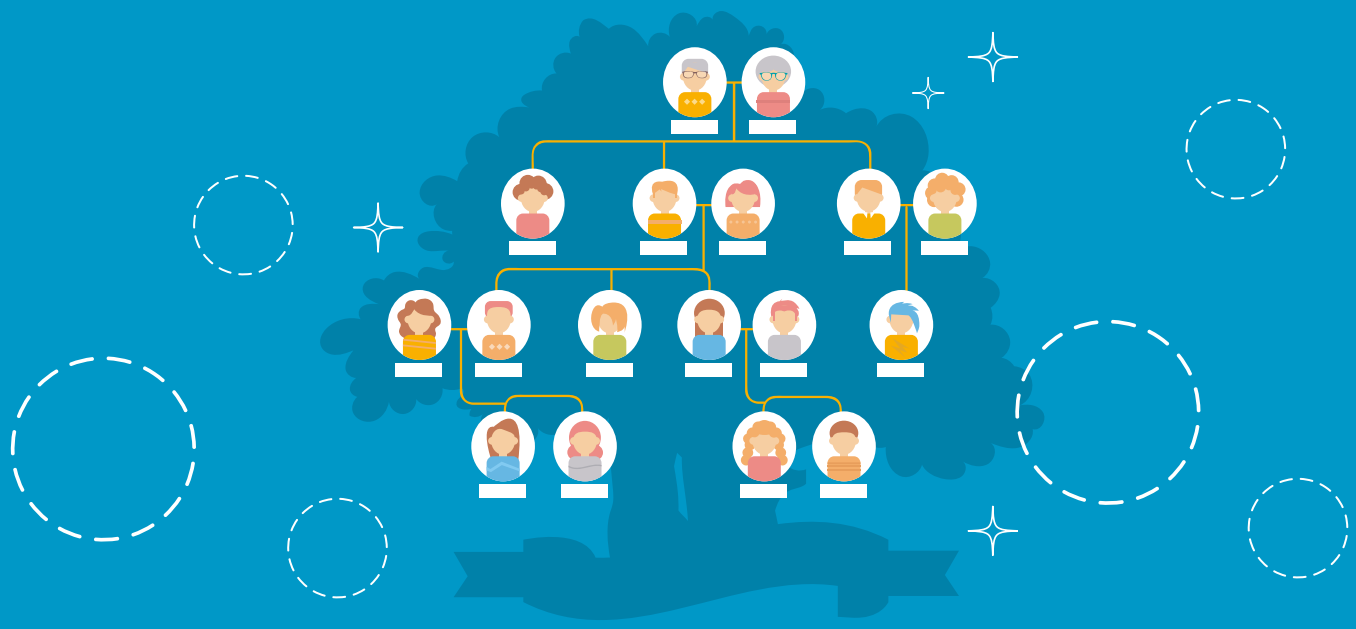
TRUSTS AND DYNASTIC PLANNING



LETTERS OF WISHES AND THE LIMITS OF TRUST FLEXIBILITY

Authored by: Robert Avis (Partner) and Molly Tatchell (Associate) - Charles Russell Speechlys SA (Geneva)

Letters of wishes are (nearly) always expressed to be non-binding.

So, what purpose does a letter of wishes serve if trustees are not bound to follow it?

In this article, we look at the role of letters of wishes (and subsequent updates) in the administration of trusts, including questions of capacity to express wishes and the weight that trustees need to give to them.

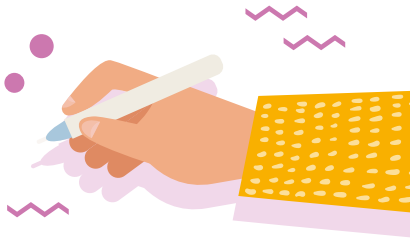
Flexibility

Whether or not a beneficiary of a discretionary trust does in fact benefit from the trust is generally (and depending on the precise terms of the trust) up to the trustees' discretion – the beneficiaries have a "mere hope" of becoming the object of the trustees' power to benefit them, albeit the trustees as fiduciaries must exercise their discretion in an appropriate way. The flexibility of discretionary trusts usually extends also to the trustees' administrative powers such as the power of investment, which will be broadly drafted, leaving trustees to invest in a manner in which they see fit (although always underpinned by their duty always to act in the best interests of the beneficiaries).

As a prospective settlor of a trust, the ambit of discretion given to the trustee can be daunting. Not only is the settlor choosing to transfer significant assets to a trustee but, on the face of the terms of a discretionary trust, the settlor gives the trustee total freedom as to how to benefit the chosen beneficiaries and manage the assets while they remain in trust. This is an equally daunting challenge for trustees.

By setting out their intentions for creating the trust in a letter of wishes, and their wishes as to how it might be administered in the future, a settlor can provide non-binding guidance and relevant considerations to trustees.

Letters of wishes afford a settlor a degree of flexibility because (to an extent) they can be updated over time as the settlor's wishes and the beneficiaries' circumstances evolve.



Purpose Of Letter Of Wishes

A trustee is obliged to take into account all relevant considerations when deliberating on the potential exercise of a power. A letter of wishes serves a purpose as a vessel for relevant considerations the settlor wishes to pass to the trustee, such as giving thought to supporting particular beneficiaries with respect to education costs and housing or types of investments to favour or avoid.

A settlor can update a letter of wishes as their wishes and circumstances evolve. These subsequent versions are also relevant considerations for the trustee, and it may be that more weight ought to be given to more recent ones and, in certain respects, older ones disregarded.

Subsequent letters of wishes may also serve an additional purpose for the trustees by providing updates as to the circumstances of the beneficiaries (for example marriages, children or changes in health or wealth positions). This context is also likely to be treated as a relevant consideration for the trustee's decision-making process.

However, current case law suggests that the first letter of wishes prepared at the time a trust is settled may also serve another very important purpose.

This first letter of wishes can provide important contemporaneous evidence as the purpose for which a trustee's powers have been conferred by the settlor. For example, it may confirm that the trust has been set up with the intention of providing for benefits to the settlor's descendants. This may be a crucial piece of evidence with the ability to shape the administration of the trust. In Grand View v Wong [2022] UKPC 47, a court found that a trustee's exercise of its powers to add and remove beneficiaries was invalid because it was not exercised in line with the "proper purpose" for which those powers had been conferred (an extreme example whereby the trustee had exercised powers to remove family member beneficiaries altogether in favour of charitable objects).

This highlights the potential "stickiness" of the first letter of wishes at least with respect to some aspects of the administration of a trust, and potential limitations as to the role of subsequent letters of wishes. If the trust is to be flexible in who it can benefit and how, it is best to build this in from the outset, rather than retrospectively.

