

Trusts and Divorce - A Trustee's Perspective

One of the attributes of humankind that can make us the best, most successful versions of ourselves is passion. It is passion that makes us dive headfirst into something unknown purely because we have that deep, visceral feeling in our gut that whatever it is we are about to do, it will absolutely, unequivocally be a roaring success. Sometimes it is. In fact, following their gut instincts has almost certainly contributed to the making of a significant number of the Ultra-High Net Worth ('UHNW') individuals that exist in Asia and around the World today. However, passion can also get us into trouble. What if the thing you are diving headfirst into is, for example, a marriage (any hopeless romantics, please stick with me here); marriage to a partner you just simply cannot imagine being without and so you rush ahead with the wedding without thinking about what might happen if the marriage breaks down. This is a story that repeats itself too often, even though almost everyone has seen the high-profile divorce horror stories or will know someone close to them who has been through a divorce. Yet time and time again, there is the belief that 'this won't happen to me'. Unfortunately, amongst other reasons, passion - if misplaced - can lead to the breakdown of many a marriage too. That is why planning ahead and planning properly are so important.

BY:

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SO WHAT SHOULD A PRUDENT UHNW INDIVIDUAL DO?

Hard earned wealth is unfortunately not so hard to lose and a divorce settlement can be one of the fastest ways to lose a significant portion of your wealth, indeed studies have shown it can reduce a person's wealth by some 77% overnight.¹

Whilst traditional discretionary trusts can be a key estate planning solution for many, they are not always as effective as one might think for asset protection. Case law has shown how they can be defeated, for example the 2015 Otto Poon case² (Hong Kong final appeal) which established the approach to discretionary trusts as spousal resources.

This does not mean that the idea of establishing a trust should be dismissed out of hand, quite the opposite in fact. Responsible planning using a trust continues to be a great tool for UHNW individuals to effectively protect their wealth for future generations, but proper planning is crucial.

IMPORTANT CONSIDERATIONS FOR UHNW INDIVIDUALS WHEN ESTABLISHING A TRUST

1. Plan early

This cannot be stressed enough. As the events in 2020 will have starkly reminded us all, it is not possible to predict what will happen tomorrow, the next day or six months from now. Once an individual creates or inherits substantial wealth their thoughts should turn to protecting it and it will hardly ever be too early to start.

In particular, when it comes to asset protection, individuals may not realise that trying to structure at the last minute can be even more detrimental than not planning at all. Case law has shown that the assets within a structure created just prior to commencing divorce proceedings or created with the intention of avoiding payment in a divorce are still likely to be treated as part of the 'matrimonial pot'. Additionally, attempting to divert or hide assets will result in both court criticism and probably penalties (such as costs) in this type of scenario.

2. Get advice from reputable legal professionals.



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3. Appoint a trustee who will implement, follow and update that advice over the lifetime of the trust.

It is important for an UHNW individual to gain perspective on what it is they are trying to achieve in the long-term, which is usually to protect and grow their hard-earned wealth so that they can provide for their children, grandchildren and perhaps other causes that may be close to their hearts.

Searching for yes-men or doing things 'on the cheap' may seem like a good way to have it all, but what UHNW individual's really need from both their lawyer and trustee are experienced, independent professionals who will create and manage a robust structure for the long term, where there can be no question that control, ownership and any claim to the assets was fully handed over by the settlor to the trustee.

WHAT SHOULD UHNW INDIVIDUALS EXPECT FROM THEIR TRUSTEE?

Selecting the right trustee is an important and very personal choice, but there are several key characteristics that an UHNW individual can look for in their potential trustees which are the hallmarks of their ability to execute a professional, prudent trusteeship:

¹ J Zagorsky (2005) *Marriage and Divorce's Impact on Wealth*

² *Kan Lai Kwan v Poon Lok To Otto and HSBC International Trustee Limited (2014) 17 HKCFAR 414 ('Otto Poon')*

1. Independence

In particular, a trustee's independence from the settlor.

Trustees should not be 'yes-men' for the settlor, as referred to earlier, and must have the ability to independently exercise their discretion and make decisions in the best interests of the beneficiaries of the trust.

Whilst at first glance, a potential settlor may believe that appointing a trustee who will act on their every whim is a good thing, it can lead to the trust being challenged, particularly in a divorce scenario. Take for example the 1993 case of *Williams v Williams*³, where the Singapore High Court determined that trust property would be treated as a financial resource of the husband (who was the settlor) because he had retained extensive powers to direct the trustee.

2. Good record keeping and accounting

A trustee should have well-established record keeping practices and prepare financial accounts for the trust and any underlying companies.

In addition to the fact that a trustee has a duty to account for the trust to the beneficiaries, thorough accounting can add to the veracity of the trust itself.

Both could prove to be invaluable in court proceedings in a divorce situation, when considering the legitimacy of a structure.

