CONTENTS

02 FOREWORD
THE EDITORS

03 CLARITY ON THE JERSEY COURT’S POWER TO REMEDY TRUST MISTAKES
ROBERT GARDNER

07 ESTATE PLANNING INVOLVING BOTH CIVIL- AND COMMON-LAW JURISDICTIONS
JEAN-MARC TIRARD

13 WHY MORE STATES SHOULD RATIFY HAGUE.35
TALIN HITIK

20 THE LATEST CASE ON DEATHBED GIFTS IN ENGLAND AND WALES
CHARLOTTE JOHN

25 WHAT SHOULD TRUSTEES DO WHEN FACED WITH HOSTILE BENEFICIARIES?
WILL TWIDALE

33 BOOK REVIEW
THE ISLAMIC LAW OF WILLS AND INHERITANCE, BY DR ABID HUSSAIN
Euro 2016 gives rise to the reflection that financial centres, just like football teams, are in perpetual competition. With the stakes now so high, can the playing field ever be level?

Firstly, a warm welcome to Shelley White, who joins our team as the first Editor from the Cayman Islands. Drawing on her experience at the Chancery Commercial Bar in London, Shelley now handles trust disputes and insolvency litigation at Walkers in George Town. We look forward to her input, given the increased relevance of her fields of practice to our industry.

Robert Gardner kicks off this edition with an analysis of In the Matter of the Z Trust. A difficult call for any referee, the court had to decide on its power to ratify actions of a trustee whose initial appointment to the office had been retrospectively declared invalid. By granting a ‘confirmatory’ order over previous acts and omissions (with a similar effect to ratification), this judgment closes down the corridor of uncertainty that exists where mistakes are made in a trust context.

Then, Jean-Marc Tirard, a recent Channel-hopper himself, comments on the structuring of estate plans that involve assets situated in France and England. Hopefully, this Clásico of cross-border estate planning will foster similar pieces, opposing other common- and civil-law countries.

The Hague Convention on the International Protection of Adults tackles the problem of clients who are unable to defend their interests by reason of an impairment or insufficiency of their personal faculties. This issue’s contribution on this topic will certainly help practitioners dribble past the obstacles posed by clients’ increased mobility and life expectancy. Just like the Bosman ruling in Europe, this Convention is a game changer, although it is still often overlooked, despite it having entered into force in 2009.

Also in this issue, Charlotte John offers an article related to the latest case law on deathbed gifts. The doctrine of donatio mortis causa imposes specific requirements, as it constitutes an exception to testamentary gift-making. Advisors and clients should play by these newly clarified rules to ensure they are not running foul of the law.

Finally, the play-off between trustees and beneficiaries is explored in Will Twidale’s article on enduring friction and hostility: should trustees be removed in circumstances where they are honouring the settlor’s wishes against the beneficiaries’ requests? Although the final whistle will probably never be blown when it comes to this topic, the author provides a refreshing historical perspective.

In extra time, Richard Frimston reviews a comprehensive book dedicated to the Islamic law of wills and inheritance, a helpful resource that advisors will undoubtedly be consulting until the next World Cup.

Some call it ‘soccer’, the rest of us ‘football’: certain players are always trying to move the goalposts.

THE EDITORS
WHAT’S DONE CAN BE UNDONE

A review of In the Matter of the Z Trust, in which the Royal Court of Jersey clarified its powers to ratify actions of invalidly appointed trustees

BY ROBERT GARDNER

ABSTRACT

• The Royal Court of Jersey has recently decided an application to set aside the appointment of a party to the office of trustee, where the appointment had resulted in unintended and undesirable tax consequences.

• The Royal Court set aside, with retrospective effect, the entire chain of trustee and corporate retirements and appointments, and the vesting of the shares in the onshore trustee, on three alternative grounds. The court declined to make an order ratifying the acts and omissions of the trustee, instead making ‘confirmatory’ orders and ordering the reinstated offshore trustee to confirm or alter the decisions of the retired trustee.

• The case reaffirms the Royal Court’s willingness to show a flexible approach to assisting the administration of Jersey-law trusts for the welfare of beneficiaries where mistakes have been made, particularly where such mistakes lead to completely unexpected, severe and illogical tax consequences.

If the court declares a party’s appointment to the role of trustee to be retrospectively invalid and of no effect, what consequential orders can also be granted to either unwind or confirm that party’s prior acts and omissions? What is the legal basis for the court declaring such acts and omissions to be valid in the future in a way that is not contrary to principle and achieves the desired tax effect?

While of obvious and particular importance to trustees who become ensnared in undesirable and unintended tax problems as a result of their acts and those of other parties, the issue has not been subject to much judicial analysis in Jersey. Some academic criticism has been levelled at the judgment of the Royal Court in Re BB,1 for ‘dramatic and magical’ ratification orders that were granted without, it was said, the benefit of a great deal of argument or analysis.

Mindful of this criticism, and with the assistance of senior English counsel’s opinion, the Royal Court has recently provided a detailed analysis of the jurisdiction to grant consequential orders relating to previous acts and omissions (see In the Matter of the Z Trust).2 The court ultimately granted orders that were different.

1. [2011] JLR 672
2. [2016] JRC 048
MISTAKES IN JERSEY  ROBERT GARDNER

‘As a result of the tax consequences that had been triggered, the Royal Court was asked, on the application of a beneficiary of the trust, to set aside with retrospective effect the entire chain of trustee and corporate retirements and appointments’

in concept to ‘ratification’ (albeit with much the same effect) and were instead borne out of the concept of ‘confirmation’ by the retrospectively reinstated trustee.

THE FACTS

The case involved a discretionary trust governed by Jersey law, the settlor of which had exercised a power, conferred on her by the trust instrument, to appoint two London-based solicitors as trustees, in place of the existing (offshore) trustee, who retired. Consequential steps were also taken to appoint replacement (onshore) officers to the trust’s wholly owned subsidiary. The trust’s assets, being the shares in the subsidiary, were transferred to and vested in a nominee for the benefit of the onshore trustees.

Subsequently, the subsidiary sold the leasehold interest in the flat it owned (worth two-thirds of the value of the trust) and distributed the net sale proceeds to the trustee, retaining a freehold property worth one-third of the trust’s value. There were also a number of other actions, including, but not limited to, a distribution of funds to one beneficiary and permitting the settlor’s spouse to occupy the freehold property gratuitously.

THE TAX PROBLEM

The adverse tax consequences that arose as a result of all of this were severe and included corporation- and income-tax charges (on both the company and trust), amounting to approximately 32 per cent of the value of the entire trust fund. Further charges would be payable in the future if similar steps were to be taken with the subsidiary’s remaining freehold property and its sale proceeds. The settlor had taken limited tax advice of a preliminary nature before embarking on the process that led to appointments and retirement, although, following her death, the evidence from her widower was that the settlor was unaware of the actual tax implications of appointing onshore trustees and of the other associated steps that ensued.

THE APPLICATION TO THE ROYAL COURT

As a result of the tax consequences that had been triggered, the Royal Court was asked, on the application of a beneficiary of the trust, to set aside with retrospective effect the entire chain of trustee and corporate retirements and appointments, and the vesting of the shares in the onshore trustee.

SETTING ASIDE THE APPOINTMENT OF THE REPLACEMENT TRUSTEES

The Royal Court acceded, on three alternative grounds, to the requests so far as they related to the settlor’s action in appointing the replacement trustees:

• under the court’s inherent jurisdiction, as supplemented by article 51 of the Trusts (Jersey) Law 1984 (as amended) (the Trusts Law), the court was able to impugn the settlor’s exercise of the (fiduciary) power of appointment on the basis that it was not exercised in the interests of all beneficiaries, failed to take account of the tax consequences and was irrational;

• under article 47G of the Trusts Law, the court concluded that the settlor had made a mistake as to the nature and effect of the powers and as to the full tax consequences of their exercise; and
under article 47H of the Trusts Law, as a person exercising fiduciary power in relation to a trust (with a fiduciary duty to the beneficiaries), and on the assumption that the settlor had been a reasonable person acting in accordance with her duties, the court was able to conclude that she would not have exercised the power but for her failure to take into account various relevant considerations, including tax.

In relation to the latter point (one formulation of the relatively new statutory version of the rule in Hastings-Bass), as a result of article 47H(4) of the Trusts Law, there was no need for the court to find any fault or lack of care on the part of the settlor, as the person exercising the fiduciary power.

The court dealt with the associated corporate retirements and appointments and the share transfer under the court’s article 47I(3) power to make appropriate consequential orders.

In making all of these orders, the court was careful to satisfy itself that there was no prejudice to the purchaser of the flat or to any other parties.

THE CONSEQUENTIAL ORDERS
The appointments, retirements and vesting of shares all having been set aside and declared to be of no effect, the court then relieved from liability the onshore and offshore trustees, who, retrospectively at least, had never been appointed or retired, as a result of the court’s order. They were relieved from liability for their actions and inactions (such having been honest and reasonable on the circumstances) except to the extent that the acts and omissions of the onshore trustees would have amounted to breach of trust had their appointments been fully effective. In doing so, the court applied article 45 of the Trusts Law, holding that the word ‘trustee’ encompassed a trustee de son tort.

The court then faced the more complex issue of whether to seek to unscramble the actions of the onshore trustees (as trustee de son tort) or to confirm or ratify those actions and, if the latter, on what basis. The court decided that it would be contrary to the welfare of the beneficiaries and to the competent administration of the trust to interfere with the acts or omissions of the onshore trustees. The court declined to make an order ratifying those acts and omissions; instead, the court took the view that it was more appropriate to make ‘confirmatory’ orders. So far as the previous distribution of funds to the beneficiary was concerned, this was made the subject of an order to the effect that the now reinstated offshore trustee should ‘replace’ the distribution made by the former trustee de son tort by executing a fresh appointment that the funds distributed and the right to recover those funds were held for the recipient absolutely. This new appointment was to be carried out by the reinstated offshore trustee, in effect reconfiguring the legal basis for the recipient’s entitlement to the funds in question.

So far as the various other acts and omissions of the trustee de son tort were concerned, such as allowing the settlor’s spouse to reside in the freehold property gratuitously, the court authorised and directed the reinstated offshore trustee to leave those acts undisturbed and authorised the reinstated trustee to confirm those acts by ‘non-intervention’, such that the trust and subsidiary be administered going forwards as if the acts or omissions had been validly made by properly appointed trustees.

The court got around potential objections relating to the absence of jurisdiction to interfere with the acts of company directors (as opposed to
trustees) by approaching the corporate level via the reinstated trustees’ ability to procure, permit and allow the acts of their wholly owned subsidiary.

