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PLACING TRUST IN ESTATE PLANNING SOPHISTICATION

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Placing Trust in Estate Planning Sophistication

The process of wealth creation and accumulation is becoming more sophisticated than ever, with holdings of diverse asset classes across multiple borders. As such, the wealth management, asset protection and estate planning requirements of the ultra-high net worth have grown ever more complex, requiring highly structured and bespoke solutions, supported by professional, institutional class management. At the same time, a raft of international initiatives focused on tax transparency have brought a heightened awareness of the jurisdictional factors pertaining to these arrangements, in regard to both compliance and optimal structuring.

In contrast to the modern nature of the wealth management business, it is one of the most traditional and long established asset holding vehicles that continues to provide the most popular and effective manner of preserving wealth for transfer across generations. With its legal origins tracing back as far as 12th century England, trusts still today provide the vital protection and control over assets, along with the means for efficient distribution according to an individual's specific need. In order to maximise these benefits fully, wealthy private clients and families around the world continue to gravitate towards Bermuda, the British Virgin Islands ("BVI"), the Cayman Islands and Jersey, all of them International Financial Centres of excellence with highly regarded legal systems, specialist financial services infrastructure and robust regulatory frameworks, providing an environment that meets the needs of a diverse clientele of high net worth individuals, families and family offices, with solutions to a broad range of challenging scenarios.

Trusts can be particularly well suited for estate planning in a wide range of contexts, such as passing assets to family members, charities or other beneficiaries, while ensuring that family businesses and/or property assets remain in place. The ability to protect assets in a trust from the actions of certain spendthrift family members can also be a useful factor to take into account. Additionally, where individual family members have connections with politically unstable regimes, or the threat exists of sovereign seizures or exchange controls, trusts can provide the necessary protection and preserve the value of family assets.

Regulatory Tension: Tax Transparency and Privacy

Against the backdrop of increased tension between the global push for tax transparency and the wholly legitimate desire for privacy in a person's financial and business affairs, greater levels of complexity have been introduced into formulating wealth management and

estate planning strategies. For the modern wealthy family, where both assets and family members may be located in different corners of the globe, this dynamic only accentuates the desire for a refined approach, customised to a unique set of personal circumstances.

In this environment, tax planning has increasingly become an integral part of estate planning and in the age of global citizenship, where trusts have been employed for this purpose, central to implementing an effective structure is the appointment of a professional trustee who will seek independent tax advice and can adapt to changes in circumstances and situations. Further tax complications may exist due to the residency status of the beneficiaries to a trust. Therefore, the trustee also needs to be able to adjust to changing circumstances as they arise and grow with the requirements of the families involved, such as when children move to different countries when they begin college, or get married in another territory and acquire citizenships elsewhere.

Professional trustees in general, are well versed in the regulatory matters that may arise from the various international transparency initiatives and complete the myriad administrative and compliance requirements. The implementation of the Foreign Account Tax Compliance Act ("FATCA") in the US and the OECD's Common Reporting Standard ("CRS") both placed significant reporting obligations in regard to the beneficiaries, settlors, protectors and trustees of a trust. Offshore jurisdictions were also placed in sharper focus from the 2015 proposal for publicly searchable registers of beneficial ownership information to be introduced in the UK's Overseas Territories.

From the perspective of our clients and the type of institutional business traditionally attracted to Bermuda, the Cayman Islands and Jersey, there is an overwhelming desire to be in full compliance with these regulations and this dynamic has resulted in a greater flow of business to these top tier financial centres that can stand up to the increased scrutiny. The jurisdictions feature prominently among the global leaders in tax cooperation and have been consistently strong partners to the international transparency initiatives, collectively signing close to 100 Tax Information Exchange Agreements, including with all

the major OECD members. They were also among the first group of countries to commit to CRS and begin exchanging information on this basis. For US FATCA, both the Cayman Islands and Jersey implemented a Model 1 intergovernmental agreement, where the central tax authority submits tax information to the IRS that has been provided by individual financial institutions, while Bermuda signed a Model 2 intergovernmental agreement for US FATCA, which would enable financial entities to report information directly to the US tax authority.

Bermuda, the Cayman Islands and Jersey were also early adopters of the OECD Convention on Automatic Exchange of Information, introducing frameworks for OECD Country-by-Country Reporting in line with the BEPS Action 13 report (Transfer Pricing Documentation and Country-by-Country Reporting).

