In most countries in continental Europe, for example, couples are subject to a matrimonial regime upon marriage to provide either for community of property (where all assets acquired during a marriage are considered to be held equally by the spouses) or for a regime where each party's assets are considered to be absolutely separate. In the absence of an election generally a particular form of community of property regime will be said to apply.

In many states in America a similar concept of community of property or equitable distribution applies to assets or wealth built up during a marriage.

The difference lies in the application of pre-nuptial agreements in these jurisdictions. Whilst a clearer (and perhaps stricter) mathematical division of assets tends to apply upon divorce, parties are at least able to specify at the outset of a marriage whether or not they wish that regime to apply or how they wish to vary it.

It is notable that, at present, as a result of the broad discretion and the recent case-law outlined above, where there is a choice of jurisdiction, the economically weaker spouse will regularly be advised to begin divorce proceedings in England, in preference to other jurisdictions.

CHAPTER 5

DIVORCE LINES OF ATTACK ON TRUSTS

5.1 INTRODUCTION

In Chapters 2 and 6 of this book, we explore how trusts can be attacked in divorce proceedings as a matter of trust law, or because it is not the trust the parties think it is. But even where a trust is genuine and complies with those matters, it may still be subject to either of two separate routes to provide a financial remedy for a claimant spouse. Where the trust is categorised by the Family Division as a 'nuptial settlement', the English court[1] has the power to make an order against the trustee to vary the settlement. In the alternative, the court could choose to take the trust assets into account as a resource of one or both of the parties to the marriage and make an order against the beneficiary spouse where the court considers that that party will have funds made available to him or her by the trustee. In this chapter, these two routes will be considered in detail, together with the likely circumstances in which the court would use each of them. Settlors and beneficiaries of trusts often assume erroneously that since the trust assets are not in their name, they will not be taken into account on divorce and so are safe from attack.

The impact of the House of Lords decision in *White v White*[2] in October 2000 continues to feed through into reported decisions as to the treatment of trusts on divorce. Since financial remedy is now concerned with percentage division of assets on divorce, rather than on a pre-*White* needs based approach, trusts are increasingly considered as part of the asset pool to be divided. This is particularly so after the Court of Appeal decision in *Charman v Charman (No 4)*,[3] in which it was held that an equal division of assets from all sources, not just generated during the marriage, is a presumption, no longer a starting point or yardstick against which to measure provisional awards; this presumption is rebuttable in appropriate cases based on the source of the assets.

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1 For the avoidance of doubt, references to 'court' should be construed as being references to the courts of England and Wales.

2 [2001] 1 AC 596.

3 [2007] 1 FLR 1246, CA. See further Chapter 4.

Charman v Charman has in effect affirmed a view of some lawyers[4] that England now has a form of community property and so assets generated during the marriage and settled by one spouse on trust are perceived to be part of the other spouse's 'unascertained share'. This has blurred the trusts as a resource approach to such an extent that trust assets in some cases can be treated as if those assets were in the settlor's bank account, which is clearly wrong as a matter of family and trust law. Post-*White* the starting point has to be to work out what assets are to be shared. The question is, how should trust assets be regarded?

Prima facie assets held in a trust of which one spouse or the other is a beneficiary are not held in the same way as the personal assets of that spouse. Otherwise the trust would not be validly constituted.[5] The Family Division has long taken the view that different types of assets should be shared; one spouse should not end up with either all cash or all pensions.[6] The principle may apply across assets held in and out of trust, but the exercise of the English court's discretion will depend upon its analysis of the assets within trust.

In this section two ways in which a court can take into account trust assets on divorce will be analysed and explained. Although reference is made to spouses throughout the chapter, the law is identical on dissolution of a civil partnership. Therefore, reference to spouses should include civil partners unless otherwise stated.

5.2 VARIATION OF NUPTIAL SETTLEMENTS

The most significant and direct power the court has regarding trusts is to vary the terms so as to provide a non-beneficiary spouse with money from the trust. This power exists for foreign trusts with foreign assets too, subject to issues of enforcement dealt with in Chapter 9.

