

Of Sound Mind and Memory: New Guidance for Trustees Regarding Settlor Capacity in the Cayman Islands

具有健全的心智和记忆力：开曼群岛有关委托人能力的受托人最新指南

The question of whether an individual has the mental capacity to exercise his or her legal rights or powers is one fraught with difficulties, and inevitably subject to great debate. In the recent decision of *CI Trustees Ltd -v- RDK and GMB*¹, the Grand Court of the Cayman Islands (the “Court”) was asked to consider whether or not the settlor of a Cayman Islands trust had capacity to exercise her power to amend the trust deed to change the sole beneficiary of the trust. For the reasons explained below, the Court found that, on the balance of probabilities and in circumstances where the settlor had since passed away, the settlor did have capacity, at the material times, to amend the trust deed.

The Cayman Islands Trust

The O Trust (the “Trust”) was established pursuant to a trust deed dated 6 May 1996 (the “Trust Deed”). The Trust was a Cayman Islands trust, containing “reserved powers” provisions sanctioned by *the Trusts Law (as revised)*. One of those reserved powers was a power, found at Article 1.1.5 of the Trust Deed, to amend the Trust Deed “by writing delivered to the Trustee, but subject to acceptance by the Trustee”.

The trustee of the Trust was CI Trustees Ltd (the “Trustee”). The settlor of the Trust was a childless widow, and resident of a Spanish-speaking country in South America (the “Settlor”). Evidence was given in the course of the proceedings, from representatives of the Trustee, to the effect that the Settlor was known to be “a very gullible and lonely person” who had “been taken advantage of in the past”. In July 2012, the Settlor sent a letter to the Trustee (the “2012 Letter”),

一个人是否具备行使其合法权利或权力的心智能力，这是个难度重重而不免备受争议的问题。在*CI Trustees Ltd -v- RDK and GMB*¹一案的最新裁决中，开曼群岛大法院（下称“法院”）被请求考量开曼群岛信托的委托人是否有能力行使其修改信托契约的权力，以变更信托的唯一受益人。由于下列原因，并按照相对可能性衡量的准则以及考虑委托人此后已去世的情况，法院认为委托人确实有能力在关键时刻修改信托契约。

开曼群岛信托

O信托（下称“信托”）乃根据日期为1996年5月6日的信托契约（下称“信托契约”）设立的开曼群岛信托，其中包含《信托法（经修订）》允许的“保留权力”条文。其中一项保留权力（载于信托契约第1.1.5条）是委托人有权“透过向受托人递送书面文件的方式修改信托契约，但前提是受托人接受相关修改”。

信托的受托人是CI Trustees Ltd（下称“受托人”），委托人是一位居住于南美洲西班牙语国家的无儿无女的寡妇（下称“委托人”）。受托人代表在诉讼过程中提供的证据表明，委托人被认为是一位“曾经被人利用过的”“非常容易受骗且孤独的人”。2012年7月，委托人致信受托人（下称“2012年信件”），声明她希望修改信托契约，将信托的唯一受益人（在判决中被称为“RDK”）撤换为委托人的朋友（即“GMB”）。值得

¹ Unreported, FSD 199 of 2015, Kawaley J, 19 January 2018.
未发布，FSD 199 of 2015，Kawaley法官，2018年1月19日。

stating that she wished to amend the Trust Deed to remove the sole beneficiary of the Trust (referred to in the judgment as “RDK”) and to replace her with the Settlor’s friend (“GMB”). It is noteworthy that GMB was also the wife of the Settlor’s lawyer. While the Trustee was satisfied that the Settlor had written the 2012 Letter, the Trustee was concerned about the Settlor’s mental capacity to properly exercise her power of amendment. The Settlor had appeared confused during telephone calls with representatives of the Trustee and, on other occasions, had refused to speak with the Trustee at all. As a result, the Trustee declined to give effect to the Settlor’s amendment request set out in the 2012 Letter.

A few years later, in July 2015, the Settlor issued a declaration (the “2015 Declaration”) which stated the Settlor’s *“irrevocable and absolute intention to remove all and any of the beneficiaries that have been named so far by any means as well as to name with immediate effect [GMB] as the sole beneficiary of the Trust”*. Despite the time that had passed since the 2012 Letter was issued, the Trustee remained concerned about the Settlor’s capacity to make the 2015 Declaration and it had attempted to arrange, on a number of occasions and without success, for the Settlor to be assessed by independent medical practitioners. Evidence was also given that the Settlor appeared to be influenced by GMB, who seemed to control who visited the Settlor and her day-to-day movements.

