

CAYMAN ISLANDS

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INTRODUCTION

The Cayman Islands are a British Overseas Territory comprised of three islands. They are located in the Caribbean Sea, immediately to the south of Cuba and north-east of Jamaica. As the Islands were acquired by settlement, rather than conquest, they are not a self-governing territory; rather, a Governor is appointed by the King of the United Kingdom, and the Governor in turn appoints a Premier. However, the Islands are not part of the United Kingdom.

The Cayman Islands has its own constitution and bill of rights, together with a local parliament (known as the Legislative Assembly) comprised of 19 elected members of parliament, the Attorney-General and the Deputy Governor. The Legislative Assembly enacts local legislation. The extension of English law to the Cayman Islands, together with court procedure, has been confirmed by section 40 of the Interpretation Act (1995 Revision) and section 18(2) of the Grand Court Act (2015 Revision) respectively, to the extent that the law and procedure has not been amended by local laws.

The Cayman Islands has a modern and sophisticated judicial system comprised of a Summary Court, Grand Court and Court of Appeal. Its final appellate court is the Judicial Committee of the Privy Council. Although English statutes do not apply to the Cayman Islands unless expressed otherwise, local legislation frequently adopts equivalent English legislation. Similarly, while English common law is not binding in the Cayman Islands, it is considered to be persuasive.

The Cayman Islands trusts law is governed by the Trusts Act (2021 Revision) ("Trusts Act"). Its matrimonial law is governed by the Matrimonial Causes Act (2005 Revision) (MCA), supplemented by the Matrimonial Causes Rules (2021 Revision) (MCR).

The Family Division of the Grand Court of the Cayman Islands ("Family Court") has jurisdiction in relation to nullity of marriage, dissolution and judicial separation in circumstances where:

- either of the parties lived in the Islands within one year of presentation of the petition; or
- the party filing the suit, being a female, was ordinarily resident in the Islands for at least two years preceding presentation of the petition.

While civil partnerships are recognised, same-sex marriage is not recognised in the Cayman Islands.

The Family Court also has power to make ancillary orders in the form of financial remedies, including:

- interim orders, such as use of a matrimonial home pending the conclusion of proceedings or injunctions for the protection of property;
- orders for the sale of property;
- property transfers;
- payments for children and spouses;
- periodic payments to the other spouse and/or for the benefit of children; and
- variation of nuptial settlements.

A couple can divorce in the Cayman Islands if they have been "domiciled" there for at least one year on the date that one of them petitions for divorce. Domicile in this context means that one or other of the parties can demonstrate an intention to reside in the Cayman Islands permanently. Alternatively, a wife can petition for divorce if she has been "ordinarily resident" in the Cayman

Islands for at least two years prior to filing the petition, regardless of where the other spouse lives. Divorce in the Cayman Islands is based on the MCA and the Maintenance Act (1996 Revision), supplemented by the MCR. Parties to divorce proceedings in the Cayman Islands are still required to provide fault-based grounds for divorce, for example, adultery, desertion and unreasonable behaviour. The court must be satisfied that the marriage has broken down irretrievably.

There is no community property regime in force and the court has discretion pursuant to sections 19 and 21 of the MCA to decide upon the division of assets on divorce, taking into account a number of factors set out in the applicable legislation, supplemented by the common law. In *Billes v. Anco* [2011] (2) CILR 74 (subsequently confirmed by the Court of Appeal in *McTaggart v. McTaggart* [2011] (2) CILR 366) it was established that the court will approach the division of assets on divorce in accordance with the “modern view”. That is, there should be no discrimination based upon the nature of the roles undertaken by the parties to the marriage, such that the court’s starting point is a 50/50 split of assets.

1. DIVORCE AND TRUSTS

The Cayman Islands is one of the leading offshore jurisdictions for the establishment and administration of trusts. Although the Cayman Islands is not a party to the Hague Trust Convention, Cayman Islands law recognises trusts whether governed by Cayman Islands law or by the laws of another country, although it has “firewall legislation” which prevents the application of certain foreign laws where they conflict with Cayman Islands trust law. It has a very well-developed body of case law concerning trusts and trust disputes and its principal courts, the Grand Court and the Cayman Islands Court of Appeal, are recognised internationally as a leading source of trust jurisprudence.

