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**THE EFFECTIVENESS OF STATUTORY PROVISIONS OUTLAWING FORCED
HEIRSHIP CLAIMS**

By
SEAN McWEENEY¹

The concept of forced heirship

- An important part of the succession law of most civil law jurisdictions, forced heirship gives the surviving spouse, children and/or other relatives of a deceased person fixed shares of his estate.
- Under most forced heirship regimes, such an entitlement is indefeasible and unavoidable in the sense that it trumps any contrary disposition that the deceased person may have made in his lifetime or under his will.
- Forced heirship, as the name implies, operates mandatorily, by operation of law, independently of what the deceased person's actual intentions may have been. In short, forced heirship is intended to apply no matter what.

Civil law forced heirship rights compared to common law dower

- For those of us who hail from the old common law jurisdictions (such as The Bahamas) where dower was (and, to some extent, still is) an important part of real property law, the concept of forced heirship will be readily understood.

¹ Partner, Graham Thompson & Co., Nassau, Bahamas; member of the Bahamas bar since 1978; Attorney-General of The Bahamas (1989-1992).

- Dower – a wife’s entitlement to a 1/3rd life interest in her deceased husband’s freehold realty – is, in many respects, illustrative of the forced heirship principle. Dower could not be defeated or avoided by any disposition that the husband might make during the marriage or under his will. Unless the wife voluntarily renounced her dower during the husband’s lifetime, or released it following his death, any purchaser of the husband’s realty would acquire a badly flawed title; he would take title subject to the wife’s dower.
- In most civil law systems, forced heirship rules are more complex and certainly more far-reaching than dower ever was under the English common law but the fundamental concept is essentially the same, namely, that the imperative of securing a widow a fixed interest in her deceased husband’s freehold realty (in the case of dower) or of securing the widow and children fixed shares of the deceased husband’s estate as a whole (under forced heirship) is of such transcendental social importance that it should trump and fetter the freedom of dispositive action the husband/father otherwise has over his property.

The Consequences of Forced Heirship Violations

- The consequences of forced heirship violations are not uniform among the countries that have it. In some jurisdictions, the offending transfers of property may be treated as void from the very outset so that no title passes. In other legal systems, the transfers may be treated as merely voidable. The far more common paradigm, however, is not to invalidate the transfer at all but rather to “claw-back” into the estate any offending gifts that might have been made by the deceased person during his lifetime.
- In most systems, this claw-back is notional rather than actual. Take the illustrative but hypothetical case of Mr. X who dies leaving an estate of two million dollars. Mr. X’s heirs are his two daughters, Alpha and Omega, who are

entitled to a 50-50 split of the estate under the succession law of Mr. X's domicile. If it turns out, however, that during his lifetime Mr. X diverted an additional one million dollars into a trust in The Bahamas solely for the benefit of Alpha, this additional million dollars, without being actually disgorged from the trust, would be notionally clawed back into the estate, resulting in an estate that would now be notionally enlarged to two million dollars. Alpha and Omega would thus be entitled to one million dollars each from this estate. However, as Alpha would already have actually received (or be solely entitled to receive) the one million dollars in the offshore trust, the other one million dollars that is actually in the estate would end up going 100% to Omega. The ultimate result then would be a model of Solomonic fairness and symmetry with each daughter walking away with an equal portion of the pie.

- There are numerous variations and alternative scenarios to the one I have just described, some of them tending toward labyrinthine complexity, but it is obviously not within the scope of my address to attempt to catalogue them much less to examine them in detail.

The emergence of Anti-forced heirship ("AFH") regimes

- Civil law jurisdictions with forced heirship rules in Latin America and continental Europe have long represented a major source of trust business for the offshore world which, of course, is common law-based for the most part. If the legal systems of this offshore world can be jiggled to empower men of wealth to give their wealth to whomever they wish rather than being obliged to leave it to gold-digging wives of dubious fidelity or children who run the gamut from profligate playboys to incorrigible drug addicts to hapless simpletons poised to fritter away in weeks the hard-won earnings of a lifetime, the attractiveness of such a dispensation would be too obvious to require elaboration. Enter the anti-forced heirship ("AFH") legal regimes that have proliferated so vigorously throughout the offshore world over the past 20 years.

