

A man and a young child are walking away from the camera on a sandy beach. The man is carrying a large woven bag and holding the child's hand. They are walking towards the ocean under a vast, colorful sky with soft clouds. The sun is low on the horizon, creating a warm, golden light. A large orange circle is overlaid on the left side of the image, containing the title and subtitle.

— Trusts in Divorce

Thought Leaders 4 HNW Divorce

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What are the issues for current cases?

Uncertainty having huge impact financially and emotionally

Managing expectations and dealing with uncertainty

- Remote hearings – more delay?
- Are valuations realistic?
- Liquidity ?
- Redundancy? Earning capacity?
- Are needs to be adjusted?

- Uncertainty
- Valuations
- Delay

Impact on valuations

Are valuations feasible? What are the alternatives?

May need
Updating?

Different
basis for
valuation?

Different
information
required

Adjourn or
delay

Deferred
lump sum

Share risk-
laden assets

“

valuations of shares in private companies are among the most fragile valuations which can be obtained

“

While generally capital claims should not be left indeterminately unresolved, there were hard cases ...where fairness and justice must prevail over the normal desirability of the finality of litigation

What are the issues for settled cases?

What is final and what is flexible?

Immediately:

- Set aside/barder
- Release from undertakings – executory orders

In the future:

- Variation of maintenance
- Variation of lump sums by instalments

- Variations are the exception
- Need to show that the position has changed significantly
- Weigh up costs of application v potential saving

What is the impact on trust cases?

Trust assets form part of the overall picture and will be examined

- Nuptial settlements
 - More likely to be varied in current climate?
 - Only interfere as much as necessary to do justice
 - Looking for additional resources to meet need
 - Look at sub trust, trust transactions, licence to occupy
- Trust as a resource
 - More dependent on trust asset
 - Safety net for beneficiary
 - Arguments re needs of other beneficiaries

- Where there is less money available trust assets may be more at risk
- Trust decisions made during the creation and management of trust will be analysed to predict what is available now and what may be available in the future



— The new tax landscape for divorcing couples

The impact of Covid-19 on
tax and divorce

Charlie Tee

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The new tax landscape for divorcing couples

- Inheritance tax / Stamp Duty Land Tax unlikely to be impacted immediately by Covid-19
- For the purposes of divorcing spouses, Capital Gains Tax (“CGT”) likely to be the main tax consideration in the “Covid-19 world”:
 - sales or transfers of the matrimonial home
 - availability of Principal Private Residence Relief
 - forced sale of other assets – dealing with losses and funding gains (if any)
 - possibility of transferring assets at a low gain or even a loss – clogged losses

- Timing of any transfer is key in this current environment and there are a number of factors to consider.

CGT and Divorce – A (very brief) summary

Disposals between spouses

- Up until the end of the tax year in which separation take place:
 - Transfers between spouses are on a 'no gain/no loss' basis
 - Such a disposal does not trigger a charge to CGT (*section 58, TCGA 1992*)
- Spouses are treated as 'living together' unless separated under a court order, deed of separation or actually separated in circumstances that are likely to be permanent (*section 288(3) TCGA 1992*)
- Transfers after the tax year of separation are subject to CGT unless another specific relief applies (e.g. PPR)
 - Spouses remain 'connected persons' for CGT purposes until Decree Absolute ("DA") so disposals between them are deemed to take place at market value (*Sections 286 and 18 TCGA 1992*)
 - Even after DA when ex-spouses are no longer 'connected persons' transfers pursuant to a court order will still be deemed to take place at market value - a disposal under a court order is not a bargain at arm's length
 - NB – HMRC have recently changed their practice on business asset holdover relief when assets are transferred pursuant to a court order and relief is now often denied or restricted in this context.

CGT and Divorce – A (very brief) summary continued...

Timing of the Transfer

- Unconditional contract – date of contract
- Conditional contract – date all conditions satisfied
- Informal transfer – date of physical transfer
- If transfers take place following a court order, then the date for the CGT disposal is the date of the court order, unless the court order precedes the date of DA. Where the order does precede DA, the date of DA becomes the effective disposal date
- For unconditional transfers made by agreement but outside the terms of a court order the date of disposal for CGT purposes is the date of the agreement but this treatment does not apply where an agreement made by the parties is then incorporated into a court order

- Important to understand when an asset is being transferred as part of the divorce proceedings.

Principal Private Residence Relief

Transfers of the Matrimonial Home

- Transferor spouse's gain may be exempted:
 - where transfer takes place in tax year of separation (on no gain/no loss basis)
 - where property is PPR
 - and transfer takes place within 9 months of separation OR
 - where additional exemption under *section 225B TCGA* applies
- When a spouse ceases to occupy family home and as part of financial settlement disposes of it, or an interest in it, to the other spouse who occupies the property as his/her PPR going forward, the property is deemed to continue to be the main residence of the transferor spouse until that transfer (NB – this extended relief needs to be claimed). However, the transferor spouse cannot claim PPR for another property for the same period
- A married couple may only have only one main residence between them. Main residence is a question of fact, or may be determined by election made where an individual has more than one property (within two years or acquisition of a particular combination) - once an election is made it can be varied at any time.