Although it originates in 1857,[7] the statutory authority for the court's power to vary a nuptial settlement is set out in the Matrimonial Causes Act 1973 ('MCA 1973'), s 24(1)(c), which states:

> 'On granting a Decree of [divorce, nullity or judicial separation] or at any time thereafter the court may make ... an order varying for the parties of the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage, other than one in the form of a pension arrangement (within the meaning of s 25D below)'.

4 See, for example, Miles Geffin's article 'Miller/McFarlane and Macleod – the duality of law-making' in *Family Law* (May 2009).
5 See Chapter 2 for more detail on what constitutes a genuine trust arrangement.
6 See, for example, *Wells v Wells* [2002] EWCA Civ 476; [2002] 2 FLR 97, CA and *Martin-Dye v Martin-Dye* [2006] EWCA Civ 681, [2006] 2 FLR 901, CA.
7 See Chapter 2 for further detail on the history of this power.

There are parallel provisions in the Civil Partnership Act 2004 which allow a variation upon dissolution or nullity proceedings or separation order following a civil partnership:[8]

> '6(1) The court may make one or more property adjustment orders—
>
> (a) on making a dissolution, nullity or separation order, or
> (b) at any time afterwards ...
>
> 7(1) The property adjustment orders are— ...
>
> (c) an order varying for the benefit of—
> (i) the civil partners and the children of the family, or
> (ii) either or any of them,
>
> a relevant settlement; ...
>
> (3) In this paragraph— ...
>
> "relevant settlement" means, in relation to a civil partnership, a settlement made, during its subsistence or in anticipation of its formation, on the civil partners including one made by will or codicil, but not including one in the form of a pension arrangement (within the meaning of Part 4).'

No doubt in drafting this definition the Parliamentary draftsperson intended to encapsulate the current law on divorce. The reference to 'anticipation of its formation' may be more restrictive than on divorce.

The English court also has powers to award financial relief following an overseas divorce under Pt III of the Matrimonial and Family Proceedings Act 1984. These powers are subject to certain jurisdictional requirements as follows:

An applicant can apply for relief and the court will have in mind a checklist of factors including:[9]

(a) the connection which the parties to the marriage have with England and Wales;

(b) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated;

(c) the connection which those parties have with any other country outside England and Wales;

(d) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;

8 CPA 2004, Sch 5, paras 6 and 7.
9 Matrimonial and Family Proceedings Act 1984, Pt III, s 16(2).

(e) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;

(f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right the reason for that omission;

(g) the availability in England and Wales of any property in respect of which an order under this Part of this Act in favour of the applicant could be made;

(h) the extent to which any order made under this Part of this Act is likely to be enforceable;

(i) the length of time which has elapsed since the date of the divorce, annulment or legal separation.

The powers of the court are identical to those on divorce with one qualification in s 20, the relevant parts of which are as follows:

> **'20 Restriction of powers of court where jurisdiction depends on matrimonial home in England or Wales**
>
> (1) Where the court has jurisdiction to entertain an application for an order for financial relief by reason only of the situation in England and Wales of a dwelling-house which was a matrimonial home of the parties, the court may make under section 17 above any one or more of the following orders (but no other)—...
>
> (e) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage so far as that settlement relates to an interest in the dwelling-house; or
>
> (f) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement so far as that interest is an interest in the dwelling-house ...'

As explained below, in many circumstances the purchase of a property by a trust, which may not be a nuptial settlement, for spouses to live in, will constitute itself the creation of a nuptial settlement. The power to vary a nuptial settlement after a foreign divorce may come as a surprise to settlors and trustees.

When considering the question of a nuptial settlement, as Munby J said at para 229 of his judgment in *Ben Hashem v Al Shayif*,[10] three questions arise:

> '(i) is there a settlement within the meeting of s 24(1)(c)?
>
> (ii) if so, what is the property comprised in that settlement?
>
> (iii) if there is a settlement, how should a court exercise its discretion?'

5.2.1 The breadth of the court's power

In Chapter 2, we explored the history of the Family Division's power to vary.

