Private Trust Companies

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What is a private Trust Company?

A Private Trust Company or ("PTC") is a company whose sole purpose is to act as trustee for a specific trust or a group of trusts, typically for a particular family, their relatives and their philanthropic beneficiaries.

Private trust companies have been around for a long, long time. Wealthy families in North America and Europe have incorporated and operated private trust companies to administer trusts for themselves and their extended families for generations. Some of those trust companies are still in existence today and others have evolved into family offices or multi family offices. Many have been sold to banks and asset managers as a platform to service their wealthiest clients.

Why do clients create PTC's?

1. To achieve a degree of control over and current knowledge of all aspects of the family's affairs and assets
2. To achieve enhanced confidentiality
3. To achieve greater asset protection
4. To integrate the family members into family decision making process and to engage family members in all aspects of the family governance now and in successive generations

Control

PTC's are most often created by a person who wants to be actively engaged on an ongoing basis in the oversight and governance of the family's financial and personal affairs and does not want to delegate that responsibility solely to others, as in the case of traditional discretionary trusts administered by professional trustees. There seems to be a shift in the creation of new PTC's away from second or third generation passive wealth to entrepreneurial clients wanting to protect and include their heirs.

Are those creating PTC's today more control oriented than in the past? Yes! Without question! Are they control freaks? Often yes! But they are also focused on getting the PTC designed to last for many generations and off to a good start. They often custom designed the current and future decision making architecture to their personal specifications.

Confidentiality

From my experience the greater the wealth, the greater the appetite for complete confidentiality, both in life and in death. Simply put wealthy individuals just don't want **anyone** to know the extent of their wealth or what assets they have. Unlike listed companies trust terms and assets are known only by the trustees and beneficiaries and there is no public accounting. Moreover, many of the underlying trusts have **purposes** or **assets** that the settlor doesn't want exposed to anyone outside the family. Here I am referring to matters such as spendthrift provisions, shares in private companies, art collections or secret trusts.
Wills and probate are public documents after death. Similarly in civil law jurisdictions family assets and liabilities come into the public domain at death. Trust assets never become part of an estate or probate process.

Asset Protection and wealth preservation

Settlors of PTC's tend to be focused on building an ownership structure which will protect the family wealth for multiple generations.

Asset protection is always important for clients considering a PTC. Trusts in general are a legitimate transfer of ownership therefore effective for immunizing beneficiaries from risk. Litigation risk is at an all time high globally and the wealthier the client the greater the risk of litigation. Many of our clients have seen the effects of litigation first hand in the press, in their businesses, in their families and in their friend's families. Clients are very sensitive to the legal risks associated with having wealth. The concerns I most often hear from clients are around the risk of matrimonial property claims, risk of personal litigation against beneficiaries, business related risks.

We have all seen families where the first generation creates wealth and the second or third generation squanders it. Our clients have seen the same trends. They want to improve the odds that their hard earned wealth will not be dissipated in the second or third generation through reckless spending by their heirs, unscrupulous investment advisors, opportunistic relationships and marriages resulting in financial claims and a list of other risks associated with having wealth.

Family Engagement and Governance

In the past, I would have said clients forming PTC's tended to be first or second generation wealthy individuals whose primary goals were confidentially, avoidance of probate and estate administration, asset protection and tax efficient transfer of wealth. The wealth creator usually formed the PTC or Foundation and appointed a family member as successor. This approach was employed throughout Europe for centuries; unfortunately it only works when a talented, caring family leader has a talented, caring successor.

