TL4 Private Client MAGAZINE

ISSUE 1

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INTRODUCTION

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We are delighted to bring you our inaugural edition of the Private Clint Magazine, connecting you with the global private client community in the midst of lockdown.

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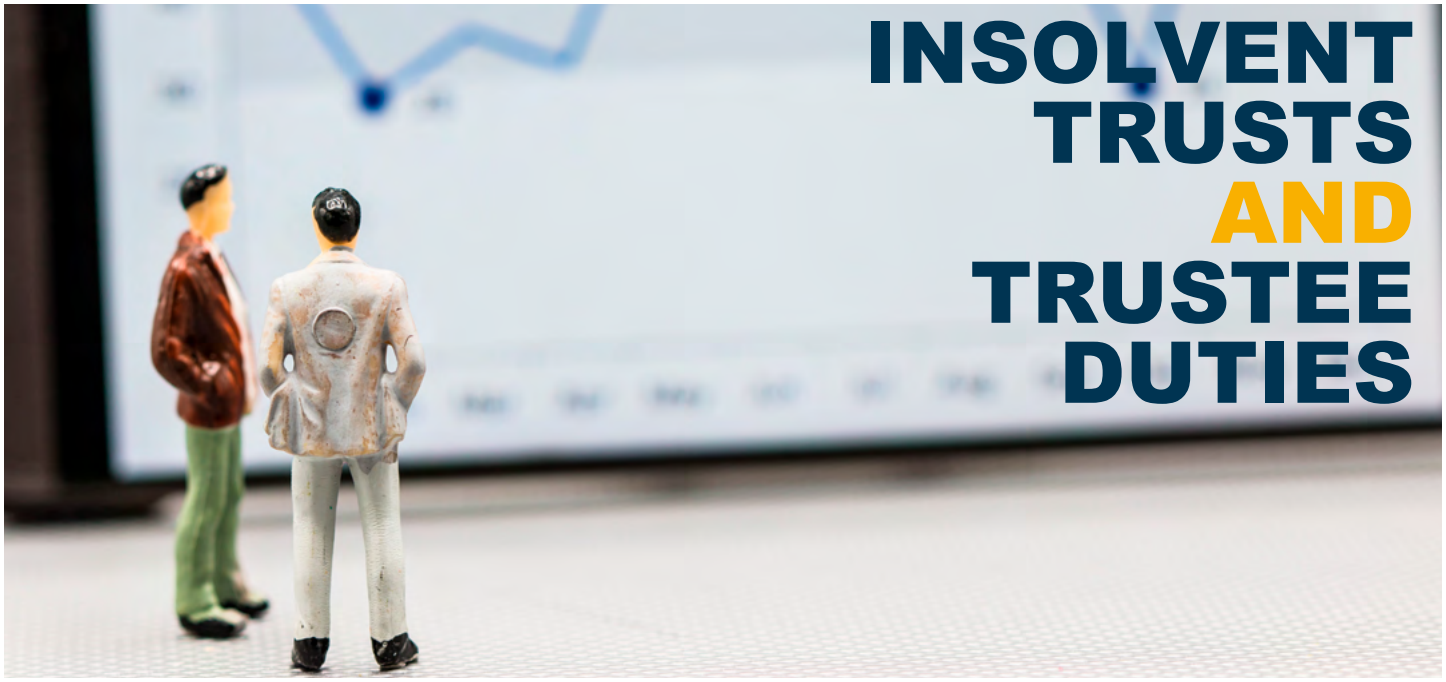


INSOLVENT TRUSTS AND TRUSTEE DUTIES

Authored by: Emma Holland – Stewarts Law

Economic uncertainty brought by the Covid-19 pandemic will undoubtedly have a profound effect on the value of trust assets. Industry experts predict steep rises in insolvencies, affecting key industries. Many businesses may become cash-flow/balance sheet insolvent (if they are not already). Trustees of trusts with underlying companies running significant commercial enterprises may already find themselves experiencing insolvency events, rendering the top-level trust "insolvent". As insolvency comes to the fore, trustees should be alive to the changes in their duties such insolvency events bring.

Insolvency in a trust context

Conceptually, "insolvent trusts" are a misnomer: a trust is not a separate legal entity and cannot, as a matter of law, be insolvent. When practitioners speak of "insolvent trusts", they refer to trustees who have incurred liabilities (as trustees) exceeding the amount or value of the trust fund, or have incurred liabilities which they are unable to meet out of liquid trust assets as they arise. Although the test for "insolvency" in this context has not been considered in England, the Jersey court has applied the "cash-flow" test, e.g. whether the trustee can meet the liabilities incurred in that capacity out of the trust assets as they fall due.

How do the duties of trustees change on insolvency?

Fundamentally, trustees owe duties to exercise their powers in the best interests of the beneficiaries. But the interposition of a trust into credit or loan arrangements introduces something of an imbalance between the parties; the interests of significant creditors (who are not beneficiaries) to the trust are, in theory, not held to the same standard as those of beneficiaries.

The duties of trustees of insolvent trusts have been considered by Jersey and Guernsey authorities. Although they would not be binding on trustees outside of those jurisdictions, these provide useful, albeit conflicting, guidance. Taken as a whole, they suggest trustees and other parties (such as settlors with reserved powers) exercising fiduciary powers will need to consider the interests of creditors, and not just their trust beneficiaries, when exercising those powers. What is less clear is the extent to which the interests of the creditors should be given priority over those of the beneficiaries.

"Industry experts predict steep rises in insolvencies, affecting key industries. Many businesses may become cash-flow/balance sheet insolvent (if they are not already). Trustees of trusts with underlying companies running significant commercial enterprises may already find themselves experiencing insolvency events"

The position in Jersey

The *Z Trust* litigation in Jersey raised the question of in whose favour fiduciary powers should be exercised. In the case of *In the Representation of the Z Trust* [2015] JRC196C, the Royal Court considered the exercise of a third party's fiduciary power to appoint new trustees, where the trust in question (the ZII Trust) was insolvent. Although the ZII Trust was not itself insolvent, the prospective trustee explained that the actual insolvency event in this case arose from another related trust's inability to repay a significant inter-trust loan to the ZII Trust.

The court took the view that insolvency triggered a shift towards the interests of the creditors analogous to that seen in company law. A trust that becomes insolvent should be administered as if it were insolvent, with the trustees treating the creditors, rather than beneficiaries, as the persons with the economic interest in the trust. It concluded that once there is an insolvency or probable insolvency of a trust, "the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors".

As it transpired, the court found that the third party had not exercised the power to appoint in the interests of the creditors, but for the beneficiaries solely; the third party's witness evidence explicitly stated that they had exercised their power to avoid an insolvency regime for another trust holding valuable family assets. Moreover, two significant creditors had not been able to consent to the appointment of the prospective trustees. The court considered that the third party holding the power to appoint owed duties to the class of creditors as a whole, and not just to a majority of those creditors (who otherwise agreed to appointing the prospective trustees).

The position in Guernsey

The Court of Appeal in Guernsey in the case of *In Re:* F 32/2013 considered, among other issues, two points arising from the first-instance decision by the Royal Court approving (or "blessing") a decision by (at that point former) trustees of the F Trust (a Jersey law trust administered in Guernsey) to refinance a trust asset (a property in London) using trust funds, where that trust was insolvent. The two points were:

- Whether the trustees of the F Trust could exercise powers in relation to trust assets where the F Trust was insolvent;
- Whether the Royal Court could (under its supervisory jurisdiction) approve a decision by a trustee which adversely affected the position of creditors to a trust.

Neither the company owning the property on behalf of the F Trust, nor its parent company, were insolvent. However, they could not, individually or together, meet the refinancing costs. The former trustees' application was to approve the use of other F Trust assets to pay those costs.

The Court of Appeal considered the fact a trust was insolvent did not mean the trustees ceased to have any powers to deal with the trust property, or that the court had no jurisdiction to supervise the exercise of those powers. It said: "The court nevertheless in principle has jurisdiction to bless an application of trust property that is not of benefit to creditors." However, that did not mean the court could ride roughshod over the interests of creditors; in every case the court's task was to consider the matter with regard to all of those interested in the trust property, i.e. including the beneficiaries.

In relation to the refinancing itself, its effect would be to preserve a trust asset for the benefit of anyone who turned out to be entitled to the assets. If the court was satisfied that the trustees had properly taken into account the interests of all those potentially interested, the court was in principle entitled to declare that the refinancing would be a proper exercise of the trustees' power.

How should trustees proceed?

Trustees administering English proper-law trusts are faced with uncertainty on administering trusts which may be insolvent. After all, there are no decisions of the courts in England and Wales to guide them. Moreover, there appears to be a conflict between offshore cases concerning such trusts: on the one hand, the Jersey position (from a court of first instance) says trustees of insolvent, or probably insolvent, trusts owe duties solely to creditors; on the other hand, Guernsey authority (from its Court of Appeal) indicates that trustees could take steps which were not to the benefit of creditors, provided their interests have been considered.

What is clear, however, is that the interests of creditors should not be ignored in trusts which are suspected of being, or are already, insolvent. Prudent trustees should review the factual circumstances surrounding the trust's financial position, and look to canvass both the views of creditors and beneficiaries. Where those interests are not aligned, the question of whose interests should be favoured appears to be more of a grey area. Consequently, we anticipate more litigation in this area.

ABUSE OF THE INTERPOL SYSTEM

Authored by: Matt Ingham, Richard Milford & Isaac Ricca-Richardson – Payne Hicks Beach

The COVID-19 pandemic has forced the planet to grind to a halt and will have a lasting economic impact. Whilst the severity of this impact remains to be seen, we know from previous economic downturns that well-connected elites in high risk jurisdictions have often used improper methods to recoup their personal losses.

Less politically well-connected high-net worth individuals, particularly those in high risk jurisdictions, may find themselves targeted for wealth extraction by way of corporate raiding.

In countries where there is a less robust rule of law than the UK, the state itself or rather some corrupt members of establishments, have been known to falsify criminal accusations against wealthy individuals. The subsequent damage to the individual's reputation is often sufficient to cause an individual to quietly settle a matter and transfer requested assets.

For those who will not be coerced, one particularly useful mechanism for corrupt state officials to utilise is the Interpol Red Notice. It subjects targets to immense psychological pressure and prevents them from travelling internationally for fear of arrest at the border.

Red Notices are intended as a mechanism for tracing and pursuing bona fide criminals. When used properly, Red Notices are a crucial aspect of Interpol's system of international police cooperation, because they allow its 194 member countries to coordinate in tackling transnational crime, cybercrime and terrorism.

"In countries where there is a less robust rule of law than the UK, the state itself or rather some corrupt members of establishments, have been known to falsify criminal accusations against wealthy individuals"

The use of Red Notices to serve political ends, including corporate raiding, is expressly prohibited by Article 3 of Interpol's Constitution, which states that 'it is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character'. Despite this, there is a body of evidence indicating that certain repressive regimes abuse Interpol's system to attack political opponents and vulnerable high-net worth individuals, notably Russia, China, Turkey, and Venezuela.

Perhaps the most prominent example of this attempted abuse of Interpol relates to William Browder. Browder was on the receiving end of an alleged corporate raid by the Russian state when he was expelled from Russia in 2005 and his company, The Hermitage Fund, was targeted. His tax adviser, Sergei Magnitsky, testified that the Russian police and tax authorities had attempted to steal $230 million in Russian taxes. Magnitsky was arrested and died in detention. Since this point Russia has filed a Red Notice request against Browder seven times requesting his arrest.

