PRIVATE CLIENT
GLOBAL ELITE

THE MONTH

APRIL 2022

FAMILY

The Month is a monthly magazine with key takeaways and content driven by our Private Client Global Elite community.

We welcome ideas and contributions from members of our Global Elite Membership group. If you are interested to contribute please contact **Francesca Ffiske** (fffiske@alm.com)

For more information about membership with the Global Elite contact **Helen Berwick** (hberwick@alm.com)

For information about our events, or if you need help registering, contact **Rachael Toovey** (rtoovey@alm.com)

For information about partnering with us contact **Ellie Donohoe** (edonohoe@alm.com)

For general enquiries contact **Rhiannon Winter Van Ross** (rvanross@alm.com)

LAWYERS WITHOUT BORDERS

We will be partnering with **Lawyers Without Borders** this year, to assist in their effort to build capacity and integrity in the world's justice sectors.

What is Lawyers Without Borders?

It is a global nonprofit organisation that for 20 years has assisted lawyers, governments, civil society and students to strengthen the rule of law in their own countries.

By sharing lessons learned from our experience and from other countries, they help to protect the disadvantaged, promote judicial integrity and efficiency, and advance human rights.

Staffed largely by pro bono lawyers, they work internationally with police, judges, prosecutors, prison officials, community leaders, paralegals , tribal councils and other local arbitrators to help them solve complex legal, organisational and community problems.

Their work encompasses a variety of approaches, including:

- Trial Advocacy Training
- Community Outreach Projects
- Mediation, Negotiation and Consensus Building, Access to Justice
- Impartial Trial Observation
- Legislative Workshops
- Justice Sector Symposia
- Civic Education and Research
- Much more.

How can you get involved?

We will have fundraising efforts throughout the year, if you are feeling generous enough to donate.

These will fund their key projects, which span from dealing with human trafficking, to wildlife trafficking, to counter-terrorism, to the fight against child labour.

If you are interested in learning more about them you can find information on their website.

CONTENTS

NOTE FROM THE EDITOR

Families - whether they are moving jurisdictions, breaking up, getting together, dying, having new children, or all-out fighting, are central to the practice of private wealth advisors.

In this edition we look at family from a variety of angles. First and foremost, we wanted to include Rosie Schumm's very powerful article about her own **Ukrainian Family.** It offers a unique perspective into the Russian invasion of Ukraine, and we thank her for her candid depiction of the situation through her own experience.

On a more technical level, we then look to a broader '**What is a Family?'** through the lens of private client. The nuclear family is more and more a thing of the past, and we need to adjust our definitions to better advise our clients.

Next, Mark Harper gives us insight into the new **No Fault Divorce** law (as he says, it has only taken the UK fifty years!)

We then are transported to the USA with John Teitler's **Cross-Border Issues in Marital Agreements** which offers great insight especially into New York.

To cap off our section on divorce, we have an article from Marcus Dearle on **Bridging the divide in divorce and trusts.**

Next we have a couple of articles which focus more broadly on family feuds - one, by Michael Giraud and Sanmari Crous which looks at how trustees will need to adapt with the new wave of client in **Fiery Family Feuds,** and a rather juicy piece from Stewarts about the recent **High Court determines ownership of Damien Hirst painting fought over in family feud.** We aren't technically allowed to show the piece of art, so you will need to head to their website to see what all the fuss was about.

Lastly, we finish with a very useful article by Ken Maxwell on **Insurance as a simple, cost effective solution for Inheritance Tax planning.**

We hope you enjoy this edition.

Francesca Ffiske, Content Director, Private Client Global Elite

2022

16-17 May, Chewton Glen, UK
Private Client Exchange UK
Chaired by Rupert Ticehurst (Maurice Turnor Gardner) and Rosie Schumm (Forsters)

17-17 May, Chewton Glen, UK
Rising Leaders Exchange
Chaired by Piers Barclay (Macfarlanes) and Yindi Gesinde (Baker McKenzie)

28-29 June, St Regis, Bermuda
Private Client Exchange Bermuda
Chaired by Vanessa Schrum (Appleby) and Hector Robinson QC (Mourant)

13-15 July, Banyan Tree Mayakoba, Mexico
Private Client Forum Americas
Chaired by Joshua Rubenstein (Katten), Rachael Reynolds QC (Ogier), Gilead Cooper QC (Wilberforce Chambers), Carola Trucco (Barros & Errázuriz)

3-4 October, Château Saint-Martin, Nice
Private Client Exchange France
Chaired by Beatrice Puoti (Burges Salmon) and Jérôme Barré (Barré e Associés)

