COLLAS CRILL

Trust confidentiality vs. divorce: Understanding the conflict

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Divorce proceedings often entail complex negotiations over assets. Assets held in trusts established in international jurisdictions can present unique challenges in divorce settlements. Here we take a look at balancing the confidential nature of trusts with duties to disclose and rights to information and how to navigate this conflict.

Confidentiality: A key trust attribute

Why do high net worth individuals place assets in trust in the first place? The stereotypical misconception is that it's simply to avoid tax in home jurisdictions or to hide assets out of reach of scrutiny from authorities, the media or estranged spouses/family members. Think Leo DiCaprio in The Wolf of Wall Street and his slick Swiss banker.

However, the world has moved on from the clichéd man with a briefcase stuffed with cash and bearer shares. Regulators, tax authorities and courts increasingly demand transparency from offshore jurisdictions. Reporting, beneficial ownership registers and global regulatory bodies ensure that there are now far fewer ways to conceal wealth offshore. The majority of offshore jurisdictions themselves are happy to (and work hard to) comply.

However, the details of trusts still remain inherently confidential and confidentiality is important for a few key reasons:

- Privacy Protection: Trusts allow individuals to keep their financial and personal matters private. Unlike wills, which go through the public probate process, trusts typically do not become part of the public record. This can be particularly important for high-net-worth individuals or those who wish to keep the details of their estate and beneficiaries confidential.
- Family Dynamics: Confidentiality helps manage family dynamics by keeping the specifics of inheritance and asset distribution private. This can prevent potential conflicts or jealousy among heirs and beneficiaries.
- Security: Keeping trust details confidential can protect beneficiaries from potential risks such as fraud, bribery, identity theft, undue influence or even kidnap. It may also help safeguard assets from creditors or other third parties who might attempt to make claims.

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The challenge in divorce proceedings

Despite greater transparency and reporting, the inherently confidential nature of trusts and their assets presents a challenge for family practitioners. Without full disclosure from both parties, one of the primary difficulties is establishing the nature and extent of the assets held within a trust.

Here we take a look at the example of a Guernsey law trust.

What information is publicly available?

Essentially, very little. Trust documents, including the trust instrument itself and financial statements and details of the key stakeholders (such as settlor and beneficiaries) are private and it will be at the discretion of the trustee to decide who gets to see or know what.

Very little information needs to be filed and any information that is, as things currently stand, is not publicly available.

Who is entitled to information?

Whether a party to divorce proceedings can obtain information about trust assets depends upon their standing and connection to the trust. The Trusts (Guernsey) Law, 2007 provides that a trustee shall, at all reasonable times, at the written request of (a) any enforcer, or (b) subject to the terms of the trust: (i) any beneficiary (including any charity named in the trust), (ii) the settlor, or (iii) any trust official (which could include a protector), provide full and accurate information as to the state and amount of the trust property.

There is potential for a person not listed above to apply for an order of the Royal Court to obtain information, but the circumstances in which this is possible are fairly limited.

Note that this statutory right of a beneficiary, settlor or trust official to request information is subject the terms of the trust. It is common practice for Guernsey law trust instruments to expressly exclude this duty to give information.

What information would or should be disclosed?

The Trusts (Guernsey) Law, 2007 refers to "full and accurate information as to the state and amount of the trust property" but does not prescribe any further what this means. Generally, it is considered that the following would be disclosable:

- trust instrument and supplemental instruments;
- accounts/financial statements of the trust;
- potentially, documents relating to underlying companies.

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The following documents would not normally be disclosable:

- documents detailing trustee deliberations (such as minutes/resolutions);
- letter of wishes;
- internal trust correspondence.

The Courts in Guernsey would follow the principles set out in Schmidt v Rosewood [2003] UKPC 26.

How does a trustee determine whether information should be disclosed?

A trust instrument may contain provisions confirming who the trustee may (or should not) provide information to, or what information they may disclose. More commonly, and in line with the confidential nature of trust information, a trust instrument will contain provisions restricting the disclosure of information.

The trustee must pay heed to the provisions of the specific trust and to the law in determining whether it can or should disclose information about trust assets. If a person generally entitled to trust information under the law of the trust makes a request, the trustee will likely go through the following process:

- Consider its powers under the trust and any express restrictions.
- Consider who is making the request – if it is a beneficiary, the likelihood of their receiving any benefit from the trust will be an important factor in determining whether disclosure should be made and the extent of that disclosure.
- Consider whether the disclosure is in the best interests of the beneficiaries.
- It may even consult with beneficiaries or other trust stakeholders to obtain their views, if appropriate.
- It would consider the circumstances surrounding the request. The trustee will be mindful that any actions it takes when it is on notice of significant family distress, such as matrimonial proceedings, will be subject to greater scrutiny. Where there is a much greater chance of challenge to any action a trustee takes, the trustee will likely be more cautious than normal.
- Take formal advice.

A trustee should not ignore a request for information and should give sufficient consideration to a request. Whilst trustees have a difficult balance to strike between maintaining confidentiality and legal duties, there are circumstances in which disclosure might be the prudent option. There are also, of course, circumstances in which disclosure is wholly inappropriate.

What to do when faced with an unresponsive trustee

If a request for information is based on the known entitlements under the laws of the relevant jurisdiction, this will help start the process correctly. Entitlement to information and duties to disclose differ between jurisdictions, so taking advice in the relevant jurisdiction is key.

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Bear in mind that the trustee may not be able to give you a full explanation as to why it will not disclose the requested information, as the reasoning itself should be kept confidential.

If approaches to the Trustee are not fruitful, there may be a process in the relevant jurisdiction to apply for an order of the Court requiring disclosure.

It may be tempting to believe requests issued to an unknown trustee entity in a far-off jurisdiction disappear off into the ether, never to be responded to. Rest assured professional, regulated trustees should know their statutory and fiduciary duties and should act on requests for information, whether that ultimately means disclosure or not.

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COLLAS CRILL

For more information please contact:



Cerisse Fisher

Group Partner*^ | Guernsey

t: +44 (0) 1481 734882 | **e:** cerisse.fisher@collascrill.com

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