Trusts in transition: Adapting private wealth structures for the modern world

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The way trusts are drafted, in terms of their clarity and use of everyday language, has improved immeasurably over the decades.

The apparent allergy that the trusts draftsmen of old seemed to have had to, for example, the use of punctuation, has largely been cured. Nevertheless, trusts established as a governance framework for assets that are intended to last decades inevitably come under strain when faced with developments unforeseen when they were first made.

Some of the themes we, as professional advisers to trustees, are encountering in our reviews of older trust instruments include out-dated, inflexible and inadequate drafting for the modern world, that leave trustees unclear about their obligations and structures vulnerable to risk and disputes.

It is a common refrain that trustees should *'review their structures'*. This article explores what that means in practice and why 'stress-testing' existing and new trust structures for the modern world should be moved to the top of the trustee's 'to do' list.

Mental capacity as a driver of trust disputes

Mental capacity is becoming a central feature on the landscape of private wealth disputes.

According to the World Health Organization, around 60 million people across the world are living with dementia, with nearly 10 million new cases added annually. Cases are projected to rise to over 80 million by 2030 and over 150 million by 2050.

Our societies have experienced an unprecedented extension of life expectancy but the prevalence of dementia increases steeply with age, from between 0.3%–1% (between ages 60-64) to 42%–68% (at those aged above 95). The statistical analysis shows that women are statistically more likely to be affected than men. At the same time, it is projected that women will control up to 70% of the world's wealth by 2070.

Another unsettling feature of neurological conditions like dementia is that the loss of mental capacity is gradual and incremental. What a person may have been capable of a year ago could have changed within months or weeks.

Unless mental capacity is assessed regularly, it can be difficult, when faced with a capacity challenge at a particular point in time, to assess the strength of that challenge. The practical question for trustees is – how are they realistically expected to do that?

Capacity issues in trusts manifest themselves when trustees, settlors or power-holders (such as protectors) lose mental capacity to perform their duties, or to properly convey their wishes. This can lead to a paralysis in the administration of the trust, administrative deadlock and potentially pose a risk to trust investments. Even the suggestion of a want of capacity (falling well short of a formal determination of a lack of capacity) can lead to any of these outcomes or to disputes.

The capacity of beneficiaries can present a risk for trustees and protectors who are under a duty as fiduciaries to give due consideration and adequate deliberation to all material factors affecting their decisions. The capacity of individual beneficiaries

(both in terms of its impact on their material needs as well as on their ability to convey their wishes) is clearly a highly material factor for fiduciaries to have regard to in their decision making. Decision making that doesn't take these properly into account is vulnerable to legal challenge.

Capacity is also more nuanced than whether, for example, an elderly settlor or power holder may, or does, suffer from a degenerative cognitive conduction such as dementia. Questions of capacity can extend to anyone at any age, eg alcohol or substance abuse/dependency or other some other debilitating mental or medical disorder.

Capacity, trusts and the modern family structure

The potential difficulties with capacity are amplified by the fact that offshore trusts often involve international families, the members of which not based in the jurisdiction of the trust and capacity.

Both the legal test and the mechanism by which a lack of capacity is established and dealt with is an intensely jurisdiction specific issue with very little by way of cross-border harmonisation of laws and approaches.

A settlor with reserved powers who becomes incapacitated in the UAE, for example, may not be deemed to be incapacitated for the purposes of giving their consent to a power of appointment under a trust governed by Jersey law.

The task for those who help high-net-worth (**HNW**) and ultra-high-net-worth (**UWNW**) individuals and families to structure their wealth using trusts is to plan with the prevalence of capacity issues clearly in mind.

