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Case No: NOT PROVIDED

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (CHANCERY DIVISION)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/03/2018

Before:

THE HONOURABLE MR JUSTICE MORGAN

- -

Between:

E.T.	**Claimant**
- and -	
J.P.	
And Others	**Defendants**

- -
- -

William Massey QC (instructed by **Birketts LLP**) for the **Claimant**
Georgia Bedworth (instructed by **Birketts LLP**) for the **Minor Beneficiaries**
James Rivett (instructed by **Birketts LLP**) for the **Trustees**

Hearing dates: 8 March 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MORGAN

MR JUSTICE MORGAN:

Introduction

1. This judgment deals with one point which arose in the course of an application for the court's approval to a variation of a trust pursuant to the Variation of Trusts Act 1958 ("the 1958 Act"). The particular point arose in relation to section 1(3) of the 1958 Act which provides, in summary, that in the case of certain persons suffering from mental incapacity, the question as to whether the proposed variation is for the benefit of such a person is to be determined by the Court of Protection rather than by the High Court. On the facts of the present case there was an issue as to whether a minor who was a beneficiary under the trust was a person within section 1(3) of the 1958 so that the question whether the proposed variation was for his benefit should be referred to the Court of Protection.

2. At the hearing, I pointed out that as I was a nominated judge of the Court of Protection, I would not need to adjourn the hearing to allow an issue to be referred to the Court of Protection but I could simply sit as a judge of the Court of Protection and determine the issue in that capacity. I also suggested that as I could sit both as a judge of the High Court and as a judge of Court of Protection I might not need to make a formal determination as to whether I was deciding the question of benefit for a relevant person in one capacity or the other. In response to that suggestion, it was pointed out that some applications for the court's approval under the 1958 Act are dealt with by Chancery Masters or by Deputy High Court Judges who are not nominated judges of the Court of Protection and in such a case the Master or Deputy Judge could not adopt an approach similar to the one I suggested but would need to know how to apply section 1(3) of the 1958 Act. I was told that there was no authority on the meaning of that subsection and it would be potentially helpful to have the court's ruling as to its meaning and effect.

3. In those circumstances, I heard argument as to the meaning of section 1(3) and I gave my ruling to the effect that I did not need to refer any question to the Court of Protection. I then heard the application for the court's approval of the variation of the relevant trust. I decided that the proposed variation was for the benefit for all persons on whose behalf the approval of the court was required and I made an order approving the proposed variation. I indicated that I would subsequently give written reasons for my ruling as to the meaning and effect of section 1(3) and this judgment contains those reasons.

The facts

4. I need recite very little of the facts of this case for the purpose of this judgment. The adult beneficiaries under the relevant trust had consented to the proposed variation of the trust. The variation could affect the position of three beneficiaries who were minors and also the position of unborn and unascertained beneficiaries and the court's approval was sought on behalf of the minor beneficiaries and the unborn and unascertained beneficiaries. One of the minor beneficiaries, to whom I will refer as "X", was aged ten and was severely autistic. I am satisfied that it is appropriate to give this judgment in an anonymised form so as not to name X or to give other information as to the parties which might lead to the identification of X.

The 1958 Act

5. Section 1 of the 1958 Act, as amended, provides:

> "1.— Jurisdiction of courts to vary trusts.
>
> (1) Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—
>
> (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or
>
> (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or
>
> (c) any person unborn, or
>
> (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined.
>
> any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:
>
> Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.
>
> (2) In the foregoing subsection "protective trusts" means the trusts specified in paragraphs (i) and (ii) of subsection (1) of section thirty-three of the Trustee Act, 1925, or any like trusts, "the principal beneficiary" has the same meaning as in the said subsection (1) and "discretionary interest" means an interest arising under the trust specified in paragraph (ii) of the said subsection (1) or any like trust.

> (3) ... the jurisdiction conferred by subsection (1) of this section shall be exercisable by the High Court, except that the question whether the carrying out of any arrangement would be for the benefit of a person falling within paragraph (a) of the said subsection (1) who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his assent is to be determined by the Court of Protection.
>
> […]
>
> (5) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by Act of Parliament.
>
> (6) Nothing in this section shall be taken to limit the powers of the Court of Protection."

6. By section 1(1) of the Family Law Reform Act 1969, a person attains full age on attaining the age of 18 and by section 1(2) of that Act, references in statutes to "infancy" (as in section 1(1)(a) of the 1958 Act) are to be construed accordingly.

The background to the 1958 Act

7. Under the rule in Saunders v Vautier (1841) 4 Beav 115, where all of the beneficiaries under a trust are *sui juris* and are together absolutely entitled to the trust property, they are entitled by agreement to bring the trust to an end or to vary the terms of the trust. The requirement that all of the beneficiaries under the trust must be *sui juris* is illustrated by the decision in Berry v Geen [1938] AC 575; see at 582. Therefore, this principle does not allow the adult beneficiaries under a trust to vary the trust where the beneficiaries include minors or unborn or unascertained persons.