Clarity is very important to ensure the advice on how to best structure the trust suits the settlor's particular needs. No two individuals or families are exactly the same and so it stands to reason that the structures they establish should be uniquely tailored too.

3. Willingness for ongoing regular contact

Regular meetings (or contact by other means when meetings are not possible, such as during the global pandemic situation we currently find ourselves) are essential. The settlor will usually give the trustee a Letter of Wishes at the outset and this should continue to be discussed and updated on a regular basis.

The trustee should make every effort to get to know the settlor and his/her beneficiaries so that they are able to properly exercise their discretion in the best interests of those beneficiaries. Family dynamics and circumstances change over time and so ongoing, open, two-way communication is essential.

Once established, the trust deed should not simply be filed away and forgotten about until an issue arises. The trustee should be proactive, engaged and interested in the settlor's beneficiaries and their current needs and requirements.

HOW TO BE A 'GOOD' SETTLOR

Whilst finding the right trustee is essential, UHNW individuals can also play their part. This means ensuring they have a good understanding of the structure, how it needs to operate and what they should do to ensure the trust is as robust as possible so that it adequately serves its purpose.

Settlors' would benefit from keeping the following points in mind when establishing a trust structure:

1. A settlor cannot treat assets in the trust as though they are his/her own.

Once a trust is established, the assets legally belong to the trustee. If a settlor is using the trust as a quasi-bank account, this will seriously diminish the protections the trust might afford in other circumstances.

For asset protection, UNHW individuals may be advised by their legal counsel to consider establishing a dynastic trust. A dynastic trust is one where neither the settlor nor his/her spouse are beneficiaries. The beneficiaries will usually be the settlor's issue and remoter issue and the settlor is likely to be an excluded person.

This structure provides more certainty that the assets are not at the settlor's disposal.

2. Be clear on the purpose of the trust.

Right from the outset the settlor should work out, in conjunction with his legal counsel and potential trustee, what it is he/she is looking to achieve from creating a trust.

Clarity is very important to ensure the advice on how to best structure the trust suits the settlor's particular needs. No two individuals or families are exactly the same and so it stands to reason that the structures they establish should be uniquely tailored too.

3. Communication

Just as the trustee should be interested in and make time for regular meetings and contact with the settlor, so should the settlor keep lines of communication open with the trustee.

The settlor will often act as the main point of contact or gatekeeper for the family and will be the go-between for the trustee and the beneficiaries. The settlor should consider early on when the appropriate time would be to introduce the beneficiaries to the trustee - future conflict can often be mitigated by engineering meetings where the settlor, trustee and beneficiaries can sit around one table and each openly share their thoughts, requirements, goals and concerns.

Too often, beneficiaries are only brought into the picture at a much later stage or even once the Settlor has passed on, leaving only written wishes and perhaps more questions for the beneficiaries than answers.

HINDSIGHT IS A WONDERFUL THING

A recent study⁴ showed that from a survey of banking RMs across Asia, currently, less than 40% of their UHNW individual clients have any planning in place at all. Many individuals do not consider establishing a structure until something goes wrong which threatens their hard-earned wealth. Unfortunately, this may be too late to protect it.

It is of course difficult to avoid all external risks, as current global affairs have brought sharply into focus. However, there are things that can be controlled and one of those is the choice by UHNW individual's to establish a structure to protect their family wealth so that when unpredictable, uncontrollable risks arise in the future, their children and grandchildren will have a well thought-out and stable safety net to rely on.

Even for those individuals with existing structures in place, now is the time to think about what that structure looks like and whether there is anything that can be done to enhance the protections.

Thinking about the situs of the trust assets, whether the settlor and their future spouse(s) will be excluded persons, whether any powers to be retained by the settlor may be deemed excessive and if certain powers to add to or vary the trust instrument really need to exist are just a few areas where, with competent legal advice, a structure can be established with the best chance of protecting the settlor's family wealth for many generations to come.

Now is the time for UHNW individuals to harness some of the passion that helped them build up their wealth and put it into responsibly creating a more secure future for their family. ■

About Hannah Bisson

Hannah joined Trident Trust in 2020. She focuses on business development with Trident Trust's network of Wealth Planners, Private Bankers, Lawyers, Accountants, Family Offices and other professional intermediaries. Hannah began her career in Guernsey with a bank trust company and relocated to Singapore in 2018. She has 12 years of industry experience. Hannah is a full member of the Society of Trust & Estate Practitioners and holds a Bachelor of Science (Honours) Degree in Management from the University of Manchester.



³ *Gaye Williams Nee Marks v Cary Donald Williams* [1993] SGHC 190 (*Williams v Williams*)

⁴ *Asian Private Banker* (2019) *Navigating Wealth Transfer: Challenges and Opportunities of Succession Planning in Asia*