- As with much of the legislative innovation in this period, the trend started in the Caribbean, initially in the Cayman Islands (1987), followed by The Bahamas (1989), before crossing the Atlantic to Jersey (also in 1989), and thereafter across a wide swath of the offshore world on both sides of the Atlantic and beyond.²
- The Cayman Islands are justly credited as the first one out of the gate with an AFH regime. In a miraculous example of telepathy, however, the Bahamian legislature soon delivered to market its own AFH law in terms virtually identical to the Cayman law. Some may be tempted to characterize the Bahamian Trusts (Choice of Governing Law) Act 1989 (the "TGLA") as a clone of the Trusts (Foreign Element) Law 1987 of the Cayman Islands but to do would be to impute intellectual piracy to the Parliament of The Bahamas, something that I would personally be loathe to do, not least because I happened to be Attorney-General of The Bahamas at the time! Rather, then, that it be said instead that the Bahamian Act is neither clone nor copycat but rather an essentially identical twin even if its period of gestation was such that its delivery was postponed to the birth of its elder twin sibling in Cayman by almost two years!
- I turn now to a synopsis of the main provisions of the Bahamian TGLA which, given its uncanny similitude to the Cayman law, should be equally applicable to that jurisdiction as well.

SYNOPSIS OF THE BAHAMIAN TRUSTS (CHOICE OF GOVERNING LAW) ACT, 1989 ("TGLA" or "AFH regime")

- (1) **Firstly, settlors, whether they reside in The Bahamas or not, are free to adopt Bahamian law as the governing law of their trusts.** In order

² For jurisdiction- by-jurisdiction survey, see Trusts & Trustees - World Trust Survey vol.13, issue 8, Oct. 2007.

to do so, however, they must "*expressly declare*" their selection in the instrument creating the trust³;

- (2) **Secondly, the choice of Bahamian law as the governing law of the trust is decisive.** The language of the statute is especially emphatic in this regard. It says that the selection is "*valid, effective and conclusive regardless of any other circumstance*".⁴ This applies not only to the trust itself but to all transfers of assets into the trust as well.
- (3) **Thirdly, the choice of Bahamian law as the governing law of the trust is (subject to prescribed exceptions) exclusionary of any other law that might otherwise have been applicable.** In the words of the TGLA, "*all questions arising in regard to a trustshall be determined in accordance with the laws of The Bahamas, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected*".⁵ I should state at once, however, that this general proposition is subject to several prescribed exceptions to which I will turn in just a moment.
- (4) **Fourthly, the Act mentions a number of specific things that are to be determined exclusively by reference to Bahamian law.**⁶ This list which is clearly non-exhaustive includes questions that may arise as to :

- whether the settlor had the capacity (to create the trust or any relevant disposition);

³ S.4 (1)

⁴ S. 4 (2)

⁵ S. 7 (1) The admonition in the TGLA that Bahamian law is to apply "*without regard to the laws of any jurisdiction*" probably indicates an intention that the domestic law of The Bahamas should apply exclusive of its common law conflict-of-law rules. If this is correct, it would mean that the doctrine of renvoi could not be invoked by a Bahamian court under the TGLA. To demonstrate how renvoi, in its simplest application, works : if a Bahamian court has to apply, say, Italian law to determine an issue but under Italian conflict-of-law rules, the issue would actually fall to be decided according to German law, the Bahamian court would end up applying German law to determine the issue.

⁶ S.7 (1)

- whether the trust, or any transfer of assets into the trust, was validly made;
- the powers, obligations, rights and liabilities of the trustees;
- reserved and other powers under the trust;
- and questions relating to the administration of the trust generally.

All of these matters are declared by the TGLA to be governed exclusively by Bahamian law.

- (5) The TGLA does, however, make significant but not surprising exceptions to the general proposition that Bahamian law is to govern.