In the context of foreign matrimonial proceedings, an issue which frequently arises is whether a foreign matrimonial award (or nuptial settlement) is capable of being enforced against a Cayman Islands trust. A trustee has the benefit of the firewall provisions in sections 90 to 93 of the Trusts Act, which are intended to preserve the validity of Cayman Islands trusts. The provisions are discussed in more detail below but by way of example, section 93 of the Trusts Act does not recognise a foreign judgment, nor shall such a judgment be enforceable or give rise to any estoppel where it is at odds with the terms of the trust or any rights arising from them, nor shall it defeat such rights pursuant to the terms of the trust. Essentially, Cayman Islands trusts are protected from interference by orders of foreign courts.

Consequently, where there is a matrimonial claim to: (1) trust assets of a Cayman Islands trust as part of a matrimonial award; or (2) treat the assets of a trust as belonging to a spouse or otherwise being a “financial resource” from which maintenance or a lump sum can be satisfied, the treatment of the trust assets of a trust governed by Cayman Islands law, and any potential variation of its terms is sought as a remedy, early and careful consideration should be given as to whether any order made by a foreign court is capable of enforcement in the Cayman Islands (given the broad scope of the firewall legislation).

If divorce proceedings have been commenced outside the Cayman Islands but the trust assets are located within the jurisdiction of the foreign family court, it will be far more difficult to invoke the firewall legislation where steps are taken to enforce a matrimonial order against those trust assets. Where trust assets are located outside the jurisdiction of a foreign family court, consideration will often be given as to whether the trust may be established as being a sham. An allegation of sham against a Cayman Islands trust goes to the validity of the trust, which also necessitates consideration of the firewall legislation. A party alleging the sham must prove that neither the settlor nor the trustees genuinely intended to create the legal relationship and prove that the settlor never intended to part with the legal ownership of property. In the absence of clear evidence, there is a high threshold for proving sham. Similarly, given a settlor's statutory right to reserved powers under the terms of a trust in the Cayman Islands, it is necessary for them to be considered before an allegation of sham is made.

1.1 Financial disclosure

Each party to divorce proceedings in the Cayman Islands is required to provide full and frank disclosure in relation to their assets, liabilities, income, pensions and any interests in trusts located anywhere in the world (regardless of whether it is contingent or otherwise). This includes an interest under a discretionary trust. If a party believes that such interest may never be realised and/or has no value, they must provide reasons for that contention.

Where a party to divorce proceedings who is a beneficiary of a Cayman Islands discretionary trust seeks information from a trustee about the trust, the principle in *Schmidt v. Rosewood Trust Ltd* [2003] UKPC 26 applies in relation to the disclosure of trust information. The starting point is that no beneficiary has a right to disclosure of trust information. However, unless the trust deed expressly provides otherwise, a trustee is usually obliged to provide a copy of the trust deed and any supplemental deeds, together with accounts which reveal the amount of the trust fund. A trustee is not obliged to provide information relating to a trustee's deliberations, the reasons for its decisions and any material which was considered for that purpose. Nor is a trustee usually required to provide any letter of wishes. The position is even more stark in relation to STAR trusts (Special Trusts (Alternative Regime), Part VIII, Trusts Act); unless the trust deed expressly provides otherwise, a trustee is usually only required to provide information about a STAR trust to an enforcer and a beneficiary is not entitled to any information about the trust.

For trustees, where divorce proceedings are commenced in a foreign jurisdiction and a foreign family court seeks disclosure of trust assets by a trustee of a Cayman Islands trust, the trustee will have the benefit of the firewall legislation mentioned above, which will render orders for disclosure by a foreign court unenforceable. That is, unless the trustee elects to submit to the jurisdiction of the foreign family court. Otherwise, it is not under any obligation to disclose anything relating to the trust where a beneficiary of the trust is a party to foreign divorce proceedings.

Nevertheless, in certain circumstances, a trustee might determine that compliance with a foreign court order for disclosure of certain information about a trust might reduce or negate a potential threat to the trust assets arising from divorce proceedings. It is a subjective, not objective, test. The trustee will, no doubt, weigh up all competing factors in determining whether to comply with a disclosure order,

including the fact that the trustee has a duty to account to beneficiaries for the administration of the trust and whether it is in the best interests of the beneficiaries. However, it is considered prudent for a trustee to apply to the Grand Court to “bless” its decision to disclose trust information. That way, if the trustee discloses certain information to foreign courts in compliance with an order, it cannot subsequently be sued by the beneficiaries for breach of trust and confidentiality. Section 48 of the Trusts Act provides that a trustee may apply to the Grand Court “for an opinion, advice or direction on any question respecting the management or administration of trust money or the assets...”. The Grand Court may also make such an order in the exercise of its supervisory jurisdiction over trusts.

