The Aver Advisory

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presented by Aver Associates Estate Planners & Trustees

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Asset Protection Trusts

Landmark Swiss decision, in divorce proceedings, orders attachment of trust assets located abroad

Rybolovlev v. Rybolovleva, Swiss Federal Supreme Court, April 26, 2012

Reversing previous jurisprudence, the Swiss Federal Supreme Court has ordered conservative measures over assets held outside of Switzerland and, specifically, over assets held through foreign trusts. The court further held that an attachment order could be granted against assets held in a foreign trust, notwithstanding that the trustee is the sole owner of those assets.

Facts. At stake is the multi-billion dollar fortune of Russian mining magnate Dmitry Rybolovlev, ranked as Russia's 10th richest man, who is locked in bitter divorce proceedings with Elena Rybolovleva, his wife of 23 years and the mother of his two daughters.

The wife is demanding close to $6 billion, or half the wealth that her husband accrued after their marriage in 1987. The couple did not sign a prenuptial agreement. Their marriage is governed by the Swiss matrimonial regime of partnership of jointly-acquired property (*participation aux acquêts*).

In December 2002, the husband prepared a will appointing his wife as his heir for 5/8 of his estate and his two daughters for the remainder.

In April 2005, the husband prepared a postnuptial agreement, which the wife refused to sign. A few months later, in June 2005, the husband settled two irrevocable trusts governed by Cyprus law. The beneficiaries were the husband and his daughters, to the exclusion of the wife.

In December 2008, the wife filed for divorce requesting liquidation of the matrimonial regime. At the same time, the wife also instituted five legal actions-in Cyprus, the British Virgin Islands, London, Singapore, and the United States-for the attachment of assets owned directly or indirectly by her husband.

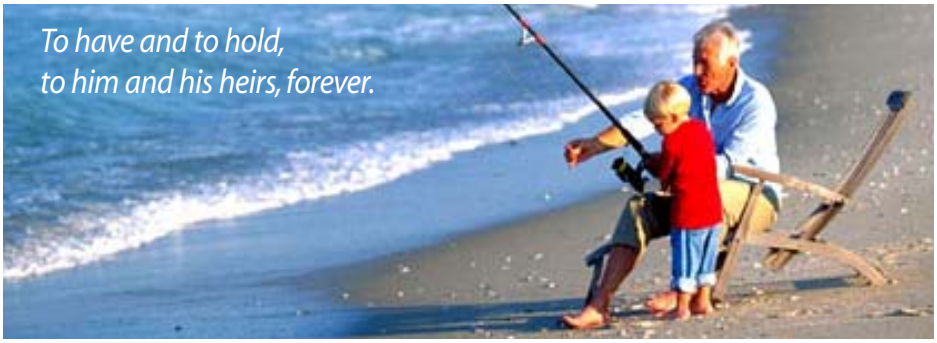
This decision addressed an application in Switzerland seeking the provisional attachment of various assets held by her husband until liquidation of the matrimonial property.

Decision. The Geneva Court of Appeal held that the wife had a right to half of her husband's jointly acquired property and that the court could, to protect the rights of a spouse, order appropriate and commensurate conservative measures. The court noted that:

- The trusts were settled two months after the wife refused to sign the postnuptial agreement.
- The wife had been expressly excluded from the class of trust beneficiaries.
- The assets in trust were liquid,
- The wife's inheritance expectancy from her husband was uncertain.

The court ordered provisional attachment of the husband's trust assets located outside of Switzerland, pending liquidation of the couple's matrimonial regime or a negotiated divorce settlement. The Swiss Federal Supreme Court upheld the decision.

Commentary. Should the wife's claim be successful, it would be the most expensive divorce in history, outstripping Rupert Murdoch's $1.7 billion divorce from his wife of 32 years. ■



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CHOICE OF LAW

Court favors public policy over choice of law in trust agreement

EM Ltd. et al. v. Argentina et al., US Court of Appeals for the Second Circuit, August 2010

An important decision from the US Court of Appeals for the Second Circuit sheds light on the enforceability of a choice of law provision in a trust agreement, and the subsequent validity of a trust.

The case involves the $80 billion default on global bonds issued by the Argentinean Government in the early 1990s.

Facts. The Republic of Argentina caused Argentina's Central Bank to create the BH Trust—with Argentine trustees—for the purpose of acquiring and holding certain shares of its Central Bank. The choice of law provision in the BH Trust agreement purported to establish the trust pursuant to Argentine law.

Two hedge funds—EM Ltd. and NML Capital Ltd.—owned some of the defaulted bonds and sought to pursue Argentinean assets in New York to satisfy their claims.

Both parties agreed that, under Argentine law, the BH Trust is a valid trust that would be protected from the Republic's creditors.

However, the hedge funds argued that the Republic was both the settlor and the beneficiary of the BH Trust because:

i) The assets that comprised the corpus of the BH Trust were controlled directly by the Republic.
ii) The Republic had the authority to direct disposition of the corpus of the BH Trust for its own benefit.

Consequently, they argued that the BH Trust was a self-settled trust that, under New York law, was void as to creditors.

Decision. New York law requires the court to honor the parties' choice of law provision insofar as matters of substance are concerned, so long as fundamental policies of New York law are not thereby violated.

In New York, it is against public policy to permit the settlor-beneficiary to tie up her own property in such a way that she can still enjoy it but can prevent her creditors from reaching it. In light of New York's very strong policy of not recognizing self-settled trusts, the court referred to New York law to determine whether the BH Trust was a valid trust.

The court found that, despite the choice of law provision in the BH Trust agreement purporting to establish a trust pursuant to Argentine law, New York law would not recognize it as such since enforcing the trust agreement would violate fundamental policies of New York law.

