ATTACKING AND DEFENDING TRUSTS IN DIVORCE

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To paraphrase a comment recently made at a conference by a senior family court judge, if the impression that the trust fund is a resource of one of the parties is not corrected, a decision will be taken on the understanding that it is. The family law concept of the 'ATM Trust Fund' needed little explanation.

Two basic thoughts occurred to this trustee: fair enough; and why are trustees still letting this happen?

On the first point, while no doubt decisions will be taken on the facts of the specific case, the Mr Charmans, the Mr Prests, the Mr Pugachevs do leave an impression - in the latter case, complete with the image of a James Bond baddie stroking an Angora Cat[1]. The lesser-known trustees in some tucked away jurisdiction make something less of an impression. Or at least not one that supports a case for robust trusteeship.

On the second point, the most often cited and valid reason is that the trustee will not wish to unwittingly submit to a foreign court. Legal guidance would usually be taken when being asked to assist in a beneficiary divorce that should ensure that this does not happen. The other reason may be simply because the files do not read well. Within the context of defending the integrity of a trust relationship, words such as 'client' (denoting the settlor) and 'instruction' littered throughout will not be helpful. Or maybe the files barely read at all. If the exercise of discretion cannot be shown to have been properly considered and/or the trust has been poorly administered the beneficiary will surely struggle to dispel the family court's impression that the trust fund is a personal resource. The trustee then is likely to have an unwelcome 'judicially encouraged' distribution decision on its hands.

Examples of the sort of disclosures requested to trustees in divorce cases include: copies of trust deeds; financial statements of trusts and underlying companies; supplemental instruments, letters of wishes; schedules of underlying assets; distribution schedules (including the date of the request, identity of the requesting party, reason for the request, the amount and nature of the provision requested, a copy of the actual request, a copy of the response to the request, the amount and nature of the provision made pursuant to the request, the recipient of any such provision, in the event of any such request having been refused, the reason given for the refusal.

Assuming that the trust was settled on discretionary terms for multigenerational benefit, trustee cooperation in the above requests (absent good reasons to refuse disclosure) should be helpful in dispelling misconceptions. All of the above-mentioned documents should be immediately at hand for the trustee of a professionally administered trust. There will be (or should be!) some considerable embarrassment for a professional trustee if any of these documents cannot be located or proceedings are held up while historical financial details are hurriedly pulled together from scratch.

As a side point, much of the trust information may very well be already in the divorce jurisdiction, such as copies of deeds and financial statements sent to beneficiaries, making it potentially subject to a court subpoena. As a result, uncooperative trustee behaviour in withholding trust information will be ineffective in concealing information and serving simply to prolong and increase the overall cost of the divorce.

Having touched upon cost, the trustee should keep their duty to account in mind. They should engage in rigorous - and recorded - scrutiny of legal bills (ensuring that the lawyers performed only the work for which they had been engaged) before settling them out of the trust fund.

As any trustee knows, usually they are adapting to imperfect 'we are where we are' circumstances. In non-contentious family circumstances, oftentimes the trustee will have communicated trust information more regularly with one senior family member beneficiary, rather than each individual adult beneficiary equally. Done not out of a desire to conceal the trust from other beneficiaries, rather on the implicit understanding the immediate family beneficiaries' interests would be broadly aligned with the family's natural financial provider. Trustee neutrality is a widely accepted as a general guiding principle when two members of a discretionary class of beneficiaries decide to divorce. The word 'neutrality' can convey an impression of passivity or inaction. It is rarely thus: adopting a stance of 'co-operative neutrality' can require some tough decisions, often beginning with any information imbalance being readdressed.

Each circumstance involving divorce will clearly be different but a trustee with complete and well organised files that demonstrate the integrity discretionary trust that properly considers all the beneficiaries' interests, will always have more options should the time come to defend it. History cannot be re-written, so the time to ensure this is from the outset, rather than the storm clouds of divorce on the horizon. And well before that lift shaft is set in motion[2].

[1]Para 438 in the decision of MezhProm Bank v Pugachev in relation to an illusory trust refers to a phenomenon in patent law known as the Angora cat problem first identified by Professor Franzosi:"When validity is challenged, the patentee says his patent is very small: the cat with its fur smoothed down, cuddly and sleepy. But when the patentee goes on the attack, the fur bristles, the cat is twice the size with teeth bared and eyes ablaze."

[2]Mostyn J in E v. E (1990) "In my judgment, in a variation of settlement case, the court can, metaphorically speaking, travel right down the lift-shaft from the top floor to the basement, without having to stop at any floor in between."