

## A decisive moment

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Lee Chiwi reviews *Re BKR*, a recent ruling of the Singapore Court of Appeal dealing with mental capacity and undue influence.

### Key points

- **What is the issue?** *Re BKR* is a leading Singapore judgment on mental capacity, dealing with the tests and law of whether a person is able to make decisions relating to their property and affairs.
- **What does it mean for me?** Trustees setting up trusts settled by clients who may be on the verge of mental incapacity or under undue influence will find the judgment contains useful comments.
- **What can I take away?** Trustees need to review their onboarding processes to ensure they do not set up trusts where clients in fact lack the ability to make such decisions.

*Re BKR* is a recent decision of Singapore's Court of Appeal relating to a dispute concerning the mental capacity of a multimillionaire.<sup>1</sup> Applications were made pursuant to the *Mental Capacity Act* (the MCA)<sup>2</sup> which related to allegations that BKR was not able to make decisions relating to her property and affairs because of her mental impairment. Issues also concerned undue influence and the ulterior motives of the parties to the action.

A detailed discussion of the court's decision is beyond the scope of this article; the decision runs to some 108 pages, with the court's discourse on the issues that arose, its findings and its exposition of the law. Undoubtedly, other legal commentators will in due course elaborate further on the court's decisions on various issues, including:

- Whether an assessment of P's mental capacity takes into account P's actual circumstances.
- The correct approach in MCA proceedings where mental impairment interacts with undue influence.
- The procedure and practice in MCA proceedings to depart from an adversarial model of litigation towards a more inquisitorial model.

This article instead focuses on the comments and findings of the court in relation to the capacity of BKR as regards her setting up a trust. This may be of particular interest to trustees involved in setting up trusts for clients who may in fact be incapable of carrying out such acts or who are vulnerable to the influence of others.

## Facts and background

The parties involved in this case come from a prominent and very wealthy family in Singapore. The third respondent (BKR) had a net worth of some SGD200 million, largely coming from inheritance. Some of her family members had alleged that she had lost her mental capacity and that her declining memory had worsened over the years, warranting concerns from her family and bankers in UBS, DBS and JP Morgan.

She has three children, of whom the first respondent, a psychiatrist, is the youngest and married to the second respondent. The middle child is a barrister in Hong Kong and her eldest child is a doctor, referred to respectively as 'CK' and 'NG'. The relationship between the siblings was not harmonious and lines were drawn with CK and NG on one side, and the first and second respondents on the other. BKR also has two sisters, who were the appellants. It is against this background that BKR repeatedly expressed the belief that this case was an action brought by CK, abetted by the appellants, in an attempt to gain control over and access to her substantial wealth. The appellants claimed that the first respondent and her husband, the second respondent, manipulated and influenced BKR for financial benefits.

## **Creation of the trust**

The trust in question was dated 26 October 2010 and created with DBS. The trustee was a BVI trust company. By way of background, BKR had created two other trusts with two different banks in 2007. One was with JP Morgan to provide for herself; the other was with UBS to provide for the education of her eight grandchildren.

The trust names a specific company beneficiary ([B] Ltd) and a class of beneficiaries, being 'Charities to be determined'. In a letter of wishes also dated 26 October 2010, BKR expressed her wishes that:

- an amount of SGD5 million be settled into [B] Ltd's bank account and replenished periodically;
- upon her death, [B] Ltd should have its bank account balance topped up to SGD10 million and [B] Ltd should then become the sole property of the protector; and
- after her death, the trustee should apply the trust property to charitable causes as recommended by a philanthropic panel to be chaired by the first respondent.

Until 27 July 2012, it does not appear that there was any express provision as to what the money in [B] Ltd's bank account would be used for during BKR's lifetime; it was only on that day that a deed of understanding was entered into between the third respondent, the trustee and the first respondent, which provided that [B] Ltd's monies would be used for the 'exclusive purpose of maintaining [the third respondent]'.

## **The court's findings**

The court, in determining whether BKR was unable to make decisions relating to her property and affairs, scrutinised her decision in setting up the trust. The court could not see any good reason for establishing the trust. If it was meant to provide for the third respondent's material needs during her lifetime, there was already in existence a trust with JP Morgan. Furthermore, prior to the execution of the deed of understanding on 27 July 2012, some 21 months after the trust was created, it appears that there was no legal obligation on the trustee to apply the money in [B] Ltd's bank account towards the third respondent's needs. If the objectives of the trust were meant to ensure that a substantial portion of her wealth was put to charitable purposes; make a gift of SGD10 million to the first respondent; and disinherit her other children, CK and NG, after her passing, this could all have been achieved by making the relevant bequests in a will.

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The court found her ability deficient to use and weigh the information relevant to her decision to set up the trust, as she was unable to explain why it was necessary or even desirable to create the trust. She did not seem capable of (i) considering whether one of these objectives was already being met by other trust arrangements already in existence, and (ii) assessing the relative merits and demerits of setting up the trust versus drawing up a will. Moreover, the evidence suggested that those were not in fact her objectives. It is apparent that the third respondent believed that, had she not established the trust, CK would have come after it and eventually left her bereft. The court also found a strong case for inferring that the third respondent was acting under the undue influence of the first and second respondents when she established the trust and transferred her assets to DBS. In this connection, the court also found it material that, in BKR's dealings with UBS and JP Morgan, she had given inconsistent and conflicting instructions to her bankers, such as in her decision to transfer all her UBS assets to DBS.

The court eventually ruled that the statutory tests of mental incapacity under the MCA had been met, arising from a combination of mental impairment and the circumstances of the undue influence to which BKR was subject. The court also held that she lacked the ability to make the decision to set up the trust (and the decision to transfer her UBS assets to DBS), notwithstanding the assistance she had received, and that the practicable steps taken by her present professional advisors were not sufficient to help her retain her decision-making ability. Accordingly, the court ordered that those decisions were to be set aside and deputies were to be appointed.

## **Conclusion**

When trust practitioners face clients with potential issues of mental incapacity or possibly under the undue influence of other persons, they need to ensure that the client clearly understands the objectives for setting up a trust. The decision in *BKR* establishes that it will be necessary that the client has the ability to understand the information relevant to the decision to set up the trust. Such

information includes how the trust will work, what benefit the client stands to gain from it, and what costs and risks are involved. It will also be incumbent on the practitioner to take time to explain the distributions, the amounts and the persons who will benefit from the trust.

If another instrument, such as a will, could similarly achieve the client's objectives, then practitioners should raise and compare the pros and cons of either using a trust or drawing up a will. Red flags are also raised where certain children are excluded as beneficiaries but other children benefit substantially or are appointed as protectors without clear rationale. Finally, the letter of wishes also provides much insight into the trust objectives of the client, and practitioners should also be wary if this was drawn up under the undue influence of others.

- See more at: <http://www.step.org/journal/step-journal-july-2015/decisive-moment#sthash.sBVhSfNz.dpuf>