These jurisdictions have also implemented the required economic substance laws and regulations, which aim to make sure relevant domiciled entities engaging in certain relevant activities have sufficient economic activity in the jurisdiction in relation to the profits they make, cementing their positive standing in the international financial community. The same can be said for the BVI, which has continued to enhance its regulatory regime and reputation as a highly compliant and cooperative international partner in the advance of international initiatives related to tax information exchange and beneficial ownership alongside anti-money laundering and counter financing of terrorism legislation.

Other considerations when assessing the suitability of a jurisdiction for the domicile of a trust for asset protection include the quality of its legal system and the sophistication of its trust legislation. The provisions in the domestic trust law of Bermuda, the BVI and the Cayman Islands, rooted in English common law, and Jersey, which reflects English common law principles in its statute, all exhibit modern and innovative characteristics, with many similarities alongside subtle differences and nuances. Professional independent trustees in these jurisdictions can help clients ascertain the optimum solution for their own particular circumstances.

Bermuda – Protection with Power

Bermuda's standing as a sophisticated, modern and pre-eminent jurisdiction for international trust business was enhanced with the amendment to the Trusts (Special Provisions) Act in 2014, which created new reserved powers for settlors over trusts. These powers include being able to revoke the trust in whole or in part, in the case of a reservation to the settlor or other donor of trust property, the power to amend or vary the terms of a trust instrument and to decide or give directions as to how trust property should be appropriated. Among other expressed reserved powers is the ability to act or give directions to the appointment or removal of directors or officers of companies owned by the trust and in connection with the exercise of any powers or rights arising from the trust property. Furthermore, settlors can appoint, add, remove or replace any trustee, protector, enforcer or other office holder and add, remove or exclude any beneficiaries. The range of reserved powers enshrined in Bermuda's legislation is among the broadest of the leading offshore trust jurisdictions, so settlors wishing to reserve many powers without the threat of the trust being regarded as a sham, may find Bermuda particularly suitable.

Bermuda is also well recognised for advancing international trust law and best practice, being at the forefront of the development of purpose trusts in 1989, which significantly expanded the ability of trusts to be used in a commercial context. As is the case with Jersey, its standing as a base for international settlors is further reinforced by Hasting Bass principles being placed on statutory footing. This useful tool for reversing trustee decisions that may be detrimental to the trust was introduced by the 2014 amendment to the Trustee Act and gave the court in Bermuda jurisdiction to remedy the negative consequences of any actions or omissions made by a trustee, settlor or other fiduciary, such as an unforeseen tax liability, representing a welcome alternative to unnecessary and costly litigation.

Notably forced heirship is not applicable in Bermuda, while the legislation is thoughtful and balanced when it comes to dealing with creditor claims, which is an issue of great importance to US residents where the litigious

culture and high cost of professional indemnity insurance makes an offshore trust particularly attractive.

BVI – VISTA Trusts

Internationally recognised as a successful and widely used domicile for international business companies, the BVI shares many of the advantages of the other UK common law based trust jurisdictions, with a well-developed legislative and regulatory framework, a deep pool of industry talent and its own unique trust products, oftentimes at a lower operating cost.

From a private wealth perspective, provisions exist for Private Trust Companies, which can act as the trustee of the trust created by an individual or family, while the Virgin Islands Special Trusts Act ("VISTA") trusts, initially introduced in 2003, have been a highly popular mechanism for the settlor of a trust to control how underlying companies in the trust are managed and administered. The legislation resolved a longstanding issue that had prevented efficient and effective generational transfer of business assets through trusts, while the company is still being run by its owner. Traditional trusts impose a fiduciary duty on any trustee to protect and enhance the trust assets throughout the duration of the trust, which means the trustees would take control of the company to manage it effectively. That can often, however, encourage quite cautious and conservative behaviour on the part of the trustee, resulting in unnecessary costs. Removing the obligation of the trustee to follow the so called 'prudent investor' rule, the VISTA regime frees the trustee from monitoring the management of the company, allowing the family run business to continue to operate independently, while still being included in the trust and subject to the requisite estate planning wishes of the settlor.

Cayman Islands – Innovation and Leadership

Internationally recognised as the premier offshore centre for investment funds and for the broad strength of its wider international financial services, the Cayman Islands has been a leading trusts domicile for decades, founded on the 1966 legislation that paved the way for its financial sector to grow, including the Banks and Trust Companies

Regulation Law and the Trusts Law. For all the reasons that the Cayman Islands became the gold standard for funds and structured finance transactions, as a politically stable Overseas Territory of the UK, with a highly developed and well regarded legal system and regulatory framework, combined with a professional infrastructure with deep pools of talent in the fields of law, accountancy and corporate services, Cayman Islands trusts have been the long standing choice for international private clients seeking the protection and preservation of generational family wealth and a mechanism for its efficient distribution.

