SUPREME COURT OF QUEENSLAND

CITATION:	*In the Estate of Constantinou* [2012] QSC 332
PARTIES:	**THEOPHILUS GEORGE CONSTANTINOU AS EXECUTOR AND TRUSTEE OF THE ESTATE OF THE LATE SIR GEORGE CONSTANTINOU** (first applicant) and **JOHN FISHER-STAMP** (second applicant) and **DAVIES KNOX MAYNARDS NOMINEES PTY LTD ACN 098 133 441** (third applicant) **v** **LAZARUS CHARLES CONSTANTINOU** (first respondent) and **GEORGINA CECILIA CONSTANTINOU** (second respondent) and **THEOPHILUS GEORGE CONSTANTINOU and MARILOU CATAMORA AS GUARDIANS OF THE ESTATE OF ALEX GEORGE CONSTANTINOU** (third respondent) and **THEOPHILUS GEORGE CONSTANTINOU and MARY DAVID AS GUARDIANS OF THE ESTATES OF HARALAMBOS ALBERT CONSTANTINOU and PANAYOITIS GEORGE CONSTANTINOU** (fourth respondent)
FILE NO/S:	BS 9182 of 2011
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	9 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2012, 20 April 2012, 22 June 2012
JUDGE:	Dalton J
ORDER:	**Various directions given pursuant to s 96 of the *Trusts Act* 1973 (Qld)**

CATCHWORDS: PRIVATE INTERNATIONAL LAW – CHOICE OF LAW – TRUSTS AND TRUSTEES – where the testator died leaving assets in Papua New Guinea, Australia and Cyprus – where trusts are created under the will for five of the testator's children under the age of 25 – jurisdiction to hear the application – what is the law governing the trusts created by the will – whether there is an implied choice of law under Article 6 of the Hague Convention on trusts – when Article 7 factors are to be assessed

SUCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – whether the will creates one trust for all five beneficiaries under the age of 25 or five separate trusts – whether the will trusts have come into existence – meaning of the words "minor beneficiary" in the will – whether the executor has power to invest in real property– whether s 9 of the *Trustees and Executors Act* 1961 (PNG) allows the executor as trustee to appoint new trustees

Juvenile Courts Act 1991 (PNG)
Trustees and Executors Act 1961 (PNG)
Trusts Act 1973 (Qld)
Trusts (Hague Convention) Act 1991 (Cth)

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CH Sherrin, RFD Barlow and RA Wallington, *Williams on Wills*, Vol 1 8th ed, Butterworths, London
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Attenborough v Solomon [1913] AC 76
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British South Africa Co v Companhia de Mocambique [1893] AC 602
Commissioner of Stamp Duties (Qld) v Livingstone [1965] AC 694
Dawson v Perpetual Trustee Co (Ltd) (1953) 89 CLR 138

Earnshaw v Hartley [2000] Ch 155
Easterbrook v Young (1976-1977) 136 CLR 308
Holdway v Arcuri Lawyers [2009] 2 Qd R 18
Holdway v Arcuri Lawyers [2008] QCA 218
Hutchison & Anor v Bank of Scotland Plc [2012] QSC 28
In Re Leigh's Will Trusts[1970] 1 Ch 277
In the Estate of Webb (1992) 57 SASR 193
Marshal v Kerr [1995] 1 AC 148
Nudd v Taylor [2000] QSC 344
Permanent Trustee Company (Canberra) Ltd v Finlayson (1968) 122 CLR 338
Re Donkin [1966] Qd R 96
Rohrlack v Evangelical Lutheran Church of New Guinea Property Trust [1995] PNGLR 185
Saliba v Falzon BC 9802912, 1998

COUNSEL: Mr PG Bickford for the first, second and third applicants
Mr DW Marks for the first and second respondents
No appearance for the third and fourth respondents

SOLICITORS: Gadens Lawyers for the first, second and third applicants
Arnold Bloch Leibler for the first and second respondents
No appearance for the third and fourth respondents

[1] This is an application made pursuant to s 96 of the *Trusts Act* 1973 (Qld) brought on behalf of the executor of a will who seeks to know:

1. what is the law governing the trust created by the will;
2. if the law governing the trust created by the will is that of Papua New Guinea:
   (a) can the executor appoint new trustees to the trust created by the will;
   (b) can the executor and/or the trustee of the trust created by the will purchase real property;
   (c) when does a beneficiary of the trust created by the will cease to be a minor;
3. if a beneficiary of the trust created by the will dies before attaining the age of 25 years, without issue, who is entitled to receive property held on trust for that beneficiary;
4. does the will create one trust for all beneficiaries under the age of 25, or separate trusts for each such beneficiary.