7-8 November, Capella, Sentosa
Private Client Exchange Asia
Chaired by Nicholas Jacob (Forsters) and Vikna Rajah QC (Rajah & Tann Singapore)

17-19 November, Villa d'Este, Lake Como
International Private Client Forum
Chaired by Basil Zirinis (Sullivan & Cromwell) and Clare Maurice (Maurice Turnor Gardner)

30 November - 2 December, La Mamounia, Marrakech
Trusts & Estates Litigation Forum. International
Chaired by Tina Wüstemann (Bär & Karrer), Dakis Hagen QC (Serle Court) and Nicholas Holland (McDermott Will & Emery)

TBC February 2023, Switzerland
Private Client Exchange Switzerland
Chaired by Tina Wüstemann (Bär & Karrer) and Werner Jahnel (LALIVE)

FAMILY IN UKRAINE

Rosie Schumm, Forsters

When the Ukrainian war broke out five weeks ago, it was closer to home for me than most. My grandmother was Ukrainian and although she spent most of her life after the Second World War in Peterborough, her sister (aged 87) and her nieces and nephews still live in the beautiful port city of Odesa in western Ukraine. As the sirens sounded in Odesa last night as it was attacked by missiles, the plight of my family continues.

Just to give you some historical context, in 1942 my grandmother was separated from her family by the German army and taken from Lviv to Düsseldorf where she worked as slave labour throughout the war. She was reunited with her family 50 years after the war ended and visited them on many occasions in Odesa.

The events of the last month have shocked us all. Many of us have felt completely powerless, organising collections and sending money to aid organisations where we can. I have spent this time frantically messaging my family, trying to encourage them to escape the conflict. They were resistant at first, but three weeks ago most of them decided to escape from Odesa and drove across the Moldovan border through Europe to Berlin (which took them five long and perilous days). My uncle offered them some rooms in his flat for a few days so they could work out where they wanted to be.

It was then that I flew out to Berlin to be with them to help them with their British visa applications. It was wonderful to see them; we had three full days and nights of finding accommodation and support for them for the next month, putting together a family tree and drinking copious amounts of Ukrainian vodka. Of course they didn't want to talk about the war and preferred instead to discuss lighter topics like exploring Berlin and where they could eventually live in England (they decided that the North East is too cold).

On the second day, I went with them to the refugee tent outside Berlin Central Station to find out what we could do about support for them and to offer support to other families. Our time there will be etched in my memory forever. Exhausted young children were resting on

tables with their mothers having spent days fleeing the conflict. Elderly grandmothers in headscarves and fur coats, for warmth not vanity, were surrounded by their lifetime belongings spilling out of plastic bags. It is so difficult to contemplate what they had been through and that this was just the beginning of the journey for them as they had to start their lives again from scratch, without their sons and fathers. Their strength was incredible. I was bowled over by the generosity of the German people. We also went to a church which had been set up as an information centre. It was there that a very kind German journalist offered his flat to my family for the foreseeable future whilst we await the outcome of their visa applications. We are all very grateful to him.

We also found a family photo (previous page) from the 1940s of my great grandmother, Natalya (centre), my grandmother (back row) and her brothers and sisters. The photo was taken during Stalin's Red Famine and you can see the famous sunflowers in the background. The girl on the left in the photo is my 87 year old Great Aunt Kerolina, who has decided to stay at her home in Odesa. Like my grandmother, she is so incredibly brave. Godspeed Odesa and Kerolina (and all the other brave souls). ■

How can you help?

Donate. We think World Central Kitchen is doing amazing things: food relief is not just a meal that keeps hunger away. It's a plate of hope. It tells you in your darkest hour that someone, somewhere, cares about you. Donate here.

Volunteer. We know a lot of you are already helping to get families out of Ukraine and to safety, if you would like to be connected with someone who will tell you more let us know.

WHAT IS A FAMILY?

From our Private Client Exchange Switzerland.

The families who seek private wealth advice are often complicated, with multiple jurisdictions, generations and tensions. For several years now nuclear families have stopped being the normal, with maybe half of the families our delegates face having a different format - whether it is a same-sex family, a patchwork family, whether it involves surrogacy or adoption, the list goes on.

The definition of what a parent is, and indeed what counts as a family or relationship, is changing and advice needs to change to keep up with it. This will only become more important with the next generation of clients inheriting wealth.

Spouse (and non-spouse) rights:

One of the most tremendous changes in the last thirty years has been the increase in single-parent households, who will face very different challenges and will therefore need very different advice.