Settlor Capacity And Undue Influence

There are certain circumstances in which a trustee ought to exercise caution when looking to treat an updated letter of wishes from the settlor as a relevant consideration for its decision making. A trustee should not follow letters of wishes blindly, and this extends to considering the possibility that the letter of wishes was prepared by a settlor who was either acting as a result of undue influence or did not possess the mental capacity to make such a wish.

How great is the burden on trustees to establish (a) absence of undue influence and / or (b) presence of mental capacity on the part of the settlor?

Every case will depend on its facts, but a trustee is only required to come to a reasonable decision on the evidence available to them. This likely means that questions surrounding undue influence and capacity would arise only on the appearance of "red flags". A letter of wishes whereby the settlor sought to remove all beneficiaries in favour of a new partner might raise eyebrows and put the trustee on notice of a potential issue.

The issue of undue influence came before the Grant Court of the Cayman Islands in 2022 in Re The Poulton Family Trust (Cause No. FSD 121 of 2016 (IKJ)). The settlor here purported to exercise powers he held under the trusts (rather than expressing wishes) excluding his children from the beneficial class. This was executed while suffering from terminal cancer and his wife preventing his children access to him in his final months without his knowledge. Highlighting the importance of evidence as to purpose contemporaneous to the time a trust was settled, one of the key pieces of evidence leading to the court setting this aside the exclusion document was evidence that the trust had been set up with a desire to benefit all his children.

The court in In the matter of the O Trust [2018] (1) CILR 59 (citing Re Beaney [1978] 1 WLR 770) considered mental capacity to make lifetime decisions. These cases suggest a threshold on a sliding scale "relative to the particular transaction which it is to effect" in the context of whether a settlor has the capacity to exercise a reserved power, and it seems likely the same would apply to the preparation of updated letters of wishes. The practical effect is that for more modest wishes (relative to the value of that particular trust) or minor modifications to previously expressed wishes, the trustee may be comfortable to make more modest inquiries than those where a significant change in wishes seems to be being expressed.

Concluding Remarks

In summary, in the context of letters of wishes:

- on the part of a settlor who is looking to set up a trust, there is a balance to be struck between ensuring the drafting is not so narrow so as to constrain the ability of the trust to evolve over time but not so broad so as to confer unworkably broad discretions on a trustee; and
- on the part of a trustee who receives an updated letter of wishes, if there are "red flags" it would be wise to discuss with an advisor the impact of the change of wishes expressed to decide whether it warrants further investigation, and if so the degree of investigation required.

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HIRACHAND

IS THERE A NEED FOR SUCCESS? (PART 2)

Authored by: Laura Gabrel (Associate) and Lynne Johnson (Practice Development Lawyer) - Irwin Mitchell

In February 2024, the authors of this article worried that their report on the Supreme Court hearing of Hirachand v Hirachand for TL4_Private_Client_Issue_14_-_March_2024_1.pdf might be superseded by the handing down of the judgment, so hotly awaited was the outcome of the appeal.

As followers of the case will know, that concern was misplaced by almost a year. It took the Supreme Court 11 months to provide a decision. So was the judgment worth waiting for?

The Decision

The Supreme Court allowed the appeal of the Court of Appeal's decision, meaning the liability for a success fee due under a Conditional Fee Agreement ('CFA') cannot form part of an award made under the Inheritance (Provision for Families and Dependants) Act 1975 (the "1975 Act"). The judgment was given by Lord Richards and all of his fellow judges were in agreement.

The Reasoning

The Supreme Court held that accrued or future legal costs may constitute "maintenance" in proceedings. This is provided for by the Matrimonial Causes Act 1973 (the "MCA"). A claimant can therefore apply for interim relief to fund legal costs, during the action, by way of application under section 5 of the 1975 Act.

Litigation costs, however, cannot form part of a substantive award. The costs of litigation are determined after trial and can only form part of a separate costs order.

The 1975 Act claims procedure is governed by the Civil Procedure Rules 1998 (the "CPR"). Granting interim relief is within the power of the Court, but awarding litigation costs as part of a substantive award is not and does not fit with the CPR.

As seasoned litigators will know, success fees became unrecoverable from the losing party in 2013, pursuant to section 58A(6) of the Courts and Legal Services Act 1990 ("CLSA 1990"). This change was one of many made on the recommendation of Lord Justice Jackson following extensive research and consultation. His rationale for disallowing the recovery of success fees was that they were

"the major contributor to disproportionate costs in civil litigation".

The Supreme Court considered, as a matter of public policy, that it could not circumvent Lord Justice Jackson's conclusion by allowing success fees to form part of a 1975 Act award.

In addition, to allow success fees to form part of a 1975 Act award makes the "offers of settlement" framework, as set out in Part 36 of the CPR, virtually unworkable. Part 36 offers to settle a dispute prior to trial are made "without prejudice save as to costs". The offers are therefore unknown to the Court at trial. Part 36 determines liability for costs based on the order made at trial. It would therefore be back to front to determine liability for costs before seeing the Part 36 offers. Orders on liability for costs must be made following the determination of the substantive 1975 Act award. Also, if success fees form part an award irrespective of Part 36 offers, this creates a disincentive for a claimant to accept a Part 36 offer. They may wish to carry on to trial to receive a higher award inclusive of the success fee despite receiving a reasonable Part 36 offer.

The Supreme Court further responded to Respondent Counsel's observation that there is a disparity between 1975 Act claims and matrimonial financial relief proceedings. The aim of both proceedings is to calculate an award for 'maintenance'. In financial relief proceedings, however, open offers of settlement are made. Accurate costs liabilities can therefore be included as part of a maintenance award. The Supreme Court pointed out that CFAs are not permitted in such proceedings and therefore there is no parallel to be drawn with the treatment of success fees in 1975 Act claims.

The Implications

Certainty on this topic provides relief to all who advise on 1975 Act claims. Success fees can be substantial and the inability to confidently state with whom that liability lies created a source of stress which has now been alleviated.

A claimant who adopts a CFA as a method of funding must also now give greater consideration to the merits of their claim and for advisers the advice given on said merits. It would be unwise for a claimant to bring a spurious claim as this decision provides certainty that, should they 'win', they will also be liable for the success fee that the 'win' inevitably brings.

A claimant must also give greater consideration to Part 36 offers. Whereas it may have previously been possible to use a success fee tactically as a tool to drive towards trial, safe in the knowledge that their success fee will be taken care of as part of the maintenance award, this incentive has now been removed.

