

Asserting beneficiaries' rights in a Liechtenstein Family Foundation

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A recent decision of the Liechtenstein Supreme Court has illustrated the nature of the rights of a beneficiary in the Liechtenstein Foundation. This article will be of interest to all concerned with Foundations and shows clearly that although a foundation may be used as an alternative to a trust, under certain circumstances the status of the parties, particularly the beneficiaries, should not be regarded as the same.

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The question of when a beneficiary of a Liechtenstein Family Foundation can assert his property rights against the Foundation or representatives of the Foundation was considered in a new judgment in the Liechtenstein Supreme Court (16.9 2001, 6CG 195/99 LES 2002, 94 et seq).

The decision answered a number of questions and gave some indication as to how effective beneficiaries' rights are with regard to the Foundation.

The term "claims regarding the property" means the right of the beneficiary or beneficiaries to claim payments, for example, the payment of regular or non-recurring financial assistance. However it does not include, for instance, the rights to information on, and the rendering of accounts by, the Foundation Board.

The situation of the beneficiaries and reversioners

To identify the nature of beneficiaries' claims and how they may be enforced requires an examination of the beneficiaries' legal status.

First, Liechtenstein law distinguishes between beneficiaries and reversioners. With beneficiaries (the holders of a benefice, or beneficiaries of a trust) there is a further distinction between benefit recipients (beneficial owners) on the one hand, and entitled beneficiaries (entitled beneficiaries of a trust) on the other. The former are persons who, according to the articles, bylaws or the law, are entitled to draw an advantage from the Foundation, while the latter are persons who also have a legal right to payment from the Foundation. (This is roughly equivalent in English trust law to beneficiaries with an interest in possession and beneficiaries entitled to a future interest). Then come the reversioners, that is those entitled in default of the beneficiaries.

The bylaws define in detail the benefits of a Liechtenstein Family Foundation, designating the first beneficiary and subsequently the second and succeeding beneficiaries. The succeeding beneficiaries acquire their interest, as the name indicates,

after the others and also depend for their entitlement on the articles or bylaws. The law also recognises that beneficiaries or reversioners may not be entitled to any benefit.

Enforceability of the beneficiaries' rights; previous decisions

The Liechtenstein Supreme Court only once has judged on whether claims by beneficiaries can be enforced by way of action where their rights are defined as unenforceable in the articles and bylaws.

In that case the plaintiff had applied to the court to have a Family Foundation declared null and void. The founder had "barred all legal rights of the beneficiaries not only to the Foundation funds but also to its income therefrom." The Liechtenstein Supreme Court considered that this provision could be challenged although generally the law permitted only the legal claims of a beneficiary of a Common Foundation to be barred by the founder; for this general rule to apply the Foundation must be under official control, as is the position with a Common Foundation. But with a Family Foundation, (the form of the Foundation in this case) the Foundation, in principle, was not subject to official supervision. The Liechtenstein Supreme Court concluded that the beneficiaries did not enjoy this protection, as the Family Foundation was not subject to official supervision. However, they may not be left unprotected. The founder of a Family Foundation may not deprive the beneficiaries of their rights to be able to claim their share of the Foundation's assets. Any provision in the Foundation Deed that bars the beneficiaries from any legal claim would be invalid. That was the position before the present case.

The new legal situation following the recent judgment

The facts were that the beneficiary, of Belgian nationality, filed a legal action at the Princely Court of Justice in Vaduz against a Family Foundation under Liechtenstein law for payment of a donation of US\$250,000. According to the articles of the Foundation the object was the

management of the Foundation's funds and payment of donations to persons designated in the bylaws. The Foundation Board should have issued these bylaws. According to the provisions of the articles the Foundation Board was supposed to decide upon the extent of the donations and upon the manner in which they were made subject to the bylaws. It was decided that the beneficiaries would have a legal claim to such allowances only to the extent provided in the regulations.

On the other hand, the bylaws, which were issued by the Foundation Board about 10 months after the establishment of the Foundation, designated the father and grandfather of the plaintiff as the beneficiaries and that they should be able to make use of these rights only collectively. In the event of death after a stated date the rights were to be transferred to the plaintiff who would then receive \$250,000 at the age of 25.

The first instance court concluded that the bylaws contained no further provisions about the enforceable nature of the beneficiaries' claims.

The defendant, the Foundation, resisted the claim on the grounds that an enforceable claim required the decision of the Foundation Board and that no such decision had been made.