In the same vein, the increase in unmarried couples cohabiting and having children is more now than ever before. There is very little uniform legislation around this, which means that they may have issues as they look to structure and leave their wealth. In Spain, for example, there are seven regional civil codes and they often do not recognise unmarried couples in the eyes of the law. Our delegates agreed that this is out-dated, but how long will it take for legislation to change (and, indeed, how will it change?) In the meantime there will be issues of inheritance tax and heirship which create challenges for the advisor.

In many jurisdictions same-sex couples still cannot marry, or if they do their rights are different to those of a heterosexual couple. As of 2022 just 30 counties recognise same-sex marriage. In Switzerland, for example, the referendum was just last year. Since this victory, the Swiss authorities are looking to review inheritance law to create new provisions for couples who are not married, too. Individuals and advisors will need to be active in creating new wills under these revised laws, or risk losing the new benefits. This is something which other jurisdictions could consider to ensure protection for the unmarried.

How do we draft documents for a fast-changing world with fast-changing rights? While Switzerland, for example, may have approved same-sex marriage, what if there are assets in other jurisdictions which do not?

Could it be something to do with the amount of time unmarried people live with? There would need to be parameters in place, our delegates agreed.

Children, step-children, adopted children...

This is an interesting debate around the world, from jurisdictions where forced heirship exists to those without. It is possible in most places to deliberately exclude certain children from a will, but in some cases human rights law can add them back in retrospectively. For example, if the settlor were to name a particular heir they want excluded (Joe Bloggs, for example, for a particular misdeed), then this should work without issue in most jurisdictions. However, if a settlor were to exclude a generic swathe of people such as 'any illegitimate children', then this is something which people are contesting more frequently. This is applicable to the various definitions of children, which are becoming broader. The phrase 'legitimate children' is looser than it once was, what must be taken into account is the settlor's intention when the will was drafted, but with an awareness of human rights issues which might spring up (or, indeed, just straight-forward litigation). For example, if an adopted child was left out of the will they may be likely to contest it - what the settlor wanted must be clearly documented as a result, and would be crucial in future disputes. Alternatively, should our delegates advise against it?

The legality of excluding illegitimate children depends on the jurisdiction. For example, it is quite common in jurisdictions under Sharia law, whereas in places like Bermuda it is illegal.

The question was asked as to whether it is possible to exclude heirs from a trust if the exclusion goes against public policy for that jurisdiction. The example raised was based in Austria, where the crystal dynasty of Swarovski attempted to introduce a statute which stated that women would not have the same voting shares as the men in the family. The Austrian Supreme Court viewed this as unconstitutional and overturned it.

This is becoming more common in the UK, too. Provisions in trusts or wills that exclude certain swathes of society (the famous example being "if my daughter were to marry a Catholic"), have been increasingly struck down for being contrary to public policy. This is something we see, too, in Jersey law where the definition of 'immoral or contrary to public policy' carries weight with regard to trusts.

Variations of a trust structure:

If, indeed, in some cases a family views a trust as being out-dated, it is possible to vary the trust. An example of a case in Jersey was raised, in which the settlor was vehemently against same-sex marriage. The family as a whole was wary that certain beneficiaries and heirs would later fall out of favour, so applied for a variation. Consent was granted, and the reason given by the court was that Jersey law had moved on to become more tolerant since the formulation of the original structure. Variations like these, which are conducive to family harmony, are key. In these instances the settlor's wishes are quite irrelevant.

The definition of a parent:

Four 'types' of parents were discussed in our session: adult-adoption, surrogacy, parents of those born through posthumous genetic material, and the actual definition of a parent. There is increasing legislation around all of these, which only goes to show how much more common these different versions of parenthood are becoming.

As such, advisors will need to take future changes in legislation into account, families and family structures with an element of vision. ■

NO FAULT DIVORCE AND JURISDICTION DISPUTESARTICLE

Mark Harper, Hughes Fowler Carruthers

It has only taken 50 years for England to remove the requirement to prove adultery or unreasonable behaviour to obtain a divorce, and finally introduce no fault divorce, which came into effect on 6 April 2022. This introduces in effect divorce on demand, with a process over time. Generally, it will take a minimum of 6 months from the start of the divorce until the grant of the divorce final order.

This welcomed modernisation of the law has a key impact in international jurisdiction disputes. Often there can be a race as to who can start a divorce quickest, in which jurisdiction and a race as to how quickly the final divorce order can be granted.

Under the new law, it is not possible to defend the divorce. It is only possible to 'dispute' the divorce in three ways. The first is to dispute that the court has jurisdiction to deal with a divorce - because of inadequate links to England, such as not being domiciled or habitually resident in England. The second is because the marriage was not valid and the third is because the marriage has already been legally ended (I acted for a Russian husband a couple of years ago who successfully defended the English divorce on the basis the wife had obtained her own divorce in Russia 10 years before – which she overlooked!).

