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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF THE WILL TRUSTS OF SARAH McCULLAGH (DECEASED)

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

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Between:

MATTHEW TRACEY, MARIE MacMAHON BOTH AS EXECUTORS OF THE ESTATE OF SARAH McCULLAGH AND AS THE ORIGINAL TRUSTEES OF THE SARAH McCULLAGH WILL TRUSTS

Plaintiffs

and

GERARD McCULLAGH (A PATIENT) BY HIS GUARDIAN AD LITEM THE OFFICIAL SOLICITOR FOR NORTHERN IRELAND

Defendant

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McBRIDE J

Introduction

[1] The plaintiffs applied to the court to approve a variation of certain Will Trusts on behalf of a patient in exercise of the jurisdiction conferred by Section 57 of the Trustee Act (Northern Ireland) 1958 ("the 1958 Act"). On 17 May 2018 I approved an arrangement varying the Will Trusts created by Sarah McCullagh ("the deceased") in her Will dated 21 August 2012. I did so at the conclusion of counsels' submissions because it was imperative that the Deed of Variation be executed by all necessary parties before the 2 year anniversary of the death of Sarah McCullagh on 22 May 2018. I indicated that, in view of the important legal arguments raised in the course of submissions, I would set out my reasons for giving approval, in writing. I now set out my reasons. I asked counsel for the patient whether he wished to make an

application for the judgment to be anonymised. He advised the court that he was not making such an application, in light of recent jurisprudence. Accordingly, I have not anonymised the judgment.

Application

[2] By originating summons dated 21 March 2018 the plaintiffs, who are executors of the estate of Sarah McCullagh (deceased) and the original trustees of the Sarah McCullagh Will Trusts, seek the court's approval of a proposed variation of the deceased's Will Trusts as set out in a draft deed of variation annexed to the originating summons, on behalf of the defendant who is not *sui juris*, pursuant to Section 57 of the 1958 Act.

[3] The defendant is a patient ("the patient") who acts by his guardian ad litem, the Official Solicitor. The other beneficiaries under the Will Trusts are all *sui juris* and consent to the proposed variation. The Attorney General was not notified of the application on behalf of the potential charitable interest in respect of the saying of masses, as the plaintiffs proposed, following discussions with the Official Solicitor, that the original wording of the will in respect of the saying of masses be retained. Given that there would be no change to the will in respect of the saying of masses, I was satisfied that representation by the Attorney General for Northern Ireland was not required.

[4] The plaintiffs were represented by Ms Grattan of counsel and the patient was represented by Mr Gowdy of counsel. I am extremely grateful to both counsel for their industry in preparing very carefully researched skeleton arguments and the clear and lucid way in which they each made their submissions. The skeletons were exemplary and proved to be of invaluable assistance to the court.

The deceased's Will and Will Trusts

[5] By Will dated 21 August 2012 the deceased appointed Matt Tracey and Marie McMahon to be the executors of her Will. The deceased died on 22 May 2016 and a grant of probate issued on 20 October 2016.

[6] The Will, *inter alia*, created two Will Trusts:

(a) An interest in possession trust in respect of the deceased's home and lands whereby the home and lands were to be held and rented out. One half of the net proceeds of such lettings was to be paid to the patient during his life and the other half paid to Matt Tracey on the basis that he was to arrange for "masses to be said annually for the souls of (the deceased) and (the deceased's husband) Thomas for a period of at least 10 years after "the deceased's death". ("the Land Trust").

(b) A trust of the residue of the estate whereby the deceased stated the trustees were to hold the residue:

> "In trust for my son Gerard during his lifetime. I direct my executors and trustees to make such payments as they in their absolute discretion should consider appropriate for the comfort and well-being of Gerard"- ("the Residue Trust").

The Patient

[7] The patient is the sole child of the deceased. He was born on 17 May 1966 and is now aged 52 years. He has a severe learning disability. He has no speech and is only able to understand simple instructions. He has limited ability to make or maintain relationships. As a result he is fully reliant on others to assist him in every aspect of his life. Whilst he can dress and toilet himself he needs assistance in all other aspects of his personal care. He enjoys good physical health. Although he has a diagnosis of epilepsy he has suffered no seizures since 2006. He suffers organic psychosis and requires medication for his mental health. He is quite solitary but enjoys listening to music. In the past the patient had a history of absconding. He presently resides full-time in residential care and is likely to do so for the remainder of his life.