He live-tweeted his arrest in Spain by Spanish police responding to a Russian Red Notice in 2018.

Within a few hours he was released, but only because the General Secretary in Lyon advised them not to honour the new Russian Interpol Red Notice.

Each member country decides what legal value to give a Red Notice. Red Notices are not always published on Interpol's website. Therefore, you may not know that you are subject to a Red Notice until you are arrested.

Due to external pressure from states and NGOs, Interpol recognised some of its deficiencies and attempted to combat vague and politically motivated notices. Between 2015 and 2017, Interpol welcomed a raft of changes and reforms that were intended to make their systems more resistant to abuse.

In 2015, a refugee policy was adopted that alerted Interpol if the target of a Red Notice had refugee status, due to seeking asylum from the country where the Notice originated. The following year, a new Red Notice review ensured that all Red Notice alerts were subjected to more detailed scrutiny by a specialist team that specialise in upholding Interpol's constitution, before circulation.

Interpol has also been required to change its frameworks in line with EU data protection law.

Individuals subjected to Red Notices can make applications before national courts or directly to the CCF (an independent body of Interpol) to request correction or deletion of the data held by Interpol.

Despite these well-intentioned changes more is required to prevent abuse of Interpol. In 2017, German Chancellor Angela Merkel publicly denounced Turkey's abuse of Interpol in the wake of the 2016 coup. Turkey had uploaded thousands of passport numbers into Interpol's stolen-passport database, in an attempt to track and catch dissidents.

Another method for circumventing the management of Red Notices is to use the slightly less high profile 'Diffusion', which acts as an informal request for cooperation from the country. A prime example of this is Nikita Kulachenkov, a forensic accountant who was an associate of Alexei Navalny, the Russian political activist and lawyer. A Diffusion was placed against him in August 2015. His 'crime' was the theft of a street-art drawing valued at just $1.55. He was arrested in Cyprus in January 2016. This arrest came about despite Kulachenkov warning Interpol in 2014 that he may be subject to a Notice from Russia. Had Russia attempted to use a Red Notice to seek Kulachenkov's arrest, it is more likely that Interpol would have identified the request as abusive, but the use of a Diffusion avoided the flag.

For those that are victims of the system and targeted by malign countries, it can be psychologically and financially life destroying. Browder is quoted in saying that Russia's use of Interpol is "a perfect way for Putin to basically breathe the fear of God into all of his enemies".

For this reason, some member states are taking active steps to combat the abuse of Interpol. The Transnational Repression Accountability and Prevention (TRAP) Act of 2019 is a piece of legislation in the USA that was introduced to the House and Senate in September 2019 – albeit, at the time of writing, not yet passed into law. It is a bipartisan response to the concern over the abuse of Interpol by authoritarian states to repress individuals transnationally.

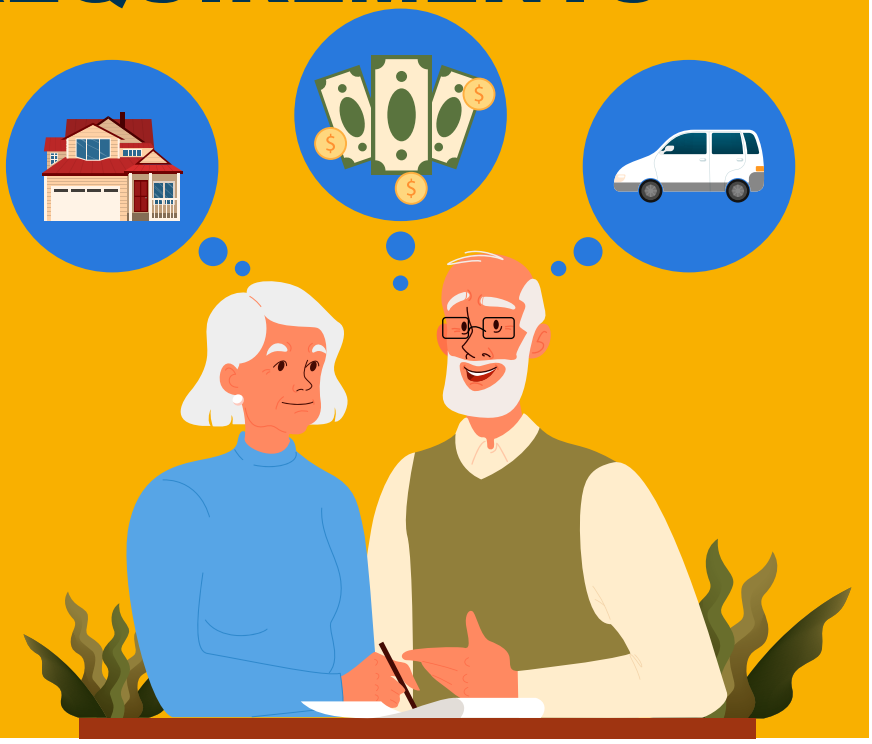
The TRAP Act assumes that if Interpol does not introduce penalties on violators the abuse will continue. The Act seeks to require Interpol to act within its own rules to "impose penalties on countries for regular or egregious violations" of its constitution. It does this by requiring the US to use its "voice, vote, and influence" to push for greater transparency. The TRAP Act has an impact on the weight of Interpol Notices in the US. It clearly acknowledges the reality of Interpol abuse, which will be particularly important to lawyers fighting these sorts of cases.

What is truly baffling is that the UK is taking a comparative backward step in response to the continued scrutiny of the global abuse of Interpol. The UK government has proposed the implementation of a new policy, which will empower police to arrest anyone listed with a Red Notice on Interpol's database, without first obtaining a domestic arrest warrant by a British magistrate.

We should instead be following the example set by the TRAP Act and be pushing for reprimands to authoritarian regimes for abuse of the system for political gain. Britain's policy towards Russia should be one of deep suspicion – see our Egorova & Others article here – instead they, along with other regimes, are permitted to use Interpol to their political advantage.

As human rights lawyers, with experience with corporate raiding matters, we can submit applications to remove Red Notices, which requires written arguments and evidence. We would also recommend making a subject access request to Interpol before demanding the deletion of information. This makes the process longer, but it may provide information that can be used as a point of argument in submissions. The granting of asylum is also an extremely persuasive form of protection from political persecution by a state using Interpol as a conduit.

RELAXING REQUIREMENTS FOR EXECUTING A WILL DURING COVID-19



Authored by: Matthew Braithwaite – Wedlake Bell LLP

The archaic nature of England's law on the execution of Wills has been called into question in recent years, but never more so than in the last couple of months with the outbreak of Covid-19. Embracing modern technology in Will writing has moved from being something that the industry felt it "should" do, to a more urgent plea to allow those that need to execute a Will now, to do so, safely and validly. Other countries have been more reactive introduced emergency legislation to deal with the situation, but so far, England has failed to do similarly. At present, it is therefore a case of working out what can be done within the confines of the legislation we have already.

The current legislation

The requirements are set out in the Victorian legislation of s.9 of the Wills Act 1837 and apply to Wills executed in England, Wales and Northern Ireland (but not Scotland). The section, provides that typically when the testator signs their Will their signature must be made in *"in the **presence** of two or more witnesses **present** at the same time."* The key problem in the current circumstances therefore concerns the witnessing of the Will and the requirement for the witnesses to be "present".

The problems with witnessing

The need for the witnesses to be "present" with the testator can clearly not be respected easily with the current social distancing rules; even more so where a testator needs to self-isolate. All of this comes at a time when the demand for Wills has surged as people rush to get their affairs in order in the event that they fall ill.

The physical act of witnessing is one problem, but finding an appropriate person to do so is another. The witness cannot be a beneficiary under the Will without causing their gift in the Will to fail, and whilst there are no statutory provisions to prevent family members from witnessing, this is never recommended for risk that it could invalidate the Will, for example on grounds of undue influence. Where a testator is in a hospital, care home or hospice, visitors are currently heavily restricted and staff are often prevented from witnessing Wills for policy reasons, making the situation even harder.

Alternatives - remote witnessing

The obvious alternative to formal witnessing is to permit witnessing via audio-visual communication, such as through a video-link such as Skype, Zoom or FaceTime. The idea is that the testator would sign by hand while two witnesses watch the proceedings via video-link. The testator would then scan the document to the witnesses, who would sign the scanned copy, all with the testator watching via the chosen video-link.

The problem with this method is that, under current legislation, it does not satisfy the requirement for "presence". Case-law has highlighted that the word means "physical presence". A test case would be needed to determine whether it can stretch to "virtual presence".

Alternatives – social distancing witnessing

The alternative to using remote witnessing is to have the testator and witnesses sign the Will in the same setting but respecting social distancing rules. The case-law on witnessing

a Will provides some flexibility that can be taken advantage of in these circumstances. In *Brown v Skirrow* (1902), the judge ruled that the witnesses must be "visually present" and have a clear line of sight to the testator, but this does not necessarily mean that they need to be standing next to one another. The court found in *Casson v Dade* (1781), that a Will can be witnessed through a window.

The approach in other jurisdictions

Other jurisdictions have rushed to amend their legislation to allow for remote witnessing. Jersey introduced emergency legislation on 23 April to temporarily relax the formal witnessing requirements to allow witnessing via video-link. Similarly in New Zealand, where emergency legislation was enacted in April to allow the testator and witnesses to sign counterparts of the Will via video-link.

The Law Society of Scotland has implemented a slightly different approach and has temporarily amended its guidance to allow the testator's lawyer to act as the witness via video-link, so long as they are not the appointed executor.

The approach in England

The issue of witnessing by video-link has been examined in England before. The Law Commission covered it in its consultation in 2017, concluding that as "presence" has been held to involve physical presence, witnessing via video-link would be invalid. The consultation also examined electronic signatures and recommended that these should not become a valid means of executing a Will until appropriate technological safeguards are in place.

The government has so far been reluctant to go against such recommendations or to introduce measures to allow for "privileged Wills" such as those that were permitted during wartime to enable military serviceman to draw up valid Wills whilst serving in the trenches.

The government is currently considering video witnessing but emphasised the need for any changes to be balanced against the important need to safeguard the elderly and vulnerable from potential undue influence and fraud. What then, are the options?