The Exceptions⁷

- Firstly, the TGLA does not validate dispositions of property which the Settlor didn't own to begin with : although this exception seems almost axiomatic, it represented, in fact, a matter of major potential difficulty before 1996 Amendment when the law was clarified (see below).
- Secondly, the TGLA does not validate trusts or dispositions of **land** outside The Bahamas if under the law of the place where the land is located such a trust or disposition would be invalid : this exception is in perfect harmony with the long established rule of private international law that legal issues concerning land should be determined by the *lex situs* (viz. the law of the jurisdiction where the land is located).
- Thirdly, the TGLA does not validate any trust made by will, or any disposition made under a will, if such a testamentary trust or disposition is invalid under the laws of the settlor's domicile : this exception is also perfectly understandable within the framework of private international law under which the law of succession is generally the law of the deceased

⁷ S.7 (2)

person's domicile. It is only fitting, then, that the Act should say, as indeed it does, that where a trust is created by will, even if it is expressed to be governed by Bahamian law, its validity is a matter for determination according to the law of the testator's domicile. Thus, if the testamentary trust is invalid under that law, the TGLA will not save it.

- Fourthly, the TGLA does not affect the recognition of foreign laws in determining whether the settlor is the owner of the trust property or the holder of a power to dispose of it : like the first exception, this, too, presented some difficulty before it was clarified by the 1996 Amendment to which I will turn presently.
- Fifthly, the TGLA does not affect the recognition of the laws of the place of incorporation of a company : again, this is an inoffensive exception since it accords with the principle of private international law that questions concerning the status, capacity and powers of a company should fall for determination according to the law of the company's place of incorporation.
- Sixthly, the TGLA does not affect the recognition of foreign laws that prescribe the technical formalities for disposing of property ;and
- Seventh, the TGLA makes the application of Bahamian law subject to any express term to the contrary in the relevant trust or dispositive instrument. – this exception is largely self-explanatory but it bears emphasis that it allows the settlor to adopt some law (other than Bahamian law) for some parts of the trust although the situations in which this would happen would be exceedingly rare in actual practice.

Continuing with the overview of the Bahamian TGLA :

(6) The Act throws its arms of protection around Bahamian trusts in anticipation of attacks based on foreign forced heirship laws. The Act proclaims that **no trust (or disposition into trust) that is valid under Bahamian law is to be "void, voidable, liable to be set aside or defective in any manner by reference to a foreign law"**. The TGLA says, moreover, that the capacity of any settlor is not to be questioned, nor is the trustee or any beneficiary or any other person "to be subjected to any liability or deprived of any right" (a) by reason of any foreign law not recognizing the trust concept or (b) by reason of the fact that the Bahamian trust may avoid or defeat any foreign forced heirship rights or any judgement of a foreign court upholding or enforcing such rights.⁸ In short, if you have a foreign forced heirship claim, or even a judgement based on forced heirship, it will be untenable against a Bahamian trust.

The Lemos case (Cayman)

- The futility of a forced heirship-based assault on a Bahamian trust is demonstrated by the trajectory of the well-known Cayman case Lemos v. Coutts & Co.⁹ which, incidentally, is one of the very few reported cases that involved any consideration of an AFH regime. Although the litigation was settled before any definitive consideration of the AFH regime could be given, it is nonetheless noteworthy how dismissive the learned Justices of Appeal were of any attempt that might be made to enforce forced heirship claims against a Cayman trust. Given the identical nature of the corresponding Bahamian statute, what was said in Lemos should apply equally to The Bahamas.
- As the background to Lemos is instructive, it would be useful to now recall it. The sons of a deceased settlor brought an action, firstly, in Greece claiming that in setting up an *inter vivos* trust in the Cayman Islands, their father, a Greek domiciliary, had violated Greek forced heirship rules. The sons claimed that the trust was therefore invalid as a matter of Greek law and that the transfers of the father's assets into the Cayman trust

⁸ SS. 8 & 9.

⁹ 1992 -93 CILR, 460 (C.A) (see espec. Kerr J.A. @506)

were invalid as well. In an intriguing twist to the case, the sons also happened to be discretionary beneficiaries under the very same Cayman trust they were seeking to invalidate in the Greek proceedings. The Greek action named a number of defendants, including Coutts (Cayman) Limited, in its capacity as trustee of the Cayman trust. It should perhaps be noted that the other forced heirs, namely the settlor's widow and the settlor's daughters, were supportive of the Cayman trustees throughout the litigation and thus in opposition to the sons.

