COLLAS CRILL

Removal of Protector: In the matter of the K Trust

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In the Matter of the K Trust

On 14th July 2015 the Royal Court of Guernsey handed down judgment in a case that will be of interest to all trust and fiduciary practitioners.

The case, *In the Matter of the K Trust*, concerned an application for the removal of a protector brought by 11 (of 14) adult beneficiaries of a Guernsey discretionary trust.

Subsequently, the protector made an application for directions under s.69 of the Trusts (Guernsey) Law, 2007 (the "Trusts Law"), chiefly in order to determine whether she could legitimately retire from her position as protector, given the circumstances. The primary relief sought by both applications was granted. This note considers the application made by the beneficiaries and certain key issues arising out of that application

The Deputy Bailiff considered the nature of a protector's powers, specifically in relation to whether those powers could be considered to be fiduciary or not. Ultimately it was confirmed that such questions are decided by the construction of the trust deed in question, and that in this instance there was an "overall impression" that the office of protector had been endowed with fiduciary powers.

The determination of the protector's powers as fiduciary was also relevant in relation to her seeking indemnification out of the trust assets against costs/liabilities properly incurred by her. This request extended to the costs and liabilities of any related future litigation.

The Deputy Bailiff, referring to relevant commentary and case law, made it clear that despite there being no express power of indemnity in the trust deed, as a third party of the trust with fiduciary functions the protector had an implied equitable right of indemnity in respect of costs arising out of the carrying out of those functions. To that end, the protector's right to be indemnified out of the trust assets was confirmed, but the court stopped short of providing the wide, blanket indemnity sought in relation to costs incurred "in any event". To do so would mean the protector's previous conduct could never be challenged, even if new information came to light.

Test for Removal of Protector

The test for the removal of a protector was also addressed for the first time in Guernsey.

The application for removal was made under s.69(1)(a)(iii) of the Trusts Law, seeking an order in respect of "any person connected with a trust". Guernsey until this judgment had no case law or authorities considering the

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removal of a protector and so comparative authority from other jurisdictions, particularly Jersey, was considered.

The general approach taken in Jersey - that the welfare of the beneficiaries and the proper administration of the trust would determine whether a trustee (and, by extension, a protector) might be removed from their position - was accepted as applicable in Guernsey, too. The Manx position (that a court might only remove a protector if it were necessary to prevent the trust from failing completely) was rejected.

Ultimately, the Deputy Bailiff was satisfied that the breakdown in the relationship between the beneficiaries and the protector was such that both the administration of the trust and the beneficiaries' welfare were being adversely affected. The application for removal was granted on that basis.

Practical points for trustees / trust professionals:

- A protector should consider the viability of their position early in the face of hostile beneficiaries, particularly so when the objectors comprise a majority of the beneficiaries;
- Applications for the removal of a protector should, in reality, only come about very infrequently - if the basis for their removal exists, a protector should recognise the signs and negotiate an exit promptly;
- The fiduciary nature of a protector and a protector's powers will be determined on a case-by-case basis, based on an overall reading of the trust deed;
- The usual indemnity rights (with the usual exceptions) will apply to a protector with fiduciary powers, but a blanket, general indemnity is unlikely to be confirmed by the court.

The Beneficiaries' position:

Following the death of the settlor of the trust, the relationship between the settlor's widow (the primary beneficiary) and protector, initially friendly, began to break down. Eventually, various requests for the protector's resignation were made by the widow and by other family members who were also beneficiaries under the trust to the protector and to the trustee.

The Protector's position:

As a non-family member, the protector initially refused to entertain the idea of her removal. She confirmed that it was her understanding that she had been chosen as protector precisely because of her separation from the family members, but that she would be willing to retire so long as a properly chosen, suitably qualified replacement was found.

The Trustee's position:

The trustee (who by this stage was not the original trustee upon which the trust was settled) took a neutral position. The trustee acknowledged the breakdown in the relationship, however, and confirmed that until a new protector was appointed the trust was likely to remain unworkable.

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