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-NUPPTIAL 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
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