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# Private Wealth 2021

Cayman Islands  
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# CAYMAN ISLANDS

## Law and Practice

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## 1. TAX

### 1.1 Tax Regimes

#### The Cayman Islands

The Cayman Islands comprise three islands: Grand Cayman, Cayman Brac and Little Cayman. They are located in the Western Caribbean Sea, approximately 500 miles south of Miami, Florida. The capital city, George Town, is located on the south-west shore of Grand Cayman.

The Cayman Islands is a British Overseas Territory, run as a parliamentary democracy with judicial, executive and legislative branches. The Cayman Islands has its own constitution and bill of rights. The local parliament, called the Legislative Assembly, has 19 elected members, from which a Premier, Deputy Premier and Speaker are appointed.

A Governor, appointed by the government of the United Kingdom, presides over meetings of the Cabinet and has special responsibility for defence, external affairs, internal security, the police and the civil service. The Deputy Governor – who, along with the Attorney General, is a non-voting ex officio member of the Legislative Assembly – is appointed by the Governor pursuant to advice from the Crown. The Governor also appoints members of the judiciary.

The Cayman Islands has a sophisticated judicial system presided over by a Chief Justice, and has a number of full and part-time judges and justices of the peace, some of whom serve as lay magistrates. There are three courts: the Summary Court, the Grand Court and the Court of Appeal. The Grand Court, which has a dedicated Financial Services Division, has jurisdiction over all civil claims in the Cayman Islands. From there, appeals lie to the Court of Appeal, which sits in the Cayman Islands three times a year. Final rights of appeal, in certain circumstances,

lie to the Judicial Committee of the Privy Council in London.

#### Taxing Regime

There are no income, capital gains, corporate, wealth, withholding, estate or inheritance taxes levied in the Cayman Islands. Import duties are payable on most items brought into the country. Stamp duty is payable on the purchase of land in the Cayman Islands and levied on certain documents executed within, brought into or produced before the court in the Cayman Islands. Stamp duty on deeds and documents ranges from KYD40 to KYD100.

The stamp duty calculated on the purchase of property is currently 7.5% of the purchase price or the market value of the property, whichever is higher; the Lands and Survey Department may carry out a property assessment to establish which is the greater. There are time limits for the payment of stamp duty on property purchases, with fines and penalties for late payment. Stamp duty exemptions are available, which currently do not apply to overseas first-time buyers.

### 1.2 Stability of the Estate and Transfer Tax Laws

There are no income, capital gains, corporate, wealth, withholding, estate or inheritance taxes levied in the Cayman Islands, and the jurisdiction is widely recognised as offering a stable economic and political system. Accordingly, a fear of future tax uncertainty in the Cayman Islands rarely plays into tax and estate planning.

#### Exempted Trusts

A trustee of a trust that satisfies the conditions set out in Sections 73 to 86 of the Trusts Act (2021 Revision) can apply for such trust to be registered as an exempted trust with the Registrar of Trusts. The register is not open to public inspection.

On payment of a fee, the Financial Secretary may provide an undertaking to the trustee of an exempted trust. The undertaking provides that no law imposing any income, capital gains or estate tax that comes into effect over a period not less than 50 years from the date of creation of the exempted trust will apply to any property in, or income arising in, such exempted trust.

### **1.3 Transparency and Increased Global Reporting**

#### **Common Reporting Standard**

The Cayman Islands is an “early adopter” of the Common Reporting Standard (CRS). As such, CRS regulations were issued in October 2015 and again in December 2016 to effect the implementation of the OECD Standard for Automatic Exchange of Financial Account Information.

#### **EU DAC 6**

The Cayman Islands does not have DAC 6.

#### **Tax Information Exchange**

At the time of writing, the Cayman Islands has signed 36 bilateral tax information exchange agreements, and an intergovernmental agreement with both the USA and the UK. It has entered into bilateral tax treaties with 27 European Union member states, under which it reports savings income pursuant to the European Union Savings Directive.

The Cayman Islands established a dedicated Tax Information Authority (TIA) in 2005 to assist in the discharge of the country’s tax information exchange obligations. The TIA is the sole dedicated channel in the Cayman Islands for international co-operation on matters involving the provision of tax-related information. The TIA is a function of the Department for International Tax Co-operation and has statutory responsibility under the Tax Information Authority Act (2021 Revision).

#### **Beneficial Ownership**

On 1 July 2017, the Cayman Islands’ beneficial ownership register (BOR) regime came into effect, which requires certain Cayman Islands companies to maintain a BOR. The BOR records details of the individuals who ultimately own or control 25% or more of the equity interests or voting rights in that company, or have rights to appoint or remove a majority of the company directors or LLC managers, together with details of certain intermediate holding companies. Companies that are within the scope of the legislation must maintain their BOR at their Cayman Islands registered office with a licensed corporate services provider.

