

# All in the family: ownership and management options for private trust companies

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## Abstract

The author addresses the development and growing use of private trust companies (PTCs) by high net-worth persons and their families for estate-planning purposes, and discusses three options for the ownership and management of these ‘family office’ structures. The article explores direct ownership and management of the PTC by the client and indirect ownership using a purpose trust, which is the most popular method and concludes by introducing a new approach utilizing a Nevis multiform foundation.

## Introduction

The ‘trust’ is the primary tool utilized by high net-worth families for estate planning and asset management. A trust is administered by a ‘trustee’ who has title to all of the assets and usually owns the shares of a privately held underlying company. The company may own a variety of assets from bank accounts to real property to chattels, or may have the right to receive income from a third party. In order to ensure proper management of the assets, the trustee usually acts as the director of the underlying company. The ‘settlor’ or beneficial owner of the assets and their families sometimes seek to involve themselves in the administration of the trust, and depending on their

level of involvement, such action can prove destructive to the structure.

In recent years, jurisdictions have amended their laws to encourage the development of private trust companies also known as ‘family office’. These laws allow clients to legally take an active role in the daily operations of their trust structures and allow efficient and cost-effective administration, without infringement on the trust concept. There are three primary ownership and management options for a family office: it can be directly held and managed by the family; it can be owned and managed by the trustee of a non-charitable purpose trust; or title and management can be placed in the name of a foundation.

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## Relationship between settlor, trustee, and beneficiaries

The relationships between the settlor and the trustee, and between the trustee and the beneficiaries are

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typically commercial arrangements, as they are entered into by trustees upon receipt of a fee. Many trustees are also professional corporate service providers located in offshore jurisdictions that have enacted legislation to encourage the establishment of trusts and other estate planning and financial service products. The concept of a trust and the bifurcated ownership of assets can be difficult for the average person to initially comprehend. Most beneficial owners have worked hard for many years to acquire their fortunes, and are reluctant to grant legal ownership of these assets to another person, regardless of their level of education and sophistication. This proposition is made even more difficult when the trustee is a corporation located in a faraway, foreign, and remote location.

### Interference with trustee's duties

Due to doubt and confusion, settlors sometimes seek to involve themselves in the daily administration of the trust and its assets, which can invalidate the structure. If it can be determined that the beneficial owner actually exercises control over the actions of the trustee, the trust would be considered to be a 'sham'.<sup>1</sup> If such a situation occurs, the dispositive provisions of the trust would be declared void, the trustee would be stripped of its power and the beneficiaries would be divested of their interest to the trust property. The trust's assets would be considered to have never left the control of the settlor, and the funds would be subject to the tax, bankruptcy, and debt collection laws of the settlor's domicile.

### Integrity of trust

Despite the danger of creating a potential 'sham' trust with its attendant negative tax and legal consequences, settlors and their legal and accounting advisors still seek to involve themselves with the management and administration of trusts. In an

effort to both please their clients and maintain the integrity of the trust concept, many jurisdictions have enacted laws to allow for 'private trust companies' or 'family offices'. A family office can be defined as an international business company which has been incorporated for the specific purpose of acting as the trustee of a single trust structure or a group of related trust structures.

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### Family offices

A family office can be registered in an offshore jurisdiction, but the beneficial owner, his family members and their advisors who remain onshore, can manage the trust structure and administer the assets themselves. With the knowledge that they will play an active role in the daily operations of the structure, the use of a private trust company can overcome much of the fear and apprehension that most settlors have when a trust is established. It can also provide true comfort to the settlors and beneficiaries, since they are both owners and managers of the structure. Despite a higher initial cost, a trust structure owned by a family office can have lower annual costs and much greater benefits over the long term.

Several jurisdictions, including the British Virgin Islands, the Bahamas and Nevis, allow the incorporation of private trust companies.<sup>2</sup> Depending on the jurisdiction, there may be rather restrictive requirements regarding the establishment of private trust companies. No country that allows private trustees permits these entities to tender their services to the public-at-large, either in practice or in principle.

1. *Rahman v Chase Bank (C.I.) Trust Company Limited*, 1991 JLR 103.

2. BVI Financial Services (Exemptions) Regulations, 2007; Bahamas Banks and Trust Companies Regulation Act, 2000, s 2; Nevis International Exempt Trust Ordinance, 1994, as Amended, s 2 'international trust'.

The family office can provide a higher quality of service to the beneficiaries since there is both a business and personal relationship between the parties. The composition of the board of directors of a private trust company or any entity that owns and manages a family office can be altered periodically to appoint new family members from succeeding generations to maintain family control over family assets. A private trustee will also have a greater familiarity with the business of the companies owned by the trust and can more easily make an informed decision. Since it is family-owned, a family office can ensure a quicker response to requests from beneficiaries for distributions.

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A private trust company can provide many benefits and services that a commercial trustee is either unable or unwilling to supply. Many commercial trustees do not want to hold certain types of assets, including yachts, airplanes, works of art or similar luxury items with high insurance premiums, a private trustee does not have similar restrictions and can allow all of the family's assets to be held by the same trust or by the same trustee.