- Subsequent to the bringing of the Greek action, one of the settlor's sons brought a separate action in Cayman against the trustees alleging various breaches of trust and asking for their removal. Significantly, however, the son did not launch an attack on the validity of the trust in the Cayman court. The fact that he was advised not to do so was, in and of itself, a convincing proof of just how robust the insulation of the AFH regime really was. Indeed, the Court of Appeal made it clear that had a direct assault been made on the validity of the trust, it would have been a complete non-hoper from the very start. Although his pronouncements were clearly obiter, Justice Kerr was not being in the least bit diffident when he said :

".....it would be asking too much of the Cayman court to entertain an action challenging the validity of a Cayman trust, of which the proper law is Cayman law, based on causes of action and seeking a remedy not only unrecognized by but contrary to the laws of the Cayman Islands, particularly the Trust (Foreign Element) Law, 1987."

- After setting out verbatim the full text of Section 6 (virtually identical to Section 8 of the corresponding Bahamian TGLA) which declares that no trust or disposition of property into trust is impeachable on the basis that it defeats foreign forced heirship claims, Justice Kerr concluded :

"I am of the view that the causes of action and the remedy sought in the Greek proceedings (namely to invalidate the trust and the dispositions of assets into it) would not be entertainable in the courts here".

A Potentially Major Problem Under the Original Act

- One of the problems with the original TGLA of 1989 (and the corresponding Cayman law of 1985) was that while it clearly insulated Bahamian trusts against forced heirship rights that arose upon the settlor's death, it was questionable whether the same protection applied where the heirship rights arose while the settlor was still alive.
- For example, if the foreign law conferred heirship rights on spouses or and/or children automatically upon marriage or birth (as the case might be) would it not follow that the settlor could only transfer assets to the offshore trust subject to these heirship rights? Or to put the same question rhetorically, how could the settlor alone lawfully transfer into trust that which he no longer owned alone? Moreover, if he actually did so, wasn't this precisely where the protective armour of the TGLA fell away? After all, wasn't it the Act itself that said it would *"not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor"*?¹⁰

How the Problem Might Have Been Exploited

- Exploiting that exception under the TGLA, an aggrieved spouse could have argued (pre-1996) that the settlor's transfers of assets to the Bahamian trust were calculated to defeat a proprietary interest that she had in those assets under the settlor's personal law (usually the law of his domicile) and that her interest, moreover, had become indefeasible upon and by virtue of her marriage to the settlor. Moreover, the aggrieved wife would not have had to wait for her

¹⁰ S. 7 (2)

husband-cum- settlor to die. While he was still alive, she could have moved against the trustees in The Bahamas for judicial relief, including a declaration that the trustees were holding the assets of the trust upon trust for her to the extent that the settlor's transfers to the trust had deprived her of what she had already become indefeasibly entitled to under the heirship laws of the settlor's domicile (and hers).

Fixing the problem : The 1996 Amendment to the TGLA

- To plug up that rather gaping hole in the defence shield under the TGLA, Cayman in 1996¹¹, The Bahamas¹² in the following year, and thereafter a succession of AFH jurisdictions, introduced an amendment that says, in effect, that no matter what the legal position may be in the relevant foreign jurisdiction, a living settlor's ability to make a full and effective transfer of his property to the trustees of a Bahamian trust is not to be affected in any way by any heirship rights that may arise during the settlor's lifetime. In short, The Bahamas will simply refuse to recognize any foreign forced heirship right that questions whether the trustees take a good, complete and unimpeachable title to the assets contributed by a living settlor.
- The same amendment goes on to block another possible line of attack by providing that for the purpose of the creditor protection law of The Bahamas¹³ "*or for any other purpose*", an heirship right conferred upon anyone in relation to the property of a living person cannot qualify as an obligation or liability.¹⁴ In short, the prospective heir of a living person will not have the status of a creditor and thus would not be able to successfully claim that he is owed anything by the trustees or the settlor in relation to his forced heirship claims.

¹¹ The Trusts (Foreign Element) (Amendment) Law 1995

¹² The Trusts (Choice of Governing Law) (Amendment) Act, 1996

¹³ The Fraudulent Dispositions Act, 1991

¹⁴ This "blocking move" had actually been introduced under the original Act but because of infelicitous drafting its limits were not entirely clear; the 1996 Amendment has clarified the matter.