[8] The patient's GP, in a report dated 16 February 2018, opined that there are no factors which indicate a reduction in the patient's life expectancy compared to the general population.

[9] The patient is in receipt of employment support allowance of £117.15 per week. This is a means-tested benefit. He is also in receipt of lower rate DLA mobility in the sum of £22.65 per week. This is a non-means-tested benefit. The patient has capital of £16,499.29 held in two bank accounts.

[10] For the period from 8 May 2018 the patient's weekly assessed charge as a permanent resident has been calculated by the local health and social care trust. The weekly costs of his accommodation are £1,373.00. He makes a total contribution of £100.88 per week to his care costs. This is calculated by adding his means-tested benefit and a tariff in respect of the capital owned by him over the threshold and then deducting his personal allowance.

[11] On foot of the Land Trust the patient would be entitled to half the income from the letting of the deceased's home and lands. The valuation of the letting is assessed as £4,160-£5,110 per annum. On the basis of this valuation the patient would receive between £2,080 to £2,555 per annum, which equates to approximately £40 per week additional income.

[12] The draft estate accounts indicate that the residue is likely to be in or around £214,531.59. The Residue Fund is held on trust for the patient for his life and appears to create a further interest in possession in the patient's favour as the trust fund is held for him "during his lifetime". There is no power to accumulate income or otherwise to deprive the patient of the income. In addition there is a power to make payments, presumably from capital, "for the comfort and well-being of (the patient)". Therefore, under the Residue Trust the patient is also likely to receive further additional income.

Tax implications of the Will Trusts

[13] All the parties agreed that the Land Trust created an immediate post death interest in possession trust. The parties agreed the Residue Trust also created an interest in possession trust with an unrestricted power to advance capital, but accepted different interpretations by HMRC were possible.

[14] Goldblatt McGuigan, Accountants, in a report dated 21 November 2007 opined that the Will Trusts created by the Will did not comply with the requirements of a disabled person's trust under Section 89 of the Inheritance Tax Act 1984. Consequently, all the parties agreed that the Will Trusts in their present form meant that any income from the Will Trusts would be taken into account in the assessment of the patient's means-tested benefits, which meant his contribution to the costs of his residential care would increase pro rata to the income he received from the Will Trusts.

Proposed Variation

[15] The proposed variation is to partition the Land Trust. This means that the patient's life interest in the Land Trust would be calculated as a lump sum. This figure would then be added to the existing funds in the Residue Trust. The resulting single fund would then be recast in terms of a trust which would unambiguously qualify as a disabled person's trust under Section 89 of the Inheritance Tax Act 1984. In non-technical terms the only difference between the existing Residue Trust and the proposed variation is that the trustees under the new trust would have the power to accumulate income. A disabled person's trust has a number of tax benefits. In particular, the assets of such a trust are not normally taken into account under capital assessments for means-tested benefits. What this means in layman's terms is that the new single fund is held in a vehicle designed to benefit only the patient during his life time in a benefits efficient manner.

[16] The proposed variation, however, also means that the patient moves from a position where he has a right to specified income in the Land Trust and a right to income in the Residue Trust and either a right to or a right to be considered for an advancement of capital from the Residue Trust, to a position where he has no absolute right or entitlement but would be the principal beneficiary under a Will Trust where the trustees have a discretion to pay income and capital to him.

Relevant Legislative Provisions

[17] Section 57 of the 1958 Act 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;
>
> …
>
> 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].
>
> (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

[18] The provisions of Section 57 of the 1958 Act raise a number of questions.

Have the Plaintiffs *locus standi* to apply?

[19] Under Section 57 of the 1958 Act the application can be brought by "whomsoever proposed". The present application is brought by the trustees of the Will Trusts. Although this is unusual, it is not unprecedented and there is nothing in the 1958 Act which prevents the trustees making the application. I am therefore satisfied that the plaintiffs have *locus standi* to bring this application.