All of this was designed to get around a number of potential objections and hurdles associated with ratification. These included objections to the court ratifying dispositive acts of the trustees, who had, from a retrospective standpoint at least, been invalidly appointed at the times of the acts in question, and problems with the court ratifying previous actions of the onshore trustees, which could be susceptible to fiscal challenge.

In this matter, the legal source of the court’s powers to make such orders, which were consequential on the orders made pursuant to articles 47G and 47H, was squarely within the article 47I(3) power to make consequential orders as the court sees fit (introduced into the statutory mistake and Hastings-Bass provisions in the Trust Law in late 2013). Accordingly, the court did not need to exercise its inherent jurisdiction, as supplemented by article 51, for the purposes of the consequential confirmatory orders.

CONCLUSION
The Royal Court has long shown a positive and flexible approach to assisting in the administration of Jersey-law trusts for the welfare of beneficiaries where mistakes have been made, particularly where such mistakes lead to completely unexpected, severe and illogical, tax consequences. There is a decent body of successful equitable-mistake and Hastings-Bass cases brought in Jersey over the past 15 years or so. Very few have involved applications to set aside the appointment of a party to the office of trustee; most relate to tax problems associated with trustee appointments of assets to beneficiaries or settlor mistakes. This explains why there have not been more examples of cases where the court has been asked to make detailed consequential orders to validate decisions of parties whose appointments to the office of trustee have been retrospectively set aside.

The judgment provides a helpful analysis as to how to avoid the minefield of unscrambling those prior acts and omissions, while carefully navigating complex issues related to the Royal Court’s jurisdiction to validate such acts and to ensure such validation has appropriate legal effect.

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TROUBLE AT THE BORDER

What are the issues and possible solutions when implementing an estate plan involving assets in both a common- and a civil-law jurisdiction, such as the UK and France?

BY JEAN-MARC TIRARD

ABSTRACT

• The common-law and civil-law legal and tax environments are very different, giving rise to difficulties in respect of cross-border investments.

• The absence of testamentary freedom and a high-tax environment are the two main hurdles for UK individuals owning assets in France.

• Although a number of techniques to avoid the above exist, they entail, as a general rule, adverse tax consequences in the UK.

• Conversely, the most efficient French tax-planning techniques are not without problems when used in cross-border situations.

• As a general rule, practitioners should favour local planning techniques to hold local assets.

A ny private-client lawyer knows that an estate- or tax-planning arrangement that is perfectly efficient and/or usual in one country might be totally inefficient or even disastrous in another jurisdiction. The risk of such a mismatch has significantly increased with the larger number of families owning assets in a country other than their country of habitual residence. The risk is greater when the jurisdictions involved have different cultural and juridical traditions. This is typically the case with common-law and civil-law jurisdictions.

Indeed, even though common- and civil-law jurisdictions have tried to overcome their differences, particularly in respect of succession laws, these efforts have not yet proved to be efficient enough. The perfect, and latest, example of this discord is Regulation (EU) No.650/2012 on matters of succession and on the creation of a European Certificate of Succession, known as the EU Succession Regulation.¹

The purpose of this article is twofold. First, to address the main legal and tax issues arising when the resident of one country owns assets in

1. This topic has been regularly covered by Richard Frimston in his EU column in the STEP Journal: bit.ly/STEP_Frimston
another country and wants to import or export estate-planning vehicles from one country to another. I will also look at the problems and suggest solutions using the UK and France as examples.

AN INDIVIDUAL RESIDENT IN THE UK OWNS ASSETS IN FRANCE

Typically, the UK individual wants to keep their testamentary freedom and struggles to keep the heavy French tax burden to a minimum. They may wish to use the same planning techniques that have proved efficient in respect of their local assets. Unfortunately, with a few exceptions, it is likely that this will not be possible.

THE PROBLEMS

FORCED HEIRSHIP

It is well known that the most significant constraint in respect of French estate planning is the absence of testamentary freedom. France, as in almost all civil-law countries, provides that an indefeasible share of the deceased’s assets is guaranteed for the deceased’s children. Many countries extend the protection to others – for example, to the spouse (e.g. Belgium, Germany, Italy, Switzerland) and to ascendants (e.g. Belgium, Germany, Italy, Switzerland).

The mechanics of the protection may be different. Whereas the French Civil Code reserves as ‘of right’ a portion for certain relatives, in Germany certain relatives are entitled to claim against the testator’s heirs ‘if they wish’. As a general rule, inter vivos gifts do not allow forced-heirship rights to be defeated. This is because, when the deceased has, by legacies or by lifetime gifts, so diminished their estate that there is not enough left to satisfy the claims of the heirs, the legacies or gifts have to be cut down if this is demanded by the forced heirs (known as ‘clawback’ claims).

Therefore, there was, until recently, little flexibility in the disposition by a UK resident of their French assets by will or testamentary provisions.

HIGH-TAX ENVIRONMENT

As a general rule, this is only an issue when the civil-law country where the UK individual takes up residence or holds assets levies taxes that are higher than in their country of domicile. This is typically the case in France, which, in addition to very high income tax, raises an annual wealth tax that does not exist in any common-law country (particularly in the UK), and which has a inheritance tax (IHT) burden that is typically higher than the UK’s, particularly because of significantly lower tax-free allowances (the higher tax-free allowance is EUR100,000 per child).

Lifetime gifts are not a solution since they are taxed at the same rates as testamentary transfers. Moreover, the IHT exemption between spouses and those in a French civil partnership does not apply to gifts. The IHT treaty of 21 June 1963 between France and the UK only prevents double taxation in respect of IHT and does not apply to gift tax.

THE SOLUTIONS

So what can be done in France to try to leave more assets to whomever one wishes, or to reduce IHT?

THE EU SUCCESSION REGULATION

The first method to avoid forced heirship is only available to nationals of a common-law jurisdiction that respects testamentary freedom. It consists of providing in the will the wish for their succession to be governed by their national law, as provided by article 22 of the Succession Regulation. Indeed, although the Succession Regulation does not alter the substantive national rules on succession, it allows the choice of the laws of one’s country of citizenship to be applied on death.

Typically, the Succession Regulation allows British citizens the freedom to distribute their estate in accordance with their national law. The Succession Regulation is binding on all EU member states, except for the UK, Ireland and Denmark, which have opted out. Hence, English or Scottish law will continue to apply to the succession of an estate in the UK. However, the Succession Regulation will still be relevant for UK nationals and individuals living in the UK where this individual owns property, is a national or is resident in a member state bound by this Regulation. In other words, despite the UK not signing up to the Succession...
Regulation, UK nationals living in France will be able to elect that the law of their nationality controls the succession of their estate.

It should be noted that the Succession Regulation does not apply to tax. UK nationals cannot opt for UK IHT rates to apply instead of French succession tax. In France, the tax rates and allowances vary according to who the beneficiary is and, as already mentioned, are higher than the UK tax rates, although transfers between spouses and civil partners are tax-free.

**Usufruct**

Usufruct is defined by the French *Civil Code* as the right to enjoy things owned by another in the same manner as the owner, but on condition that their substance is preserved. A usufruct may be created in relation to immovable and movable property, tangible and intangible. Under French law, it is even possible to create a usufruct in relation to fungible property (quasi-usufruit) (e.g. on a securities portfolio).

For French tax purposes, the gift of the bare ownership is a very efficient tax-planning strategy, as the following example shows:

Parents transfer the bare ownership of a personal residence to their children and retain the use (usufruit) for themselves. If they are 60 years old, the value of the bare ownership is deemed to be, for gift purposes, 50 per cent of the property’s current value. If the house is worth EUR500,000 now but twice as much 20 years from now, the parents will have transferred a EUR1 million residence to their children with a gift-tax value of only EUR250,000.

**LIFE INSURANCE**

The most frequently used substitute for a will in France is the beneficiary designation in a life-insurance policy. As a general rule, neither the capital nor the annuities are considered part of the policyholder’s estate. They are not generally subject to the forced-heirship rules (rapport and reduction) unless they are considered to be obviously in excess of the policyholder’s means. Viewed as the preferred French investment tool, life insurance owes much of its success to the preferential tax treatment it receives. Holding assets in the framework of an authorised and approved *assurance vie* wrapper can significantly reduce tax due on investment income and gains. No French income tax or capital gains tax (CGT) is due if the income and gains are accumulated within the policy. When a withdrawal is made, it is taxed at significantly lower rates than ordinary income and/or gains.

Although successive tax reforms have undermined its preferential tax treatment, *assurance vie* allows significant IHT savings, providing premiums are paid before the policyholder’s 70th birthday.

Amounts due from an insurance company by reason of the death of the assured are not subject to IHT, unless the amount received by the beneficiary exceeds EUR152,500, when a withholding tax becomes payable at the rate of 20 per cent. The tax rate is increased to 31.25 per cent for any benefits exceeding EUR700,000, which is still significantly lower than the top IHT rate, which may reach 60 per cent, with negligible allowance.

**MARRIAGE CONTRACTS**

Unlike in the UK, married couples in France can choose a particular matrimonial regime by entering into a marriage contract before getting...
married. They may also change it during the marriage. These regimes affect how property is owned within the marriage and how it is divided in case of divorce or on death, as well as the liability for business debts. There are two main categories of marriage regimes. The separation-of-assets regime clearly distinguishes between ‘own assets’ (biens propres) and ‘common assets’ (biens communs). It is also possible for a couple to hold every asset in joint (or common) ownership.

If a couple marries without concluding a formal contract, they automatically fall, by operation of law, under the regime of communauté réduite aux acquêts. Under this regime, common property is limited to the assets acquired by the couple during the marriage. The community ends with the death of the first spouse or on divorce.

At the other extreme, if the spouses opt for a universal community regime, including a provision of attribution of the whole ownership of the common assets to the surviving spouse, the whole matrimonial property automatically reverts to the surviving spouse on the death of the first spouse. This allows spouses to avoid the application of French forced-heirship rules benefiting the children on the death of the first spouse.

It is worth mentioning in this respect that couples who own holiday houses in France but who remain UK-resident may adopt communauté universelle restricted to their French property.

The marriage contract usually determines only the spouses’ respective interests in their assets both as between themselves and third parties.

THE TONTINE

Although the concept of joint tenancy with right of survivorship is not recognised in French law, the tontine has a similar effect in practice. In the event of joint acquisition of any kind of property, the parties can stipulate in the conveyance deed that, when either one of them dies, their share will revert to the survivor in such a way that they will be considered as having owned the property from the start. The rights of the deceased’s heirs can thus be avoided.

As a general rule, however, under a tontine arrangement, the property transfer resulting from the first death is subject to IHT under normal conditions. However, when included in the articles of association of a company (e.g. an SCI), a clause stipulating that, if one of the shareholders dies, the other shareholder(s) become retroactively owners of the deceased’s shares, effectively avoids an IHT charge.

