

THE DUTIES AND ROLES OF JERSEY AND GUERNSEY TRUSTEES DURING DIVORCE PROCEEDINGS

A tropical island with several palm trees and a red heart icon in the foreground, set against a light blue sky and ocean.

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It has been widely reported that the stresses and pressures of the global pandemic have led to an increase in relationship breakdown and divorce. Where wealthy couples are divorcing and one or both of the partners are beneficiaries of a Jersey or Guernsey law-governed trust (or where their children are beneficiaries) trustees are likely to be drawn into disputes over assets.

The disputes are unlikely to be straightforward. When the divorcing couple are both beneficiaries, even the most experienced Jersey or Guernsey trustee may struggle to follow a neutral line through the emotionally heightened dynamics of an acrimonious break-up.

Yet assistance from the side-lines and neutrality between the couple can often be in the interests of the wider class of beneficiaries and thus the safest and most sensible course for a trustee to adopt. That said, the priorities of the divorcing couple and the focus of the (typically) English family court may not align with the trustee's duties to the beneficiaries, and particular care should be taken when the beneficial class is wider than the couple and their children or when the couple's objectives differ.

Every case will present with their unique facts and the spectrum of issues is wide-

ranging, but below are some practical pointers, on some common themes, to assist a trustee through the split.

Requests for Information

A typical starting point will be a request for information. Even at this juncture there are different options for a trustee to weigh in how they could respond and so a careful and documented decision should be taken. A neutral trustee that provides disclosure to its beneficiaries through an exercise of discretion will not automatically engage any off or onshore judicial process. An exercise of discretion can be cast as distinct from responding to a request arising from divorce proceedings. The trustee should also give due consideration to its duty of confidentiality to and between the parties.

Trustees are often well placed to understand the financial situation of their clients, but typically, the number of requests will be greater for the party who has taken a passive role in the establishment and running of the structure. Communications received from the couple's divorce lawyers may be hostile in tone, but a measured and neutral response will set the right course for the trustee and others hopefully to follow.

Behind the outward communications should be a supporting bank of tightly drawn trustee resolutions with one eye on potential judicial scrutiny of reasonableness. While the judiciary may be reluctant to intervene in the decisions of trustees, the recent Jersey case of *B v Erinvale PTC Limited and Ors* [2020] JRC 213 is a reminder of the Court's supervisory jurisdiction when considering how a trustee has exercised their discretionary powers. In *Erinvale* the trustee's decision not to add a divorcing spouse to the beneficial class in her own right was set aside.

A disclosure request may quickly turn into a disclosure or discovery order and a trustee's status within the divorce proceedings will determine the framework of any response. The Jersey Court has consistently held that it will be important for a foreign divorce court to make decisions based on accurate and complete information regarding assets that might be considered to be a resource of the marriage. If a trustee's decision to comply or not with a disclosure request or order is referred to the Court for blessing, it is very likely that that principle will be followed.

Joinder and Submission to a Foreign Family Court

A trustee may also receive notification of a party's intention to join the trustee to divorce proceedings. Indeed a trustee may be joined to proceedings in their absence, but that does not equate to submission to the foreign court's jurisdiction. This distinction between joined and submitted has legal significance when it comes to enforcement of any order made by the foreign court directly over the trustee.

Trustees are well versed about the family courts' prioritisation of the divorcing couple's interests over a trustee's duty to administer a trust in the interests of the entire beneficial class. In consequence submission is often resisted to avoid giving the onshore court the power to enforce its judgments directly against the trustee (potentially to the detriment of other beneficiaries¹ and ultimately with the risk of conflict with an offshore court) outside of the foreign jurisdiction. Once a decision to not submit has been taken, every action or inaction undertaken by the trustee thereafter, should be carefully chosen to reinforce and avoid unintentional submission by its subsequent conduct. There are many traps for the unwary trustee to fall foul of and unwittingly submit.

If all, or a significant part of the trust assets are located within the jurisdiction of the family court, local advice should be taken on the orders that might be made by the family court which could put those assets at direct risk. Whilst trustees will typically not submit, an exception could be where there is merit in the trustee "defending" the trust assets before the family court. Trustees will face a much more difficult decision where a smaller proportion of the trust assets are within the jurisdiction of the family court.

Enforcement/ Implementation and the Domestic Court

Once a divorce settlement has been agreed or a final order made the trustee will next consider how or whether to give it effect. Every case will have its own variables but some key points are:

Has the trustee submitted? Decisions from foreign courts where the trustee has not submitted are not automatically enforceable against a Guernsey or Jersey law trust. Instead, an application to implement a foreign order before the domestic court may be expected from the enforcing party. The case of *A and C v PQ, RS and T Trustees Limited*, [2019] GRC013 in the Guernsey Royal Court confirmed that orders made in the English High Court are not automatically binding on the trustee and instead an application to the Royal Court will be needed should the parties wish to put the terms of the foreign order into effect. However, English orders which enshrine commitments made by the on-shore parties will often be highly influential over the offshore courts when considering how the Trustee should later act in response. In *A and C*, whilst the trustee had not submitted to the English proceedings, ultimately, the Royal Court saw fit to implement commitments made between the onshore parties and vary the terms of the trust.

Has the trustee been joined? An application to enforce is also to be expected where a trustee has been joined as a party but has not submitted. For a trustee, the consequence of being joined to English proceedings is limited to action that may be taken in England, for example against English sited trust assets. Any action required of the joined trustee outside of England may result in an application to the local court if enforcement is resisted.

A trustee may apply for directions or a blessing² if the trustee is minded to make a decision which has the effect of compliance with the settlement agreement or final order and that decision is momentous. Such an application can be made at many other points in a complex divorce process, to provide a trustee with a measure of protection. An alternative option may be for a trustee to agree terms through wide ranging and carefully drafted instruments and indemnities.

Firewall Legislation in both Guernsey and Jersey renders orders from another court that have been made other than by applying Guernsey or Jersey law (for example which may amount to an alteration or invalidation of the local trust) unenforceable. Instead, challenges about validity, administration and dispositions are to be determined by the local court applying domestic law (Article 9 of the Trusts (Jersey) Law 1984 and s.14 of the Trusts (Guernsey) Law.

Conclusion

There is no one size fits all approach when dealing with divorcing beneficiaries, as the personalities and assets involved will set the tone of each divorce, and there are many other issues beyond the scope of this article to be considered.

While it is likely to be an uncomfortable process, with many pitfalls, there are some fail-safes for a trustee to adopt. Careful consideration and

documentation of trustee decisions through tightly drawn trustee resolutions should be prepared with the expectation of judicial scrutiny.

An early decision should be taken about submission and rigorously adhered to in all steps and communications that follow. A neutral trustee that provides disclosure to its beneficiaries through an exercise of discretion will not automatically engage any off or onshore judicial process. Yet for some trustees and some circumstances, a blessing from their local court (for example where the issue of submission is balanced in view of the location of trust assets or where decisions as to disclosure could be particularly contentious) should provide the most comfort and certainty to both traverse and conclude the split.

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The information contained in this advisory is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter. For example, different considerations will apply where a regulated entity is involved.

1 Re H Trust [2006] JLR 280

2 Public Trustee v Cooper [2001] WTLR 901