#### **Economic Substance**

On 1 January 2019, the International Tax Co-operation (Economic Substance) Act 2018 now in its 2021 Revision (the “ITC Act”) came into force, with accompanying regulations. “Relevant entities” undertaking “relevant activities” (as defined in the ITC Act) must provide an annual report of their activities to the TIA and satisfy the “economic substance test” set out in Section 4 of the ITC Act.

## **2. SUCCESSION**

### **2.1 Cultural Considerations in Succession Planning**

There are no notable cultural factors playing a part in succession planning in the Cayman Islands. Cayman Islands’ succession law is based upon the principle of testamentary freedom, meaning that a testator or testatrix can leave their estate in their will to anyone that he or she wishes, if they have the necessary capacity to do so.

The relevant statutes in connection with succession matters are the Wills Act (2020 Revision), the Succession Act (2021 Revision) and the

Probate and Administration Rules (2008 Revision). Broadly, these laws set out the practice and procedure for obtaining grants of probate, letters of administration and the resealing of foreign grants, as well as the rules relating to the disposition of an intestate's estate.

If a deceased dies leaving a will, the executors will apply for a grant of probate, which will authorise them to access the estate of the deceased and distribute it in accordance with the terms of the will. If a deceased dies without a will, various relatives in order of priority are entitled to take out the grant of letters of administration. Other grants of representation are available to deal with less common situations.

## 2.2 International Planning

As families and businesses have become increasingly global, the focus on international planning has benefited the Cayman Islands as a centre of excellence in financial services. The jurisdiction offers a diverse range of succession planning vehicles and highly experienced service providers who are accustomed to working closely with a family's advisers in their home jurisdiction(s) to tailor a structure to suit the family's requirements.

## 2.3 Forced Heirship Laws

There are no "forced heirship" laws in the Cayman Islands. Succession law is based upon the principle of testamentary freedom.

When a person dies without a will, the intestacy rules provide that the surviving spouse will share the estate with the surviving children of the deceased. Closer relatives, starting with the parents of the deceased, will benefit in order of priority if no spouse or child survives the deceased.

## 2.4 Marital Property

### Divorce in the Cayman Islands

A couple can divorce in the Cayman Islands if they have been "domiciled" there for at least a year on the date that one of them petitions for divorce. Domicile in this context means that one or other of the parties can demonstrate an intention to reside in the Cayman Islands permanently. Alternatively, a wife can petition for divorce if she has been "ordinarily resident" in the Cayman Islands for at least two years prior to filing the petition, regardless of where the other spouse lives.

Divorce in the Cayman Islands is based on the Matrimonial Causes Act (2005 Revision) (MCL), the Maintenance Act (1996 Revision) and supplemental Matrimonial Causes Rules, currently in their 2021 Revision. Parties in Cayman Islands divorce proceedings are still required to provide fault-based grounds for divorce; for example, adultery, desertion and unreasonable behaviour.

### Division of Assets on Divorce

There is no community property regime in force and the court has broad discretion under Sections 19 and 21 of the MCL to decide the division of assets on divorce, taking into account a number of factors set out in local statute and derived from the common law.

In *Billes v Anco* [2011] (2) CILR 74 (subsequently confirmed by the Court of Appeal in *McTaggart v McTaggart* [2011] (2) CILR 366) it was established that the court will approach the division of assets on divorce in accordance with the "modern view". That is, there should be no discrimination based upon the nature of the roles undertaken by the parties to the marriage. The court should "aim for equality", derogating from that principle only in "exceptional circumstances".

Family law reform has been under discussion for some time, but the proposals have yet to become statute.

While there is no specific legislation in relation to pre or postnuptial agreements, the court is likely to afford them a similar status as the English Supreme Court in *Radmacher v Granatino* [2010] UKSC 42. Again in *Billes v Anco*, the Judge found that the court should give weight to what was in that case an unsigned copy of what he referred to as a “marriage contract” or prenuptial agreement, in the division of assets upon divorce. The court thus retains discretion to disregard pre or postnuptial agreements or to lend them less weight, if they are found to be unfair to the children of the marriage or if there was some injustice in the way that the agreement was reached between the parties.

## **2.5 Transfer of Property**

As there are no income, capital gains, corporate, wealth, withholding, estate or inheritance taxes levied in the Cayman Islands, a transfer of property on death or during one’s lifetime has no effect on the cost basis of the property being transferred.