- Needless to say, this amendment is calculated to make life a lot easier for trustees who need no longer be concerned (at least not nearly as much as they would have been prior to the 1996 amendment) as to whether they might be taking a flawed title to the trust assets or, worse, that they might be holding the assets on a constructive trust for persons claiming to have heirship rights in the assets at the time of their transfer into trust. The 1996 amendment has largely eliminated such concerns.
- With the 1996 amendment, the AFH regime has been buttressed considerably – some might argue to the point of virtual impregnability – although perhaps not quite for the careless or unwary trust and estate planner.
- Be that as it may, it is, I think, a telling fact, that in the 20 years since AFH regimes first came into being, there has not been, as far as I am aware, a single reported instance in which a trust established in an AFH jurisdiction has been successfully attacked in litigation purely on the basis of forced heirship considerations.

1996 Amendment : TGLA made retroactive

- Before leaving the 1996 Amendment, it also needs to be mentioned that it has now been made clear that the TGLA applies to *"every trust and every disposition of property in trust made before or after the commencement of this Act, whether such property is situate in The Bahamas or elsewhere"*.¹⁵ Thus, the anti-forced heirship regime operate across the entire universe of Bahamian trusts, past, present and future.

Extension of the AFH regime to Bahamian Foundations

¹⁵ No. 20 of 1996 (statute laws of The Bahamas), S.5

Moreover, the AFH regime has now been extended to cover Bahamian foundations as well. Foundations were introduced into Bahamian jurisprudence as recently as 2004¹⁶. The Foundations Act replicates virtually the whole of the TGLA and applies it to all foundations established in The Bahamas. The bottom line, therefore, is that foundations are intended to have precisely the same defence shield against forced heirship claims that *inter vivos* trusts enjoy under the TGLA.

THE HAGUE CONVENTION ON TRUSTS

A word or two about the Hague Convention on Trusts and how it relates to this whole discussion of forced heirship.

- The genesis of AFH regimes in 1987 was clearly influenced by the promulgation two years earlier of The Hague Convention on Trusts¹⁷.
- The Bahamas is not a signatory to the Convention nor is it likely to become one in the foreseeable future. Indeed, of the major offshore jurisdictions, only the Cayman Islands, The Bahamas and Singapore are not parties to the Convention. The United Kingdom is, of course, a ratifying state¹⁸ along with most of its remaining colonial territories - with the notable exception of Cayman. Through the UK's intercession (not that it was necessarily solicited), Bermuda, the British Virgin Islands, and the Turks & Caicos Islands in this hemisphere have been brought on board the Convention. Farther afield, The UK has also ratified the Convention on behalf of the Isle of Man, Jersey and Guernsey in the Channel Islands. Hong Kong is bound by the Convention as well. Other ratifying states of note include Luxembourg, Liechtenstein, Australia, and Canada except for the provinces of Ontario and Quebec which are, of course, the two provinces that are the primary exporters of Canadian trust business to the offshore world.

¹⁶ Foundations Act 2004

¹⁷ The Convention obtained treaty status on July 1st, 1985

¹⁸ See The Recognition of Trusts Act, 1987 in England. Ratification implies that the Convention has been domesticated, i.e. incorporated into the laws of the ratifying state by legislative action

- The United States, although a signatory, is not among the ratifying parties to the Convention. The same applies to many of the continental Western European countries. Although signatories to the Convention, they have yet to ratify the Convention, perhaps, in part, for precisely the reason that since the trust concept is alien to their jurisprudence¹⁹, ratification presents obvious difficulties.
- If there has been a dearth of case law on the AFH laws that have been adopted over the past 20 years by various common law jurisdictions, the case law on the Trusts Convention hovers around the zero mark. Indeed, as Prof. Donovan Waters QC remarked in a 2005 paper:

*"There has been surprisingly little case law in the 20 years since the Convention came into force, and none known to the present writer which has clearly sought to carry the language of the Convention forward, explaining and expanding upon the "bare bones" of the Convention text"*²⁰

Important Differences Between the Hague Convention and Bahamian type AFH regimes

A word or two on some important differences between the Hague Convention and the AFH regime as typified by the Cayman and Bahamian model.

- Firstly, the Convention, by Article 4, has no application to any threshold issue that may arise as to whether the settlor had the capacity to create the trust. Ratifying states have therefore had to provide for this separately in their trust legislation or, alternatively, have to rely on pre-existing conflict-of-law principles. In contrast, of course, the AFH law of The Bahamas specifically addresses the

¹⁹ Liechtenstein, which incorporated the trust concept into its domestic law in the 1920's, is a notable exception).

