



Q&A



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DEALING WITH FAMILY DISPUTES WITHIN A TRUST CONTEXT

TO WHAT WOULD YOU ATTRIBUTE THE GENERAL RISE IN TRUST LITIGATION?

Inevitably when dealing with complex family circumstances and substantial assets, disputes can arise. Fortunately, the vast majority of trusts are established and administered without any disputes and rather than looking at trusts as a source of potential disputes, I see establishing a trust as an effective way to resolve or avoid disputes in the first place.

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A trust can also offer a gradual change of control from one generation to the next and help to avoid issues arising on succession. By comparison, Wills are less flexible and can reflect a situation at one point of time only. Failure to keep a Will updated will give rise to problems with limited possibilities to make changes after the testator's death.

WHAT BASIC SAFEGUARDS WOULD YOU RECOMMEND TO MINIMISE THE RISKS OF DISPUTES ARISING LATER ON?

There has undoubtedly been trust litigation as a result of the mis-selling of trusts: the settlor has been happy during his lifetime as the trustees are doing as they are told; the trust provisions and structure have not been adapted to the particular circumstances, but this only comes to light when the settlor is no longer around. As settlors age and die and wealth passes to the next generation, this is the time when conflict is most likely to arise.

A carefully drafted trust deed and properly administered trust will be less vulnerable to a successful attack and may discourage an attempted challenge after the settlor's lifetime. Encouraging the settlor and, as appropriate, the beneficiaries to get good independent legal advice at the outset is extremely important. It is equally important for the trustees and the settlor to ensure that they have a common understanding of the aims of the trust and how it will work once established.

Getting the right structure is also important. Considering different structures for different purposes or for different branches of the family, for example where there has been a re-marriage, can be helpful.

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It might be appropriate to discuss the succession plan with the family at the time the trust is set up, but this will really depend on the particular family circumstances and should be discussed with the settlor's advisors. The extent to which documenting or not documenting the rationale for certain decisions should also be explored.

WHAT MAKES A TRUST MORE VULNERABLE TO A SUCCESSFUL CHALLENGE ?

In many cases, trustees need to manage the settlor's expectations as to how much influence and control he or she can properly retain. Taking the settlor's wishes into account is a legitimate and proper course of action for the trustees to take when making decisions and it has become more difficult to prove sham trust since the line of cases beginning with *Re Esteem Settlement* [2003] JLR 188. Nevertheless, the integrity of the trust can be successfully challenged if the settlor continues to treat the trust assets as his or her own and the trustee complies.

Many trust jurisdictions have understood that the settlors wish to retain a certain measure of control over the trust assets, in particular the investment management function, and have responded by introducing legislation which confirms the validity of settlor reserved power trusts even when the powers are considerable. The retention of excessive powers is to be avoided but so long as they are reasonable and the limits are respected the risks of a successful challenge are limited.

The settlor needs to consider the type and the location of the trust assets. There may be unrealistic expectations, for example, concerning forced heirship claims where assets are left outside the jurisdiction with "fire-wall" legislation.

DO YOU SEE A PROTECTOR AS BEING HELPFUL IN AVOIDING OR RESOLVING DISPUTES ?

Having a family advisor or a trust protector who is trusted and respected by as many family members as possible and can perhaps give an impartial view or who can speak impartially to the various beneficiaries and the trustee can be invaluable.

WHAT ABOUT FAMILY COUNCILS ?

Whether or not to get family members involved, for example by giving them a role in a philanthropic project or starting to hand over the reins of a family company, is a tricky question as it can create problems to have too many persons with too many different interests involved in the decision making process. The right balance is to have only the right people involved. Each settlor must consider what is right for his or her family: there must be a plan. Just assuming that things will work out increases the risk that they will not.

Another development of many offshore jurisdictions has been the growth in private trust companies. In some cases, these can give rise to more problems than they solve. It is particularly important that there is professional support to ensure that the trust is properly administered but it is another possibility which may be right for certain types of assets, including the shares in family businesses, and for including family members in the decision making process.

HOW HAVE YOU SEEN DISPUTES WITHIN FAMILIES AFFECTING THE BENEFICIARIES RELATIONSHIPS WITH THE TRUSTEES ?

A trustee tries to balance the interests of all beneficiaries. Unfortunately, trying to reconcile competing interests can impact the relationship between the trustee and beneficiaries.

Inevitably, some will be disappointed with the trustee's decision. The key is to ensure that all beneficiaries have the opportunity to express their views and be heard as, even if they do not agree with a trustee decision, hopefully they will recognize that there has been due process.

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The information and comments contained herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.