Case notes

In re Robert Palmer's estate

X et al. v. Y, First Civil Chamber, Court of Appeal of Ticino, 19 December 2007

David Wallace Wilson and Julie Wynne*

Abstract

This is the first trust case rendered in Switzerland after the ratification of the Hague Trust Convention, which came into force on 1 July 2007 (Judgment of the Court of Appeal of Ticino of 19 December 2007 (11.2004.49)). This case deals with trust litigation in connection with the estate of Robert Palmer, the British pop singer. It examines whether there is a conflict of interest in simultaneously acting as executor of an estate and as trustee of a testamentary trust and highlights the differences between the executor of an estate and a court-appointed administrator in a civil law jurisdiction.

Facts

Robert Palmer ('Palmer') was a pop and soul singer of international fame, known for such hits as 'Addicted to Love', 'Simply Irresistible', 'I'll Be Your Baby Tonight' and 'Every Kinda People'. He was divorced and father of two children from his ex-wife. He lived with his companion in Lugano, Switzerland, where he died on 26 September 2003. In October 2004, newspapers reported on the struggle over Palmer's estate, worth an estimated 30 million pounds sterling, between his companion and his two children.

Similar testamentary dispositions were filed with the Lugano probate judge, a 1981 will and a 1987 codicil. According to these deeds, Palmer, after having disposed of all his personal possessions (jewellery, books, art works, furniture, cars and boats), bequeathed the residue of his estate, including his royalties, to a trust to be established for beneficiaries designated by him, notably his companion and his brother. Palmer appointed his manager as trustee, entrusting him with the task of managing the substantial trust assets and distributing these—in whole or in part—at his discretion among the beneficiaries. In both deeds, Palmer appointed his ex-wife and his manager as co-executors; but one codicil contained hand-written deletions, further to which his ex-wife's name had been crossed out.

During the probate proceedings, Palmer's companion opposed the issuance of any inheritance certificate by the probate judge, while his children opposed the issuance of such a certificate[1] in the names of his companion and his brother. The children also opposed the issuance of the grant of probate[2] in favour of Palmer's manager on the grounds that he was an alcoholic and drug consumer. For his part, Palmer's manager accepted to act as executor and applied for the grant of probate to be issued in his sole name. In response, Palmer's children petitioned for the appointment of a

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1. *Certificato ereditario, certificat d'héritier, Erbbescheinigung.*
2. *Certificato di esecutore testamentario, certificat d'exécuteur testamentaire, Willensvollstreckerzeugniss.*

court-appointed administrator. After considering all pleadings, the probate judge ordered the administration of the Palmer's estate and appointedf a third-party administrator.

Appealing against this order, Palmer's manager applied for the grant of probate to be issued in his sole name and sought to obtain the annulment of the order for administration and, further or in the alternative, his appointment as an administrator. Palmer's children and ex-wife all applied for the dismissal of the appeal.[3]

Decision

Executor versus administrator

The Ticino Court of Appeal first examined whether a third-party administrator should be appointed at all. The Court confirmed that opposition to the issuance of an inheritance certificate did not necessarily justify the appointment of an administrator, especially when the conflict of interest between the heirs appeared to be merely theoretical or potential. However, the Court held that such appointment was appropriate because the conflict seemed real between the heirs *ab intestate* (Palmer's children) and the testamentary heirs (Palmer's companion and brother). Indeed, leaving Palmer's estate in the temporary possession of the heirs *ab intestate* could endanger the interests of the testamentary heirs, which the former did not recognize. Accordingly, the Court concluded that an administrator had to be appointed, especially since Swiss succession law did not offer another alternative than leaving the estate in the temporary possession of the heirs *ab intestate* (Article 556 §3 CC).[4]

The Court further noted that, as a rule, the designation of an executor renders superfluous the appointment of an administrator, since such designation already guarantees the estate's proper administration even when conflicts of interest arise between the heirs. Nevertheless, the Court acknowledged that, in certain cases, the executor's powers are too extensive and the appointment of an administrator might be advisable. Indeed, while an administrator is limited to protective measures aimed at preserving the estate, the executor must also pay legacies, prepare the asset partition and carry out the estate's liquidation. Therefore, when it is unclear who the heirs are, it seems reasonable to appoint an administrator for preserving the estate; as a result, the executor's powers will be limited during the administrator's mandate.

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Executor versus trustee

The Court further examined whether there would be a conflict of interest in simultaneously appointing Palmer's manager as the estate's sole executor and as trustee of the testamentary trust. In his testamentary dispositions, Palmer had requested the settlement of a trust and appointed his manager as trustee, vested with full discretionary powers with respect to appointing beneficiaries amongst the persons designated by Palmer and distributing trust assets.

Palmer's children and ex-wife contested this appointment on the ground that it posed a conflict of interest. They also alleged that the manager was wholly unsuitable to fulfil any role, indicating that Palmer had actually fired him after a violent scuffle for having stolen a large sum of money from him and that, for a long time, he had 'abused alcohol and taken drugs, to the point of appearing in a drunken, vexatious state at the deceased's funeral'. In their opinion, the manager did not in fact carry out any administrative activity nor was he even capable of it. Furthermore, they suspected him of partiality in

3. Although issued in December 2007, this judgment was only made public during the Summer 2009, after the Second Civil Chamber of the Swiss Federal Court dismissed the final appeal that had been lodged against it (5A_111/2008, 9 December 2008); hence the belated reporting.

