

Article by **Stephen King, partner and head of Dispute Resolution and Emily Gailey, Dispute Resolution solicitor at Payne Hicks Beach** first published online in Private Client Adviser on 21 March 2016  
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Stephen King  
Partner and Head of Dispute  
Resolution



Emily Gailey  
Solicitor, Dispute Resolution

## Solid foundations?

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**Foundations are non-existent in the England and Wales legal toolbox - we generally use trusts to achieve the same effects. So what happens when beneficiaries dispute over a foundation, using a legal system ill-equipped to deal it?**

In the past month the media have been fascinated by a sibling feud of epic proportions which has been unfolding at the London High Court. This dispute, between siblings Alan and Carolyn Hamilton, concerns the estate of their late father David Hamilton, a multi-millionaire businessman in the property and fashion industries.

According to reports, the late Mr Hamilton left an English estate of £4.5m when he died in 2007 and, under the terms of his English will, this was divided equally between his two children with a bequest of £500,000 to his widow. However, and this was where matters became more contentious, Mr Hamilton also left assets of £3.2m in a Liechtenstein foundation called the Rainbow Foundation.

Unlike the will, under the rules of the foundation, the assets were divided unequally between the siblings, with Carolyn, a highly respected barrister, receiving £2.2m and her brother only £1m.

Alan Hamilton, an accountant based in New York, allegedly only discovered this discrepancy four years after his father died and has now challenged the unequal division. He is arguing that the Rainbow Foundation forms part of his father's UK estate and therefore should be divided according to the terms of the will.

This could have consequences for inheritance tax depending on the domicile of the deceased. Carolyn, unsurprisingly, is arguing that the foundation operates under its own rules and should therefore be treated separately.

### **Liechtenstein foundations**

The difficulty for the court is to determine whether the rules of the foundation are effective under English law. Such a foundation has no real equivalent in England and Wales, falling somewhere between a company and a trust, and it is currently unclear what the court will decide as regards its status in this case.

There are parallels with the English Family courts where in divorce cases, the court has, on occasion, ordered an overseas trust to be set aside making assets from it available to a spouse. Overseas jurisdictions may or may not give effect to such rulings.

Under Liechtenstein law, a foundation is a legal entity in its own right and therefore entitled to hold assets independently. But unlike a corporation it has no members; only beneficiaries who are entitled to the assets or income at the direction of the founder

This hybrid vehicle provides potential founders with certain particular benefits. Depending on what is desired, the foundation can be (within certain limits) a bespoke vehicle, allowing the founder broad powers to control of what the beneficiaries receive while ceding actual ownership to the foundation. There can also be the potential to allow the founder to revoke the foundation, rather like US style revocable trust.

Liechtenstein does not routinely enforce foreign judgments. In most cases, assets are protected by the need to bring legal action before the Liechtenstein courts if anyone is seeking to challenge a foundation. A Liechtenstein foundation, therefore, could be an effective method for someone seeking to preserve family assets from future political turmoil.

This is precisely what Carolyn argues Mr Hamilton, a Holocaust survivor, was doing when he established the Rainbow Foundation - seeking to secure his family from the horror that blighted his own childhood, and caused him to arrive in England as a destitute teenager in 1938. Contrastingly, Alan claims that his father used the Rainbow Foundation primarily as part of a system of tax avoidance.

How the foundation was managed is likely to be a consideration by the judge when deciding whether to give the rules of the Rainbow Foundation legal recognition in the UK. Did Mr Hamilton, for example, treat the foundation as if he were entitled to it absolutely, or did it have a more profound purpose?

Either way, what approach the UK court decides to adopt in this instance will almost certainly pose interesting questions for practitioners dealing with such foundations both in this jurisdiction and in Liechtenstein.

**Emily Gailey** is a solicitor and **Stephen King** is a partner and Head of dispute resolution at [Payne Hicks Beach](#) - they both specialise in contentious trusts