Under the old law, the spouse opposing the divorce in England would always defend the divorce, disputing the adultery or unreasonable behaviour. That would delay the divorce for 6-10 months and prevent the divorce being granted.

The new law means that it will be quicker to obtain a divorce in England than before. In a dispute between, say, England and Switzerland as to where the divorce can be, typically the Swiss courts can be slow with long gaps between court hearings. Moreover, in some countries it is not possible to finalise the divorce without dealing with maintenance and/or asset division. That is not required under the new law in England.

Although the economically weaker spouse can apply to the court after the conditional divorce order to delay the granting of the final divorce order, that is only in limited circumstances which will often not apply. Moreover, the court has the power to expedite the granting of a conditional or final divorce order in some circumstances.

The unexpected impact of the new no fault divorce law in England is that more jurisdiction disputes and races can be won more quickly in England. ■

CROSS-BORDER ISSUES IN MARITAL AGREEMENTS

John M. Teitler, Esq., Teitler & Teitler

Among the great financial risks that our roving international UHNW clients face are the consequences of marriage upon divorce and death.

In various jurisdictions, these risks are often mitigated (although not eliminated) through marital agreements such as election of property regimes and pre- or post-nuptial agreements (including waivers or limitations of spousal rights on divorce and/or death). In many common law jurisdictions, the challenges presented in the negotiation, the drafting, and the enforcement of such marital agreements are significant and the outcomes can be extraordinarily varied. Clarity can be elusive given common law judicial decisions which apply to the "facts of that particular case in that particular jurisdiction." These issues are only further obscured by the legal kaleidoscope presented by competing international jurisdictions in which clients may have a presence now or in the future. Clients and their advisors often do not realize how easily exposure to the laws of other jurisdictions can arise and how very different these cross-border outcomes can be.

While marital agreements may in certain circumstances be imperfect devices (see discussion below), and made even more challenging in the cross-border context, they often provide the opportunity to mitigate various cross-border risks. While many of us have been faced with the challenges of international application of marital agreements throughout our careers, the great "COVID migration" of the past two years has only increased the number of clients facing these issues, both with respect to marital agreements that have already been entered into as well as those currently being negotiated.

In order to provide the maximum available level of protection across potential jurisdictions, careful consideration must be given to competing substantive and procedural laws, execution formalities, and public policy considerations of those jurisdictions in which the client (or spouse) maintains a presence, and coordination and advice should be obtained from counsel in those jurisdictions. At the time that a marital agreement is entered into, jurisdictions in which it appears likely that the client (or spouse) may have a presence in the future should also be considered. Similarly, even well after entering into a marital agreement, prior to a client (or spouse) creating a presence in a new jurisdiction, a review of the effectiveness of the marital agreement in that jurisdiction should be made.

While the format of this article does not lend itself to a comprehensive discussion of the threshold issue of "which jurisdiction's law applies to determine the validity of the agreement" in the application of marital agreements in the cross-border context, there is no simple or uniform approach in New York. Decisions vary, applying New York law, the law of a foreign jurisdiction, or some combination thereof. These are hard-to-predict, subjective determinations, based on the facts and circumstances of the individual case.

Consideration should be given as to whether approaches are available to increase the likelihood of enforceability in various jurisdictions, such as:

(1) Choice of law, choice of forum, and severability clauses.

(2) In addition to the typical provisions in the primary jurisdiction where the agreement in being executed, adding specific provisions (and financial disclosure) common in other likely potential jurisdictions, and including these all together in one omnibus agreement.

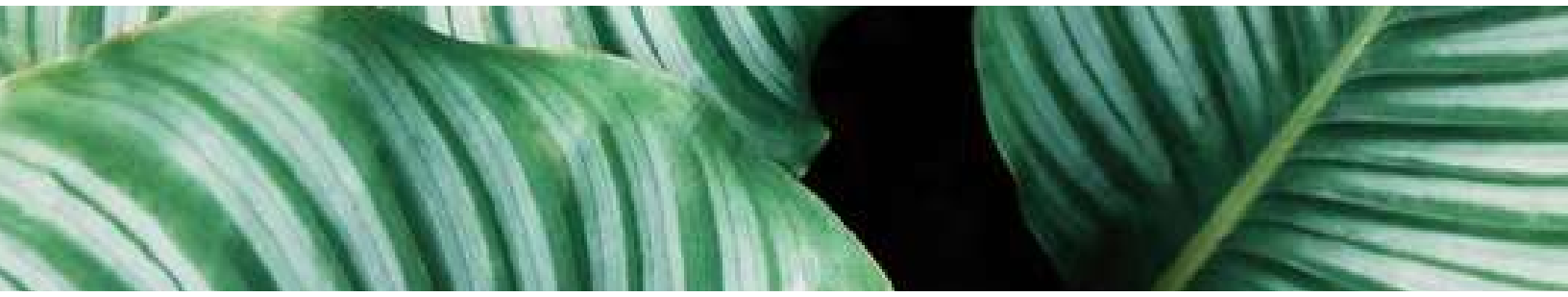
(3) Following the execution formalities not only of the primary jurisdiction, but also of other likely potential jurisdictions.

