When is a trust not a trust?

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Readers are familiar with the three supposed certainties: intention to create; identifiable property duly settled; and certainty (identifiability) of objects (beneficiaries). A settlor (or 'truster') may also be a, or the, 'trustee' (although this might pose operational or tax issues) and may be a, or the, beneficiary (which may also pose such issues). Often powers are reserved – the approval/replacement of trustees, approval over investment facets, later inclusion or exclusion of members of the beneficiary class, revocation, trust 'export', inter-beneficiary allocation and so on. In this issue of the *Trust Quarterly Review*, Christen Douglas and Lynsey McIntyre survey the developing case law across Bermuda, the Cook Islands, New Zealand, the UK and the US. At what point does excessive control reservation erode the irreducible core of obligation beyond the seamark of validity?

We need to be careful of terminology here, as a 'sham' trust may mean different things. There is nothing unfamiliar with a finding that a (valid) trust structure does not meet the taxation tests expected of the vehicle. This is not a sham but a tax ineffective one. Equally, the power of a divorce or insolvency court to make dispositive orders over trust assets does not, again, describe a sham so much as a vehicle over which, in that forum, those powers have become exercisable.

Our '30 years of trusts' series continues with further welcome contributions. One notices the South African case of *Richards Estate* v *Nichol* (1999), where the fact that the trustee might select beneficiaries from a specified class of persons did not impugn the trust's validity. How easily does this now sit in the sham trust debate?

Ireland's 30-year timeline mentions the re-abrogation of the rule against perpetuities. Joni James' song 'When Irish Eyes Are Smiling' can almost be considered a national anthem. One wonders how many beneficiaries' eyes in two generations' time will be a-smiling when faced with an inflexible, unbreakable, perpetual trust.

It was the Irish who developed the ‘stalking horse’ in the Middle Ages (that is, a person or thing that is used to conceal someone’s real intentions). Stalking deer on open moorland, the hunter, with bow and arrow or flintlock, was much too visible. So, a horse was trained to wander obliquely and slowly towards the deer, its innocent approach masking the wily stalker behind it until the range was satisfactory. In this way, the term ‘stalking horse’ has come into currency, and what better illustration of this than the ‘trust advice disclosure’ litigation in New Zealand ably described by Georgia Angus TEP and Bethan Read. As grey-haired professional trustees know, in any inter-family dispute, the main motivating spring is not the trust, but the family.

Pandemics chain us to our kitchen tables and preclude in-person meetings, so legal issues of auto-signature become acute. Temporary legislative assistance has been patchy, but Ontario’s initiatives and inadequacies, carefully told by Tim Youdan TEP and Katie Sullivan, merit study and our thanks. See, in passing, *Swiddle Estate (Re)* – the case of attempted telephonic will-witnessing. As mad King Lear said to Edgar: ‘Get thee glass eyes and … seem to see the things thou dost not’. In neither case was the witnessing successful.

Good reading!

Authors

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