

## CASE UPDATE

## Protecting future family: Jersey Court refuses to bless trustees' decision to exclude beneficiary classes

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*The Jersey Court declined to bless a trustee decision in the recent case of *Re the V, W, X and Y Trusts* [2021] JRC 208. Despite the decision having the unanimous support of the ascertained beneficiaries and leading matrimonial, trust and tax counsel, the Court identified a number of “unresolved issues” that left it “sufficiently uncomfortable” to provide its blessing. In this case update, we look at why the application failed, and consider the significance of the decision for Jersey trust administrators.*

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### Background

The case concerned four Jersey law discretionary trusts, Y, V, W & X (**the Trusts**). The class of beneficiaries of each trust comprised the first respondent (B), his wife (C), their two children (D and E) and the spouses, widows, widowers and remoter issue of D and E.

The full history of the matter is unknown as the judgment is partially redacted, but there is reference to previous litigation between the wider members of the family. Against that background, the trustees of the Trusts were keen to mitigate risks of future litigation reducing the Trusts' assets, in particular by a claim being made by a spouse for a financial remedy upon divorce.

The trustees consulted with the ascertained beneficiaries (B, C, D and E) and took advice from leading matrimonial, trust and tax counsel, before arriving at a decision to irrevocably exclude from the classes of beneficiaries the spouses, widows and widowers of D and E's children and their remoter issue, and instead create a new settlement with assets of £7.5 million in which B, C, D, E and their spouses, widows and widowers would be included. As a condition for any future advances/benefit, D and E would be expected to enter into (i) a pre-nuptial agreement with their intended spouse prior to any marriage, and (ii) accept that the Trusts are non-nuptial and should not be pursued as part of a claim upon divorce. The idea being that the £7.5 million 'pot' would be the only target fund a person from the excluded class could expect to have access to in the event of any matrimonial or other claim.

The trustees applied to Court for a blessing of their obviously momentous decision under Article 51 of the Trusts (Jersey) Law 1984.

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## The Decision

The Court applied the well-known test for blessing a momentous decision, as laid out in *Re S Settlement* [2001] JLR N 37:

- (i) The decision must be ‘*momentous*’;
- (ii) The decision must be formed in good faith;
- (iii) The decision must be one which a reasonable trustee properly instructed could have reached; and
- (iv) The decision must not be vitiated by any actual or potential conflict of interest.

The Court was satisfied that the first, second and fourth limbs of the test were met, but not the third.

The difficulty of the proposal was that it irrevocably excluded the spouses, widows and widowers from Trusts worth approximately £100 million and replaced those interests within a singular trust worth £7.5 million, which could be further diluted by a power to add additional beneficiaries.

The Court cited the Court of Appeal’s judgment in *Representation of Otto Poon Trust* [2015] JCA 109:

*“The exercise of a power to exclude a beneficiary is unusual. Other than in exceptional circumstances it is unlikely to operate for the benefit of the person excluded, and its justification is accordingly likely to rest on the benefit to be gained by the other beneficiaries or by the harmonious administration of the trust estate as a whole. Where the interests of those excluded have not been properly taken into account, a decision to exclude can be struck down.”*

(Emphasis added)

The Court then scrutinised the proposed new trust and the rationale behind its creation and identified a number of “*unresolved concerns*”:

- It was not clear how the new trust would operate in practice. Would the trustee not come under pressure to make ‘non-divorce’ related distributions to the beneficiaries? If there was a divorce, how much of the fund should be retained to cover the prospect of future divorces affecting other family members and/or future generations? It was suggested that the assets be retained in cash or cash equivalent, but is this a prudent investment strategy for a trust fund which may need to be retained for many years (if not decades) to come?
- The rationale for excluding widows and widowers from the Trusts was a further point of concern. Widows and widowers posed no risk of making divorce related claims against the Trusts, and in that respect the trustees were throwing the baby out with the bathwater.

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- Would the proposal actually achieve its apparent objective of ‘*divorce proofing*’ the Trusts? The Court noted the guardian *ad litem*’s submission that the proposal was not watertight in that it would not prevent claims being brought for disclosure about the affairs of the Trusts or for a lump sum in the expectation that it would be met by the Jersey trustees.

The Court concluded that “*taking into account the unresolved issues*” canvassed by it in its judgment, it was left “*sufficiently uncomfortable with what is proposed to be in doubt as to its propriety*”. The Court accordingly declined to bless the decision.

## Takeaway points

- The Jersey Court did not share the same level of concern regarding spousal claims upon divorce as the trustees and ascertained beneficiaries. The possibility of a future spouse making a claim against the trust upon divorce was referred to by the Court as a “*remote, if not very remote, possibility*”.
- The conceptual appeal of a proposal is just one factor; equally important are the mechanics of how the proposal will operate in practice. It is evident from the Court’s judgment that a number of questions on how the new trust would work were left unresolved by the trustees and their advisors. It is apparent now, with the benefit of hindsight, that the trustees’ evidence to the Court did not go far enough in explaining precisely how the new trust would function throughout its lifespan.
- Excluding an unascertained/unborn beneficiary is a perilous exercise. The trustees had given the spouses, widows and widowers’ interests some degree of consideration by including within their proposal the creation of a substitute trust worth £7.5 million, apparently designed to cater for their needs upon divorce or death of their spouse. Evidently, this did not go far enough. Although not spelled out in the judgment, it can be deduced from the refusal to bless the decision that the Court was not satisfied that the trustees had properly taken into account the interests of those excluded and, consequently, it follows that the decision was not one which a reasonable trustee properly directed could have reached.
- Even if the proposal had found favour with the Court, it would not have immunised the Trusts from any and all future claims brought by spouses. A spouse who is not a beneficiary of a trust can still cause problems for Jersey trustees. For example, a divorcing spouse may obtain an order from their home court for disclosure of trust documents, which the Jersey Court may direct the trustee to provide (as occurred in *Re the Avalon Trust* [2006] JRC 105A) or for a lump sum that the beneficiary spouse cannot afford to pay without recourse to the trust assets, in the expectation that the liability will instead be met by the Jersey trustee (as occurred in the *Otto Poon* case).

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### Conclusion

The Court's decision is a salutary reminder to trustees on their duties when excluding beneficiaries, and on the need to demonstrate in the context of Article 51 blessing applications that they have considered all relevant factors and permutations. If a new structure arrangement is in contemplation, especially within a charged context such as divorce, the trustees will need to demonstrate to the Jersey Court that the structuring has been future-proofed against all possible eventualities. The judgment also indicates a new factor to which the Court may have regard in the exercise of its supervisory jurisdiction over trusts: the 'propriety' of a proposed course of action.

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