Options for witnessing Wills

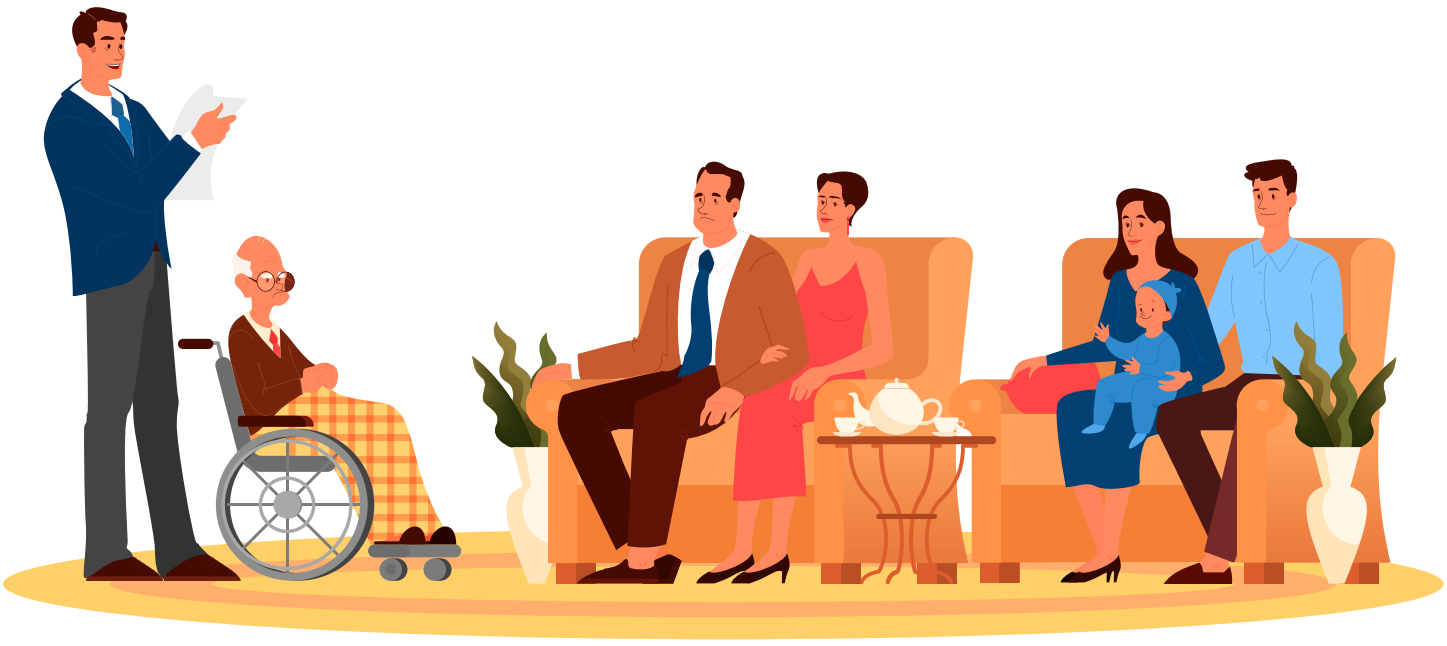
The best option, where possible, is to have a Will witnessed by those who are physically present but respecting the social distancing rules. Witnessing neighbours signing on the other side of a window for example, or across the garden fence, provided there is a clear line of sight to the testator's signature.

Where this is not possible, remote witnessing could be considered but the testator should be made aware of the risks. The video-conference should be recorded, and where possible, the Will re-executed when normality resumes. Where a solicitor is involved, there is the obvious need for careful file notes and evidence to document the circumstances and the advice given.

The testator could sign an informal letter of wishes with their testamentary requests. This will obviously not be legally binding but it may be possible for the inheriting family members under the intestacy rules to carry out the wishes via post-death gifts to the intended beneficiaries.

Conclusion

Although the government is considering the issues, there is a real risk that they will miss the boat and, with the peak of the epidemic now reportedly past, those that wanted to execute Wills may well already have done so, validly or not. Sadly, we are likely to see an increase in contentious probate cases surrounding execution in the coming months, and if the government has in the interim failed to act to change the law, it is possible that a resulting test case may finally prompt the government to update a law that so many are now urgently requesting.



PRIVATE LABEL FUNDS – COLLECTIVE INVESTMENT VEHICLES FOR HNWIS

Authored by: Richard Grasby – RDG Fiduciary Services

Collective investment vehicles are very familiar to high net worth investors ("HNWIs") and their connected structures (trusts/family offices etc). In fact, many such HNWIs are key investors for new fund launches. Most such funds are put together by wealth managers looking to profit from the management of the fund. There is a key rule to bear in mind - all investors of the same class should be treated equally. The fact that one investor is wealthier or strategically more important to the manager does not in itself give such investor any priority – particularly in terms of redemption rights. Preferential treatment would need to be permitted via side letter or different classes of shares and can result in disputes between investors who each want to get the best deal!

Sizeable investors are therefore attracted by having their own fund vehicle- aka "the private label fund". Many private banks are offering such a service to their wealthy clients. But what are the main advantages of this arrangement?

Firstly, the investor (or the selected group of investors) is isolated from other investors. The client can dictate all the terms. Subject to any local regulations [1], choice of manager (potentially a family member), removal of manager, investment mandate, fees, redemption rights, valuation details, information rights, service providers and others are all chosen by the investors.

Second, the use of a fund vehicle gives the client an additional layer to aid confidentiality and, if the fund is regulated, the consequence is that the underlying investment is being made by a regulated entity rather than one or more individuals. There may also be potential for tax deferral if gains are made / dividends are received to a fund vehicle in a suitable jurisdiction.

Third, where there is more than one investor there is a pooling of assets which can give advantages in terms of buying power / access to deals, negotiating strength, the enhanced value of larger aggregated holdings, streamlined due diligence and increased investment diversification.

Fourth, it is easier to allow family members in and out of the "family investments" if there is a consolidated fund and a valuation mechanism. If, for example, a sibling wishes to "go-it-alone" there should be a clear mechanism for this to happen. Either the fund can redeem their holding at agreed values or other investors buy their shares at an agreed value (insurance and borrowing may come

"There is a key rule to bear in mind - all investors of the same class should be treated equally. The fact that one investor is wealthier or strategically more important to the manager does not in itself give such investor any priority – particularly in terms of redemption rights. "

1 Depending on the jurisdiction and the chosen structure there are likely to be several formalities that cannot be ignored.

into play to fund this). It may be possible to do this without breaking up certain investment positions. Without such pooling it would be necessary to buy/sell/ transfer a portion of each investment whenever such an event occurred. This also assists with disruptive events such as death or divorce where the economic impact can be concentrated into dealing with one holding in one jurisdiction (i.e. the fund). A word of warning, there may well be sound planning to have assets and structures in more than one jurisdiction and structure type so a private label fund ought not contain all of the family wealth.

Fifth, with such a structure, it is possible to allow family members / trustees exposure to investments but without any direct ownership or control of such investments. Limited partnership interests or non-voting shares are two such options. Control is retained in the hands of the general partner or voting shareholders. Succession planning and restricting participation to certain persons is often a key part of a private label fund and it is important that the advisers and service providers are able to offer such advice as well as fund-specific expertise.

Sixth, personalized fund structures can in certain instances be a springboard to setting up a family office and obtaining residence for family members in a particular jurisdiction (see for example Singapore).

So what is required for such a private label fund to be set-up?

- **Choice of jurisdiction.** This will involve many factors – ease of establishment, cost, regulatory regime, tax etc. Recent developments affecting many offshore centres have resulted in more regulation and compliance for collective investment vehicles – particularly in respect of filings, audit and AML.
- **Entity type.** Company, trust, limited partnership, cell company, LLC etc. This will depend on jurisdiction, investor familiarity, cost etc.
- **Terms.** Who may invest? What will be done with the funds? How are valuations done and by whom? How can other family members invest or get out of the fund? Does there need to be pre-emption rights? Put and call? Drag and tag?
- **Assets.** What assets should be in the fund? In theory any asset can be placed in the fund. Notwithstanding the advantages certain assets may not be best suited to be pooled with others. Aircraft and ships for example may have liability issues and necessitate segregation. Works of art to which certain family members have a particular affinity are perhaps better off not being pooled! As mentioned above there may also be merit in a certain degree of diversification.
- **Service providers.** The private label fund will need legal, compliance, administration/valuation, custody, brokerage and audit. A decision will need to be made as to who will manage the assets and whether a management entity needs to be set up for the family.

Tailored fund vehicles can offer many advantages to HNW families but there is no “one-size-fits-all”. A corporate structure to organize family assets is often far more understood by wealthy families than traditional trust structures and more likely to be executed. It is crucial as with many such matters to get appropriate advice.

DEALING WITH THE DEATH OF A SETTLOR

ASSISTING FAMILIES IN TIMES OF TRAUMA

Authored by: Tara Hopwood – Summit Trust International

Trusts are settled for many reasons but succession planning is usually featured at the top of this list. Many settlors like the idea of leaving a legacy, of leaving their accumulated wealth in safe hands and of doing what they can to minimise if not completely eliminate family disharmony after their passing.

Choosing the right trustee is vital, and, knowing the settlor, his/her family, his/her desires and wishes and his/her needs and those of his/her family (or other beneficiaries) is of paramount importance.

In my experience, and whilst I acknowledge this might be an oversimplification of the complicated and fascinating people we have the privilege of working with, there are three types of settlor: those who do not wish for the beneficiaries to know anything about the trust, those who are content for beneficiaries to know about the trust but would prefer that no specific details are divulged (such that there might be no reason for a trustee to do so if the settlor is to be considered the primary beneficiary during his/her lifetime), and those that involve the beneficiaries from the early stages and encourage communication between all parties to ensure a comprehensive understanding of what the future may hold is achieved.

The first type of settlor is the more traditional or old school settlor and one everyone will no doubt be familiar with. There is nothing essentially wrong with his/her way of doing things but it is important to be cognisant that the job of trustee will always be more difficult on his/her death. By way of an example, let's take a Mr. P, settlor of a trust that owns 5 offshore companies. Two companies own properties in desirable offshore jurisdictions (I'm sure we can all think of at least one!), one owns a property in the UK, one owns a sizeable investment portfolio, and one owns a large art and antique furniture collection all of which is housed in Mr. P's estate in the UK and enjoyed by him during his lifetime (and which he has of course declared the benefit of).

Upon his death, the trustee discovers that whilst Mr. P implicitly understood the mechanics of a trust, he had not thought to pass on this knowledge to any of the beneficiaries, being his children and grandchildren (and remoter issue). He had 3 'children' (all now in their late '40's and early '50's and with children of their own) and 10 grandchildren. Each of the children had grown up with the knowledge of the various properties. With their father, they had all enjoyed the use of these properties from childhood, but each of them was ignorant of the fact that their enjoyment was subject to a licence to occupy granted to Mr. P, also a beneficiary of the trust. Each of them had come to understand during their father's lifetime that they would each inherit a property, a share of the wealth currently invested and a vast collection of artwork and antique furniture, and Mr. P had never disabused them of this notion.

Enter the trustee, just a few short months after Mr. P's death, now with the unenviable task of having to introduce themselves to the beneficiaries, who, despite being adults themselves, are of course, still children who have just lost their father. This is not an easy task. The introduction itself is easy, but letting a room full of mourners know that their father did not in fact own any of the assets they had assumed were to all intents and purposes now theirs, is not.

In an instance such as this, it is possible, in fact, highly likely, that the trustee will be regarded with suspicion and the beneficiaries will not, at least initially, be open to embracing new concepts least of all those that involve to their minds, 'their' assets having been taken from them. This is when a trustee can either start a very contentious relationship with the beneficiaries or, by

educating them, learning about them (and their needs and circumstances), and listening to them, can start a very positive relationship with them and even more beneficially, can assist them in educating their children to avoid history repeating itself when their time comes. In my experience, it is best to leave the subject of their mortality until the relationship has been well established!

The second type of settlor is a hybrid of the old school settlor and the more modern (oftentimes younger) settlor. In the above scenario, walking into that room full of children mourning the loss of their father is still difficult (in fact, I cannot imagine when walking into a room such as this would not be difficult). However, there is an acceptance of the fact that the trustee has a place in their lives and is someone they understand even if they are not aware of the specifics. The beneficiaries in this instance will be far more likely to be more open to the dialogue and more prepared to understand the benefit of having a trustee at that time. There may of course still be difficulties. I challenge any trustee out there who says they have never had difficulties. However, some of the best relationships are borne out of difficult beginnings. They say in a crisis you will witness the very best of people and the very worst of people and during times of difficulty, stronger bonds are usually formed than during times of peace.

