

# Issues for trustees of Guernsey trusts when foreign couples divorce

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This briefing is intended to provide a general overview of some of the issues to be considered by trustees of Guernsey trusts and their advisers when foreign couples connected with the trust divorce.

This briefing note is not applicable to any particular circumstances and should not be regarded as a substitute for specific legal advice. Equally it is not intended to be comprehensive in its scope and it is recommended that clients seek legal advice on any proposed decisions prior to taking steps to implement them.

Guernsey has legislated to incorporate strong firewall provisions in its Trusts (Guernsey) Law, 2007 ("TGL"). These are designed to protect trustees of Guernsey trusts by ensuring that any questions concerning validity of the trust or dispositions (transfer of assets into them) are decided in Guernsey, in the court of the trustees' home jurisdiction and are to be determined according to the law of Guernsey without reference to foreign law[1]. There is a "carve out" in relation to dispositions of property into the trust where the property is either not owned by the settlor, or he has no power to make the disposition, in which case the Guernsey courts will recognise the law of a foreign jurisdiction in order to determine whether the settlor was the owner of the property or had the right to dispose of it. Thus, the TGL will not avail a foreign settlor who has settled assets into a Guernsey trust which for example he obtained by fraud or theft as constituted under his foreign domestic law[2].

As a matter of common law, matrimonial property questions, in the absence of a contract or settlement, are determined by the law of the matrimonial domicile, which usually differ to those typical of an offshore jurisdiction. The matrimonial domicile law may contain a matrimonial

property regime such as community of all property acquired during the marriage with the result that both spouses are joint owners, and a husband may not properly transfer these assets into a trust without the consent of his wife. Guernsey's firewall provisions protect Guernsey trust assets from attack based on community property regimes contained in the law of the matrimonial domicile, or because the law of settlor's domicile does not recognise the concept of a trust[3]. Such situations give rise to complex issues which may require detailed consideration of the precise ambit and effect of the foreign matrimonial laws.

Another common issue turns on the situs of the trust assets. Orders made under foreign matrimonial legislation may purport to vary a Guernsey law trust. For example, the English Matrimonial Causes Act gives the English courts (domestic) jurisdiction to vary anything it considers to be a "nuptial settlement" even though that may be a Guernsey law trust. Where the situs of the assets is within in the local jurisdiction of the foreign matrimonial court, that domestic jurisdiction will usually enable a spouse to enforce against the assets, but where the assets are held outside the matrimonial jurisdiction in a Guernsey trust, any order from the foreign matrimonial court purporting to vary the trust on the basis of non-Guernsey law falls foul of the firewall provision in Section 14(1) of the TGL[4].

Section 14(4) of the TGL provides that no foreign judgment or order shall be enforceable or given effect to the extent that it is inconsistent with the firewall provision[5]. Whilst the Royal Court has yet to consider these sections, the way the Jersey courts have dealt with similar but not identically worded firewall provisions in practice is that if the effect of the foreign court's ruling is to change the terms of the trust in a way which the trustee has the power to effect, the court may in its discretion give directions to the trustee under the TGL which will achieve the same thing. The giving of directions under the TGL by the court arguably does not amount to enforcement of a foreign judgment for the purposes of Article 14(4) as it is an exercise of the court's inherent supervisory jurisdiction over trusts, exercised for the benefit of the beneficiaries when considered as a whole. If however, the variation ordered by the foreign court is not something that the trust deed allows, the Royal Court would not be able to exercise its supervisory jurisdiction in this way[6].

Much therefore also depends on whether the spouse and marital issue are beneficiaries of the trust, are excluded persons and/or whether the trustee has power to add to the beneficial class.

When foreign couples connected with a Guernsey trust divorce, the trustee is faced with many decisions such as whether and to what extent they should become involved in the foreign matrimonial process. Trustees will often wish to seek the direction or "blessing"[7] of the Royal Court in order to obtain a measure of protection in relation these complex decisions.

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[1] 14. (1) Subject to the terms of the trust, all questions arising in relation to a Guernsey trust or

*any disposition of property to or upon such a trust, including (without limitation) questions as to -*

*(b) the validity, interpretation or effect of the trust or disposition or any variation or termination thereof,*

*(d) the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function,*

*are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction. For these purposes "the law of Guernsey" does not include the Guernsey rules of private international law, except those set out in this section.*

*[2] 14 (2) Subsection (1) -*

*(a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor,*

*(b) does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power*

*[3] 3) No Guernsey trust, and no disposition of property to or upon such a trust, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any settlor, trustee, enforcer, trust official or beneficiary to be questioned, nor is any settlor, trustee, enforcer, trust official, beneficiary or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that -*

*(a) the laws of any other jurisdiction prohibit or do not recognise the concept of a trust, or*

*(b) the trust or disposition -*

*(i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person -*

*(A) by reason of a personal relationship to a settlor or any beneficiary, or*

*(B) by way of foreign heirship rights, or*

*(ii) contravenes or potentially contravenes any rule of law, judgment, order or action of any other jurisdiction intended to recognise, protect, enforce or give effect to any such rights, claims, interests, obligations or liabilities.*

*[4] The firewall provision by which the Royal Court must only apply Guernsey domestic law to Guernsey trusts.*

*[5] (4) Notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that -*

*(a) it is inconsistent with this Law, or*

*(b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, so orders.*

*[6] In re IMK Family Trust (Royal Ct.) 2008 JLR 250.*

*[7] Public Trustee v Cooper [2001] WTLR 901, Ch D.*

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