



An equal share

Alex Carruthers asks if Obama's push for trust transparency will benefit divorcing wives



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One of Mr Obama's main targets both before and after he was elected has been offshore trusts, where he believes vast sums are hidden away from the prying eyes of, amongst others, the US tax man. It may well be that substantial assets are hidden away in a jurisdiction that is out of reach of the relevant tax authorities, and tax practitioners continue to debate what should be done with such money-laundering-friendly jurisdictions. Some of the publicity, notably around UBS's decision to allow the US government access to its records, led to another leap in assumptions about the consequences, resulting in August in the *Time* magazine banner headline trumpeting: 'Ex wives eagerly await UBS tax cheater list.'

The rationale of the *Time* article, and other similar outpourings, is that wives of rich individuals are one of the stakeholders who will benefit from the production of lists of US individuals who use foreign bank accounts. This assertion seems to me to be spurious and a weak attempt to prop up the drive for transparency. Experience dictates that only a minuscule proportion of divorcing husbands would place any 'hidden money' in an account, in their own names, in a 'high street' bank without leaving any clues at home to its whereabouts. Given the recent cases of Mubarak and Charman, the real problem in offshore jurisdictions for divorcing wives may well not be identifying money, but getting their hands on the cash, if it has been incorporated into a trust structure in an

'advantageous' jurisdiction.

Most individuals would have difficulty in hiding assets effectively from their spouses. Certainly, any spouse who has a regular income (or bonus payments) will leave a paper trail showing money coming in, and money going out, of their bank accounts. Their spouse during the divorce proceedings can obtain through the Court process documents and information which will uncover the paper trail (e.g. lists of bonuses for the last ten years and where the monies have been placed) that will uncover any siphoning-off of money. The individuals who have the best opportunity for siphoning-off money are self-employed businessmen and others, who receive commission and money from deals where the paperwork is less rigorous and complete.

Even for these couples, with modern technology clever wives have taken advantage of a number of self help remedies to uncover funds. There is growing case law within the divorce court of wives (and accomplices) removing correspondence from their husband's study and even electronic media, including laptops, BlackBerrys etc., to download information about their ex-loved-one's assets.

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This is a hot topic at present in the Family Division, with a diversion of views being held between not only the Queen's Bench Division and the Family Division (see *L v L* [2007] EWHC 140 (QB) where the removal of a hard drive was criticised by Tugendhat J, but

whose judgment has received some criticism amongst family practitioners), but also in the Family Division itself. Notwithstanding these differences, it is clear that 'self-help' remains an important tool for a wife faced with a husband who may be determined to defend her legitimate claims. Documentation, which has been discovered in the husband's study or on his laptop, may prove a goldmine of information, which helps either to identify any hidden asset or to force the husband to be full and frank in setting out details of his assets and interests.

The various methods of disclosure in England & Wales (whether through the Courts or through 'self-help') may identify hidden assets or provide pointers towards them. If help is required from a foreign jurisdiction then there are further weapons up the divorce court's sleeve, including letters of request to the judicial authority of a foreign country. These letters request the Court to examine individuals in a foreign jurisdiction and can be very useful in obtaining information and documentation from individuals in that country (e.g. trustees). The usefulness of these letters will depend on whether the foreign jurisdiction recognises them, for example in Jersey there was a tradition of disclosure of certain trust documents in accordance with English Court orders (see *Wadham v Dick* [1998] 3 FCR 9).

The biggest problem that one may face in cases whose assets are located in overseas jurisdictions is that, having used all of these tools to identify where the money is, you cannot get your hands on it. An individual who has gone out of his way to siphon money away may well have taken additional steps to safeguard its position by, for example, putting the money into offshore vehicles, including trusts. The English divorce court's attitude

to them is summed up in the notorious expression of Coleridge J in *J v V* [2004] IFLR 1042: 'These sophisticated offshore structures are familiar nowadays to the judiciary who have to try them. They neither impress, intimidate, nor fool anyone. The courts have lived with them for years'.

The divorce court will not be shy about making orders relating to trust structures. They can, if appropriate, vary them as nuptial settlements, judicially encourage the trustees to make a payment to the wife or, in extreme cases, declare that they are a sham. However, whether these orders will have the desired effect of releasing money is another matter. If there are other assets in England & Wales, which can be seized and used to offset against those assets identified in foreign jurisdictions, then the situation will begin to look more favourable to the wife.

However, if the wife has to rely on varying a trust abroad then she may face significant problems. Mrs Charman had to go to Bermuda to try and break Mr Charman's trust. Similarly, Mrs Mubarak needed to go to Jersey to break Mr Mubarak's trust. Although, in the latter case, as Mrs Mubarak succeeded on a technicality, she has made it much more difficult for wives following on from her. They will have to prove that the order of the English Court is not 'altering' the trust and is only requiring the trustees to do something that they have the powers to do.

Of course, this highlights the need to choose the jurisdiction of the trust and draft the trust deed carefully. For example, if the settlor of a Jersey Trust is concerned about the possibility of an attack from a spouse, then the powers of the trustees may have to be more restricted than would otherwise be the case. If the marriage does start to break down, then issues may arise including removing the

wife as a beneficiary. If divorce proceedings are commenced, trustees may also wish to consider making a pre-emptive application to the Court, which has jurisdiction over the trust, for a ruling as to the correct amount of money to pay the divorcing spouse, rather than wait for the English Court to order that a

specific amount be released.

It is these areas that are going to be more contentious for wives of husbands with offshore money, rather than the chance to discover on a list that he had an additional GBP1 million in a particular bank's office account, which he has 'forgotten' to disclose. ■