Lastly, we have the third, what I have called the more modern settlor. This is a Mr. Q, who has not only made it clear to his children that there is a trust and many of the assets they've enjoyed such as the house on the beach, are within the trust, he has also made clear the rules that apply to their enjoyment of such an asset. He's also taken the time during his life to ensure the trustee and his children have met on a number of occasions and in this example, it is the children who call the trustee to let the trustee know their father has passed away, and there are no difficult meetings, just heartfelt sympathies passed on and a much easier dialogue in relation to the current circumstances of each beneficiary so that the trustee can do what it can (if appropriate and per the deed) to assist during such a difficult time. And there are often many ways a trustee can assist, especially where probate on the free estate of the settlor may be complicated and take some time to achieve and with bills to pay and a funeral to arrange not to mention perhaps acting as a mediator between siblings to ensure the best outcome for all.

There is not of course, a settlor shaped box that all settlors should conform to (and even if there were, it would not be possible nor desirable to have them conform). It is simply to say that as a trustee, we are far better equipped when we can identify the challenges that we might face on the death of a settlor and simply knowing what these are can ensure a smoother transition so that the relationship with the beneficiaries may continue for generations, as was presumably intended by any of the settlors mentioned above.

In conclusion, I believe that all of the difficulties one might encounter during times of family trauma, such as on the death of the settlor, can be largely mitigated, if not entirely eliminated, by doing everything you can during the lifetime of the settlor, to nurture that relationship and learn as much as humanly possible about the extended family (or class of beneficiaries). Simple perhaps, but invaluable to ensure the wellbeing of the families we work with and our ability to exercise our discretion in full knowledge of what is best for all concerned.

UNEXPECTED DEATH IN THE TIMES OF COVID 19: ESTATES WITH U.K. AS WELL AS INTERNATIONAL FOCUS

Authored by: Helene Pines Richman – 9 Stone Buildings

Regardless of whether you previously read books on pandemics, were fully au fait with the Spanish flu of 1918, and/or at least broadly knew that epidemics on a grand scale occur about once every 100 years, the Corona Virus has shocked the world in its speed of spread and truly terrible consequences. The death toll as of this writing is almost 29,000 for the U.K. and 250,000 worldwide.

The most obvious consequence is that huge numbers of people have died unexpectedly. And despite the steady stream of adverts on Facebook and elsewhere for and by will writers, and articles by lawyers addressing the difficulties of, inter alia, obtaining instructions and executing wills in accordance with the Wills Act 1837 (as amended), it may be anticipated that very many people will die intestate or with wills which they thought were revoked, or should have been. This article considers how this can happen and the particular issues which may arise where the deceased had international connections including homes and households abroad.

Section 9 of the Wills Act 1837 states that a valid will must be in writing, signed by the testator, or by some other person in his presence and by his direction, it must appear that the testator by signing intended to give effect to the will, and the will must be witnessed by two witnesses who attest that they were present when the testator signed. They must also themselves sign the will in the presence of the testator, but not necessarily in the presence of the other witness.

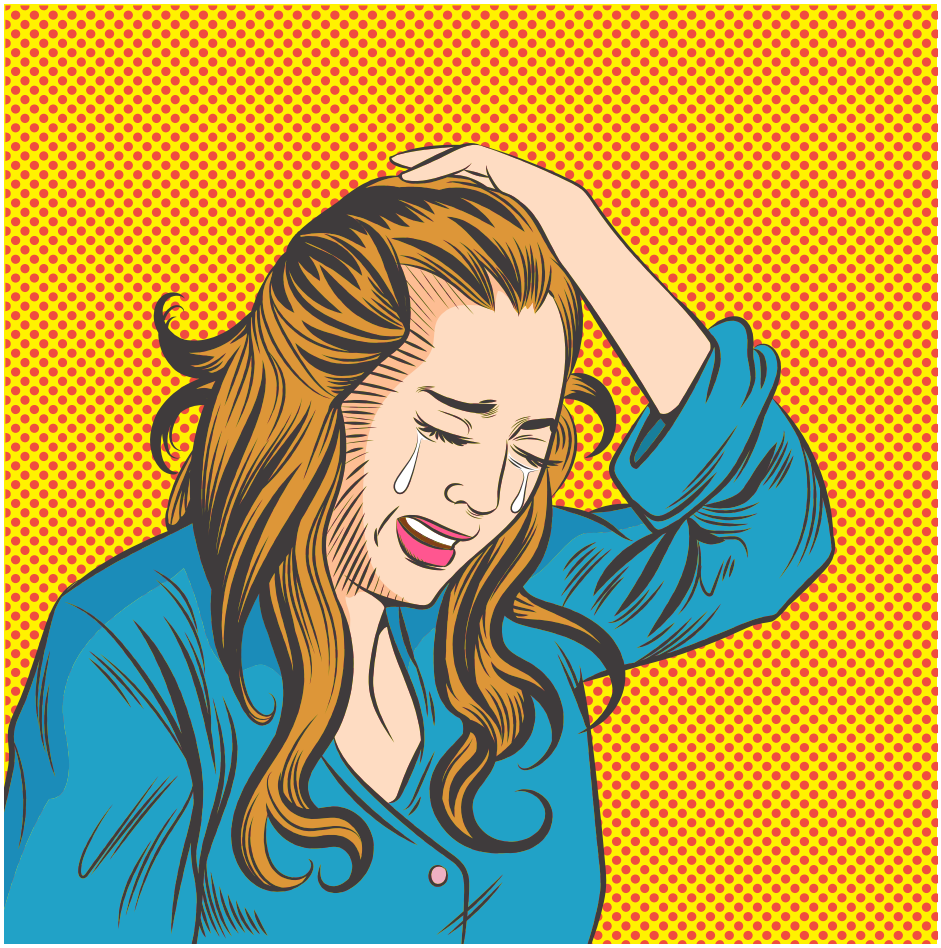
Complying with the above formalities requires specific care. As set out above, a will can be executed in one of two ways:- either by personally signing, or directing someone else to do it. If relying on someone else, it has to be more than just signing on the testator's behalf. There should be evidence of an instruction to do so – a detailed attestation. The issue of valid execution was raised in *Barrett v Bem* [2012] EWCA Civ 52, where it was noted that heretofore there had been no modern authority on the signing of wills other than the Northern Irish case of *Fulton v Kee* [1961] NI 1 where the testator had a severe physical disability which made movement difficult if not impossible. He was attended at hospital by his solicitor, instructions were taken, a will drawn up, the testator acknowledged it, and then the solicitor took the will and the pen and he "backed the pen against his fingers and I (the solicitor) made the mark". The pen was in contact with the testator's hand the whole time. It was found that the actual signature was validly executed, but if it hadn't, it was still a valid signature by direction (though it was not attested to as such).

The facts in *Barrett v Bem* itself were considerably more problematic:- on the day of the testator's death in hospital, the testator had received the assistance of his sister, who was the sole beneficiary, in executing his will. The crucial finding was that the sister "stepped in, took the pen, and signed the … will on [the testator's] behalf". But there was no finding (no evidence) that the testator asked her to, or that she had inquired if she could. It was not enough to assert that it was what the testator had wanted, and that he had tried to execute the will himself but could not. Moreover, as noted by the trial judge and Court of Appeal, it was "plainly undesirable that beneficiaries should be permitted to execute a will in their own favour in any capacity; and that Parliament should consider changing the law to ensure that this cannot happen in the future".

In 2017, the Law Commission undertook a public consultation on reforming the law of wills to, inter alia, consider whether to reduce or eliminate formalities for a will where there is clear evidence that it is what the deceased wanted. To date, however, there has been no relaxation of the formal requirements of the Wills Act 1837(as amended) .

It may be anticipated that many a will in the times of Corona will fall, for formal as well as well as substantial validity reasons with the result that pronouncement may be sought in respect to earlier wills if not revoked because of, for example, marriage.

Alternatively, the deceased may be found to have died intestate. If he



is domiciled in England (domicile is decided under English law), there will likely be no question but that the English rules of intestacy apply and a grant of administration may be made even in an instance where there is no property in this country (there may be good reasons to do so, for example, in order to bring or defend proceedings in England, or maybe to get an English grant to assist in obtaining a foreign grant).

Alternatively, as has become so common, the position may be less clear. The deceased may have been born abroad, moved many times, and/or been visiting family in England, or attending to his business, or he may have homes here, and abroad, wives abroad, and under the English laws of domicile may be considered to be domiciled in another country even he resides mainly in England. If domiciled abroad, however, the court may still exercise its jurisdiction to make a grant to administer the estate where the deceased had immovable (real) property in England.

The applicable law is the law of the situs where the property is located - in England, the English laws of intestacy [Administration of Estates Act 1925 (as amended) s 46]. Under current intestacy laws, the surviving spouse or civil partner takes the entire estate- if there are no issue. If the deceased died with a spouse or civil partner and children, the surviving spouse or partner receives a statutory legacy, now £270,00 as of 6th February 2020, one half of the residue, and all personal chattels. But what happens when there are multiple spouses? That is precisely what happened in the unusual case of *Official Solicitor to the Senior Courts v Yemoh and others* [2010] EWCH 3727 (Ch). The deceased had died intestate and domiciled in Ghana, owning immovable property and various other assets in England. He was survived by 8 wives and numerous children. All of the wives were recognised as "the surviving spouse"- the marriages were validly celebrated in Ghana, and they were entitled to an equal share of the statutory legacy and collectively a life interest in half of the residue – the law on amount of entitlement has since changed.

For movable property, the law of the country of the deceased's domicile at the time of his death will generally apply. Succession will be based on the laws of that country regardless of the location of the assets – see *Baindail v Baindail* [1946] P. 122 – domicile in India, succession to personal property in England governed by Indian law. English courts will generally follow decisions of the court of domicile, exercising an ancillary rather than primary jurisdiction. Considerations regarding evidence and procedure, however, are still governed by English law – the lex fori, which will also apply to will challenges.

There are separate and additional considerations which arise in relation to jurisdiction and laws on substantial validity of wills and will construction. Under the Wills Act 1963 s 1, any will of a person who died after 1963 will be deemed validly executed if it was valid in the country of execution, or the law of the country of nationality, domicile or habitual residence either at the date the will was executed or the date of death. This applies for immovables and movables. Additionally, if the will contains gifts of immovable property, it will be treated as validly executed if the execution complies with the "internal law" of the lex situs [Wills Act 1963 s 2]. By contrast, for immovables and movables it is the law of the deceased's domicile at the date of the will which generally applies in respect to will construction disputes regarding the property, though other substantive issues will be governed by the law of domicile at death (for movables) or lex situs (immovables).

As to claims under the Inheritance (Provision for Family and Dependants) Act 2975 – the law is quite clear – the deceased must have died domiciled in England. The facts, of course, may well be less transparent, particularly in larger estates.

Undoubtedly, we are living in interesting times.

IT'S TIME TO ADAPT

THE NEXT GENERATION IS ON THEIR WAY!

Authored by: Edward Bennett – Bedell Cristin

It is widely publicised that economists and financial observers estimate that, over the next few decades, assets worth many trillions of dollars will pass from one generation to the next - dubbed "The Great Wealth Transfer". This passing of wealth is likely to take many forms including the transfer of individual influence over existing wealth-holding structures and as such it is clear that the fiduciary industry will experience the effects of this intergenerational change.

The Founder Generation

The typical wealth holding structure available and established 30 plus years ago by the settlor and the initial generation of beneficiaries – the founder generation - was a 'one-size-fits-all' trust under which trustees could exercise a wide range of discretionary powers over a mix of property.