Can the court give approval on behalf of the patient?

[20] Section 57 sets out the various persons on whose behalf the court can give approval. In accordance with paragraph 1(a) the court is empowered to give

approval on behalf of a person who is "incapable of assenting". Having regard to the evidence before the court I am satisfied that the patient lacks capacity to consent and accordingly the court has jurisdiction to give approval on his behalf.

What is the extent of the court's jurisdiction – variation or resettlement?

[21] In accordance with Section 57 of the 1958 Act the court has power to vary or revoke any or all of the trusts. The jurisprudence makes clear that the court only has power to approve a variation and not a resettlement. In *Wyndham v Egremont* [2009] EWHC 2076 (Ch), the court when considering the ambit of Section 1(1) of the Variation of Trusts Act 1958 (which is the equivalent of Section 57 of the 1958 Act) held at paragraph 21:

> "Section 1(1) of the 1958 Act authorises the court to approve an arrangement varying (or revoking) all or any of the trusts of a will, settlement or other disposition. It does not authorise the court to approve a resettlement. See *Re T's Settlement Trusts [1964] Ch 158 at 162*."

[22] Similarly in *Re Towler's Settlement Trusts [1963] 3 All ER 759*, the court refused to approve a proposed scheme on the basis it amounted to a resettlement and instead approved a variation. In *Towler* in accordance with the terms of the settlement the whole of the trust fund was held, subject to the appellant's life estate in half the fund, on trusts under which a daughter of the applicant would become absolutely entitled on attaining 21 to one quarter of the trust fund in possession. The daughter had shown herself to be immature and irresponsible as regards money. Her mother applied to the court under Section 1 of the Variation of Trusts Act 1958 to approve a proposal to transfer the daughter's share to new trustees who would hold it on a protective trust for her for life with the remainder to her children or issue or in default of children to the other infant interested under the settlement. The court held that the proposed arrangement contemplated a completely new resettlement and therefore the court did not have jurisdiction under the 1958 Act to approve it. In the event, the court approved an alternative proposal for a variation of the terms of the settlement, the variation being one which would defer the infant's right to capital for a period and would give her a protected life interest meanwhile.

[23] In determining whether a proposal amounts to a variation, which is permissible, or a resettlement, which is not permissible, Blackburne J in *Wyndham* set out at paragraphs 22 and 23 a number of factors to assist the court in drawing this distinction. He said as follows:

> "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; 1968 1 WLR 899 at 905* 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; [1982] AC 279*. The case was concerned with a claim for capital gains tax. It was material to that claim to decide whether the exercise of a power of appointment contained in a settlement gave rise to a settlement separate from the main settlement. Lord Wilberforce (with whose speech three of the other four Law Lords agreed: Lord Roskill delivered a separate speech) said this, *[1981] STC 96 at 100, [1982] AC 279 at 292-293)* speaking generally on the topic:

> '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.'"

[24] As already noted the proposed arrangement is one which involves the Land Trust being partitioned and the terms of the Residue Trust varied so that the accumulated funds from both are placed in a single fund which is then set up in a vehicle which is a more tax efficient way and which protects the patient's benefits entitlement.

[25] In determining whether the proposed arrangement is a variation or a resettlement I have considered a number of factors. Firstly, I have had regard to the original purpose of the Will Trusts. Some assistance as to the testator's intentions can be gleaned from the affidavit of Mr Brian McMahon, solicitor, who drafted the deceased's Will. He avers at paragraph 4 of his affidavit sworn on 22 May 2018 as follows:

> "While the testatrix's principal concern was overwhelmingly directed in favour of her son Gerard, she was well aware that there was no prospect of him resuming life in the community and also that his financial needs were being met. The provision in her last Will that one half of the annual letting monies should pass to Gerard was, I believe, intended to provide for additional 'comforts' (eg a new bed or chair) should these be required while her residuary estate could be utilised in the event of a major emergency. It is also my belief that the testatrix appreciated that as a result of his mental condition the considerable estate which she owned was of little use to Gerard and that in these circumstances she would have wished that the four remainder men referred to in her Will should benefit as much as possible."

