COLLAS CRILL

Offshore trusts, onshore divorces

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We have all seen the newspaper articles where a divorcing spouse (or in some cases a willing family member) is accused of 'hiding' money in an offshore trust to avoid including those funds as part of the financial provision on divorce.

Trusts have long been used by settlors looking to ring-fence their property, whether that be as part of a tax planning strategy, or to shield it from the claim of another. Many offshore jurisdictions (including Guernsey) have built up their offerings in trust services, and will often be one of the first places that people will turn to when looking to establish a trust.

But what are the consequences of settling or being a beneficiary of an offshore trust when it comes to the breakdown of onshore marriages?

Nuptial settlements

In England and Wales, the Family Division of the High Court (**Family Division**) possesses various powers when determining the appropriate level of financial provision between divorcing spouses. Part of their job is to consider all of the resources and assets available to each of the parties – including those held in trust.

The extent to which the Family Division will take trust assets into account depends on the specific circumstances. A trust from which the beneficiary spouse has no real expectation of benefitting in the foreseeable future is likely to be viewed very differently by the Family Division to one where a history or expectation of benefit can be demonstrated.

There are certain trusts which the Family Division has greater powers over under the Matrimonial Causes Act, 1973 (**MCA 1973**), known as 'nuptial settlements'. A nuptial settlement is a trust that makes "some form of continuing provision for the parties": quite a broad definition and one worthy of entire articles in its own right. When it comes to nuptial settlements, the Family Division not only has to take the assets into consideration, but are empowered by section 24(1)(c) of the MCA 1973 to make "an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement…made on the parties to the marriage".

This gives the Family Division a broad range of powers. For example, they could:

- change the terms of the trust;

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- order that payments be made from the trust assets to one of the spouses regardless of whether or not they are a beneficiary of the trust;
- order that beneficiaries be added or removed; or
- require that the trustee be changed.

Where the trust is onshore (a trust governed by English Law, with trustees based in England) such variation orders of the Family Division can be enforced through the English courts, and a professional trustee is likely to follow them in any event. But what are the consequences of such an order on an offshore trust?

Is an English order to vary a nuptial settlement enforceable in Guernsey?

When it comes to variation orders made in the course of onshore divorce proceedings, the starting point is likely to be that they are ineffective at varying the trust. Guernsey, like most offshore finance centres, has 'firewall provisions' within the Trusts (Guernsey) Law, 2007 (**Trusts Law**), which will come into play where a trust is a Guernsey trust.

Firewall provisions will usually specify that only the Court of the trust's jurisdiction (in the case of Guernsey, the Royal Court (**Royal Court**)) has the power to vary it, and any orders of foreign courts which purport to do so are void and of no effect. That would include an order of the Family Division in relation to a Guernsey trust.

This does of course lead to a tension between the Courts of the two jurisdictions, but a trustee will usually be advised to go with their home Court.

An order by the Family Division purporting to vary a Guernsey trust, therefore, will not be binding on the trustee, unless the trustee has submitted to jurisdiction in the divorce proceedings.
The Royal Court is unlikely to simply enforce without question the orders of the Family Division, and a more complex process usually ensues.

So what options are there?

Just because the order is not automatically recognised, hope is not lost for the spouse who stands to be disadvantaged.

If the Family Division has purported to vary the trust (which is increasingly unusual, with a recognition that avoiding a purported variation of a trust in another jurisdiction is preferable), then an offshore trustee is likely to be advised to seek directions or approval from their home court as to what action they should take.

Taking it to Court

As to the approach the Royal Court would take, it will usually be a more involved process than just rubber-stamping the 'variation' ordered by the Family Division.

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The underlying policy is that the Family Division's job in considering the division of assets is just to consider the interests of the parties to the divorce (i.e. the spouses). They have no reason to have turned their mind to the wider beneficial class of the trust, whose interests all need to be considered in a decision to vary the trust. It is on that basis that the Royal Court tends to be robust in reserving for itself the ability to make decisions on variation.

That said, we have (largely) moved on from the days of the offshore courts and the Family Division clashing on this issue. We understand from practitioners in England that we regularly work with that the Family Division are less likely now to try and vary trusts of other jurisdictions, in recognition of this issue, and will often explore other options such as the making of financial orders which "encourage" the trustee to make assets available to the paying spouse to meet the orders. If a variation order is made, a Guernsey trustee is likely to approach the Royal Court a bit more delicately than simply arguing that the trust has been effectively varied by the Family Division.

For example, in the Jersey case of the *R Trust*, Recorder Frank Feehan KC of the Family Division did make orders purporting to vary a Jersey trust. However, the approach by the trustees to the Royal Court in Jersey was not to suggest that such a variation was effective but instead to seek a blessing of *their* (the 'trustees') decision to vary the trust on the basis of the factual findings of the Family Division.

The trustees relied on the argument that, in making the order it did, the Family Division had considered all of the factors that are relevant to the proper consideration by the Royal Court in Jersey. It suggested that the Court might find a way to bless the trustees' decision to the same effect. Importantly though, it was framed as recognising that it was a decision for the Court to take. The Court gave its approval.
That case was thankfully straightforward, as the beneficiaries of the trust were the immediate family of the husband and wife only (i.e. their minor children). All of whose interests were considered by the Family Division. Not every trust would follow that model.

The Royal Court will generally be keen not to "set itself against" the Family Division, and provided it is satisfied that all of the relevant interests have been considered, it is likely to make orders that the trustee should give effect to the Family Division's proposed split or variation.

Ignoring the Family Division's order

But what if the trustee fails to take any action, perhaps due to pressure from the settlor or spouse set to benefit if the order is not carried out? All is not necessarily lost for the disadvantaged spouse. If they are:

1. a beneficiary of the trust; or
2. obtain permission to do so from the Royal Court,

it would be open for them to bring an application in their own name in the Royal Court to ask them to make the necessary orders.

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In summary

It is clear that there is not a straightforward enforcement system, should the Family Division purport to vary an offshore trust. If you are considering setting up a trust which could later be construed as a nuptial settlement, or if you stand to benefit from such a trust, we would recommend that you seek advice to protect against future possibilities (including marriage breakdowns, however unlikely that may seem).

Assets based in England and Wales

There is one important caveat to all of the above. If the offshore trust owns assets based in England and Wales, then the Family Division could well enforce an order directly against those assets, bypassing any firewall provisions entirely. So if you are targeting assets situate in England or Wales, seeking a variation from the Family Division may still be an attractive strategy notwithstanding the above risks.

Indeed, with assets located within reach of the Family Division (in England), the landscape can be very different in terms of disclosure and a willingness on the part of the trustee to be involved in the divorce proceedings from the start.

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