The founder generation at the time of the trust's creation is likely to have had common attributes, for example:

- All beneficiaries living in a 'home' jurisdiction
- A strong expectation beneficiaries would be educated or live in the "home" jurisdiction

- Moderate understanding of wealth holding structures and no easy access to information, although entrepreneurial and well-versed in business activities
- A close relationship with most, if not all, members of the founder generation
- Beneficiaries with fairly traditional characteristics and qualifications i.e. children, grandchildren and great grandchildren of the founder generation, together with their spouses, would automatically qualify as beneficiaries
- A shared aim as to the purpose of the trust
- Active participation in the choice of trustees and therefore likely to have developed a close personal relationship with the trustees

For the founder generation, the 'one-size-fits-all' trust was sufficient for their requirements.

The Next Generation

The next generation is also likely to have common attributes, but different to those of the founder generation, for example:

- Beneficiaries will have been educated or living in multiple jurisdictions beyond the 'home' jurisdiction
- A greater understanding of wealth-holding structures obtained via online research
- Expectation to easily access information 24 hours a day, seven days a week
- Difficulty in gaining or sustaining a relationships with other beneficiaries due to the growing size and international locations of the beneficial class; now including cousins, nephews or nieces and grandchildren

- More complex family arrangements
- Experience of divorce, multiple marriages, long-term but unmarried relationship, same sex relationships, and any children from these relationships
- More likely to have individual requirements and aspirations which may not necessarily be shared among all of the next generation
- A shift to a transactional-style relationship with trustees, so less likely to have long-term loyalty towards the trustees

It is unlikely that the 'one-size-fits-all' approach will be suitable for all of the next generation's needs and the trustees will need to consider how they and the trust should adapt to keep pace with the next generation.

So what might the trustees do to support the next generation?

Ten Pointers for Proactive Trustees

1 **Prepare a trust structure summary.** Distribute it to the next generation and explain:

- The trustee's role and their duties or responsibilities
- The terms of the trust
- What it means to be a beneficiary of the trust
- Current activities of and investments held by the trust
- Applicable regulatory requirements

2 **Set up a meeting with the next generation.** Meet as many as possible (easy to do using our newly acquired video conference skills). Topics for discussion could include:

- Clarify the trust structure summary
- Current circumstances of the immediate family eg any health issues?
- Aims and aspirations, what is important to the next generation?
- Performance of current investments
- Issues of conflict or potential conflict among the next generation
- If appropriate, gain an understanding of what is considered to be 'fair'. Will notional distributions among the next generation apply in equal amounts among several branches of the family (per stirpes)? Or in equal amounts among all beneficiaries (per capita)?

3 **Focus on the existing structure and its purpose.** Does the structure meet the wishes of the next generation and can it be modified? Might it be appropriate to establish a new parallel structure eg a foundation?

4 **Review trust fund investments.** Are investments aligned with the next generation's aims and aspirations? Is there a collective philanthropic aim which could unite extended family around a shared set of values?

5 **Apply a current-thinking approach.** Is the trust able to accommodate the lifestyle and characteristics of the next generation? Is it able to provide benefits to those in either a same sex relationship or to children of unmarried parents? If not, what is the status of such individuals under the trust?

6 **Focus on values and future growth.** Can the growth of the trust fund keep pace with the growing size of the next generation? If not, should the trust's overall purpose be modified to provide only essentials eg a family health trust?

7 **Clarify the impact of pre and post nuptial agreements.** If any of the next generation is party to a pre or post nuptial agreement, do any of investment structures need to be altered to better reflect the terms of the pre or post nuptial agreement?

8 **Clarify who wants to remain a beneficiary.** Is it important for the next generation to remain as beneficiaries of one trust when one or more beneficiaries want to go their separate ways, or is the formation of a new structure aligned to different aims or aspirations more feasible?

9 **Be willing to innovate.** Could a private trust company be established (with the next generation included as directors) to act as a co-trustee? If there is a need for investment transparency, can read-only access be given to investment portfolios held as part of the trust fund?

10 **Adapt your communications.** The next generation expect fast, accurate and responsive information. If not already in place consider adopting technology to enable this.

The Future

To meet the evolving needs of the next generation, advisors must adopt a proactive approach now.

If private wealth practitioners are not already talking about the impact of The Great Wealth Transfer, then they soon will be.

Authored by: Matt Ingham & Isaac Ricca-Richardson – Payne Hicks Beach

As asylum lawyers with extensive experience of corporate raiding cases involving parallel extradition requests, our overriding view has always been that the best way to guarantee protection from persecution is to claim asylum. Putting aside their legal differences, asylum provides a right to travel internationally through a UN Travel Document, whereas merely defending an extradition request can leave an individual stranded in England. In addition, asylum provides our clients with an unparalleled opportunity to fully rehabilitate their reputation.

Despite these important points, on 9 December 2019 Westminster Magistrates Court handed down a judgment that undeniably improves the situation with regards to extradition for Russian nationals. In *Egorova and Others*, the Court held that extradition to the Russian Federation currently presents an unacceptably high risk of torture or ill-treatment, contrary to Article 3 of the European Convention of Human Rights.

Although allegations of torture in Russian prisons are far from novel, the important finding in this case was that it is now impossible to rely on assurances from the Russian authorities that they will protect individual prisoners from harm, because the authorities and monitoring bodies have themselves become root and branch corrupt.

Where before the Russian prisons' Public Monitoring Committees (PMCs) were directly elected and independent, their members have since been replaced by former military personnel, law enforcement representatives and *Siloviki* associates. In addition, their powers were curtailed by a July 2018 Act that prohibits private conversations with inmates and limits their access to penal institutions. The Commissioners for Human Rights that Russia proposed as an alternative are even more politicised, being directly subordinate to the federal prison service and engaged in 'cooperation agreements' with prosecutors.

Last week the English High Court approved the decision in *Egorova*, and the Russian Federation has since confirmed that they will not seek leave to appeal further. Is it safe to say that this sounds a death knell for Russian extradition requests for the foreseeable future? That depends on whether the Russian authorities can remedy the fundamental structural problems identified – but what can be said for certain is that this decision follows a growing number of cases involving Russian abuses in many spheres of relations with the West, and a wider disintegration of diplomatic relations that may take time to resolve.

In our view, the decision in *Egorova* is to be welcomed. As the Henry Jackson Society has argued, the Russian authorities have, for the past decade, "set about consciously misusing judicial mechanisms by stealth, pursuing perceived opponents around the world" – and whilst our judiciary must be encouraged to treat all sovereign states equally, they are right to closely scrutinise the inclination to lie and misdirect of some in the Russian political elite.

Despite these positive signs, we remain cautious of advising clients that they are now safe from abusive Russian extradition requests. Previous cases indicate that regardless of Egorova, the Russian Federation will return with further requests, likely even for the same individuals. In this regard asylum is again a far superior form of protection, because it provides a permanent safeguard against removal.

Furthermore, whilst further Russian extradition requests *could* be refused out of hand, both the Magistrates and the High Court in *Egorova* were at pains to emphasise that the Russian Federation are free to return once their monitoring system is remedied. And although the problems appear to be structural and to demand root and branch reform, the writing also seemed to be on the wall for Russia after a series of negative decisions in 2012 and 2013.

If the Russian Federation does surmount the hurdle put down by *Egorova*, defending extradition becomes a hard task. The high threshold of Article 3 means it provides a relatively weak form of protection, regardless of the requesting state – as evidenced by the number of Russian extradition requests that have been granted over the years despite the wealth of evidence of mistreatment in Russian prisons.

In contrast, asylum utilises a more sophisticated and nuanced definition of persecution that fits more closely with the lived experiences of our clients. Asylum proceedings are also confidential in a way extradition proceedings are not. This confidentiality allows those who are fearful of persecution to deploy all of the evidence and witnesses in support of their case, where they may be reluctant to do so in open court with their persecutor and the press all in attendance. In addition, there is precedent case law to the effect that extradition should normally be adjourned until an asylum claim is determined, reducing the risk of having to deal with two substantive proceedings at once.

So, whilst it would be fair to say that Egorova marks a positive and potentially significant change in direction with regard to our judiciary's response to Russian abuses, we would advise anybody fearing an abusive extradition request not to rest on their laurels, and to take advice on the viability of claiming asylum right away.

PRACTICAL CONSIDERATIONS FOR TRUSTEES

Authored by: Andrew Peedom – Collas Crill

The profound impact which the current pandemic has had on all aspects of life cannot be understated. This, of course, includes the global economic downturn; in some quarters it has been compared to, or indeed said to be likely to eclipse, the Great Depression.

The spectacular collapse in global stock markets is also likely to have another effect, which is unlikely to crystallise for some time: disgruntled beneficiaries and settlors with reserved powers laying the blame with trustees for the significant depletion in the value of a trust's assets, particularly where the trust's portfolio is focussed on investment in equities. Claims for relief in the form of damages and/or the reconstitution of the trust fund will follow.

It is no secret that litigation is an inevitable consequence of a global recession; the fall-out from the global financial crisis in 2008 is a paradigm example. Indeed, there is trusts litigation which continues afoot in various jurisdictions as a consequence of that crisis. One notable recent example is what has colloquially become known as the *DBS Bank* case, where the Hong Kong Court of Final Appeal confirmed only last November that anti-Bartlett clauses in trust deeds remained relevant.

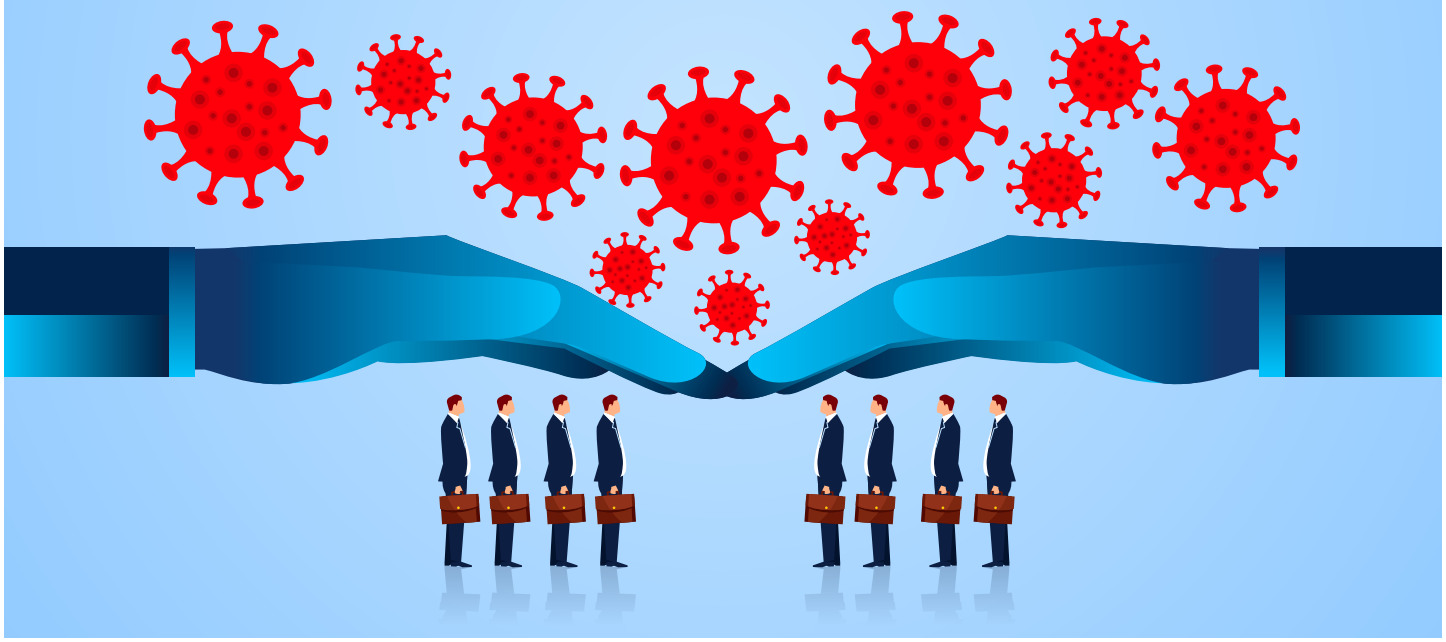
So what are the lessons learnt from 2008? There was a particular issue which became somewhat of a sticking point for some claimants in post-2008 proceedings, including where damages were claimed for gross negligence and/or breach of duty as trustee: causation. That is, how was the trustee negligent for failing to preserve the value of a trust's portfolio in circumstances where no one predicted the global financial crisis? And importantly, what steps should the trustee have taken to avoid such losses that it did not take? In some very significant trusts litigation, proceedings were dismissed because there was an inherent failure by disgruntled beneficiaries to persuade the courts that a trustee's conduct was causative of loss.