The judgment of the court of first instance was in complete agreement with the plaintiff and was based on the conclusion that the plaintiff's claim arose independently of any related action by the Foundation Board.

On appeal the defendant objected on the grounds that this decision was wrong in law. The Liechtenstein High Court did not agree. This court referred to the articles which required that the Foundation Board should decide upon the extent of the donation and the manner of any distributions subject to provisions of the regulations. The Board had decided the extent of the donation and the manner in which it is distributed (in US Dollars): the time when the donation could be made fixed precisely by the bylaws. This meant that the Foundation Board was no longer able to make decisions on matters that were provided for in the bylaws. On this construction there was no scope for any discretion on this topic by the Foundation Board.

Therefore the plaintiff was entitled to an enforceable claim for the \$250,000.

The Foundation Board then lodged a further appeal.

The Liechtenstein Supreme Court made general observations concerning the

Liechtenstein Family Foundation which are extremely informative.

The object of the Liechtenstein Foundation was established in perpetuity to carry out the Founder's pre-determined objects of which the beneficiaries held a position of priority. (According to Section 552 et seq on the Liechtenstein Persons and Companies Act (PGR) in conjunction with Para 1 et seq TRUG (SEC 932 a PGR which was established practice of the Liechtenstein Supreme Court and followed the so-called "principle of solidification.") The organ of the Foundation, the Foundation Board, only had a right of management and was bound to fulfill the stated objects, the core of a Foundation. This principle is decisive in the interpretation of the articles and bylaws. The will of the founder prevails. This is contained entirely in the terms of the Foundation Deed and any possible bylaws, which are the only valid source of authority in connection with the Foundation's funds.

The Foundation was established in perpetuity for the enforcement of the founder's predetermined objects in connection with which the beneficiaries hold a position of priority. As stated, the organs of the Foundation, for example the Foundation Board, only has a right of management and has to fulfill the objects of the Foundation.

Moreover the Liechtenstein Supreme Court also made it clear that the founder's will basically would be the decisive influence for the interpretation of the articles and bylaws as the founder had expressed in the Foundation. This interpretation led to the principle that to determine the will of the founder required that the ordinary meaning of the words be not applied but that the words are to be understood as used by the founder. But the founder's will could not be determined by this method in contradiction to the clear meaning of the words. Applying this the Liechtenstein Supreme Court came to the decision that taking into account the articles of the Foundation, the beneficiaries would have a legal claim to the Foundation's funds only to the extent provided for in the regulations. The founder explicitly gave legal rights to the reversioners. Contrary to the opinion of the Foundation Board they had no margin of discretion at all. On his 25th birthday the plaintiff had acquired directly an enforceable claim to a donation by virtue of the terms of the bylaws. The plaintiff was then entitled to demand fulfillment of the bylaws according to the statutory provisions listed above.

This decision follows the law on Swiss Foundation with the difference that under Liechtenstein law the Foundation Deed

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could provide that the Foundation's organs would have free discretion in connection with distribution. However, in the present case, the articles of the Foundation did not provide such a reservation of right and therefore it was not necessary to consider further any possible conflict between the beneficiaries' rights and the Foundation Board's discretion.

"The 'solidified will of the founder' ... has to be interpreted."

Following this decision it is possible to summarise the circumstances where beneficiaries and reversioners may make an enforceable claim. They will have an enforceable claim if:

1. The precondition for a reversion and the date and extent of the donation are described objectively.
2. The Foundation Board has neither choice nor discretion on the matter.
3. There is no statutory regulation, which requires a resolution of the Foundation Board to be made before such a payment can be made.

"The Liechtenstein Supreme Court has not adopted the 'regulation of doubt' of the Austrian Private Foundation law ..."

The decision is the first that shows the circumstance under which beneficiaries can sue for their assets. It is necessary in all cases to consider in detail the constitution of the Family Foundation, the articles and bylaws. The "solidified will of the founder" (ie, as fixed in the document) has to be interpreted. The Liechtenstein Supreme Court has not adopted the "regulation of doubt" of the Austrian Private Foundation law, according to which beneficiaries' rights are only

enforceable if this results explicitly from the Foundation Deed or by its interpretation. Under Liechtenstein law the beneficiaries' claim has to be determined according to the will of the founder as contained in the Deed and that right is not subject to the discretion of the Foundation Board.

There is, however, the question of "discretionary" Foundations where the board members have a discretion in exercising their rights and duties. These Foundations do not grant, in general, an enforceable claim to the beneficiaries. The Supreme Court left open the situation of the position of beneficiaries under such a Foundation.

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