8. In Chapman v Chapman [1954] AC 429, the House of Lords held that the High Court did not, at that time, have power to give its approval, on behalf of a beneficiary who was a minor, to a variation of the trust on the ground that the variation would be beneficial to the minor. The 1958 Act was passed to deal with the lack of power in the High Court, as declared in Chapman v Chapman, to give such approval and the 1958 Act now confers power on the High Court to give such approval on behalf of any person "who by reason of infancy or other incapacity is incapable of assenting" and also on behalf of unborn and unascertained persons. The history of the matter is explained in Goulding v James [1997] 2 All ER 239.

The effect of an order under the 1958 Act

9. The effect of an order of the court giving approval under section 1 of the 1958 Act was described in Goulding v James [1997] 2 All ER 239 at 247e – h, as follows:

> "First, what varies the trust is not the court, but the agreement or consensus of the beneficiaries. Secondly, there is no real difference in principle in the rearrangement of the trusts between the case where the court is exercising its jurisdiction on behalf of the specified class under the 1958 Act and the case

> where the resettlement is made by virtue of the doctrine in *Saunders v Vautier* (1841) 4 Beav 115, [1835–42] All ER Rep 58 and by all the adult beneficiaries joining together. Thirdly, the court is merely contributing on behalf of infants and unborn and unascertained persons the binding assents to the arrangement which they, unlike an adult beneficiary, cannot give. The 1958 Act has thus been viewed by the courts as a statutory extension of the consent principle embodied in the rule in *Saunders v Vautier*. The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument."

Incapacity by reason of being a minor

10. A minor is under a general incapacity in relation to certain matters but not all matters: see Halsbury's Laws, 5th ed., (2017), Children and Young Persons at para. [4]. For example, some minors will have capacity to make some contracts: see the same volume of Halsbury's Laws at paras. [12]-[25]. It seems to be accepted that a minor beneficiary does not have capacity to agree to a variation of a trust under which he is a beneficiary. At any rate, it could not be suggested that a typical ten-year old beneficiary could have consented to the variations of the trust which are proposed in the present case.

The Mental Capacity Act 2005

11. Section 1(3) of the 1958 Act refers to "a person who lacks capacity (within the meaning of the Mental Capacity Act 2005)". Section 2(1) of the 2005 Act provides:

> "For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."

12. A person under the age of 18 can be a person who lacks capacity within section 2(1) of the 2005 Act. That subsection does not state that it is confined to persons who are adults. In addition, there are provisions in the 2005 Act which show that a person under 18 can be a person who lacks capacity within section 2(1) of the 2005 Act: see sections 2(5), 18(2), 18(3) and 21.

The question arising

13. The way in which section 1 of the 1958 Act operates can be summarised as follows:

    (1) In the case of an adult beneficiary who has capacity within section 2(1) of the 2005 Act, the adult can decide for himself whether to agree to a proposed variation of a trust and the court has no power to give approval on his behalf;

(2) In the case of an adult beneficiary who does not have capacity within section 2(1) of the 2005 Act to agree to the variation of a trust, the court has power to give approval on his behalf but the question as to whether the variation is for his benefit is decided by the Court of Protection rather than by the High Court;

(3) In the case of a minor beneficiary, the minor does not have capacity (by reason of being a minor) to decide for himself whether to agree a proposed variation of a trust and the court has power to give approval on his behalf.

14. The question then arises: what is the position of a minor beneficiary who, by reason of an impairment of, or a disturbance in the functioning of, the mind or brain would not have capacity for the purposes of section 2(1) of the 2005 Act to make decisions for himself in relation to certain matters? Is such a minor within section 1(3) of the 1958 Act so that the question as to whether a variation of a trust would be for his benefit is to be determined by the Court of Protection rather than by the High Court? If that question had to be referred to the Court of Protection and that court determined that the variation was for the benefit of the minor, the matter would then have to return to the High Court for it to give its approval to the variation under section 1 of the 1958 Act.

Section 1(3) of the 1958 Act

15. The answer to the question which arises depends on the true construction of section 1(3) of the 1958 Act. To construe that subsection, it is helpful to set out its wording as expanded to bring in the wording of section 1(1)(a) of the 1958 Act and also the wording of section 2(1) of the 2005 Act. So expanded, the subsection reads:

> " … the jurisdiction conferred by subsection (1) of this section shall be exercisable by the High Court, except that the question whether the carrying out of any arrangement would be for the benefit of a person falling within paragraph (a) of the said subsection (1) [i.e. any person having … an interest … under the trusts who by reason of infancy or other incapacity is incapable of assenting] who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his assent [i.e. a person who lacks capacity in relation to a matter because at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain] is to be determined by the Court of Protection."

