overlook the irreversible consequences of going through a puberty which conflicts with gender identity. Greater reflection on the positive impact of PBs and the potential consequences of limiting treatment would have allowed a more balanced proportionality analysis – particularly as gender-affirming care engages the "right of transgender persons to personal development and to physical and moral security" under Article 8 E.C.H.R. (*YY v Turkey* (Application no. 14793/08), Judgment 10 March 2015, at [109]).

Finally, even if one concedes that the High Court was correct to establish the stricter, eight-factor *Gillick* competence test for PBs, it is unclear why the judges decided to issue additional, quasi-bright-line guidance on the capacity of children under 16 years to consent. To the extent that *Gillick* assessments are "treatment and person specific" (at [145]), surely expert clinicians – having an established professional relationship with a minor and free from potentially unhelpful assumptions – are best placed to determine whether specific young people satisfy the relevant factors, without recourse to a best interest order if unnecessary.

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## THE RESERVATION OF POWERS BY SETTLORS: INTENTION AND ILLUSION

IN *Webb v Webb* [2020] UKPC 22, the Privy Council held inter alia that the reservation of powers by the settlor of two discretionary trusts was so extensive that the trusts were invalid. In matrimonial proceedings in the Cook Islands, Mrs. Webb had contended that the Arorangi Trust and the Webb Family Trust, both of which were effectively settled by Mr. Webb, were invalid, with the result that the trust assets were available for division as matrimonial property. Her two key arguments were that Mr. Webb had never intended to alienate the beneficial interest in the trust assets, alternatively the trusts were shams. In closing submissions at first instance these arguments were merged into one, which Potter J. treated as "essentially a sham allegation" and rejected ([2017] CKHC 31, at [51]–[52]). The Cook Islands Court of Appeal agreed that the trusts were not shams but allowed Mrs. Webb's appeal on the basis that Mr. Webb never intended to dispose of the beneficial interest and the trust instruments failed to alienate it effectively ([2017] CKCA 4, at [65]). Mr. Webb appealed to the Privy Council.

Because the trust instruments were materially identical, they stood or fell together. Lord Kitchin (giving the judgment of the Board) reviewed the terms of the Arorangi Trust and emphasised some key features (at

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[80]–[82]). Mr. Webb was appointed as sole trustee, and the trust instrument named only two beneficiaries: Mr. Webb and his son. The trust permitted the trustee to appoint a Consultant to advise the trustee in the administration and management of the trust and the investment of trust assets, and who had full discretion to remove and replace the trustees, request (with any nominated beneficiary) the early vesting of the trust assets and consent to a variation by the trustee of the trust instrument. Mr. Webb had appointed himself Consultant at the outset. The trust also permitted Mr. Webb to exercise his powers and discretions as trustee notwithstanding a conflict of interest.

His Lordship then identified (at [83]–[87]) three ways in which Mr. Webb could exercise his extensive powers to secure the benefit of the trust assets for himself. The first and most important was through clause 10, which reserved to Mr. Webb a non-fiduciary power to appoint himself as sole beneficiary in place of the existing beneficiaries. As trustee, Mr. Webb also had the power to apply the whole of the capital and income of the trust for his personal benefit and to the exclusion of any other beneficiary. He could also ensure that all the trust assets vested in him, either by exercising the powers of the trustee to resettle the trust assets upon another trust in favour of any of the beneficiaries of the Arorangi trust or, with his own consent as Consultant, vary the terms of that trust. However, he had to exercise the second and third of these powers consistently with his fiduciary obligations.

Lord Kitchin held that the powers reserved to Mr. Webb could be analysed in two ways, either of which rendered the trust invalid (at [89]). First, his powers were so extensive that he could not be said to have disposed of any of the property purportedly settled on or acquired by the trusts (in this connection, Lord Kitchin thought one might also ask whether the trust lacked the irreducible core of obligations required of trustees). Second, Mr Webb's powers were such that "in equity and in all of the circumstances of this case, he can be regarded as having had rights in the trust assets which were indistinguishable from ownership". This was because Mr. Webb had the power at any time to secure the benefit of all the trust property to himself and to do so regardless of the interests of the other beneficiaries. Therefore, "the trust deeds failed to record an effective alienation of any of the trust property" and "[t]he bundle of rights which he retained is indistinguishable from ownership".