Efficacy of foreign orders for disclosure

The judgment in *The Matter of the A Trust* [2016] 2 CILR 416 confirmed that orders for disclosure by foreign courts in relation to a Cayman Islands trust are not enforceable against a Cayman Islands trustee or the trust assets. However, it is important to distinguish between a disclosure order and any final order in divorce proceedings where assets of the trust are located in the foreign jurisdiction where the orders are made. In that scenario, a Cayman Islands trustee may still be bound by such orders.

1.2 Financial orders

Obligations of a spouse who is a beneficiary of a trust governed by Cayman Islands law

Regardless of whether a foreign family court has made a financial award in divorce proceedings which requires a beneficiary of a Cayman Islands trust to pay income or capital to a spouse, a beneficiary usually does not have any power to request that the Cayman Islands trustee makes a distribution to them so that they might comply with such an order. While the firewall legislation protects the trust from orders made against it, it does not afford beneficiaries the same level of protection. As a result, beneficiaries are left in a predicament where a financial order cannot be satisfied without the trustee’s assistance.

Where a trustee is considering making a distribution for that purpose, seeking the court’s blessing before doing so is advised. The importance of doing so cannot be overstated, as a trustee making a distribution to enable a beneficiary to discharge a financial order — in circumstances where the distribution will end up in the hands of a spouse who might not be a beneficiary of the trust — potentially exposes the trustee to a claim for breach of trust. Other members of the class of beneficiaries might be opposed to such a distribution, given the impact it might have on the size of the trust fund. Where a trustee refuses to accede to a beneficiary’s request for a distribution for that purpose, an aggrieved spouse is unlikely to benefit from taking enforcement action which attempts to bind the trust. The Royal Court of Jersey has previously confirmed that it is not possible for a judgment creditor, such as a spouse with an unsatisfied matrimonial award, to enforce its judgment against the interest of a discretionary beneficiary under a Jersey trust (*Kea Investments Ltd v. Watson* [2021] JRC 009). Although judgments of the Channel Islands are only persuasive (but not binding), the judgment provides useful guidance as to the position which is likely to be adopted in the Cayman Islands.

The English Court of Appeal has previously held that, before treating an interest in a discretionary trust as an asset for distribution in proceedings for a financial remedy, the court must conclude that the trustees “would be likely to advance the capital [in the trust to the spouse] immediately or in the foreseeable future” (see *Charman v. Charman (No.2)* [2007] EWCA Civ 503). The objective is to establish what a trustee is likely to do. However, such a finding is unlikely to have any bearing on any related decision taken by a Cayman Islands trustee. Some commentary suggests this is only intended to provide a trustee with “judicious encouragement”, so it is unlikely to have significant effect on the decision of a Cayman Islands trustee.

Obligations of trustees of trusts governed by Cayman Islands law with regard to court orders made in divorce proceedings filed in the Cayman Islands requiring payment of income and/or capital

The Family Court has the power to make orders affecting trusts, subject to such orders complying with Cayman Islands trust law.

Obligations of trustees of trusts governed by Cayman Islands law with regard to orders made in divorce proceedings filed in a foreign jurisdiction requiring payment of income and/or capital

See the previous section in relation to the firewall legislation. Pursuant to section 90 of the Trusts Act, the following questions in relation to a Cayman Islands trust are to be determined according to Cayman Islands law:

- the capacity of a settlor;
- any aspect of the validity of the trust or its construction or the effect thereof;
- the administration of the trust, including the powers, rights, obligations and liabilities of trustees; and
- the existence and extent of powers and the validity of the exercise of them.

In addition, no trust shall be declared void or voidable because the laws of a foreign jurisdiction prohibit or do not recognise the concept of a trust, or the trust defeats any rights, claims or interests conferred by foreign law (section 91). This also applies to heirship rights conferred by foreign law, which shall not be recognised (section 92); nor shall a foreign judgment be recognised in so far as it is inconsistent with the above provisions (section 93).