[2] The testator died on 16 December 2008 leaving assets in Papua New Guinea (about $26 million), Australia (primarily Queensland) (about $10 million) and Cyprus (about $560,000).

[3] Probate of the will was granted by the National Court of Justice in Papua New Guinea on 20 March 2009 and was also granted by the Queensland Supreme Court on 7 July 2009. The grant from the Papua New Guinea Court was re-sealed in New South Wales.

[4] The testator left 14 children. The executor, a son, is not a beneficiary. There are five children presently under 25 (currently aged 21, 19, 13, nine and five). Of these

five children, the two oldest live in Queensland, the 13 year old in the Philippines and the two youngest in Papua New Guinea.

[5] The will is dated 8 June 2006. At the time it was made the testator was domiciled in Papua New Guinea; the testator's business interests were largely in Papua New Guinea and the executor was domiciled in Papua New Guinea. The two oldest children under 25 resided in Queensland and some of the estate assets were situated in Queensland.

[6] The will is very simple. After revoking all former testamentary acts and making arrangements for his funeral, the testator provided as follows:

> "3 (a) **I APPOINT** as my Executor and Trustee and Guardian of my infant children my son, Theophilus George Constantinou … who in this Will is referred to as 'My Executor' but in the event he predeceases me or be unwilling or unfit to act I appoint my son, Kostas Constantinou ...
>
> (b) Except for my sons Theophilus George Constantinou and Kostas Constantinou who I have previously provided for throughout my life **I GIVE** the whole of my Estate to all my other children hereinafter referred to as 'my children' in equal shares but if at the date of my death any of my children has not attained 25 years My Executor shall hold their share in Trust until they attain the age of 25 years. If any of my children die before me or before attaining a vested interest leaving children then those children shall on attaining 25 years take equally the share that their parent would otherwise have taken.
>
> 4. **MY** Executor shall have the following powers:
>
> (a) to apply for the maintenance, education or benefit of any minor beneficiary as my Executor think(s) fit the whole or any part of the capital of that part of my Estate to which that beneficiary is entitled or may in future be entitled provided that on becoming absolutely entitled he or she shall bring into account any payments received under this clause,
>
> (b) for the purposes of paragraph 4(a) make a payment or payments to a minor beneficiary's parent or guardian or a person with whom the minor beneficiary resides and accept the receipt of that payee as an absolute discharge, and
>
> (c) to invest and change investments freely as if my Executor is beneficially entitled and this power includes the right to invest in property for occupation or use by a beneficiary."

[7] The executor wants to appoint professional trustees as additional trustees of the trust created under the will and, following completion of his duties as executor, retire as trustee of the trusts created under the will. The trustees he wishes to appoint practice in Queensland.

Service

[8] This application was served on the five children who are under 25 years old. The matter first came before Justice A Lyons in the applications list. She made orders that the third and fourth respondents (infant beneficiaries) be provided with independent legal advice by the executor about the subject matter of this application. I am satisfied that that order has been complied with.

[9] Only the five beneficiaries under 25 years old have been served with this application. In my view that is sufficient because the orders sought affect only the trusts established by the will, and not wider questions which would affect the other seven beneficiaries.

[10] Before me the first and second respondents were represented by counsel. The third and fourth respondents were not represented, but letters from the lawyers acting for these respondents were before the Court. Some of those letters made quite detailed (and I might say, helpful) submissions as to the points for determination in the proceeding.

Jurisdiction of this Court

[11] Initially, I had doubts about my jurisdiction to hear this matter given the many foreign elements involved in it. The first applicant is resident in and domiciled in Papua New Guinea, but by bringing this action *in personam* he submits to the jurisdiction of this Court. So do the third and fourth respondents who are also foreign residents: having been properly served, they have not objected to the jurisdiction of this Court. From letters to the applicant's solicitors it is clear that they do submit to jurisdiction, because they particularly ask that the applicant bring to the Court's attention their submissions on the substantive questions to be decided in the application. The other parties are resident in Queensland.