The Settlor died in August 2015, before the Trustee had given effect to her requested amendments to the Trust Deed. Article 1.1.5 of the Trust Deed provided that, on the death of the Settlor, the Trustee was to hold the trust fund *“upon the terms set forth in any Distribution Schedule to this Trust Deed which shall then be in effect”*. At the time of the Settlor’s death, the Trust Deed had an outdated distribution schedule annexed to it: the Trustee was therefore concerned to determine whether it should in fact give effect to the 2015 Declaration and distribute the trust fund to GMB rather than to RDK.

Preliminary Issue

In an initial judgment in the proceedings², the Trustee asked the Court to determine, as a preliminary issue, whether or not it could authorise the exercise of the Settlor’s reserved power to amend the Trust Deed, provided in writing by the Settlor prior to her death. The Court determined that, in light of the wording of the Trust Deed, the Settlor’s death did not impact on

注意的是，GMB 同时也是委托人律师的妻子。虽然受托人信纳2012年信件由委托人撰写，但受托人担心委托人是否具备适当行使其修改权的心智能力。委托人在与受托人代表的电话沟通中显得含糊不清，并在其他场合完全拒绝与受托人交流。因此，受托人拒绝执行委托人于2012年信件中提出的修改请求。

此后，委托人于2015年7月发布了一份声明（下称“2015年声明”），表示其“不可撤销且绝对地有意透过何种途径撤销目前为止指定的所有及任何受益人，并指定 [GMB] 为信托的唯一受益人，且该指定立即生效”。尽管距离“2012年信件”已有几年时间，但受托人依然担心委托人是否有能力作出2015年声明，并且受托人曾多次试图安排委托人接受独立执业医师的评估，但均未能成功。另有证据表明，委托人似乎受到了GMB的影响，GMB似乎可以决定委托人的访客并控制其日常活动。

委托人于2015年8月去世，但当时受托人尚未按其要求修改信托契约。信托契约的第1.1.5条规定，若委托人去世，受托人应“根据本信托契约所附的任何分配计划中载列的条款持有该信托基金，相关条款届时生效”。然而，委托人去世时信托契约附有的分配计划已过期，这令受托人认为有必要决定是否应该按照2015年声明将信托基金分配给GMB而非RDK。

初步聆讯涉及的问题

在诉讼程序的初步判决中²，受托人请求法院对初步问题作出裁决，即受托人可否允许按照委托人在去世前提供的书面声明行使委托人修改信托契约的保留权力。法院裁定，依照信托契约的措辞，委托人的死亡并不影响受托人随后落实委托人书面行使其修改权力的能力。法院在为此目的解释信托契约时认为，第1.1.5条具有两层

² Unreported, FSD 199 of 2015, Clifford J, 28 October 2016
未发布，FSD 199 of 2015，Clifford 法官，2016年10月28日

the Trustee's ability to later give effect to the Settlor's written exercise of her power to amend. In interpreting the Trust Deed for this purpose, the Court held that Article 1.1.5 was two-pronged: it conferred on the Settlor a power to amend, and on the Trustee a power to accept that amendment. It followed that the Settlor must have actively exercised the power to amend during her lifetime and that, subsequently, the Trustee must have actively accepted (or, as the case may be, rejected) the exercise of the Settlor's power.

The Court found that, by delivering a valid written amendment to the Trust Deed to the Trustee, the Settlor had validly and properly exercised her power of amendment. All that remained was for the Trustee to separately exercise its power to accept the written instrument as a proper exercise of the Settlor's power to amend if it considered it appropriate to do so. The Settlor's death had no impact on this process.

Capacity

In the substantive proceedings, the Court was then asked to consider whether the Settlor had the capacity to exercise the power to amend at the time it was exercised. In considering the question, the Court noted that the most practical approach to capacity in the circumstances of this case was to require the party positively asserting that capacity existed to prove that it did on the balance of probabilities (following the civil standard of proof).