What's different today? While the use of the PTC strategy is still efficient for confidentiality, asset protection, and tax efficiencies, the most common reason I hear for forming a PTC is to create a structure that fosters family engagement for multiple generations! Wealthy individuals want to involve and engage their siblings, children and grandchildren, nieces and nephews in understanding and managing the family assets. Family assets are not just financial assets but often include art, homes, vacation properties, horses, boats and aircraft, cherished family assets, charitable foundations and anything else the PTC deems "family Assets".
Today's clients want to create a formalized structure to train and mentor their successors by exposing them to prudent decision making practices through a carefully thought out governance structure. Many wealthy clients have seen first hand families who have created great wealth fall into disrepair and disrespect among the family members. They want to create an environment that will enhance the likelihood that subsequent generations will succeed financially, emotionally and achieve the highest degree of self actualization for them and the world they live in. One of the cornerstones of the ownership and governance structure for forward thinking families is the PTC.

Advantages and uses of a private trust company

Dynasty planning:

One of the key benefits of a PTC is the opportunity for the principal and his or her family to create a lasting dynastic structure which retains greater control over decisions made in relation to the family's trusts and the family's wealth.

Involve knowledgeable advisors: A PTC provides the architecture which can include the principal, family members, key advisors and employees. All of whom have a close working knowledge of the family and its businesses can be appointed as director(s) of the PTC and participate in the decision-making processes. In this way, the trustee (through the board of the PTC) can be highly knowledgeable of, and sensitive to, a family's circumstances.

PTC Mandate: The scope of a PTC's role and powers given to the trustees can be tailored to suit the intentions of the principal. Moreover, the composition of the PTC's board will also allow commercial decisions to be made swiftly. The PTC will usually be designed to co-ordinate the management of any underlying assets in consultation with investment, legal and tax advisors.

Family Education and involvement: The education of beneficiaries who will inherit large fortunes can also be comprehensively undertaken within the forum of a PTC arrangement. The board can form advisory and sub-committees, inviting various family members to sit on these committees in order that they might become familiar with the management of the family's financial assets and, where appropriate, contribute to deliberations underlying the exercise of the trustee's powers.

Advisory committees often include: investment committee, philanthropic committee, business advisory committee, director appointment committee, family education committee, art committee, family office committee, strategic planning committee…

Family profile: Families that create PTC often have also developed a family council, family mission statement, identified and quantified family financial capital, family intellectual capital and family human capital as part of the overall family governance strategy.

Regulatory environment for PTC's

In many jurisdictions a PTC is exempt from the local licensing requirements as a Trust Company so long as it only provides trustee services to those trusts specified in its Memorandum and Articles of Association, and it does not offer such services to the public and the administration of the PTC is carried on by company which is registered to carry on **trust** business in the jurisdiction. Some of the more common PTC jurisdictions are: Guernsey, Jersey, Cayman, Bahamas and Barbados (which last week enacted PTC legislation).

CREATING A PTC

A PTC usually takes the form of an ‘exempt’ private company. The company must have a registered office in the jurisdiction and must maintain certain records there, such as its Register of Members, Register of Directors and Secretary and its minute books. While it is not necessary in all jurisdictions for the directors to be resident there, it is common to see one or more local directors appointed to ensure it is not a deemed a controlled foreign corporation by the settlors home jurisdiction . Professional trustees are often asked to take a seat on the board not only as administrators and experts in trust law and administration but to ensure the PTC is treated as non-resident for tax purposes.

The PTC can often be incorporated within five business days of the delivery of the application for incorporation. What takes the time in the formation process is completing due diligence on all parties to the company and underlying trusts and the drafting of the legal documents. There is generally no prescribed minimum capitalization of the company. It is accepted that a PTC might be created with an authorised share capital consistent with its particular requirements and an issued share capital appropriate for the circumstances of its ownership. There is also, generally, no ongoing requirement to submit any financial statements in respect of the PTC or any of the trusts for which it acts as trustee, unless it is an authorised trust company in Cayman. The trust administrator will however keep appropriate accounts for each underlying trust.

