

A Marriage Made In Heaven: A Foundation Acting As Trustee

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I recently assisted a Middle Eastern family who were desirous of creating a trust structure to hold their assets situate outside the Middle East. The case perfectly illustrated the tension that can exist when trying to create a structure that will be both valid and robust, but at the same time will contain a number of the control mechanisms that families seek. This family wished to abide by Sharia law in terms of the proportions the spouse and each child should receive. The patriarch however, wanted to keep his personal and business assets in one structure and not for them to be fragmented on his death, and for the family to enjoy the advantages of having their non-UAE assets held offshore but available to them as they needed them. Where my advice was particularly required was in relation to the degree to which the patriarch retained ultimate control over the structure. Too much control over a structure and the robustness, or indeed validity itself, can be compromised.

Often patriarchs will seek to achieve control through one of two ways. Firstly, by ensure the trust instrument is drafted with little discretion being left to the trustee. In one extreme example on which I am currently working, the settlor sought to retain the power to revoke the trust, to amend it, to add and remove beneficiaries, to hire and fire the trustee, and the protector. On top of that, the settlor left no discretion during his lifetime to the trustee in respect of the disposition of capital. This trust instrument, in my view, had gone too far.

The other, less controversial and more modest way of achieving control, is through the classic purpose trust and private trust company structure; the purpose trust being the vehicle to own

the shares of the private trust company. Control can easily be provided to the settlor through providing the enforcer of the purpose trust with the power to hire and fire the trustees of the purpose trust. It is then the trustees of the purpose trust who controls the identity of the board of the private trust company, which, of course, makes the trustee decisions. If the settlor ultimately controls the makeup of this board, he can ensure the structure is run in the way he wishes.

The foundation as a vehicle for private client planning is gaining in popularity. Initially, it has been used mostly for holding vehicles such as protector companies or indeed trustee companies, but not used to act as the decision maker itself. I do believe we will begin to see a shift in this over the next 18 months. In the case of my recent Middle Eastern family, there is a desire to use a foundation to act as the trustee entity itself. There are a number of attractions. Firstly, it is simpler to understand and explain to the client because there is one level only, and not two as you have with the purpose trust/private trust company combination. The foundation is an ownerless vehicle and therefore does not require any other vehicle or entity to own it. Clients like this simplicity. Secondly, the inevitable happy consequence of cutting out a level is that the structure becomes cheaper to run. Clients like less cost; thirdly, because the foundation is corporate in nature, the way it runs appeals to clients who may have less comfort with, and understanding of, trusts. With the single foundation route, the more opaque purpose trust is jettisoned, and the foundation trustee can operate very much like the private corporate trustee that you have with the more traditional model. The main caveats to the use of the foundation in this way are that firstly, the lawyer needs to be comfortable that the foundation acting as trustee and charging fees is not breaching the prohibition against commercial trading, and secondly that there is still a degree of unfamiliarity with this structure, and this in itself can scare off cautious clients and advisers.

What I believe we will see next, particularly with clients from the Middle East, is the foundation being used as the trustee of the holding vehicle for the various family assets via a family unit trust. We have advised a Middle Eastern family on the establishment of a family unit trust. Such a trust is attractive because the unit trust holds the assets (businesses, planes, boats, investments for instance) and the family holds specific units in the trust. No beneficiary can say they own any portion of the assets directly, but their interest (through the units) is more tangible than that of a discretionary beneficiary, and the unit trust deed allows for units to be redeemed, and therefore for family members to leave the structure.

In conclusion, it has often been said that structures are becoming more complex. Equally, in the age of transparency, there is a need for simplicity in structuring where possible. It does seem to me that using a foundation to act as trustee to the family settlements (including a unit trust) has the attraction of simplicity which clients are finding very much to their liking.

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