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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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IN THE MATTER OF THE WILL TRUSTS OF THOMAS HENRY EGERTON (DECEASED)

AND IN THE MATTER OF THE TRUSTEE ACT (NORTHERN IRELAND) 1958

SONYA ANN McCONKEY, ANDREW McCONKEY AND SARAH MARGARET (SALLY) HAIRE (BOTH AS EXECUTORS OF THE ESTATE OF THOMAS HENRY EGERTON (DECEASED) AND AS THE ORIGINAL TRUSTEES OF THE THOMAS HENRY EGERTON (DECEASED) WILL TRUSTS)

Plaintiffs;

and

IMELDA EGERTON, REBECCA JANE EGERTON, SALLY HAIRE ON BEHALF OF EMMA LOUISE EGERTON (A MINOR), SALLY HAIRE ON BEHALF OF GEORGE WILLIAM THOMAS EGERTON (A MINOR)

Defendants.

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Sheena Grattan BL (instructed by Hinds & Co Solicitors) for the Plaintiffs
Louise Maguire BL (instructed by Cooper Wilkinson Solicitors) for the minor children

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McBRIDE J

Application

[1] The plaintiffs ("the trustees") are the executors of the estate of Thomas Henry Egerton deceased and are also the trustees of the Thomas Henry Egerton deceased will trusts ("will trusts"). The trustees have applied to vary the will trusts created by the deceased's will dated 25 March 2013 and seek the court's approval on behalf of the third and fourth named defendants, Emma Louise Egerton and George William Thomas Egerton, pursuant to Section 57 of the Trustee Act (Northern Ireland) 1958 ("the 1958 Act").

[2] The third and fourth defendants are minors. Emma Louise was born on 18 March 2006 and George William Thomas was born on 13 March 2008. Originally Imelda Egerton, their mother and the first-named defendant was to act as their guardian ad litem. Given the potential conflict between her interests and those of the minor children it was agreed that Sarah Margaret Haire should act as next friend. Sarah Margaret Haire is a sister of the deceased and aunt of the minor children. She enjoys a good relationship with the children and their mother Imelda.

[3] Ms Haire is also an executor of the testator's estate and trustee of the will trusts and also therefore a plaintiff in the proceedings.

[4] I have read the affidavit filed by Ms Haire which was sworn on April 2022. I note that Ms Haire is not a beneficiary under the trusts created by the testator's original will and does not stand to gain under the proposed variation. She enjoys a good relationship with the minor children and their mother and understands her responsibility to act in the best interests of the children. I am satisfied that she is a suitable person to act as next friend for the purpose of these proceedings and accordingly appoint her as the next friend.

[5] The other beneficiaries under the will trusts are all sui juris and consent to the proposed variation.

Representation

[6] The plaintiffs were represented by Ms Grattan of counsel and the minors were represented by Ms Maguire of counsel. I am very grateful to both counsel for their clear, concise and well-marshalled skeleton arguments which set out all the relevant principles and authorities and proved to be of much assistance to the court.

Time limit

[7] The deceased died on 17 April 2020. For tax purposes it was necessary that any deed of variation be executed by all the necessary parties before the two year anniversary of the death. In light of this time limit I agreed to hear the application before the two year period. After hearing submissions of counsel, I approved the draft deed of variation but indicated in light of the issues raised that I would set out my reasons for doing so at a later date. I now set out my reasons for granting the application.

Background

[8] The deceased died on 17 April 2020. He made his last will on 25 March 2013. The deceased was survived by his widow, Imelda who was born on 20 December 1969 and his four children: Sonya Ann McConkey (nee Egerton) who was born 23 June 1971, Rebecca Jane Egerton who was born on 20 March 2001 and the two

minor children, Emma Louise Egerton who was born on 18 March 2006 and George William Thomas Egerton who was born on 13 March 2008.

[9] Imelda was the deceased's second wife. He was previously married to Cherry Egerton and Sonya is the only child of that marriage. The deceased and his first wife were divorced.

The will trusts

[10] The deceased's will after appointing his executors provides as follows:

> "… All the rest residue remainder of my estate goes both real and personal wheresoever situate (subject to and after payment of my debts, funeral and testamentary expenses) I leave, devise and bequeath to my trustees upon trust for the benefit of my wife Imelda Egerton for her life and on her death to my children then surviving in equal shares absolutely and in the event that any of my said children being under the age of 25 years then to be held upon trust by my trustees until that child reaches the age of 25 years whereupon they shall take their entitlement absolutely. If any of my said children shall have died in my lifetime leaving a child or children living at my death such child or children shall take by substitution (if more than one in equal shares) the share which their mother or father would have taken had she or he survived me.
>
> The standard permissions of the Society of Trust and Estate Practitioners (Northern Ireland) Version, 1st Edition) shall apply."