The court has made use of the power to vary settlements not only where a formal trust exists but also in circumstances where there is no formal arrangement. In such instances, the court has construed the existence of a trust arrangement or settlement so that it could be varied for the benefit of the applicant.[11] For the reasons explored in Chapter 2,[12] the court's discretion has historically been exercised by way of a variation of trust where other powers were not available. Not only does the power extend to informal arrangements, but it even extends beyond the court's jurisdiction in England. Even where the proper law of the trust is not the law of England and Wales, the trustee is not resident in England and the trust assets are held outside of the court's jurisdiction, the court has the power to vary a nuptial settlement.[13] In the 1934 case of *Goff v Goff*[14] Sir Boyd Merriman P was concerned with a New York trust. He said:

> 'It is clear from the decisions in *Nunneley* and *Forsyth* that this court has the power to vary a settlement inter partes even though it comprises property out of the jurisdiction and the trusts are administered by trustees out of the jurisdiction and the settlement is governed by foreign law.'

The issue in such circumstances then becomes one of whether an order of the English court for variation of a foreign settlement is enforceable against assets in England and/or in that other jurisdiction. In the absence of evidence to the contrary, the court will assume that an order made in relation to real property situated outside the jurisdiction will be applied.[15] For more detail on this question, see Chapter 9.

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10 [2009] 1 FLR 115.

11 See, for example, *Brown v Brown* [1959] P 86 and Lord Denning's case of *Smith v Smith* [1970] 1 All ER 244, which in which the conveyance of a property bought on trust by a husband and wife was held to constitute a 'settlement' on themselves capable of variation on divorce.

12 See **2.3.2**.

13 *Nunneley v Nunneley and Marrian* (1890) 15 PD 186.

14 [1934] P 107.

15 See *Razelos v Razelos (No 2)* [1970] 1 WLR 392 and *Hamlin v Hamlin* [1986] Fam 11.

requested may in fact be of positive benefit to the beneficiaries or may prevent the court drawing inferences adverse to the interests of one or other of the beneficiaries.

CHAPTER 9

INTERNATIONAL ENFORCEMENT ISSUES RELATING TO TRUSTS

9.1 INTRODUCTION

The attitude of the Family Division of the High Court towards trusts is well known. Many a judicial pronouncement, uttered by family judges as a statement of the obvious, raises nothing but groans from chancery lawyers.[1] Take this example:[2]

> 'Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court's wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce. The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of the Civilian Member States is exacerbated by the fact that our law has so far given little status to pre-nuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at the least the opportunity to order their own affairs otherwise by a nuptial contract?'

But, with respect, it is simply not right to say that we in England have no marital property regime.[3] However, instead of having supinely to choose one of several pre-digested regimes ordained by the legislator, as they have to do in civil law countries, in this country individual autonomy rules. Everyone can make their own regime, to fit their own individual circumstances; and, in the past, the monied classes did. Even middle class people had marriage settlements – *trusts*.[4] Today, the mechanism remains

1 It is only right to say that this is not always the case. The decision and reasoning in *A v A* [2007] EWHC 99 (Fam) is an honourable exception.

2 *Charman v Charman (No 4)* [2007] EWCA Civ 503, para 124 (the court in this occasion comprised the President of the Family Division, the Vice-President of the Family Division and one former Family Division judge). See further Appendix 2 below.

3 Nor, indeed, that the English position (whatever it is) is almost unique: it is the position in nearly all common law countries.

4 See e g Holdsworth *A History of English Law* (2nd edn, 1937) vol 7, pp 376–381 and 547–559; *Williams on Settlements* (1879) especially Lecture XV; Cheshire *The Modern*

there, albeit modified for settlements of land in 1996.[5] Precedents are still to be had.[6] There is a thriving community of lawyers who know all about them, and who regularly advise their clients on them.[7] The reason that new ones are not created so frequently today is simply the impact of capital taxation. Paradoxically, the harsher that that becomes (and fiscal drag by itself is doing that for the Chancellor of the Exchequer, even without the need to introduce more unpleasant anti-trust regimes), the less likely it is that anyone will use the institution. On the other hand, for those who are not subject to the crushing burden of UK capital taxation,[8] the marriage settlement can be an attractive way of ordering the devolution of family property, presenting significant advantages[9] over, say, pre-nuptial contracts, which are, after all, well, just *contracts*. But what is really depressing is that three senior English judges apparently have no idea of the history of marital property in this country, and give no thought to encouraging marriage settlements.