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## Nevis

The island of Nevis ('Nevis') is part of the Federation of Saint Kitts-Nevis (the 'Federation'), a two-island nation and former British colony which received its Independence in 1983. Under the Federation's

Constitution, certain sovereign rights are granted to Nevis, including the right to enact its own legislation. Since 1984, thousands of companies, trusts, and foundations have been incorporated, settled, and established on-island. The legislation of Nevis is designed to make the incorporation of a Nevis-registered family office and any related entities, a speedy and easy process.

## Nevis-registered family offices

Nevis' trust law, the Nevis International Exempt Trust Ordinance, 1994, as amended (the 'NIETO') defines an 'international trust' as a 'trust registered [thereunder]' and one where at least one of the trustees is a trust company doing business on-island or a '... corporation incorporated under the Nevis Business Corporation Ordinance [the 'NBCO']'.<sup>3</sup> Planned amendments to the NIETO would also allow companies formed under the Nevis Limited Liability Company Ordinance to act as trustee. While commercial trustees must be licenced, there is no licensing requirement for private trust companies incorporated under the NBCO and no prohibition on the receipt of fees by the company.<sup>4</sup> There is also no maximum number of trusts that a Nevis-registered family office is allowed to administer and there is no requirement that there be a relationship between the trusts which are administered.

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## Limitation on clientele

While there is no stated prohibition against offering services to the public-at-large, other benefits would

3. Nevis International Exempt Trust Ordinance, 1994, as Amended, s 2 'international trust'.

4. *ibid.*

make such action impossible. All Nevis trusts must be registered under the NIETO and are required to provide information to the Registrar of Trusts (the 'Registrar'), including the name of the trustee and its registered office.<sup>5</sup> While the Registrar does not have the power to refuse registration of a trust, if there is a suspicion that an attempt is being made to skirt the spirit of the family office concept, the Registrar will inform the registered agent, who has a duty to take corrective action.

### **Unenforceability of foreign judgments**

An unregistered trust can prove detrimental to anyone with an interest in the trust. Under the NIETO, any judgment obtained in a court outside of the Federation will not be recognized against a trust, its property, or any person related to the trust, including a settlor, a trustee, a protector or a beneficiary.<sup>6</sup> All lawsuits against the aforementioned persons must be brought in the High Court of the Federation ('High Court'). To be assured of protection under the NIETO against foreign judgment, the trust must be registered with the Registrar.<sup>7</sup>

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### **Ownership and management options for family offices**

The shares of a family office may be owned and managed via three ownership options: by the beneficial owner and their family; by the trustee of a

non-charitable purpose trust or by a foundation. The first option presents a potential legal risk, while the second involves unnecessary complexity and additional costs; the best option is ownership and management structure for a private trust company is a foundation.

### **Direct ownership and management of a family office**

The most direct and transparent method of structuring a family office places ownership and management of the entity directly in the name of the beneficial owner or their family. This structuring option offers the owners no contingency plan and offers no protection from potential legal action. If the structure is solely owned by the beneficial owner, depending on the nature of the family relationship, having all of the power behind the structure in the hands of one person, upon the death of the head of household, the private trust company, the trusts and any underlying entities may collapse. Another option would have multiple shareholders of the family office to ensure the continuity of the private trustee. If the structure is owned directly by the beneficial owner or the family members, there would be no creditor protection; and any debtor who is a principal of the private trustee could be forced to part with their shares in the family office in order to satisfy a debt.

### **Ownership and management of a family office via a purpose trust**

A very popular ownership structure places the shares of a family office in a non-charitable purpose trust. In keeping with the trust concept, the purpose trust does not own the shares of the family office, the