²⁰ "Cross-Border Trusts and the Conflict of Laws (Part 2)" : Trust Quarterly Review Vol.3 Issue 3, pg. 2,

issue of capacity and declares it to be a matter to be determined according to Bahamian law.

- Secondly, issues as to the validity of transfers of property into the trust are also not covered by the Convention, again with the result that countries that are bound by the Hague Convention would have to deal with this issue either statutorily or by reference to pre-existing conflict-principles. By contrast, any question as to the validity of a transfer of property into trust is, by the express terms of the TGLA, a matter of Bahamian law.
- Thirdly and perhaps even more fundamentally, The Convention, by Art. 15 expressly requires subscribing states to honour “(mandatory) *succession rights, especially infeasible shares of spouses and relatives*”. This is a clear and pointed reference to forced heirship rights and the succession laws that frame them. Needless to say, AFH regimes, as exemplified by the Bahamas and Cayman model, run in the completely opposite direction, being designed to give primacy of the trust and the beneficial interests created thereunder over forced heirship rights.
- Distinguished academics, chief among them Professor David Hayton²¹, as he then was, have gamely sought to resolve this apparent contradiction by contending that if a valid trust is created during the settlor’s lifetime, the assets he puts into that trust are *ipso facto* no longer a part of his personal estate (title passing instead to the trustees for the benefit of the trust beneficiaries). By extension, therefore, those assets, so the argument goes, would not be subject to succession laws and thus not subject to forced heirship rights.
- The argument is superficially attractive but it cannot be right because it would make a complete nonsense of Art 15 or, at the very least, allow it to be reduced

²¹ The General Editor of Underhill and Hayton’s Law Relating to Trusts and Trustees, now a Justice of the Caribbean Court of Justice based in Trinidad.

to rubble in a way that could hardly have been intended. Indeed, it would give every settlor *carte blanche* during their lifetime to put his assets beyond the reach of his heirs through the simple expedient of an offshore trust. That, of course, is precisely the object of the AFH regimes we have been discussing but it most assuredly is not what Article 15 of the Convention has in mind when it requires mandatory rules of succession and, in particular, forced heirship rights, to prevail over the law of the trust, and to be respected and given effect to.²²

- This contradiction creates obvious difficulties for those offshore jurisdictions that have signed on to the Hague Convention but who would still like to have their cake and eat it too, that is to say, to uphold the principles of the Convention, on the one hand, but to attract anti-forced heirship trust business on the other. Happily, this is not a problem for The Bahamas, nor for Cayman, since neither is a party to the Convention.

Making the AFH Trust Even More Tamper-Resistant : Structuring Issues

However impervious to penetration Bahamian type AFH regimes may appear, nothing is foolproof. As in everything there are weaknesses and potential traps in any trust and estate planning. Let's have a quick look at some of some of these and, in so doing, develop something of a checklist - some Do's and Don't's - to bear in mind when the offshore AFH trust is being put together.

Beware of Claw-back

- (1) Firstly, it always has to be borne in mind that in the final analysis an offshore AFH trust is likely to be of little utility if the settlor, after the trust is set up, retains assets in his domicile of sufficient value to offset what the aggrieved heirs may have lost out on in relation to the trust. Going back to the example I gave earlier in this address as to how claw-back works, if the aggrieved

²² For a discussion of this, see Explanatory Report of the Convention by Alfred E. von Overbeck (especially discussion of Article 15), International Trust Laws (Vol. 1), Glasson

heirs can compensate for their loss under the trust by simply getting the courts in the settlor's domicile to adjust the property distribution under the estate accordingly, the offshore trust will be safe and secure alright but the settlor's overarching hope of favouring one heir over another, or of favouring non-heirs over heirs, will have been defeated in the process. On the other hand, it is probably not a good idea in any case for a settlor to push his luck by trying to put virtually all of his personal assets into an offshore AFH trust. To do so would just be begging for trouble. An heir who is left virtually nothing has virtually nothing to lose by fighting tooth and nail wherever he can to get a piece of the pie. He is less likely to do so, however, if he is at least provided for reasonably, if not optimally in his mind, under the estate. (I should perhaps add, however, that in The Bahamas, non-resident plaintiffs without substantial assets in The Bahamas are generally required to put up rather hefty "security for costs" from the start. The trustee of an AFH trust is almost certain to pursue this if sued by aggrieved heirs who are not beneficiaries under the trust. This alone may have a powerfully deterrent effect on the aggrieved heirs.