The Board's decision has practical significance, as it suggests that settlors should take care to ensure that the validity of the trust is not jeopardised by the reservation of powers. In particular, where the settlor is also a beneficiary and trustee, it would be wise to avoid reserving a non-fi duciary power like that conferred by clause 10, as the exercise of such a power would have the effect of merging in the same person the trustee's legal title and the beneficiary's beneficial interest, thereby collapsing the

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trust (as Lord Kitchin noted at [87]). Mr. Webb had not exercised that power but its mere existence was central to Lord Kitchin's conclusion that he had not effectively disposed of the beneficial interest in the trust assets. It is unclear whether the reservation of such a power by the settlor would be fatal in circumstances where the settlor was either not the sole trustee or not a trustee at all, and it remains to be seen what impact the decision in *Webb* will have in offshore jurisdictions, where the reservation of powers may be explicitly permitted by legislation.

Lord Kitchin's conclusion that the powers reserved by Mr. Webb rendered the trust invalid is surely correct. However, his reasoning is brief and in places a little opaque. For example, it is difficult to see a clear distinction between the question whether Mr. Webb "could not be said to have disposed of any of the property purportedly settled on or acquired by the trusts" and whether "in equity he can be regarded as having had rights which were tantamount to ownership". Either Mr. Webb created a valid trust (in which case someone else was entitled to the beneficial enjoyment of the trust assets in equity, at least in part) or he did not (in which case Mr. Webb retained absolute ownership).

The question then is: what was it about the extent of the powers retained by Mr. Webb that prevented the creation of a valid trust? It is submitted that the answer lies in the doctrine of certainty of intention, as the Court of Appeal recognised. To create a trust, the settlor must intend to confer the beneficial enjoyment of the assets on someone else (B) *and* to do so by imposing legally binding obligations on himself and/or someone else (T) to exercise control over those assets for B's benefit. If either part of this composite intention is missing, the settlor does not intend to create a trust.

Although a settlor may *subjectively* intend to create a trust, equity measures the effectiveness of a settlor's intentions by reference to whether they are adequately manifested, e.g. in a trust instrument. As French C.J. explained in *Byrnes v Kendle* (2011) 243 C.L.R. 253, at [61]–[62],

> the question is what the settlor or settlors did, not what they intended to do. That truth tends to be obscured by constant repetition of the need to search for an "intention to create a trust" .... [T]he "intention" referred to is an intention to be extracted from the words used, not a subjective intention which may have existed but which cannot be extracted from those words.

Thus, if a trust instrument purports to create a trust but the extent of the powers reserved to the settlor means that any part of the composite intention referred to above is missing, the trust will be invalid.

As the Court of Appeal put it, the "ultimate question ... [was] whether the powers reserved to this respondent-settlor were inconsistent with an intention to irrevocably relinquish a beneficial interest" ([2017] CKCA 4, at [56]). Although Mr. Webb subjectively intended to enter into the arrangements set out in the trust instruments (and therefore they were not

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shams), the extent of his ability to control the trust assets meant that the *effect* of the instruments was not to manifest an intention to transfer the beneficial interest in the assets to anyone else, and thus the intention necessary to create a trust was missing. This analysis corresponds with equity's usual analytical framework and helps to explain Lord Kitchin's conclusions.

Although the moniker "illusory trust" has been used to describe the failure of a trust for reasons similar to those given in *Webb* (e.g. *Re AQ Revocable Trust* [2010] 13 I.T.E.L.R. 260 (Bermuda)), its invocation in this context was deprecated in *Clayton v Clayton* [2016] NZSC. 29, at [123] (obiter dicta) and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* (2017) 20 I.T.E.L.R. 905, at [169]. Counsel for Mrs. Webb did not rely on the "illusory trust" concept at first instance ([2017] CKHC 31, at [55]), and although both cases were cited in the Court of Appeal, neither it nor Lord Kitchin addressed the issue in these terms. Perhaps this unhelpful and distracting label has itself turned out to be illusory.

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## WHAT DOES IT MEAN TO BE A FIDUCIARY?

IN *Lehtimäki v Cooper* [2020] UKSC 33, the Supreme Court applied a hitherto unauthoritative test for when ad hoc fiduciary relationships arise. It also suggested that the scope of fiduciary obligations is wider than previously established.

When their marriage collapsed, the co-founders of the Children's Investment Fund Foundation (UK) ("CIFF") – Sir Christopher Hohn and Jamie Cooper – agreed that it should pay $360,000,000 to Big Win Philanthropy ("BWP"). BWP would be the vehicle for Cooper's future benevolence. CIFF was a charitable company limited by guarantee. Its directors were Hohn, Cooper and several third parties. Its members were Hohn, Cooper and Marko Lehtimäki.

CIFF's planned disbursement constituted "a payment for loss of office . . . to a person connected with a director" under section 215 of the Companies Act 2006. It therefore required the approval of CIFF's members (s. 217) and the Charity Commission's consent (Charities Act 2011, s. 201). CIFF sought that consent. However, rather than provide it, the Commission authorised the bringing of proceedings to obtain the court's endorsement of the transaction and any necessary directions regarding a members' resolution.

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