[12] There are substantial assets in Queensland and a grant of probate in this Court, although it is likely to be limited to the Queensland estate. While the estate comprises, in part, land situated overseas, it seems to me this proceeding is not caught by the rule in *British South Africa Co v Companhia de Mocambique*[1] – see *Nudd v Taylor*.[2] The proceeding here is similar to that discussed in *Dawson v Perpetual Trustee Co (Ltd)*,[3] and the facts concerning the situation of property are also broadly similar to the facts in that case.

[13] In all the circumstances I am satisfied I have jurisdiction, see the discussion and authorities cited in *In the Estate of Webb*.[4]

[14] I now turn to the numbered questions listed at paragraph [1] above. For reasons which I hope will become clear, I deal first with the last of these questions.

Question 4: One Trust or Five?

[15] The executor sought advice as to whether the words at cl 3(b) of the will created one trust for all children who had not attained the age of 25 years, or five separate trusts,

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1 [1893] AC 602.
2 [2000] QSC 344.
3 (1953) 89 CLR 138, pp 150-151.
4 (1992) 57 SASR 193; see also *Ballard & Ors v AG for the State of Victoria* [2010] VSC 525 [21].

one for each such child. In my view I am construing the will in determining this question, rather than the words of the trust itself, although I can see that the opposite view might be taken. All parties agreed that the proper law of the will was the law of Papua New Guinea. There was some dispute before me as to whether the proper law of the trusts was the law of Papua New Guinea or the law of Queensland. It was not contended that, so far as the exercise of construing the words of cl 3(b) of the will was concerned, there was any difference between the law of Papua New Guinea and Queensland. For that reason I am content to construe cl 3(b) of the will before coming to a determination as to the proper law of the trusts, for, as will be seen below, it was contended that the result of the exercise of construing cl 3(b) of the will makes a difference to the question of the proper law of the trusts.

[16] There are five children under the age of 25 years. As a matter of construction of the language of cl 3(b) of the will, it seems to me that there are five separate trusts; the trust property in each case being the share of the estate due to each of these five children. The words "their share" in that clause should be read as meaning "his" or "her" share. To me this is clear from the fact that the word "share" is singular rather than plural, and from the expression "any of my children" in the part of the clause immediately before the words "their share". The words "the share that their parent would otherwise have taken" in the last part of the clause tend to the same result.

[17] Regard to the substance of the clause, which necessarily involves the possibility of different children obtaining an absolute interest at different times, also shows that five separate trusts were intended.

[18] The rules as to when gifts in wills will be construed as gifts to tenants in common or to joint tenants are conceptually analogous to the questions of construction thrown up by cl 3(b) of this will and all support the conclusion I have reached as to the construction of cl 3(b). They are collected in *Williams on Wills*.[5] The inclusion of a substitutional gift, such as on the death of a primary donee – for example, "to be divided among my children then living or the issue of any deceased child" (my underlining) – will indicate a tenancy in common rather than joint tenancy – [86.2]. Words which show an intention to divide the property – for example, "equal shares" – will negative the presumption of a joint tenancy – [86.5]. The circumstance that gifts will vest at different times also negatives a joint tenancy – [86.4].

Question 1: The Law Governing the Trusts Created by the Will

[19] The *Trusts (Hague Convention) Act* 1991 (Cth) adopts the Hague Convention on trusts as a schedule having the force of law in Australia. It applies to trusts created *inter vivos* or on death which are voluntary and created in, or evidenced in, writing. An Australian Court should apply the rules from the Hague Convention on trusts to determine the proper law of the will trusts.

[20] Article 8 of the Convention provides that the law determined in accordance with Articles 6 and 7 governs the administration of trusts; the appointment, resignation and removal of trustees; the power of trustees to administer or dispose of trust assets; the power of trustees to acquire new assets; the powers of investment of trustees; restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust and the variation or termination of the trust, amongst other things.

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5 CH Sherrin, RFD Barlow and RA Wallington, Vol 1 8th ed, Butterworths, London.

[21] Article 6 of the Convention provides:

> "A trust shall be governed by the law chosen by the settlor.
>
> The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case."