FOREIGN TRUSTS

In common-law countries in general and in the UK in particular, a popular and very effective technique to transfer assets from one generation to another is the use of trusts. The same technique can be used by French residents to hold UK-located assets, although the UK tax treatment must be carefully considered.

Indeed, one of the most common misconceptions about the French legal system is that it does not recognise trusts. The truth is that, although it is not possible to set up a trust under French law, the French courts have agreed to recognise the effects in France unless they are incompatible with French public policy (see ‘The solution’ below), which is rarely the case in practice.

Up until recently, the use of trusts also opened the door to useful tax planning, especially with respect to French wealth tax. Unfortunately, that planning technique was closed. French law now treats all trusts as transparent as to the settlor (or deemed settlor), whether they are revocable or irrevocable, or whether the rights of the beneficiaries are discretionary or absolute.

THE INDIVIDUAL RESIDENT IN FRANCE OWNS ASSETS IN THE UK

As a general rule, it is easier to implement an efficient estate and tax plan in this situation than in the previous one. This is because common law offers...
more flexibility than civil law. French individuals should not expect, however, that the techniques used in France will necessarily be efficient in the UK.

On the contrary, estate-planning arrangements that are commonly used in France might be inefficient or even detrimental in the UK. This is typically the case with marriage contracts and usufruit arrangements. Moreover, although the Succession Regulation allows British citizens domiciled in France to distribute their estate in accordance with the law of their nationality, the same is not true in respect of French nationals holding assets, or domiciled, in the UK.

### THE PROBLEMS

#### THE INTERPRETATION OF FRENCH MARRIAGE CONTRACTS BY ENGLISH COURTS

As already explained, one should beware of preconceived ideas. Indeed, contrary to common belief, in the aftermath of the UK Supreme Court’s decision in *Radmacher v Granatino*, English judges now attach weight to French matrimonial regimes or agreements. The law into which the couple entered the marriage contract now influences the application of English law. It is nonetheless noteworthy that English judges do not appear to adopt a French point of view.

For example, in a recent case, a premarital property agreement that had been entered into in France and that excluded the sharing of assets on divorce was enforced in England. On the other hand, in another case, although the husband and wife had entered into a marriage contract in France electing to hold their assets separately, in England the wife was considered to be entitled to a full share in the matrimonial assets. Indeed, even though this marriage contract (which contained a specific election by this couple of a property regime known as *séparation de biens*) was binding under French law, it was decided by the English judge that the circumstances in which it came to be signed made it unfair and that it should not be applied.

According to case law, English courts will see themselves as bound by the matrimonial agreement only if both parties are found to have had all the information that was likely to have been material to their decision and/or they clearly intended that the agreement should govern the financial consequences of the marriage.

As a conclusion, a French matrimonial agreement, otherwise perfectly valid under French law once signed in front of a *notaire*, can, therefore, be ignored in England due to the lack of separate and independent advice from two lawyers representing each spouse, which, according to English judges, ensures that the parties understand the implications of the agreement. This requirement might not be met since, as a general rule, only one *notaire* acts for both parties.

#### THE UNFAVOURABLE UK TAX TREATMENT OF USUFRUCT

A very common solution to reduce French IHT is for a donor to give the future interests in the property (bare ownership) and to keep an interest limited to the donor’s lifetime (usufruct). Under such circumstances, the bare owner is treated as the owner and is subject to gift tax/IHT at the time of the gift on the value of the bare ownership. Moreover, on the death of its holder, the usufruct is extinguished and the consolidation of bare ownership with the usufruct does not trigger any taxable event for IHT purposes.

As we have seen above, the creation of a usufruct is a very efficient tax-planning tool. Unfortunately, the UK does not have a concept of usufruct as it is known in France, and there is consequently no legislation regarding the treatment of usufruct.

The key issue is, then, how usufruct should be characterised for UK IHT purposes. HMRC usually treats a usufruct as a gift with reservation. As a consequence, and as opposed to the situation in France, the titleholder who recoups the property at the death of the life-interest holder is subject to IHT. In certain circumstances, this analysis is not necessarily correct.

### THE SOLUTIONS

On the other hand, the French resident may use the most common tax-planning strategy in the UK, consisting of holding their UK assets in trust. Although the trust concept does not form part of French law (see ‘Foreign trusts’ above) and although France has not yet ratified the *Hague Convention of 1 July 1985 on the Law Applicable*...
to Trusts and on their Recognition (the Hague Convention), trusts created outside France, but having effect in France, have nevertheless been recognised for very many years by case law.\footnote{See, in particular, Jean-Paul Béraudo and Jean-Marc Tirard, Les trusts anglo-saxons et les pays de droit civil (2006), paragraph 338 et following}

Legal recognition of the validity of foreign trusts and their effects in France has been established by a number of court decisions. It is generally accepted that the leading case is *Courtois and Others v De Ganay Heirs*,\footnote{10 January 1970} decided by the Court of Appeal in Paris in 1970. In this decision, the French judge took the view that the trust was a contract, creating respective obligations for the parties. Although such an analysis was clearly not satisfactory, as it misunderstands the trust concept, its practical interest is to subject the trust to the law of autonomy, namely the law chosen by the settlor, which complies with the principles laid down by the Hague Convention. A more satisfactory analysis was given by the Tribunal de Grande Instance de Bayonne in 1975,\footnote{28 April 1975, JCP 7511, 18168} which held that the trustee is the owner of the property, but with powers limited by the trust instrument and rules of equity, and that the beneficiaries have no ownership rights though their interests are ‘guaranteed’ by equity.

In the *Ziesennis* case in 1996,\footnote{Cass Civ 1, 20 February 1996, n°93–19855} the Cour de Cassation (the French Supreme Court for private-law matters) also set aside the qualification of the trust as a contract but maintained that the trust is subject to the law of autonomy, namely the foreign law chosen by the settlor. In this particular case, which involved a revocable trust, the Cour de Cassation judged that the trust constituted an indirect gift dating from the date of the settlor’s death.

In 2004, a French court ruled\footnote{Tribunal de Grande Instance de Nanterre, 4 May 2004} that a French-resident beneficiary of a discretionary trust should not be subject to wealth tax in respect of a trust’s assets. In a decision in 2007,\footnote{Cass Com, 15 May 2007, n°05–18268} the Cour de Cassation decided that the trust set up by M Tardieu de Maleysie was to be treated as an indirect gift for gift tax purposes.

In accordance with the above-mentioned case law, foreign trusts are, therefore, recognised by the French courts as such and seen as a specific legal arrangement in their own right. Since a trust cannot be set up under French law, it will necessarily be governed by the law of any jurisdiction, including offshore jurisdictions, that recognise the concept. Applicable law is the foreign law chosen by the parties or, if not, the one with which the trust shows the closest links.

Clearly, the foreign law governing the trust must comply with French mandatory law (ordre public) and the constitution of the trust should not be deemed to constitute a fraude à la loi. However, it is essentially in inheritance matters that the mandatory rules of French law are likely to limit some of the trust’s effects and it should be borne in mind that, under French law, forced heirship is only a matter of succession law after death, at which time, and not before, the heirs may waive their hereditary reserve. It is, therefore, only after death that forced heirship becomes mandatory and thus it cannot have the effect of rendering the constitution of a trust invalid.

Moreover, in the event that the trust has been constituted without complying with the hereditary reserve, generally the consequence would be that transfers made during the lifetime of the deceased, including to the trust, will be brought back into the estate for purposes of calculating the minimum set aside for the reserved heirs by French law. The trust will not be invalid per se, unless the dispossessed heirs can prove that the sole purpose for the creation of the trust was to defeat their legal reserve, which would constitute a fraude à la loi, as laid down by the Cour de Cassation in the *Caron* case.

**CONCLUSION**

Clearly, hoping to be able to implement a unique estate plan that will be both efficient in the UK and in France is and will remain unrealistic. At the risk of stating the obvious, in most cases the only sensible solution is to use the usual planning techniques of each jurisdiction. When in Rome, do as the Romans do.

JEAN-MARC TIRARD TEP IS A PARTNER AT McDERMOTT WILL & EMERY. HE WISHES TO ACKNOWLEDGE THE INVALUABLE ASSISTANCE OF MARIE-AMÉLIE TIRARD IN WRITING THIS ARTICLE
THINK BIG
Why more states should ratify the Hague Convention on the International Protection of Adults

BY TALIN HITIK

ABSTRACT

• The Hague Convention of 13 January 2000 on the International Protection of Adults (Hague 35) is an international treaty regulating the rules of private international law, with the aim of better protecting vulnerable adults and their property in international situations.

• In our ever-shrinking world, in which people frequently move or invest abroad, and in which mental incapacity is increasing on a global scale, the need for such a Convention is apparent now more than ever.

• Hague 35 has not been ratified by England and Wales; it is only in effect in Scotland. Although the Mental Capacity Act 2005 implements the majority of Hague 35’s provisions in England and Wales, UK citizens would be better protected if the UK as a whole ratified the Convention.

• Hague 35 establishes a complex web of cooperation among states and, that being so, its effectiveness as a treaty is directly commensurate with the number of states that are party to it. Hague 35 should be ratified by as many states as possible in order for its object and purpose to have maximum effect.

The Hague Convention of 13 January 2000 on the International Protection of Adults (Hague 35) is a comprehensive scheme of carefully crafted rules of private international law that coordinates between national legal systems issues of jurisdiction, applicable law and recognition and enforcement, with the aim of protecting vulnerable adults. The need for such a Convention is apparent now more than ever.

The world’s population is ageing. Significant improvements in healthcare in many countries over the past century have contributed to individuals living longer and healthier lives. The number of older persons has tripled over the past 50 years and it will more than triple again over the next 50.1 This development carries with it an increase in neurological diseases, most commonly dementia, that render the elderly incapacitated or vulnerable. The risk of developing dementia increases exponentially with age, doubling every 5.9 years.2 Current estimates indicate that 35.6 million people worldwide are living with dementia.3 That number is projected to nearly double every 20 years, to 65.7 million in 2030 and 115.4 million in 2050. The number of new dementia

1. For the purposes of this study, ‘older persons’ are defined as 60 years old and older; UN, World Population Ageing: 1950–2050
3. Statements of Dr Margaret Chan, Director-General, World Health Organization, in Dementia: A Public Health Priority, at v
cases each year worldwide is nearly 7.7 million, implying one new case every four seconds, leading the World Health Organization to declare dementia a public health priority in 2008.4

The development of comprehensive national protective or supportive regimes to effectively address the needs of vulnerable adults presents its own complex and unique challenges – for example, flexibly and adequately addressing the needs of an adult with dementia or an intellectual disability who only sporadically needs representation or assistance in managing their affairs.

