

**Private Client Law Bulletin****Discretionary Trust considered as a resource in divorce proceedings**

In the case of *Whaley v Whaley* the Court of Appeal held that a husband's interest in an off-shore discretionary trust was a financial resource to which he had access and should be taken into account when making a property adjustment on his divorce. It had previously been thought that interests in a discretionary trust would not form part of a divorcing party's available assets.

Further, the Court held that on the facts, it would also consider the availability of funds from a second off-shore discretionary trust of which the husband was not currently a beneficiary on the basis that it was possible to appoint him as such.

The Court's decision was based on the fact that in the past, the trustees of the first discretionary trust did exactly what the husband told them without question, and therefore it was found that it was likely that the husband's future call for further funds would be met. The second discretionary trust, in which the husband did not have a current interest, was likely to release funds to him on the basis that the trustees were the same and again would follow his instructions. This finding was made despite the fact that the second trust solely benefited the generation below.

Practical effects

The effect of a property adjustment order made by an English Court binds the relevant party (here the husband) to make the adjustment. It is not binding on off-shore Trustees. The Court cannot therefore order the Trustees to make funds available to the husband.

From a practical point of view however, if the husband is left with insufficient liquid personal assets to meet the order he may be left no other choice than to request the Trustees to release funds to him. The Trustees are not bound to follow a discretionary beneficiary's request, but are bound to consider it and may find it difficult to refuse. Such a request will require careful consideration, balancing the present and future needs of all beneficiaries.

Trustees will be placed in the invidious situation of either leaving a divorced beneficiary without the means to meet the property adjustment order or leave themselves open to a potential claim by the remaining beneficiaries that funds have been applied in breach of trust. Such a claim could be based on the premise that the funds applied were not for the benefit of the divorced beneficiary but for the benefit of his ex-spouse.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Private Client issues, please contact: Duncan Bailey in Liverpool on 0151 600 3451, Richard Bate in Manchester on 0161 836 8840 or Stephen Marriott in Preston on 01772 229 816.

If you no longer wish to receive the bulletin please let us know by return e-mail to kimberley.malcolm@brabnerscs.com

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