

Successful application for variation of a court order and construction of a trust instrument

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The Ogier trusts team in Guernsey has been successful in its application on behalf of a Jersey trustee (the **Trustee**) to vary an order previously made by the Royal Court and to invoke the Court's power to construe a trustee power under its *Public Trustee v Cooper* jurisdiction.

Background

The Trustee was trustee of two Guernsey law trusts, both of which were established by the same settlor for the sole benefit of his daughter (the **Beneficiary**), a long-term US resident. Under the terms of one of the trusts (the **V Trust**), the Beneficiary had a right to withdraw the whole of the trust fund (the **Right to Withdraw**) on a given date, which date had, pursuant to a court order made in 2001, been postponed by 20 years.

The Beneficiary was considering moving away from the USA and had been advised by her New York legal advisers that it would be substantially preferable if the V Trust could be deemed a "grantor trust" and thus not subject to a 30% withholding tax with respect to any taxable distributions made to the Beneficiary once no longer a US resident. This conversion from a non-grantor to a grantor trust could be achieved by bringing forward the date upon which the Right to Withdraw could be exercised to a current date, which in turn could only be achieved by order of the Royal Court, there being no appropriate power of amendment under the terms of the V Trust.

The Beneficiary had also been advised to simplify the structure by amalgamating the trust fund of the other trust (the **I Trust**) with that of the V Trust such that the I Trust terminated. However, the terms of the trust instrument establishing the I Trust were very narrow and did not permit a prima facie construction allowing the Trustee to transfer the trust fund for the benefit of the Beneficiary as opposed to transferring the same directly to her (an opinion which was endorsed by Chancery Queen's Counsel).

The application

Having taken advice and considered its options, the Trustee determined that it was in the best interests of the Beneficiary (as the sole beneficiary of the trusts) for the Trustee to seek orders from the Court:

- varying, pursuant to section 69 of the Trusts (Guernsey) Law, 2007 (the **Law**), the previous order with respect to the V Trust so as to bring forward the date upon which the Right to Withdraw may be exercised;
- confirming, pursuant to section 68 of the Law and the Court's jurisdiction under the first limb of *Public Trustee v Cooper*, that the Trustee had the power to appoint the trust fund of the I Trust to the trustees of the V Trust for the benefit of the Beneficiary; and
- granting, pursuant to the Court's inherent jurisdiction and principles laid down in case law, the sealing of all documents put before the Court which contained private details relating to the Beneficiary, while maintaining suitably redacted versions of those documents on the Court file.

In hearing the application, the Court directed that HM Procureur be convened in her capacity as *partie publique* i.e. to represent the interests of the class of charitable causes that might ultimately benefit as remote contingent back-stop beneficiaries in the event of the Beneficiary dying without having withdrawn or otherwise received the whole of the trust fund of the V Trust and further without having appointed recipients of the same by instrument or will. The Court also requested that the parties jointly instruct an independent tax expert to confirm that the advice provided to the Beneficiary with respect to her proposed emigration from the USA was correct.

Advocate Gavin Ferguson, the partner heading up Ogier's Private Client & Trusts department in Guernsey, and Alice Bricogne, a senior associate in the team, successfully represented the Trustee in the court hearing, in which all three orders sought were granted by the Bailiff.

Lessons

- When establishing a trust, consider including a power to vary exercisable by the trustee (with the consent of the settlor or professional protector if necessary) to avoid the need for applications to court should circumstances change in the future.
- When applying to court for an order with respect to a trust (as the previous trustee had done with respect to the V Trust), ensure that thought is given to future circumstances changing and consider how this might be provided for without the need for further recourse to court.
- When establishing a trust, ensure the dispositive provisions are clear insofar as appointments "for the benefit of" beneficiaries are concerned.

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