This chapter is about one aspect of English family litigation, and that is its impact on trustees (and assets) of foreign trusts. Suppose that an English court in matrimonial litigation has made an order affecting foreign trustees, not within the jurisdiction of the court. Probably the foreign trustees will not comply with that order, notwithstanding the English court's assertion that it had jurisdiction to make it. Unless and until the *foreign* court directs or permits them to do so, they might think they will be at risk of action by their beneficiaries for doing something without legal sanction.[10] The question whether and to what extent the foreign court will in effect enforce the English order is a complex one, and is the subject of this chapter.

The chapter is for these reasons split into sections that address the following four questions:

- What is it about a trust that can give rise to jurisdiction and enforcement issues?
- When will the English court assert jurisdiction?

Law of Real Property (1st edn, 1925), 367–72; Megarry & Wade *The Law of Real Property* (2nd edn, 1959), 381–89; Stebbings *The Private Trustee in Victorian England* (2003), especially at 10–11.

5 By the Trusts of Land and Appointment of Trustees Act 1996.

6 See *The Encyclopedia of Forms and Precedents* (5th edn, 2005 reissue) vol 40(1), paras 2690–2800.

7 See eg *X v A* [2005] EWHC 2706 (Ch) for a recent case concerning a marriage settlement made in 1964.

8 Eg those not domiciled (or deemed for inheritance tax purposes to be domiciled) in the UK, or those whose assets are subject to 100 per cent relief (eg agricultural or business property).

9 Including protection from bankruptcy and the ability to trace into the products of wrongfully alienated assets, to mention but two.

10 For recent examples, see *Re Rabaiotti 1989 Settlement* 2000 JLR 173; *FM v ASL Trustee Company Ltd* [2006] JRC 020A, para 11; *Re H Trust* [2006] JRC 057.

- When will the foreign court recognise and enforce an order of the English court?
- What effect will foreign asset protection legislation have on the foreign court's approach to the English court order?

9.2 FOREIGN TRUSTS

It is necessary to recap briefly on what was said in earlier chapters in order to recall why jurisdiction and recognition and enforcement can be issues in the context of trusts and divorce. We need to consider what it is that makes a trust 'foreign' and we need to recall how foreign trusts are related to English matrimonial proceedings.

English matrimonial proceedings for a financial remedy purport to be able to affect foreign trusts in the same way that they can affect English trusts. Assets held within *any* trust, *including foreign trusts*, may be considered to form part of a spouse's allocable resources in financial remedy proceedings. First, this might be because the English Family Division considers the trust set up by the spouse to be a sham disguising that spouse's continued beneficial, or even legal, ownership of the assets. Second, the Family Division, notwithstanding its recognition that the trust is not a sham, might consider that the spouse is in reality the only beneficiary likely to benefit from the trust assets or that the trustees are in reality (or following the court's order) likely to satisfy any request by the spouse beneficiary for assets out of the trust. Third, the Family Division may consider it just to exercise its variation powers to vary a trust in order to give effect to what it considers to be the appropriate division of matrimonial resources. Fourth, the Family Division may grant an interim freezing order over the trusts assets pending the result of the full hearing.

If a trust is (1) governed by English law, with (2) trustees, (3) assets and (4) beneficiaries located in England (and Wales), it is a quintessential English trust. In this case, questions of jurisdiction and recognition and enforceability of the order of the Family Division are unlikely to arise. These questions will arise, however, with increasing vigour, as more of these English elements are found to be missing from the particular trust set-up, ie the more 'foreign' the trust is.

Categorisation of a trust as foreign can be a matter of degree or even depend on the context of the requirement for categorisation (ours being legal jurisdiction). Probably a trust that has a foreign governing law will be easily categorised as a foreign trust. Trusts governed by English law with other foreign elements, however, may or may not be so categorised, but an order of the Family Division pertaining to such a trust could still give rise to questions relating to jurisdiction and recognition and enforceability.

Given the increasing use of offshore trusts, the Family Division is often confronted by trusts that are almost entirely foreign: trusts governed by a foreign law with trustees located in a foreign jurisdiction and assets and beneficiaries located in England *and* abroad. We have this situation in mind when we say 'foreign trust'. Nevertheless, it is still necessary to bear in mind that the key focus here is the question of enforceability of an order of the Family Division that affects a trust with foreign or international elements. The applicability to a particular trust of labels such as 'foreign trust' is not the guiding factor, but such a label can be a helpful shorthand for pointing out that there are international elements in the trust set-up that may lead to issues surrounding jurisdiction and recognition and enforceability.

