

Global Trust Trends - Mini Series

We recently spoke to Matthew Sperry, Partner at Katten in London about the latest trends in US trust disputes and what he and his team are seeing in the context of their clients.

What are the major trends you have seen in Trusts disputes over the past 12 months?

It comes as little surprise to most that the United States is a litigious jurisdiction, and an important trend to follow is the robust increase of trust disputes on the dockets of US courts. There are numerous factors leading to this increase. One is the recent emergence of the United States as a global trust jurisdiction. In the US, each state has its own trust laws, fostering competition but adding the complexity that naturally arises from 50 different sets of trust laws. Second is the fact that even in respect of non-US trust structures (whether centered in the Caribbean, Channel Islands or otherwise), the United States is a difficult jurisdiction for any global UHNW family to avoid. At a minimum, most trust structures for UHNW families contain one or more US investments. Another factor spurring disputes is the increased sophistication of beneficiaries and other interested parties – they are more savvy and informed than ever regarding their legal rights and potential claims against trustees, settlors, protectors, private trust companies (and their boards) and investment advisers.

Notably, at least one US trust jurisdiction, Wyoming, is attempting to address this trend by creating a Court of Chancery (the first outside the State of Delaware) – operational as of late 2021. Its purpose is to provide a forum for streamlined resolution of, among other things, trust cases. One question is whether other US trust jurisdictions will follow suit?

Another major trend involves evolving definitions of family and its impact on trust and other wealth succession structures. In short, US courts continue to grapple with the trust and other

estate planning issues surrounding surrogacy, adult adoption, same-sex marriage, and transgender individuals. While some states have enacted laws designed to provide more certainty in respect to these matters, a myriad of issues remain (and continue to arise) for resolution by the courts.

How do you expect these trends to play out in 2023 and beyond?

As more and more global families establish US law trusts or otherwise interact with the US, it is certain that litigation involving disputes over trust administration, investments and settlor intent will follow. Although Delaware out of all US states has the most developed jurisprudence concerning trust law (and a separate Court of Chancery), other leading states attracting international families and their investments do not. It is somewhat unclear how the judiciaries in these other states will approach and rule in cases involving far-flung family members, global assets and multi-jurisdictional legal issues.

In addition, the use of the US as a global trust jurisdiction is a relatively recent phenomena, and the experience of US trust companies and staff in dealing with international families and their assets vary widely. The relative inexperience of some will lead to US-based litigation involving the administration of US-based trusts for global families. It is foreseeable that, due to the complex nature of the US tax code, any US inbound structure should be carefully considered, as many future disputes will center on trust administration mistakes triggering US income and estate taxes that could have been avoided.

What are the main issues international families are dealing with and how should their professional trustees and advisors be helping them deal with these?

Global Compliance. The continued rollout and expansion of aggressive global compliance and information reporting regimes impacts every one of my clients and their structures. Although many families initially resisted these measures

by moving structures to jurisdictions largely viewed as free from regulatory burdens, it became evident that global compliance initiatives, although manageable, are largely unavoidable. It is critical that families surround themselves with professional trustees and advisors that have a deep understanding of the global landscape and the expertise and infrastructure to provide timely advice as the landscape invariably changes. The right trustees and advisors navigate families through worldwide compliance measures in a manner that is both legally compliant but also considerate of family values such as privacy.

Interactions with the United States. As a US lawyer, I regularly advise professional trustees and other non-US advisors when an international UHNW family interacts with the US. As more UHNW families turn their focus globally, most invariably touch the US. These interactions will increase as the number of UHNWs continue to grow exponentially in Asia, the Middle East, Africa, Latin America and other parts of the world.

The New Generation. The great wealth transfer will continue to impact global UHNW families as the current generation, as good stewards of the family wealth, ages and the next generation prepares to step in and influence the administration, investment and deployment of family wealth. It is imperative that professional trustees and other advisors work closely with these families to shepherd a family dialogue and adapt family trust and investment structures that address the family's wealth transfer, transition and cultural issues in a manner designed to avoid future disputes and preserve family harmony and wealth.