(4) Entering into more than one agreement to address exposure in other jurisdictions (in such event particular care must be given to consistency of agreements and/or, where appropriate, indicating priority of agreements).

(5) Entering into a post-nuptial agreement prior to establishing a presence in a new jurisdiction.

While various of the above approaches may not be available or feasible, each is worth examining.

New York State has a strong public policy in support of the recognition of duly executed domestic and foreign marital agreements, as codified in its Domestic Relations Law ("DRL").



See N.Y. DRL § 236B(3) (providing for written marital agreements, executed by the parties, and "acknowledged or proven in the manner required to entitle a deed to be recorded"); Matisoff v.Dobi, 681 N.E.2d 376, 381 (N.Y. 1997) (creating a "bright line test" for marital agreements mandating strict compliance with the formalities provided for in 236B(3)); Van Kipnis, 900 N.E.2d at 979-80 (it is "well settled that duly executed prenuptial agreements are generally valid and enforceable given the 'strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements'") (quoting Bloomfield v. Bloomfield , 764 N.E.2d 950 (N.Y. 2001)).

The importance of compliance with execution formalities cannot be overstated, as was again seen in a recent decision extensively addressing the issue by New York's highest court in Anderson v. Anderson, 180 N.E.2d 1043 (N.Y. 2021); see also Matisoff, 681 N.E.2d at 381; Galetta v. Galetta, 991 N.E.2d 684 (N.Y. 2013); Gardella v Remizov, 42 N.Y.S.3d 225, 229 (App. Div. 2d Dep't 2016)). However, where the formalities are met, New York is an extremely favorable jurisdiction for the enforcement of marital agreements. While there are some limitations as to the scope of the issues that may be covered, P.M. v. M.M., 144 N.Y.S.3d 312, 323-24 (Sup. Ct. N.Y. Cnty. 2021) (child custody and child support issues), in general New York courts will (absent the existence of fraud, overreaching, unconscionability, or the like) hold parties to the terms of such an agreement as an enforceable contract, not merely viewing such agreement as providing some weight or serving as one factor to be considered among many.

As strong a jurisdiction as New York may be with respect to the recognition of properly executed marital agreements, the corollary to that strength are the risks to UHNW clients presented by New York's divorce laws absent an enforceable marital agreement. These include, but are not limited to: a presumption of marital property which places the burden of proof on the proponent of a separate property claim; multiple ways in which separate property (or portions thereof) can be "comingled," "transmuted," and otherwise turned into marital property; attacks on trust in divorce; and, regardless of the outcome of any of the foregoing issues, a process that is long, expensive, and provides for extremely broad "discovery" practices. These risks weigh heavily in favor of marital agreements.

Careful consideration must be given to the terms of marital agreements to ensure they are clear and unambiguous so that a busy matrimonial court with a full docket can understand and enforce them. Clients must also do their part as well. In a recent decision in the case of Anonymous v. Anonymous, 2021 WL 609930 (N.Y. Sup. Ct. N.Y. Cnty.), aff'd, 152 N.Y.S.3d 806 (App. Div. 1st Dep't 2021), which has been widely reported as the Robert DeNiro and Grace Hightower divorce, the Court described a highly detailed agreement that obligated the parties to engage in annual "record keeping" of separate and martial property with a "designated accountant," which according to the decision they failed to do. While the Court upheld the agreement, and denied certain broad financial discovery, it ordered the re-creation retroactively of 15 years of record keeping as required by the prenuptial agreement, with the proponent of any separate property credit bearing the burden to establish such credit. The Court cautioned against using practitioners to prepare martial agreements who were unfamiliar with the legal terrain in which they are later enforced, including a quip from a member of the bar that "if you ask a neurosurgeon to perform your knee-replacement surgery, you may wind up with a limp." This is a good reminder to keep agreements simple and clear. Further, to the extent that an agreement imposes post-execution duties such as record-keeping or accounting (or annual exchanges of information throughout a marriage -- unusual and highly recommended against), the client must meet their obligations thereunder even when they are no longer being advised by the attorney. ■

BRIDGING THE DIVIDE IN DIVORCE AND TRUSTS

Marcus Dearle, Miles Preston

It is has been firmly established in England and Wales and Hong Kong for many years that assets held in a discretionary trust are at risk of being treated by the court as a potential financial resource in divorce proceedings if either or both of the parties are beneficiaries of the trust. Yet the vulnerabilities are often still misunderstood.