These challenges are only compounded when the internationalisation of that protection is contemplated. In the modern world, the movement of people is increasingly fluid. A total of 3.4 million people immigrated to one of the EU’s 28 member states during 2013, while at least 2.8 million emigrants were reported to have left an EU member state.5 For good reason, we often only read about those fleeing from homes ravaged by war, but people commonly move abroad for reasons of work, relationships or retirement. In fact, retired people are seeking out milder climes and a lower cost of living abroad in increasingly great numbers.

Many elect to move abroad permanently, while others invest in properties as vacation homes. In the UK, for example, the number of properties purchased abroad grew by 89 per cent between 2001 and 2010; the number of second homes purchased within the UK grew by only 19 per cent over the same period.6

A GLOBAL SOLUTION
A piecemeal approach by each individual state acting in isolation is insufficient to address the diverse needs of vulnerable adults whose lives and property are connected with more than one state. The Hague Conference on Private International Law (HCCH)7 undertook the challenging task of creating an international treaty to unify the rules of private international law with regard to the cross-border aspects of protective regimes, and, importantly, to provide for international judicial and administrative cooperation, ensuring the better protection of the vulnerable adults and their property on a global scale.8 With the benefit of the unique position of the HCCH and its work, Hague 35 has grafted the systematic and practical mechanisms of private international law (e.g. addressing issues of international jurisdiction, applicable law, and recognition and enforcement of foreign measures) onto a human rights backdrop, to yield a set of concrete solutions to make the substantive rights of vulnerable adults function.

PROTECTING THE AUTONOMY OF WILL OF THE ADULT
Hague 35 sets out to fill the vast lacuna in the cross-border protection of vulnerable adults by coordinating the rules of private international law concerning jurisdiction, applicable law, and recognition and enforcement of protective measures in each contracting state. At the heart of Hague 35 is the enhancement and promotion of the adult’s autonomy and self-determination. Illustrative of this is first and foremost the preamble of Hague 35 itself, part of which reads: ‘…affirming that the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations.’

Moreover, throughout the drafting of Hague 35, discussions of the delegates consistently reflected this idea as being central to the choices made for the final instrument, especially giving the adult the right to make as many choices as possible in anticipation of incapacity.9 In this vein, Hague 35 encourages cooperation among its contracting states to achieve cohesive and uninterrupted protection of adults across international boundaries.

SCOPE
Article 1, paragraph 1 of Hague 35 reads: ‘This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal

4. Ibid
7. The HCCH is a permanent intergovernmental organisation and is the sole international legislative body in The Hague. It currently comprises 80 states and the European Union. A full list of Hague Conventions can be found on the Hague Conference website: www.hcch.net
faculties, are not in a position to protect their interests.’ The language as to persons covered by the Convention was deliberately crafted to have as wide an application as possible, and avoids using certain juridical terms that could convey different meanings across jurisdictions. The broad language of this provision also has the benefit of omitting a requirement of any duration, thus allowing Hague 35 to apply to a temporary impairment – a novel approach in the protection of vulnerable adults.

The following factual elements must be met in order for the adult in question to fall within the purview of Hague 35:

• there is an impairment or insufficiency of the person’s faculties – either physical or mental; and
• the impairment is to an extent that they are not in a position to protect their interests.

At its outset, Hague 35 cites two of its objects as being ‘to provide for the recognition and enforcement of such measures of protection in all Contracting States’; and ‘to establish such cooperation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention’. Thus, in the tradition of the HCCH’s range of successful conventions codifying rules of private international law, Hague 35 is intended primarily to govern relationships between contracting states, and is not necessarily intended to apply erga omnes.

As Hague 35’s explanatory report, written by Professor Paul Lagarde, points out: ‘Since measures of protection vary within each legal system, the enumeration given in this article can only be illustrative.’ Notably, in many jurisdictions, the type and degree of the protective regime is commensurate to the level of insufficiency or impairment of the

An interpretation of the Convention in France, for example, seems to have applied Hague 35 conflict-of-laws rules to non-party states. A 2013 case in the Cour d’Appel de Rennes (the Court) concerned a woman of dual French and Australian nationality who was suffering from Alzheimer’s disease, whose ex-husband and son were her representatives and whose son had been appointed her guardian by an Australian court. The ex-husband and son sought for the French court to allow them to redeem her French life-insurance policy in order to fund her growing healthcare costs in Australia. The tribunal d’instance, applying French law, required that a separate measure of protection in accordance with French law be put into place over the woman before they could be authorised to receive the funds. The Court, however, overturned the decision, recalling that, in accordance with Hague 35 and other French rules of private international law, the Australian power of attorney and guardianship measures already had legal authority in France, and that the ex-husband and son, therefore, had the legal authority to handle the woman’s assets as they saw fit.

Interestingly, the court addressed France’s obligation under Hague 35 to give effect to the foreign protective measures, independent of the fact that Australia is not currently a party to the Convention. In fact, it may have helped the appellants’ case: the court took note of the appellants’ argument that it would be practically impossible to put a French protective measure into place because Australia was not a party to Hague 35 and, therefore, was not required (or perhaps not equipped) to cooperate with French authorities in this regard.

Hague 35 defines an adult as a person who has reached the age of 18 years. It avoids any gaps in protection of the individual by deliberately picking up where the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague 34) leaves off. The types of measures of protection to which Hague 35 applies are enumerated in a non-exhaustive list (under article 3). As Hague 35’s explanatory report, written by Professor Paul Lagarde, points out: ‘Since measures of protection vary within each legal system, the enumeration given in this article can only be illustrative.’ Notably, in many jurisdictions, the type and degree of the protective regime is commensurate to the level of insufficiency or impairment of the
adult’s personal faculties. The terms employed in the Convention, such as ‘protective regime’ or ‘measure of protection,’ are intended to cover the range of different scenarios, including a subsequent revocation of a determination of incapacity.17

Regarding matters that are excluded from Hague 35, a few general themes are mentioned with a view to avoiding overlap with other Hague Conventions. Protracted discussions in Special Commission negotiations addressed whether or not medical and health matters should fall within the ambit of Hague 35. The solution reached was that medical acts themselves, which are within the province of medical practitioners, are excluded from Hague 35, while legal questions concerning the authorisation and representation of the adult connected with those medical acts are indeed within Hague 35’s scope.18

TRUSTS AND SUCCESSION
Article 4(d) excludes from Hague 35 matters related to trusts and succession, so as to avoid conflicts with the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition and the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, respectively. It remains true, however, that the finer points of its practical application require some further analysis. For example, different jurisdictions classify matters within the definition of ‘succession’ differently, and it is, therefore, somewhat left open to each jurisdiction as to whether types of testamentary instruments would fall within the exclusion of article 4(d) or would indeed be considered a protective measure under Hague 35. It has been suggested, for example, that statutory wills under the law of England and Wales and other common-law jurisdictions do not, in fact, always fall within the scope of the trusts and succession exclusion, and, therefore, can constitute a measure of protection for the purposes of Hague 35.19

JURISDICTION
The general outline of this chapter departs significantly from Hague 34 for practical reasons related to an adult’s propensity to have more international jurisdictional ties related to their person and property. The drafting sessions for Hague 35 generated considerable debate regarding the option, for example, of a concurrent jurisdictional scheme, which was ultimately rejected, citing potential logistical impracticalities.20 Instead, principal jurisdiction is attributed to the authorities of the state of the adult’s habitual residence.21 Importantly, Hague 35 avoids giving a definition to ‘habitual residence’. The definition should remain a factual concept rather than a qualitative definition.22 Jurisdiction may alternatively be exercised by the authorities of the contracting state of the adult’s nationality, regardless of whether the adult is physically present, if:
• they consider that they are in a better position to assess the interests of the adult; and
• they inform the authorities of both the adult’s habitual residence and of the state where he or she is currently present, if different.

The authorities of the adult’s habitual residence may also request that the authorities in another state with subsidiary jurisdiction take measures if that is in the best interest of the adult, further underscoring what is at the heart of Hague 35: international cooperation for the common goal of adults’ practical protection.23 Courts in the situs of the adult’s property are granted jurisdiction to take necessary measures over the property, provided that they are compatible with those already taken by other authorities with jurisdiction.24

APPLICABLE LAW
Hague 35’s applicable-law scheme functions on the basis of the general notion that the authorities of each contracting state will apply their own law when they exercise jurisdiction,

17. Proceedings at 403, paragraph 20
19. Frimston et al
21. Article 5(1)
23. Article 5(1)
24. Article 9
‘One of the most noteworthy aspects of Hague 35 is article 15, which envisages future powers of representation granted by a still-capable adult, to take effect upon incapacity’

and in the implementation of foreign measures. In addition, Hague 35 recognises the fact that, in many jurisdictions, it is common for adults to execute private mandates to manage their affairs in advance of their incapacity, such as a power of representation. Interestingly, in Hague 35 negotiations, it was discussed whether the power-of-representation provisions should be treated as the functional equivalent of parental responsibility for the purposes of Hague 34.25

Under article 13(1), in exercising their jurisdiction according to the rules of Hague 35, states will generally apply their own law. Authorities may exceptionally apply or take into consideration the law of another state, with which the situation has a substantial connection, when this is required for the protection of the adult’s person or property.26 In any case, Hague 35 does not prevent the application of national law considered mandatory in the state where the adult is to be protected and also provides safeguards such that a contracting state will not be obligated to apply the law of a foreign state if it would be ‘manifestly contrary to public policy’.27

HAGUE 35 AND PRIVATE MANDATES
One of the most noteworthy aspects of Hague 35 is article 15, which envisages future powers of representation granted by a still-capable adult, to take effect upon incapacity. Importantly, a power of representation for the purposes of Hague 35 can arise in two distinct ways. The first is through the implementation of a protective measure by a state authority.28 The second is through a private mandate executed by the adult – an idea recognising that, in many jurisdictions, a growing number of adults provide for a representative to manage their personal, property or medical matters on their behalf in the event of their incapacity. Article 15 provides that the existence, extent or modification of powers of representation granted by an adult will be governed by the law of the adult’s habitual residence at the time of the agreement or act granting such powers.29

The adult is also permitted to choose a different applicable law from a designated list of laws with which they have a close nexus.30 The provisions addressing private mandates echo the conflict-of-laws scheme laid down in the rest of Hague 35, requiring the state where the powers of representation are exercised to apply their own law to the ‘manner of exercise’ of such powers.31

Article 15 best illustrates that the autonomy of the will of the adult is a primary concern of Hague 35.32 It thus stands to reason that Hague 35 drafters anticipated that the adult’s choices regarding representation should endure, regardless of the state in which they are exercised.33 Article 15 can also be considered against the backdrop of the significant work done at the Council of Europe that underlines the importance of ‘private mandates’, including advance powers of representation in the event of incapacity. Council of Europe Recommendation (2009) 11 on ‘Principles concerning continuing powers of attorney and advance directives for incapacity’, in Principle I, notes:

25. Proceedings at 41, paragraph 16
26. Article 13(2)
27. Article 15(3)
28. Proceedings at 429, paragraph 99
29. Proceedings at 134. See, for example, the comment of Finland, Preliminary Draft Convention, August 1999: ‘Some thought should be devoted to problems which may arise when an adult, habitually residing in a country where continuing powers of attorney are unknown, takes the opportunity offered to him in paragraph 2 of article 15. In such cases, it is very unlikely that the state of habitual residence of the adult has in its internal law mechanisms whereby the initiation of the mandate can be established and the powers of the attorney controlled. That would jeopardise the interests of the adult. A proper implementation of the Convention would, therefore, in practice, require setting up such mechanisms and in this way to accept the new institution in domestic law.’ (Emphasis added.)
‘1. States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives.