- How robust are the internal governance mechanisms within the trust to ensure that a failure of capacity (whether actual or merely the suggestion of it) does not result in paralysis, deadlock and attendant litigation risk?
- Does the trust contain provisions dealing with the want of capacity – of the settlor, or a power-holder, like a protector?
- How is capacity (and want of capacity) to be defined?
- How is capacity (and want of capacity) to be assessed?
    - By whom (a doctor – with what qualifications)?
    - By what standard (is capacity to be assessed by reference to the law of the trust or by the law of the domicile of the person subject to the assessment?)
    - By what mechanism – this is a practical question as to how capacity is assessed, eg what if the settlor or power holder is in a different jurisdiction and cannot (or refuses to) be reached for assessment?
- Does the trust distinguish between want of capacity and a person simply disappearing or becoming incommunicado (i.e. there becomes no practical way to make any kind of assessment of capacity?)
- How robust is the trust drafting and governance where there is a risk of challenge or a disagreement about an assessment of capacity?
- Is capacity something that is assessed only once – how does the trust deal with the possibility of a 'lucid interval' or deteriorating capacity?

- How can the trustees be insulated from the risk of having their decisions challenged or set aside if a want of capacity is sought to be weaponised as a vitiating factor to undo the decision making process later on?
- How does the trust instrument address the mere suggestion of a want of capacity? Is it clear what duties that imposes upon the trustee and how are those duties to be discharged?
- How will incapacitated adult beneficiaries be dealt with in any court applications that may be necessary in which their interests are expected to be represented?

Trust assets and investment

One of the core duties of a trustee is to preserve, and so far as is reasonable, to enhance the value of the trust assets for which they are responsible.

In recent years there has been an intense focus on sustainability, ethical or 'impact' investing and environmental, social, and governance (ESG) as a counterpoint to the traditional duties on trustees to seek to generate and maximise a financial return from trust assets.

These concepts are all concerned with incorporating criteria other than financial performance into the duties of trustees, to align the management of asset portfolios with personal views and values (such as the settlors' and/or beneficiaries') or broader societal goals.

Trustees have been looking at their trust instruments to find a way to try and square their traditional duties with these concepts to seek to satisfy the desires and needs of the families they serve.

Some jurisdictions – Bermuda's Trustee Amendment Act 2025 being the recent example – have passed legislation to modify the traditional duties of trustees from simply 'preserving and enhancing' the value of the trust assets to allow trustees to adopt so called 'responsible' or 'sustainable' investing approaches that not only consider financial returns but can also reflect the settlor's and beneficiaries' wishes on broader social, environmental and other impacts.

For settlors and families who are interested in allowing their trustee's latitude to take into account their personal wishes and goals when it comes to decisions about how trust assets are invested and managed, there is also a drafting solution that can achieve something very similar to what the Trustee Amendment Act 2025 has brought about in Bermuda.

The traditional duties of the trustee to 'preserve, and so far as is reasonable, to enhance the value of the trust assets' is always subject to the terms of the trust itself which can – with appropriate drafting – accommodate:

- Limiting the duties of trustees so as not to impose any duty to 'enhance' the value of the trust assets or limiting liability for holding wasting or non-return producing assets.
- Permitting trustees to take into account non-financial considerations in their investment decisions and mandates given to investment managers (such as the views and wishes of settlors and beneficiaries regarding the impact of trust investments on wider society, the environment etc.)
- Permitting trustees to seek to satisfy a range of views among families about the approach to be taken with the investment of trust assets by establishing sub-funds within a larger trust structure.

For trustees, clear drafting can provide both legal certainty and a clearer framework to act in line with their fiduciary obligations and accommodate the ever-evolving expectations of the families they serve.

For wealth creators and their beneficiaries, it is possible to have a structure that aligns the trust administration with their family legacy, succession planning and their values.

Another area where we are seeing traditional drafting relating to investments coming under strain (with the potential for their to be tension and disputes) are in trusts that hold family-run businesses.

These sort of structures present risks in terms of:

- the concentration of assets (or lack of diversification and risk); conflicts with business interests;
- improper due diligence;
- monitoring of financial performance; and
- environmental issues (depending on the industry).