## **2.6 Transfer of Assets: Vehicle and Planning Mechanisms**

As there are no income, capital gains, corporate, wealth, withholding, estate or inheritance taxes levied in the Cayman Islands, the mitigation of local taxes on the transfer of assets to younger generations is not a primary driver in succession planning.

## **2.7 Transfer of Assets: Digital Assets**

There is no statutory regime in the Cayman Islands that applies specifically to the treatment of digital assets for the purposes of succession. If Cayman Islands law governs succession to the digital assets, then they will be treated in the

same way as any other asset transferred pursuant to a will or the intestacy rules.

## **3. TRUSTS, FOUNDATIONS AND SIMILAR ENTITIES**

### **3.1 Types of Trusts, Foundations or Similar Entities**

The Cayman Islands is a common law jurisdiction that has based its trusts law on that of England. As such, the Cayman Islands court will have regard to the significant body of reported trusts cases and equitable principle that has steadily built up in England and the common law jurisdictions since the early 19th century (and in England’s case, sometimes considerably earlier). Much of this body of case law has been cited with approval, and the principles applied in and by the Cayman Islands Grand Court.

### **STAR Trusts**

The Cayman Islands was the first international financial centre to provide for non-charitable purpose trusts, known locally as “STAR trusts” after the initial legislation, the Special Trusts Alternative Regime Act. Since coming into effect in 1997, this law has been consolidated with other elements of trusts legislation and is now found at Part VIII of the Trusts Act, now in its 2021 revision, see **4.2 Succession Planning**.

### **Foundation Companies**

The Foundation Companies Act came into effect in the Cayman Islands on 18 October 2017 and allows for the formation of a new vehicle in the Cayman Islands, the foundation company. This vehicle is a body corporate with a legal personality distinct from that of its members, directors, officers, supervisors or founder, and is governed by the Companies Act, currently in its 2021 revision. A number of fundamental modifications have been made to the Companies Act model company, meaning that it has additional flexibil-

ity for achieving private wealth planning as well as commercial objectives; see **4.2 Succession Planning**.

### **Estate and Succession Planning**

Trusts are most commonly established in the Cayman Islands for estate and succession planning, and can include fully discretionary trusts to provide for fixed interest and life tenancies of income. Trusts may be created for individual beneficiaries who either currently exist or may do so at some time in the future, or to benefit charities, or they can be settled for non-charitable purposes. The perpetuities period for ordinary private trusts is currently 150 years.

A Trusts Amendment Act (TA) came into effect in June 2019, the provisions of which have since been incorporated in the Trusts Act (2021 Revision). The TA made certain important changes to Cayman Islands trusts law, including to provide in Section 64A for the setting aside of the exercise of a fiduciary power in whole or in part, or subject to such conditions as the court thinks fit, if certain conditions set out in Section 64A(2) are met.

### **Non-Profit Organisations Law**

A Non-Profit Organisations Act (the “NPO Act”) came into effect on 1 August 2017 and applies to certain charities and philanthropic organisations in the Cayman Islands but not to charitable trusts that have a trust company licensed or registered under the Banks and Trust Companies Act (2021 Revision) as their trustee.

### **Creditor Protection**

While trusts in the Cayman Islands can be established for asset protection reasons, under the Fraudulent Dispositions Act (1996 Revision) a gift made with the intention of defeating a creditor is vulnerable to being set aside within six years of the date of the gift, on application to court by the creditor concerned.

### **Anti-money Laundering**

The Cayman Islands has stringent anti-money laundering laws, with the Proceeds of Crime Act (2020 Revision), Anti-Money Laundering Regulations (2020 Revision) and detailed Guidance Notes currently in force. These laws set out the due diligence and “know your client” requirements that trustees and other financial services providers must meet in order to fully understand the transaction in which they are involved and the identity and source of funds.

### **3.2 Recognition of Trusts**

The Hague Convention on the Law Applicable to Trusts and their Recognition has not been extended to the Cayman Islands.

Cayman Islands trust law is based on the English Trustee Act 1925 but there are significant differences and so it should not be assumed that Cayman Islands trust law is identical in every way to English trust law.

### **3.3 Tax Considerations: Fiduciary or Beneficiary Designation**

There are no tax consequences for a citizen or resident of the Cayman Islands who serves as a fiduciary or is a donor or beneficiary of a foreign trust, foundation or similar entity.

### **3.4 Exercising Control over Irrevocable Planning Vehicles**

#### **Reserved Powers**

A key feature of Cayman Islands trusts law is the extent to which settlors may reserve certain powers to themselves (or grant powers to third parties) over key decisions in the administration of the trust.