OWNING THE SHARES OF THE PTC

The settlor and/or various family members can hold the PTC shares either directly or through a legal structure. However direct ownership may give rise to unfavourable tax consequences and even compromise the degree of confidentiality provided by the structure. Furthermore, animosities may develop among family members not included as shareholders themselves. Remember, the main purpose of the PTC is to act as a control structure rather than to create value for the family. For those reasons, the most the common ownership structure for a PTC involves the use of a (non-charitable) “purpose trust”. This purpose trust (Star Trust in Cayman) has a sole purpose to own and hold the shares in the PTC.

The non-charitable purpose trust does not have beneficiaries and any succession issues are therefore overcome. It is usual for a person or entity, separate to the trustee, to fulfil the role of enforcer of the purpose trust. This usually involves the appointment of a trusted family advisor but will again depend on your specific family circumstance. Included among the powers of the enforcer could be the power to remove the trustee of the purpose trust and appoint an alternative.

PITFALLS ASSOCIATED WITH A PTC

- In the most respected offshore jurisdictions it is a legislative requirement that a locally licensed fiduciary service provider is appointed as the administrator to the PTC this adds to the cost of the PTC.

- If directors or committees fail to respect the PTC structure and the planning involved litigation or family animosity can result.

- The a structure may be challenged by one of the Settlor's heirs, who may claim that the PTC was established in order to retain control of the assets and that it was never the Settlor's intention for the PTC to fulfil its fiduciary duties. This can happen with any trust. The simplest way to avert this will be for the board and trustees to ensure that the decisions made by the PTC are of a fiduciary nature and that all other aspects of the PTC are respected, i.e. all filings are made on time, the structure is correctly administered, the PTC has sufficient trust experience within it's board of directors etc.

- Conflict of interest where the planning allows for the beneficiaries or persons employed by businesses owned by the trusts to be directors or officers of the PTC.

- Should a trustee commit a breach of trust, i.e. exercise a trustee power in such a way which is not provided for in the deed, then the trustee is open to attack from the trust's beneficiaries, especially if the breach of trust results in a loss to the trust assets. This could lead to a family dispute between those acting for the PTC and those who do not.

- If the PTC is thinly capitalised the PTC does not necessarily have resources to defend itself. If that were the case, in theory a beneficiary can force the PTC to be removed as trustee of trusts by alleging wrongdoing or unsuitability.

