THE AVER ADVISORY

MARCH 2011

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LUXEMBOURG

The financial centre gears up

Minister of Finance Luc Frieden announces new estate planning vehicle

Development of the Luxembourg finance centre is a political priority of the government. On February 3, Minister of Finance Luc Frieden briefed the media on the objectives and measures to be taken.

Frieden noted that half of the centre's wealth management customers currently come from neighbouring countries and that new markets must be sought out in regions like Asia and Latin America.

Fully aware that these customers are wealthier, and thus more demanding, Frieden announced that Luxembourg will launch a new investment vehicle similar to the English trust or the Dutch *stichting*.

Comments. In January 2009, Luxembourg introduced an umbrella foundation — the *Fondation de Luxembourg* — with the objective of promoting private philanthropic commitments. It is quite unusual, however, for a Luxembourg non-profit entity to be used in private estate planning. This situation is about to change! ■

TAXATION OF TRUSTS

Dutch tax inspector fails to demonstrate settlor control

Court of Appeal The Hague, November 3, 2010

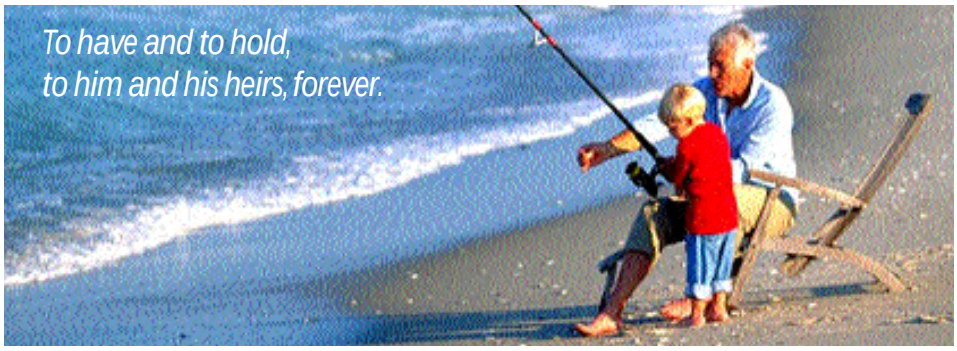
Facts. A Dutch taxpayer emigrated in 1964 and returned to the Netherlands in June 2003. In 1997, she transferred all shares of a private investment company to a Guernsey irrevocable discretionary trust.

A godson of the taxpayer assisted in setting up the trust and signed the trust deed. The godson was also one of the beneficiaries of the trust. In 2005, the godson became an investment advisor to the trust. No distributions to the settlor or any of the beneficiaries have taken place.

The Dutch tax inspector held that the trust should be transparent for tax purposes, because the settlor retained indirect control of the trust through her godson.

Decision. The tax inspector failed to demonstrate settlor control over the trust assets. Neither the godson's appointment as investment advisor, nor the fact he is named as a contact in the memoranda of wishes establish settlor control of the trust.

Comments. Effective January 1, 2010, new legislation provides that assets transferred to a trust automatically revert back to the settlor for Dutch tax purposes. This case remains interesting, however, to support a degree of family involvement in the management of trust assets. ■



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PROFESSIONAL SECRECY

The confidential nature of the role of trustee

In the matter of the representation of Y., [2010] JRC 54

This case concerned an application to the court by Y, the liquidator of Centurion Trust Company Limited, to approve the proposed appointment of Herald Trust Company Limited as the trustee of the Q Trust.

Facts. Centurion was the subject of a winding up order and Y had been appointed as liquidator. Centurion was the trustee of the Q Trust, a Jersey trust set up by the late N for the benefit of his children and grandchildren from his first marriage (the "L Beneficiaries") and the children from his second marriage (the "M Beneficiaries").

The power to appoint new trustees of the Q Trust had vested in Y on his appointment as liquidator of Centurion. The need to appoint a new trustee had become pressing as the process of transferring the client base of Centurion to new service providers was nearly done and Y's staff would soon be released.

Y had made extensive efforts to find a new trustee but was struggling to do so because of the limited financial resources of the trust and, in particular, a lack of liquidity. Only two trust companies were willing to take on the trust. Y had concerns about the resources of one of those companies and the fact that the person who would be dealing with the trust knew certain of the M Beneficiaries socially.

Consequently, Y elected to appoint the other company, Herald, as trustee. The M Beneficiaries agreed to the appointment of Herald. Although the L Beneficiaries agreed in principle, they felt unable to formally agree as the court had not disclosed to them certain correspondence between Y and the M Beneficiaries.

The Royal Court of Jersey approved the appointment of Herald, but the issue was raised whether certain correspondence between Y and the M Beneficiaries should be disclosed to the L Beneficiaries.

Decision. The court stressed that it was very much in the interests of all beneficiaries for a new trustee to be appointed. It was noted that the trustee role is a confidential one and beneficiaries have no absolute right to see trust documents. Similarly, it is important that beneficiaries be able to communicate in confidence with the trustee. The court may, however, order disclosure if it is deemed to be "in the interests of justice".

In this case, the correspondence between the Y and M Beneficiaries was not relevant to the issue before the court, save for one email, which had already been disclosed to the L Beneficiaries. Consequently, there was no justification for breaching the confidential nature of the correspondence. ■

ATTORNEY-CLIENT PRIVILEGE

Beneficiary barred from accessing confidential communications between trustee and legal counsel

N.K.S. Distributors Inc. v. Tigani, Delaware Court of Chancery, May 7, 2010

Facts. In 2008, Christopher Tigani became embroiled in a bitter legal battle with his father, Robert Tigani, over control of the family's lucrative liquor business, N.K.S. Distributors Inc. based in Delaware.