Settling wealth on trust by transferring legal title to a trustee who may be situated in a jurisdiction far away from the family’s home is a highly significant decision for most settlors; often they have some nervousness in doing so and understand-

ably wish to retain an element of influence over the administration of the assets after establishing the trusts. Alternatively, if they would prefer not to have those powers themselves, settlors often ask whether it would be permissible for other trusted individuals, such as family members or long-standing advisers, to have those powers conferred on them instead.

The powers that may be reserved to a settlor or granted to a third party without invalidating a Cayman Islands trust are set out at Section 14 (1) of the Trusts Act, and include powers to do the following:

- amend or vary the trust deed;
- appoint capital or income, or both;
- give directions to the trustee over the purchase, holding or sale of the trust property;
- appoint or remove the trustee, protector or beneficiary;
- change the governing law and the forum for administration; and
- restrict the exercise of any powers or discretions of the trustee by requiring that they can be exercised only with the consent of the settlor or some other person that they nominate.

Plainly, reserving a wide power of amendment or variation of the trust deed would permit changes to be made to the terms of the trust in future. Similarly, a widely drafted power of appointment in the hands of the trustee might permit the appointment of trust assets on to new trusts in appropriate circumstances.

### Variation of Trusts

The TA also, amongst other things, amended the variation jurisdiction at Section 72 of the Trusts Act. The court can approve on behalf of certain persons – eg, minor or unborn beneficiaries – “any arrangement varying or revoking all or any of the trusts or enlarging the powers of the

trustees in managing or administering any of the property subject to the trusts”, if effecting that arrangement “would not be to the detriment of that person”.

Alternatively, if all of the beneficiaries of a trust are adults and have capacity to do so, they can agree to call for the trust property to be paid to them under the principles established in *Saunders v Vautier* (1841) Cr & Ph 240.

Section 63 of the Trusts Act allows the court to confer certain powers not contained in the trust deed on trustees, on the grounds of expediency in the management and administration of the trust.

The TA also introduced a new Section 64B into the Trusts Act. The court can approve the compromise of “trust litigation” involving a proposed variation of the terms of the trust on behalf of any beneficiary, if “the compromise is not to the detriment of such beneficiary notwithstanding that the court is not satisfied that it is for his benefit”.

## 4. FAMILY BUSINESS PLANNING

### 4.1 Asset Protection

Irrevocable fully discretionary trusts in which the settlor reserves no powers to themselves remain the most popular method of asset protection planning in the Cayman Islands.

### 4.2 Succession Planning

#### STAR Trusts

STAR trusts have proved to be a popular method for succession planning, and an ideal vehicle for philanthropic projects that would not fall within the strict definition of “charitable purposes” as per the “heads of charity” defined by Lord Macnaghten in *Re Pemsel* (1891) AC 531.

In summary, the principal features of a STAR trust are as follows:

- the objects can be persons or purposes, or both;
- they are not subject to the rule against perpetuities and so can exist for as long as the settlor wishes;
- beneficiaries have no standing to enforce a STAR trust, and thus have no entitlement to information about it;
- an enforcer is appointed, and all rights to enforce the trust and to receive information about it are held by said enforcer rather than by any beneficiaries of the STAR trust; and
- the rule in *Saunders v Vautier* (1841) Cr & Ph 240 has no application to STAR trusts, meaning, for example, that even if all of the beneficiaries are adults and of full capacity and are in agreement, they cannot call on the trustee to pay the trust property to them and bring the trusts of that property to an end.

## Foundation Companies

Foundation companies are also proving popular for succession planning purposes. They attract the protections of the Cayman Islands' "firewall" provisions found in Sections 92 and 93 of the Trusts Act that apply to foundation companies as well as to trusts.

Such companies can be formed for any lawful object, including providing financial assistance or benefits to beneficiaries.

The constitution of a foundation company consists of its memorandum and articles of association, and may provide for the creation of by-laws that will not form part of the constitution. As well as providing for its management, the constitution may grant rights, powers and duties of any type to members, directors, officers, supervisors, founders or others, for the benefit of the company or other purposes.

Rights under the constitution will be enforceable only against the foundation company, and a beneficiary of a foundation company will have no powers or rights relating to the company, its management or its assets. If the objects of a proposed foundation company are to be carried out mainly outside the Cayman Islands, then an application can be made to register it as an exempt company. This means that the foundation company will be eligible for a tax exemption undertaking in relation to any tax that may arise in the Cayman Islands on profits, income, gains or appreciations in the 20 years following the grant of the undertaking.

The foundation company is entitled to provide in its constitution for the resolution of internal disputes by arbitration or mediation, or some other method of alternative dispute resolution. It also has a right to apply to court for an opinion, advice or directions, pursuant to Section 48 of the Trusts Act, in a similar manner to trustees and personal representatives (see **5. Wealth Disputes**).