The Court found that there was no dispute as to what are the essential requirements for establishing capacity in this context: the same test which applies to the making of wills should also apply to the exercise of any other impugned legal powers. That test requires proof of testamentary capacity (so, proof of the capacity to understand certain important matters relating to the instrument in question such as its nature and effect, the extent of the property which is being disposed of, and the claims which might arise as a result) and, as a separate requirement, actual knowledge and approval of the contents of the instrument.

The Court also noted that the level of understanding required depends on the circumstances of each case and the particular transaction which it is to effect.³ Capacity is "*not necessarily a black and white issue*" and a testator or donor might suffer from conditions which deprive them of capacity under some circumstances, while in others, full capacity was enjoyed. In such cases, the crucial question is whether

含义：赋予委托人修改信托契约的权力，同时赋予受托人接受该修改的权力。因此，委托人必须曾在其有生之年有效行使修改权，而随后受托人必须有效接受（或拒绝，视情况而定）委托人行使权力。

法院认为，委托人已以书面方式向受托人递送有效的信托契约修改要求，因此委托人已有效适当地行使其修改权。剩下的便是受托人单独行使其接受权，在其认为合适的情况下接受相关书面文据作为委托人适当行使其修改权。委托人的死亡对于这一过程并无影响。

行为能力

在实质诉讼程序中，法院随后被请求考量委托人当时是否有能力行使修改权。法院在审议该问题时指出，考虑到此案的具体情况，确定其是否拥有行为能力最实际的方法是，要求明确肯定该行为能力存在的当事方证明其观点乃按相对可能性衡量的准则作出（遵循民事举证标准）。

法院认为，就此而论，对于确定行为能力存在的必要条件这一方面并没有争议：适用于遗嘱订立的测试也同样应当适用于任何其他受争议法定权力的行使。该测试要求提供拥有遗嘱能力的证明（证明有能力理解与文据有关的某些重要事项，如其性质和影响，被处置财产的范围以及可能招致的权利要求），并单独要求能够实际知悉和同意文据的内容。

法院还指出，对理解水平的要求取决于每个案件的具体情况及将要进行的特定事务。³对行为能力的定义“*不一定非黑即白*”，立遗嘱人或赠与人在某些情况下可能被视为丧失行为能力，而在另一些情况下却被视为拥有完全行为能力。在此类案件中，关键问题在于签署相关法律文件时，立遗嘱人是否有行为能力，且有十分健全的“*心智和记忆力*”，使其能够知晓和理解其订立遗嘱时

³Citing *In re Beane* [1978] 1 W.L.R 770.
援引 *In re Beane* [1978] 1 W.L.R 770 一案

capacity existed at the time that the relevant instrument was executed and whether the testator's "mind and memory" were sufficiently sound to enable him or her to know and understand the business in which he or she was engaged at the time his or her will was executed.⁴ The Court noted the leading English case of *Banks -v- Goodfellow*⁵ where, despite having been confined to the "county lunatic asylum [and remaining] subject to certain fixed delusions" for many years before making his will, the testator's gifts were deemed valid because he was capable of conducting business at the time of executing his will.

The Evidence

In considering the evidence in this case, the Court noted that the Trustee was right to be concerned about capacity given that the Settlor was 82 years old at the time of giving her instructions; the instructions themselves offered no explanation as to the Settlor's motivations, and the Settlor had at times sounded confused and refused to talk to the Trustee. Despite this, the Court found that any confusion on the part of the Settlor at material times was "transitory in nature and attributable to a variety of factors which were individually and cumulatively more plausible than a complete loss of mental capacity". In particular:

- The medical evidence indicated that the Settlor could be suffering from ailments that caused temporary confusion;
- The Settlor clearly preferred face to face meetings to telephone conversations and was not comfortable "speaking to strangers" even in the presence of a translator;
- The evidence indicated that the Settlor was prone to "bouts of confusion" possibly caused by sleep problems, rather than a lasting and critical cognitive decline; and
- The evidence that the Settlor had insisted that she reward those who had helped her by changing the beneficiary to GMB was "insightful" and showed a "clarity of intent".

