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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 legal services firms. 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. The firm maintains relationships with leading legal counsel, and leverages this local expertise to deliver an integrated service offering for global business initiatives.

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1. Tax

1.1 Tax Regimes

The Cayman Islands is made up of 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 western 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.

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, and a property assessment may be carried out by the Lands and Survey Department 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. A trustee of a trust that satisfies the conditions set out in sections 73 to 86 of the Trusts Law (2018 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 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

The Cayman Islands is an 'early adopter' of the Common Reporting Standard (CRS) and, 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.

At the time of writing, the Cayman Islands has signed 36 bilateral tax information exchange agreements, and an Inter-governmental Agreement with both the USA and the UK. It has entered into bilateral tax treaties with 28 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 Law (2017 Revision).

On 1 July 2017, the Cayman Islands' beneficial ownership register (BOR) regime came into effect. This regime requires certain Cayman Islands companies, including limited liability companies, to maintain a beneficial ownership register that records details of the individuals who ultimately own or control more than 25% 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.

On 1 January 2019, the International Tax Co-operation (Economic Substance) Law 2018 (ITC Law) came into force, with accompanying regulations. 'Relevant entities' undertaking 'relevant activities' (as defined in the ITC Law) must provide an annual report of their activities to the TIA and satisfy the 'economic substance test' set out at s4 of the ITC Law. Guidance notes were published in April to provide further practical guidance on the application of the ITC Law.

2. Succession

2.1 Cultural Considerations in Succession Planning

There are no notable cultural factors that play a part in succession planning in the Cayman Islands. The Cayman Islands' succession law is based upon the principle of testamentary freedom, meaning that a testator or testatrix can leave his or her 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 Law (2004 Revision), the Succession Law (2006 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 – for example, *ad colligenda bona* grants – if there is an urgent need for a grant to be issued or to preserve assets in the estate until such time as the person entitled to take out the grant is able to do so.

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, where 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.

The validity of a foreign will or lifetime gift and the administration of a deceased's estate will be determined in accordance with the laws of the deceased's domicile. The general rule in the Cayman Islands is that a child will take the domicile of his or her father, unless his or her parents were not married, in which case they take the domicile of their mother. This is called 'domicile of origin'.

As an adult, a person may acquire a domicile of choice that is different to the domicile of origin. Acquiring a domicile of choice requires evidence of an unequivocal intention to reside permanently and indefinitely in that country, so that a person abandons his domicile of origin, as per *Holliday v Musa* [2010] Civ 335.

Section 13(1) of the Cayman Islands Trusts Law (2018 Revision) (Trusts Law) provides for a presumption of lifetime effect, meaning that unless the trust instrument is expressed to be a will or codicil or to take effect only on the settlor's death, then it will be presumed that the trusts and powers were intended to take effect immediately upon the property being vested in the trustee. Section 13(1) is expressed at s13(2) to apply notwithstanding certain facts, including that the trust may have been created in order to avoid the application of laws relating to wills or succession on the settlor's death or during the lifetime of the settlor.

A great deal has been written about the Cayman Islands' firewall legislation, stemming in part from the fact that it was the first international financial centre to pass legislation of this nature. Passed into law in 1987, the legislation is designed to insulate Cayman Islands trusts from attacks by forced heirs and those claiming against the trust by reason of a personal relationship with the settlor. This means that it is likely that Cayman Islands trusts will be protected against orders of overseas courts based on their domestic matrimonial or inheritance laws, as long as the relationship in question is with the settlor.

Section 90 of the Trusts Law stipulates that if a trust is expressed to be governed by Cayman Islands law and has a jurisdiction clause in favour of the Cayman Islands court, all questions arising in relation to that trust will be determined in accordance with the laws of the Cayman Islands, without reference to the law of any other jurisdiction with which the trust may be connected. Section 90 is stated to relate to, among other things, questions about the capacity of the settlor, any aspect of the validity, construction or administration of the trust, including the powers, obligations, liabilities and

rights of trustees, their appointment and removal, and the existence and extent of powers in the trust.

However, there are a number of exceptions. Section 90 will not operate to validate a disposition of property that the settlor does not own, nor will it validate any testamentary trust or disposition that is invalid according to the laws of the testator's domicile.

Subject to the same conditions as are set out in s90, s91 provides, among other things, that no Cayman Islands trust will be void, voidable, liable to be set aside or defective in any fashion, nor is the trustee, any beneficiary or any other person to be subjected to any liability or deprived of any right because the trust avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship with the settlor, for example, by marriage. Section 93 of the trust law consolidates this point: if a foreign judgment is inconsistent with s91, that judgment will not be recognised or enforced by the Cayman Islands court.

2.4 Marital Property

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 Law (2005 Revision) (MCL), the Maintenance Law (1996 Revision) and supplemental Matrimonial Causes Rules, currently in their 2009 Revision. Parties in Cayman Islands divorce proceedings are still required to provide fault-based grounds for divorce – for example, adultery, desertion and unreasonable behaviour.

There is no community property regime in force and the court has broad discretion under ss19 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.

It has been held in *Billes v Anco* [2011] (2) CILR 74 (subsequently confirmed by the Court of Appeal in *McTaggart v McTaggart* [2011] (2) CILR 366) that the court will approach the division of assets on divorce in accordance with the 'modern view' that there should be no discrimination on the basis of 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'. However, family law reform has been under discussion for some time, but no draft legislation has yet been produced.

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 k 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 either on death or during one's lifetime has no effect on the cost basis of the property being transferred.

2.6 Transfer of Assets: Vehicles 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 either pursuant to a will or pursuant to the intestacy rules.

3. Trusts, Foundations and Similar Entities

3.1 Types of Trusts, Foundations or Similar Entities

As a common law jurisdiction that has based its trusts law on that of England, 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 which has been cited with approval, and the principles applied in and by the Cayman Islands Grand Court.