Again, bespoke drafting solutions can be fashioned to adapt older structures and help mitigate these risks.

The definition of 'child' or 'issue' in older trusts

The beneficial class in many offshore trusts and wills will often be defined by reference to the relationship of 'children or remoter issue of X'. 'X' may be the settlor themselves or perhaps a relative in the settlor's family.

Who counts as a child of any particular person is a question of obvious importance to a person claiming to be a 'child' but is also of importance to trustees or executors who may be presented – maybe unexpectedly - with a person claiming to be a beneficiary of an estate or a trust by reason of that status.

The landscape of modern family life has become increasingly complex, with many different permutations of how a parent-child relationship can arise eg

- 'blended' families with step-parents and children from previous relationships (whether or not the parents are married);
- adopted children;
- a 'child of the family' ie a non-biological child whom the settlor treats as their own;
- children of same-sex relationships (where only one or potentially neither parent has a biological connection to the child); and
- children (of either mixed or same-sex relationships) conceived by way of surrogacy arrangement or with the assistance of fertility treatment or artificial insemination.

Unless the intention, as expressed in the trust instrument is crystal clear, the answer of who is going to count as a child can be a complex and sensitive one for trustee and advisors to navigate. Difficulties arise where:

- the intention in the drafting of a trust instrument may be ambiguous from how the document is phrased or where the intention appears at odds with the family circumstances; and/or

- the intention expressed in the document appears more restrictive than the prevailing social attitudes or the state of the general law (or, in the other direction, there is an expectation that a person is a 'child' when legally they are not).

It is unsafe to assume that what a settlor means by an apparently simple phrases like *'my children and issue'* is the same definition provided for in the general law in jurisdictions like Jersey, Guernsey, Cayman (ie where a trust is established).

Depending on the settlor's background and culture, they may have a very different expectation of what they mean. Settlors accustomed to Sharia law, for example, may have an attachment to concepts of legitimacy when it comes to the entitlements of children.

Legitimacy in Jersey law, has recently been abolished. For a settlor to specify that only legitimate children and issue are to be counted as beneficiaries of his Jersey law governed trust now requires specific drafting. That potential gap in expectation is a space in which disputes can arise (especially where the settlor may have died and is no longer able to express themselves).

A key point for those involved in wealth structuring for international families is that the legal regimes governing family relationships are often intensely parochial and it is important to be aware of these differences when anchoring an entitlement to wealth by reference to family relations that may not easily translate across international borders.

For example, surrogacy arrangements and arrangements for the parentage of children from same-sex relationships vary markedly between jurisdictions. Jersey, for example, will not automatically recognise a foreign surrogacy arrangement (ie a surrogacy arrangement that has occurred outside Jersey, under the laws of a different jurisdiction). That gives rise to the clear potential for a child resulting from a surrogacy arrangement in one jurisdiction not to be recognised as a child of the receiving parents for the purposes of law in another.

More information on how recent changes in Jersey law on the legal definition of child/parent relationships can be found here.

The role of protector in offshore trusts

The office of protector is a common feature in many offshore trusts. As originally conceived, a protector was a bespoke office holder, being a person or entity appointed in the trust instrument to monitor the trustee's administration and holding various powers of oversight, co-consent or veto over the powers capable of being exercised by trustees. Typically, a protector was a trusted advisor to the settlor or the family for whom the trust assets were held.

As originally conceived, the office of protector fulfilled the role of a supervisor or 'watchdog' who would provide a 'thumbs up' or 'thumbs down' to decisions of the trustees on an *ad hoc* basis as required by the particular trust instrument.

As the law of fiduciaries has developed, the proper role of protectors in the mechanics of how an offshore trust is supposed to operate has become more complicated and can become the subject of judicial scrutiny.

