

My trust, your rules?

The English Court's reach over Guernsey family trusts

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Every so often, trustees based in Guernsey find themselves caught in the middle of a divorce dispute between one or more of the beneficiaries of a trust. A plethora of articles is available on the various issues that arise for a trustee in such circumstances, including on whether the trustee should submit to the jurisdiction of the foreign court where the divorcing beneficiaries live abroad. This guide focuses on the effective variation of Guernsey trust instruments by the English Family Court and what steps a local trustee can consider taking to minimise the English's Court's reach over the trust.

The fact that the divorce and its consequential orders may have been pronounced by the English Family Court has little bearing on their effect for the Guernsey trustee. English Courts have made it clear that when considering the true asset position of a spouse in the context of a divorce, they are not intimidated by offshore trusts. If they consider that an asset held on trust in Guernsey should fall into the joint matrimonial estate, they are not afraid of making orders which conflict with the trust instrument.

The English Family Court's power to vary a settlement is not restricted by the location of the trust's assets. The Court may 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 postnuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage' (section 24(1)(c) of the Matrimonial Causes Act 1973).

The purpose of that provision is clearly to prevent one spouse or dependent children being written out of assets by the other spouse. If the settlement is proven to be nuptial, the English Court may vary the terms of the trust in any way it considers to be necessary to achieve a fair result in the divorce proceedings between the spouses. A settlement is deemed to be nuptial if it is connected to the parties in their capacity as husband and wife and makes 'some form of continuing provision' for both or either of them in that capacity or their children (see *Brookes v Brookes* [1996] AC 375). Examples of upheld nuptial settlements include where the trust bought a property for use by the spouses as the matrimonial home, the trustees made a loan to a spouse's company or where properties held by the trust are managed solely by the spouses. Where assets are held outside the jurisdiction of the English Family Court, eg in a Guernsey trust, the difficulty for the spouse in whose favour the varying order was made will be in enforcing the order in the offshore jurisdiction.

Both Guernsey and Jersey have incorporated firewall provisions in their trusts laws which prevent an order of the English Court from being enforced or given effect to if it is inconsistent with their respective trust laws (section 14(4) Trusts (Guernsey) Law, 2007 and section 9(4) Trust (Jersey) Law 1984). Whilst the Guernsey Courts have yet to express a view on these provisions, the Jersey Royal Court clarified in *Mubarak v Mubarak* [2008] JRC 136 that if the order of the English Court purports to alter the trust in terms inconsistent with the trust deed, then that order cannot be enforced by the Jersey Courts. This is so, even if the trustees have submitted to the jurisdiction of the English Court. However, if the order of the English Court is something which is within the powers of the Trustee then, the Jersey Court may use its discretion to give effect to that order (by giving directions to the trustees which will achieve the same thing) but in doing so, the Court must have regard principally to the interests of the beneficiaries.

However, the introduction of these firewall provisions or the reaffirmation by the Jersey Court of its independence did not appear to have discouraged the English Family Court from continuing to interfere with offshore trust structures. As an alternative approach to varying the terms of the trust, the English Family Court has on certain occasions resorted to what is known as an encouragement order. This is where the Court makes an adverse order against one spouse which he or she is unlikely to satisfy without assistance from the trustees. A trustee is under a fiduciary duty to consider a beneficiary's request for financial provision. In practice, it is highly unlikely in most cases that the trustee would refuse to step up and assist the beneficiary by making the trust assets available to satisfy the adverse order. The result achieved is that the spouse left out is nonetheless allowed to benefit from those assets deemed by the English Court to form part of the matrimonial estate.

For the Guernsey trustee, the interference of the English Family Court in a trust's affairs means that it may be necessary to make difficult decisions. For example, the trustee must decide whether or not to participate in the proceedings or comply with the English Court's order. They may be faced with protest or criticism from their beneficiaries whichever decision they take. This is why in such situations trustees are ordinarily advised to seek directions from the Royal Court.

Trustees should consider what preventative measure, if any, they could or should take to avoid or reduce the English Court's interference in the trusts affairs. For example, they may want to avoid the trust being deemed 'nuptial' so as to prevent an order under section 24(1)(c) of the Matrimonial Causes Act 1973. To this end, they should be very aware of the purpose of the trust and the extent to which they decide to fund the spouses' lifestyle, eg. they may choose to grant the spouses a licence to occupy a property instead of a life tenancy, or they may suggest that the spouses enter into a premarital agreement or ring-fence certain assets. The trustees may consider whether on occasion they should refuse beneficiaries' requests for financial provisions or whether they could insert a clause in the trust deed to make clear that they would not advance capital to the parties. In each case, the trustees should ensure that they take early independent advice from both their local advocates and English lawyers.

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