The discretionary trust in the leading Hong Kong, trusts as a resource, Court of Final Appeal case of Kan Lai Kwan v Poon Lok To Otto [2014] HKFLR 329 (Otto Poon), in which I led the team representing the Jersey trustee, was not improperly drafted as is mistakenly assumed by some. It was a standard discretionary trust, drafted in a similar way to most other discretionary trusts. The CFA's decision did not impact on the far more robust asset protection approach afforded by genuinely dynastic trusts, where the settlor is not a beneficiary.

It is to these dynastic trusts that individuals wishing to ring-fence assets responsibly, ideally in tandem with pre- and postnuptial agreements, should continue to be directed. But it is usually an impossible sell: the paradox is that substantially wealthy clients in Asia and elsewhere, who can easily afford to put a significant part of their wealth aside into truly dynastic trust structures, are usually not prepared to settle a trust without being a beneficiary. Thus, a discretionary trust is chosen, despite its asset protection vulnerabilities in a divorce context, as demonstrated in Otto Poon.

It is crucial that when discretionary trusts are set up advice given to the client is carefully noted to guard against the risk that the client might later assert that those vulnerabilities were not explained sufficiently, or at all, at the outset, and that they were lulled into a false sense of

security. Sometimes it transpires that there is truth in these complaints - particularly where a trust was set up through an intermediary more interested in the money in the portfolio account than the suitability of the wrapper the asset was held in.

Some practitioners trumpet the fact that Mr Akhmedov 'got away with it' by avoiding full compliance with the financial orders of the London High Court where assets were held in trust: see the Akhmedova v Akhmedov series of judgments. That is a risky and misleading knee-jerk approach to adopt. The case of Akhmedov can be distinguished: Mr Akhmedov was residing outside the United Kingdom, and that was a major reason why he was able to evade full enforcement of the English orders. In contrast, however, what about the entirely different situation where the debtor spouse settlors and/or beneficiaries are living in the jurisdiction of the divorce court in London or Hong Kong? And - unlike Mr Akhmedov - genuinely facing prison for non-compliance.

There is also the need to highlight the tension between (a) common law trusts with Liechtenstein trustees, in which criminal offences under Liechtenstein law might well be committed by the trustees if trust disclosure is for example provided and (b) the English court, which will not necessarily recognise the 'secrecy laws' criminal offence defence as an excuse for not providing disclosure and generally co-operating with the English court. Note in particular, in Akhmedova v Akhmedov &

Ors (Litigation Funding) (Rev 1) [2020] EWHC 1526 (Fam) (12 June 2020), when Knowles J stated that the Liechtenstein trustees, 'Counselor and Sobaldo have presently offered no defence on the merits of the Wife's claims. They contend that they are unable to plead to the facts because of Liechtenstein secrecy laws and assert that there should be a stay of these proceedings and/or the court's powers should not be exercised extra-territorially in this case.'

Divorce and trusts family law specialists, and private client practitioners, together need to consider, debate and warn about these (and other) vulnerabilities in more significant detail going forward. Members of the Legal Week Global Private Client Elite are potentially well positioned to do so. ■

FIERY FAMILY FEUDS

Michael Giraud and **Sanmari Crous**, Standard Bank Fiduciary Services International

Gone are the days when the patriarch ruled and the rest simply followed – younger generations now have their own views, opinions, and aspirations, which may be significantly different to those of the patriarch/matriarch. We know, however, that the younger generations – even the avocado-loving millennials – can add value through their unique perspectives. That said, ensuring their constructive involvement in the family's interests can be a challenge if not properly planned for and managed.

Younger generations often have different views on investment strategies. They are more interested in sustainability and ESG-focussed investments, and in some cases may even wish to diversify interests away from a sector in which the family has historically acquired substantial wealth. In addition, modern families are commonly geographically dispersed and mmersed in different cultures, potentially leading to a complicated and sensitive family dynamic requiring careful and considered navigation by a trustee and a family's advisors.