‘2. In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other measures of protection.’

The same rationale of autonomy and self-determination of the adult applies to other types of private mandates, such as advance directives that provide specific instructions with regard to the adult’s property or medical matters. Notably, Lagarde’s explanatory report on Hague 35 specifically contemplates advance directives in the medical context, when combined with an advance power of representation.34

RECOGNITION AND ENFORCEMENT
There are three distinct ideas in relation to the recognition and enforcement of foreign measures of protection: recognition of a measure by operation of law; a declaration of enforceability or registration for enforcement of a measure; and ‘naturalisation’ of a measure by the requested state.35 The objective is to ensure that the measures of protection in question are given ‘real effect’ between contracting states for the benefit of the vulnerable individual.36 As aforementioned, this idea is novel in the protection of adults, and it is one of the most noteworthy successes of Hague 35.

Hague 35 also provides for certain exceptions to recognition and enforcement of another state’s measures, including: for reasons of public policy, incompatibility with mandatory law in the implementing state, and other grounds such as improper grounds of jurisdiction and due-process rights of the adult.37 Such provisions protect the implementing state from applying measures that may be contrary to their essential values or the fundamental rights of the individual.

COOPERATION
The most significant aspect of the Hague 35 chapter on cooperation is the requirement of the establishment or designation of a central authority for the purposes of carrying out the obligations contemplated by Hague 35, promoting cooperation among states, and sharing information. Central authorities under the Convention also have important duties to assist with the location of a missing vulnerable adult, and to encourage the use of mediation, conciliation or similar agreed solutions related to the protection of the person or property of an adult.38

Hague 35 additionally includes a certification mechanism (article 38) whereby authorities of a contracting state may, where a measure of protection has been taken or a power of representation confirmed, provide a certificate indicating the capacity in which that person is entitled to act and the powers conferred. Hague 35 provides a suggested form for the certificate.39

It should be noted that contracting states (such as France, noted above) may choose to give effect to measures for vulnerable adults from states that are not party to Hague 35. However, generally, a non-party state’s ability to recognise or give effect to foreign measures for the benefit of vulnerable individuals, or to cooperate effectively with other states, will be hindered or limited by its ability to comply with the range of specific and practical procedures enshrined in Hague 35, including with chapter 5 cooperation measures. Therefore, Hague 35’s effectiveness is directly commensurate with the number of states that are party to it, putting in place a network of cooperation among states subject to clear international obligations.

THE UK AND HAGUE 35
Hague 35 was ratified by the UK with effect only in Scotland, on 5 June 2003, in accordance with article 55, which allows states meeting certain criteria to ratify the Convention in part of their territory.40 The Adults with Incapacity (Scotland) Act (AWI 2000) was drafted on the basis that Hague 35 should be ratified in order for it to enter into force.41 Schedule 3 of AWI 2000 is entitled

34. Proceedings at 427, paragraph 96
35. Frimston et al
36. Ibid
37. See article 22(1)
38. Articles 30(b) and 31
40. Article 55(1): ‘If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time’; see, generally, Frimston et al
41. Frimston et al
‘Jurisdiction and Private International Law’ and contains many of the articles implementing Hague 35, as well as other rules of private international law. Article 1, Schedule 3 of AWI 2000 lists the grounds for jurisdiction and largely mirrors chapter two of Hague 35.

Although the UK has not ratified Hague 35, other than with respect to Scotland, a range of the private international law rules of Hague 35 are implemented in England and Wales through Schedule 3 of the Mental Capacity Act 2005 (MCA 2005), although a number of rules that would apply as between contracting states under Hague 35 are not yet in force.42 According to the MCA 2005, a measure of protection taken in another country is ‘to be recognised’ in England and Wales, provided that it was taken on the ground that the adult was habitually resident in that other country.43

To understand how this might operate in practical terms, one can imagine a scenario where an incapacitated adult, Virginia, is habitually resident in country X, a contracting state to Hague 35. Tom, Virginia's guardian, appointed by a court in country X, is arranging first to sell Virginia’s London flat, and then to move funds from Virginia’s English bank account into a hedge fund headquartered in London, in order to assist with paying her healthcare costs in country X. Under the MCA 2005, Tom’s guardianship should be recognised in England and Wales.44 With regard to third parties, if the realtor, land registry, bank, or hedge fund refuses to heed Tom’s directions on behalf of Virginia, Tom might petition an English court for a declaration that the foreign protection measure should indeed be recognised (and enforced) in England and Wales.45 If Hague 35 were in force between the two jurisdictions, Tom could have elected to obtain a certificate from country X pursuant to article 38, which would certify the existence and extent of his powers.

Additionally, Hague 35 attempts to facilitate transactions made by representatives of vulnerable adults by protecting third parties from liability in certain circumstances.46

WHAT LIES AHEAD
Currently, Hague 35 has been ratified or acceded to by nine states, and signed by seven more.47 While Hague 35 has already demonstrated its practicality and functionality in the states where it has been implemented, a far wider net must be cast for it to meet its full potential. Indeed, Hague 35, which has international cooperation as a common goal, must be ratified by as many states as possible for it to accomplish its purpose in this crucial area of law.

The European Parliament has strongly encouraged the ratification of Hague 35 by EU member states, noting that '[national] legal protection regimes must... have continued legal effect, not least to ensure the continuity of decisions taken at a judicial or administrative level, or by the person him/herself.'48 The widespread operation of Hague 35 would best provide for the global protection of vulnerable adults. As such, a positive step forward would be for many more states to become parties to Hague 35 without delay.

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42. See, generally, Frimston et al
43. Section 19(i) MCA 2005
44. Ibid
45. Sections 20(i) and 22(i) MCA 2005
46. Article 17
47. As of the date of this publication, Austria, the Czech Republic, Estonia, Finland, France, Germany, Switzerland, Monaco and the UK have ratified or acceded to the Convention. Cyprus, Greece, Ireland, Italy, Luxembourg, the Netherlands and Poland have signed the Convention.
RIGOUR MORTIS

The recent Court of Appeal of England and Wales decision in King v Dubrey emphasises the need for strict compliance with the test for making a valid deathbed gift.

BY CHARLOTTE JOHN

ABSTRACT

• The Court of Appeal of England and Wales has recently reviewed the law relating to the doctrine of donatio mortis causa. Deathbed gifts, where the necessary requirements are complied with, are treated as an exception to the formal requirements for testamentary gift-making.

• The decision, which is binding on the courts of England and Wales, reaffirms the test for a valid deathbed gift and emphasises that the courts will insist on strict compliance with those requirements in the interests of avoiding abuse of the doctrine.

• The decision confirms that the earlier High Court case of Vallee v Birchwood was wrongly decided and brings welcome clarification to the law. However, the decision will make it more difficult for future claimants to successfully establish that a valid deathbed gift has been made.

You would be forgiven for considering that the doctrine of donatio mortis causa (DMC) or deathbed gifts is something of a footnote in succession law. It is a subject that proves popular with law students but seldom gets an airing in practice.

The doctrine has recently been taken off the shelf and dusted down by the Court of Appeal in the case of King v Dubrey and Others,1 in which it was decided that not only was the first-instance judgment under appeal wrongly decided, but that the earlier High Court case of Vallee v Birchwood2 was also wrongly decided and should not be followed. It is clear from the decision of the Court of Appeal that the doctrine must be applied strictly and that the courts are unlikely to extend the circumstances in which the doctrine will be held to apply.

The facts of King v Dubrey were that the deceased, June Fairbrother, left the bulk of her estate, aside from a few minor legacies, to a number of animal charities that she had supported throughout her life. It was well known to her family members that she intended to leave her home (valued at around GBP350,000) to the charities that she supported. The claimant, Kenneth King, was her nephew and

1. [2015] EWCA Civ 581, [2016] 2 WLR 1
2. [2014] Ch 271
had something of a chequered past. He had been declared bankrupt twice and had been convicted of acting as a company director while disqualified. From about June 2007, following the breakdown of his marriage, Kenneth came to live with June, and the arrangement was that he would care for her in return for being provided with accommodation. June died in April 2011.

Kenneth contended that, about four months before her death, June had presented him with the deeds to the house (title to which was unregistered), stating: ‘This will be yours when I go.’ At the date of this discussion, June was in failing health but there was no evidence that she was contemplating her imminent death. On 4 February 2011, June had further written a document, which was witnessed by a friend, stating: ‘In the event of my death I leave my house garden car etc and everything to Kenneth Paul King same address in the hope he will care for my animals as long as reasonable.’ There was further evidence that purported to be a will (signed but not witnessed), reiterating June’s intention that Kenneth should care for her dogs and cats. The court noted, one senses with some disapproval, that Kenneth had not complied with her wishes regarding her animals, and had sent her dogs to a dogs’ home.

At first instance, the deputy judge concluded that June’s actions, in the words she spoke to Kenneth a few months before her death and in the delivery of the deeds, constituted a valid DMC of her house. In the alternative, if he was wrong about that, he considered that Kenneth would have a good claim to provision under the Inheritance (Provision for Family and Dependants) Act 1975, which Kenneth had claimed in the alternative, and which the judge hypothetically quantified at GBP75,000.

The charities appealed to the Court of Appeal. Kenneth cross-appealed the decision under the 1975 Act. In a unanimous decision (Jackson, Patten and Sales LJJ), the Court of Appeal upheld the charities’ appeal in respect of the DMC and dismissed both appeals against the 1975 Act decision, permitting Kenneth to retain the award of GBP75,000 as reasonable financial provision.

THE BACKGROUND TO THE DOCTRINE OF DMC

The doctrine of DMC is neither fish nor fowl, being a disposition neither of a wholly testamentary character nor of a wholly inter vivos character. In essence, a DMC is a gift made in circumstances where death is imminently anticipated, and that is intended to take effect on death. It operates as an exception to the strict requirements of s9 Wills Act 1837, to save, in prescribed circumstances, a gift that would otherwise be void for failing to comply with the statutory formalities for a testamentary gift.

