

Forced Heirship And Trust Planning

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I have had a number of instructions over recent months which have necessitated a consideration by me of the forced heirship rules of the client's home jurisdiction, and advice being provided to the client on the firewall provisions in Jersey's trust law, which seeks to provide protection for a Jersey trust, or the transfer of property to that trust, when attacked by an heir of a deceased settlor who may have established that trust in contravention of the forced heirship rules in his or her own country. I shall return to that Jersey provision later in this article.

In respect of one of the clients I have advised, I have encountered an interesting practical question which I thought I would share with readers. I was acting for a divorced client who was living in a jurisdiction with forced heirship laws. His compulsory heirs, so to speak, were his minor children, who following the divorce, lived primarily with their mother. The client who was somewhat older than the mother (and who was somewhat stressed about his own mortality) was concerned to know that his wishes in regard to the children's inheritance would be followed. The client had two principal concerns. Firstly, in the event he died whilst the children were minors, the client was concerned about the fitness and properness of the likely candidates from the family who would control the children's inheritance, if selected as their guardian. Whilst whoever was appointed would be bound to administer the funds in the children's best interests, given his concerns, the client would have preferred for the funds to be held by a third party. The other issue for the client (assuming he had died) was the fact that under the laws applicable in the place of residence of the children under any guardianship, the children would have been entitled to receive their inheritance from their guardian at aged 18 and, given the sums involved, the client was very unhappy at this prospect.

The client's objective therefore was to put in place an arrangement such that the children's inheritance was held in neutral and responsible hands for the benefit of the children. Establishing a trust was an obvious solution in his case and there were no significant tax issues which would have prevented that. At this stage you may be wondering where is the forced heirship angle? The children who would be my client's only compulsory heirs would be the sole beneficiaries under the trust. However, the client was wanting to establish a discretionary trust. Under its terms, the children would not be inheriting at 18 as they would in the event there were no trust and they were inheriting from his estate. Accordingly, the advice from the client's home jurisdiction was that if the client died, having placed his estate in trust, then whoever was the guardian would have a claim against the transfer of assets into the trust. How would a Jersey court deal with such a claim?

As regards any forced heirship claim under the terms of Article 9 of the Trusts (Jersey) Law 1984 as amended (the **Law**) the validity or interpretation of a trust, the validity or effect of any transfer or other disposition into trust and the nature and extent of any beneficial right or interest in the property in the trust shall (amongst other things) be determined in accordance with the law of Jersey and no rule of foreign law shall affect any such question.

When considering any such questions and applying the relevant Jersey law, the resolution shall be determined without consideration of whether or not the trust itself or any disposition made to it voids or defeats any rights, claims or interests conferred by any foreign law including by way of any heirship rights.

The Law goes further to say that no judgment of a foreign court in respect to a trust shall be enforceable to the extent that it is inconsistent with Jersey law.

The only time a disposition into trust could be deemed invalid would be because the property was not owned by the settlor at the time the disposition was made or if the trust itself contained some contrary provision or if the disposition itself is actually invalid under the law of the jurisdiction in question.

Aside from the forced heirship considerations, and looking more at some practical questions we had to cover with the client when drafting the trust, the following questions were pertinent and upon which we required instruction:-

1. Assuming there were no successful forced heirship claims, how should the trustees interact with the children's guardian and/or their mother?
2. Should the trustees be permitted to pay away capital, or should only income be paid away?
3. If payments of capital are to be permitted, in what circumstances should the trustees consider interim advances?

4. At what age should the children receive their shares or should that question be left to the discretion of the trustees?

In conclusion, this was an interesting case. For clients from forced heirship jurisdictions, it is apparent that they may derive significant comfort from knowing that they can establish an offshore trust safe in the knowledge that, absent any other factors, the trust they put in place will be defended by the offshore court and their wishes upheld.

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