Having regard to this and the actual wording used in the Will, I am satisfied that the original intention or purpose of the testatrix was to provide for the patient's "comfort and well-being". I am further satisfied that the proposed variation seeks to ensure that the patient receives his inheritance in such a way that it benefits him. The proposed arrangement ensures that his inheritance can be used to purchase items for his comfort and welfare rather than increasing his contribution towards his existing residential fees. I therefore consider it is designed to achieve the intention of the testator. Applying the test set out by Megarry J in *Re Balls Settlement Trusts* I am satisfied that the proposed arrangement effects the testator's intention by other means and is therefore a variation and not a resettlement.

[26] Secondly, the proposed arrangement involves the same property, the same trustees and the same beneficiary. Having regard to the indicia identified by

Lord Wilberforce in *Roome v Edwards*, I am satisfied that the proposed arrangement is therefore a variation and not a resettlement.

[27] Taking a practical and common sense approach to all the facts in this case I am satisfied that it is a variation and not a resettlement. Accordingly, I am satisfied that the court has jurisdiction to approve the proposed Deed of Variation.

Test for approval – What does "benefit" mean?

[28] Before a variation can be approved the court must be satisfied that it is for the benefit of the patient as Section 57(2) of the 1958 Act provides:

> "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."

[29] Benefit is not defined in the 1958 Act but there is some jurisprudence which is of assistance. In *Re CL [1969] 1 Ch 587* the Official Solicitor was appointed receiver of the estate of a patient (a widow). The estate comprised, *inter alia*, a protected life interest in a trust fund settled by the patient's husband which on her death would be added to a fund settled by him on their two adopted daughters and in certain events to the daughter's children with an ultimate trust to the patient. The adopted daughters took out a summons under the Variation of Trusts Act 1958, seeking the approval of the court of an arrangement by which the patient gave up for no consideration her protected life interest in the settlement made to her and her contingent interest in remainder in the settlement in each case in favour of the adopted daughters. In determining whether the arrangements should be approved on the basis that they were for the benefit of the patient within Section 1(3) of the Variation of Trusts Act 1958 the court held that "benefit" in Section 1(3) of the Variation of Trusts Act 1958 had the same meaning in the context of a variation as it had in the context of an advancement and that it was not necessary that there must always be some element of financial advantage to the incapable person. The court ascribed a broad meaning to the word "benefit" in the Variation of Trusts Act 1958 and held that it was not limited to financial benefit but also included "strong moral obligation". In the circumstances of that case the court made the Order sought.

[30] In *Re Elizabeth K Gates Estate Trust [2000] 3 ITELR 113*, the Royal Court of Jersey had to determine whether a variation of a trust was for the benefit of a person who was incapable of consenting. The case involved a 16 year old girl who, due to the premature death of her mother, stood to acquire a trust fund of US $44M absolutely on her 20th birthday. Amongst other matters, this would have created liability to US taxes amounting to 55% of the whole and to US income tax on the income of the trust. The trustee applied for a variation to the trust not merely to prevent the beneficiary acquiring the capital while so young but substituting discretion for the trustee to pay the income and capital to the subject and with her consent to her issue or charities. The court noted that the girl was doing well at

school and planned to qualify as a veterinary surgeon. The court held that it was undesirable that she should come into possession of a very significant capital sum at a very young age and this consideration was a powerful reason for varying the trust so as to defer her entitlement to the trust fund. The court quoted with approval dictum in *Re ANZ Trust Corporation Limited and the Brian Monrose Settlement* (28 July 1995, unreported) when the Royal Court of Jersey held:

> "It is not in our judgment generally in the interests of young persons to come into possession of large sums of money which might discourage them from achieving qualifications and from leading settled and industrious lives to the benefit of themselves and of the community."

