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Whaley v Whaley poses the question of when a trust fund is a 'resource' in divorce proceedings, as Kelly Noel-Smith and Laura Brown explain

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'In a divorce, the Matrimonial Causes Act 1973 (s25(2)(a)) requires the court (as part of taking into consideration all the circumstances of the case) to specifically consider the "financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future".'

The divorce case of *Whaley v Whaley* [2011] is a stark example of the application of well-established principles in the family courts concerning the treatment of a trust fund as a resource to which one of the parties has access. While no new law was formulated, the case serves as a vital object lesson in the importance of trustees taking a considered and careful stance within the proceedings, and appropriate legal advice at the earliest opportunity.

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In the Whaleys' divorce proceedings, Mr Whaley contended that his financial resources stood at just over £3m on the basis that he was not a beneficiary of one of the trusts, and the assets in the other were inherited and pre-marital and so not accessible to him; Mrs Whaley, on the other hand, put the figure closer to £12m, contending that assets held in two Jersey trusts, the Farah Trust and the Yearling Trust, one of which Mr Whaley was a beneficiary, one of which he was not, should be brought into account by the court as resources available to Mr Whaley.

In 2010, Mrs Justice Baron, in the High Court, largely agreed with Mrs Whaley. She took a figure of £10.4m for the resources available to the parties. Nearly £7m of this was made up of assets in the two trusts as resources likely to be available to Mr Whaley. The net value of assets held by the Whaleys outside the trusts was nearly £4m, of which just over £1m was in Mrs Whaley's name. Mrs Justice Baron did accept that some of the wealth introduced by Mr Whaley to the marriage was by way of contribution of assets, made available to him by his parents, which formed the trust funds (ie inherited and pre-marital). This, Mrs Justice Baron indicated, was taken into account in her departure from an equal division of the assets: the wife was awarded 36% not 50%.

In his appeal, Mr Whaley argued that Mrs Justice Baron had not given sufficient weight to the fact that the trust assets derived from his family and were held on 'dynastic' trusts that were pre-marital and inherited, all reasons to depart further than Mrs Justice Baron had from an equal division of the assets in Mr Whaley's favour. The Court of Appeal was not sympathetic to these arguments, and they upheld the findings of Mrs Justice Baron and dismissed Mr Whaley's appeal in May 2011.

The key issue for the family court in these circumstances is 'the reality' of the situation (per Singer J in *SR v CR* (*Ancillary relief: Family Trusts*) [2009]). The court is required by statute and authority to consider all the resources of the parties. This is a test that goes beyond propriety rights and obligations, but looks at what, on the balance of probabilities, will happen in the future.

Thus, while a beneficiary of a discretionary offshore trust (whether named or falling within a wider class) cannot compel or require the receipt of assets/funds from the trustees, this is not the end of the matter for the family court. The family court asks itself: 'is the

beneficiary likely to receive or be able to access trust funds for their benefit?' This is a matter of fact and evidence generally based on the historical conduct of both the trustees and the beneficiary in respect of the trust.

on the basis that the trustees had the power to add him to the class, with the consent of the protectors, and were likely to do so if he so asked.

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In *Whaley*, the first instance court, after considering the history between Mr Whaley and the trusts, the nature of the disclosure, the trust assets and such evidence as it had about the freedom or otherwise in which requests were made and fulfilled, concluded, as a finding of fact, that the husband would be able to access the trust funds in the future, effectively at will, even those of the trust of which he was not a beneficiary. This was that the funds held in trust were *de facto* resources of the husband, and thus considered available to meet an award to the wife (or to replenish the husband's personal assets if these were in part or whole awarded to the wife). The Court of Appeal upheld the findings of Mrs Justice Baron. Lewison J said (at para 113):

> [T]he court looks at resources; not just at ownership. Thus whether a beneficiary under a discretionary trust has a proprietary interest is not relevant. The resource must be one that is 'likely' to be available. This is the origin of the 'likelihood' test. No judge can make a positive finding about the future: the best that can be done is to assess likelihood. What is relevant is the likelihood of the trust fund or part of it being made available to him, either by income or capital distribution. If the husband were to ask the trustees to advance him capital, would the trustees be likely to do so: [...] The question is not one of control of resources: it is one of access to them.

This principle was in evidence in *Charman v Charman* [2005], too, where Wilson LJ said at para13:

> In principle, however, in the light of s25(2)(a) of the 1973 Act, the question is surely whether the trustee would be likely to advance the capital immediately or in the foreseeable future.