The strength of the Cayman Islands' legal system and the reputation of its judiciary provide significant advantages to clients undertaking trust business. Again, rooted in English common law, with certain domestic legislation that takes priority, it is sophisticated and features judges with great experience in trust matters, with a specialist Financial Services Division of the Grand Court established in 2009 to meet the need for such skills in order to deal with the highly complex financial matters that arise from the jurisdiction's major financial sector. Notably, the Cayman Islands court made one of the most significant judgments on *Hastings Bass* and while the convention is not part of the local law, unlike Bermuda and Jersey, the substantial weight of Cayman Islands case law on *Hastings Bass* is equally effective.

The Cayman Islands financial services industry is recognised for its ability to innovate and the close cooperation between the private sector and government in relation to developing new legislation ensures commercial applications are considered and the requirements of clients are taken into account. A case in point is the Cayman Islands' STAR Trusts regime. The Special Trusts (Alternative Regime) Law, 1997 – now incorporated into the Trusts Law, introduced a new type of trust with certain special characteristics that make STAR Trusts suitable for a broad range of applications and addressed the limitations that had prevented the use of trusts in certain situations.

STAR Trusts can be established for beneficiaries that can be persons or purposes of any kind, or both which is unique to this form of trust, without being restricted to

charitable purposes, as long as they are legal and not contrary to Cayman Islands public policy. An enforcer is required for a STAR Trust who has the right and the fiduciary duty to enforce the terms of the trust, which creates a separation from the beneficiary who receives the trust proceeds. In order to make sure that the administration of STAR Trusts is conducted to the required standards, at least one trustee must be a regulated trust corporation or private trust company. The vehicle can be of unlimited duration, avoiding the perpetuity of 150 years for other forms of trust in the jurisdiction, so can be used to form a dynasty trust throughout generations. Due to the enforcer's role, there is also the ability to restrict certain information from beneficiaries which may be useful in some circumstances. In addition, there are a wide range of commercial applications, such as structured finance deals, where the STAR Trust can be incorporated into a company ownership structure, where the trust owns the voting shares and has no interest in any of the transaction parties. With the development of the STAR Trust regime and its popularity among both institutions and private clients, the Cayman Islands has become the market leader for non-charitable purpose trusts and many other jurisdictions have modelled their own legislation on its successful framework.

Further enhancing the jurisdiction's private wealth offering is the foundation company, which presents an alternative vehicle to a trust that is particularly useful where an individual is resident in a civil law legal system, due to their greater familiarity. Foundation companies, introduced in the Cayman Islands in 2017, operate like a Cayman Islands company, with a separate legal personality from its members and directors, officers and founder. Foundations also have limited liability, can be sued and can hold assets in their own name. As the constitution of a foundation can be drafted to meet the founder's requirements, with the ability to assign rights, powers and duties, they are highly attractive in circumstances where there is concern over ultimate control resting with a trustee. Ultimately, foundations provide a highly flexible vehicle that eliminates many of the uncertainties that can sometimes be associated with trusts and can achieve a broad range of private client, philanthropic or family office objectives.

Jersey – Highly Developed Legislation

Over a period of more than 50 years, providing private client services to trust and foundation structures, Jersey has evolved into an internationally recognised and sophisticated jurisdiction that strikes the right chord between the preservation of client confidentiality and full compliance with global regulatory standards, with regular review by local industry experts to ensure the legislation remains robust and appropriate. A notable feature of Jersey's regime is that domestic trusts can be of unlimited duration, updating the prior regime where trusts could only be established for 100 years, which provides certainty that assets may be truly passed down through generations. A high degree of privacy is also assured, as with other jurisdictions, Jersey trusts are not required to be registered with the government and no public register of trust documents exists. Furthermore, neither the settlor nor the beneficiaries will be the registered owner of any assets within the trust, which represents an additional welcome layer of confidentiality.

The Trusts (Jersey) Law 1984 ensures a high degree of protection for both settlors and beneficiaries, which is enforced by the Jersey Courts. It confirms that the trust assets constitute a separate fund and are not part of the personal property of a trustee, in addition to imposing fiduciary duties on trustees, regulating the administration of trusts and providing rights to beneficiaries, such as the legal right to force a trustee to act in accordance with the terms of the trust instrument and the law.

