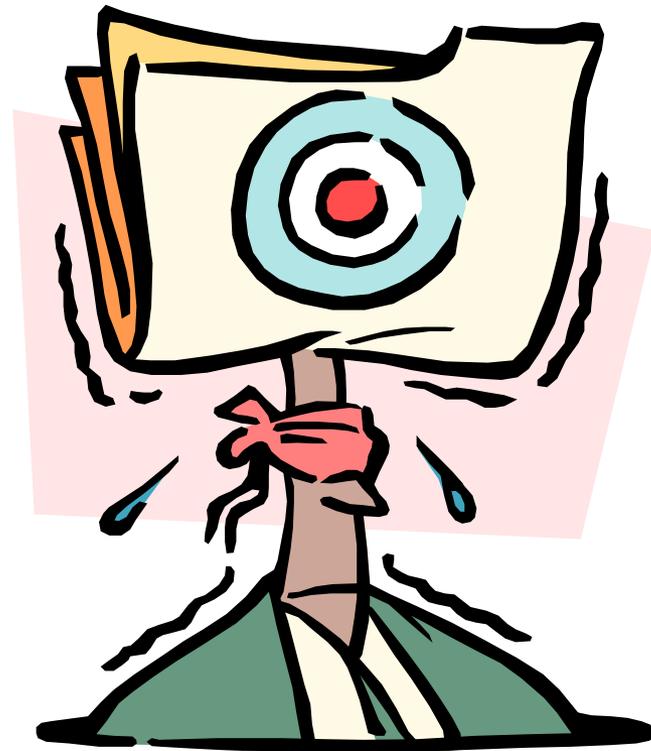




TRUSTEE'S POSITION ON DIVORCE OF BENEFICIARIES

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CONSIDERING DIVORCE ON CREATION OF TRUST

- *White v White (2000)* meant England an attractive jurisdiction for divorce
- Divorce courts do not always apply Chancery principles
- More & more challenges to offshore trusts
- Desirable to consider issue of possible future divorces when setting up trust
- Divorce of settlor & spouse and then next generations

ONSHORE COURTS' VIEWS OF OFFSHORE TRUSTS

- Divorce Courts in many counties are increasingly familiar with offshore structures – “They neither impress, intimidate nor fool anyone” (*J v J (Disclosure: Offshore Corporations) (2004)*)
- If divorcing spouses are not totally open the courts may assume assets are being hidden
- There could be a serious costs implication to this approach
- This affects the position of trustees, who although they should be separately advised, need to be aware of the position of the divorcing beneficiary
- Trustees need to be aware that an order can be made which effectively benefits a spouse who may not even be a beneficiary
- Parties to English proceedings may try to join offshore trustees in proceedings; trustees should only agree if courts in jurisdiction of trustees would sanction any order

PRE-NUPTIAL AGREEMENTS & LETTERS OF WISHES

- Pre-Nuptial agreements not enforceable in England, and some other countries
- However courts are giving some weight to them
- Indications to trustees as to what should happen on divorce helpful but trustees have duties to all beneficiaries
- Letters of wishes can help or hinder
- Can help to guide trustees in a divorce situation
- Can hinder if it indicates a substantial “entitlement” from trust for divorcing beneficiary

DISCLOSURE OF INFORMATION (1)

- Courts have wide powers to order disclosure of information as well as beneficiaries having certain rights of information eg *Schmidt v Rosewood Trust (2003)*
- Courts may order beneficiary to obtain disclosure of assets and accounts of offshore trust. If trustees will not disclose, this puts beneficiary in difficult position
- *Schmidt* suggests that if trustees decline to give information, beneficiary has to go to court to see if court will order disclosure
- Other courts are generally giving the beneficiaries a right to information – recent case of *Countess Bathurst v Kleinwort Benson (CI) Trustees Ltd (Guernsey) (2004)*
- S.25 MCA – trust assets are an actual or potential financial resource
- *Schmidt* and other cases suggest that underlying company's accounts should also be disclosed
- Letters of wishes – courts will usually want to see those – see *Rabaiotti (Jersey) (2000)*

DISCLOSURE OF INFORMATION (2)

- Generally courts will not sanction an approach to trustees by a non-beneficiary
- Onshore court could issue Letters Rogatory, which would seek the assistance of the offshore court in the proceedings
- If there is a suggestion that the assets have been settled to put them beyond the reach of the non-beneficiary spouse, then a *Norwich Pharmacal* type order may be sought in respect of assets sought to be hidden (applied in *Re Murphy's Settlements (1998)*)
- If trustee is holding assets that have been put there to be beyond the reach of the other spouse, some courts will order that the trustee must provide information eg in *Guernsey – O'Dwyer Russell (2001)*

DISCRETIONARY TRUSTS

- Courts are seeing some discretionary trusts as giving beneficiaries an “entitlement” equivalent to their expectation
- Very difficult for trustees to accept this principle when they will always apply trust principles
- However, trustees do have a duty to consider the interests of all the beneficiaries, and those interests must extend to considering the interests of the divorcing beneficiaries
- *Brown v Brown (1989)* – wife used trust as piggy bank and court regarded trust assets as hers; she was guilty of contempt and trustees felt it was in her interest to pay husband

RESERVED POWERS TRUSTS & A MULTIPLICITY OF TRUSTS

- Powers reserved to a settlor can mean the court will force the settlor to exercise those powers for benefit of divorcing spouse
- Consider trusts for specific beneficiaries which will only be discloseable by that beneficiary
- Consider trust where beneficiary is not named but can be added in later, but care over Letter of wishes

BENEFITING A NON-BENEFICIARY (1)

- *Compass Trustees v McBarnett (2002)*
 - Beneficiaries included spouses but not former spouses
 - During financial provision proceedings, decree absolute granted so wife was “former wife”
 - During English proceedings (although not Jersey proceedings) wife was a wife, and therefore appropriate to make payment to former wife
 - Therefore Jersey court would give effect to that position and benefit her by varying trust
 - Jersey court applied doctrine of Comity – where the courts will try to assist each other where they could
 - Good example of care needed over named beneficiaries
- *X Trust (2002-3)*
 - Court order against husband beneficiary in order to pay wife non-beneficiary was not a fraud on a power

BENEFITING A NON-BENEFICIARY (2)

- *Charalambous v Charalambous (2004)*
 - Cypriot resident trustees of Jersey law trust set up by husband's mother and which had English situate assets
 - Husband had power to remove and appoint trustees
 - Trust deed gave exclusive jurisdiction to Jersey courts
 - English Court of Appeal said it had jurisdiction in any case
 - Rejected arguments on *Recognition of Trusts Act 1987* and *Art 8 of Hague Convention* (states that law of trust prevails)
 - Reason was Court of Appeal said that settlement could not override wife's right to apply for finance from her husband on divorce in jurisdiction where divorce being heard
 - But even if wife got order in England, she would "probably" still have to take separate proceedings in Jersey to bind trustees

COMMON LAW SPOUSES

- Need to be clear whether the person is within class of beneficiaries or specifically named
- Probably will not be within class of “spouse” but this may change
- Raise issue with settlor re children & grandchildren
- Watch the law change in the future

CONCLUSIONS

- Raise the issues with the settlor at the outset
- Consider obligations to disclose information
- Be careful with Letters of wishes
- Consider how to comply with obligation to act in best interests of the beneficiaries
- Care with reserved powers trusts
- Consider what protective measures can be implemented at the outset
- Do not exclude a spouse when the marriage becomes difficult

