

## Offshore Wealth Preservation Trusts

### The Anderson Case

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A very popular method to protect one's hard-earned (or easily-inherited) assets is through the establishment of an irrevocable discretionary trust in a debtor-friendly foreign jurisdiction such as the Bahamas, Belize, Nevis or the Cook Islands. As discussed in our October, 1999 Caribbean Today article, where such a trust is properly established and maintained, and the funding of the trust is timely effectuated, it can be an extremely useful mechanism to discourage creditor attacks and promote settlements favorable to the debtor/trust settlor. However, recent cases show that in certain circumstances, U.S. courts will do their best to pierce the structure through every perceivable means, including some that may be legally questionable.

This judicial policy is best shown in the United States Ninth Circuit Court of Appeals case of Federal Trade Commission v. Affordable Media, LLC, better known as Anderson. The old legal adage that "bad facts make bad law" could not be more applicable than here. In this case, a husband and wife, Denyse and Michael Anderson, were involved in a late-night television telemarketing venture that offered investors the chance to participate in a project that sold such "modern marvels" (the court's words) as talking pet tags and water-filled barbells. Although the promoters promised that an investment in the project would return 50 per cent in a mere 60 to 90 days, the venture in fact was a Ponzi scheme, which eventually unraveled and left thousands of investors with tremendous losses. However, the Andersons' profits from their commissions generated from this clearly criminal enterprise had been "safely tucked away across the sea" in an irrevocable Cook Islands trust.

The FTC then obtained a U.S. District Court order demanding the repatriation of the Andersons' ill-gotten gains. When the Andersons asked the Cook Islands co-trustee to comply with this order, it refused to do so, citing the "anti-duress" clause of the trust document which prevented honoring coerced requests. In large part because the Andersons had unwisely appointed themselves co-trustees and protectors of the trust and had unsuccessfully tried to resign from these positions at the last possible moment, the U.S. District Court promptly cited them for contempt of court and incarcerated them. The court denied the Andersons' claim that it was legally "impossible" for them to exercise control over the trust and its assets. The appeals court later affirmed the lower court ruling.

The Andersons were freed from jail several months later when they agreed to further cooperate with the FTC in an attempt to pierce the trust. The U.S. government subsequently brought an action in a Cook Islands court to seize the trust assets, but was again unsuccessful other than obtaining a co-signatory arrangement. At a recent seminar, the Cook Islands trustee of the Andersons' trust indicated that the trust funds remained effectively tied-up, thus creating a potentially indefinite stalemate situation.

Anderson shows that even a poorly-conceived offshore wealth preservation trust structure can work effectively to shelter assets. On the other hand, going to jail for contempt of court is probably not acceptable for most persons as a means of keeping creditors at bay. In a number of cases, U.S. courts have used this contempt power as a sword in a manner which arguably exceeded their legal authority (a situation which we will discuss in a future article). As a bottom-line, however, even though there are no guarantees that they will work perfectly in every conceivable situation, offshore irrevocable wealth preservation trusts remain the most viable and effective means of ensuring that assets go to the settlor's intended beneficiaries.