[22] In this case the testator did not expressly choose what law was to govern the will trusts.

[23] As noted in *Berezovsky v Abramovich*[6] there is scant authority in relation to the correct approach for the Court in deciding whether there is an implied choice of law governing a trust.[7] In particular there is no authority as to the extent to which a Court may have regard to extrinsic evidence in construing the will "in the light of the circumstances of the case".

[24] The words of the will in question here show the testator's address as Port Moresby, Papua New Guinea; the address of the "Executor and Trustee and Guardian" as Port Moresby, Papua New Guinea, and the address of the alternative executor, trustee and guardian as Port Moresby, Papua New Guinea. The executor, trustee and guardian and potential alternative executor, trustee and guardian are described as the testator's sons. It is plain that the testator envisaged that his trustee (who was also the guardian of the infant beneficiaries) would be resident in Papua New Guinea. The will is marked as having been drawn up by solicitors having an address in Port Moresby.

[25] In my view the phrase, "in the light of the circumstances of the case" in Article 6 of the Convention would allow me to have regard to the fact that the testator was domiciled in Papua New Guinea at the time he made his will and that much of his property, and the majority of his business interests were in Papua New Guinea at that time. Having regard to those facts and the terms of the will discussed in the above paragraph, I find that there was an implied choice of law governing the trust: the law of Papua New Guinea.

[26] In my opinion the same result obtains if Article 7 of the Convention is considered. Article 7 of the Convention provides:

> "Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.
> In ascertaining the law with which a trust is most closely connected reference shall be made in particular to –
> (a) the place of administration of the trust designated by the settlor;
> (b) the situs of the assets of the trust;
> (c) the place of residence or business of the trustee;
> (d) the objects of the trust and the places where they are to be fulfilled."

[27] The first of the four factors listed in Article 7 can be disregarded as a settlor did not designate a place of administration. At the time the will was made, and at the time of the death of the testator, as now, some assets were situated in Queensland but the

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6 [2010] EWHC 647 (Comm) [108].

7 See *Saliba v Falzon* BC 9802912, 1998, per Young J and *Hutchison & Anor v Bank of Scotland Plc* [2012] QSC 28, two local examples.

testator's business interests were largely in Papua New Guinea. At the time the will was made, and at the time of death, as now, the trustee was domiciled in Papua New Guinea. At the time the will was made, and at the time of the death of the testator, two of his children under the age of 25 years resided in Queensland. The evidence is silent as to where the next two youngest children lived at these times. The youngest child was not born as at the date of the will. The evidence is silent as to where that youngest child lived at the date of death.

[28] The Article 7 list of factors to which particular reference is to be made in deciding what law a trust is most closely connected with is not exclusive. It does not include the matter which was definitive of the question at common law, the domicile of the testator.[8] Of this Ford and Lee in *The Law of Trusts*[9] say:

> "In the case of a testamentary trust a relevant although not necessarily decisive factor will be the law of the testator's last domicile since it is that law which establishes the validity of the will. Many testators will assume that the law governing succession under the will will also determine the validity of a trust created by the will."

[29] The Convention does not specify the time at which the connection between the trust and the relevant law is to be made. By necessary implication, if a settlor has chosen a governing law – Article 6 – the time of the choice will either be the settlement itself or, perhaps, later, the time of the writing evidencing it. That will be the case whether the trust was made *inter vivos* or by will. If a settlor does not expressly or impliedly choose a governing law, Article 7 applies and, in the case of an *inter vivos* trust, it is difficult to see that any time could be relevant except the time of the creation of the trust, although an issue might arise if the trust is created before the writing evidencing it comes into being. In the case of a testamentary trust it may well be that there is a considerable time between the making of the will and death, and separately, between death and the will trusts coming into being. It is possible that in the case of such delay there will be significant change in the factual circumstances to which regard is to be had under Article 7.

[30] Counsel for the first and second respondents contended that, having regard to the Article 7 factors, the proper law of the two trusts created for them was Queensland. The basis for this submission was the fact that the trustees the executor wishes to appoint to replace him are domiciled in Queensland.[10] Once the replacement has been carried out, the submission goes, the place for administration of the trusts will be Queensland. Additionally, having regard to my construction of the will as establishing five separate trusts for the infant beneficiaries, the two beneficiaries who live in Queensland will each be the sole beneficiary of their particular trust, so that the sole objects of those trusts will be based in Queensland. As well, there are significant assets in Queensland so that it may be, for convenience, that assets to be transferred as the property of these two trusts are never sold by the executor, but are transferred to the trustee to be held in Queensland. From the point of view of the first and second respondents to the application, the pragmatic attractions of this position are obvious.

