Client Memorandum

TRAVERS THORP ALBERGA
ATTORNEYS-AT-LAW

In re the Poulton Family Trust FSD 121 of 2016 (IKJ) – judgment delivered 18 February 2022

In a highly significant judgment, which awarded a resounding and substantial victory to their clients, Travers Thorp Alberga secured a ruling that a Settlor-Protector's decisions, (i) to exclude his children from a Cayman Islands Trust and (ii) to request the Trustee to terminate the Trust and appoint the Trust's assets jointly to him and his third wife, had been procured by his third wife's undue influence.

The Poulton Family Trust was settled in Cayman in 2003 for the benefit of the Settlor and his descendants and held a substantial property portfolio. At the end of 2014, the Settlor-Protector (Alan) received notice from the Trustee (Cayman National Trust Co. Ltd) of FATCA reporting obligations. This caused him to take legal advice from Florida attorneys (Holland & Knight) in the spring of 2015 to the effect that the Cayman Islands trust should be terminated and that he should regain control of the assets of the Trust and onshore them to the US. In the middle of 2015, then aged 76, Alan became unwell, he was later diagnosed, in October, with Stage IV colon cancer. At the same time his third wife (Deborah) became involved in his affairs and dealt extensively with lawyers in Florida, Cayman and London in relation to the Trust and its affairs. This involved: (i) excluding his children from the Trust, (ii) having the Trustee terminate the Trust and appoint its assets to him and her jointly, and (iii) enabling her and her son and daughter-in-law to take control of the underlying trust companies in Cayman and England. When documents were sent to his children seeking them to agree to a transfer of the trust assets directly to their father, his children, suspicious of what may have been going on behind the scenes, refused to sign the documents and warned the Trustee and the Trustee's Cayman Islands attorneys (Appleby) of their concerns over their father's health, capacity and that their father was being subjected to his third wife's, their step-mother's, undue influence.

Deborah was advised by solicitors in London and her then Cayman Islands attorneys (Ogier) of the need to engage with her husband's children and to seek to arrive at amicable resolution of the dispute surrounding Alan's access to the Trust assets. Deborah was also advised by her then Cayman Islands attorneys that the Trust assets were safe in the Cayman Islands and that retransferring the assets back to Alan's direct ownership may not be a sensible way of proceeding. Deborah did not follow that advice and, from summer 2015 onwards, all meaningful direct contact between the children and their father was cut off and never re-established. Soon after receiving advice from Ogier which questioned the sense of the potential retransfer of the Trust assets to Alan, new Cayman Islands attorneys (Kobre & Kim (Cayman)) were retained to represent and advise Alan.

The retainer of Kobre & Kim (Cayman) including two QCs to advise and represent Alan as

Settlor-Protector was, the Court found, “on a very tight leash” (paragraph 528) with them being granted authority on the face of their Letter of Engagement to take their instructions from Deborah acting on behalf of Alan. The Court noted at paragraph 556 of the judgment,

“It is against this background that the engagement of Kobre & Kim Cayman by Mr Knecht on terms which expressly required them to pursue termination of the Trust and distribution of the assets to Alan and Deborah, and implicitly forbade the firm from giving any broader legal advice, must be viewed. It was not suggested that the confines of this retainer were inappropriate, and it is only in hindsight that the brief looks a somewhat unbecoming one. But at the material time and in ways that were probably not obvious, the persons on whom the terminally ill, bed-ridden and legally blind Alan was heavily dependent for personal care and business needs were each (perhaps in somewhat different ways) committed to a strategy which (a) had the effect of alienating Alan from his children and (b) had the unconditional goal of terminating the Trust and transferring the assets to Alan and Deborah. This was a ‘who dares wins’ strategy, because termination would result in Deborah sweeping the board and leaving the children out in the cold. Demonizing Alan’s children would ensure that he had no motivation at all to urgently address making alternative provision for his children in place of their interests under the Trust.”

QCs from Kobre & Kim (Cayman) met with Alan in January 2016 to discuss their instructions, although their notes of those meetings had been lost by the time discovery in the trial action took place. A further meeting with Alan took place in March 2016, this time between Alan, one of his QCs, the General Legal Counsel and Senior Trust Officer of the Trustee, at which the decision to terminate the Trust and take back control of the Trust assets was discussed with Alan. Following that meeting, the Trustee received a Declaration of Exclusion from Kobre & Kim (Cayman), who had received it from Deborah. The Declaration was signed by Alan as Settlor and Protector of the Trust and recorded the decision to exclude irrevocably all of the Trust’s beneficiaries, with the exception of him and Deborah. The Trustee, on advice from its attorneys, accepted the Declaration and gave effect to it and then, some weeks later, following a request from Kobre & Kim (Cayman) as attorneys for Alan, the Trustee executed Deeds of Termination and Appointment, terminating the Trust and appointing the assets of the Trust to Alan and Deborah jointly.