## "No Contest" Clauses

Forfeiture clauses (also known as "no contest" clauses) that provide for the forfeiture of a beneficiary's interest under the trust in question if that beneficiary challenges the validity of the trust, or the disposition of property to it, have been the subject of detailed consideration by the courts of the Cayman Islands. See, in particular, *AN v Barclays Private Bank & Trust (Cayman) Limited* [2006] CILR 367, applied most recently in *AB Jnr v MB & ors* [2013] (1) CILR 1. Public policy will not prevent the enforcement of forfeiture provisions in circumstances where the challenge was made without good cause and unsuccessfully.

## 4.3 Transfer of Partial Interest

As there are no income, capital gains, corporate, wealth, withholding, estate or inheritance taxes levied in the Cayman Islands, transfers of par-

tial interests in an entity (whether during one's lifetime or at death) do not attract transfer tax.

## 5. WEALTH DISPUTES

### 5.1 Trends Driving Disputes

There are no particular trends driving wealth disputes in the Cayman Islands at the time of writing, although the restructuring of wealth held in trusts by way of court application remains common, as do applications for the construction of the terms of wills and trusts. There have been a number of recent decisions of the Cayman Islands Grand Court in relation to trustee applications for directions.

#### Trustee Directions Applications

Under Section 48 of the Trusts Act, any trustee or personal representative is at liberty to apply to the court for an opinion, advice or direction on any question regarding the management or administration of trust money or assets of any testator or intestate. Provided a trustee acts on the advice or direction given, that trustee will be deemed to have discharged their duty in respect of the subject matter of the application, unless they are guilty of fraud, wilful concealment or misrepresentation of the facts in respect of their application. It follows that a trustee seeking the directions under Section 48 has a duty of full and frank disclosure and, as such, must disclose all material facts in relation to that application.

Recent notable decisions in this area include *HSBC v Tan Poh Lee and ors* (unreported) 22 November 2019 in relation to the surrender of a trustee's discretion and *AA v BB* (unreported) 14 February 2020 in relation to the Court's blessing of a "momentous decision" in the administration of a trust.

Order 85 of the Grand Court Rules also allows for a trustee, beneficiary, enforcer, executor or

administrator of an estate to make an application to the court for determination of any question that could be determined in an administration action, including any question arising in the execution of a trust or about the composition of a beneficial class or the rights or duties of an enforcer.

#### Alternative Dispute Resolution (ADR)

The Cayman Islands has a modern arbitration law: the Arbitration Act, 2012, which is largely based on the English Arbitration Act 1996. Arbitration clauses are rarely found in Cayman Islands trust deeds.

There is no requirement under Cayman Islands law for trust disputes to be referred to arbitration or to any other form of ADR. The court has implemented an "overriding objective" that is set out at the preamble to the Grand Court Rules 1995 (revised edition) and is expressed to be a method by which the court can deal with every cause or matter in a "just, expeditious and economical way". Mediation of trust disputes is therefore increasingly utilised as a form of ADR.

### 5.2 Mechanism for Compensation

Beneficiaries of ordinary private trusts are entitled to enforce the trusts against a trustee and to seek recourse against them for failure to administer the trusts for their benefit in accordance with the terms of the trust instrument and statute. There are no statutory limitations on a trustee's liability for breach of trust, although Section 67 of the Trusts Act provides for a power in the hands of the court to relieve a trustee from personal liability for breach of trust if they have acted honestly and reasonably and ought fairly to be excused either wholly or in part for the breach and for failing to apply to the court for directions.

Broadly speaking, where loss has been caused to the trust fund, a beneficiary will seek an

account and to recover compensatory damages from the trustee in order to reimburse the fund on behalf of all of the beneficiaries.

## 6. ROLES AND RESPONSIBILITIES OF FIDUCIARIES

### 6.1 Prevalence of Corporate Fiduciaries

The use of corporate fiduciaries is common in the Cayman Islands. There is no statutory duty of care in the Cayman Islands so, broadly, a trustee must take such care as an ordinary prudent and vigilant person of business would take in the management of their own affairs (see *Speight v Gaunt* (1883) 9 App Cas 1). In the investment of trust assets, for example, a lay trustee was bound to act as an “ordinary prudent man of business” when investing for the benefit of others “for whom he felt morally obliged to provide” (*Learoyd v Whitely* (1886) 33 ChD 347).

A paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid lay trustee, and those who advertise themselves as specialists – in other words, professional trustees – have an even weightier duty of care. As held in *Bartlett v Barclays Bank Trust Co Ltd* [1980] 1 Ch 515: “a trust corporation holds itself out... as being above ordinary mortals... and is capable of providing expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of trusteeship”.