For those with a penchant for legal history, Jackson LJ, in giving the lead judgment in King v Dubrey, gave a short history of the doctrine. DMC is a creature that originated in Roman law, refined and codified under Justinian I, and which made its way into the English common law in a series of decisions by judges in the 18th and 19th centuries.

Despite the apparent strictures of the maxim that ‘equity will not perfect an imperfect gift’, the law of equity is replete with examples of occasions when the courts have sought to temper the harsh results that may be produced by strict insistence on compliance with statutory formalities. It is no coincidence that the adoption of the doctrine of DMC into English law was contemporaneous with the enactment of the Statute of Frauds (1677), which introduced formal requirements for the making of a will.

The doctrine of DMC had its heyday in the 18th and 19th centuries – a time when travel, war, childbirth and infectious disease all presented a greater risk of mortality. Our lives are now less risky and more predictable. Better education and ready access to affordable will-writing services tend to mean that the affairs of people today are better ordered, and it is unsurprising that there is less recourse to these sorts of informal arrangements. Prior to King v Dubrey, Vallee v Birchwood was the first reported decision in this area for around 20 years.

THE REQUIREMENTS OF A VALID DMC

Before the decision of the Court of Appeal in King v Dubrey, the doctrine of DMC was given its most recent and authoritative statement in the
case of Sen v Headley,4 in which the doctrine was further decided to apply to a gift of real property, notwithstanding the failure to comply with the formalities of s53(1) Law of Property Act 1925 for the transfer of an interest in land.

The basic requirements of the doctrine may be summarised as follows:
- the donor must contemplate their imminent death;
- the donor makes a gift that is conditional on death, and that will only take place if and when their death takes place, and that will be revocable until that time; and
- the donor must deliver ‘dominion’ of the subject matter of the gift to the intended recipient.

Each of these requirements is subject to further qualification and constraint, which Jackson LJ considered necessary to keep the doctrine within its bounds and to prevent abuse.5

Of the first requirement stated above, Jackson LJ stressed that the donor must be contemplating their imminent death in the near future from a specific cause, which need not, however, be inevitable – there may be a prospect of survival or recovery. However, if the donor does not succumb to the death that they anticipated, the DMC will lapse and will not run on until their eventual death.

As to the second requirement, that the gift be conditional on death, Jackson LJ noted that it must generally be intended that the gift will be revocable until the date of death. The requirement that the donor should specifically require the property back if they survive may be relaxed in circumstances where early death is inevitable and there is no prospect of recovery.

The final requirement of parting with ‘dominion’ over the subject matter of the gift is the most difficult and ‘slippery’ of the three requirements. Since property will not pass until a future date (if ever) and the donor has the right to recover the property whenever they choose, it is not easy to understand what ‘dominion’ actually means. On reviewing the authorities, Jackson LJ concluded that it meant ‘physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter’.6

Those elements must, the Court of Appeal emphasised, be strictly applied – the doctrine being ripe for abuse by, in Jackson LJ’s colourful terms, ‘unscrupulous treasure hunters’ – and the courts should not permit any further expansion of the doctrine.

THE DECISION ON APPEAL
Applying the law to the facts of King v Dubrey, the Court of Appeal unanimously concluded that Kenneth had failed to establish that June had made a valid DMC of her house to him for the reason that June could not be said to be contemplating her imminent death at the date of the discussions. June had not been suffering at the time from any specific illness, although she was aged 81 at the date of the conversation. Further, her words ‘This will be yours when I go’ were more consistent with an expression of testamentary intent than a gift that was conditional on her death within a limited period of time. This view was supported by the ineffective documents, which June had subsequently signed, that indicated she was trying to dispose of her estate by will and that were inconsistent with the view that she had already disposed of her estate by a DMC. All three of the Lord Justices expressed doubts about whether the evidence of Kenneth, which was uncorroborated, was sufficient to satisfy the requirement that there be clear and unequivocal evidence of the DMC.

THE DECISION IN VALLEE DISAPPROVED
Vallee v Birchwood appeared to have heralded a more permissive approach to the strict requirements of the doctrine of DMC. The claimant, Cheryle Vallee, was the daughter of the deceased, Mr Wlodzimierz Bogusz, who died intestate. Cheryle had been fostered and then adopted and consequently it was an agreed fact that she could not inherit upon intestacy. Cheryle had last seen her father in August 2003 and he died in December 2003. In the course of her last visit, Cheryle told her father that she planned to visit him again at Christmas. He replied, as it transpired with remarkable accuracy, that he did not expect to

5. Paragraphs 55-60
6. Paragraph 59
live very much longer and might not be alive by then. He said that he wanted her to have the house when he died. He went into another room and returned with the deeds to the house (to which title was unregistered) and a key, all of which he gave to her.

At first instance, a judge of the Oxford County Court held that these circumstances were sufficient to establish a DMC. That decision was upheld on appeal to the High Court, where the deputy judge hearing the appeal held that the deceased had made the gift in contemplation of impending death. The fact that he thought he might die within five months, and that he did in fact die five months later, was sufficient to fulfil this requirement. The deputy judge held that, in the context of DMC, ‘dominion’ meant conditional ownership. By handing over the deeds to his daughter, he delivered to her dominion over his house.

In King v Dubrey, the judgment of the High Court in Vallee was subjected to further scrutiny. Mr Bogusz, like many elderly people, was approaching the end of his natural lifespan. However, the Court of Appeal did not consider that he had reason to anticipate death in the near future from a known cause. If Mr Bogusz wished to leave his house to his daughter, he had ample opportunity to take advice and make a will. Accordingly, the decision in Vallee was wrongly decided and should not be followed.

**POINTS FOR PRACTITIONERS**

It is quite clear that the Lord Justices constituting the bench in King v Dubrey do not much care for the doctrine of DMC, Jackson LJ stating: ‘I must confess to some mystification as to why the common law has adopted the doctrine of DMC at all. The doctrine obviously served a useful purpose in the social conditions prevailing under the later Roman empire. But it serves little useful purpose today, save possibly as a means of validating deathbed gifts.’ The scope for the doctrine to be abused was of particular concern (no doubt a reflection of their reservations concerning the credibility of Kenneth King’s evidence). The doctrine subsists but is unlikely to be applied more flexibly.

‘The requirements of the doctrine are unlikely to be relaxed and “unequivocal evidence” is said to be required before a purported donatio mortis causa will be upheld’

The following points should be noted:

- The requirements of the doctrine are unlikely to be relaxed and ‘unequivocal evidence’ is said to be required before a purported DMC will be upheld.
- The donor must contemplate imminent death from a known cause – e.g. an illness or risky impending operation. It is not enough that they have a general sense that they do not have long to live.
- Subsequent attempts to make a will disposing of the subject matter of the DMC are likely to support the view that no DMC had been made (since, if the testator believed that they had already made an effective DMC of the property in question, there would be no need to make a will).
- The question of whether or not the doctrine may apply to registered land is yet to be resolved. Many commentators consider that the doctrine will not apply to registered land due to the requirement stated in Birch v Treasury Solicitor that the donor must pass the ‘indicia’ of title to the donee where the asset in question is one that cannot be physically delivered to the donee – namely the document that must be produced to establish ownership of the asset. In the case of unregistered land, that document is the title...

7. Paragraph 53

8. [1951] Ch 298
DEATHBED GIFTS  CHARLOTTE JOHN

deed; in the case of registered land, no such document exists.

• Does the view of Jackson LJ – that the requirement that the donor parts with dominion over the asset may be established by evidence that the donor had delivered ‘physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter’ – leave open the possibility that the doctrine could apply to registered land?

Do these alternative means of establishing that dominion has passed apply to all assets or does the permissible method strictly depend on the nature of the asset? Could mere physical possession, by permitting the donee into occupation, be enough? The passing of title deeds to unregistered land has no legal effect as such and is a symbolic act; might some other form of symbolic act suffice in the case of registered land? It remains to be seen whether some other form of symbolic indicia, such as historic deeds, other conveyancing documents or Land Registry printouts could suffice if coupled with the means of accessing the property. While the Court of Appeal has strongly indicated that the doctrine should not be extended, it is difficult to see why there should be a difference in approach between registered and unregistered land.

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DONATIO MORTIS CAUSA: THE APPLICATION IN AUSTRALIA
BY RICHARD WILLIAMS TEP, AN EDITOR OF THE TRUST QUARTERLY REVIEW

In Australia, the recent decision of White J in Hobbes v NSW Trustee & Guardian [2014] NSWSC 570 is a rare example of judicial consideration of the doctrine of donatio mortis causa (gifts made in contemplation of death). This has been described as ‘a curious doctrine’, neither entirely inter vivos nor testamentary (Dal Pont and Mackie, Law of Succession (LexisNexis, 2013), at [1.15]).

In Hobbes, White J referred to the three essential requirements, as outlined in Public Trustee v Bussell (1993) 30 NSWLR 111:

• The gift must be made in contemplation of death.
• There must be delivery of the subject matter to the donee or a transfer of the means or part of the means of getting at the property, or the essential indicia of title.
• The gift must be conditional on it taking effect on the death of the donor, being revocable until then.

The following items were given by the deceased to Ms Hobbes:

• A passbook for his passbook account, and a card containing details of his fixed-term investment account. The deceased said: ‘Take these. I don’t need anymore’ and ‘Plenty there for you. Look after you’.
• The keys to his apartment. The keys were later returned to him by Ms Hobbes.
• A council-rates notice, the deceased saying ‘You live here when I go’ and that the unit was ‘now yours’.
• The keys (again), the deceased saying: ‘All yours now. Not coming back. Look after Shorty.’ Shorty was the deceased’s pet bird.

The first and third requirements were found to be satisfied in relation to each of the gifts. The second requirement was met in relation to the passbook account and the fixed-term investment account, but not in relation to the unit. White J considered the question of whether an absolute interest in land could be the subject of a valid donatio mortis causa, but did not need to decide the point, since he found that the delivery of the certificate of title would have been a delivery of the essential indicium of title, but delivery of the keys and rates notice was not.

The judgment is accessible at bit.ly/HobbesvNSW
ABSTRACT

Events leading to hostility between trustees and beneficiaries are often similar. The following is a typical situation:

• The settlor places their fortune in a discretionary trust for the benefit of their children, grandchildren and further issue. They make it clear in their letter of wishes that they do not wish the trustees to fund extravagant lifestyles for the children.

• The settlor dies and their children bring pressure on the trustees to make substantial distributions to them. The trustees refuse.

