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Trusts in divorce and 1975 Act spouse claims

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Trusts in divorce

- The statutory jurisdiction under Matrimonial Causes Act 1973
 - Trusts as a financial resource of one of the spouses (s.25 (2) (a) MCA 1973): *“the court shall in particular have regard to... other financial resources which each of the parties... has or is likely to have in the foreseeable future”*
 - Nuptial settlements (s.24 (1) (c) MCA 1973): *“an order varying for the benefit of the parties to the marriage and of the children of the family... any anti-nuptial or post nuptial settlement... made on the parties to the marriage”*

Resource part 1: is the trust a resource of the husband or wife?

- The relevant question: if the spouse asked the trustees to advance the whole of the trust capital to them, would they be *likely* to agree to that request? See *Charman v Charman* [2006] 1 WLR 1053 at para 12
- Question one of access rather than control: Lewison J in *Whaley v Whaley* [2011] EWCA Civ 617 at para 113

Resource part 2: what can the court do?

- If not nuptial, no power to vary
- Award can be made to spouse from non-trust assets leaving the beneficiary spouse to call on the trustees (e.g. *Charman* in which 87% of non-trust assets worth c.£48m awarded to wife)
- Alternatively, court may make “judicious encouragement” orders which the spouse will only be able to satisfy if the trustees advance funds (see *Thomas v Thomas* [1995] 2 FLR 668). Court will not put “*undue pressure*” on trustees: Lewison J in *Whaley* at para 114
- Limits of judicial encouragement orders?

Nuptial settlements part 1

- Settlement “*not a term of art with one specific and precise meaning*”:
see *Brooks v Brooks* [1995] 3 WLR 141
- Nuptial element: a disposition which makes some form of continuing provision for one or both of the parties to the marriage with reference to their married state (see *Prinsep v Prinsep* [1929] P 225). This is broad: see the judgment of Arden LJ in *C v C* [2005] 2 WLR 241
- Can a settlement become “nuptialised”?
- **Yes**, per Coleridge J in *Quan v Bray* [2014] EWHC 3340 (Fam) at para 60
- **No**, per Sir Peter Singer in *Joy v Joy-Morancho* [2015] EWHC 2507 (Fam) at para 109

Nuptial settlements part 2

- Where a trust is not itself a nuptial settlement, property held by the trustees may be subject to such a settlement and therefore capable of variation.
 - *N v N* [2005] EWHC 2908 (Fam): Guernsey trust not nuptial settlement but matrimonial home held within it subject to anti-nuptial settlement.
 - *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam): property held by company; settlement in relation to it; property settled was a revocable licence; no power to deal with the leasehold
- How will the court exercise its jurisdiction to vary?

Other points to consider

- Applications under s.37 MCA 1973/s.423 Insolvency Act 1986
 - Section 37: dispositions intended to avoid claims for matrimonial relief
 - Section 423: transactions defrauding creditors
 - N.B. limitation periods: 6 years under section 37 MCA 1973 and (possibly) 12 years under s.423 IA 1986 (see *B v IB* [2013] EWHC 3755 (Fam))
- Sham
- Resulting trust (see *Prest v Petrodel Resources* [2013] UKSC 34)
- Bare trust

Spouse claims under the 1975 Act

- Section 1 (2) (a): reasonable financial provision not restricted to maintenance standard
- Section 3 (2) factors:
 - Divorce comparator
 - Age of the applicant and duration of the marriage
 - Contribution made to the welfare of the family

The divorce comparator: principles

- The court will apply the principles derived from *White v White* [2001] 1 AC 596. The “*fundamental principle which illuminates all the detail*” is that marriage is now recognised as an equal partnership and the division of the available property is conducted on that basis: Briggs J in *Lilleyman v Lilleyman* [2012] 3 WLR 754 at para 46
- Two-stage approach: (1) computation of the available resources (2) distribution
- On distribution the court will consider the following principles: (a) needs (b) compensation (c) sharing (matrimonial/non-matrimonial assets). Overall objective is fairness

The divorce comparator: application and limits

- Important to remember that it is a cross-check: the court will not embark upon a “*slavish and wholly artificial comprehensive enactment of the ancillary relief process*” (per Black J in *P v G* [2007] WTLR 736)
- Limits to the divorce comparator e.g.
 - Only one spouse for whom provision needs to be made; may result in greater provision under 1975 Act
 - No statutory imperative for independence as with section 25A MCA 1973