[11] A grant of probate was issued on 25 March 2022.

The estate

[12] The deceased's estate comprises assets valued at approximately £2M. The estate comprises the former matrimonial home, various commercial properties and liquid assets both within this jurisdiction and the Republic of Ireland.

The effect of the will

[13] Under the will the deceased leaves his entire estate to his wife Imelda for life, remainder to his four children in equal shares absolutely and in the event any child is aged under 25 years of age his or her interest is to be held in trust until the child attains the age of 25 years. Imelda therefore receives a life interest across the entire

estate and the deceased's children's interests do not fall into possession until Imelda's death.

[14] Under the terms of the will and the administrative powers of the STEP provisions, which are incorporated into the will, the trustees have no power to confer capital upon Imelda. Further, the court can only exercise the statutory power of advancement to give the children capital with the consent of Imelda. The children can therefore only benefit from the will trust during Imelda's life if she so consents.

[15] A construction issue may arise in respect of the will in the event family members do not die in the expected order, i.e. one of the children predeceases his mother. There are a number of possible constructions of the residuary clause in such an event. This court however is not asked to rule on the true construction of the will in such an event. Rather, for the purposes of this application the court is only required to identify all the possible potential beneficiaries under the will and then be satisfied that they have either consented to the proposed variation or the court gives consent on their behalf.

[16] An issue arises whether there are potential beneficiaries as yet unborn as the testator made an express substitutionary gift to grandchildren in the event any of his children died in his lifetime. His will provided as follows:

> "If any of my said children shall have died in my lifetime leaving a child or children living at my death such child or children shall take by substitution (if more than one in equal shares) the share which their mother or father would have taken had she or he survived me."

[17] In the events which have happened all of the testator's children survived him and accordingly this substitutionary clause does not take effect. Accordingly, I am satisfied that there are no potential beneficiaries as yet unborn who may become entitled to an interest in the will trusts. I do not therefore have to approve the variation as being for the benefit of potential future beneficiaries as yet unborn. Accordingly, I consider that the only beneficiaries under the will trusts are Imelda and the four children. Imelda and the two adult children have consented to the proposed variation and this court therefore only has to consider whether it should consent on behalf of the two minor children.

The proposed variation

[18] Under the proposed variation Imelda receives a lump sum of £25,000 absolutely. Sonya, the adult daughter from the former marriage receives a gift of £75,000. Three trusts are then created in the sum of £75,000 each for the children who have not yet reached the age of 25. The proposed variation also clarifies that the residue will be held on trust for the benefit of the deceased's wife Imelda, for her life and on her death, it passes to the children. It also contains a substitutionary

clause in respect of any of the testator's children dying before the age of 25 in which case their children if any will take their parent's share upon reaching the age of 18.

Legal framework

[19] The application is brought pursuant to Section 57 of the 1958 Act. It provides as follows:

> "(1) Subject to sub-section (2), where property is held on any trusts or settlements arising under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—
>
> > (a) any person having, directly or indirectly, an estate or interest, whether vested or contingent, under the trusts or settlements who by reason of infancy or other incapacity is incapable of assenting; or
> > …
> > any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts or settlements or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts or settlements.
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> (2) Except by virtue of paragraph (*d*) of sub-section (1) the court shall not approve an arrangement on behalf of any person unless the carrying out of the arrangement would be for the benefit of that person."

Consideration

[20] To comply with the provisions of Section 57 the court must be satisfied that the plaintiffs have locus standi; that the proposed variation is a variation and not a resettlement; and that the proposed variation is for the "benefit" of the minors.

Question 1 – Do the plaintiffs have locus standi?

[21] The application is brought by the trustees. In *Tracey v McCullagh* [2018] NI Ch 15 the court held that trustees have locus standi to bring such an application and therefore I am satisfied that the plaintiffs can bring this application.

Question 2 – Is the proposed variation a variation or resettlement?