The Grand Court has previously ordered that, in certain circumstances, a trustee should request a foreign court to direct the courts of the Cayman Islands to act as an auxiliary court for determining questions relating to a Cayman Islands trust by only applying Cayman Islands law (see *HSBC International Trustee Limited v. Tan Poh Lee & Ors* [2019] CIGC J1107-3).

The efficacy of the firewall

See Section 1, above, on firewall legislation. The location of the assets of a trust will be a determinative factor in relation to the effect of the firewall legislation.

Where trust assets are at risk because they are located outside of the Cayman Islands, a trustee should consider applying to the Grand Court for directions as to whether: (1) it should submit to the jurisdiction of the foreign courts; and, if so, (2) it should comply with the applicable foreign order. In *The Matter of the A Trust*, the Cayman courts confirmed that the consequence of the firewall legislation was

that any orders made by the English High Court against the trustee would not be enforceable. Although the Grand Court held in *Geneva Trust Company (GTC) SA v. IDF (by her court appointed guardian GM) & Anor* (“*The Stingray Trust*”) (Unreported, GCCl, 21 December 2020) that if a party submitted to a foreign jurisdiction such orders would be binding on a Cayman Islands trustee so long as Cayman Islands law was applied, the author is not aware of this having occurred in the context of matrimonial proceedings which involve Cayman Islands trusts.

Relevance of the trustee’s decision to submit to the jurisdiction of a foreign court

The Grand Court has previously held that an order of a foreign court in relation to a trust “cannot be recognised by the trustee” (*In the Matter of the B Trust* [2010] 2 CILR 348). Clearly it is a momentous decision for trustees and, as a matter of private international law, submission to a foreign jurisdiction risks conferring jurisdiction on a foreign court to act to the detriment of the beneficiaries of a trust (which may include ignoring the express terms of the trust). That, in turn, may give rise to allegations that a trustee has not acted in the best interests of the beneficiaries of a trust and potential claims against the trustee for breach of trust.

Conversely, a trustee which does not submit to the jurisdiction of a foreign court — at least without an order of the Grand Court — preserves its ability to act in a way that it considers to be in the best interests of the beneficiaries when steps are taken to enforce a foreign order. Before taking such steps, a prudent trustee will seek directions from the Grand Court.

In *The Stingray Trust*, the Grand Court held that the firewall legislation does not confer exclusive jurisdiction on the Cayman Islands courts to adjudicate questions relating to Cayman Islands law. What is crucial is whether the foreign court has applied Cayman Islands law in relation to a question or matter concerning the trust. If that occurred, the firewall legislation is not triggered.

One of the key considerations for trustees before determining whether to submit to a foreign jurisdiction is whether trust assets are located in that jurisdiction. If so, the trustee will have difficulty defending those assets from any proceedings to enforce a financial order in divorce proceedings. Another key consideration is whether the provision of information is likely to ensure the foreign court is properly apprised of all relevant information in relation to the trust which might ultimately influence the foreign court’s determination as to whether the trust assets should form part of any financial orders (potentially to the benefit of the beneficiaries).

In any event, applying to the Grand Court for a blessing of the trustee’s decision to submit to a foreign jurisdiction or otherwise will have the effect of securing the court’s protection against a potential claim by a disgruntled beneficiary.

1.3 Enforcement

While the Grand Court has jurisdiction to make orders for contempt of court in respect of non-compliance with its own orders, it will not directly enforce an order of a foreign court against a Cayman Islands resident or trustee which is the subject of a foreign order. In those circumstances, it is necessary for the judgment creditor to commence new proceedings in the Cayman Islands to enforce a foreign debt. Subject to obtaining judgment from the Cayman courts, a number of enforcement mechanisms for recovery of a judgment debt are available.

The Grand Court has previously held that where there is no evidence that the trust is a sham, and no evidence that someone has “a right to call for any of the trust fund to be transferred to him”, it shall not make orders seeking to enforce an order against future distributions which a beneficiary/judgment debtor may receive from a discretionary trust (*Y v. R* [2018] (1) CILR 1). Although *Y v. R* concerned an application to appoint receivers over such future distributions from a trust fund, it is likely that the court would apply the same principles in relation to a claim by a spouse in respect of proceedings to enforce a financial order of a foreign court.