### 6.2 Fiduciary Liabilities

Trusts have no separate legal personality in Cayman Islands law and so cannot sue or be sued in their own name; consequently, there is no concept of “piercing the veil” of a trust. One can pierce the veil of a company in certain limited cir-

cumstances – see *Kenney and CC International Limited v ACE Limited* [2015] (1) CILR 367, CA, in which *Ben Hashem v Ali Shayif* [2009] 1 FLR 115 was considered.

As in other English common law jurisdictions, when settling property upon trust, a settlor is entitled to place whatever limitation on the liability of the trustee that they wish, save to the extent that such limitation would prejudice the “irreducible core” of obligations owed by the trustee to the beneficiaries to perform the trusts honestly and in good faith for their benefit. Thus, as long as an exculpation clause does not purport to exclude a trustee’s liability for acts or omissions made dishonestly or in bad faith, a trustee will be entitled to rely upon an exculpation clause in defence of a claim in breach of trust. Accordingly, a settlor can validly exclude a trustee’s liability for negligence however gross it may be, but not for fraud.

For a trustee, it is a corollary of the assumption of responsibility for the administration of property for the benefit of others that they will be liable for the performance of their responsibilities in relation to that property, subject, of course, to the breadth of the exculpatory provisions of the trust deed.

The Cayman Islands court has recognised the “irreducible core” of trustee obligations described in the English court of appeal case of *Armitage v Nurse* [1998] Ch 241.

### 6.3 Fiduciary Regulation

The financial services industry in the Cayman Islands is supervised and regulated by the Cayman Islands Monetary Authority (CIMA), which, subject to local statute, regulates banks, building societies and credit unions, trust companies, trust and corporate service providers, company managers, insurance companies, investment funds, fund administrators and securities invest-

ment businesses in the Cayman Islands. CIMA also approves individuals to act as directors, officers and managers of licensed entities and auditors of regulated entities.

#### **6.4 Fiduciary Investment**

There are provisions in the Trusts Act that relate to the investment of trust assets but, broadly, in modern structures, the investment of trust assets is governed by the terms of the trust instrument. If a settlor wishes to settle their family business on trust and for the trustee to be involved in the conduct of that business, then the trustee will first need to agree and then be empowered expressly in the trust deed to do so, usually by way of an express power to carry on a trade in any part of the world.

There is no statutory requirement that trust assets should be diversified and, often, any common law duty to diversify is expressly excluded by the terms of the trust instrument. Many settlors prefer to retain a power of investment or a power to direct the trustee, or require settlor or protector consent in the exercise of the power of investment. Others retain a power to appoint an investment manager of their choosing or occasionally the trustee is permitted by the terms of the trust to delegate its power of investment to a third-party investment manager.

Subject always to the terms of the trust and, in particular, any reserved power to direct the trustee in the investment of trust assets, the trustee may remain duty bound to keep an eye on investment performance and the conduct of any investment manager in order to discharge its “irreducible core” duties to the beneficiaries, even if the trustee is not responsible for investing the trust assets. Some families will document investment guidelines and profiles for the trust assets in discussion with the trustee.

## **7. CITIZENSHIP AND RESIDENCY**

### **7.1 Requirements for Domicile, Residency and Citizenship**

The Cayman Islands is not part of the United Kingdom, nor a member of the European Union. No citizenship advantage is given to British or European nationals over any other nationality.

Subject to a number of exceptions, most foreign nationals working in the Cayman Islands need a work permit to do so. For foreign nationals not wishing to work but simply to reside in the Cayman Islands, there are a number of options. One can apply for a residency certificate, which is valid for 25 years and is renewable. Applicants must provide evidence of an annual income of at least KYD120,000 without employment, and of investment in the Cayman Islands of at least KYD1 million, of which KYD500,000 must be in real estate.

All foreign nationals employed in the Cayman Islands, subject to a valid work permit, are currently entitled to apply for permanent residence with the right to work after eight years, but before nine years from the date of arrival. Work permits are granted for an initial term of three years, subject to certain conditions, and can be renewed until the nine-year term limit expires. After nine years, foreign nationals who have not applied for permanent residency or have had their application refused or their appeal against refusal turned down will not be granted any form of work permit until they have ceased to be resident in the Cayman Islands for at least one year. For most, this will mean they have to leave the Cayman Islands for a minimum of 12 months before they can be granted a new work permit.