4. After the filing of the last will, the authorities shall, if possible after hearing the interested parties, either leave the estate in temporary possession of the legal heirs or order the administration of the estate. (Article 556 §3 Swiss Civil Code, hereafter 'CC').

favour of Palmer's companion. Finally, they stated that the fact that he lived outside Switzerland would prevent proper supervision of his activities as administrator.

The Court pointed out that, under Swiss succession law, if a deceased has designated an executor, the estate's administration is entrusted to him and that this rule also applies when an administrator is appointed by a probate judge.[5] However, this rule was not mandatory and the probate judge must thus ascertain in each case whether the executor has the capacity to administer the estate given his professional skills, trustworthiness and impartiality. In particular, an executor is not automatically excluded from being appointed as an administrator merely because he does not enjoy the heirs' trust or because they contest the will. Moreover, the probate judge is not required to appoint several executors simply because the deceased designated more than one executor.

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Concerning the conflict of interest issue, the Swiss Federal Court had already held that one cannot remove an executor solely because the testator also appointed him as sole board member of a family foundation to be settled under his will, not even if some of the heirs intend to contest the will and the foundation's validity.[6] Although removing an executor is not equivalent to appointing an administrator, the criteria for evaluating a possible conflict of interest remain substantially the same. Thus, in the foundation case, the Federal Court did not see a problem precisely because the executor, despite running the risk of finding himself in a delicate situation, was not an heir. Following the same reasoning, the Court stressed that Palmer's manager was not an heir to the estate. Furthermore, the assets of the trust would be registered in his name (or in the name of a third party on his behalf), but further to Switzerland's ratification of the Hague Trust Convention they would form a distinct mass that will not become part of his own property. Moreover, as trustee, Palmer's manager would have to manage the trust assets in accordance with the terms of the trust and as provided by law, a duty in respect of which he is fully accountable.[7] Finally, the allegation that, apart from his role as trustee, Palmer's manager had other personal interests capable of conflicting with his function as an administrator, was not supported by the evidence produced.

Lastly, the Court examined whether the foreign residence of Palmer's manager posed a problem. In the past, the administrator was specifically required to reside in the jurisdiction of the probate judge ordering such an appointment. More recent scholars agree that residence in a foreign country no longer precludes an appointment as administrator or as executor. Further, as Palmer's manager had himself requested his appointment as administrator, the probate judge could reasonably assume that he was ready to fully comply with Swiss succession law and with the rules of procedure that will underpin his relations with the supervisory authority. Among others, this meant that the probate judge was entitled to request from him an address in Switzerland where all correspondence could be sent and the use of Italian for all communications. To that end, Palmer's manager could use auxiliaries, as the international nature of this succession would in any case require that a Ticino-resident administrator uses auxiliaries abroad. Thus, the Court held that the English residence of Palmer's manager did not involve complexities or disproportionate costs.

In conclusion, the Court held that the manager's case had some merits to the extent he requested his

5. Article 554 §2 CC.
6. ATF 90 II 386 consid. 5.
7. For the purposes of this Convention, [. . .] a trust has the following characteristics: (a) the assets constitute a separate fund and are not a part of the trustee's own estate; (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law (Article 2 §1 of the Hague Convention concerning the Law Applicable to Trusts and their Recognition of 1st July 1985).

appointment as an administrator. Nevertheless, the Court dismissed his appeal to the extent he had requested the annulment of the order for administration as well as the issuance of the grant of probate in his sole name. Thus, although it seems that Palmer's manager may have been addicted to many things, he was apparently 'evicted for love'.

Comments

In our opinion, the Ticino Court of Appeal rightly held that there is no inherent conflict of interest in simultaneously acting as an executor of the deceased's estate and as a trustee of his testamentary trust—especially when one is not an heir, neither testamentary nor *ab intestate*, to the estate. Nevertheless, these distinct functions each entail distinct rights and obligations, notably the trustee's fiduciary duties under the relevant trust law and the executor's regulatory duties under the relevant succession law—duties in respect of which one will be fully accountable if one accepts such functions, as they prove to many 'Simply Irresistible'.

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doi:10.1093/tandt/ttp098

Receivers and revocable trusts: reserved powers cannot be exercised against the will of the settlor

TMSF v Merrill Lynch Bank and Trust Company (Cayman) Limited, 26 June 2009[†]

Nigel Meeson QC*

Abstract

A recent judgment of Chief Justice Smellie in the Grand Court of the Cayman Islands has considered the nature of a settlor's reserved power of revocation in a Cayman Islands trust. It is believed that this is the first time this issue has been judicially considered. The judgment was in the context of whether the trust assets may be made available to satisfy a judgment creditor of the settler through the appointment of a receiver by way of equitable execution empowered to exercise the reserved power of revocation against the will of the settlor.

[†]This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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