There will, however, inevitably be a rise in section 5 applications for interim relief. This will add to the overall costs of the 1975 Act claim. There is also uncertainty as to the bar for a successful application in this regard.

Ultimately, the obvious negative effect of this judgment is that a success fee will eat into a carefully calculated award for maintenance when a claimant has entered into a CFA. Whereas Lord Justice Jackson prescribed an uplift of 10% on damages awarded in personal injury cases to account for the claimant's liability for the success fee, no such allowance was afforded to 1975 Act claimants.

CFAs provide an important mechanism for funding litigation, without which 1975 Act claimants of little financial resource may be unable to bring their claims.

Following this judgment, there is a concern that there will be fewer 1975 Act claims where there is a genuine financial need because the claimant cannot find a workable method of funding the dispute.

Overall, there are positive and negative implications flowing from this decision. The Supreme Court provided a sound judgment and a workable solution in the system in which 1975 claims operate. A perfect solution, it seems, was unachievable.


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60 SECONDS WITH... CLEMENTINE DOWLEY LEGAL DIRECTOR PAYNE HICKS BEACH

What Motivates You Most About Your Work?

Helping clients resolve stressful or difficult situations is usually very rewarding. More generally, I like solving problems, learning new things, meeting interesting people and working with fun colleagues – and having such a wide variety of things to do from day to day is great too.

What Has Been The Best Piece Of Advice You Have Been Given In Your Career?

Early on in my career a colleague recommended that I "say yes to everything, as you never know where it might lead". I'd probably caveat that with "within reason", but generally I think it's served me well to give things a go rather than not.

Who Has Been Your Biggest Role Model In The Industry?

Jessica Henson and Richard Manyon, of course! They're both super smart, loved by clients, very supportive and a lot of fun – so great people to work with, which conveniently I get to do every day. I've learned something from almost everyone I've worked with, though – I look for their best bits and try to copy those.

Where Has Been Your Favourite Holiday Destination And Why?

I've been hiking in Iceland twice recently and loved it - it was so beautiful and otherworldly. On one hike in the fjords we found a perfectly preserved whale skeleton on a deserted beach, which was amazing. Less amazing was the time hurricane force winds ripped our tent apart in the middle of the night - luckily a kindly Icelandic warden took us in.

Do You Have Any Hidden Talents?

My partner often says I've got an uncannily good visual memory – admittedly though, that tends only to be when he wants me to help find his glasses.

What Motivated You To Pursue A Career As In The Industry?

I started out as a corporate lawyer at a US firm but a few too many nights in the office sleeping pods and a growing sense that I might be better suited to contentious work pushed me towards the private client/disputes world. Luckily my corporate experience has turned out to be quite useful in that context - I often find myself advising trustees or beneficiaries caught up in complex corporate situations or navigating their way through shareholder disputes.

What Was The Last Book You Read?

A History of Byzantium by John Julius Norwich. It's a pretty comprehensive account of all the bloodcurdling ways in which the various emperors murdered or mutilated each other – quite a different approach to resolving inheritance disputes!

Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

Yes – get better at tennis. I've just signed up for my local tennis league which matches you up with people of a similar level in your area, so hopefully that'll keep me committed.

What would you be doing if you weren't in this profession?

I've always wanted to be a spy, so live in continual hope of receiving a tap on the shoulder! More realistically though, perhaps an editor or publisher - I did English at university so love reading, and think I'd really enjoy the process of bringing a book or magazine to life.

What Is The One Thing You Could Not Live Without?

Regular trips to the sea and the moka pot I got for Christmas. And my huge family, too – I'm one of five sisters and think I would find things extremely quiet without them!

What Does The Perfect Weekend Look Like?

I think it would involve a big walk, preferably by the sea, possibly a cold swim, and definitely a pub. I'm also - since Iceland - a big fan of the sauna/ icy plunge routine, so ideally that would happen at some point too.

What'S Your Go-To Relaxing Activities To De-Stress After A Long Day At Work?

I'm lucky enough to be able to walk home from the office via various London parks, which is a great way to unwind. I've also recently started learning the organ, which really helps me switch off – I'm so focused on getting everything to coordinate that it's impossible to think about work.

CONTENTIOUS TRUST DISPUTES IN THE COMMON LAW COURTS OF THE UNITED ARAB EMIRATES

Authored by: Peter Smith (Legal Director) - Charles Russell Speechlys

The Dubai International Financial Centre ("DIFC") and the Abu Dhabi Global Market ("ADGM") are autonomous financial free zones within the UAE with their own civil and commercial legal frameworks and courts. The DIFC Courts and ADGM Courts operate in English and apply principles of English common law jurisdictions alongside their own laws and regulations.

Contentious trust disputes within the UAE's common law jurisdictions are governed by distinct legal frameworks that reflect each jurisdiction's ambition to be a leading international financial hub with a legal system attuned to global practices.

As both jurisdictions have adopted English common law principles, they provide a familiar foundation for resolving complex trust disputes.

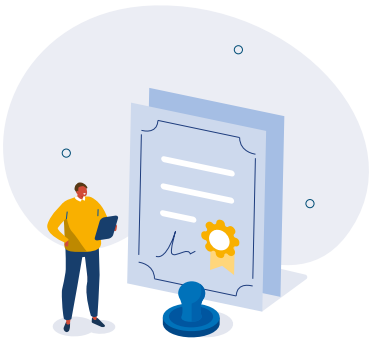
The DIFC has its own Trust Law (DIFC Law No. 4 of 2018 as amended), which is modelled after the English common law on trusts but also incorporates features from other jurisdictions to create a hybrid system tailored to the needs of the region, including provisions from the United States Uniform Trust Code, the Cayman Islands' revised 2011 Trusts Law, and the Guernsey Trusts Laws 1984 and 2007. The DIFC Trust Law provides a framework for the creation, regulation, and administration of trusts within the DIFC. When disputes arise, they are handled by the DIFC Courts, which have the authority to adjudicate trust-related matters such as the interpretation of trust documents, issues concerning trustees' duties and powers, beneficiary rights, and questions of trust validity.

The DIFC also has a Foundations Law (DIFC Law No.3 of 2018) in its toolkit, which provides a mechanism for wealth management in the civil law device of the foundation.

Similarly, the ADGM has established its own legal framework for trusts, the ADGM Foundations and Trust Law, which is also inspired by English common law. In distinction to the DIFC, the ADGM approach to the application of English law has been one of very limited statutory modification, which reflects the approach in similar jurisdictions such as Hong Kong and Singapore. It has, for example, modified the English law by abolishing the rule against perpetuities (Regulation 4 of the Application of English Law Regulations 2015), as well as some private international law protections, provision for purpose trusts, and specific provision for recognition of foreign trusts contained in the Trusts (Special Provisions) Regulations. The ADGM Courts have jurisdiction over trust disputes within the ADGM, providing a venue for the resolution of conflicts involving the administration of trusts, breaches of trust, the removal of trustees, and other related trust issues.

