What benefit?

Marcus Flavin*

Abstract

This case note looks at the recent decision of Norris J in *Wright v Gater*, in which the parties sought the approval of the court under the Variation of Trusts Act 1958 to a variation of statutory trusts arising in favour of an infant as a result of two successive intestacies. While saving inheritance tax was an issue, the case was mostly concerned with the infant's mother's desire that he should not have access to such significant funds on his 18th birthday, and the court's approach to the notion of 'benefit' in such applications.

The facts

Edward Greenstreet died intestate on 28 October 2009. His entire estate, which had a net value of some £515,000, passed to his son Kieran. No inheritance tax was payable because Edward was entitled to a doubled-up nil rate band. Tragically Kieran then died, also intestate, less than a year later on 17 May 2010 and long before a grant had even been obtained in Edward's estate. He left an infant son, Rory, by his partner Ellen. Most of Kieran's own assets were jointly owned with Ellen and passed to her by survivorship, but his entitlement to Edward's estate passed on to Rory, who was two at the time, along with the rest of his estate.[1] As a result the combined estates would be subject to tax on the whole amount above Kieran's single nil-rate band, and then, pursuant to the Administration of Estates Act 1925 section 47, after completion of administration, be held on trust for Rory contingently on his reaching 18 or marrying (or entering into a civil partnership) under that age, with the statutory powers of sections 31 and 32 of the Trustee Act 1925 applying in the meantime, and subject to that contingency for Kieran's uncles and aunts.

The options

It was clearly sensible to make a Deed of Variation in accordance with section 142 of the Inheritance Tax Act 1984 so that Edward's estate would, for tax purposes, be deemed to have been left on those same trusts directly, thus preserving the right to a doubled-up nil rate band. As is well known, that section provides that if an instrument of variation is made within the time limits and in accordance with the section by the persons affected, for the purposes of Inheritance Tax the estate is deemed to have been left on the terms of the will (or statutory trusts on intestacy) as amended by the variation. Even that might technically have required an application for the court's approval since Rory was unable to consent himself and the Revenue would need to be satisfied someone had given consent on his behalf, but there was little doubt such approval would be readily forthcoming since its only effect was to mitigate tax, which

* Marcus Flavin, Barrister, Radcliffe Chambers, 11 New Square, Lincoln's Inn WC2A 3QB, UK. Tel: +44-20-7831-0081. Email mflavin@radcliffechambers.com

1. Ellen also received some pension death benefits. She expressly disclaimed any possible claim under the Inheritance (Provision for Family and Dependants) Act 1975.

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would clearly be to his benefit. However, Ellen was strongly of the view that it would be extremely undesirable for Rory to obtain the right to such a substantial fund (including accumulated income) at such an early age, believing that it would be bad for his personal development and that the money would be wasted. Her own preference would have been to keep both capital and income from him until he was 30. That would obviously involve taking away from him a proprietary right he would otherwise have obtained, and further would make the tax saving far less significant, since it would bring the trust within the more onerous taxation under the 'relevant property' regime of Part III of the Inheritance Tax Act.[2]

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The application

The application was therefore brought seeking the court's consent on Rory's behalf pursuant to section 1 of the Variation of Trusts Act 1958 by Ellen and Kieran's brother Michael, as joint administrators of Kieran's estate, against Mr Gater (a solicitor) as administrator *ad colligenda bona* of Edward's estate and Rory, with Ellen also acting as Rory's litigation friend. Her Majesty's Revenue and Customs take the view that in a 'double death' variation the Instrument of Variation should be made by the personal representatives of the second person to die, as they are the persons immediately entitled to the benefit that is being varied, but that they must also see evidence of consent by the beneficiaries of the second estate. The parties instructed one counsel only to argue the claim before the court in order to save costs. While Norris J was prepared to hear the application on this footing he made it clear that he considered this an undesirable approach, stating that he would have been assisted greatly had Rory's litigation friend been someone other than Ellen, and that it was of great importance in these cases to appoint separate counsel to put opposing arguments.