Recent Changes to Principal Private Residence Relief

- The amount of relief is proportionate to the time for which the property was the main residence; but also
 - Last 9 months of ownership exempt in any event
 - Periods of absence may be disregarded if up to 3 years (*s223(3)(a) TCGA*)
 - Time spent working abroad or another part of the UK may also be disregarded (*s223(3)(c) TCGA*)
 - Limited relief also available for periods of letting (*s223(4) TCGA*)
- Note that with effect from **6 April 2020**, it is only the last 9 months of ownership which are exempt in any event – this has been reduced from the last 18 months of ownership (and it had been the last 36 months up until April 2014).
- Very important to properly assess the availability or otherwise of PPR as it is now more likely that there could be a charge to CGT on a transfer of the matrimonial home from one spouse to the other on a divorce.
- Do note that if there is a loss realised on the transfer of the matrimonial home and PPR would have been available in respect of a gain then this loss cannot be used against other gains.

Utilising Losses on Transfer?

- One impact of the new landscape is that a number of assets might be standing at a loss. As a starting point, if losses are realised on a disposal then they can often be offset against chargeable gains to reduce an individual's tax burden.
- However, take care when assets are standing at a loss in a divorce.
- If assets are transferred before Decree Absolute realising a loss then such losses are 'clogged losses'
- Clogged losses are only relievable against chargeable gains arising from transfers to the recipient spouse whilst the spouses remain connected persons
- Make such transfers after Decree Absolute when spouses are no longer connected persons and so the losses will not be 'clogged losses' and can be used in the usual fashion.
- Particularly relevant in the current climate.

Timing the transfer in the new tax landscape

- Issues to consider when structuring a divorce
 - Is the asset in question standing at a loss? If so, if the transferor spouse wishes to benefit from this loss, then the transfer needs to be made post-Decree Absolute so as not to be a clogged loss.
 - Conflict with usual practice of wanting to transfer assets in the tax year of separation so that they are transferred on a no-gain, no-loss basis.
 - Consider the matrimonial home and further restrictions on availability of PPR (only last 9 months of ownership are now automatically exempt) – when is the most beneficial time to transfer the property?
 - Look at each asset on an asset by asset basis – do not just group them all together.
- In the new tax landscape, timing is therefore key and needs to be properly considered. This could make the difference between a beneficial tax treatment and a detrimental one.

Other “Covid-19” Considerations

- Future considerations when doing a deal
 - valuation issues
 - where are the markets going - absence of market comparisons
 - tax considerations for trustees
 - If trustees are realising assets to help a beneficiary on a divorce then they need to ensure that they are acting in a proper fiduciary capacity and that they are not causing themselves issues by realising assets at this time
 - indemnities for future tax as part of divorce settlement
 - Difficulties in quantifying likely future rates which could apply – how much will an indemnity end up costing in tax terms?
 - Will tax rates rise in the near future? How will the cost of the pandemic be paid for?
 - Much more difficult to predict future tax rates now

A wide-angle photograph of a beach at sunset. The sky is filled with soft, white and orange-tinted clouds. The sun is low on the horizon, casting a warm glow. In the middle ground, a small, white lifeguard stand with a red roof and the number '3' on its side stands on the sand. The foreground is dominated by deep, dark tire tracks in the sand, leading towards the lifeguard stand. In the distance, a line of palm trees and a city skyline are visible on the horizon.