[31] The court further held that there were strong fiscal reasons for admitting a variation, even though it meant that the girl's entitlement would not only be deferred but would effectively be removed by the substitution of entirely discretionary provisions. The court, however, was satisfied that the fact the trustees would have power to advance any or all of the capital and that the trustees would be unlikely to refuse any reasonable proposal or request mitigated against any detriment the variation had. The court concluded:

> "Taken in the round, we have reached the conclusion that the proposed variation is for (the minor's) benefit. Should circumstances change we have no doubt that the trustee will have regard to the history leading up to the establishment of the trust in exercising his discretion in relation to any particular request."

Submissions by the parties regarding benefit to the patient

[32] The Official Solicitor submitted that the proposed variation was of benefit to the patient for a number of reasons. First, if the Land Trust was not varied any income the patient received would be of no direct benefit to him as the income of £40 per week he would receive from the letting of the house and land would simply increase his contribution to residential care fees by £40 per week. In addition, given the way in which the Residuary Trust fund was drafted it was also likely that any income received from it would similarly be used towards payment of his residential fees. In contrast, under the proposed variation the patient would become a beneficiary under a disabled person's trust which was a means-tested efficient fund and any income received by him from it could be used for his own personal benefit and, in particular, could be used to purchase items for his comfort and welfare.

[33] Whilst the Official Solicitor accepted that the proposed scheme with the power to accumulate income, meant the patient's right to income was substituted by a discretion on the part of the trustees to pay income and advance capital, the Official Solicitor was satisfied that the patient's loss of a right to income was

mitigated by the fact the trustees, in the exercise of their discretion, were likely to accede to any proposals or requests made for payments to meet the patient's needs and comforts. This view was strengthened by a statement which was provided by Mr Tracey to the court.

[34] The Official Solicitor also submitted that the partitioning of the Land Trust to create a lump sum which would then be added to the Residue Fund, was for the benefit of the patient provided that the proposed figure representing the life interest was reasonable. The partitioning of the Land Trust meant that the patient would be able to benefit from both capital and income as he required. Further the new single fund trust could be invested in forms of investment which would give a better return on capital than land.

[35] The Official Solicitor further submitted that the variation provided greater clarity as to the tax treatment of the trust and thus avoided the risk of protracted correspondence with HMRC and/or litigation as to the proper treatment of the trust.

[36] The Plaintiffs submitted that, even though the proposed variation involved the loss of an interest in possession with the substitution of an interest under a disabled person's trust, the variation was still for the "benefit" of the patient for the following reasons:-

(a) The variation provided greater clarity as to the tax treatment of the trust.

(b) It reduced the risk to the patient that the inheritance from his mother would lead to a loss of means-tested benefits and state support with his residential fees.

(c) The use of the new proposed discretionary trust meant that the inherited funds could be used to benefit the patient rather than being merely used to replace an existing state support. Even though the patient would no longer have automatic entitlement to income the court could consider how the trustees were likely to exercise their discretion and this could be a mitigation of what otherwise might be seen as a loss of a benefit to the patient.

Valuing the Life Interest

[37] There are a number of ways to value a life interest. In England & Wales provision has been made to buy out a life interest under the Intestate Succession (Interest and Capitalisation) Amendment Order 2008. The schedule to the Order sets out tables which can be used to calculate the value of the interest. Using these tables the value of the patient's life interest would be £136,000.

[38] An alternative approach to valuation was carried out on behalf of the plaintiff by Mr Liggett, who is the Managing Director of Legacy Private Wealth, with 25 years' experience in the financial services industry. He is a Chartered Financial

Planner and a member of the Society of Trust and Estate Practitioners who specialise in inheritance tax trusts and investment planning. He has experience acting as an expert witness in cases in respect of financial matters including the calculation of the value of trusts with life interests and remaindermen. Using an investment approach based on assumptions of 2% inflation and 3% inflation and based on the life expectancy of the patient together with the figures provided in respect of income from the house and lands, his conclusion is that the value of a fund to produce equivalent income for the patient would be between £69,600 and £87,720. The £87,720 figure being based on a real return of 0%.

Discussion - Is the proposed variation for the benefit of the patient?