Taking the assets offshore

(2) Secondly, although this is really implicit in the first point just made, the assets that are put into the trust really do have to be moved offshore. If a settlor, for example, owns a corporation that holds, say, a large bank account in his home country, it is idle to simply transfer ownership of the corporation to the offshore trust if the bank account is to be left where it is. It will be picked off like a sitting duck by the aggrieved heirs. The money has to be moved offshore, preferably into the AFH jurisdiction.

Observing the technical formalities for transfer

(3) Thirdly, apropos of the point just made, care has to be taken to ensure that when assets are, in fact, transferred into the trust from the settlor's home country, all the necessary formalities for such transfers under the law of the

settlor's home country are adhered to. In this regard, it will be recalled that the TGLA does not affect the recognition of foreign laws relating to the technical formalities that have to be observed for the disposition of property. The Trustees should therefore obtain the opinion of legal counsel in the relevant foreign jurisdictions that these formalities have been observed whenever assets are transferred into the AFH trust.

Deepening the Connections to the AFH jurisdiction

(4) Fourthly, although the TGLA says that it is enough to simply stipulate Bahamian law as the governing law of the trust in order to access full AFH protection, it would certainly behoove the prudent trust planner to fortify the Bahamian trust to better withstand any possible future aggression in foreign quarters. This is done by diversifying and deepening the trust's connections with The Bahamas – or whatever the relevant AFH jurisdiction happens to be. Ideally these points of connection should include the following:

- Ensure that the trustees are all resident in The Bahamas (or other relevant AFH jurisdiction) or, at the very least, ensure that none of the trustees is resident in the forced heirship jurisdiction in question or any other jurisdiction which may have a judicial co-operation arrangement with the forced heirship jurisdiction such that the trustee living there might become susceptible to orders directing him to take certain actions against the trust on pain of committal for contempt or other forms of judicial pressure.
- The same advice applies to protectors and, even more so, to those who hold powers of appointment under the AFH trust. Such persons should not be resident in the forced heirship jurisdiction or any other jurisdictional danger-zone.

- Another important way of deepening the connection of the trust to the AFH jurisdiction is to hold the trust assets in an underlying company which is itself domiciled in the AFH jurisdiction (e.g. in The Bahamas, via an “IBC”²³).
- The connections are deepened still further by ensuring that the directors and officers of the underlying company are themselves resident in the AFH jurisdiction. And whatever they do, the directors should not turn around and give a blanket power of attorney to some nominee of the settlor or to one of the trust beneficiaries if they are living in the forced heirship jurisdiction. Again, this might make them susceptible to the jurisdiction of the foreign court on the basis that the true command-and-control centre of the company is where the donee of the power is resident and calling the shots.

(5) Fifthly, in setting up his trust, the Settlor should avoid doing so by a Declaration of Trust declaring himself the trustee of the trust and sole beneficiary while he is alive. While this would probably no longer be considered an invalid testamentary instrument in The Bahamas as a result of the special anti-sham provisions of the Trustee Act²⁴, this sort of paradigm may create serious complications (too involved to go into here) upon the settlor’s death and should therefore be avoided.²⁵

(6) Sixthly, the use of foreign corporate settlers should also be avoided, especially if the corporate bodies are incorporated in the Settlor’s home country. In this regard, it will be recalled that the TGLA implicitly concedes

²³ a company incorporated under the International Business Companies Act 2000 (replacing the 1989 Act of the same name)

²⁴ See Trustee Act, 1998, S. 3 (3).

²⁵ for discussion of this point, see “Launching the Rocket – Capacity and the Creation of Inter Vivos Transnational Trusts”, Jonathon Harris, International Trust Laws, vol.1

that any issue as to the capacity of a corporation should fall to be governed by the law of its place of incorporation, rather than the law of the trust.²⁶

(7) Seventhly, the trust should be cast as a fully discretionary trust rather than a “fixed interest” trust with specific allocations of trust property to specific beneficiaries. A discretionary trust should make it that much more difficult for anyone to argue that any specific beneficiary²⁷ or class of beneficiaries has been quantifiably enriched to the detriment of any aggrieved heir or group of heirs. The hallmark of the discretionary trust is, of course, that no beneficiary can point to any part of the trust fund as belonging to him, the corollary to which is that the beneficiaries have no definite interest that can be attached (unless, of course, the trustees decide, in their discretion, to make a disposition in their favour).