Twenty years earlier, the father settled a trust in which he was the trustee and sole beneficiary. In 2000, the father exercised his power to name Christopher as sole successor beneficiary of the trust, which was the majority shareholder of NKS.

In litigation between Christopher and the company, Christopher sought to compel production of communications between the father and his legal counsel concerning the trust. The father's lawyers refused to produce documentation on the basis of attorney client privilege.

Decision. The Delaware Court of Chancery rejected the son's request. The court noted that nothing in the law provided justification for the beneficiary of a trust to receive privileged documents where, as in this case, the documents were prepared on behalf of a trustee in preparation for litigation between a successor beneficiary and the trustee. ■

DUTY OF LOYALTY

Trustee found in breach, despite acting within trust powers

Paradee v. Paradee, C.A.No. 4988-VCL V.C. Laster (Delaware Court of Chancery, October 5, 2010)

Facts. The court evaluated a trustee's decision to borrow against a life insurance policy that was the principle asset of an irrevocable trust and to extend a corresponding loan to the couple, which funded the trust.

Despite his lawyer's written advice, the trustee made an unsecured loan that paid interest at a rate lower than the interest owed to the insurer.

Decision. The court found that the trustee acted to please the settlors (the couple) rather than to benefit the trust, thus breaching his fiduciary duty of loyalty. ■

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LIFE SETTLEMENTS

Insurers suffer setback in litigating payment obligations

Kramer v. Phoenix Life Ins. Co. 2010 WL 4628103, 2010 N.Y. Slip Op. 08376 (New York Court of Appeals, November 17, 2010)

In our last issue, we reported on two recent decisions which held that life insurance policies issued under STOLI arrangements are void from their inception for lack of an insurable interest, thereby relieving the insurer of any duty to pay a death benefit.

In November 2010, the highly respected New York Court of Appeals held, in a 5-2 decision, that New York's insurable interest rules do not prohibit an insured from buying a policy on his or her own life and then transferring the policy to a person who has no insurable interest.

Facts. The case involved prominent New York attorney Arthur Kramer, who acquired over $56 million in life insurance on his own life in 2005. Two irrevocable life insurance trusts were subsequently established and funded with the life insurance policies. Kramer's adult children were named as beneficiaries. Neither Kramer nor his children ever paid premiums on the policies.

As planned, the named beneficiaries promptly assigned their beneficial interests to two investment firms, neither of which had an insurable interest in the life of the insured. Kramer died in January 2008.

Decision. The court held that an insured could validly buy a policy on his own life, even if he had the intent to immediately transfer it to a stranger. ■

PRIVATE INTERNATIONAL LAW

Dutch national disinherits his son by will validly

Dutch Supreme Court, February 12, 2010

Facts. The deceased was born in 1916 in St. Maarten (Netherlands Antilles). Around 1940, he left St. Maarten and moved to New York. He acquired American citizenship, while retaining his Dutch nationality.

The deceased vacationed regularly in St. Maarten. In September 1999, while on vacation in St. Maarten, he passed away.

Shortly before his death, in June 1999, the testator made a will in New York, wherein his grandchildren were designated heirs. His son was not mentioned in the will.

The son argued that under the applicable Dutch Antilles inheritance law, the will was invalid. Consequently, the son argued that he is the rightful heir.

The grandchildren (all residing in St. Maarten) argued that the law of the State of New York applied, and that under that law the will is valid and they are the legal heirs.

Decision. In June 2006, the Court of First Instance of the Netherlands Antilles in Sint Maarten rejected the claims of the son.

In the opinion of the court, the deceased had greater affinity with the State of New York than with St. Maarten. Therefore, the inheritance law of the State of New York is applicable and the inheritance is to be settled in accordance with the will.

The trial court decision was affirmed by the Court of Appeal. The Dutch Supreme Court has now dismissed the son's final appeal. ■

EQUITABLE SET-OFF

Model wins landmark ruling in Isle of Man

KSF (IofM) Limited (in liquidation) et al. v. Light House Living Ltd and Elle Macpherson, Case Ref. No. 11, (Isle of Man High Court, December 2, 2010)

Facts. Australian model Elle Macpherson sued Kaupthing Singer & Friedlander, a liquidated Isle of Man bank, after it refused to allow her to use her personal deposits at the bank to offset money owed by one of her companies, also registered at KSF.

The liquidators said her company's debts could not be offset from the deposits, which came from the sale of a London property, because the latter was held in her personal capacity.

Decision. The Isle of Man High Court found in favour of Macpherson on the basis of a 300-year-old legal principle known as "equitable set-off", with the judge ruling that Macpherson and her company were "in-equity" the same. This legal principle had not been used successfully in this way since the 1870s. ■

FINAL IDEAS

Court allows insurance benefits to posthumously conceived twins

Capato v Commissioner of Social Security, Case No. 10-2027 (C.A. 3, January 4, 2011)

Facts. The case involved a claim for surviving child's insurance benefits on behalf of twins born in 2003 to Robert Capato, who died of cancer 18 months earlier, and his widow, who conceived the children using her late husband's frozen sperm.

Decision. The court held that children conceived by way of in vitro fertilization with their father's sperm after he had died cannot be denied Social Security survivor benefits simply because the law has failed to keep pace with advances in reproductive technology.

Comments. Rapidly changing reproductive modes have impacted the definitions of family, children and descendants, clearly offering new opportunities in estate planning. ■