Discussion

16. Section 1(1)(a) of the 1958 Act refers to "infancy or other incapacity". This shows that "infancy" is treated for the purposes of the 1958 Act as producing a state of incapacity.

17. The application of section 2(1) of the 2005 Act is issue specific. A person may have capacity in relation to some matters and not in relation to others.

18. Section 1(1)(a) of the 1958 Act uses the phrase "by reason of infancy or other incapacity" and section 1(3) of the 1958 Act, by cross-referring to section 2(1) of the 2005 Act, refers to a person who lacks capacity in relation to a matter "because … he is unable to make a decision by reason of" impairment or disturbance of the mind or brain.

19. I will now seek to apply the ordinary meaning of section 1(3) to the facts relating to X. X is clearly incapable of assenting to the proposed variation "by reason of infancy", that is, by reason of being a minor. X does not lack capacity because he is unable to make a decision for himself in relation to the variation (the relevant "matter") because of an impairment or disturbance of the mind or brain. Even if X did not have that impairment or disturbance, he would still not have capacity to assent to the variation. It follows that the reason X lacks capacity to assent is because he is a minor not because he has an impairment or disturbance of the mind or brain.

20. I can see that it might be argued that there are two reasons why X lacks capacity, the first reason being that he is a minor and the second being that he has an impairment or disturbance of the mind or brain. It might then be argued that because one of the reasons X lacks capacity to assent is the impairment or disturbance of the mind or brain the matter should be referred to the Court of Protection. However, section 1(3) of the 1958 Act appears to apply to a person where the impairment etc is the single or only reason for the lack of capacity to consent. That requirement is not met where there are argued to be two reasons for the lack of capacity.

21. I consider that on the literal reading of section 1(3) of the 1958 Act taken together with section 2(1) of the 2005 Act, X is not able to assent to the variation by reason of being a minor. His inability is not by reason of another incapacity and is not because of an impairment or disturbance of mind or brain.

22. At my request, counsel made submissions as to the legislative history in relation to section 1(3) of the 1958 Act. There have been four versions of that subsection over the years. The first was in the 1958 Act as originally enacted. The second version was introduced by the Mental Health Act 1959 and the third version was introduced by the Mental Health Act 1983. The fourth version is the current version. I wished to consider the legislative history to see if there had been a consistent pattern in the various versions which might throw light on the meaning of the current version.

23. In the first version of the subsection, the line of demarcation which distinguished between the cases which were referred to the Judge or Master in Lunacy was drawn in a different place from where the current line is drawn. In 1958, the case was to be referred to the Judge or Master in Lunacy where a committee had been appointed of the person's estate or a receiver had been appointed of his income. Thus, in the case of an adult who lacked mental capacity but where there was no committee or receiver, the question of whether the variation was for his benefit was determined by the High Court.

24. The second and third versions took a different form. The second version referred to a person who was a patient within the meaning of Part VIII of the Mental Health Act 1959 and the third version referred to a person who was a patient within Part VII of the Mental Health Act 1983. The definition of "patient" for the purposes of Part VIII of the 1959 Act was different from the definition of "patient" for the other parts of the

1959 Act. The position was the same in relation to Part VII of the 1983 Act. For the purposes of Part VIII of the 1959 Act and Part VII of the 1983 Act, the power to manage the property and affairs of a person only arose if the court was satisfied that the person was incapable "by reason of mental disorder" of managing and administering his property and affairs: see section 101 of the 1959 Act and section 94 of the 1983 Act. I was not shown any authority which considered how the quoted phrase applied in the case of an infant. In the event, I do not get any help from considering the provisions of the 1959 Act and the 1983 Act in construing the current version of section 1(3) of the 1958 Act. Further, the original version of section 1(3) of the 1958 Act drew the line of demarcation in a different place from the current version and provides no assistance with the construction of the current version. Whilst I am grateful to counsel for carrying out these researches at my request, I find that I am not in the end assisted by them.

25. I consider that the literal interpretation of section 1(3) of the 1958 Act produces a clear and workable line of demarcation between cases which need to be referred to the Court of Protection and those which do not and I do not see any policy reason not to give the section its literal meaning.

Conclusions

26. Accordingly, if I apply the literal reading of section 1(3) of the 1958 Act to the case of X, I consider that section 1(3) does not require me to refer to the Court of Protection the question whether the proposed variation is for the benefit of X.

27. The above reasoning produces the general result that in the case of a beneficiary who is under 18, the question as to whether the proposed variation is for his benefit will always be a matter for the High Court. This will be the position even if that person is nearly 18 and lacks capacity in relation to other matters within section 2(1) of the 2005 Act. Indeed, the position will be the same even if that person's circumstances have been considered in other respects by the Court of Protection and a deputy has been appointed in relation to that person.