

TRUSTS IN DIVORCE: RECENT DEVELOPMENTS IN HONG KONG

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The last decade has seen a rapid increase in the number of high-profile divorce cases involving wealthy individuals with substantial assets held in offshore trusts (e.g., *Minwalla v Minwalla* [2005] 1 FLR 771, *Re B Trust* [2006] JLR 562, *Charman v Charman* [2007] EWCA Civ 503; [2006] 1 WLR 1053; *A v A and St Georges Trustees Limited* [2007] EWHC 99 (Fam)). The intersection between trusts and divorce gives rise to interesting questions, both theoretical and practical. For example, trustees may encounter practical issues about whether they may be ordered to join the matrimonial proceedings, to vary an offshore trust, or to deal with the trust assets as if they were part of the matrimonial estate. These raise the theoretical question of the extent to which rules of ancillary relief may undermine the trusts structure, and ultimately, the asset protection function of the trust as a wealth management tool.

English courts have considered some of the above issues. In the seminal case of *Charman v Charman* (above), the Court of Appeal held that even an ostensibly validly created discretionary trust could be susceptible to attack, with the consequence that the trust assets could be treated as matrimonial property for the purpose of the divorce. Where some property is vested in an offshore company, the Supreme Court held in *Prest v Petrodel Resources* [2013] UKSC 34 that the corporate veil may be pierced to hold that the company in fact held such property on trust for one of the divorcing spouses.

The Hong Kong Court of Final Appeal had an opportunity to consider the application of the *Charman* principle in a local divorce case, which also turns out to have made the region's highest award in divorce proceedings (of more than HK\$830 million (approx. SGD134 million)): *Kan Lai Kwan v Otto Poon & HSBC International Trustee Ltd* [2014] HKCFA 66. While the Court did not suggest that the trust was a sham, the settlor's control over and access to the trust assets were determinative in treating them as part of the husband's matrimonial assets. This has significant implication for trusts established by local / Chinese businessmen who tend to reserve as much powers to themselves as possible. Besides, since the trust concerned was governed by the laws of Jersey, the Jersey courts also considered how trustees should react to foreign divorce proceedings: In the matter of the *Representation of HSBC Trustee International Limited* [2011] JRC 167 and [2014] JRC 254A.

This paper reviews the major cases when trusts and divorce intersect and considers some of the issues arising therefrom. It addresses whether, on the one hand, courts have been interfering too readily with legitimate structures designed for careful and tax-efficient management of family wealth; while on the other hand, offshore jurisdictions have gone too far in enacting protective policy-driven asset protection legislation to safeguard offshore trusts from external interference. It concludes by evaluating the theoretical and practical implications of the above competing approaches on the modern institution of the trust.