

WORKSHOP: Trusts and divorce

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Mr Mef is a wealthy businessman. He has been married to Mrs Mef since 2001. They have 3 children together, Tim (18), Stephanie (16) and Bob (14). On the eve of their 20th wedding anniversary in January 2021, after having spent lockdown together, Mrs Mef says that she wants a divorce. Proceedings are started shortly afterwards.

Mr Mef's father, Mr Grand, had settled a discretionary trust under BVI law, **the X Trust**. The total assets of the trust are worth \$60m, and the BVI trustee is Springtime Trust Planning. The beneficiaries are Mr Mef, his siblings, and their issue. Spouses are included within the class, but former spouses are not. The main asset of the trust is shares in a BVI company, which holds various investments through other structures, including property in England. One of these properties (**the London Property**) has been occupied by Mr and Mrs Mef for the last 10 years, and is where the couple's children grew up.

A separate BVI company (still owned by the X Trust) holds **the Dorset property**, which Mr Mef had use of prior to meeting Mrs Mef, since 1998. Mrs Mef has visited the property on several occasions, and the couple and their children have occasionally spent holidays there.

During the marriage, Mr Mef has also established various offshore structures for holding wealth. These are held under one BVI trust called **the Y Trust**, a discretionary trust the beneficiaries of which are Mr Mef and his issue. The BVI trustee is again Springtime Trust Planning. The trust is worth £15m. Mr Mef is paid a substantial income from the trust.

In the divorce proceedings, Mrs Mef alleges that the X and Y Trusts are nuptial settlements, and issues an application for their variation in her Form A. She also alleges that, given the provision that has been made from the trusts so far, the Judge should make an order that the trustees provide her with a lump sum to use in the purchase of a property, and that the entirety of the trusts must be viewed as resources available to Mr Mef.

Mr Mef has said that the X Trust will not be able to provide him with any further funding, pointing to limited benefits which he has received from trust assets in the past, and that the trust has never made any substantial distribution to him on a permanent basis.

Questions

1. How will the Court approach the X Trust and Y Trust? Is either trust a nuptial settlement? Or is either likely to be treated as a resource available to Mr Mef?
2. How will the Court deal with the Dorset Property?
3. How will the Court deal with the London Property?
4. What options for enforcement might Mrs Mef have if any award is made in her favour?

Points to consider:

Section 24 Matrimonial Causes Act 1973

- (1) *On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say—*

...

- (c) *an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage other than one in the form of a pension arrangement (within the meaning of section 25D below)*

Section 25 MCA 1973

- (2) *...the court shall in particular have regard to the following matters—*

- (a) *the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire*

- “Settlement” is construed widely – a trust can give rise to a number of “settlements” and a “settlement” may not be a trust. See e.g. Ben Hashem v Al Shayif [2009] 1 FLR 115, AB v CB [2015] 2 FLR 25
- What makes a settlement “nuptial”? Hargreaves v Hargreaves [1926] P 42 at 45, Prinsep v Prinsep [1929] P 225 at 232, Brooks v Brooks [1996] AC 375, DR v GR [2013] EWHC 1196 (Fam) at [8], Joy v Joy-Morancho [2015] EWHC 2507 (Fam) at [101]
- Can a non-nuptial settlement become “nuptialised”? Li Quan v Bray [2014] EWHC 3340 at [60] (yes); Joy v Joy-Morancho at [106] to [109] (no)
- How does the Court approach settlements where the asset is company shares? Prest v Petrodel Resources Ltd & Ors [2013] UKSC 34, DR v GR, Joy Monrancho at [112] (tensions which remain unresolved)
- How does the Court approach variation of settlements with a foreign character? Consider firewall legislation and possibility of enforcement in due course. What if the assets are onshore? Charalambous v Charalambous [2004] All ER (D) 582, Li Quan v Bray at [71], JB v DB [2020] EWHC 2301 (Fam), Akhmedova v Akhmedov [2021] EWHC 545 (Fam)
- Should the trustees be joined to the proceedings? What are the rules and guidance in this area? What are the alternatives to joinder and are they preferable? Does it make a difference if variation is not sought (see also next bullet point)? Family Proceedings Rules, DR v GR, TM v AH [2016] EWHC 572, Akhmedova v Akhmedov

- Trusts as a resource under s25(2)(a) MCA: what is the latest word on “judicious encouragement”? What is the evidence that is required and what is the role of the trustees? Whaley v Whaley [2011] EWCA Civ 617, Daga v Bangur [2018] EWFC 91, Ipecki v McConnell [2019] EWFC 19, RM v TM [2020] EWFC 41 at [81], Villiers v Villiers [2021] EWFC 23
- Some thoughts on enforcement: if a lump sum award is made to Mrs Mef, might the Court order Mr Mef to make request of Springtime Trust Planning to pay him a capital sum to discharge his obligation to her? What if he refuses to do so and the Court orders a third party to make the request on his behalf? How should the trustees approach this situation? Section 37 Senior Courts Act 1981, Tasarruf v Merrill Lynch Bank and Trust Co (Cayman) [2012] 1 WLR 1721, Blight v Brewster [2012] 1 WLR 2841