2. PRENUPTIAL AND POSTNUPTIAL AGREEMENTS (PNAs)

A nuptial agreement is a legal agreement made between two individuals before or after their marriage has taken place. Usually, its purpose is to set out how the couple would like their assets, income and earnings to be divided between them if they later separate or divorce. The agreement is intended to avoid uncertainty as to what a court might order upon divorce.

While a nuptial agreement is not strictly binding on the parties and not enforceable as a matter of Cayman Islands law, the Grant Court of the Cayman Islands recognised in *DJ v. BJ* [2019] (2) CILR 511 that a court should have regard to the terms of a prenuptial agreement. This adopted the principles from the leading English case of *Radmacher v. Granatino* [2010] UKSC 42, which established that a prenuptial agreement should be considered as part of “all the circumstances of the case”, unless there was evidence that the parties should not be held to its terms. To determine its enforceability or otherwise, it was also necessary to consider:

- the financial needs of any children;
- whether there was any suggestion of fraud, undue influence, duress or misrepresentation; and
- whether the parties obtained independent legal advice.

Those principles were affirmed by the Cayman Islands Court of Appeal in *AH v. AW* (CICA) (Civil) Appeal No 12 of 2021. In *AA v. BB* (GC) (Fam) 118 of 2022, the Family Court made financial orders beyond the terms of a prenuptial agreement which had not made any provision for two children of the marriage. The judgment confirms that such agreements are not enforceable and the weight to be attached to them is a matter for the discretion of the court.

2.1 Procedural requirements

See the introduction to Section 2, above.

2.2 Spouse's financial claims

A PNA can be entered into by spouses in respect of any part of the matrimonial assets, including assets not forming part of either spouse's personal or joint estate. This includes assets in a discretionary trust.

2.3 Children's financial claims

See the introduction to Section 2, above. The Family Court will not give effect to an agreement which does not make any, or any proper, financial provision for the needs of children.

3. THE MEDIA AND DIVORCE/FAMILY LAW PROCEEDINGS

Although the Cayman Islands recognises the principles of open justice, divorce proceedings in the Cayman Islands are usually held in private and judgments will often have the names of the parties anonymised. This is due to the nature of the proceedings and the sensitive issues which frequently arise, including children, security concerns and mental health issues.

3.1 Reporting restrictions

As divorce proceedings and those relating to children are held in private, members of the press cannot attend hearings in the Family Court. While they have access to the published law reports, the names of the parties are anonymised to preserve privacy.

Although a member of the press may apply to the Grand Court for access to a court file to inspect the pleadings and affidavit evidence, it is extremely rare for the court to grant access. In the unlikely event it does, the court is highly likely to apply certain restrictions, such as ensuring that the identity of a minor is not disclosed.

The Grand Court recognises the need for proceedings relating to trusts to also be heard in private, often due to the issues involving minors, security concerns and sensitive issues such as the mental capacity of a settlor or office holder. As a result, it is common for the names of parties and a trust to be anonymised in judgments and orders of the court, and for the court file to be sealed. Such orders are usually made shortly after the commencement of the proceedings.

If a member of the press wishes to inspect a court file concerning a trust which is subject to a sealing order, the court will usually have also made an order that the parties to the trust proceedings be given written notice (usually between 7–14 days) of an application by someone applying to access the court file, so the parties to the proceedings may make submissions to the court in response. Similarly to family law proceedings, it is extremely rare for the court to grant a third party access to a court file in trust proceedings where privacy and sealing orders have been made.

AUTHOR BIOGRAPHY



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Andrew is a partner at Collas Crill and has extensive experience in complex multi-jurisdictional litigation, with a focus on contentious and non-contentious trust and estate disputes. He regularly acts for trustees, settlors, protectors, enforcers and beneficiaries, and also advises on regulatory matters. Andrew has worked offshore since 2010, first in Guernsey, before relocating to the Cayman Islands in late 2016. He is frequently involved in the largest trust disputes in the Cayman Islands and is called upon regularly to speak at conferences on topics pertinent to the trusts industry. He is a full member of the Society for Trust and Estate Practitioners (STEP), a member of the STEP Council for the Cayman Islands branch, the STEP Contentious Trusts and Estate Special Interest Group Steering Committee and the Contentious Trusts Association (“ConTrA”).