### **7.2 Expedient Citizenship**

There is also a process by which a certificate of permanent residence for persons of independent

means can be granted. This option has no expiry date and qualifies the holder to become eligible for naturalisation as a British Overseas Territories Citizen (BOTC) once they have been resident in the Cayman Islands for five years, subject to certain conditions. Once naturalised, applicants are entitled to a BOTC passport. Once the person has been a BOTC citizen for five years, they can apply to become Caymanian.

In order to qualify for this certificate, applicants are required to have invested a minimum of KYD2 million in developed real estate and to possess sufficient financial resources to maintain themselves and their dependants. Applicants also need to demonstrate that they and their dependants are in good physical health and of good character. The number of these certificates granted annually is subject to an upper limit of 250.

The Immigration (Transition) (Global Citizen Exemption) Regulations, 2020 introduced the Global Citizen Certificate, which allows a person who is employed outside the Cayman Islands to enter and work remotely from the Cayman Islands for a period not exceeding 24 months. A Global Citizen Certificate holder (a “Global Citizen”) cannot offer or provide goods or services to any person or entity in the Cayman Islands. A Global Citizen and their dependants may enter and re-enter the Cayman Islands during the period of the Global Citizen Certificate. The Regulation will expire on 30 November 2023 or such other date as the Cabinet of the Cayman Islands may determine. An application for a Global Citizen Certificate must be made no later than 31 October 2021 or, in the event of an extension of the Regulation, at least two years before expiry of the Regulations.

There are a number of other means by which applicants can be granted the right to reside in

the Cayman Islands via a substantial business presence or direct investment.

## **8. PLANNING FOR MINORS, ADULTS WITH DISABILITIES AND ELDERS**

### **8.1 Special Planning Mechanisms**

There are no special planning mechanisms for minors or adults with disabilities in the Cayman Islands.

### **8.2 Appointment of a Guardian**

The procedure for the appointment of legal guardians for persons who lack capacity to deal with their own affairs is laid down in the Mental Health Act (2021 Revision) and the Grand Court Act (2015 Revision).

There is no equivalent in the Cayman Islands to the English Court of Protection, which is a specialist court adjudicating the highly sensitive and technical issues that arise in relation to mental health and supervises conduct of the patient’s health and welfare. However, the Cayman Islands court is accustomed to hearing applications under the Grand Court Act for the appointment of a guardian on behalf of a person who is no longer capable of managing their own affairs.

Under this jurisdiction, with respect to the property or affairs of a patient, the court can order anything that appears desirable for the maintenance or benefit of that person and those members of their family who rely on them to provide for them. The court has power under the Mental Health Act (2021 Revision) to arrange for a guardian to:

- manage, sell, acquire, charge or deal with property;
- provide for the management of a business;

- complete contracts;
- enter into a settlement;
- dissolve partnerships;
- conduct legal proceedings;
- act as trustee; or
- appoint a receiver.

### **8.3 Elder Law**

The Health Care Decisions Act, 2019 (HDL) brought “living wills” legislation into effect in the Cayman Islands. A living will or advance healthcare directive is a document by which a person sets out what steps should be taken in relation to their health if it should ever transpire that they are no longer able to make decisions for themselves due to illness, disability or a lack of capacity. In the Cayman Islands, advance healthcare directives are now legally binding.

The HDL also provides that the Cayman Islands will recognise advance healthcare directives from other jurisdictions, such as the United Kingdom, Australia, Canada, South Africa, New Zealand, Jamaica, the United States of America and member states of the European Union.

Other than the HDL, the Cayman Islands has no legislation equivalent to the English Mental Capacity Act 2005 (MCA), which provides a legal framework to empower and protect people who become incapable of making specific decisions for themselves, either permanently or temporarily.

#### **MCA Principles**

Despite that, the Cayman Islands courts have applied a number of the principles enshrined in the MCA, most notably in the case of *Re D*. In that case, the Chief Justice moved away from the pre-MCA “lucid intervals” test as set out in the English cases of *Re L (WJG)* [1966] Ch 135 and *Re D(J)* [1982] 1 Ch 237 to embrace a more modern “best interests” approach, akin to that set out in the MCA. The Chief Justice found that

the “wide ambit” of Cayman’s Mental Health Act was “entirely accommodating” of the test set out in the English MCA and so it was open to the court to adopt the same test in that case.

This means that the Cayman Islands court will try to judge what a patient would have wanted if they were in a position to make the decision for themselves in their best interests. In *Re D*, the Chief Justice started his analysis from the position that Mrs D would wish to benefit her immediate family. As she had freely entered into the settlement agreement while still capable of doing so with the benefit of legal advice, it seemed to the Chief Justice a logical and indeed essential step in her best interests to restore family harmony in her twilight years.