At the same time, Alan’s children commenced proceedings in Florida to gain access to their father and asked the Trustee not to give effect to the exclusion and termination of the Trust until after their access proceedings in Florida had been determined. The Trustee, following advice from its attorneys, did not accede to that request. Unfortunately, Alan died before the Florida proceedings could be heard and therefore his children never had in person contact with Alan during the last 10 months of his life.

After Alan’s death, his children instructed Travers Thorp Alberga to advise and represent them. Neil McLarnon of Travers Thorp Alberga represented them in their application for and obtained an *ex parte* injunction restraining Deborah and her son and daughter-in-law from dealing with the Trust assets, which by that stage had been transferred to Deborah, pending a trial of the Plaintiffs' claims to set aside their exclusion from the Trust, the termination of the Trust and the appointment out of the Trust assets.

The trial of the proceedings lasted some 7 weeks and Justice Kawaley delivered a painstaking 250 page judgment (with judicial references from Shakespeare, through Schopenhauer to Julia Roberts, in *Pretty Woman*) in which he considered the parties' competing cases with meticulous care. Was Deborah merely following and implementing her beloved dying husband's instructions and carrying out his last wishes? Or was she seeking to push Alan's children out of the proverbial nest and take the spoils for herself and her own family?

Importantly, the Court found, accepting and following the decision, cited and relied on by the Plaintiffs, of Morritt J (as he then was) in *Simpson v Simpson* [1992] 1 FLR 601 that a relationship of husband and wife can give rise to a presumption of undue influence when one spouse becomes ill and dependent on the other, paragraph 341 *ff.* of the judgment.

The Court also accepted the Plaintiffs' legal analysis on the law of undue influence. The Plaintiffs' relied on passages from the English and Canadian authorities *Bullock v Lloyds Bank Ltd [1954] 1 Ch 517, Powell v Powell [1900] 1 Ch 243* and *Mundinger v Mundinger (1968) 3 DLR (3d) 338* to illustrate the operation of undue influence in wholly familial circumstances. At paragraph 340, Justice Kawaley found,

"These passages suggest that the doctrine of undue influence is more fluid than it might initially appear to be, especially if one has only encountered it in limited factual and legal contexts, such as the well-known scenario of the Etridge case. They also remind one of the need to avoid confusing the legal principle itself with the way it is applied in particular factual contexts, a 'tail wagging dog' tendency which often flows from a mechanistic interpretation of judicial authorities."

Lessons to take away

(1) The rule of Kenward v Adams *(1977) 127 NLJ 487* remains salutary,

"In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it maybe to suggest that precautions be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and findings.

There are other precautions which should be taken. If the testator has made an earlier will this should be considered by the legal and medical advisers of the testator and, if appropriate, discussed with the testator. The instructions of the testator should be taken in the absence of anyone who may stand to benefit, or who may have influence over the testator.

These are not counsels of perfection. If proper precautions are not taken injustice may result or be imagined, and great expense and misery may be unnecessarily caused."

The rule should be followed not only in the context of Wills but also where there is any dealing with substantial assets of an elderly and infirm person during their lifetime.

(2) Assessments by lay persons, trust officers, even attorneys, are often unreliable and of limited assistance to the court, *PH-v-A Local Authority* [2011] EWHC 1704 (Fam).

(3) Trustees and their attorneys should adopt a cautious approach and not seek to become judge and jury where a dispute arises between beneficiaries, things are often not what they seem and what goes on behind the scenes can often be dramatically different from what is presented to a Trustee and from what people want to present and want others to believe. In cases where there is any room at all for doubt, a prudent Trustee should seek guidance from the Court and let the Court decide for itself any significant issues that arise between disputing beneficiaries. The Court is much better equipped to find out where the truth lies than trustees or even attorneys. The immediate cost of doing so is, in the long run, invariably likely to be much cheaper for the Trustee and the Trust than having long drawn out trust proceedings to put things right after the event.

Neil McLarnon was Partner with conduct of the proceedings on behalf of the Plaintiffs and appeared as Junior Counsel with Tom Lowe QC at the trial of the action.