

BERMUDA SUPREME COURT

In The Matter Of A Trust (Change of Governing Law) [2017] SC (Bda) 38 Civ (19 May 2017)

TRUST-DIFFERENTIAL PROVISION FOR LEGITIMATE AND ILLEGITIMATE CHILDREN - PROPOSED CHANGE OF GOVERNING LAW FROM CAYMANIAN TO BERMUDIAN LAW - ABOLITION OF LEGAL DISTINCTIONS BETWEEN LEGITIMATE AND ILLEGITIMATE CHILDREN BY SECTIONS 18A TO D OF THE CHILDREN ACT, 1998 - APPLICATION FOR DECLARATION THAT CHANGE OF GOVERNING LAW WOULD NOT TRIGGER THE APPLICATION TO THE TRUST OF THE PROVISIONS OF SECTIONS 18A TO D OF THE CHILDREN ACT, 1998

A Trustee wished to modernise various provisions of a Trust and to change the governing law to Bermuda, so as to be able to upgrade the Trust structure under the flexible jurisdiction conferred by Section 47 of the *Trustee Act, 1975*. If the effect of changing the domicile of the Trust from the Cayman Islands to Bermuda triggered the application to the settlement of the relevant provisions of the *Children Act, 1998* (the "1998 Act"), the change of domicile could not properly be exercised as such a course would be materially adverse to the interests of the unborn (legitimate issue) beneficiary class.

The crucial question was therefore whether once a settlement, created after sections 18A-18G (Part IIA) of the 1998 Act entered into force in 2004, became governed by Bermuda law, the settlement fell to be construed subject to those statutory provisions. The relevant analysis centred on the transitional provisions of Section 18C which provided for the application of Part IIA. This section clearly applied to "any instrument made on or after the day this Part comes into operation" (i.e. on or after 19 January 2004). However, less immediately obvious was the meaning of the 'ouster clause' in the same section, which provides that Part IIA does "not affect":

"(c) any instrument made before this Part comes into operation;

(d) and a disposition of property made before this Part comes into operation" .

Read literally, Section 18C appears to provide that Part IIA potentially applies to dispositions of property and instruments which were validly made under a foreign governing law after 19 January 2004, but which subsequently changed their governing law to Bermuda law. However, the Trustee's counsel successfully argued that the change of governing law power could be exercised without triggering the operation to the Trust and any instruments executed under it of the relevant statutory provisions in the 1998 Act.

In the Court's judgment, clearer statutory language would have been required to justify construing Section 18C as intending to retrospectively interfere with rights under dispositions originally made under a foreign governing law (after Part IIA entered into force) merely because the trustees of such settlements choose to have the settlement governed by Bermuda law. This purposive approach engaged longstanding canons of statutory construction which require the interpreter to apply, *inter alia*, a starting presumption that Parliament does not intend to interfere with existing property rights, or indeed to legislate with retrospective effect.

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