Spouse claims and nuptial settlements

- Section 2 (1) (f) of the 1975 Act: “*an order varying any ante-nuptial or post-nuptial settlement... made on the parties to a marriage... the variation being for the benefit of the surviving party to that marriage...*”
- Enables assets to be brought in from outside the estate e.g. pension trusts
- Court likely to apply the same legal principles as on divorce (see e.g. *Roberts v Fresco* [2017] 3 WLR 209)

Practical points for litigation

- Creation of detailed schedules of needs important to enable consideration of likely Duxbury fund and size of needs vs sharing claims
- Choice of division: spouse claims in the Family Division; unmarried partner claims in the Chancery Division
- Joinder of trustees if looking to vary settlement(s)

Example

Penelope and Odysseus have been married for thirty years. There is one child of the marriage, Telemachus. Penelope is the homemaker and Odysseus the breadwinner.

Twenty years ago Odysseus left on a work trip to Troy. Penelope heard nothing from him but remained at home faithful to him doing her weaving as the suitors piled up at her door.

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Odysseus finally returns, barely recognisable. Sadly and unexpectedly, he gets into a fight with one of the suitors and dies.

Faithful Penelope is devastated...



Penelope finds Odysseus' will and is shocked to discover that she has been left a terminable life interest in the residuary estate with no power to advance capital and one of the will trustees is Odysseus' old nurse Eurycleia who never liked her.

What is more, Penelope discovers that the palace is held in a trust of which she is not a beneficiary.

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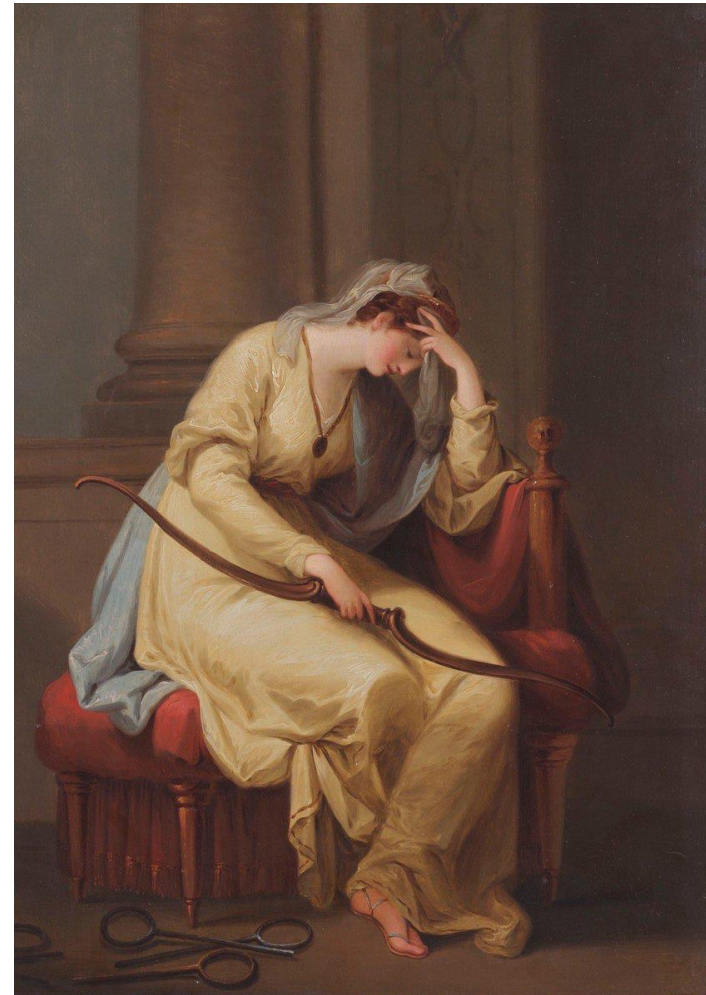
Penelope is even more shocked to receive a 1975 Act pre-action letter from the witch Circe, who claims that Odysseus lived with her on her island for at least a year and she bore him three sons.

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Both Circe and Penelope issue proceedings under the 1975 Act in the Family Division of the Ithacan High Court, where they appear before Mrs Justice Athena at trial. What happens next?





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