Add to this mix emotive assets, such as a family home or a longstanding family business that has been settled onto a trust, involving decisions regarding its retention or sale, management, and whether the business aligns with the beneficiaries' interest or beliefs, and tensions can rise.

If not properly managed, a trustee's involvement in a family dispute may exasperate matters. This may result from the trustee holding the purse strings: restricting allowances, sometimes holding back distributions, or refusing funding for a business in the absence of a proper business plan. What can a trustee do to avoid tensions escalating?

A Trustee's role in managing family tensions:

Family Culture
A trustee should expect to play an important role in helping to manage complex family dynamics. Each family has a unique micro-culture, in addition to the societal culture in which members exist. Acknowledging this means understanding the roles and relationships within a family, the norms and rules, behavioural patterns, important personal events, and most importantly, the shared values of the family.

Only with an understanding of the shared values and objectives - and recognition of the differences - can a trustee, working with a family's advisors, begin to facilitate a discussion around a family's long-term plan. If assets permit, this may mean putting a family charter in place.

Letter of wishes
A trustee can facilitate the drafting of a bespoke letter of wishes (or a trustee's memorandum), setting out the intention of the settlor and how they would have managed matters had they retained ownership of the settled assets. Although not a legally binding document, the letter of wishes will aid the trustee in their decision-making and, if properly communicated, help ameliorate potential tensions between beneficiaries. This is especially true for blended families with an unequal distribution or enjoyment of the family wealth.

The reality of intentions
A trustee must be well-informed of the different circumstances of a beneficial class. Trustees sometimes mistakenly focus on formal equality over substantive equality, making the trust a source of relationship stress instead of being a resource bringing the family together.

For a trustee, that means being aware of the different jurisdictions that beneficiaries may live in and what that means for them, be it the general cost of living, taxation of distributions, healthcare or education cost or levels, gifts of assets beyond the trust structure, past behaviour, etc.

Trust Deeds
A carefully drafted and bespoke trust instrument is invaluable. A well-drafted modern deed will not only provide parties with well thought out, modern removal and appointment mechanisms, but can make prenuptial agreements a requirement (removing the stress of a very sensitive topic from the family) and various committees can be drafted in to include family members on any charitable ambitions. The deed can furthermore provide whether investment decisions, such as when to sell an emotive asset, are to be considered by a wider committee; how people will benefit if they are directly involved in adding value to a structure and its underlying assets (e.g., a beneficiary running an underlying company); exclude family members if they fall foul of the law; ensure beneficiaries abide by the terms of an agreed family charter; etc.

A trust is of course one of many tools a family can use in their estate and succession plan to help manage family dynamics. The flexibility of a trust and its proven track record in assisting families for generations, however, makes it one of the most popular structures for families with a common law connection. That said, a well-drafted trust instrument will not in itself suffice: families should have an experienced trustee and advisors who know and understand their family and future aspirations. ■

HIGH COURT DETERMINES OWNERSHIP OF DAMIEN HIRST PAINTING FOUGHT OVER IN FAMILY FEUD

Geoff Kertesz, Catriona Abraham and **Francesca Bugg**, Stewarts

A family dispute about the ownership of a Damien Hirst painting, 'Beautiful tropical, jungle painting (with pink snot)' bought for only £68,000 in 1998, has been decided in favour of Stewarts' client, Robert Tibbles. Geoff Kertesz, Catriona Abraham and Francesca Bugg, who acted for Robert Tibbles in the case, examine the decision.

Robert Tibbles was an early follower of the 'Young British Artists' and has a long history of collecting contemporary art. Unfortunately, he has been engaged in a family disagreement that boiled over into a dispute over one of his pieces of artwork, a Damien Hirst painting 'Beautiful tropical, jungle painting (with pink snot)'.

Robert's father, Nigel, and twin brother, Sebastian, sued him. They claimed that they, not Robert, owned the painting. Following a three-day trial over the ownership of the painting, His Honour Judge Geraint Webb QC determined that Robert had full title to the painting and rejected Nigel and Sebastian's claims in full.

Background to the dispute

Robert bought the painting in 1998 for £68,000, paying in two instalments of £10,000 and £58,000. In happier times, Robert and the family had a history of using offshore companies to purchase assets, and the gallery issued invoices for the painting to two British Virgin Islands (BVI) companies controlled by Nigel and Sebastian. The painting hung on Robert's wall for more than 20 years. He insured it, and neither his father nor brother ever acted in a manner that suggested either of them had any interest in the painting. His father conceded he "had no interest in abstract or contemporary art".

Unfortunately, family relations broke down irretrievably in 2014. The court used the term "litigation warfare" to describe the deterioration in the relationship. Robert's father and brother have issued multiple claims against him in various countries.

