



International Wealth Structuring

By Tony Crilly

A field trip to the Bahamas might be necessary

Recently, I was reading an article in the digest for STEP (Society of Trust and Estate Practitioners). This is an organisation that shares information and resources for trust and estate lawyers throughout the world.

There is always something interesting to be gleaned from the regular digest and it demonstrates that people are the same the world over.

Recently in New York, the Supreme Court convicted 85-year-old Anthony Marshall of stealing millions of dollars from his demented mother, the late Brooke Astor. Marshall's lawyer, Francis Morrissey, was convicted of fraud and of forging Mrs Astor's signature on a codicil. The two were released on bail pending appeal.

Mrs Astor died in 2007 aged 105, leaving an estate of approximately \$180 million. A great deal of her estate planning was under the advice of Morrissey and in 2003, when her faculties were diminishing, he persuaded her to add a clause that gave him full control of \$60 million of her estate. A jury found that the testatrix was already lacking capacity at that time and furthermore they found that the two men had conspired to deceive her. There was also a conviction of Marshall for misusing a Power of Attorney to pay himself \$1 million while handling his mother's financial affairs. In addition, Marshall kept \$2 million from the sale price of \$10 million of one of her treasured paintings.

Now that the 2004 will has been found invalid, a whole new range of issues arise about the terms of the estate. Essentially, the beneficiaries under the earlier will are making claims that in 2002 she was competent and that is the will that should apply. The major beneficiaries of that earlier will are charities.

Similar issues can arise in Australia, and in Queensland, where I practise, there are provisions that enable an action against an attorney where there has been a breach of duty.

A claim for compensation can be made against the attorney to recover money lost pursuant to the exercise of a power, provided the claim is made within six months of death.

Currently, my firm has a case in which a claim for an account of financial dealings has been made against the attorney. A claim for compensation for loss of cash and property has been filed and a claim of undue influence on the transfer of real property has been made. The Court has very wide discretion to set aside transactions that were not made for valuable consideration and in this case it seems likely.

Family members are not always the best solution when appointing an attorney and if the estate is large, sometimes it is best to have an independent advisor to act jointly.

Section 106 of the *Powers of Attorney Act 1998 (Qld)* provides that an attorney can be required to pay compensation for any loss suffered as a result of failure to comply with the provisions of the Act. Once there is prima facie evidence of a breach of duty, the onus shifts to the attorney to prove otherwise.

On another front, there is a very popular new structure comprising a Private Trust Company (PTC) situated in the Bahamas which enables a benefactor or founder to appoint trusted people as the directors who can then exercise the powers of the trust.

These directors of a PTC are often better placed than professional trustees to act in times of family dispute given their knowledge of the family and their values. Adopting the use of such a structure raises the extra problem of who should own the shares in that entity.

Similar to the usual model of a purpose trust, the new Act allows a founder to choose the officers they consider best suited for the function, but it also protects them from liability as if they were directors of a company with limited liability.

It is like a company, but the executive foundation, through its Articles of Association, facilitates the application of best practice corporate governance necessary for lasting and workable structures, especially if they were going to operate a business. The officers do not need to be disclosed. This is an attractive means for families who wish to preserve privacy and keep financial matters confidential.

Each executive foundation does require a disclosed Bahamas agent. With many wealthy families looking to restructure and diversify their assets for better protection as a result of the economic downturn, the mission of the Bahamas executive foundation to develop structuring tools is a timely solution. There is an increasing need for family owned business to show

proper corporate governance when they are trading as well as holding assets so that they can preserve their credit rating and borrowing status.

It seems that there is no end to the new structures that can be created when it comes to perpetual trusts. It will be interesting to see how legislation develops in Australia given these developments overseas. These so-called Private Trust Companies are intended to solve the problem of succession by independent appointment and continuity of the control element. It is intended to hold assets only to the extent that it needs to do so to carry out its executive functions and there are no minimum share capital requirements.

Perhaps an extended trip to the Bahamas is required to explore these options!