The Cayman Islands was the first international financial centre to provide for non-charitable purpose trusts, known locally as 'STAR trusts' as a consequence of the initial legislation, the Special Trusts Alternative Regime Law. 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 Law.

The Foundation Companies Law 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 Law, currently in its 2018 revision. A number of fundamental modifications have been made to the Companies Law model company, meaning that it has additional flexibility for achieving private wealth planning as well as commercial objectives.

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 Non-Profit Organisations Law (NPO Law) 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 Law (2018 Revision) as their trustee.

While trusts in the Cayman Islands can be established for asset protection reasons, under the Fraudulent Dispositions Law (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.

The Cayman Islands has stringent anti-money laundering laws, with the Proceeds of Crime Law (2019 Revision), Anti-Money Laundering Regulations (2018 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.

The Cayman Islands introduced its first trust law in 1967, which has since been regularly revised. It is currently in its 2018 Revision which, in turn, is subject to a Trusts (Amendment) Law, 2019 (TAL 2019), which came into effect on 14

June 2019. 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 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

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 understandably 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 s14 (1) of the Trusts Law, 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 he nominates.

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.

Alternatively, if all of the adult beneficiaries agree to a proposed variation, 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 trust's, if effecting that arrangement 'would not be to the detriment of that person.'

Section 63 of the Trusts Law 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 TAL 2019 also introduces a new s64B into the Trusts Law by which 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 himself remain the most popular method of asset protection planning in the Cayman Islands.

4.2 Succession Planning

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.

A foundation company is also proving popular for succession planning purposes. It attracts the protections of the Cayman Islands' *'firewall'* provisions found at sections 92 and 93 of the Trusts Law (see 2.3 **Forced Heirship Laws** for a more detailed analysis), which apply to foundation companies in the same way as they apply 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 s48 of the Trusts Law, in a similar manner to trustees and personal representatives (See **5. Wealth Disputes** for further details).

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 partial 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.

Under s48 of the Trusts Law, 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 his duty in respect of the subject matter of the application, unless he is guilty of fraud, wilful concealment or misrepresentation of the facts in respect of his application. It follows that a trustee seeking the directions under s48 has a duty of full and frank disclosure and, as such, must disclose all material facts in relation to that application.

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.

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

While there is no requirement under Cayman Islands law for trust disputes to be referred to arbitration or to any other form of alternative dispute resolution, the court has implemented an “*overriding objective*” which 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 alternative dispute resolution.

5.2 Mechanism for Compensation

Beneficiaries of ordinary private trusts are entitled to enforce the trusts against a trustee and to seek recourse against it 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 s67 of the Trusts Law provides for a power in the hands of the court to relieve a trustee from personal liability for breach of trust if he or she has 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 his or her 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, however, 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 the Judge stated 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 accept, 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 circumstances – 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 he or she wishes, 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 he or she will be liable for the performance of his or her 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 investment 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 Law 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 his 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

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 Expeditious 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 dependents. Applicants also need to demonstrate that they and their dependents are in good physical health and of good character. The number of these certificates granted annually is subject to an upper limit of 250.

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 Guardian

There is provision in Cayman Islands law for the appointment of legal guardians for persons who lack capacity to deal with their own affairs. The procedure is laid down in the Mental Health Law (2013 Revision) and the Grand Court Law (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 by guardians known as 'deputies'. However, the Cayman Islands court is accustomed to hearing applications under the Grand Court Law 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 his or her family who rely on him to provide for them. The court has power under the Mental Health Law (2013 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

Living wills legislation was enacted on 14 May 2019, entitled the Health Care Decisions Law, 2019 (HDL). 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. 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*. Before she lost capacity, Mrs D had entered into a settlement agreement compromising litigation, which had burdened her family for several years both in the Cayman Islands and elsewhere. Subsequently, after she had lost capacity, a question came up about the requirement for an indemnity as a consequence of that settlement. A committee of guardians had been appointed by the Cayman Islands court to look after Mrs D's financial affairs relating to her interest as a primary beneficiary of the family trust that had been at the heart of the dispute. Two of their number made an application to court for directions to allow them to enter into the indemnity on behalf of Mrs D on the basis that the potential liability under the indemnity was to be assumed entirely by Mrs D and her estate.

In considering the application, the Chief Justice in *Re D* 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 Law 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.

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 Law (2003 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, s17(2) of the Adoption of Children Law 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 Law (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 at s87 of the Trusts Law, for the purposes of the protections afforded to Cayman Islands trusts under sections 90 to 93 of the Trusts Law (in other words, the '*firewall*' provisions), '*personal relationship*' is defined to include children who are '*natural or adopted ... legitimate or illegitimate.*'

Nonetheless, there is no legislative equivalent of s17 of the Adoption Law in relation to illegitimate children and so 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 this will not prevent same-sex couples from utilising the Cayman Islands' wealth planning structures. It will, however, mean that particular care should be taken in drafting documentation to ensure that the settlor's estate or succession plans are properly put into effect.

The Cayman Islands does not yet have any legislation recognising domestic or civil partners.

10. Charitable Planning

10.1 Charitable Giving

The NPO Law came into effect on 1 August 2017 and broadly governs non-profit organisations (as defined in the NPO Law) that raise money from the public or a section of the public within the Cayman Islands. The NPO Law 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 Law (2018 Revision).

The NPO Law 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

The Cayman Islands allows for the establishment of charitable purpose trusts in accordance with English common law principles – namely, that their purposes fall within one of the four '*heads of charity*' described by Lord Macnaghten in *Re Pemsel* as '*... 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 Law 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. He 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 he wishes to be heard in order to protect the interests of charity.

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