COSTS ASSOCIATED with a PTC

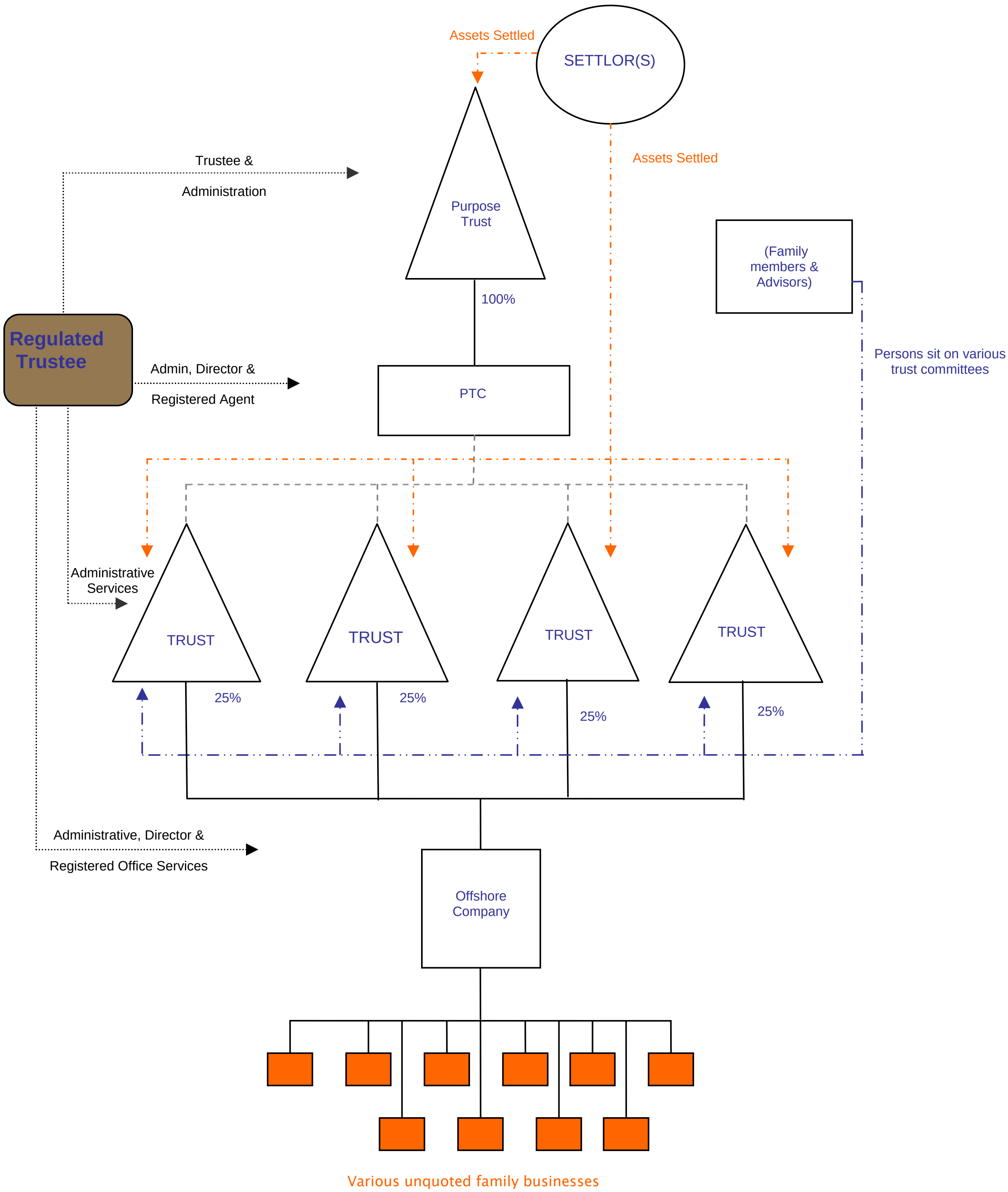
The cost of establishing a PTC would include any legal and taxation advice, trustee establishment fees and local regulatory costs that may be applicable. Generally speaking the choice of location would not appear to be a factor in overall cost.

When looking at the cost one has to look at both set up and annual costs in order to be able to assess a reasonable fee comparison between providers. In general terms a traditional trust structure with an underlying holding company will be less expensive to establish than a PTC. However, where there is more than one trust, more than one family, there are complex assets (art, animals, yachts or aircraft) or private companies the PTC generally wins in the annual cost comparison. While the regulated trust administrator generally has a position on the board and administers the purpose trust holding the PTC shares, they have less fiduciary exposure than under a traditional trust and this can mean a lower fiduciary responsibility cost.

Increasingly clients incorporate their family office into the PTC structure ensuring family office resources can be efficiently used by the PTC and directed to all family members for subsequent generations and providing for greater job security for family office staff.

Appendix 1 provides a sample of a potential structure where by the Cayman PTC acts as trustee for a series of individual trusts, essentially one for each branch of the family as required, and each holding 25% of a Holding Company that could own any number of underlying business. A licensed trustee can provide directors, registered office and secretarial services as required and undertake the day to day trust administration. As time progresses, and the family's expertise grows, the PTC can take on more of the daily administration as required, and bring any other family trusts under the fiduciary control of the PTC.

Appendix 1



Assets Settled
SETTLOR(S)
Assets Settled
Trustee &
Administration
Purpose Trust
(Family members & Advisors)
100%
Regulated Trustee
Admin, Director &
Registered Agent
PTC
Persons sit on various trust committees
Administrative Services
TRUST
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25%
Administrative, Director &
Registered Office Services
Offshore Company
Various unquoted family businesses