(8) Eighthly, cynical and counter-intuitive though it may sound, the settlor may want to consider adding all of his heirs (spouse and children) to the beneficial class under the AFH trust. In doing so, he should establish his bona fides by making it known in his letter of wishes that he does, in fact, want all of his heirs to receive something from the trust. It need not be a princely sum that he entreats the trustee to set aside for those he does not particularly care to benefit (“the lesser heirs”) but it should certainly not be so small either as to be derisory. After making that pitch in favour of the lesser heirs, the settlor can then proceed in the same letter of wishes to entreat the trustee to distribute the lion’s share of the trust fund to the persons he thinks should have most favoured status. Clearly, such a design will not satisfy those heirs who think they have been gypped out of what is rightfully theirs but it will nonetheless put them at something of a tactical disadvantage if they have to assert forced heirship rights against an anti-forced heirship trust under which they are themselves beneficiaries. Moreover, if the potential benefits for

²⁶ TGLA, S. 7 (2) (d).

²⁷ References herein to beneficiaries of trusts should be understood to include objects of powers of appointment contained in trust instruments.

them under the trust are nothing to sneeze at, the aggrieved heirs will certainly have to think twice before attacking the trust or disclaiming any interest they may have under it. A careful reading of the *Lemos* case (ante) reveals what a obstacle-course this can become for beneficiaries who want to keep their options open and not make a frontal assault on the validity of an AFH trust.

(9) Ninethly and apropos of the point just made, consideration should perhaps also be given to including a no-contest provision in the trust deed to the effect that if any beneficiary asserts forced heirship rights against the trust or seeks to impugn any transfer of assets into the trust as a violation of forced heirship laws, he will automatically be excluded from taking any benefit under the trust.²⁸ No-contest clauses in trusts (or wills) are, in principle, effective provided they are not purely *in terrorem* or calculated to oust the jurisdiction of the courts in matters that should properly be put before them. This seems to be the law for no-contest/forfeiture clauses that operate automatically.²⁹ If, on the other hand, the discretion of the trustees is interposed such that it is left to the trustees to decide whether the contesting beneficiary will be disqualified, the view has been expressed that the trustees could find themselves in contempt of court in threatening to use it to discourage a beneficiary from taking proceedings or to punish him for having done so.³⁰ There is some very recent and interesting case law out of Cayman on the subject of these no-contest clauses. It merits close reading.³¹

Finally, if the Trustees are is sued in the foreign court, what then?

²⁸ For a useful discussion of this, see Anthony Duckworth's "Attacking International Trusts", Private Client Business 1996 no.2 p. 97; and his paper "Forced Heirship and the Trust", International Trust Laws, Glasson, vol. 1.

²⁹ (Cooke v. Turner (1846) E.R.vol.153 at pg.1044; Adams v. Adams (1892) 1 Ch. at pg. 369).

³⁰ Halsbury's Laws of England (4th ed)., vol. 9, para. 30

³¹ AN v. Barclays Bank & Trust (Cayman) Limited [2007] 9 ITELR 630

- Because their first duty is to protect the trust assets for the benefit of the beneficiaries of the trust, trustees will have to consider whether they should submit to the jurisdiction of the foreign court or, even where they have not been sued, whether it would be in the best interests of the trust for them to seek to intervene in the foreign forced heirship proceedings. A Beddoe order can be obtained from the Bahamian court giving the trustees leave to do so on the basis that their costs will be chargeable to the trust. Both the Lemos case and the Ojeh case³²(also out of Cayman) are good examples of this approach. In Lemos , the trustees, in fact, obtained the leave of the Cayman court to not only defend the proceedings brought against them in Greece but to counterclaim in that action as well. Having said that, cases in which the trustees of an AFH trust will be advised to enter the foreign fray are likely to be very rare indeed.

³² 1992-93 CILR (Cayman), 348