For trustees, however, this does not mean they are insulated from such claims because no one could have anticipated our current predicament, or indeed the concomitant collapse in the global economy. Now, more than ever, is an appropriate time for trustees to consider the following:

- **Trustee minutes/resolutions** - Are these up-to-date? Do they adequately record a review of investment portfolio reports, a consideration of the recommendations made where investment decisions have been delegated, the current parlous state of the financial markets globally and the trustee's decision to agree with the recommendations proposed, or to seek alternatives? The same applies for board minutes and resolutions for underlying investment companies within a trust structure.
- **Anti-Bartlett clauses** - what do they say and how comprehensive are they? Do they afford a trustee adequate protection and are they consistent with the investment framework e.g. the terms of the investment management agreement.
- **Communication** – a key focus for trustees has always been strong client relationships. Now, more than ever, is an appropriate time to contact clients to discuss the current crisis, understand their concerns and to discuss what steps should be implemented to insulate the trust's assets from further loss. This is crucial given a trustee's duty to preserve and enhance the value of the trust fund. Documenting those concerns and the strategy which has been agreed for the ongoing administration of a trust is equally important.

Reviewing current work practices and implementing additional measures where appropriate, might be the difference if a trustee is faced with a breach of trust claim. Such measures will not necessarily protect a trustee from prospective claims, but contemporaneous documents which record the measures they have taken in the face of unprecedented times might prove to be key when defending such claims. Case dismissed.

WHAT SHOULD PROTECTORS BE THINKING ABOUT SINCE THE ARRIVAL OF COVID-19?



Authored by: Roberta Harvey & Hannah Mantle – Forsters

Many protectors or their advisors will already have navigated difficult issues during the recession following the financial crisis in 2008, others will have done so even earlier. The issues which arise from the physical restrictions placed on us and our movement during the current crisis may be quite unusual, but the economic issues arising from the Covid-19 crisis are likely to be similar to previous downturns. In times of crisis it is pertinent to undertake trust reviews to plan for the future of the trust, in particular to head off potential disputes. If nothing else, it may be a useful moment to ensure that the protector is familiar with their role and the duties and powers under the particular trust deed and general law.

Covid specific issues

Physical restrictions:

Across the world, Covid-19 has caused limits to be imposed on people's movement and meetings with others; both on a local level, for work or socialising, and on an international level. For those involved in international trusts, this is likely to create significant practical difficulties.

For example, where beneficiaries or protectors are no longer happy with the performance of their trustees (or perhaps investment advisors), and would like to replace them, but are no longer able to travel and meet with

potential replacements. The protector is likely (depending on the terms of the trust) to have a role in deciding whether the trustee's conduct has been so unsatisfactory that they should be replaced with a new trustee who they have only been able to meet by video conference (at best); or whether the dissatisfaction is of a lower level, where the risk of the increased time, costs and confidentiality issues which would arise from removing and replacing trustees, potentially twice in quick succession, would be of greater concern. Obviously, both courses of action will be open to criticism with the benefit of hindsight, so there is a balance to be struck and documented, to best protect the protector in years to come.

Equally, we are rapidly becoming accustomed to video calls and virtual meetings. Even if in many ways these are less attractive than meetings in person, they can save travel time and focus the minds of the attendees, such that there may be a greater place for them going forward. For many it would certainly be worth considering how, when and with whom they can best be used both in the coming months and beyond.

Succession planning:

One of the specific consequences of the current situation is that whilst many people are generally unwilling to consider their own mortality, the risk of Covid-19 and the restrictions imposed as a result have provided a catalyst for such discussions and considerations. Whilst this is most visible in Will making and planning for loss of capacity on a personal level, it can also be the case for succession planning within a family trust. Depending on the terms of the trust and the powers given to the protector, succession planning could involve the addition of another protector to form a committee, replacement of an individual protector (particularly if they are in a high risk group for the disease), or the discussion or appointment of a future protector (to come in to effect on the death or incapacity of the current officeholder).

Equally, a protector might need to be involved in the consideration of the future of the trust – this could provide an opportunity to ensure that proper updates are being provided to the protector by the trustees to allow them to fulfil their role; to speak to the settlor more generally about their wishes, so that their views can be taken in to account (as one of a number of factors) in years to come; or to check that the approach being taken by the trustees in respect of investments or other powers is within the scope prescribed by the trust deed.

Economic issues

Investments:

It is perhaps inevitable that some beneficiaries will question their trustees' investment decisions immediately before and during the Covid-19 crisis, particularly where they have underperformed compared to the wider market. Some trusts with particularly low risk investment strategies, where the assets are held in 'safe' investments, might have been comparatively unaffected by the downturn. Other investments may be more significantly affected – some trustees will have been following particular requests or wishes of their beneficiaries regarding the types of investments (advisedly or otherwise); or will have loaned monies to beneficiaries or their related companies, which may now be irrecoverable (at least for the time being). In any event, the protectors should (if they have powers to do so) satisfy themselves that such investment decisions were within the trustees' powers and consider whether the protector itself has and should exercise any powers they may have to minimise the impact of these decisions, or to reduce the risk in future.

Beneficiaries' positions:

Beneficiaries circumstances may have changed significantly – income (from the trust or other sources) may be substantially reduced; businesses may be temporarily closed or have failed completely, while others may be thriving. This is likely to result in changes to beneficiaries' future economic or lifestyle plans, or even their residency. The protector might have to consider whether to approve distributions from capital to compensate for any reduction in income, or to approve the addition or removal of certain beneficiaries depending on their financial needs, family health issues, or tax residency. Frustratingly, it may only be possible to deal with beneficiaries' changes after the event, so they should always be urged to take their own advice on tax, immigration and other issues, to ensure that they are aware of any risks arising from their decisions.

Not overstepping

Whilst it goes without saying for professional protectors, it can be important to highlight to individual protectors that throughout their decision-making, they must remain alert to not overstepping their role and taking on the position of a quasi-trustee, as this risks claims being brought against the protector, who, subject to any exoneration clause or indemnity, will be personally liable for any loss arising from his negligence.

Just as many individuals are using the current or recent lockdown as an opportunity to review their lives and their priorities; protectors and their advisors could and should use this as a time to review their trusts, to ensure that they are in the strongest possible position as restrictions are lifted and life returns to the new normal.

THE MORAL MAZE

CONSIDERING CHILD ADULT CLAIMS UNDER THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

Authored by: Elizabeth Ware – Foot Anstey

Introduction

In England and Wales, we are free to leave our estates to whomever we choose. This is the principle of testamentary freedom, and it is a principle the Court is keen to uphold. Whilst we have this freedom in England and Wales, we also have the Inheritance (Provision for Family and Dependants) Act 1975 ('the 1975 Act'). A statute that was implemented to protect and provide for those individuals where it would be unjust for them not to receive financial provision from the deceased's estate.

It is possible for an adult child to bring a claim under the 1975 Act and seek financial provision towards items including their accommodation needs and day to day living costs. When considering a claim, the Court will carry out a balancing act of several different factors set out in the 1975 Act including:

- the financial needs of the applicant and the beneficiaries in the will,
- the size of the estate; and
- any obligation or responsibilities that the deceased had towards the parties.

Simply saying that a parent has an ongoing obligation to their child is not enough to demonstrate that it was unreasonable for the parent to exclude their child from their will. Although the concept of "fairness" carries little weight, the Court does recognise when a 'moral claim' arises. The moral claim is not a requisite component for a claim. However, recent case law has shown it to be a crucial element to a successful claim in those cases where an adult child can support themselves independently and is not in dire financial need.

The 'moral claim'

The concept of a 'moral claim' arose in the case of Re Coventry [1980] where the applicant was the adult son of the deceased. The Court of Appeal held that it was not enough for an applicant to simply show financial need. The applicant was required to demonstrate something more to persuade the Court that it was unreasonable that greater provision was not made for them in their parent's will. This concept is particularly important in claims where the adult child is independent, capable of supporting themselves financially and of working age.

"Simply saying that a parent has an ongoing obligation to their child is not enough to demonstrate that it was unreasonable for the parent to exclude their child from their will"

There are examples of cases by adult child applicants who were not in desperate financial need but were able to bolster their claim by advancing a moral claim. For example, in the Supreme Court case of *Ilott v The Blue Cross and others* [2017], Heather Ilott was awarded £50,000 from her estranged mother's estate. Heather had lived independently from her mother for several years, albeit she was dependant on benefits. Her mother had disapproved of Heather's decision to leave home at a young age to move in with her partner. She subsequently excluded her daughter from her will, preferring to leave her estate to charity. The Court was persuaded that Heather's estrangement from her mother was due to her mother's unreasonable behaviour. The reasons for the estrangement were an important factor in persuading the Court to make an award. If it was not for this factor, it is unlikely that Heather would have received an award.

The issue of estrangement was considered again in *Nahajec v Fowle* [2017]. The applicant was young with several working years ahead of her. She was estranged from her father at the time of his death, having attempted to reconcile with him numerous times. The Court considered the evidence in the round and found the deceased to be stubborn, which was the reason for their estranged relationship. The applicant was awarded a sum of £30,000 to enable her to complete veterinary nursing qualifications. This demonstrates that a capable applicant can still receive an award. The Court's approach in this case shows that where financial need is not a strong enough factor in itself, a 'moral claim' can result in an award being made.