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8 Davies, Bell and Brereton, *Nygh's Conflict of Laws in Australia*, 8th ed LexisNexis, Australia, 2010 [34.12].

9 Lawbook Company [24.2790].

10 They are the second and third applicants in the matter.

[31] However, the above scenario is to some extent speculative. It is true that, after administration is complete, the executor wishes to replace himself as trustee with Queensland trustees. At the moment that course is opposed by the third and fourth respondents who raise questions as to the suitability of the proposed new Queensland trustees. I am not asked to resolve those questions on this application. But the material before me does deal with them to some extent. The concerns could not be regarded as trivial; there must be real doubt as to whether the second and third applicants will become trustees of the will trusts. There must also be doubt as to when that might occur. The estate is still under administration, it is a large estate and involves some complexities of administration. There is also some element of speculation in the assumptions that the trust property of the first and second respondents' trusts (when they are established) will be located in Queensland. All these are future matters.

[32] The response of counsel for the first and second respondents to that uncertainty was to submit in the alternative that it is premature to decide the question of the proper law of the trusts, because, administration not having finished, those trusts have not yet come into being.

[33] On death the entire interest in property (legal and beneficial) owned by a deceased person passes to the deceased person's executor for the purpose of administration under the will. While the estate remains in the course of administration, no person entitled under the will has any proprietary interest in any particular asset.

[34] While an estate remains unadministered, persons entitled under the will have a chose in action to require the deceased's estate to be duly administered, and that right is disposable and transmissible. It carries with it the right to receive the fruits of the chose in action when they mature. It is recognised by the law that this is an inchoate interest of a kind in the assets of the estate.[11] But that interest can be defeated by the executor using the assets to pay the liabilities of the estate.[12] No doubt, from the time of demise the executor was subject not only to duties as executor but fiduciary duties in respect of the trusts established by the will.

[35] However, it is not until the executor has completed the administration of the estate and assents that property passes to those entitled under the will. Those taking property at that point in time take under the will, not by reason of the assent,[13] but the dispositions of the will become operative because of the assent.[14]

[36] This estate is still under administration, the executor has not assented. Thus, the executor still holds the entire legal and beneficial interest in all the property and there is no property the subject of the will trusts. There cannot be any extant trusts because, as yet, there is no property held on trust.[15]

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11 *In Re Leigh's Will Trusts*[1970] 1 Ch 277, 281-282; *Earnshaw v Hartley* [2000] Ch 155, 161; *Marshal v Kerr* [1995] 1 AC 148, 165-166; Williams, Mortimer and Sunnucks, *Executors Administrators and Probate*, 19th ed Sweet & Maxwell, London, 2008 [78-04]; *Williams on Wills*, Butterworths, (8th ed) London 2002 Vol 1 [25.18].

12 WJ Williams, *The Law Relating to Assents*, Butterworths, London, 1947, p 26.

13 *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694; *In Re Leigh's Will Trusts* (above), 281; *Re Donkin* [1966] Qd R 96, 114-5; *Holdway v Arcuri Lawyers* [2009] 2 Qd R 18.

14 *Attenborough v Solomon* [1913] AC 76, 83 followed in *Holdway v Arcuri Lawyers* [2008] QCA 218, [72], per Keane JA.

15 *Easterbrook v Young* (1976-1977) 136 CLR 308, 319, Kerridge, *The Law of Succession*, 12th ed, 2008, [24-59].

[37] I record that there was a preliminary question as to what law I should apply in determining whether or not the will trusts have come into being. It was uncontroversial between the parties that the law of the will was Papua New Guinea, the place of the testator's domicile. However, it seems to me that the question of whether or not the administration has concluded is a question of administration of the estate which is governed by the place of the grant of probate.[16] Here there have been two grants of probate – one in Papua New Guinea and one in Queensland. Happily, the evidence before me was that the law which governed the determination of this question was the same in Papua New Guinea and Queensland.

