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UPDATE

Discharged bankrupt can now be an executor in Jersey

Update prepared by Justin Harvey-Hills (Partner, Jersey), Luke Olivier (Counsel, Jersey), Bethan Watts (Associate, Jersey)

The Royal Court of Jersey has recently handed down judgment in In the Matter of the Will of X [2018] JRC 030A where it decided that, contrary to a long-standing policy of the Registrar of Probate, an individual who had previously been declared bankrupt in England but had since been discharged was suitable to act as the executor of an estate. Justin Harvey-Hills (Partner), Luke Olivier (Senior Associate), and Bethan Watts (Associate) acted for the Executor.

The executor was the sole named executor of his late mother's will and the only beneficiary of the will. He had sought to have the will admitted to probate, but the Judicial Greffier (Registrar of Probate) (the **Registrar**) had refused to permit him to be appointed as executor of the will on the basis that it was a policy (the **Policy**) of the Representor not to allow someone to be appointed as the executor of an estate if they are or have ever been bankrupt, whether in Jersey or another jurisdiction. The Registrar referred the matter to the Royal Court under Article 6(9) of the Probate (Jersey) Law 1998. We believe that this is the first time such a referral has been made.

On behalf of the Executor, we argued that the Policy was unlawful. Its origins were unclear. It amounted to a blanket ban on anyone who had ever been bankrupt being appointed as an executor no matter what the circumstances. There was no prima facie reason why an individual who has been discharged from bankruptcy should be prevented from ever being appointed as executor of an estate. Just because someone has previously been bankrupt did not mean that they had acted improperly.

Even if it was legitimate to have a policy on the appointment of discharged bankrupts, that policy could not be absolute. The fact that it was absolute amounted to a failure on the part of the Registrar properly to exercise her discretion. In this case, there were compelling reasons why the Executor would be the most appropriate candidate to be appointed as executor of the estate in question, but the Policy had been applied on a blanket basis without due consideration of those reasons. This amounted to an unlawful fetter on the discretion which was conferred upon the Representor under the Probate Law.

The Royal Court concluded that the Policy should be qualified and not absolute.

It considered Article 24 of the Bankruptcy (Désastre) (Jersey) Law 1990 which clearly prevented someone who was *en désastre* (bankrupt) from being appointed as an executor or administrator of an estate. On the basis of the maxim *inclusio unius exclusio alterius*, the Court held that the ban ceased on the bankrupt being discharged. The Court also looked at relevant English and Scottish legislation which did not appear to prevent a discharged bankrupt from acting as executor.

However, it was not the case that the question of whether an executor had ever been bankrupt might never be relevant. The office of executor was an important one and the Court's general supervisory power over the appointment of trustees was one that was capable of being applied to applications for probate or administration. There might be circumstances where those entitled to the estate would wish to contend that an executor who had previously been bankrupt was not a fit and proper person to hold the position. Relevant factors might include how long ago the bankruptcy had taken place, how long it had lasted, the

amounts involved and whether there was any evidence of mal-practice in the events leading up to the bankruptcy.

In this case, the Court held that there were strong reasons for the Executor's appointment to be recognised and the will admitted to probate. He had been discharged for seven years. He was the sole executor and sole beneficiary. The estate was involved in litigation and needed to be represented. The Court therefore directed that the Executor's appointment should be recognised and the will admitted to probate.

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