[22] Under Section 57 the court can only approve a variation and it cannot approve a resettlement. The factors which distinguish a variation and a resettlement were set out in *Wyndham v Egremont & Ors* [2009] EWHC 2076 at paras 22 and 23:

> "22. There is no bright-line test for determining whether it is the one or the other. In *Re Balls Settlement Trusts* [1968] 2 All ER 438 at 442 Megarry J stated that:
>
> > 'If an arrangement, while leaving the substratum effectuates the purpose of the original trusts by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed.'
>
> That does rather beg what is meant by `the substratum' of the trust and `the purpose of the original trust' and how one is to distinguish these elements.
>
> 23. Useful guidance for determining whether what is proposed is a variation rather than a resettlement, indeed the analogy is very close, is to be found in *Roome v Edwards* (Inspector of Taxes) [1981] STC 96 …
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> > 'There are a number of obvious indicia which may help to show whether a settlement, or a settlement separate from another settlement, exists. One might expect to find separate and defined property; separate trusts; and separate trustees. One might also expect to find a separate disposition bringing the separate settlement into existence. These indicia may be helpful, but they are not decisive … There are so many possible combinations of fact that even where these indicia or some of them are present, the answer may be doubtful, and may depend upon an appreciation of them as a whole.' …
>
> I think that the question whether a particular set of facts amounts to a settlement should be approached by asking

> what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common-sense manner to the facts under examination, would conclude. There can be many variations on these cases each of which will have to be judged on its facts."

[23] The proposed variation in this case comprises a small part of the estate. It represents less than 20% of the estate. The remainder of the estate will continue to be governed by the structure in the original will trust with the same trustees. I therefore consider that this is a variation rather than a resettlement and therefore falls within the scope of Section 57.

Question 3 - Is the proposed variation for the benefit of the minors?

[24] The court must be satisfied that the variation is for the benefit of the two minor children. Benefit is not defined in the 1957 Act but jurisprudence has established that benefit is not limited to financial benefit but can also include educational and social benefits – see *Tracey v McCullagh* [2018] Ch 16 at para 29 and *Re Weston Settlement* [1969] 1 Ch 223.

[25] In *Re Elizabeth K Gates Estate Trust* [2000] 3 ITELR 113, the Royal Court of Jersey determined that it was undesirable that minors should come into possession of a very significant capital sum at a very young age and this consideration was a powerful reason to vary the trust so as to defer the entitlement to the trust until the beneficiary was older.

[26] In this case I consider the proposed variation has a number of advantages for the minor children. Firstly, it gives the minor children a capital sum at age 25 and further empowers the trustees to advance funds to them in advance of that age. In contrast under the present will trusts the children have no entitlement to capital until Imelda's death and prior to that date they are only entitled to advancement in the event Imelda gives her consent.

[27] Secondly, the proposed variation removes uncertainty regarding the true construction of the will in the event a child predeceases Imelda with or without issue and or does not attain the age of 25 years at the date of her death. The proposed variation allows the remainder class to be closed when the youngest child attains the age of 25 and consequently allows a future of consensual planning including partition of the fund if Imelda and the children so agree. Such arrangements can then be entered into without the necessity for and expense of court intervention.

[28] Thirdly, the proposed trusts have certain tax advantages as they come within Section 71(d) of the Inheritance Tax Act 1984 commonly known as the "18-25 Trusts."

[29] Fourthly, by giving the mother a capital sum now there may be indirect benefits to the children as the children reside with her.

[30] Finally, the proposed variation ensures that the minor children can look forward to a substantial inheritance on their mother's death together with the possibility of consensual partition of capital and income before that date.

[31] The proposed scheme therefore provides the trustees with a scheme whereby they are able to release funds for the minor children's education. As appears from Ms Haire's affidavit the deceased wanted his children to proceed to university if that was within their ability. The other children are high academic achievers and this therefore is something that the minor children may pursue. The proposed variation allows a power of advancement which means that they can receive money during their years at university. Accordingly, I consider the proposed variation is of benefit for the children's education.

[32] The deferment to age 25 I consider has a social benefit. At that stage the children will have completed their education. Monies will then become available to them which they can use as they wish. At this age the children are embarking upon a new stage of their lives and it is a time when they may usefully use the monies to, for example put a deposit on a home or purchase equipment necessary to pursue their chosen career etc.

[33] There are, however, some disadvantages to the proposed variation. For example, if Imelda dies soon after the variation is granted the children lose a quarter of the £25,000 capital advanced to Imelda. I consider the likelihood of this is slim given her age. Further, the amount involved is very small particularly when viewed against the size of the estate.

[34] The second disadvantage is that there are more administrative costs with the postponement of the interest to age 25.

[35] In deciding whether the proposed variation is for the minors' benefit the court must consider it as a whole. I consider on balance that the advantages in this case outweigh the disadvantages and, accordingly, I consider that the proposed variation is in the children's best interests.

Conclusion

[36] In the exercise of my overarching discretion I grant the proposed variation.

Costs

[37] Costs of both parties to be paid out of the estate.