[38] My conclusion that the will trusts have not yet come into being does not necessarily determine the issue as to when the factors listed in Article 7 should be assessed. If the relevant time is the time the will was made, or the time of death, the question is susceptible of determination now. It is only if the relevant time is the time of assent, when the will trusts come into being, that the question cannot now be determined. No doubt in an appropriate case a Court could refuse to determine a question as to the proper law of a will trust before assent on the basis that there was some doubt that the trust would ever come into being and that the question was therefore hypothetical. That is not the case here.

[39] There is no case that determines this question of when the Article 7 factors are to be assessed. Writers in the area are of the view that the relevant time to assess the law of closest connection with the trust is the date the will was made.

[40] In his book *The Hague Trusts Convention*[17] Professor Harris argues that Article 7 of the Hague Convention ought to apply to determine the law of will trusts having regard to the facts as they stood at the time of creation of the will. His reasons are that:

> "It would be very much preferable for the protection of the testator's expectations and (given the importance which the Convention attaches to the written document creating or evidencing the trust and, implicitly, to the factors as they stood at the time of the creation of that document) it is very hard to see why such an interpretation should not be adopted." (references omitted).

[41] The text *Private International Law*, Cheshire, North and Fawcet[18] expresses the same opinion, commenting, "This would follow the common law position where changes in the identity and thus the domicile or residence, of the trustees, or in the place of investment, which took place after the trust was created were to be ignored."

[42] Dicey, Morris and Collins, *Conflict of Laws*,[19] say:

> "Although not expressly stated in the Hague Convention, it is clear from other provisions of the Convention that these factors are to be considered as at the moment of creation of the trust, at least in the case of *inter vivos* trusts."

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16 *Permanent Trustee Company (Canberra) Ltd v Finlayson* (1968) 122 CLR 338, 342-3.

17 Harris J, Hart Publishing Oxford, 2002, p 228-229.

18 14th ed, pp 1317-1318.

19 14th ed, [29-021]. And see Underhill and Hayton, *Law Relating to Trusts and Trustees* 17th ed, [102.157] which express the same opinion in fact, in identical words.

The footnote to this proposition is:

> "In the case of testamentary trusts, this rule would be unsatisfactory, however, since the trusts will not come into existence until the testator's death, and not at the time of the creation of the will. In the intervening period, the testator's domicile may change, as may that of the trustees or beneficiaries. Accordingly, it is suggested that the Art 7 factors should, in the case of testamentary trusts, be determined at the date of creation of a will. This view is supported by the decision in *Jewish National Fund Inc. v Royal Trust Co* (1965) 53 DLR (2d) 577, where the Supreme Court of Canada refused to consider supervening changes in determining the law of closest connection. But *cf O'Sullivan* (1993) 2 J Int Corp P 65, 69."

[43] Ford and Lee, *The Law of Trusts*,[20] say this on the topic:

> "Article 7 does not make clear when the closest connection of a testamentary trust will be assessed but the better view is that it should be the date of creation of the will (as suggested by Jonathan Harris, *The Hague Trusts Convention*, Hart Publishing, at 228-229). Testators who expect the same system of law to govern both their will and any trust created by the will will be unable to control the occurrence of some of the factors listed in article 7 if they are to be assessed at the date the trust comes into effect. Of course any difficulties in determining the law applicable to a testamentary trust will generally be overcome if the law governing the trust is expressly prescribed in the will."

[44] As noted above, I can see the pragmatic attractions from the first and second respondents' point of view in arguing that the proper law of the will trusts (so far as they concern those respondents) should be determined at the date of assent. The overwhelming difficulty with that as an approach to Article 7 of the Convention is that it produces uncertainty and, as Harris says, "If a trust is to be validly created, it must be subject to a particular legal system from the moment of commencement."[21] The facts here are illustrative: in a big estate, where the administration is lengthy and complicated, and where it is prudent for the executors to plan well in advance, it is highly inconvenient, if not impossible, that the law of the trust or trusts cannot be determined until assets vest in the trustee. As the facts here illustrate, it is not until this actually happens that the residence of the trustee; the site of the assets, and the place of administration will be known. In my view the preferable date to assess the connection under Article 7 is the date of making the will. This provides certainty at an early time; accords with the common law, and for the reasons given in the extracts above, particularly from Harris and from Ford and Lee, is more likely to protect the expectations of testators.