The rationale for such an approach is clear. If the family court confined itself to considering only the resources of

the parties that were legally theirs (in its purest sense), any placement of any assets in a 'usual' discretionary trust would remove them from consideration by the court on a divorce. This could, in some cases, operate to cause great unfairness between the spouses on a divorce (for example, what would Mrs Charman have received in *Charman* had the huge proportion of Mr Charman's assets settled by him before divorce in a Bermudan discretionary trust been accordingly left out of account, even though it was perfectly clear that he was able to access them per his own letter of wishes?).

There will be cases, however, where trustees are (quite properly) not willing to financially assist a beneficiary who is divorcing. The key for the family court in facing such a stance is to ascertain whether or not it is adopted solely for the purposes of the proceedings. The court will ask itself a number of questions; the most important of which is 'how have the trustees assisted or treated requests for assistance in the past?' If the trust has historically funded a beneficiary and their family during a marriage, but ceases this immediately on the marriage breaking down and then refuses to assist the beneficiary in the future, this will be met with inevitable cynicism. The family court also does not confine itself to the 'mere *ipsi dixit*' of the trustees (per *SR v CR*). It is important to note that the trustees and protectors of Mr Whaley's family trusts were robust in their stance in letters that were put before the court, that the trusts would not help him by advancing him assets. The court, however, did not accept this in light of past conduct. Mrs Justice Baron, in describing the protectors said (at para 105 and 106):

> I am absolutely satisfied that [...] Mr Williamson became accustomed to doing the husband's bidding [...] until his retirement in about 2005/6. Thus, while it cannot be said, nor is it being suggested, that the trust is a sham, in reality, the husband knew and expected all of his wishes would be followed whilst Mr Williamson was at the helm. I am convinced that the same was (and is) true with the chosen successor, Mr Hess, who did everything that was asked of him.

And, in terms of the trustees, Mrs Justice Baron held (at para 119):

> There is simply no evidence of the trustees ever failing to provide funds for the husband's needs whether in terms of business investments or assistance with the provision of homes. In addition, the manner in which Mr Hess can be demonstrated to have fulfilled his role since the proceedings began confirms that he continues to follow the husband's wishes.

It is also important to note that Mr Whaley was not assisted by the trustees being unwilling to provide such disclosure of trust records and accounts as the court (and indeed he) felt necessary. Rather than prove the trustees' case, it operated further to undermine it.

This illustrates the classic dilemma for the trustee (and divorcing beneficiary). A refusal to provide adequate or necessary information by the trust (or in the beneficiaries' case, an inability to compel from the trust such disclosure) can, and frequently does, operate against the interests of both sides and can be counterproductive in any court proceedings. If the court has to make findings of fact, and the beneficiary (and by implication the trustee) would like the court to find that assets will not be forthcoming, then the provision of information may assist in establishing that. For example, disclosing details of a history of a conservative attitude being taken by trustees towards past requests for funding or showing that other beneficiaries (for example, siblings) have been unable to access funding from the trust in similar or other circumstances can be compelling. A cogent and reasoned explanation of the rationale for the trustees purported stance can also be persuasive, even though providing details of such deliberations may be anathema to the very nature of discretionary trust administration in the normal course of events. A disclosure of records that show the beneficiary in question has been refused advances or funds in the past also can be crucial. After all, in the family division, past behaviour is often the only indicator the court will have before it as to likely future conduct.

These issues will all need to be weighed up carefully by the trustees particularly when considerations such as submission to the jurisdiction and duties of confidentiality arise. As set out above, however, it can often be the case that the negative, but natural and understandable, first reaction of trustees to requests for information and disclosure can be counterproductive. While in the most closely related offshore trust jurisdictions to England and Wales (for example the Channel Islands) recent years have seen a greater appreciation of the complexities that a divorcing beneficiary creates (and interestingly an increased degree of pro-disclosure positions being taken or endorsed by their courts), this is not necessarily the case elsewhere (*Charman*).

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Frequently, trustees and trust advisers consider when dealing with the Family Division of England and Wales that they are entering a foreign land. A qualified guide is therefore essential, not only to assist in protecting the trustees' position and the trust itself, but also the interests of the beneficiary in question. Not only is it vital that the trustees have a proper understanding of the likely reaction to (by the English court), and effect of, all of their actions, it is equally vital that the beneficiary's advisers and the trust advisers are all 'pulling in the same direction'. In short, there is little substitute for the trustees taking advice from a lawyer well familiar with the vagaries of the English divorce courts. ■

Charman v Charman
[2006] WTLR 1
SR v CR
[2009] 2 FCR 69
Whaley v Whaley
[2011] WTLR 1267