The Jersey Trust Law was amended in 2006 to extend the scope of the protection provided to Jersey law trusts from attack by foreign courts and it protects trustees of Jersey trusts against the consequences of non-Jersey forced heirship rules. The law provides, when considering questions relating to the trust or transfers of property to it, the court must apply Jersey law only and that no consideration should be given to any rule of foreign law. It also provides that any foreign claim based on a lack of recognition of the trust machinery will be ignored by the court. Therefore, where a settlor transfers assets to a Jersey trust during their lifetime, these assets will not form any part of the settlor's estate upon his

death. Furthermore, Jersey law will not give effect to any rule of any other jurisdiction relating to inheritance which says such a transfer is not allowed, so settlors should therefore be able to avoid any forced heirship rules in their home country or residence.

As with Bermuda and the Cayman Islands, Jersey's trusts framework provides a wide range of powers that can either be reserved by the settlor or granted to others, without invalidating the trust, bringing a degree of control over the trust assets to the settlor and reducing an element of risk for the trustee. Jersey also swiftly responded to the 2013 UK Supreme Court ruling which had restricted the use of Hastings Bass under English law, becoming the first specialist trust jurisdiction that same year to place the rule on statutory footing. Additionally, Jersey introduced the concept of non-charitable purpose trusts in 1996 and its well-regarded legislation has proven a successful route to providing an orphan vehicle for structures such as securitisation, which require some separation from the beneficial owner.

Among other key benefits of the Jersey framework, which maintain its appeal among international clients and would be expected to feature in a well-developed trust domicile is the ability to have complete foreign ownership, where foreigners may create trusts for foreign beneficiaries and the efficient service in Jersey where a trust can be created in a single day.

Professional Trustees – Transparency and Oversight

In the context of the broad popularity of trusts for wealth management and estate planning solutions, alongside the wide-ranging alternative applications for the vehicle, trusts established for legitimate purposes retain the traditional benefits of protection with privacy and confidentiality. Sweeping changes to the rules governing global financial activity in recent years, with a seemingly continuous pipeline of further regulatory change still to come, serves only to highlight the advantages of appointing a professional independent trustee, providing additional comfort from the assurance that all regulatory obligations are properly attended to

and that fiduciary duty is expertly conducted to the highest standards.

The Maples Group's team of highly qualified and experienced independent trustees, with backgrounds in law, accounting, investment management, banking and risk management, in addition to trust and private client services and trust administration, are committed to serving with diligence and in good faith, in accordance with the terms of the trust deed and for the benefit of beneficiaries, following the arrangements and wishes of individuals and families, impartially in a professional and objective manner.

About the Authors

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Christopher has over 30 years' experience in the financial services industry. He provides fiduciary services to a variety of investment funds including unit trusts, charitable trusts, private equity funds and hedge funds. Christopher joined the Maples Group in 2017. Previously, he worked at the Bermuda Monetary Authority as an Assistant Director, where he was Head of Investment Group responsible for supervising some of the largest investment groups operating in Bermuda. Prior to that, he acted as Managing Director of Tribley Asset Management in Bermuda, a firm that provided investment management services to institutional, family office and high net worth clientele. He also worked at the Bank of Bermuda and the Bank of Montreal, in the role of Senior Dealer (Foreign Exchange), also taking on the roles of Chief Dealer (Foreign Exchange), Director (Treasury Asset Management) and Treasurer of the Americas region. Christopher graduated with a Bachelor of Arts in Economics from Acadia University in Canada. He is a member of the Chartered Financial Analyst.

Robert Lucas

Robert has more than 16 years of offshore fund, corporate and trust experience in both Jersey and the Cayman Islands and specialises in establishing corporate structures. Robert is highly experienced in a variety of corporate operations such as compliance, investor administration, asset administration and valuations. He also specialises in fund management, including directorships, governance and company secretarial services. Prior to joining the Maples Group in 2018, he was the Head of Fund and Corporate Services for two Jersey based providers, Director of a Global Fund Administrator and Custodian heading up their Real Estate and Infrastructure Fund Administration Business. Robert is a Chartered Accountant and holds a Bachelor of Arts degree in Accounting and Economics from the University of Liverpool. He is also a fellow member of the Institute of Chartered Accountants in England and Wales.