[45] My conclusion then is that the proper law of the trusts, whether (as I prefer) as a matter of implication (Article 6) or as a result of the exercise prescribed by s 7 of the Convention, is Papua New Guinea.

[46] I add that Article 10 of the Convention is to the effect that, "The law applicable to the validity of the trust shall determine whether that law or the law governing a

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[20] Lawbook Company [24.2790].

[21] Above, p 228.

severable aspect of the trust may be replaced by another law." As Nygh (above) points out,[22] this may provide some relief where there is change in the circumstances which exist at the time of the settlements.

Question 2(a): Power to Appoint New Trustees

[47] The executor asks whether s 9 of the *Trustees and Executors Act* 1961 (PNG) allows him, as trustee, to appoint new trustees. His desire to do so is in train of a plan to retire as trustee of the will trusts after the administration of the estate is complete. Section 9 provides:

> "**9. Power of appointing new trustees.**
>
> (1) Where a trustee … –
>
> …
>
> (c) desires to be discharged from all or any of the trusts or powers reposed in or conferred on him; or
>
> …
>
> then –
>
> (e) the person nominated for the purpose of appointing new trustees in that event by the instrument (if any) creating the trust; or
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> (f) if there is no such person or no such person able or willing to act –
>
> (i) the surviving or continuing trustees; or
>
> (ii) the personal representatives of the last surviving or continuing trustee,
>
> may by instrument appoint another person or other persons to be a trustee or trustees in the place of that first-mentioned trustee.
>
> (2) On the appointment of a new trustee for the whole or a part of any trust property –
>
> …
>
> (d) it is not obligatory –
>
> (i) to appoint more than one new trustee when only one trustee was originally appointed; or
>
> (ii) to fill up the original number of trustees when more than two trustees were originally appointed,
>
> but where only one trustee was originally appointed a trustee shall not be discharged from his trust under this section unless there is –
>
> (iii) a trustee company specially authorized by Act to act as sole trustee; or
>
> (iv) at least two trustees to perform the trust; and

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22 [34.14].

…

(3) Where in a case not referred to in Subsection (1) or (2) it is desired to increase the number of trustees of a trust, the existing trustees or trustee may, with the written concurrence of the person or persons (if any) nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, by instrument appoint another person or other persons to be a trustee or trustees in addition to the existing trustee or trustees.

(4) A new trustee appointed under this section, whether before or after all the trust property becomes by law or by assurance or otherwise vested in him –

(a) has the same powers, authorities and discretions; and

(b) may act,

as if he had been originally appointed a trustee by the instrument (if any) creating the trust.

…

(6) This section has effect subject to the terms and provisions of the instrument (if any) creating the trust."

[48] Section 10 of the *Trustees and Executors Act* provides:

"**10. Retirement of trustee.**

(1) Where –

(a) there are more than two trustees; and

(b) one of them declares by deed that he wishes to be discharged from the trust; and

(c) his co-trustees and such other person (if any) as is empowered in that event to appoint trustees by deed consent to the discharge of the trustee and to the vesting in the co-trustees alone of the trust property,

the trustee wishing to be discharged –

(d) shall be deemed to have retired from the trust; and

(e) is by the deed discharged from the trust under this Act without a new trustee being appointed in his place.

(2) An assurance or thing necessary for vesting the trust property in the continuing trustees alone shall be executed or done.

(3) This section has effect subject to the terms and provisions of the instrument (if any) creating the trust."

[49] Notwithstanding the apparent width of the definition of the related word "trust" as including "the duties incident to the office of representative of a deceased person",[23] I am not convinced that the word "trustee" in ss 9 and 10 of the *Trustees and*

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[23] See s 1 *Trustees and Executors Act* 1961 (PNG).

Executors Act includes an executor. In particular, having regard to s 65 of the *Trustees and Executors Act* which makes specific, and more formal, requirements for an executor who desires to be discharged from his office, I am convinced that ss 9 and 10 (at least as is relevant to the facts here) apply only to trustees *per se*.