The resolution of contentious trust disputes in the UAE's common law courts offers several advantages, particularly due to its legal framework, judicial system, and international standards of practice:

- The common law courts operate under a common law framework that is familiar to many international practitioners and parties. This can provide a level of comfort and predictability, especially for those who are accustomed to the principles and precedents of English common law.
- The common law courts are staffed by a specialist judiciary from various common law jurisdictions who are experienced in complex commercial and trust law matters. This specialist knowledge ensures that contentious trust disputes are understood and adjudicated by experts in the field.
- Parties can engage with legal professionals who are qualified in various jurisdictions and who have access to a network of international experts in trust law. This can be particularly beneficial in complex cross-border trust disputes.
- The common law courts conduct proceedings in English, which is the international language of business. This eliminates language barriers and makes the process more accessible to international parties.
- The common law courts are known for their efficiency and expeditious handling of cases. They have procedures in place designed to resolve disputes in a timely manner, which is crucial for trust matters where the management and distribution of assets may be time-sensitive.
- Trust disputes often involve sensitive information, and the common law courts can offer a degree of confidentiality that may not be available in other jurisdictions. This is particularly attractive to those parties concerned with privacy. Both the DIFC and ADGM offer private mediation services as an alternative to dispute resolution in court.
- The common law courts have arrangements with various countries for the recognition and enforcement of its court judgments. This can be advantageous for the enforcement of judgments related to international trust assets. Although the United Arab Emirates has not signed or ratified the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition, the Convention is an open convention and applies in jurisdictions that have adopted it whether or not the trust of which recognition is sought has been established in a Convention jurisdiction. A DIFC or ADGM trust would therefore be recognised in jurisdictions like Bermuda, the British Virgin Islands, England, Gibraltar, Guernsey, the Isle of Man, Hong Kong, Italy, Liechtenstein, Luxembourg, Monaco, and Switzerland.
- The common law courts contribute to the development of common law in the region by creating precedents that can provide guidance for future trust law disputes. This evolving body of case law helps to clarify and develop trust law principles in the DIFC and ADGM.



The combination of these factors makes the DIFC and ADGM attractive venues for the resolution of trust disputes, particularly for high-net-worth individuals, family offices, and international corporations seeking a reliable and sophisticated legal environment.

To date there have been few reported judgments from either courts on contentious trusts matters. Of note is the DIFC Court of Appeal's binding advisory decision in The Dubai International Financial Centre Authority [2020] DIFC CA 002 (13 January 2021), in response to 13 questions pertaining to the Trusts and Foundations Law posed by the DIFC Authority, and in which inter alia the Court confirmed that it would have regard to but not be confined by English law jurisprudence on trusts matters.

In all, the DIFC and ADGM offer robust legal frameworks for the resolution of trust disputes, drawing on English common law principles to provide clarity and predictability for international investors and trust parties.

As these financial centres continue to grow and attract global wealth, the role of their courts in adjudicating trust disputes will likely become increasingly significant.

Trust litigation in these jurisdictions requires careful navigation of complex legal issues, and parties will benefit from the guidance of legal professionals with expertise in both local and international trust law.

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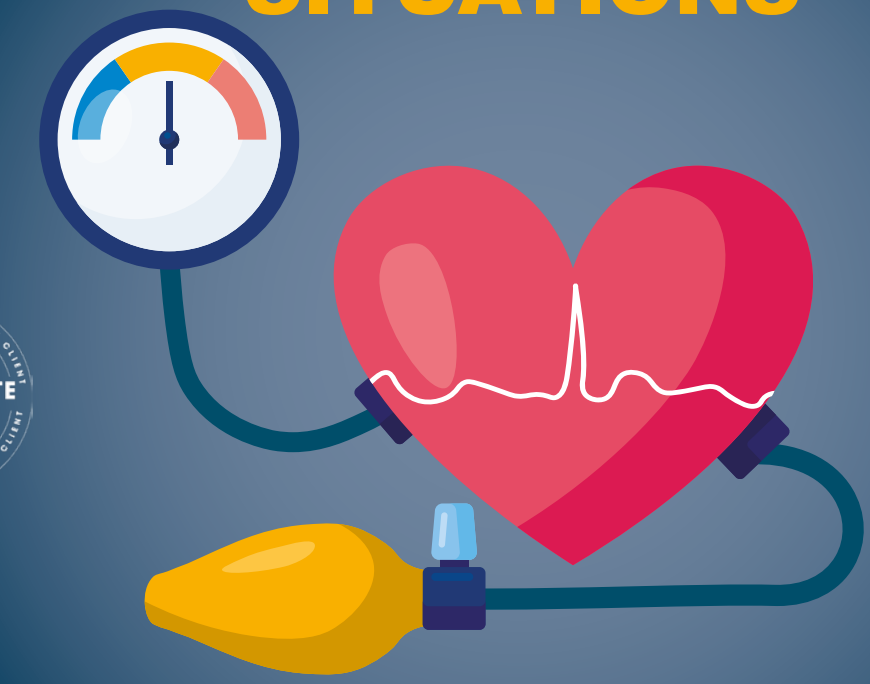


CORPORATE PARTNER

HIGHVERN

DEALING WITH THE INEVITABLE

Authored by: Richard Joynt (Head of Family Office) - Highvern

As a Trustee, I've found that a favourite topic of many contentious trusts lawyers is "Stress-testing Trusts" – with the notion being that, absent any actual disputes,

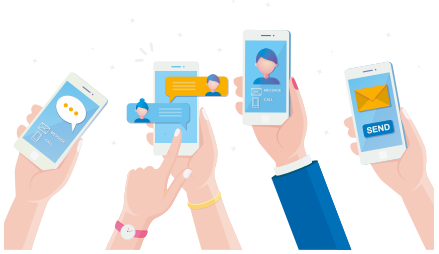
Family Dynastic Trusts can be reviewed either on set up or afterwards, specifically with a view to preventing disputes.

It's a good notion – and I'm sure there have been examples of where this has worked – perhaps spotting a family dispute before it has time to brew into legal action, and maybe anticipating that by creating sub-trusts within the main Dynastic Trust, thereby freeing family members who are in personal conflict from feeling that they are financially bound together for ever.

However, there are some occasions where a Trustee is drawn into an inevitable conflict even when they really don't want to be.