In practice, the difficulties for the Family Division arise because the assets and trustees are not within the reach of the English court's enforcement mechanisms (or officers!) and because trustees are cautious about complying with foreign orders without local judicial reassurance (where compliance might leave them liable to their beneficiaries). Both these factors mean that the courts where the trustees (and perhaps even the assets) are located are vital to the practical efficacy of the order of the Family Division.

Our next concern is the considerations that underpin a decision of the Family Division to assert jurisdiction to make orders (of the kinds described above) that affect trusts with foreign elements, or even trusts that are undeniably 'foreign'.

9.3 ENGLISH JURISDICTION

The word 'jurisdiction', when used in the context of the jurisdiction of the English court, is used in at least two different senses in English law. First, there is 'territorial' jurisdiction, ie answering the international question *which* persons are (or are claimed by English law to be) within the reach of the English court. In English law this extends not only to persons actually within the physical territory of England and Wales, but also to include some cases where the potential defendant is elsewhere (what the Americans call 'long-arm' jurisdiction). The second sense of jurisdiction is 'power' jurisdiction, ie the circumstances in which the English court will *in fact* deal with a particular matter, in relation to a defendant who falls within the jurisdiction of the court in the first ('territorial') sense. Both senses are tied up in the same question of jurisdiction for our purposes, for if there is no jurisdiction in the first sense the question of jurisdiction in the second sense does not arise.[11]

There are no rules in England and Wales concerned *specifically* with jurisdiction in relation to trusts and financial remedy on divorce. There

[11] *Mercedes-Benz AG v Leiduck* [1996] AC 284 at 298.

are rules concerned with financial remedy and there are distinct rules concerned with trusts. In this section we are examining first the jurisdiction arising purely from divorce[12] and financial remedy. We are not at this stage concerned with jurisdiction over trustees per se but rather jurisdiction to make orders affecting distribution of matrimonial assets that happen to include foreign trust assets (and hence happen to affect foreign trustees).

9.3.1 Financial remedy jurisdiction

The jurisdiction of the English court to make financial remedy orders in general is summarised in rules 99(1) and 99(5) of *Dicey, Morris & Collins on the Conflict of Laws*.[13] Rule 99(1) states that: 'English courts have jurisdiction to make an ancillary order for financial provision on or after granting a decree of divorce, nullity of marriage or judicial separation whenever they have jurisdiction in the main suit …'. In other words, if the English court exercises its jurisdiction to grant a divorce, then it has jurisdiction to deal with all financial matters arising out of the divorce.[14] The question of jurisdiction to grant a decree of divorce is addressed in Chapter 3.

In addition, the English court also has jurisdiction to order financial remedy where a divorce that did not take place in England is entitled to be recognised in England *and* the parties have a genuine connection with England. Paragraph 5 of Rule 99 reads:

> 'English courts have jurisdiction to make an order for financial provision after the grant in a country outside the United Kingdom, the Channel Islands and the Isle of Man of a divorce, annulment of marriage or legal separation which is entitled to be valid in England if –
>
> (a) the applicant or respondent is domiciled in England either on the date of the application for leave to proceed or on the date on which the divorce, annulment or legal separation took effect in the foreign country; or
>
> (b) the applicant or the respondent was habitually resident in England throughout the period of one year ending with either of those dates; or
>
> (c) the applicant or respondent has (or both of them have) at the date of the application for leave to proceed a beneficial interest in possession in a dwelling house situated in England which was at some time during the marriage a matrimonial home of the parties.'

[12] The reference to divorce in this chapter includes for this purpose a reference to similar decrees such as nullity, judicial separation, and dissolution or annulment of a civil partnership.

[13] 15th edn.

[14] Other than matters relating to maintenance obligations if jurisdiction was founded solely on the domicile of one of the parties (art 3(c) read with art 2(3) of Council Regulation (EC) 4/2009 (known as the Maintenance Regulation)).