The court's view

Noting that *Re Bernstein* [2008] EWHC 3454 is authority for the proposition that it is possible to approve a variation of the statutory trusts on intestacy under the Variation of Trusts Act Norris J emphasized that the role of the court is not to redistribute property '*according to some wise scheme of which I approve*': the Courts of Chancery had never claimed such a power and the 1958 Act had not changed this.[3] What the court was doing was supplying consent on behalf of Rory.

> The question to be asked is therefore: 'Should Rory consent to this arrangement?'. That question is answered in the sense 'Only if the judge is satisfied that it is for his benefit'. So it is never enough that the proposal does Rory no real harm: to elicit his consent it must always confer on him a real benefit.

Benefit is usually considered in financial terms but Norris J accepted that those were not necessarily the only considerations. While the New Zealand case of *Re Gerbich* [2002] NZLR 791 was authority against a '*wholesale remaking of the lawful position*' by deferring vesting when trusts arising on intestacy were varied, Norris J did not consider that the judge in that case was saying that it was never possible to defer vesting in that situation, and that if that was the meaning he

2. Because providing for that would make it impossible for Rory to have an Immediate Post-Death Interest.
3. *Re T's Settlement Trusts* [1964] Ch 158 at 161.

respectfully disagreed. In his view the correct approach was that

> in each case the Court will have to be persuaded that a variation incorporating such a feature is justified on the facts of a particular case; perhaps because of the proven personal characteristics of the beneficiary; or perhaps because the size of the fund, the circumstance in life of the beneficiary, the family context in which the existing trusts will be implemented or some similar feature (the list is not exhaustive) gives rise to risks which any reasonable person would regard as real, and to which the proposed variation provides a sufficient and proportionate response. I accept that it is of benefit to a beneficiary to make provision for eliminating, or moderating or compensating for realistically assessed risks to which he or she is exposed, at least to a degree that is no more than necessary.

In this case an accumulation rate of 2.5 per cent would give Rory (subject to expenditure on maintenance and the like) a fund in excess of £750,000 at 18. In the judge's view

> any reasonable person would regard that as posing risks for Rory, being brought up in a family not accustomed to significant wealth, and without his father; a context which makes Ellen's ability to discipline and guide him more difficult and which exposes Rory to significant temptation and the realistic possibility of exploitation,

and he was prepared to conclude that even without further evidence. Norris J went on to take judicial notice of the common use of accumulation and maintenance settlements prior to Finance Act 2006 as a pointer to that being a sensible approach.

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His conclusion was that he was not prepared to go as far as keeping Rory out of the whole of the capital and unaccumulated income until he was 30. That was too drastic a deprivation, and thus not something to which he felt he could consent on Rory's behalf. But he would be prepared to approve a settlement under which he became entitled to income (but not accumulated income) at 18,and 10 per cent of the then value of the capital at 21, with the remainder vesting at 25. In the event he did not reach 18 the fund was held for Kieran's next of kin (ie those who would have been entitled in that event under the statutory trusts arising in Kieran's estate), and otherwise there was a discretionary clause of ultimate default beneficiaries from a wider group of Rory's family and relations.

Final points

The most significant points of the judgment are the decision that it can be appropriate to defer vesting when one child is interested absolutely[4] and it can be permissible to defer vesting, whether the trusts are statutory or express trusts, even when there is no particular financial benefit to doing so, and even when another course would be more tax-efficient if the court is properly persuaded of the weight of other considerations.

The judgment is doubtless at the extremes of what is permissible on a variation requiring the court's consent, and the court was not prepared to go as far as the applicants had hoped, but it is indicative of the approach the court will take. Despite Norris J's emphasis that the judge must be convinced on the facts of each case that it is appropriate for a variation to defer vesting, it is notable that the facts on which he based his decision were primarily simply the size of the fund and the fact Rory would be growing up with only one authority figure.

4. A point left open in another recent case on the subject, *CD v O* [2004] EWHC Ch 1036.

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