Rather than then beating oneself up about how this "might have been avoided" there are some key lessons I have learned in my recent contentious cases which I sincerely I hope I learn from in future.

- Try to be brutally honest with oneself about the reasons for the dispute – have you or colleagues actually done something wrong, or is this a case when the complainant feels so disadvantaged and angry that they would do anything to "get litigious"?
- If the reason for the dispute is because of misbehaviour of one the family members, and the Trustee is then really not at fault, don't take sides. You will probably be dealing with this legal dispute for some months to come (and unlikely to be able to resign as Trustee until it is all resolved), so seek to act logically and without undue emotion. Continue to treat all parties involved in the Trust dispute with professionalism and respect.
- Crucially, don't stop communicating simply because there is a dispute. It may be tempting to "go quiet" on beneficiaries because you fear saying the wrong thing, but actually it is your duty to keep everyone informed as far as you are able.



- The lawyers acting for you as Trustee will not do the communicating for you – and if you think they will, this may escalate matters. If you were a beneficiary of a Trust and the only communications, you received were from contentious trust lawyers you might be left feeling frustrated and nervous.

- Disputes sometimes happen, and sometimes Trustees are dragged into it. Whoever is to "blame", Trustees should see that dealing with this professionally and diligently as part of the role they signed up for. Don't take it personally (easier said than done).
- Try to find a way of working with your contentious trust lawyers so that they give you the support you need, communicate effectively with the complainant's lawyers, but don't get sidetracked into side issues that cost money to resolve but were never part of the main action. This is very difficult – the lawyers know more about how "the law" works than you, and you are therefore reliant on them to help spot issues, but at the same time they are professional service providers and need to control so that costs do not spiral.
- This will mean making yourself available very regularly, often at unexpected times as new issues can arise whenever. This may be frustrating as you will have other clients to deal with but thinking that the lawyers can resolve matters without your input is likely to lead to more delay and cost.

- Work out early on how everyone's costs will be paid for – who is in the best position to authorise the Trustee's additional time-based fees in the event of a family dispute (the Protector?) and what if the legal action includes a frozen Trust fund? How will this lack of liquidity be bridged? These are issues that Trustees normally do not have to deal with and they can lead to great stress if not bottomed out in the early days of the dispute. No Trustee wants to be dealing with a lawyer who is threatening to come off the record if their bills aren't paid.
- Mobilise a slightly different team from the Trustee side compared to a "day to day" team. Issues involving Risk & Compliance are likely to be more prevalent, and it is probably helpful to involve a second Director on most communications to provide continuity and a second set of eyes on what are issues that can create risk for the Trustee organisation.
- Referring risk issues to a senior management committee can slow things down in an unhelpful way – find a way of having senior Trustee eyes on matters without this becoming a bottleneck and creating further issues!
- Think about how you are going to manage the stress arising from such a dispute, and don't underestimate the potential stress even if this is not a breach of Trust case. Causal factors are unhappy family members bombarding you with messages, legal letters from the other side which are designed to make you wonder if you have done something wrong, requests for information outside of working hours, preparation for appearances in Court – I could go on.
- Across our industry professionals are told to behave with respect to one another, to adopt participative language, to be kind to those who are still learning and to appreciate the pressure that their colleagues are under. In a financial dispute this all goes out of the window – you may be faced with unjust accusations which are framed in very nasty language. No one is looking after your mental health at this point (although perhaps someone should be!).

Taking all the above into account, I suppose the inevitable Trust disputes can all be summarised as

"it's just part of the job of a Trustee".

Wherever great wealth is held, there will sometimes be people who will seek to attack it using legal arguments. Try to be thick-skinned and recognise the signs of stress and reach out to colleagues for help when it gets overwhelming.

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THE ARBITRATION OF TRUST DISPUTES

THE CURRENT PANORAMA

Authored by: Paul Grant (Senior Associate) - Signature Litigation

Arbitration has increasingly become a preferred method for resolving disputes. In the realm of trusts, arbitration presents several potential benefits, including confidentiality and flexibility. However, despite these perceived advantages, the arbitration of trust disputes remains a contentious issue, particularly in jurisdictions that lack a specific statutory framework.

This article explores the current landscape of trust arbitration, its advantages and challenges, relevant case law developments, and the future outlook for arbitration as a viable method for resolving trust disputes.

Advantages Of Arbitration In Trust Disputes

Arbitration offers greater flexibility, allowing parties to tailor procedures to their specific needs, including the selection of arbitrators with relevant expertise in trust law. It also encourages settlement by fostering a more

collaborative environment compared to adversarial litigation. Arbitral awards may also be more easily enforceable in foreign jurisdictions. Another obvious advantage of arbitration in the context of a trust dispute is that private issues at play can be resolved confidentially and the affairs of the family kept out of the public domain, an outcome which cannot be guaranteed in Court proceedings. Another benefit is the timely resolution of trust disputes; the volume and complexity of matters being dealt with by judges in the offshore courts can mean that litigants are required to endure a long wait following trial for a judgment to be handed down by the court.

Despite these advantages, significant challenges remain that cast doubt on the widespread adoption of arbitration in trust disputes.

Challenges And Concerns

One of the main challenges in trust arbitration is the absence of a uniform statutory framework governing its use across jurisdictions. Traditional concern has centred on the perception that arbitration seeks to oust the jurisdiction of the court, which has a unique supervisory role in trust administration.

Courts are often tasked with ensuring that trusts are properly managed in the interests of all beneficiaries, which raises fundamental concerns about whether arbitration can adequately address the fiduciary responsibilities of trustees and the interests of all parties involved.

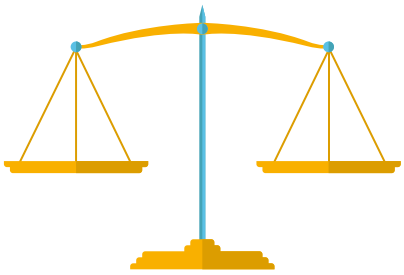
Several complexities arise when considering the arbitrability of trust disputes:

i. Arbitration requires the consent of all parties. However, in trust disputes, beneficiaries, particularly minors or unborn persons, are often not signatories to the trust instrument and may not have provided consent.

ii. Some disputes, such as the removal of trustees or the interpretation of complex trust provisions, may not be suitable for arbitration, as tribunals may lack the statutory powers conferred on courts.

iii. Changes in trusteeship and the involvement of third parties can complicate the binding nature of arbitration clauses.

iv. Even if an arbitration clause is valid under the governing law of the trust, enforcing an arbitral award in foreign jurisdictions may present significant challenges, particularly if the local law does not recognise trusts or consider trust disputes arbitrable.



