

Trust Litigation Avoidance in Divorce Proceedings

Insights - 11/02/2020

Chris Hards, senior associate in Ogier's Guernsey Private Wealth team, recently shared his insights into asset holding structures and nuptial agreements in cross-border divorce with Citywealth Weekly. Below are his extended comments. Read the original article [here](#).

When considering a trust structure for the express purpose of asset protection within family succession planning, the prospect of divorce is never far from the mind of the settlor or the draftsman. Divorce is itself a costly undertaking and never more so than when consideration must be given to offshore trust assets and the role of a trustee. Combined with the additional possibility of a successful claim against trust property, the cost has the potential to wipe out the anticipated benefit to future generations.

It is imperative therefore that asset protection structures are established in such a way so as to (i) minimise so far as possible the risk of being drawn into divorce proceedings or, where such proceedings are unavoidable, (ii) minimise the involvement of the trustee and the trust assets. Fortunately, in Guernsey, the fiduciary sector is experienced in dealing with foreign law divorce proceedings and Guernsey trust legislation and jurisprudence is sufficiently sophisticated to withstand foreign law pressures.

For purely discretionary trusts, it can be relatively simple to mitigate the risks for example by ensuring that spouses of the beneficiaries are not themselves beneficiaries, and by limiting the beneficiaries' rights to both trust assets and trust information so far as the law permits. While these measures will not prevent foreign divorce proceedings affecting the trustee, early engagement by the trustee may ensure that its involvement is kept to a minimum while preserving trust assets.

Other factors will arise where, for example, fixed interest trusts are involved or where one or both of the parties to the divorce are settlors of offshore trusts, however, properly advised, there are methods of mitigating the risk of exposure to foreign divorce litigation suitable to a multitude of modern dynastic planning circumstances. Where litigation does arise, the trustee

will need to take early advice to ensure its action (or inaction) does not prejudice the interests of its beneficiaries.

In addition to the more traditional approaches I have described here, we are also experiencing increased instances of the use of pre and post-nuptial agreements to set out the circumstances upon which trust assets may be considered in any future settlement. The extent to which such agreements may bind trustees in the future remains to be seen but, in theory at least, it is an added layer of protection which further minimises the risk of trustees' involvement in litigation.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

Meet the Author



Chris Hards

Managing Associate

Guernsey

E: chris.hards@ogier.com

T: [+441481 752306](tel:+441481752306)

Key Contacts



Gavin Ferguson

Partner

Guernsey

E: gavin.ferguson@ogier.com

T: [+44 1481 752307](tel:+441481752307)



Matt Guthrie

Partner

Guernsey

E: matt.guthrie@ogier.com

T: [+44 1481 752342](tel:+441481752342)



Catherine Moore

Partner

Guernsey

E: catherine.moore@ogier.com

T: +44 1481 752364

Related Services

Dispute Resolution

Private Wealth

Legal

Related Sectors

Trusts Advisory Group