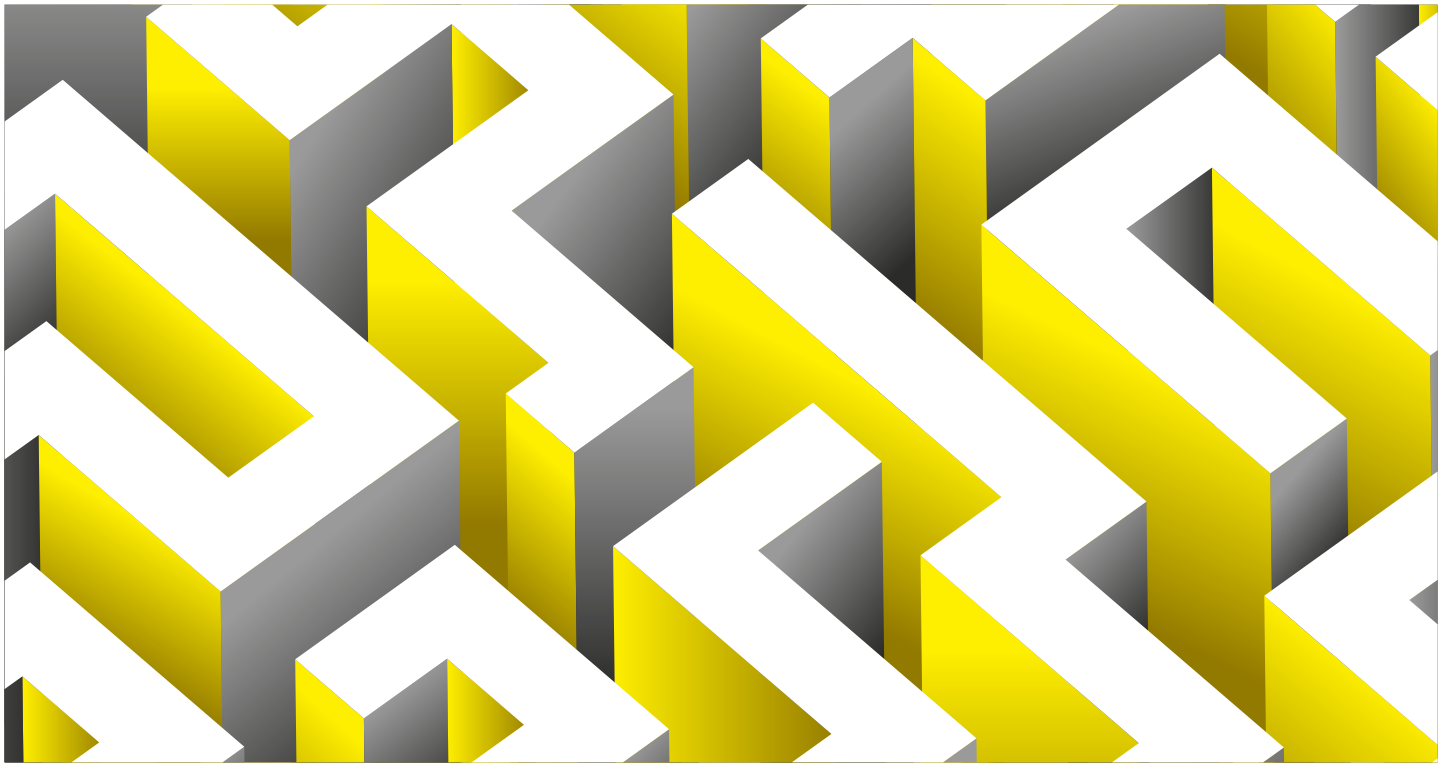
In contrast, Lady Tara Wellesley's claim against her estranged father's estate, the 7th Earl of Cowley was dismissed in 2019. The Court found that she was able to live independently and within her own means. The Court gave more weight to the deceased's testamentary wishes given that the estrangement was as a result of Lady Tara's bohemian lifestyle, indulging in drink and drugs.

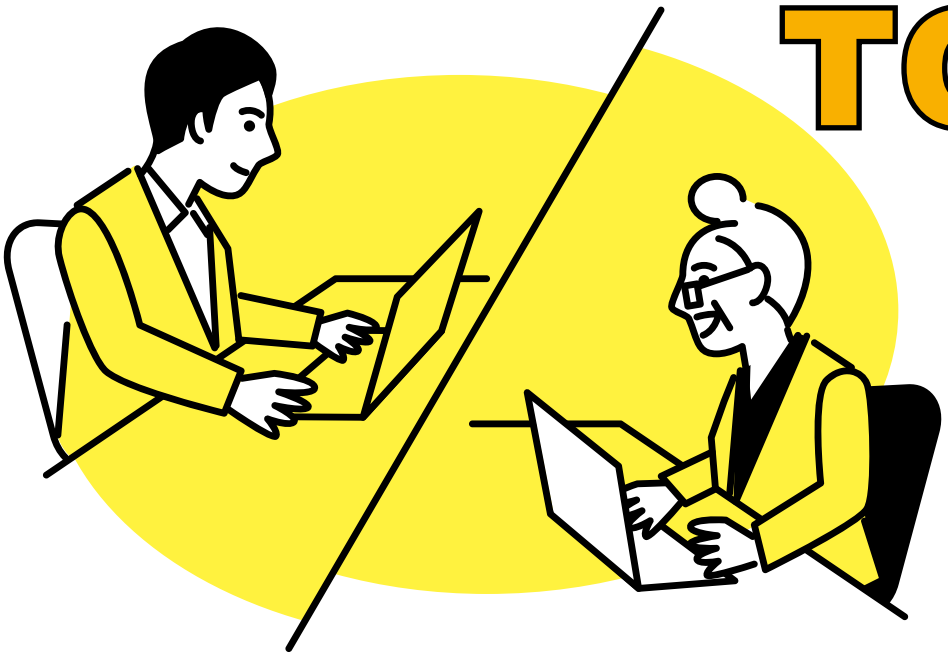
Re Seviour [2020] is a recent claim brought by a financially stable daughter (albeit with some credit card debt) against her father's modest estate which had been left to her terminally ill step-mother. Deputy Master Lloyd robustly dismissed the claim saying in his judgment *'as the argument wore on it became clear that [the applicant] was motivated by the view that she was entitled as of right to one quarter of her father's estate. She clearly is not. The will is quite clear...'* On the facts of this case, the applicant was unable to demonstrate financial need or a reason why it would be unconscionable for her father to exclude her from her will in line with the criteria set out in the 1975 Act. It is important to remember that this steely dismissal of a 1975 Act claim by an adult child will not automatically translate to any claim by an adult child, as each case turns on the facts.

Conclusion

It is clear from recent case law that claims by adult children should not be easily dismissed, as perhaps they once were historically. Estrangement and the reasons for estrangement has become a key factor in considering some/many claims. Recent research (Ipsos MORI, 2020) has shown that one in five families are affected by estrangement. One may expect an increase in 1975 Act claims by adult children given the Court clearly considers the reasons for estrangement in determining the obligations and responsibilities of a parent to the child.

However, each case much be carefully considered on the facts. A moral claim is not a box that must be ticked. Rather, it appears to strengthen claims where otherwise the applicant's claim may not have been strong due to their financial independence or ability to make their own way in the world. It is natural to consider the morality of a will exclusion on a subjective footing. We all have own perceptions of what we think is right and wrong. However, the Court must consider these claims objectively and consider whether the deceased has made reasonable financial provision in their will for their adult child in all the circumstances and facts of the case. The Court must navigate the moral maze carefully. Despite recent unsuccessful cases by adult children, I anticipate that adult child claims are here to stay.





TOP 10 TIPS FOR SUCCESSFUL VIDEO INTERVIEWS

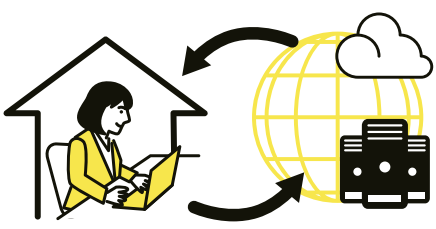
Authored by: Siobhan Lewington & James Quick – Fox Rodney Search

Now that we're all working remotely and practising social distancing, we're seeing our clients' meetings with candidates moving to video platforms such as WebEx, Zoom or Skype. As this is a new experience for many of us, we thought we would share our top 10 tips for successful video interviews.

In Advance

1 Test the technology

If you've never used the video platform before, make sure you do a test run well in advance. Ask a family member to do a test with you. Some people even record the test run to see how they present on screen, especially if they're not accustomed to it. Check the visuals but also the sound. In any event, have back up contact details in case the technology doesn't work on the day: it's good to swap phone numbers in advance.

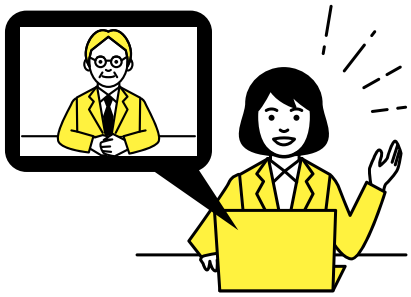


2 Find your location

Choose the right spot for the meeting. This could be in your home office but not everyone is lucky enough to have one. If you normally work in your bedroom and your bed is visible or the light is poor, try and find another spot. If you normally work in the kitchen, make sure other family members are not coming in and out. They'll laugh but one option is to put an "On Camera!" sign on the kitchen door. In any event, try and have a neutral background: a blank wall or a bookcase works well. Some video platforms allow you to choose your own background (e.g. tropical beach, cityscape, or if you are our CEO, Thierry Henry!) but this can look a bit stilted and artificial. Try not to have a window or light behind you. Ideally, have a window or lamp in front so that light is shining on your face. This allows for a more professional camera look.

3 Do the usual pre-meeting or interview preparation

Sometimes, as there is less of a time investment, we find that some people tend to treat video interviews more casually and don't prepare as much as they might for an in-person meeting. Remember this is not a less important meeting: it's exactly the same meeting, it's just on video!



On the Day

4 Dress Professionally

Lots of advice around video interviews advocates dressing smartly from the waist up only. Yes, it's true, the other person only normally sees your top half. However, if you need to get up during the meeting (e.g if your 2 year old is threatening to join you) your whole outfit will be seen so it's best not to pair your smart sweater or shirt with your pyjama bottoms. Just in case. If you want advice from those on TV, solid colours are best rather than patterns.

5 Optimise your chances for a good video connection

This means pleading with other household members not to stream the new season Money Heist or play in a Fortnite tournament when you're doing your video call.

6 Be early and double check your set up

Get to your desk (or table! try not to do the meeting from your sofa) early and ensure you've connected before the start time of the meeting. Just as you would turn up to an interview in person a bit early, you should connect to the meeting 5 minutes early. This also gives you time to sort out any technical issues or problems. Make sure you put your phone on silent and also silence any app notifications. Ideally, you should set your camera a little higher than your face. Most of your top half should be seen on screen rather than just your face: this is mirroring how you would look in an in-person meeting.

7 Look at the Camera!

During the meeting, ensure you are looking at the camera, not at the screen or even your keyboard. It if helps, put a tiny post-it with an arrow pointing at the camera. If you're looking directly at the camera, your points will come across more powerfully and you'll have a stronger connection with your interviewer. Whatever you do, don't check yourself out on screen: I've seen people check out their hair and fix it during videocalls.

8 Put your interviewer at ease

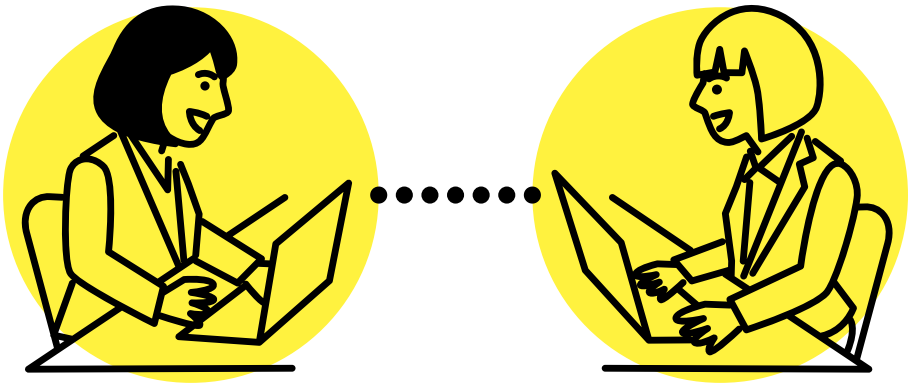
It's a nice touch if you can put your interviewer at ease by having a bit of small talk at the beginning if there is the opportunity. The interviewer should do this also of course but sometimes it doesn't happen. When you meet in person, this normally happens but in video meetings, this personal touch at the beginning is missed out which is a shame as it can put everyone at ease. At the very least, you can ask if the connection is okay and if they can hear and see you properly. Sometimes, people are too polite to say there is a problem.