— The Impact of Divorce on Trustees and Beneficiaries

Dawn Goodman

withersworldwide
The law firm for success

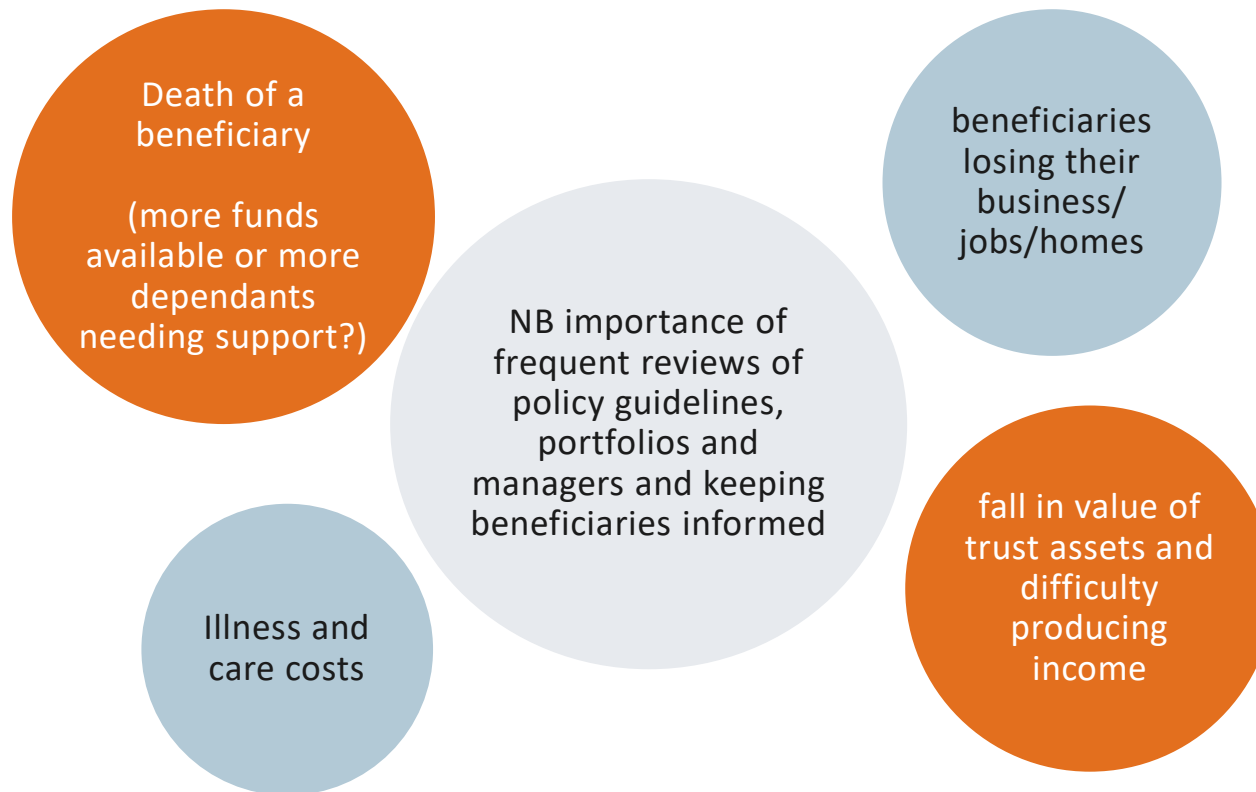
Trusts and trustees under pressure DC & AC

- Trust more likely to be viewed as the money box during and after Covid 19
- Possible reduction in value of parties' assets; employment uncertain or ends = greater demands on trust
- Trust needing to provide for other beneficiaries in difficulty
- Trust asset values down and difficult to produce decent income
- If settlor becomes bankrupt, risk of transfer into trust being set aside
- (NB 3 year presumption under s 37 MCA)

But do the usual resource arguments still work?

- Can it still be said that if a trustee has the power to appoint to a spouse the trustee will likely do so on request?
- What about the needs and expectation of others?

Covid - related considerations



Should trustees do what they consider they should do for their beneficiaries, irrespective of divorce?

- Restructuring due to changed family dynamics/ relocation/ tax considerations
 - New letters of wishes triggered by Covid-related developments
 - Addressing disaster or financial distress for other beneficiaries
 - Robust (and proper) trustee decision - making taking into account all relevant factors
- Asking blessing of the trustees' supervisory court?

How not to address the resource question

*Charman
v
Charman*

Failing to engage/ declining to provide any indication as to future exercise of discretion

How
does it
come
across?

Adopting approach of divorcing spouse/ their parent and coming over as unreasonable/ partisan

Have
you
tried...

Indicating potential benefit which couldn't possibly fulfil the need

*In the
matter of
the C Trust,
Jersey
2012*

Deliberately and unreasonably taking steps to reduce assets available for division

(contrast re *C Trust Co Ltd v Temple*, Jersey 2009)

How to address the resource question

- Taking advice on obligations as trustee and on dynamics of particular divorce to inform appropriate response
- Making enquiries as to beneficiaries' circumstances and needs
- Considering availability/ liquidity of assets and likely need to provide for others
- Addressing request in reasonable and reasoned way, drawing attention to needs and expectations of others
- Making it difficult for court to conclude that assets in excess of what indicated as might be available are **likely** to be available

Communication during crisis and during divorce

- Increased communication with beneficiaries required during crisis – health, circumstances, investment reporting
- Reduced face to face meetings so how to inform safely?
- Document lockdown during/ pending divorce - are Zoom meetings (unrecorded) and data rooms a possible solution?

(NB *Tchenguiz*)

If in doubt as a trustee caught up in divorce...

Ask supervisory court to direct or bless decision

Take dispositive and management decisions with great care and proper regard to all relevant circumstances

Use innovative procedures to avoid putting beneficiaries at risk of third party disclosure orders

If offshore don't submit to divorce jurisdiction or attend to give evidence without sanction of trustees' supervisory court

Take care of the children of the marriage (but take care over providing confidential information to their parents/ guardians)

The Withers Separation Model

Our video explains how it works:



https://youtu.be/8cApuU_AhFE



Any questions?

Panel session: How is the pandemic affecting trusts and divorce in your jurisdiction?



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Lucia Perchard

Director | Highvern
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The background of the slide is a photograph of a sunset or sunrise over a body of water. The sun is a bright, glowing orb on the right side, partially obscured by the horizon. Its light reflects across the water's surface, creating a shimmering path. The water is dark blue and black, with white foam from breaking waves visible on the left side. A large, solid orange circle is centered on the slide, serving as a backdrop for the text.

Any questions for our
panellists?

Our speakers



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Thank you for
attending