Institutionalizing Family Wealth. UHNW families have become much more sophisticated regarding their wealth, adopting wealth structures, investment programs and wealth strategies that are institutional in nature. Desiring family control and transparency, many families have established family offices (of varying forms) and private trust companies (permitting family participation, alongside trusted advisers, over trustee decisions), along with adopting global investment structures utilizing private equity-like elements – designed to foster pooled family investments, third-party co-investments and the like.

What advice would you give to wealthy families when it comes to appointing a professional trustee? What do you look for when asked to recommend new or replacement trustees to your clients?

Starting with the obvious, the trustee must have demonstrated experience, depth and a track record of supporting similarly-situated families. Families need to consider if the trustee has the ability to serve the family as it grows from a wealth and geographic perspective. From there, families need to be comfortable with the team of individuals staffed to administer their structure. How does staff turnover look like? Who would be the family's daily point-of-contact? Are there multiple points of contact?

If not obvious, families focus on cost. However, they should not be driven by the lure of the lowest cost provider, especially given the differences among how trust companies approach client proposals. Often, it is not an "apples-to-apples" comparison. Each proposal should be scrutinized by family decision-makers, with the assistance of relevant advisors, as to assumptions regarding time, number of distributions, staffing, the ultimate structure, trust investments and the like. Most families understand that trustees need to be fairly compensated for the services that they provide, and the inherent risks of their role, but many families are misinformed regarding these issues given a lack of trustee transparency concerning costs. Great trustees give their clients comfort surrounding fees, the value that they create, service levels and the general manner in which they intend to serve and interact with the family.

What are your top tips for avoiding trust disputes?

1. Engage and surround yourself with the right combination of professional trustees, lawyers and other advisors. When designing a trust and wealth succession structure, these advisors should foster a dialogue among the family that leads to transparency and an ultimate structure that accounts for the family's needs in a manner that reduces the likelihood of disputes
2. Although difficult for many given family dynamics are sometimes at odds with cultural norms, creating an atmosphere of transparency among all family members is critical. When family members feel that something is being hidden from them, rightfully or wrongfully, disputes and litigation often follow. Family members, at the proper age, should have a basic understanding of the trust and family wealth structures, assets held within them, role of the professional trustee and the wealth succession plan. Periodic family meetings, with presentations by the professional trustee, investment advisors, and attorneys where family members can listen and ask questions, can be extremely helpful in this regard.

What is your sage advice when families have fallen out and a trust is in dispute?

Surround yourself with the best professional team possible. The team, especially the lawyers, should be forthright in providing their assessment of the case and situation. And it is rarely advantageous to be the last litigant to the party. If a client believes that a dispute could be on the horizon, take advice early as strategy and decision-making is paramount. Often strategic and procedural choices concerning choice of jurisdiction of the litigation forum and when to bring a claim can yield significant advantages.

Although difficult in trust disputes among family members, clients sometimes need to take a step back and assess the situation like a disinterested third party. Being consumed in family dysfunction often leads to poor litigation strategies and unnecessarily lengthens disputes and increases costs.

How does your practice in London typically interface with offshore trust companies and their clients and what kind of legal advice do you offer in this field?

I am London-based predominantly due to the dearth of US private client lawyers based outside the US generally and the fact that London continues to serve as the global capital of international private wealth. Much of this private wealth touches the US in some manner, whether it be in the context of US-based investments, family members spending time in the US (whether on a temporary or indefinite basis), or otherwise. These interactions with the US almost always raise a host of tax and other US legal issues.

In that context, I frequently represent offshore fiduciaries and the families that they serve on a prophylactic basis, working to minimize US tax exposure while ensuring compliance with relevant US legal framework, all in a manner that is considerate of family goals such as maintaining privacy, preserving structural flexibility, and granting family control over investments.

When disputes involve the US, whether with the Internal Revenue Service or involving trust fiduciaries or other family members, I work closely with clients and their non-US advisors to formulate a US legal strategy and, where applicable, assist them in pursuing remedies in US courts and support them in respect of US law matters arising in non-US controversies, or otherwise.