• The children turn against the trustees and allege overpayment by the trustees of their costs. The children only agree to correspond with the trustees via their solicitors. The children’s solicitors request the trustees stand down in favour of the children on the grounds that they may be in breach of trust through overcharging.

and that, in any event, there is such friction and hostility between the trustees and the children that the trusts cannot be executed properly, thus jeopardising the welfare of the beneficiaries. The trustees refuse to resign.

• The court is required to balance the wishes of the settlor (although not binding) and any perceived risk to the interests of future generations in the trust fund against the ongoing difficulties that exist between the trustees and the children, and the potential impact that has on the proper execution of the trusts and the welfare of the beneficiaries.

This article considers the often difficult question, first for trustees and second for the court, as to whether or not trustees should be removed in circumstances where they are honouring the wishes of the settlor against the requests of the beneficiaries, the beneficiaries then turning against the trustees, alleging breach of trust and generally making the proper administration of the trust difficult to achieve.
Consider this scenario. A self-made man works extremely hard throughout his life and accumulates significant wealth. He has four children who enjoy a very comfortable upbringing. None of them has his drive and, although all profess a desire to work, their incomes are not substantial and are sporadic; the father has concerns that, given the option, they would choose a life of leisure and spend freely. While he has bought them all large houses, provides them with allowances to supplement their income and pays their children’s school fees, he is concerned that they would fritter away his wealth after his death if they were to have unfettered access to it.

Accordingly, the father places the large part of his wealth in a discretionary trust for the benefit of his children and future generations. He chooses as his trustees two professionals (one a solicitor and one an accountant), whom he knows well and trusts. The trustees have unfettered discretion to apply income and capital for the benefit of any beneficiary as they see fit. The father makes clear to the trustees his concern that his children would fritter away money if they had the opportunity of doing so, and he sets out in a letter of wishes his wish that the trust funds be used to enable all of the beneficiaries to enjoy a ‘comfortable, though not extravagant, lifestyle’.

The father dies and, one by one, the children approach the trustees for increases in distributions to them. Initially, the increases sought are not significant and the trustees are somewhat sympathetic. However, over time, the sizes of the distributions sought increase significantly and the trustees become concerned at the apparently lavish lifestyle being led by the children. Thus, they take a harder line in response to requests for distributions and the children join forces in their approaches to the trustees for greater and greater funds.

The trustees, conscious of the wishes of the settlor, reach a point where they reject the children’s requests to the extent that they consider them excessive. The children instruct solicitors, who begin to make enquiries of the trustees in relation to the trust’s affairs. The trustees take their own legal advice and respond as advised.

On production of trust accounts, the children, through their solicitors, challenge the trustees’ charges and threaten to apply to court for the charges to be moderated under the procedure adopted in Re Wells.1 Conscious that their charges would be likely to be reduced on moderation (given their charge-out rates as central London practitioners), the trustees are advised to offer a reduction in their recent charges on the terms that no admissions are made that the charges were not proper. That offer is accepted but the children then begin to suggest that the trustees have been in breach of trust by knowingly overcharging the trust for many years prior to the year in which the charges were agreed to be reduced.

The children’s language becomes intemperate as the trustees continue to refuse to accede to their requests for ever-greater distributions. The point is reached where correspondence between the trustees and the children is only conducted through solicitors, and the ascertainment by the trustees of the children’s financial position and needs (and also those of the children’s children, who in some cases are approaching majority) becomes extremely cumbersome and time-consuming. The trustees are concerned about the time they are expending in circumstances where allegations of overcharging remain in the background.

Eventually, the children request that the trustees retire and that they be appointed in their place. They say that the appointment of all four of them will ensure equal treatment between their respective families and that, as the trust fund comprises a portfolio of stocks and shares that is professionally managed, there is no need for the trust to incur the ‘considerable’ cost of having two professionals as trustees.

The trustees are unwilling to accede to the children’s request. They are mindful of the settlor’s wishes and concerned that the interests of future generations need to be protected. In addition, they dislike the accusations being levelled at them by the children and are conscious that they are not charging the trust fees that they would charge in normal circumstances, and that their doing so may be perceived to be unfair within their respective firms. They perceive that their fellow partners...
TRUSTEES UNDER ATTACK

WILL TWIDALE

would consider it in the best interests of their respective firms were they to cease to act.

Thus, the trustees take it upon themselves to make discreet enquiries of other professionals of high standing outside of London, who are familiar with acting as trustees, who would charge less, but who, they are satisfied, would respect the wishes of the settlor and treat the children fairly as discretionary beneficiaries of a trust established to benefit them and future generations. They identify suitable candidates (again a solicitor and an accountant), who indicate a willingness to act, notwithstanding that they are told in general terms that there is disharmony between the trustees and the children.

The trustees approach the children and say that they will not retire in their favour. They say that their primary position is that they should remain as trustees but that, if the children apply to court to seek their removal and the court considers that they ought to retire, they will agree to retire in place of the two eminent individuals they identify. They provide full details of the individuals, their practices and their charge-out rates.

The children apply to have the trustees removed and propose themselves as replacement trustees. They say that the trustees may have committed breaches of trust, but, even if they have not, there has been a complete breakdown in communications that is preventing the trust from being administered properly. They say that the trustees have, in effect, acknowledged that they should retire; that they (the children) do not know the trustees’ proposed replacements; that the trust does not need to incur the cost of two professional trustees; and that the appointment of all of them would ensure the proper and fair administration of the trust for the benefit of them and their individual families.

THE LAW

The starting point when one considers the court’s power to remove trustees from office and appoint new trustees in their place, as part of its inherent jurisdiction to supervise the due administration of trusts, is the seminal decision of Lord Blackburn in Letterstedt v Broers. Lord Blackburn said, at paragraphs 385–388:

‘Story [Story’s Equity Jurisprudence] says, s1289, “But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of fidelity.”

‘It seems to the Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out or were greatly exaggerated, so that the trustee was justified in resisting them, and the court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

‘The reason why there is so little to be found in the books on this subject is probably that suggested by [counsel for the appellant] in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the court might think it proper to remove him…

2. (1883-1884) LR 9 App Cas 371 (an appeal to the Privy Council)
‘In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definitive rule in the matter so essentially dependent on details often of great nicety.’

But, at paragraph 389, Lord Blackburn also said:

‘It is quite true that friction or hostility between trustees and the immediate possessor of the trust is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.’

This passage is quoted time and again by judges considering applications for the removal of trustees. One can immediately see that there are parts of Lord Blackburn’s judgment that one would wish to rely on where one is seeking the removal of trustees (e.g. mere human infirmity preventing harmony justifying removal) or alternatively resisting their removal (e.g. friction or hostility of itself not being a reason for removal).

Yet, what can be said with certainty, as Lewison J (as he then was) said in Thomas and Agnes Carvel Foundation v Carvel,3 is: ‘The overriding consideration is, therefore, whether the trusts are being properly executed; or, [as Lord Blackburn put it,] the main guide must be “the welfare of the beneficiaries”’.

ARGUMENTS AGAINST REMOVAL
In the above scenario, the trustees decided that they should stay. In support of their position, one would imagine that they would submit, inter alia, as follows:

THE SETTLOR’S DECISION
Generally, they would say that the fact that there existed friction and hostility between them and the children was not enough. It was not preventing the trust from being administered properly. The father chose them as trustees as he trusted them to resist excessive demands made by the children and protect the trust fund for future generations. That is what they were doing. His selection of them should be respected. Further, the father knew the rates that the trustees charged and how they charged when he appointed them. They should be allowed to charge accordingly. The appointment of the children, given the wide powers of appointment of capital which exist, would pose a threat to the interests of future generations. The trust fund held very significant assets and the professional charges incurred were reasonable in the context of a trust fund of that size.

THE REMOVAL OF PERSONAL REPRESENTATIVES
As to case law, in addition to Letterstedt, they would rely upon the decision of Newey J in Kershaw v Micklewaite and Others.4 Although that case involved an application to remove executors, it had been accepted in Carvel that principles similar to those laid down by Lord Blackburn in Letterstedt should apply to the removal of personal representatives. Newey J said:

‘... a testator’s choice of executors is capable of being of relevance, if on no other basis than because the testator may be expected to have had knowledge of the characters, attitudes and relationships involved, which a court will lack.’ (Paragraph 14.)

‘It is significant... that there is evidence that Mrs Kershaw devoted considerable thought to who her executors should be.’ (Paragraph 35.)

‘In all the circumstances, I have not been persuaded that there is any good reason for any of the defendants to be removed as executors. The matters on which [the claimant] relies do not, either individually or taken together, provide any real basis for supposing that, if the defendants remain as executors, the estate will not be administered satisfactorily, nor that “the welfare of the beneficiaries” (to use Lord Blackburn’s

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3. (2007) 4 All ER 81, paragraph 46
4. [2010] EWHC 506
‘Two points may be made by reference to this passage. First, if the friction or hostility is generated by the behaviour of the “possessor of the trust estate”, the Court would need more than just the fact of friction or hostility to be satisfied that the trustees ought to be removed: the Court would at least need to be satisfied that the friction or hostility was impeding the proper execution of the trusts and was detrimental to the “welfare of the beneficiaries”.

‘Second, where the friction or hostility is with someone who is merely a discretionary beneficiary, no doubt it will be relevant to form a judgment as to the ability of the trustees to give proper consideration to the claims of that beneficiary, as well as of the other beneficiaries; that that beneficiary is not, after all, the “possessor of the trust estate”. In this context [counsel for the defendants] drew attention to the significance of the fact that the Defendants had been chosen by Mr Alkin to be his Executors and Trustees. As was noted by Ashley J in the Australian case of Monty v Delmo [1996] 1 VR 65 (Supreme Court of Victoria) at 75, “… the testator’s selection of executors should not lightly be set aside. It should not be disregarded except, at the least, for serious reason. That is a relevant matter... both when a question of passing over an executor arises and also when removal of an executor is under consideration.”

In Alkin, George Bompas QC found that ‘What, I think [Mrs Price, one of the claimants] was doing was to try to find anything she could to build a case against the Defendants’ (see paragraph 41). He went on, at paragraph 52, to describe that claimant’s criticism of the defendant as ‘grotesque’. Accordingly, George Bompas QC refused to remove the executors on the basis of a breakdown in relations (or, to put it another way, friction and hostility) between them and the beneficiaries.

THE COURT OF APPEAL DECISION

Finally, the trustees would rely on the decision of the Court of Appeal in Re Estate of Jimmy Savile; National Westminster Bank plc v Lucas and Others, a case in which a beneficiary sought the removal of the bank as executor. Patten LJ said (at paragraphs 81 to 85):

‘The case was put to the Judge on the basis that relations had broken down between the Bank and the beneficiaries so that they no longer retained confidence in the Bank’s ability to administer the estate...
‘But, as Lord Blackburn indicated... the direct intervention by the court in the administration of a trust or an estate by the removal of the trustee or personal representative has, for the most part, to be justified by evidence that their continuation in office is likely to prove detrimental to the interests of the beneficiaries. A lack of confidence or feelings of mistrust are not therefore sufficient in themselves to justify removal unless the breakdown in relations is likely to jeopardise the proper administration of the trust or estate...