Case Law Developments

Recent case law has provided some clarity on the arbitration of trust disputes, although several uncertainties remain.

In England and Wales, arbitration is governed by the Arbitration Act 1996 (the 1996 Act), which requires arbitration agreements to be evidenced in writing and relate to "present or future disputes".

This creates a distinction between prospective arbitration, where a trust instrument includes a clause referring future disputes to arbitration, and freestanding arbitration agreements, which apply when parties agree to arbitrate an existing conflict.

One key issue in trust arbitration is whether beneficiaries who did not sign the arbitration agreement are bound by it. In Ryan v Lobb [2020] NZHC 3085, the New Zealand High Court ruled that arbitration clauses may be null and void with respect to beneficiaries who are not parties to the trust instrument.

Likewise, in Crociani v Crociani [2014] UKPC 40, the Privy Council examined jurisdiction clauses in trust disputes and emphasised that beneficiaries cannot selectively accept trust benefits while rejecting associated obligations, including arbitration. Despite this, it remains unclear whether non-signatory beneficiaries can be bound by an arbitration clause under the 1996 Act.

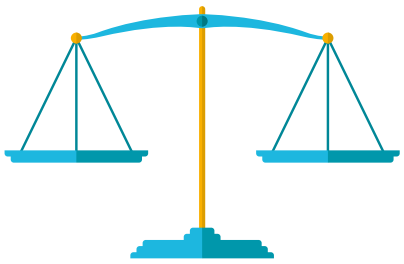
The recent Grosskopf v Grosskopf case in England grappled with the issue of trust arbitration. It involved a trust established by an Orthodox Jewish family, where disputes arose regarding its administration. The parties agreed to arbitrate through a Jewish Rabbinical Court, which issued several interim awards. However, subsequent claims were filed in the High Court including applications for the removal of trustees. The court ruled that trust disputes were capable of arbitration and stayed the proceedings under Section 9 of the 1996 Act. It held that arbitral tribunals could issue binding orders similar to court orders, such as requiring trustees to resign and appointing replacements. But Grosskopf did leave some issues unresolved, particularly concerning the enforceability of arbitral awards against non-signatory beneficiaries and whether an arbitral tribunal has the full range of powers available to courts in trust matters.

Jurisdictions With Specific Trust Arbitration Legislation

Some jurisdictions have sought to address these challenges through legislative reform.

The Guernsey Trusts Law 2007, for example, addresses the binding nature of settlements reached through arbitration in actions against trustees founded on breach of trust. While this addresses representation issues, it does necessarily assist in circumstances where claims are not founded upon breach of trust or on matters of enforcement in other jurisdictions.

The Bahamas Arbitration Act 2009 has been considered with substantial prominence in Volpi v Delanson Services Ltd, which involved a family trust established by Gabriele Volpi, with Delanson serving as the trustee. Delanson distributed the entirety of the trust assets to Gabriele, a decision contested by his son, Matteo, who argued that the distribution constituted a breach of trust and was executed for improper purposes. The matter was addressed through arbitration, resulting in awards favouring Matteo. Gabriele and Delanson sought to challenge these arbitral awards in the Bahamian courts. The Supreme Court of the Bahamas upheld the arbitral decision, reinforcing the jurisdiction's pro-arbitration stance on trust disputes. The position in the Bahamas has since been revised by virtue of the Arbitration (Amendment) Act 2023, which includes further provisions concerning trustee removal and appointment, and representation mechanisms for minors and unborn beneficiaries.



Conclusion

Despite evident theoretical advantages, including confidentiality, efficiency, and flexibility, several practical challenges – particularly regarding enforceability, the binding nature of arbitration agreements, and the representation of all beneficiaries – remain obstacles to widespread adoption of arbitration in trust disputes.

While certain jurisdictions have taken legislative steps to facilitate trust arbitration, the legal framework in other common law jurisdictions remains uncertain.

A FIDUCIARY'S PERSPECTIVE

ON TRUSTS IN LITIGATION

Authored by: Richard Wakeham (Group Head of Commercial) and Bhavnita Gosrani (Director) - ZEDRA

Whilst most professional trustees are keen to grow their businesses, many will (understandably) make a sharp volte-face when considering assuming the role for a trust embroiled in litigation.

Perfection; The Trustee's Paradigm

Trustees are naturally cautious - with clear duties to discharge. Ensuring that the trusts that they act for and administer are in 'premium' condition is a trustee's never-ending quest for perfection.

The backdrop to this, is a regulatory environment which is becoming increasingly rigorous - an environment to which trustees, particularly offshore trustees, are subject.

Key protagonists involved in this pursuit often include vigorous compliance departments that defend business risk assessments and protect their businesses, the individuals working in them and ultimately, their jurisdictions.

Thus, a cautious trustee's onboarding files ought to contain: precise and practical legal and tax advice (leaving no scope for misinterpretation); an encyclopaedic third party report detailing the full financial backstory of a prospective client entertained or executed; and apostilled identification documentation for every person associated with the trust and its assets.

The perfect quest would result in there being no scope for uncertainty with regard to the execution of the trust, enabling the trustee's obligations to be discharged with predictable ease.

Risk And Reward

Conversely, the dirty word 'risk' is inherently embedded in most litigation. Equally, most litigation is infected with the prospect of somebody associated with the trust in question, even in administrative proceedings, becoming upset with the outcome and apportioning blame in the trustee's general direction.

Why then would any trustee be frivolous enough to expressly agree to become the trustee of a trust involved in litigation, and why would some trustees expressly seek out this sort of appointment?

We all know how any self-respecting dispute resolution lawyer would answer the question and it is fair to note that there is usually commercial reward for risk taking behaviour and complexity.

However, there are more elevated goals at stake here.

Finding The Remedy

A trust in litigation is likely to cause significant emotional and financial damage to the interested parties who may be struggling to see the wood for the trees. You may think that this provides you with the stage on which you can be the panacea for the uppermost problems for the interested parties. And you may be right, and that is the platinum outcome for all concerned.

Conversely, it may result in a large beneficial class respecting and despising you in equal measure, because you have forced an equitable solution which does not allow for winners and losers. Whilst this outcome may not earn you universal praise, there is no doubt that it is a worthy cause which is very likely to validate your credentials and stand you in good stead for all types of further opportunities from those you've impressed in the process.

Done badly, it's carnage. The horror show starts with a disgruntled cast of thousands (beneficiaries, settlors, advisers, judges and other fellow professionals).

However, the reputational impact is only part of the story. There is also the invariable risk of yet further litigation involving potential personal liability for your own actions. So, getting it wrong is not an option.