9 Be natural but try to be energetic

It's a well-known fact to those who make their living on camera that video deadens your energy. This means that you need to make an effort to be engaged and energetic otherwise you may present as a bit flat. It's very important to smile and to nod occasionally to acknowledge what the other person is saying. Speak clearly and don't speak too quickly. If you normally speak quickly, slow down as there can be a sound delay during a video meeting. Whilst it's good to be energetic, try not to fidget or bounce around in your chair: a lot of movement on video can make you appear fuzzy or out of focus.

10 Unexpected interruptions

These can happen! It could be your teenager who is angry that he's lost out in that Fortnite tournament or your partner who has forgotten that you're on a videocall. If this happens, don't be embarrassed, just say "Excuse me for a moment, whilst I look after this". Remember, you're at home so these interruptions are perfectly understandable and no reflection on you.



AND FINALLY...

"Thank the interviewer as usual afterwards by sending a follow up email. If you are meeting more than one person, send an email to each of them to thank them and to express your interest in continuing the discussion…… if of course you want to."

GOOD LUCK!

ITALY

NEW RULES ON THE INCOME TAX TREATMENT OF TRUST DISTRIBUTIONS TO RESIDENT BENEFICIARIES

Authored by: Nicola Saccardo – Maisto e Associati

1 INTRODUCTION

Article 13 of Law Decree 124 of 26 October 2019, converted by Law 157 of 19 December 2019, introduced rules concerning the income tax treatment of distributions from non-resident trusts to resident beneficiaries ("**the New Rules**"). The New Rules should apply to distributions cashed as from 1 January 2020.

2 THE SCOPE OF THE NEW RULES

The New Rules provide that distributions of income from trusts established in low-tax jurisdictions qualify as taxable income for the resident recipient.

The New Rules should apply exclusively to the extent that the trust qualifies as opaque, rather than disregarded or transparent.

A trust is disregarded if either it is revocable or a person (typically the settlor or a beneficiary) has intrusive powers over the trust. The income (its notion includes gains) of a disregarded trust is regarded as income of its settlor or beneficiaries (depending on the specific facts and circumstances) as if the trust does not exist. Accordingly, any distribution made by the disregarded trust to the settlor or beneficiaries should not be relevant to income tax.

A trust qualifies as transparent to the extent that a beneficiary has a current right to receive the income of the trust. In such case, the taxable income shall be computed at the level of the trust but imputed to, and taxed upon, the beneficiary under a transparency regime, irrespective of the actual distribution. The distribution of such income should not be relevant to income tax. This holds regardless of the fact that the income of the trust was effectively taxed upon the beneficiary by way of transparency. For instance, the trust may realise a capital gain from the sale of a real estate that has been owned for more than 5 years: in such a case, according to the rules applicable to trusts (and individuals), the gain would not be taxable, so that no gain would arise at the level of the trust and no gain would be imputed by way of transparency. However, the distribution of the gain would still not be relevant to income tax.

"Article 13 of Law Decree 124 of 26 October 2019, converted by Law 157 of 19 December 2019, introduced rules concerning the income tax treatment of distributions from non-resident trusts to resident beneficiaries"

3 THE NOTION OF "LOW-TAX JURISDICTION"

The New Rules should imply that distributions of income made by trusts that are not established in low-tax jurisdictions should not be taxable income for the resident recipients.

A jurisdiction is considered as a "low-tax jurisdiction" based on the criteria laid down by Article 47-bis Income Tax Code. The issue arises whether Member States of the EU and the EEA could be regarded as "low-tax jurisdictions". Article 47-bis defines low-tax jurisdictions based on the tax rate, but provides an exclusion of EU and EEA Member States from the notion of low-tax jurisdiction. Such exclusion should apply also in relation to trust distributions, so that income distributions made by trusts established in EU and EEA Member States should not be taxable income. A different interpretation could trigger a violation of the EU fundamental freedoms as it would entail a discrimination between distributions from trusts resident in other EU/EEA Member States rather than from resident trusts (the latter distributions are not subject to income tax).

Subject to the above exclusion, an entity is resident or located in a low-tax jurisdiction if the tax rate in such jurisdiction is lower than 50% of the tax rate that would have applied if the entity had been resident of Italy. Reference is made to the effective tax rates when a resident person either controls the foreign entity or has a profit share exceeding 50%. In all other cases, the comparison is based on nominal tax rates. Therefore, in relation to trusts, reference is generally made to nominal tax rates.

Regarding the Italian nominal tax rate, the issue arises whether it is the 24% corporate income tax rate or whether also the 3.9% regional tax rate should be taken into account.

The determination of the foreign nominal tax rate depends on how the trust is taxed abroad. If the trust is taxed abroad pursuant to a "special regime", the foreign nominal income tax rate should be determined on the basis of the special regime, rather than the ordinary regime. For instance, if, in the jurisdiction of establishment of the trust, trusts established therein are generally subject to a 30% tax rate, but, to the extent that the trust derives foreign-source income and the beneficiaries are non-residents, no taxable income accrues to the trust, the trust could be regarded as subject to a "special regime" that grants a nominal tax rate of 0% and, therefore, could be regarded as established in a low-tax jurisdiction.

4 CAPITAL V. INCOME

The New Rules implicitly confirm that distributions of capital should not qualify as taxable income, irrespective of the jurisdiction where the trust is established.

The New Rules further provide that distributions qualify as distributions of income, unless there is adequate evidence that the trust distributed capital. Italian law sets out a presumption, applicable to companies, whereby – irrespective of the content of the shareholders' resolution – any distribution is deemed to constitute a distribution of income reserves, first, and, only to the extent that income reserves are exhausted, a distribution of capital reserves. This presumption should not apply to trusts, so that the trustee is entitled to decide whether to distribute income or capital without being bound by any priority rule. Therefore, if a trust distribution is properly formalised as a distribution of capital, it should not be re-characterised as a distribution of income, to the extent that there is capital available for distribution.

The computation of the available capital should be carried out pursuant to Italian tax criteria, regardless of the criteria applicable in the jurisdiction of establishment of the trust. Lacking official clarifications, it seems reasonable to conclude that only additions to the trust fund should be regarded as capital (income and gains, including retained income and gains, should qualify as income). Foreign financial statements are generally a useful basis for the computation of the available capital, but they need to be adjusted on the basis of Italian tax criteria.

WHY VIRTUAL MEDIATION IS HERE TO STAY FOR PRIVATE CLIENT DISPUTES

Authored by: Julia Burns – Dove in the Room

A couple of months ago few people in the legal world had heard of virtual mediation. Thanks to Zoom's confidential breakout room technology, virtual mediation has been widely adopted by mediators and litigators who have adapted quickly. Once the Rubicon is crossed, there is no going back.

In this article, I explore why virtual mediation will outlive the pandemic and share some tips from my experience of virtual mediation in private client disputes.

Advantages for private client disputes

- For many clients, a face to face mediation in an acrimonious family dispute is a very daunting prospect. Clients often fear bumping into their opponent arriving or leaving the venue or during the mediation. Virtual mediation strips away that anxiety.
- Joint sessions are likely to feel less intimidating as there is no need to be in the same room and look at each other across the table. There is something strangely calming about sitting in front of a computer screen expressing how you feel, compared with talking in front of a room full of lawyers and family members you have fallen out with.
- There is no "home advantage" associated with a virtual mediation. Arranging the logistics of a mediation can become very contentious. Some clients would rather pay to hire a neutral venue than walk onto the other side's pitch. Virtual mediation enables a level playing field as everyone is in the comfort of their chosen environment, without the need for lengthy journeys for some and not others.
- There are considerable time and cost savings for clients. A one-day face to face mediation can become a three-day enterprise involving train fares, hotel bills and travel time. There are also more hidden costs in the form of the hourly rates of the lawyers debating where the mediation is to be held and liaising with venues. Virtual mediations are easier to schedule because of the time saving and individuals from different jurisdictions can join without international travel.

Positive dynamics of a virtual mediation

- For individuals, it is comforting to conduct a mediation from their own home. A client with a more relaxed mindset, is more likely to approach negotiations in a positive way. The ability to take more regular breaks by yourself and consume your chosen food and drink will reduce the common problem of blood sugar levels dropping to unhealthy levels resulting in rational thought being impaired.
- There is a power equalisation for the mediation participants. Some of the power passes from the mediation advocate to the client, who may feel empowered by not attending glamorous legal offices, which can add to nerves.
- As a mediator, it is easier to build rapport virtually than you might think. Video conferencing accentuates non-verbal language because there are fewer distractions, so it is very easy to read someone accurately over video.
- Many people fear that a virtual mediation would be less effective for

highly emotional disputes. I find that people find it easy to be authentic and display emotion over video. There is in fact some safety associated with the distance created by the virtual environment. The experience is actually less intense for individuals.

- A creative mediator can enable a personal one to one conversation with a sense of privacy by asking others in the breakout room to mute their microphones and stop their video. It is also possible for the mediator to hide the image of themselves so that they are really focussing on the person they want to talk to.

Practical Tips

- It is essential to have a test call with all the mediation participants. This allows any technological issues to be ironed out. This also enables the mediator to deal with any administrative issues and start building rapport and trust with the client before the morning of the mediation. A pre-mediation call with the client, rather than just the legal representatives is something that I have always advocated as a mediator. Virtual mediation normalises this and people are beginning to see the benefits. Pre-mediation contact enables the parties to hit the ground running at the start of the mediation and get on with the negotiations.
- It is very important that everyone is positioned close enough to the camera, but not so close that it is impossible to see body language as well as facial expression. It is very difficult to build rapport with someone who is a long way from the camera or not sat squarely in front of it. Wobbling mobile phones are also unhelpful; joining from a computer screen is preferable.

- Legal representatives need to prepare well in advance for the settlement drafting stage of the mediation. Attending with pre-prepared settlement agreement templates is helpful. Using the “share screen” function in Zoom, or software that enables easy collaboration and comparison of amendments on a document is also beneficial.
- Agree who is attending the mediation from beginning to end. It is not helpful to have the sudden arrival of an overbearing spouse towards the end of a mediation if they change the dynamic of the negotiations having not heard everything that has led to that point. All mediation participants, not just the parties to the actual dispute, should sign the mediation agreement.

Some final thoughts

I heard a story about a virtual mediation which took place within 48 hours of lockdown starting. The client asked her solicitor afterwards why she was not given the option of virtual mediation before the Coronavirus. This story powerfully shows that solicitors are going to have to consider virtual mediation with their clients going forwards to comply with professional conduct rules.

I have always believed in good things coming out of bad situations. The Coronavirus crisis has given everyone an opportunity to reflect on the state of their family relationships, their health and wellbeing. Family feuds take a terrible toll on our mental health. People need to limit their stress by resolving conflict, buying certainty and a swiftly organised virtual mediation can offer that.

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