‘The judge’s finding that the Bank has acted and will continue to act fairly and with proper regard to the interests of the beneficiaries in its administration of the Scheme is therefore in my view determinative [of the removal application being rejected]...’

ARGUMENTS FOR REMOVAL
Against the trustees’ submissions, the children would presumably argue, inter alia, as follows:

LORD BLACKBURN’S DECISION IN LETTERSTEDT
Adopting the words of Lord Blackburn, ‘the continuance of the trustees would prevent the trusts being properly executed’. The trusts are not being executed properly at present as the trustees are not even able to maintain a dialogue with the beneficiaries. They only correspond with the beneficiaries through their solicitors and thus fail to understand the needs of the beneficiaries.

The children cannot ‘work in harmony with the trustees’ and thus, following what Lord Blackburn said, the trustees should be advised by their own counsel to resign.

Again, per Lord Blackburn, the ‘main guide must be the welfare of the beneficiaries’ and the welfare of the beneficiaries is not best served by the continuance in office of the trustees. This is a case in which ‘the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate’, a factor specifically identified by Lord Blackburn.

OVERCHARGING
Although the executors were not removed in the Alkin case because of friction and hostility, they were removed on the grounds of invoices charged to the estate by one of the executors (and approved by the other) which did not ‘bear scrutiny’. In this case, the trustees have already reduced their charges when faced with an application to court and there is serious concern that they have been deliberately overcharging the trust in breach of trust for a number of years.

SIMILAR CASES
This case has some similarities with the recent case of James and Another v Williams and Others.7 That case involved the removal of two professional trustees (one a solicitor and one an accountant) chosen by the testator to be executors of his will and then trustees of the trusts created by the will.

Although there was some mention of a potential conflict of interest as regards one of the trustees, there was no evidence of conflict, or wrongdoing by them, whatsoever. The beneficiaries of the will trusts were the testator’s daughters and grandchildren. In relation to one trust, a daughter was the life tenant and her children the remaindermen. The trust funds comprised shares in a profitable business and what appeared to have been significant proceeds of sale of a property. The estate was described as being ‘of some considerable value’.

As stated, there was no evidence of wrongdoing by the trustees. Yet, the testator’s family wanted the trustees to be removed and sought the appointment of the two daughters, together with a solicitor who was assisting them with the probate, in their place.

The trustees said: ‘We are prepared to be replaced upon terms, but primarily because we do not wish to continue in that role if the persistent (unfair and untrue) allegations are made as to our suitability.’ They proposed that another solicitor and accountant, whom they had identified, be appointed in their place.

As Judge Purle QC, the presiding judge, said: ‘[The case] was heard on relatively limited evidence and without cross-examination, expert evidence or disclosure of anything over and above that which the parties have chosen to put before me. I was invited by both sides to decide, if I could, the removal application,'
applying the criteria appropriate to a summary judgment application.’
Judge Purle QC made, *inter alia*, the following findings in his judgment:

‘I agree that a mere loss of confidence in a set of trustees is not enough, but loss of confidence can in turn lead to avoidable conflict and dispute, and therefore to expense which is, of necessity, detrimental to the trust estate...’ (Paragraph 27.)

‘Modern reality requires the court to take into account the risk of increasing costs when considering issues of administration...’ (Paragraph 37.)

‘There is, in my judgment, looking at the matter objectively, a justified fear that it would prove to be too costly to retain or appoint two professional trustees of different albeit complementary disciplines rather than the counter-suggestion of two individuals who are already beneficiaries (and who will not charge anything) assisted by an experienced probate solicitor who is already acquainted with the dynamics of the family and the position of the company, and in whom the family beneficiaries have confidence.’ (Paragraph 39.)

‘Those considerations in my judgment justify the court’s intervention, given also the additional factor that, for good reason or bad, that is what the family wants...’ (Paragraph 40.)

‘The appointment, or continuation in office, of trustees, against the wishes of beneficiaries, who are perceived as being in a position of potential conflict brings in another level of litigation risk, with an attendant substantial increase in costs...’ (Paragraph 42.)

‘I have already said that, in my judgment, the administration of these trusts is likely to benefit if the family assets are held by the two family members with the assistance of their chosen probate solicitor rather than in the hands of two professionals of different albeit complementary disciplines, who will attract greater charges than the assistance that is likely to be needed from the solicitor, and who, in the event that the new professionals are appointed, will require to read into the background and familiarise themselves with the estate and family dynamics...’ (Paragraph 55.)

‘The appointment of two professional trustees therefore bristles with cost implications.’ (Paragraph 55.)

‘Trusts, it can be said generally, are better administered in an atmosphere of harmony, not disharmony. In my judgment the better chance of harmony in this case is achieved by appointing the family members, with the probate solicitor of their choice, as trustees rather than anyone else. That is also likely to be significantly cheaper than the appointment of two professionals of different albeit complementary disciplines. In those circumstances I accede to the application to appoint [the two family members] new trustees.’ (Paragraph 59.)

Thus, as can be seen, Judge Purle QC said a great deal that, on the face of it, may be of considerable assistance to the children.

**THE DECISION**
One could understand a judge reaching any of the three options open to them:
• Rejecting the removal application on the basis that they are satisfied that the trustees will continue to administer the trust fairly for the benefit of the beneficiaries as a whole.
• Removing the trustees and appointing the two nominated professionals in their place on the basis that: friction and hostility is hampering the proper administration of the trust; the change of personalities and reduction of charges ought to remove much of the friction and hostility; the wish of the settlor for there to be professional trustees ought to be recognised; and the size of the fund and the protection of the interests of future generations justifies the appointment of professional trustees, as opposed to the children.
• Removing the trustees and appointing the children in their place on the basis that harmony will only be achieved by doing so, as the children are likely to be hostile to the replacement trustees and their charges; and the appointment of all four of the children ought to provide sufficient protection against the risk of dissipation of the trust’s assets to the detriment of future generations.

WHAT WOULD I DO?
I would adopt the first option above. A close scrutiny of the facts reveals that the trusts can be properly executed by the current trustees and that any difficulties that arise are caused solely by the beneficiaries.

The current trustees are perfectly entitled to seek to uphold the wishes of the settlor, provided they do not impact on the welfare of the beneficiaries. The distributions that the trustees make, which provide for a reasonable standard of living for the children, are adequate, and the children’s welfare is not at risk.

The trustees owe duties to the grandchildren and their desire to protect the trust fund is reasonable.

So far as the trustees’ costs are concerned, the settlor undoubtedly knew of the level of costs that the trustees would charge when he appointed them. Yet he did appoint them and their charges are not disproportionate in the context of the value of the trust fund. There is no allegation of the recording of excessive hours. Provided such terms are lawful, the beneficiaries take their bounty on the terms set out in the trust deed, including those that could reasonably be envisaged as to the trustees’ costs. The trustees should be entitled to charge their normal hourly rate.

WILL TWIDALE IS A DISPUTES RESOLUTION PARTNER AT BISHOP & SEWELL, SPECIALISING IN CONTENTIOUS TRUSTS AND ESTATES MATTERS
THE ISLAMIC LAW OF WILLS AND INHERITANCE


BY DR ABID HUSSAIN  REVIEWED BY RICHARD FRIMSTON

This is a weighty book, and one for which I have been waiting for years; it is formed of 508 pages and 53 chapters densely packed with extremely useful material.

Dr Abid Hussain is not a lawyer but a UK health worker and a Muslim with a great interest in this topic. I have been very lucky to have been able in the past to participate in some seminars with him in the UAE and now to count him as a friend. Readers may feel that this review is, therefore, perhaps coloured by that friendship.

The author’s background inevitably means that this is not a book written by lawyers for lawyers, but a book written by a believer with a fascination for the subject, in an attempt to help anyone struggling to understand this branch of Shari’a law. Although his previous book, The Islamic Law of Succession was very valuable, this new work is invaluable.

In his introduction, Dr Hussain acknowledges that ‘The public has been conditioned to hear alarm bells at the mere mention of the word Shari’a’. In chapter 48, he directly addresses the criticisms of the rule that a male is given twice as much as a female. Whatever the views of non-Muslims, an explanation of the Islamic laws of inheritance by a Muslim helps us, as professionals, to understand the Islamic perspective.

Chapters one to nine give a helpful introduction to Islam; the Qur’an and the relevant verses; the Sunna, or path of the Prophet Muhammad; and the Ijma, or consensus of the Muslim jurists. Many other concepts used in the book are also dealt with, including, in chapter seven, issues relating to marriage and divorce.

Dr Hussain’s detailed explanation of the Islamic laws of inheritance, in chapters 10 to 37, is very similar to his earlier work. The tables and examples are exhaustive, not for browsing but for practical use. He also sets out, in chapter 49, some scholars’ differing views from the 1980s onwards, and discusses their merits and demerits.

There are detailed descriptions of many interesting issues. Chapter 28, for example, deals...
with missing persons (Mafqud), while chapters 34 to 36 deal with illegitimate, adopted, foster and unborn children, and chapter 37 considers hermaphrodites (Khuntha).

In chapter 53, the author refers to and approves of the Irth (‘The Islamic Inheritance Program’), a downloadable computer program (www.islamicsoftware.org/irth), but stresses the need always to use the most up-to-date version. He also explains its limitations and defects.

His summary in chapter 44 of the reforms to Islamic law in various states, including Afghanistan, Egypt, Indonesia, Iraq, Pakistan, Syria, Tunisia the UAE and many others – the variations to the four main Sunni schools – is excellent. However, references to Shia are limited, and Iran is not featured. That is perhaps for the next edition.

Chapters 46 and 47 deal with the related subjects of gifts (Hibat) and endowments (Waqf and their plural, Awqaf).

This book, in chapters 50 to 52, also deals very clearly with estate-planning issues and the forms of wills in non-Islamic countries, such as the UK, that might be Shari'a-compliant. Dr Hussain discusses the advantages and disadvantages of different arrangements and provides some clear precedents and options for forms of wills that could be regarded as Shari'a-compliant. He also discusses the problems caused for Muslims by the US community-property and spousal-election rights, and the New Zealand and Canadian family-law rules.

Many parts of this book need to be read as a whole, while others provide necessary reference material. The eight-page glossary at the end is brilliant, although the index could perhaps be improved.

For any practitioner who might need to advise Muslim clients, this book is a must. For anyone interested, it is also fascinating.

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