What Does This Look Like In Practice?

Many of the litigious cases that we see today involve battle weary and entrenched families involved in long running sagas which they desperately want to resolve in a way that is more 'fair' to them than anyone else involved.

More often than not, the disputes we see invariably relate to the demise of a settlor and the intergenerational transfer of wealth. The vast majority of these disputes will arise from disharmony; as a result of perceived unfairness hardwired into the structuring, a beneficiary having more assets or control than they ought to, or the mismanagement of business interests held in the structure.

We recently assumed office in a case where years of multi-jurisdictional litigation had resulted in the family members forming two distinct camps, each consisting of many beneficiaries, and holding entirely opposing views to one another.

It goes without saying that a happy outcome was unlikely; the sort of case where equality of dissatisfaction amongst the beneficial class is the true measure of success.

As is always the case, one must approach the situation with fresh eyes and a neutral outlook whilst you work your way through the relevant forensic investigations and detailed dialogues with the family members and interested parties.

Post analysis, it was predictably clear that the actions required to balance the books in both directions would not be welcomed with uniform acceptance and that nothing would be agreed between the parties. The difficult decisions needed to be made, and it was clear that the only way to deliver the equitable solution would be through opposed court application - which would add further to the stress, fatigue and resentment of the parties involved.

On reflection, our key take away was that a huge amount of this disharmony (and cost) can be avoided where trustees are much more active during the lifetime of the settlor, and when the early signs of fracture appear. While difficult questions do need to be asked at this stage, they are much less difficult than the questions required when the relationships have soured, this proactivity can, in many cases, keep the family and the structure aligned to common goals and mutually beneficial outcomes.

In Conclusion

No trustee is going to earn an elevated reputation without putting in the hard yards and making the difficult decisions.

Similarly, you will not find it easy to make those decisions if you are only in it for profit as your objectives will be diametrically opposed to anything resembling resolution. Fiduciaries can gain a huge amount (intellectually, relationally, financially, reputationally) from engaging in litigation but the role is not to be taken lightly.

BENEFICIARIES BEWARE

PLAY FAIR, OR PAY THE PRICE

ASLAM V SEELEY [2025] EWHC 24

Authored by: Millie Ray (Barrister) - New Square Chambers

Beneficiaries of an estate, frustrated with the lack of progress in the administration of an estate, make an application to remove the personal representative under s.50 of the Administration of Justice Act 1985. The costs are ordered to come out of the estate or, if their conduct has been particularly unreasonable, the personal representative is deprived of their indemnity and bears the costs themselves.

This is a scenario with which we are familiar. But who foots the bill when personal representatives apply to remove themselves? This was the question arising in Aslam v Seeley [2025] EWHC 24 (Ch).

The Facts

The defendants were the daughters of the deceased. The claimant, Mrs Aslam, was a family friend appointed as an executor under the deceased's will. She unusually sought her own removal. This, it was said, was due to Mrs Aslam's old age and poor health, as well as a lack of co-operation and harassment on the part of the first defendant, Ms Seeley.

The Parties' Positions

Ms Seeley opposed the claim, maintaining that she, rather than an independent solicitor, should be appointed.

The second defendant, Ms Madan, did not oppose the order sought by the claimant and in an effort to save costs did not file evidence nor attend the hearing of the substantive application.

The judge, Master Brightwell, was satisfied that an independent solicitor needed to be appointed. He held that the tenor of Ms Seeley's correspondence and the way in which she addressed the court suggested she was too emotionally involved to carry out the administration of the estate in the interests of all beneficiaries. Further, she had a poor relationship with Ms Madan, not least because the latter had accused Ms Seeley of murdering their father.

A repetitive feature of the proceedings was Ms Seeley's allegation that Mrs Aslam lacked capacity. In his earlier judgment in January 2024, Master Brightwell indicated that he was satisfied that Mrs Aslam had capacity; her solicitors had a professional obligation to ensure that this was so.

It was only at a later hearing in June 2024 that Mrs Aslam's legal representatives indicated that they had become aware of facts suggesting she might have lost capacity to litigate.

The hearing was adjourned to October 2024.

Shortly before the October hearing, Ms Madan filed a witness statement and lengthy exhibit, having neither filed evidence in response to the claim nor sought directions permitting reliance on evidence for the purposes of costs.

Mrs Aslam sought an order that all of her costs be paid out of the estate on the executor's indemnity.

Ms Madan's position was that the majority of costs incurred by her and by the claimant should be borne from Ms Seeley's share of the estate. To the extent that any costs were not recoverable from Ms Seeley, they should be payable out of the estate on the indemnity basis. Ms Madan's arguments were twofold. First, she said that the proceedings were necessitated by Ms Seeley's aggressive and bullying conduct, rendering the claimant unwilling to act as an executor. Second, Ms Seeley should have consented to the claim once on foot. Her opposition, together with irrelevant correspondence, increased costs.

The Findings

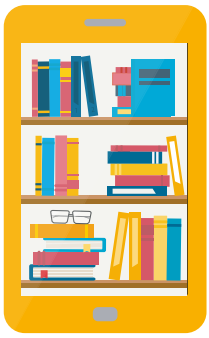
Master Brightwell found that Mrs Aslam had acted entirely reasonably and was, therefore, entitled to her costs out of the estate, save for those thrown away by the adjournment of the June 2024 hearing.

As for Ms Madan, more than half of her costs were incurred in preparing for and attending the final hearing in October 2024, having attended neither the January nor June 2024 hearings. The October hearing would not have been needed but for the adjournment of the June hearing, which was Mrs Aslam's responsibility.

That is to say, Ms Madan's real participation in the proceedings began after the point at which it would have concluded were it not for the issue of the claimant's capacity arising as it did.

Master Brightwell reiterated that a costs order was not to be made as a sanction for intemperate and insulting language. Whilst Ms Seeley's language had at times been insulting, those insults were levelled at Mrs Aslam's solicitors, not Ms Madan or her solicitors. Accordingly, it was not appropriate to order that Ms Seeley pay either party's costs.

Ms Madan was held to be entitled in principle to an order that her costs be paid out of the estate on the indemnity basis. This did not apply to the costs incurred since the June 2024 hearing, which were essentially incurred in pursuing Ms Seeley personally.



Key Takeaways

As well a helpful exposition of costs principles in estate matters, Master Brightwell's decision, serves as a valuable reminder that removal applications may pose a powerful threat not only to personal representatives, but also to embittered beneficiaries.

Beneficiaries should resist the temptation to shift their costs burden onto a fellow beneficiary without a solid basis for doing so. In Ms Madan's case, having initially taken a pragmatic, neutral stance, she allowed her personal grievances with Ms Seeley to influence the extent of her involvement in the proceedings.