More recently, in the matter of the *O Trust* [2018] CILR, Kawaley J held that the legal test for mental capacity in the exercise of a power reserved to the settlor under a trust deed was the same as that in relation to the making of a will. Citing with approval the summary of the *Banks v Goodfellow* test as described by the English court in *Hoff v Atherton* [2004] EWCA Civ 1554, Kawaley J held that it was essential that the settlor understand the nature and effect of the exercise of the power, the extent of the property over which the power was being exercised and the claims to which he might be giving effect.

## **9. PLANNING FOR NON-TRADITIONAL FAMILIES**

### **9.1 Children**

In trusts and succession law, adopted children are treated in the same way as biological children of the relationship in question. Section 17(1) of the Adoption of Children Act (2021 Revision) provides that if the adoptive parent or the adopted person dies intestate at any time after making an adoption order, the property devolves in all

respects as if the adopted person were the child of the adopter born in lawful wedlock.

Similarly, Section 17(2) of the Adoption of Children Act provides that, after the date of adoption, any reference in a will, codicil or lifetime settlement to a “child” will include the adopted child.

“Child” has been expressly defined to include illegitimate children in legislation that relates to the protection of children’s welfare. For example, under the Maintenance Act (1996 Revision), there is a duty to maintain the children of the relationship, regardless of whether they were born in wedlock or not.

It is notable that in Section 87 of the Trusts Act, for the purposes of the protections afforded to Cayman Islands trusts under Sections 90 to 93 of the Trusts Act (in other words, the “firewall” provisions), “personal relationship” is defined to include children who are “natural or adopted... legitimate or illegitimate”.

There is, however, no legislative equivalent of Section 17 of the Adoption Act in relation to illegitimate children. If the intention is that children born outside of marriage are to benefit in a settlor’s estate or succession plans, a will or trust should be drafted using express words to ensure that the settlor’s intentions are properly reflected in the document.

There is no specific legislation in relation to surrogate pregnancy or posthumously conceived children.

## **9.2 Same-Sex Marriage**

The Bill of Rights, Freedoms and Responsibilities at Part 1 of the Cayman Islands Constitution Order, 2009 protects, among other things, the right of men and women to marry a person of the opposite sex and have a family together.

The Cayman Islands does not yet have legislation permitting same-sex marriage, but the Civil Partnership Act was passed in 2020 and provides legal recognition to same-sex partnerships. Same-sex couples can, of course, utilise Cayman Islands’ wealth planning structures and particular care should be taken in drafting documentation to ensure that the settlor’s estate or succession plans are properly put into effect.

## **10. CHARITABLE PLANNING**

### **10.1 Charitable Giving**

The NPO Act came into effect on 1 August 2017. It broadly governs non-profit organisations (as defined in the NPO Act) that raise money from the public or a section of the public within the Cayman Islands or elsewhere.

The NPO Act does not apply to an NPO that has a government entity as its regulator, nor to one that is established as a trust and has as its trustee a trust company licensed or registered to carry on trust business (or a controlled subsidiary of such) registered under the Banks and Trust Companies Act (2021 Revision).

The NPO Act provides for the establishment and maintenance of a register of NPOs that are within the scope of the legislation, under the supervision of a Registrar of NPOs. An application for registration must be made in a prescribed form by the “controller” of the NPO; for example, a director of a company if the NPO is established as a company, or the general partner of a partnership if established as such. Once accepted for registration, the NPO must file annual returns to the Registrar.

### **10.2 Common Charitable Structures**

Cayman Islands law allows for the establishment of charitable purpose trusts in accordance with

English common law principles. Accordingly, their purposes should fall within one of the four “heads of charity” described by Lord Macnaghten in *Re Pemsel*: “... trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads”.

Charitable trusts, either in the form of exclusively charitable purpose trusts or STAR trusts, are the most common method of structuring charitable giving in the Cayman Islands.

Section 71 of the Trusts Act provides that a charitable trust will not fail to qualify as such because its purposes may benefit the public or a section of the public outside the Cayman Islands.

The Attorney General is the only person with standing to enforce charitable trusts under Cayman Islands law. They will therefore be joined to any court application that involves charity or charitable interests in order to ensure that the charity is bound to whatever order the court eventually makes. The Attorney General is at liberty to take an active part in the proceedings on behalf of charity but will usually decline to do so unless there is an issue on which they wish to be heard in order to protect the interests of charity.

*Contributed by: Maxine Bodden and Alex Way, Maples Group*

**Maples Group** advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg through its leading international law firm, Maples and Calder. With offices in key jurisdictions around the world, the Maples Group has specific strengths in the areas of corporate commercial, finance,

investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the Group leverages this local expertise to deliver an integrated service offering for global business initiatives.

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