Till divorce do us part

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As the year progresses the headlines about the post-Christmas rush for divorce start to fall away. The divorce instructions become personal stories rather than tabloid ones. However the lack of newspaper headlines does not mean that the issue itself falls away for either onshore divorce lawyers or offshore trust lawyers. When looking at offshore structures, Settlors and Beneficiaries are beginning to view divorce as the biggest threat to their family wealth and stability and it is becoming of more concern to many than tax or even succession issues. Although death (and therefore succession issues) is the only true certainty, many Settlors are viewing the divorce of at least one of their children as almost as much of a certainty. The "risk" does of course vary between jurisdictions and cultures but as families become more mobile then risks and behaviour patterns can change.

Pre and Post Nuptial Agreements

Settlors are beginning to think more about reducing the risk of loss of trust assets in divorce settlements. It is becoming increasingly common for either the trust deed or letter of wishes to require issue to enter into pre-nuptial agreements if they wish to remain Beneficiaries when married. Given the still uncertain status of pre-nuptial agreements in the onshore courts, let alone the offshore courts, I wonder whether such provisions should be included in the trust deed itself. There may be better ways than the trust deed to place pressure on offspring to enter into such agreements but there is no doubt that prenuptial agreements are increasingly being considered by Settlors.

The raising of post nuptial agreements is perhaps even more sensitive, but again I have recently seen cases where the Settlor was suggesting this should be a condition of a child being a Beneficiary or even remaining a Beneficiary of an already long established trust. However,

Settlors do need at times to remember that the trust fund is not their asset anymore and it may be relatively difficult for trustees to start excluding Beneficiaries for failing to enter into post-nuptial agreements. Many Beneficiaries may not view introducing discussion of a post-nuptial settlement into an otherwise harmonious marriage as being for their benefit. Although Settlors are right to be conscious that perhaps the traditional method of protecting a trust by excluding spouses from the outset may no longer work in the modern world, there does need to be a degree of acceptance that issues such as pre and post-nuptial agreements can be difficult. This is a changing area both of law and attitude and one which Settlors, Beneficiaries and offshore advisers are increasingly having to consider when establishing structures.

Is the Approach of the Courts Changing?

Although offshore jurisdictions have generally introduced "firewall" legislation which in theory prevents onshore divorce awards being enforced, it can still be difficult to protect family wealth from the divorce courts. However, despite the historically fairly hostile approach of onshore courts to offshore trusts in divorce cases, there are signs the treatment of offshore trustees is beginning to change a little. Unlike perhaps in the past, I am seeing relatively few attempts by onshore courts to purport to vary offshore trusts. The onshore courts are certainly viewing trust assets as available for a divorce settlement but in my experience are taking a different approach. Orders now tend to be made against one of the divorcing parties for them to pay an amount that can only be facilitated with the cooperation of the offshore trustee. Even where trustees have stated they will not assist, such statements tend to be given little weight in my experience. It is a very difficult place for a conscientious offshore trustee to be if they elect to protect the family wealth in the long term at the expense of the divorcing Beneficiary being made bankrupt or found in contempt of court.

Perhaps in recognition of some of the difficulties facing offshore trustees, it is also becoming increasingly common for disclosure orders to include a clause stating that if the trustee produces documentation to the onshore court then this will not be deemed a submission to the onshore court's jurisdiction. Whist the introduction of the firewall legislation in the Channel Islands, for example, should mean that submission is not as much of an issue as previously; there is still considerable nervousness on the part of trustees. Many offshore trustees still refuse to submit to the jurisdiction without home Court sanction.

In my work I see many offshore trustees faced with genuine competing interests where one Beneficiary is divorcing but other Beneficiaries are objecting either to payments being made or disclosure being given. My experience is that professional trustees consider such issues seriously and do not, unlike as sometimes alleged, deliberate withhold information just to harm one of the parties to the divorce. At times the divorcing parties can forget there are other Beneficiaries whose interests the offshore trustee cannot ignore.

However, although we are seeing some changes, divorce and wealth protection is likely to

continue to exercise the minds of both onshore and offshore advisers.

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