[39] As appears from the jurisprudence the definition of 'benefit' is broad and includes not just direct financial benefit but also includes fiscal planning and moral benefits. In certain circumstances the moral benefit can outweigh immediate financial benefit. In a number of cases the court has approved schemes, on the basis they are for the benefit of the person on whose behalf it is asked to approve the scheme, even when the proposed scheme meant the beneficiary gained less financial benefit.

[40] As outlined by the Official Solicitor, I have to be satisfied that the valuation placed on the life interest is for the benefit of the patient. To be for his benefit, I consider the figure has to be a fair and reasonable one. Mr Gowdy accepted that the calculation of the life interest in accordance with the scheme set out in the Intestate Succession (Interest and Capitalisation) Amendment Order 2008 is not an entirely appropriate method to calculate the patient's life. I agree, as different considerations apply to the calculation of the patient's life interest to those which are applicable to the scheme under the Intestate Succession Order 2008. I consider that the approach taken by Mr Liggett is a reasonable and fair method to value the patient's life interest as it creates a fund which is designed to yield the equivalent of the rental income provided for in the Will Trusts for the patient's life. I consider that he has made reasonable assumptions. I consider the proposed figure of £100,000 is a reasonable and fair figure and, therefore, one which is for the 'benefit' of the patient when taken in conjunction with the other advantages of the proposed scheme.

[41] In determining whether the proposed scheme is for the benefit of the patient, a number of factors need to be weighed and placed in the balance.

[42] On one side of the balance, the patient loses the right to immediate income as under the proposed scheme he only receives payments at the discretion of the trustees. In *Gates*, when assessing 'benefit', the court took into account the likely approach to be taken by the trustees in the exercise of their discretion and the mitigation this may make to the detriment a beneficiary would otherwise sustain when he loses a right to payments from a fund. The court in that case concluded that the proposed variation was for the minor's benefit, and in coming to that conclusion, took account of the following:

> "Should circumstances change we have no doubt that the trustee will have regard to the history leading up to the establishment of the trust in exercising his discretion in relation to any particular request." (Paragraph 9)

Whilst the case of *Gates* is not binding, I find that it is highly persuasive as it dilates upon the meaning to be given to the word 'benefit' in similarly worded legislation relating to applications to approve variations of trusts on behalf of persons lacking capacity. I am satisfied that the patient's loss of right is mitigated by the fact the trustees are likely to accede to any reasonable requests or proposals asking them to pay or advance monies to the patient for items which enhance his comfort or welfare. The trustees obviously cannot fetter their discretion as to how they would exercise their dispositive discretions going forward but the court has the benefit of a statement by Mr Tracey which gives some indication as to how the trustees might be expected to consider that discretion. Mr Tracey, in his statement, states that he is anxious to provide the patient with all the comforts which he requires. From this, it is clear that the trustees are likely to accede to any request for monies to be paid to the patient which would meet his needs or enhance his comfort or welfare. I note that there is, potentially, a conflict between Mr Tracey and the patient as Mr Tracey is a default beneficiary under the proposed trust. Notwithstanding this, I am satisfied in light of his statement and his conduct during these proceedings that he would not act in a manner which would be contrary to the purpose of the trust and the intentions expressed by the deceased in her Will. Further, any concerns that the court may have in respect of a potential conflict have been mitigated by the fact that the court has now ordered that at least one of the trustees should be a professional person, namely a solicitor.

[43] On the other side of the balance, it is of significant weight that the proposed scheme protects the patient's means-tested benefits. What this means, in practice, is that any monies made available to the patient by the trustees can be used for additional benefits towards his comfort, welfare and other needs. In addition, although these matters may be of less weight, the proposed variation has the advantage of removing uncertainty as to tax and property law issues. Further, the trustees only have the administrative and running costs of one trust fund and the trust funds can be invested more flexibly than the Land Trust would currently permit.

[44] Weighing all the factors in the balance, I am satisfied that the proposed scheme is for the benefit of the patient. It benefits him financially as it permits him to better maximise his means-tested benefits while his trustees are free to utilise the capital of the single trust fund in its entirety to meet his other needs.

Overarching discretion of the court

[45] The jurisdiction of the court to vary trusts or settlements is a discretionary one as Section 57 (1) states:

> "the court "may" if it thinks fit by order approve any arrangement on behalf of the named persons."