The dispute arose when Robert sold the painting as part of a collection in February 2020 for £350,000.

This prompted Nigel and Sebastian, standing behind a BVI company, to issue a claim alleging that they, rather than Robert, owned the painting. The dispute proceeded to a trial, where the central issue was a simple one: what was the ultimate source of the funds used to buy the painting?

Evidence in the case

The case turned largely on the credibility of the

evidence given by the family members:

- The judge said Robert's evidence "was calm and measured at all stages in the face of some firm cross-examination, including on issues of alleged forgery". The judge formed the impression that "he was giving evidence honestly and was doing his best to assist the court".
- The judge found that Sebastian, on the other hand, "had no direct knowledge about the purchase of the painting… His allegations that his twin brother is relying on forged documents are based on his reading of those documents, rather than any direct knowledge of the underlying facts." In his view, his evidence "was heavily influenced by the wider 'family feud'".
- In the judge's view, Nigel "was attempting to give accurate evidence. However, his evidence concerning the details of the purchase of the painting was inconsistent and contradictory in some important respects". The judge believed "he had no real memory of the details relating to the purchase".

Conclusions

The court found it to be "inherently improbable" that Nigel decided to buy the painting on behalf of the BVI companies either as a financial investment or because he "liked" it. The court felt that Nigel's "reconstruction of the relevant events had, perhaps inevitably, been coloured by the subsequent 'family feud'".

As a result, the court concluded that Robert was the ultimate source of the payments and held he had always had full title to the painting.

While it is unfortunate that this matter proceeded to a trial and could not be resolved amicably, we are pleased that the court found in our client's favour and he prevailed in this unfortunate family dispute.

Jonathan Chew of Wilberforce Chambers was instructed on this matter. ■

INSURANCE IS A SIMPLE, COST EFFECTIVE SOLUTION FOR INHERITANCE TAX PLANNING

Ken Maxwell, John Lamb Hill Oldridge

In recent years, the UK tax authorities have been taking an increasing share of inheritances. The latest figures from HM Revenue & Customs (HMRC) show that, between April 2021 and February 2022, Inheritance Tax receipts were £5.5 billion, up £0.7 billion when compared to the same period a year earlier. The UK chancellor has also frozen the threshold at which Inheritance Tax is payable until 2026. As the value of property and assets rise over the next four years, the tax burden is only going to increase.

A simple solution is to buy insurance to cover the tax and it is often surprisingly inexpensive. Clients tend to buy cover to protect gifts, or longer term covers through to age 90, or indeed on a guaranteed whole of life basis. Insurance can be delivered on a bespoke basis to match liabilities, whether that's due to very significant, short term, liabilities arising from a restructure, or liabilities arising until a client loses UK liabilities on expatriation. A life insured needs to be UK resident at the point cover is taken out, future plans disclosed but the UK market is then available. The UK market remains very cost effective, future residency is not material.

Gifting

If gifts are being made there is a 7 year tail and while the beneficiaries may understand this they are unlikely to reserve for the tax – it is better to buy insurance to cover the liabilities and the cost for a £1 million gift that, excluding nil-rate bands, comes with a potential liability of £400,000 would be:

Year	Donor Age - 60	Donor Age - 70
1 to 3	£2,213	£6,684
4	£1,788	£5,412
5	£1,275	£4,141
6	£947	£2,870
7	£490	£1,488
	£11,238	**£33,963**

If it is envisaged that gifts will be made in the future then insurance can be modelled to cover future potential liabilities.

Long-term liabilities

Life insurance can also be designed to pay longer-term liabilities whenever they occur. Cover can be written on a single life basis or on a joint life second death basis depending on when the liability to IHT is likely to arise. Again this provides an inexpensive, simple solution.

	Single Life		Joint Life Second Death	
Age	10 years	Term to 90	10 years	Term to 90
30	£245	£1,190	£195	£1,485
50	£1,140	£4,300	£730	£3,285
70	£8,950	£15,750	£6,115	£10,240

Current estimated annual costs per £1million of cover – guaranteed rates

For clients with very significant liabilities based on property, where the liability could be paid over 10years, and the clients are concerned with regard to cash flow, a solution is to buy cover for say 3 or 4 years of the liability which gives the beneficiaries a chance to restructure the holding of illiquid assets and not be forced sellers.

Trusts:

Insurance policies tend to be written into trust to take the proceeds out of the chargeable estate being protected. However increasingly covers are owned by the beneficiaries with the premiums either paid by the donor (ranking as PETs rather than CLTs), or indeed with the beneficiaries paying the premiums themselves. ■

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