自己正在处理的事务。⁴法院认为，在 *Banks-v- Goodfellow*⁵这一典型英国案件中，虽然立遗嘱人在订立遗嘱前已被关在“县精神病医院（因为患有长期妄想症）”长达数年之久，但因为其在订立遗嘱时有能力处理事务，因此立遗嘱人的馈赠是有效的。

证据

法院在审议本案的证据时认为，由于委托人在作出指示时已是82岁高龄，因此受托人有理由担心委托人的行为能力。委托人的指示动机不明，且言语经常含糊不清，并拒绝与受托人交流。虽然如此，但法院认为委托人在关键时刻言语含糊不清只是“短暂的，且由多种原因导致，而这些原因（个别或共同）要比完全丧失心智能力的说法更为合理”。特别是：

- 医学证据表明，委托人可能患有会引发暂时性神志不清的疾病；
- 比起电话沟通，委托人明显更喜欢面对面交流，而且即使有翻译在场，委托人也会觉得“与陌生人交谈”很不自在；
- 证据表明，委托人的“阵发性神志不清”很可能是由睡眠问题引发的，而并非因为其认知能力有持续严重的退化；及
- 证据显示，委托人坚持认为要回报帮助过自己的人，因此将受益人改为GMB，这种做法表明委托人“很有见地”且“动机明确”。

⁴This is consistent with the decision of the Honourable Chief Justice in *In re Lindzon* (deceased) 19 February 2015 这与首席大法官在 2015 年 2 月 19 日 *In re Lindzon*（已故）一案中的裁决一致

⁵(1870) LR 5 QB 549

When considering the case as a whole, the Court noted that neither the Trustee nor RDK had positively asserted incapacity and concluded that the Settlor's decision to nominate GMB was entirely rational and did not operate to disinherit anyone with a stronger moral claim to her generosity.⁶ The Court determined that there was no solid basis for concluding that the Settlor lacked capacity altogether in the requisite legal sense and at the time she executed the 2015 Declaration, the Settlor's mind and memory were sufficiently sound to enable her to know and understand the business in which she was engaged. She had been clear then, and for a few years later, about the essentials of her instructions and her motivations for them. The Settlor therefore had capacity to instruct the Trustee to amend the Trust Deed.

Conclusion

While each case concerning the legal capacity of the settlor of a Cayman Islands trust will fall to be determined on its own facts, the judgment in this case is a helpful reminder of the key legal tests to be applied to those facts and the medical and circumstantial considerations to which the Court will have regard. In this case, language barriers, family connections (or lack thereof), personality traits of the Settlor, and scepticism on the part of the Trustee as to the motives of those caring for the Settlor had together given rise to "plausible" concerns that capacity issues may have existed. However, applying the legal tests, it was clear that capacity was not an issue and the beneficiary preferred by the Settlor was entitled to receive a distribution from the Trust.

For additional information, please contact your usual Conyers Dill & Pearman representative.

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.

法院在审议整个案件时指出，受托人和RDK均未正面指称委托人无行为能力，因此认为委托人将GMB指定为受益人的决定完全合理，且这种行为并未剥夺任何在道义上更有权获得委托人遗赠之人士的继承权。⁶法院裁定，没有强有力的依据可断定委托人无法律行为能力，且在执行“2015年声明”时，委托人的心智和记忆力均十分健全，足以使其能够知晓和理解自己正在处理的事务。且在之后的几年，她也一直很清楚自己指示的要项和动机。因此，委托人有能力指示受托人修改信托契约。

结论

尽管有关开曼群岛信托之委托人法律行为能力的案件须根据各自不同的事实进行判决，但本案的判决强调了适用于案件事实的主要法律测试，及法院会加以考虑的医疗和偶然因素，这十分重要。在本案中，语言障碍、家庭关系（或缺少家庭关系）、委托人的人格特征以及受托人对关心委托人之人之人士的动机所持的怀疑态度均令人有理由担心委托人是否有行为能力方面的问题。但应用相关法律测试结果表明，委托人并无行为能力问题，其指定的受益人有权获得信托分配。

有关其他资料，请联络阁下于康德明律师事务所的日常联络人。

本文并非法律意见，其内容亦非详尽无遗，只可作为概览及一般参考资料。感谢您的垂阅！

⁶ RDK had never challenged her removal as a beneficiary, and had taken no active part in the proceedings before the Court despite having been made a defendant.

RDK 未曾就其受益人身份被撤销一事提出质疑，虽为案件的被告，但其并未积极参与法院的诉讼过程。

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