VOISIN LAW

Relevancy of Settlors Wishes & Public Policy to Variation of Jersey Trusts | 1

Since the introduction of the Trusts (Jersey) Law 1984 the Royal Court has had statutory jurisdiction to vary trusts by way of an order approving the proposed variation on behalf of minor, unborn and unascertained beneficiaries where all the adult beneficiaries have reached an arrangement over that variation to the terms of the trust. The Court's jurisdiction is of the nature that it is required to only provide its approval to a variation if it is for the "benefit" of the persons on whose behalf the approval is to be given but as a matter of Jersey law "benefit" is accorded with a wide construction that is not restricted to financial benefit.

In *re the Y Trust and the Z Trust,* (2017) JRC 100 several interesting issues of note arose in a variation application brought under Article 47(1) of the Trust (Jersey) Law 1984 which had not come before the Royal Court previously, despite the fact that there have been a number of applications for variation over the years.

Background

The two trusts in question held very substantial value for the family of the Settlor who had died a number of years before the application.

The Settlor had clear views over who should be able to benefit from the trust and care had been taken to restrictively define the beneficial class to include (a) issue born as the legitimate child of their father and mother and those subsequently legitimated by the marriage of their father and mother (b) children of unmarried heterosexual relationships of at least two years duration at the date of birth and (c) in certain cases the adopted children of otherwise childless heterosexual married couples.

Children of homosexual relationships were outside the beneficial class, whether their parents were married, in a civil partnership or otherwise.

It was accepted by the Court that the Settlor's views were firmly held, notwithstanding that certain grandchildren of the Settlor who nonetheless fell outside the beneficial class of the trusts been raised as his grandchildren and he had treated them as such.

The adult beneficiaries of the trusts reached a consensus that it would be appropriate for the beneficial class to be varied so it is to allow family members excluded by the Settlor's definition of beneficiaries to become included therein, thus providing for equal recognition of the issue of same sex relationships, general recognition of illegitimate children and potential for their inclusion as beneficiaries (subject to certain safeguards), together with relaxation of the criteria for adopted children to qualify as beneficiaries.

Accordingly, the Royal Court was asked to engage its jurisdiction under Article 47 of TJL 1984 to approve these proposed variations.

The two key issues that arose in the application were (a) the impact, if any, of the Settlor's wishes (which would dictate that no variation should occur) and (b) public policy considerations (being, in particular, the potential desirability of providing assurance to settlors that the terms of a Jersey trust that they declare will be enforced by the Courts in Jersey, a consideration which if accepted would mitigate against the conclusion that, in this case, the trusts should be varied).

As to issue (a), the Court was satisfied (having regard to two English cases, namely Goulding v James [1997] 2 All ER 239 and Pemberton v Pemberton [2016] EWHC 2345 (CH) that the wishes of a Settlor, even though they were firm and clear during his lifetime, did not provide a basis for the Court to withhold its approval to the variation. The Court took into account the fact that the Settlor's wishes are only relevant where they bear on whether the proposed variation is beneficial to those for whom the Court is to supply the approval. The role of the Court was not to stand in for the Settlor to represent his wishes.

The Court accepted that there may be cases where the Settlor's views are relevant to a variation, such as a case where a protective trust had been established to prevent a spendthrift beneficiary from squandering the trust fund. In that case, an understanding of the Settlor's reasons for establishing protective trust provisions might bear upon whether the Court should withhold its approval to a variation which aims to permit the beneficiary to access capital. However, such features did not apply with the present application.

As to (b), namely public policy, whilst the Court recognised that such considerations as the assurances to settlors that the terms of trust that they declare will be enforced in Jersey was a consideration, there were compelling reasons why approval to the variation was not contrary to public policy.

The Court noted, in particular, that "policy follows the law". In the context of an application under Article 47 of TJL, the Settlor's views would only be relevant to the extent that they address the issue of benefit (or absence of benefit) of an arrangement to the beneficiaries on whose behalf the Court is asked to give approval.

Secondly, there were considerations of contemporary public policy which weigh in favour of approving the proposed variation (which provided for the acceptance of homosexual relationships and illegitimate children) having regard to legislation in Jersey including legislation for civil partnerships, the adoption of the Human Rights (Jersey) Law 2000 and the Discrimination (Jersey) Law 2013.

The Court considered that a policy of tolerance and acceptance of the rights of others to live lives as they see fit outweighed any contrary public policy that might be based upon upholding the wishes of settlors in the face of a variation sought by beneficiaries. It was noted by the Court that there may be occasions where the cultural and religious norms of the beneficiaries might themselves be relevant to the Court's assessment of benefit to minor unborn and unascertained beneficiaries.

Given the value of the assets held in trust, the Royal Court was not concerned that extending the beneficial class would dilute the interest of the beneficiaries in any significant manner. As such, financial considerations were not material on this occasion.

The Court had due regard for the fact that maintenance of family harmony through the acceptance into the beneficial class of the wider class of family members as proposed was a significant benefit to the minor unborn and unascertained beneficiaries. Indeed, they might themselves have children in the future who could fall outside the restrictive definition of beneficiaries that stood at present. It was in the interest of the minor and unborn and unascertained beneficiaries that the future children should be able to benefit in those circumstances. Accordingly the Court approved the variation to the classes of beneficiaries of the Y Trust and the Z Trust.

There were also certain other variations made to the Y Trust to permit a further charitable beneficiary the Court noting that proposed charity had, on its board, members of the family and this, of itself, was a positive advantage in that it connected the family directly with philanthropic efforts conducted in their names. This activity was considered for the benefit of the beneficiaries including the minor unborn and unascertained beneficiaries.

At at one level, this decision could be viewed as inhibiting the rights of settlors to freely dispose of their property on such terms as they determine (provided they are not doing something intrinsically unlawful e.g. supporting terrorism). As such, it could be argued that there is a tension between these rights of freedom to dispose of one's property with the rights against discrimination (not that it be suggested that discrimination as displayed by the Settlor in this case should be applauded). Nevertheless, most systems of law that recognise trusts have provisions for variation and given that settlors do have to accept that trusts are established for the benefit of beneficiaries rather themselves (unless they are retaining an interest) they may not necessarily continue to take the form originally intended if the beneficial class wish to vary their collective assets of that trust to meet their needs.

For further information or specific advice, please contact Nigel Pearmain, Jeffrey Giovannoni, Daniel Walker or Frances Littler of Voisin.