[46] In the exercise of its overriding discretion, the court ought to take into account relevant public policy issues.

[47] The only relevant public policy issue which arises in the present case is whether the court should approve a scheme which has the effect of ensuring monies paid to a beneficiary under a Will Trust are not available to increase his contribution towards payment of his residential care fees.

[48] In determining whether the proposed scheme offends public policy, there are a number of factors which I think it is appropriate for the court to take into account in the present case. First, I consider it appropriate to consider the legislation and guidance relevant to the charging for residential accommodation. The guidance "Charging for Residential Accommodation Guide ("CRAG")" was issued under Article 17(1) of the Health and Personal Social Services (Northern Ireland) Order 1972 ("the 1972 Order") by the Department of Health, Social Services and Public Safety ("the Department"). It gives general guidance on the Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993 that apply in the case of residents who have their residential accommodation provided or arranged by Health and Social Care Trusts ("HSS Trust") by virtue of Articles 15 and 36 or 99 of the 1972 Order. The patient's accommodation has been arranged by an HSS Trust and therefore the CRAG guide is applicable. Chapter 8 provides guidance as to the circumstances in which the Trust can consider a resident has deprived himself of income.

At paragraph 8.075 it states:

> "A resident is to be treated as possessing income of which he has deprived himself for the purpose of paying a reduced charge."

Paragraph 8.076 defines 'deprive' as follows:

> "A person will have deprived himself of a resource if, as a result of his own act, he ceases to possess that resource."

Further paragraph 8.081 provides:

> "There may have been more than one purpose of the disposal of income only one of which is to avoid a charge. This may not be the resident's main motive but it must be a significant one. "

In addition, the CRAG guidance provides for cases where the resident has converted a right to income into a capital asset for the purpose of paying a reduced charge.

[49] Similar guidance on the deprivation of assets has been the subject of consideration by the Scottish Court of Session in *Yule v South Lanarkshire Council [1998] SLT 490*. The Court held that the local authority must have material before it from which it can be reasonably inferred that the deprivation of capital took place deliberately and with a purpose of the nature specified.

[50] In this present case, I am satisfied that the purpose of the proposed scheme is to provide for the patient's comfort and welfare in the way the settlor of the Will Trusts intended. Whilst one of the effects of the proposed variation is that the monies will not be available to reduce the contribution made by the Health and Social Services Trust towards the patient's residential fees, I am satisfied that this is not the significant operative purpose of the proposed variation. Rather, I am satisfied that its significant operative purpose is to better effect the settlor's intention that the patient should benefit from his inheritance. In these circumstances, I am satisfied that the proposed scheme is not one designed to deprive the resident of income in order to reduce his accommodation charges.

[51] Secondly, the proposed scheme is one which creates a disabled person's trust. The most important feature of such a trust is that income can be accumulated and consequently means-tested benefits are protected. The fact Parliament provided that such trusts can be created indicates that it is permissible to set up trusts which are for the purpose of ring-fencing a disabled person's means-tested benefits. I am therefore satisfied that the proposed scheme does not offend public policy.

[52] For all these reasons I am satisfied that there is no public policy reason why the court should not exercise its discretion to approve the proposed arrangement, set out in the draft Deed of Variation, on behalf of the patient. I am satisfied that the proposed scheme is for the benefit of the patient and in the exercise of my discretion I consider that it is in the interests of justice that I should approve the scheme.

[53] I therefore approve the draft Deed of Variation which is attached to the court order I have made.

Costs

[54] The parties effected a scheme whereby costs were paid in a way that did not affect the patient's interests and in these circumstances it is not necessary for me to rule on the issue of costs.

Conclusion

[55] This case has highlighted the complexity which can arise when will trusts are created, especially where one or more of the beneficiaries lack capacity to enter into deeds of variation. To avoid the expense, delay and uncertainty of litigation in this area it is very important that practitioners who undertake this work should familiarise themselves with the most relevant and recent precedents to ensure that the will trusts are drafted in a way which prevents or at least reduces the need for expensive and, at times, uncertain litigation.