

DIVORCING BENEFICIARIES - A PRACTICAL GUIDE FOR TRUSTEES



THE PROBLEM

A Jersey law trust. A Jersey corporate trustee. Divorcing beneficiaries, both of whom are resident in a foreign jurisdiction. What should you do? What shouldn't you do? ⁱ

You will need to consider three matters:-

1. Provision of information
2. Submission to the jurisdiction of the foreign Court
3. Enforcement of judgment in Jersey

PROVISION OF INFORMATION

Disclosure of trust documentation falls under the inherent jurisdiction of the Court to supervise the administration of the trust.ⁱⁱ It is therefore advisable to seek a directions hearing in front of the Court for endorsement of any decision as to the documents you intend to disclose and documents you intend to withhold.

You should bear in mind the following:-

- A beneficiary will normally be entitled to see:-
 - The trust deed
 - Accounts of the trust, which may include accounts of underlying companies
 - Bank statements
 - Portfolio valuations
- A trustee is entitled to withhold disclosure of documents that reveal how they deliberate or how they exercise their discretion, unless the Court orders there is good reason to make disclosure.ⁱⁱⁱ This will normally include:-
 - The Letter of Wishes
 - Minutes of trustee meetings
- If there is any indication that a beneficiary or stranger to the trust intends to use the information to attack the trust – for example by asserting the trust is a sham – disclosure of information may be withheld.^{iv}
- The Court will normally order the provision of the fullest information to assist the foreign Court in determining how to divide matrimonial assets.^v
- In some circumstances the Court will order disclosure of information which is normally confidential, for example an old Letter of Wishes may already be in the possession of a spouse and it might be in the best interests of the trust to ensure the foreign Court has the most up to date version.



SUBMISSION TO THE JURISDICTION

It is advisable to seek directions from the Court to approve any decision you reach whether to submit to the jurisdiction of the foreign Court.

- Ordinarily the Court will order the trustee not to submit to the jurisdiction of the foreign Court.^{vi} As a matter of private international law, submission to the jurisdiction by the trustee may make the judgment of the foreign Court automatically enforceable in Jersey. A trustee is therefore normally advised not to submit, so that it will remain a matter of discretion for the trustee and the Jersey Court whether to give effect to the foreign judgment.
- A failure to seek directions before submitting to the jurisdiction from the Court may amount to a breach of trust.^{vii}
- The Court might endorse submission to the jurisdiction in some circumstances. For example if trust property is situated in the foreign jurisdiction, the Jersey Court may accept that it is unrealistic for a trustee to resist enforcement of the foreign order and may order the trustee to submit.^{viii}

ENFORCEMENT OF THE JUDGMENT

Enforcement of the judgement will turn on whether the foreign Court applied foreign law or Jersey law.

- If you submitted to the jurisdiction and the foreign Court applied Jersey law to any question concerning the trust, the judgment will be enforceable, but at the discretion of the Jersey Court.^{ix}
- If the foreign Court applied foreign law to any question concerning the trust, any order will not be enforceable in Jersey.^x You will therefore have to consider whether to exercise your discretion to give effect to the foreign Court order.
 - If the foreign Court made an order which varies the trust, but is a variation that you have the power to make as trustee under the terms of the trust deed, you may choose to give effect to the order. In any event it is advisable to seek the blessing of the Court at a directions hearing.
 - If the foreign Court made an order which purports to alter the trust, so that it is a variation that lies outside the powers you have as trustee under the terms of the trust, you cannot give effect to the order without the consent of all the beneficiaries.
 - Where all beneficiaries are ascertained and are adult and of sound mind, they may agree the alteration.^{xi}
 - Where beneficiaries include minors, unborn or unascertained beneficiaries you will need to seek the consent of the Court to any alteration to the trust.^{xii}

- If you, as trustee, are maintaining a neutral position, you should represent the interests of unascertained beneficiaries.^{xiii}
- If the foreign Court has ordered appointment of capital to a sub-trust for the benefit of one spouse, consider whether you should accept trusteeship of both the main trust and sub-trust. You may be trustee of both.^{xiv} But you need to be alert to conflicts of interest. For example if the beneficiary spouse of the sub-trust requests payment out of the entire capital of the sub-trust for tax purposes, giving consideration to the interests of the beneficiary spouse of the main trust will place you in conflict.^{xv}
- The foreign Court may have made an order that the beneficiary spouse pay a lump sum to a non-beneficiary spouse. The beneficiary spouse requests payment of the lump sum by the trustee. Again you have a discretion as to how to act. Payment to a non-beneficiary will not amount to a fraud on a power if made for the benefit of the beneficiaries because it discharges a legal and moral obligation which is recognised by the beneficiary spouse.^{xvi}

CONCLUSION

It is advisable at each stage of your decision making process to seek the endorsement of the Court. The Court is unlikely to criticise you for seeking such endorsement. You will be protected from any potential future breach of trust claim and you will be indemnified for your reasonable legal fees associated with such an application.

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ⁱ This practical guidance is based upon the Deputy Bailiff's speech to ACTAPS in November 2008

ⁱⁱ Schmidt v Rosewood [2003] 2 AC 709

ⁱⁱⁱ Re Rabaiotti 1989 Settlement [2000] JLR 173; Breakspear v Ackland [2008] EWHC 220 Ch

^{iv} Re the L and M Trusts [2003] JRC 002A

^v Re H Trust (2006) JLR 280

^{vi} Re H Trust (2006) JLR 280

^{vii} Re The Fountain Trust (2005) JLR 359

^{viii} Re Turino Consolidated Ltd Retirement Trust [2008] JRC 100

^{ix} Brunei Investment Agency v Fidelis Nominees Ltd [2008] JRC 152

^x Article 9(4) Trusts (Jersey) Law 1984; Mubarak v Mubarik [2008] JRC 136

^{xi} Saunders v Vautier

^{xii} Article 47 Trusts (Jersey) Law 1984

^{xiii} Mubarak v Mubarik [2008] JCA 196

^{xiv} Re B Trust [2006] JLR 562

^{xv} A Trustees Ltd v W, X, Y and Z [2008] JRC 097

^{xvi} In the Matter of the X Trust [2002] JLR 377