This reinforces the long-established stance of the court: play fair or prepare to pay the price.

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THE INCREASING IMPORTANCE AND IMPACT OF FERTILITY LAW

FOR PRIVATE CLIENT PRACTITIONERS

Authored by: Lucinda Brown (Partner) and Colin Rogerson (Head of Fertility Law) - Mills & Reeve

Increasing numbers of children are being born following assisted reproduction and surrogacy. As the number of children conceived through assisted reproductive technology ("ART") grows, the more likely it is that Private Client practitioners will face legal issues as a result.

Legal Parentage

One important legal issue arising from ART is legal parentage.

Legal parentage may not always be clear and, in some cases, may not reflect what is recorded on the child's birth certificate.

Differing ethical and cultural attitudes towards surrogacy and ART globally has led to vastly different legal approaches towards legal parentage in different jurisdictions as well as a booming international fertility industry. Even if legal parentage is established where the child is born, other jurisdictions (including where the intended parents have citizenship, domicile or residence) may not recognise that legal parentage. For ART created families with international connections, it is vital to understand the legal position as to parentage in those jurisdictions to which they have important connections.

For Private Client practitioners, legal parentage can impact upon inheritance and succession planning through wills and trusts. There will be a need to interpret existing instruments to consider whether children born through ART are included within the class of beneficiaries (some of which instruments will have been drafted in a time when such methods of procreation were the work of science fiction). There will also be a need to ensure the drafting of new instruments caters for such children (which may not be straightforward where conflict of laws in different jurisdictions arises).

In England & Wales, where a child is conceived through artificial insemination (including surrogacy), the child's legal parentage will be determined by statute. To add complexity, which statute applies will depend on when the artificial insemination took place. For children where treatment occurred after 6 April 2009, that statue is the Human Fertilisation and Embryology Act 2008. The "mother" is the woman who carried the child and the child's second legal parent will usually depend on whether she is married or in a civil partnership.

Parental Orders

Where children are born via surrogacy, it is possible under English law to apply for a parental order under s.54 of the Human Fertilisation and Embryology Act 2008 (subject to certain statutory criteria being met).

The effect of a parental order is similar to that of an adoption order: the child is treated in UK law for all purposes as the child of the applicants.

It creates a lifelong legal relationship.

One practical limitation with parental orders is that they can only be obtained post-birth. They should be applied for within six months of birth, but the process itself can take several months. This produces an unavoidable "limbo" period, between the time of birth and the date of the parental order where the people caring for the child are not their legal parents. Should one or both parents die during this period, would their will or trust provide for them? Certainly if they died intestate, the child is not necessarily going to be treated as if legal parentage had been established.

The recent case of Re AB (A Child) [2024] EWHC 586 (Fam) involved a surrogacy arrangement undertaken in the USA. As is common in US surrogacy arrangements, the intended parents established their legal parentage in the law of the state of birth by way of a parentage order made before the child was born. This enabled them to register the child's birth with the intended parents listed as parents on the birth certificate. The family were also resident in the USA at the time of birth, although had connections to the UK (where one of them retained a domicile). There were a number of substantial trusts in both England and Guernsey which the parents sought to enable their child to establish a beneficial interest in. Neither Guernsey nor English law recognised the US parentage order. Under Guernsey law, the parents could only establish their legal parentage under an adoption order. Accordingly, the parents obtained an adoption order from the US. The US adoption was recognised automatically as an overseas adoption in both England and Guernsey.

The adoption presented a problem under English law, since the English trust in question predated adoption law reform in England in 1976 and so an "adopted child" was not recognised within the class of beneficiaries of the trust.

The solution was ultimately to apply for a parental order under s.54 of the Human Fertilisation and Embryology Act 2008.

Where legal parentage is established under UK law, the legal issues for Private Client practitioners should be more straightforward. If legal parentage is not established (which is often the case), there is the potential for disputes to arise in relation to the beneficial entitlement of individuals.

Posthumous Conception

In some circumstances, fertility treatment using eggs or sperm where the egg or sperm provider has died is permitted (in England and Wales this is subject to clear rules about consent to their use in treatment following their death). In the UK, this consent will be evidenced by signing consent forms at the fertility clinic where the sperm/eggs/embryos are stored. Neither embryos nor gametes are chattels under English law, so clients cannot rely on their testamentary provisions to put maters beyond doubt. Where posthumous conception is achieved, this may impact upon the distribution of the estate and specialist fertility law advice should be sought.

With increasing numbers of families created through ART it will be important for Private Client practitioners to be aware of fertility law issues when considering how to define "children" in any given trust document.

There will be an increasing need for the modernisation of testamentary documents to reflect the diverse set-up of families and an increasing need to consider conflict of laws issues.

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60 SECONDS WITH... MATTHEW MILLS BARRISTER RADCLIFFE CHAMBERS

Q What Has Been The Best Piece Of Advice You Have Been Given In Your Career?

A Keep it simple.

Q What Motivated You To Pursue A Career In Law?

A I'm afraid it's a boring answer: I studied Law at university, really enjoyed it, and became a lawyer.

Q What Do You See As The Most Rewarding Thing About Your Job?

A Seeing a client's relief when you help them to resolve a long-running dispute.

Q What Was The Last Book You Read?

A A Man on the Moon by Andrew Chaikin. It was a great source of 'fun space facts' to tell anyone who would listen.

Q What are you looking forward to in 2025?

A Our pupillage recruitment process has just started. Every year, I look forward to meeting and interviewing my frighteningly clever colleagues of the future.

Q Do You Have A New Year's Resolution, And If So, How Do You Plan To Keep It?

A I want to see my extended family more regularly this year. The first step will be to send out invites in January.

Q What Is The One Thing You Could Not Live Without?

A The TL4 Private Client Magazine, of course! (Note to editor: payment by bank transfer please.)

Q What Does The Perfect Weekend Look Like?

A Something outdoorsy with friends and ideally pie and mash somewhere along the way.

Q What Is Something You Think Everyone Should Do At Least Once In Their Lives?

A Visit Rome. It has fantastic scenery, history and food.

Q If You Could Give One Piece Of Advice To Aspiring Practitioners In Your Field, What Would It Be?

A Understand and embrace all forms of ADR. It really works.

Q What Legacy Would You Hope To Leave Behind?

A A badly drafted will that gives the next generation of private client lawyers something to argue about.

Q Dead Or Alive, Which Famous Person Would You Most Like To Have Dinner With, And Why?

A Neil Armstrong. I am fascinated by all things space.

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