Commentary. If you can reach your assets, so can your creditors. ■

ASSET PROTECTION

Judgment against directors of failed hedge fund highlights need for asset protection

Weavering Macro Fixed Income Fund Limited (In Liquidation) v Peterson and Ekstrom, Grand Court of the Cayman Islands, August 2011

A recent decision in the Cayman Islands found two directors of the Weavering Macro Fixed Income Fund guilty of wilful neglect of their duties. Holding these non-executive directors personally liable for losses of US$111 million, the case highlights the need for asset protection for company directors.

Facts. The Weavering fund was incorporated in 2003 and listed on the Irish Stock Exchange. The fund's investment manager was a company owned and controlled by Magnus Peterson. The directors were Peterson's stepfather Hans Ekstrom and his brother Stefan Peterson. Although sophisticated financially, the two directors acted in a non-executive role and agreed to act for free.

While the directors claimed to attend regular quarterly board meetings at which previously prepared pro forma minutes were signed and administrative requirements such as the signing of documents were facilitated, they were essentially hands-off directors.

The meetings did not act as a forum through which the directors' analysed the fund's operations, scrutinised the fund's service providers or ensured that the investment manager was acting in accordance with the fund's investment criteria.

The fund went into liquidation after it emerged that $637 million of the fund's $639 million actively traded assets was held, in breach of the fund's investment criteria, in a single position with another vehicle controlled by Peterson.

Decision. Notwithstanding the non-executive and gratuitous role of the two directors, the court stated unequivocally that when it comes to exercising a supervisory role, the directors of a company can only discharge their duties properly if they exercise independent judgment in respect of all matters falling within the scope of their supervisory responsibilities. ■

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FLORIDA HOMESTEAD

Trustee in bankruptcy cannot infer debtor's lack of intent to reside permanently in homestead property

In re: Randall E. Gentry, US Bankruptcy Court, Florida, November 2011

Florida's homestead exemption—providing an exemption from forced sale—is among the most protective in the United States, offering no limit on the value that can be protected from creditors.

Every person who has legal or equitable title to real property in Florida, and who makes it his permanent home, is eligible for a homestead exemption. In a recent bankruptcy case, the issue before the court was whether the homestead owner must have the present intent to live in the homestead permanently.

Facts. Randall Gentry filed a bankruptcy petition in which he did not claim his residence as exempt. In regard to a homestead, the debtor is required to choose one of three options relating to debts that are secured by property of the estate:

i) Redemption; that is, pay the present fair market value of the property.
ii) Reaffirmation; that is, pay the mortgage debt on the property.
iii) Surrender; that is, abandon the property.

Gentry indicated his intent to surrender the property to the mortgagee. Thereafter, the bankruptcy trustee filed a notice of his intention to sell the property. Gentry then filed an objection, together with an amendment claiming his property as exempt and indicating his intent to retain—not surrender—the property. The trustee argued that Gentry, having indicated his intent to surrender on the petition date, was not eligible for the Florida homestead exemption as of that date.

Gentry testified that he intended to reside in the home permanently, or until such time as the mortgagee foreclosed on the property. Given his financial inability to either redeem the property or to reaffirm the mortgage debt, he chose the only remaining option; to surrender the property.

Decision. The court held that the debtor's stated intention to surrender the property does not impact the debtor's ability to exempt certain property. The statement of intention is directed to the creditors, and has no effect on whether the homestead is property of the estate.

The court added that a trustee cannot infer a debtor's lack of intent—for homestead purposes—from the statement of intention. The fact that a bankruptcy debtor may ultimately lose his home to foreclosure does not alter the current status as homestead property, or otherwise disqualify him from having an intent to reside permanently at his home. ■

BANKING SECRECY

Victory for bank secrecy as French court blocks use of stolen data

France's Supreme Court has ruled that private client information stolen from HSBC Private Bank's Geneva branch cannot be used in the prosecution of alleged tax evaders.

Facts. In 2007, an HSBC employee, Herve Falciani, illicitly copied the details of thousands of client accounts and took the stolen data to France, where he tried unsuccessfully to sell it.

The Swiss Government issued a warrant for his arrest for theft of the data. In a convoluted action, the French authorities then used the Swiss warrant as an excuse to raid Falciani's home and seize the stolen data.

The French authorities subsequently made the confidential information available to tax enforcement agencies of many other countries, as well as using it to investigate its own tax residents, including searching their homes.

Decision. France's lower appeal court held in February 2011 that the searches carried out by the French tax authorities were all unlawful. The French Budget Ministry appealed that ruling to the country's highest court, the Cour de Cassation, which upheld the appeal court decision. ■

CELEBRITY ESTATES

Wedding of Spain's Duchess of Alba offers alternative approach to pre-marriage estate planning

The October 2011 wedding of Spain's Duchess of Alba—the most titled aristocrat in Europe—to civil servant Alfonso Diez Carabantes reportedly caused concern for the Duchess' six children and eight grandchildren. The prospective heirs were worried that a substantial part of the Duchess' estate could pass to Señor Díez upon her death or in the event of a divorce.

The Duchess' wealth is estimated at up to $5.5 billion, including stocks, art masterpieces, works of literature, and various palaces, property and castles around Spain.

In lieu of a prenuptial agreement, the Duchess pre-emptively signed her children's inheritances over to them by registering them as the owners of her various assets. This step has ensured that the Duchess will retain control of the House of Alba during her lifetime, and guarantees her children of their inheritance rights upon her death.

In Spain, a substantial portion of a testator's estate, known as the *legitima*, is subject to forced heirship; about two-thirds of the estate passes to the testator's children, while the Duchess' widower, Sr Diez, would have acquired a life interest-right of usufruct-over at least one-third of her estate. ■