[50] As discussed above, at present the executor is not a trustee. However, I cannot see that there is any objection to his appointing new trustees under s 9 and then retiring under s 10 of the *Trustees and Executors Act* once he becomes a trustee, i.e., on assent, provided that the terms of those sections are complied with. In that latter regard I note that the material before me contemplated that an individual might be appointed as the new trustee with the intention that the existing trustee then retires. This would seem to be a breach of the provisions of s 9(2)(d)(iv) of the *Trustees and Executors Act.* Another proposal before me was that a trustee company be appointed. I do not know whether or not that company is authorised by any "Act" within the meaning of s 9(2)(d)(iii) of the *Trustees and Executors Act.*

Question 2(b): Power to Invest in Real Property

[51] Clause 4(c) of the will is expressed to give the executor power to "invest and change investments freely as if my Executor is beneficially entitled and this power includes the right to invest in property for occupation or use by a beneficiary." I read the word "executor" as shorthand for "executor and trustee" and construe the will as giving power to invest in real property. Section 6 of the *Trustees and Executors Act* provides that specific powers of investment given by ss 3, 4 and 5 of that Act are "in addition to the powers conferred by the instrument (if any) creating the trust". In my view then, the executor now, and the trustee after assent, has power to invest in real property.

Question 2(c): Construction of the words "Minor Beneficiaries"

[52] The executor sought guidance as to when, having regard to the words of cl 4(a) and (b), a beneficiary ceased to be a minor. Submissions were made as to an asserted uncertainty in Papua New Guinea law as to the age of majority.[24] In my view the question posed by the originating application, that is as to the cessation of minority at law, does not actually arise. The question which does arise is the meaning of the words "minor beneficiary".

[53] Inconsistently with the question in the amended application, the applicant's submissions said:

> "Assuming that the proper law of the will and the trust or trusts created under the will is PNG law, there is a question as to whether or not the older beneficiaries who are still under the age of 25, but who have passed the age of 18, are entitled to ask for payments to be made directly to them rather than to a parent or guardian."

[54] In drawing a distinction between beneficiaries who are over 18 but under 25, this submission does seem apt to address the meaning of the phrase "minor beneficiaries", but it then focuses on questions of discharge for payment, rather than the meaning of those words.

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[24] *Rohrlack v Evangelical Lutheran Church of New Guinea Property Trust* [1995] PNGLR 185; s 51 *Trustees and Executors Act* (1961) PNG; cf *Juvenile Courts Act* 1991 (PNG) s 1, definition of juvenile.

[55] Clause 4(b) of the will simply facilitates a pragmatic process whereby a parent or guardian can give a good discharge for money paid to a minor beneficiary. It does not raise any question as to whether or not beneficiaries who have obtained a legal age of majority can ask for payments to be made to them rather than to their parent.

[56] At common law a minor cannot give a good discharge, and for that reason there is an indication in the substance of cl 4(b) that "minor beneficiary" might mean a beneficiary who had not reached the age of majority. However I do not interpret that facultative provision as governing the meaning of the words "minor beneficiary" in circumstances where a construction of cl 4(a), the operative provision, tends in the opposite direction. And in my view cl 4(a) does not draw attention to the age of majority of any beneficiary, but makes provision for beneficiaries under the age of 25 before their interests become absolute. Under the will, beneficiaries under the age of 25 years obtain a contingent interest. Clause 4(a) provides that upon their becoming absolutely entitled they will bring into account payments received under cl 4(a). It seems to me that the words "minor beneficiary" mean a beneficiary who has not attained a vested interest, i.e. not attained the age of 25 years. Thus cl 4(a) of the will gives the executor, and the trustee (after assent), the power to apply funds in accordance with that clause to any of the beneficiaries who have not reached the age of 25 years, up until the time their interest becomes vested at the age of 25 years. I cannot see that s 51 of the *Trustees and Executors Act* 1961 (PNG) changes this position, by subsection (3), it is expressed to take effect subject to the will.

Question 3: Death of Minor Beneficiary

[57] A Court exercising jurisdiction under s 96 of the *Trusts Act* has power to give advice, rather than ruling, more traditionally, on disputes which have arisen. Nonetheless, as to the matter outlined at [1] above at point 3, I cannot see that any occasion for advice has arisen. No beneficiary has died; all are in good health. It is a matter with which I shall not deal. It is hypothetical.

Costs

[58] I will hear the parties as to how the costs of this matter ought to be dealt with.