There has been a division of judicial opinion in different offshore jurisdictions about whether a protector's powers should be construed narrowly or widely. That is to say, that under the 'narrow' view, the protector should only interfere with a trustee's decision where it is irrational or tainted by conflict (basically akin to the court's role in a blessing application).

The 'wider' view, is that the protector has full discretion to consider the trustee's decision afresh (or, put another way, the power confers on protectors an independent decision-making discretion).

The recent decision of the Privy Council in *A v Others [2026] UKPC 11* has resolve that the default position is that unless there are restrictions on the protector's role to the contrary, a protector's powers should be construed widely.

Uncertainty has arisen because many historic trust instruments are not drafted with this particular question in mind - increasing the potential for conflict between trustee and protector about the protector's proper role. Following the *A v Others* decision, many trustees are consulting their advisors whether to amend their trust instruments.

There are many examples of older-style trust instruments that simply provide for a protector and a list of powers in a schedule for which their co-consent is required.

It is worth reviewing the provisions governing the role and powers of protectors to ensure they are sufficiently detailed and fit for the rigours of the modern world:

- Does the trust instrument prescribe or suggest the protector should have a 'narrow' function in the exercise of their powers and how is that expressed?
- What provision does the trust instrument make for the replacement, retirement or removal of a protector?
- Does the trust instrument always require there to be a protector and if so, what happens when there is no one willing or available to assume that office?
- May it be appropriate to have provision in the trust instrument that dispenses with the office of protector in certain circumstances?
- Is a protector in fact required? the working relationship between trustees and settlors has, in general terms, evolved to grow closer in many cases, through better communication and better service. Technology has greatly assisted. Appointing offshore trustees does not inevitably mean, as perhaps used to be the case, a distance and disconnect between settlor and trustee.
- Interposing a protector may, therefore, be seen to be unnecessary. The starting question for trusts drafters, before any discussion over powers, should perhaps be whether a protector is needed at all.
- Where a protector wears more than one 'hat' or set of duties (eg where they have a subsisting professional relationship with the settlor or may be a director of a company controlled by the settlor or certain of the beneficiaries) how robust is the trust instrument's drafting to deal with potential arguments about whether a protector is subject to a conflict of interest or a conflict of duties?
- Does the trust instrument adequately address what should happen if a protector becomes incapacitated or incommunicado?
- How is capacity to be assessed and addressed and how does the trust instrument provide for the trust to function in the interim?
- What is to happen if a protector does not cooperate or consent to a capacity assessment?

- What are the consequences for the administration of the trust if the capacity of the protector only comes to light after a particular decision they have participated in has been made?
- What provision is there to deal with a situation where it suddenly becomes inappropriate for a protector to be based in a particular jurisdiction eg a protector located in country that is suddenly sanctioned?
- Is it appropriate for a protector to exercise – or not exercise – what amounts to a suspensive veto over the trustees by their non or sporadic engagement?
- Does the protector's office require exoneration provisions? This will be influenced, to a large extent, by whether the protectors' powers are considered 'wide' or 'narrow'.
- Does the trust instrument provide for the protector to have recourse to trust funds (akin to the trustee's indemnity) to take independent advice on their powers and position should that be required (eg if matters become contentious)?

Many protectorships are often based upon a personal relationship between the settlor and the protector and conceived of as a gratuitous office. The duties of modern protectors (particularly if a 'wide' view is taken of their role) may justify a protector drawing some kind of remuneration for their time from the Trust. Older drafting may not accommodate that.

How can we help?

Collas Crill's Private Client and Trusts team has decades of experience advising trustees, beneficiaries and protectors about the administration of offshore trusts. We frequently assist fiduciaries and UHNW families with the increasing complexity of decision making, including 'stress-testing' of existing trusts for the issues above and restructuring. A regular review (and if necessary update, to older instruments) helps ensure trusts remain fit for purpose.

Where disagreements arise we can also advise on how best to resolve tensions, whether through court or by a negotiated agreement.

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