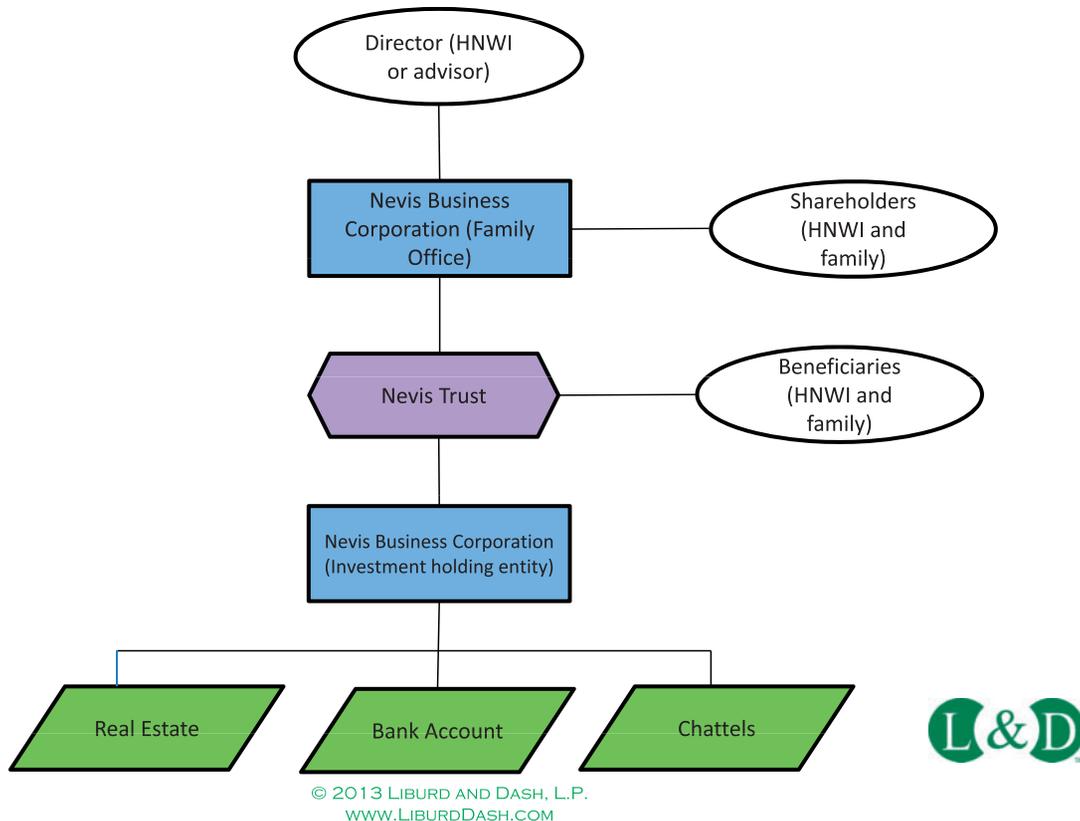
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5. *ibid*, s 37 (6) (b).

6. *ibid*, s 28.

7. *ibid*, s 37 (2).

## Family office owned directly and managed by HNWI and family.

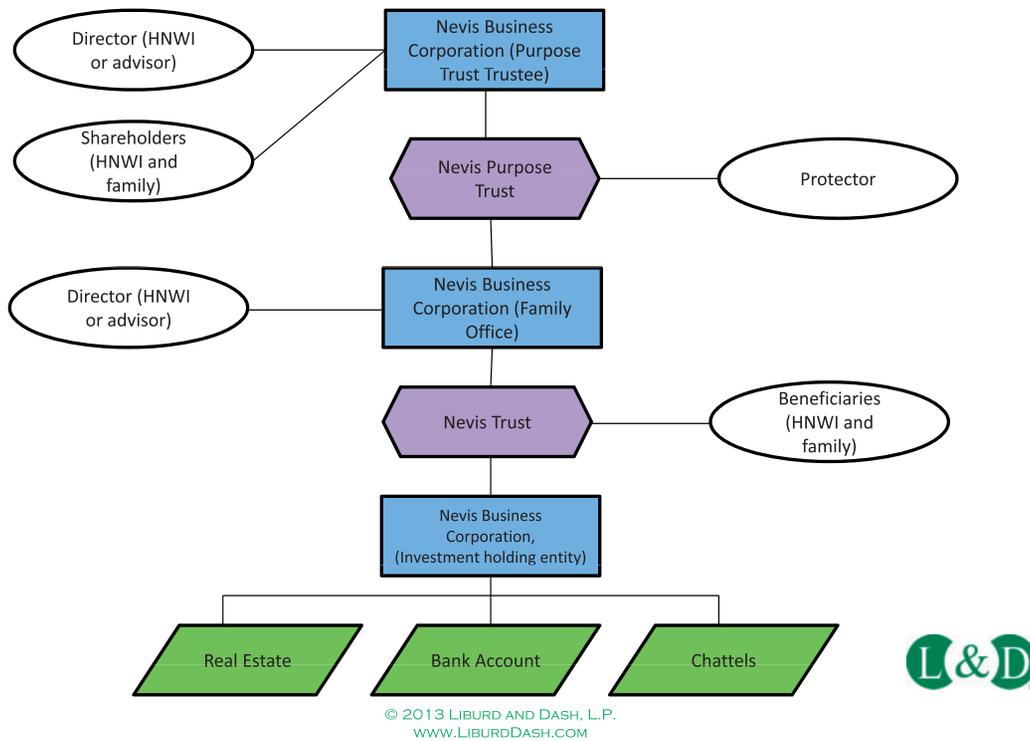


purpose trust trustee is the owner on behalf of the purpose trust. While this method provides for indirect ownership by the beneficial owner and their family, and also allows for creditor protection; it can prove unduly complicated. A *'purpose trust'* is one which is settled to achieve a goal, rather than to benefit persons. Since no person has an interest in ensuring that the trustee fulfills their duties, a *'protector'* must be appointed to fulfil this role. Therefore, a private trust company owned by a purpose trust must appoint two additional persons; a purpose trust trustee to own and manage the shares of the family office, and a protector to ensure that such trustee fulfils their obligations. In addition to the purpose trust trustee and protector, the family office must also be a director. This approach may prove problematic if simplification is an aim of the structure.

### Ownership and management of a family office by a foundation

The best ownership structure for a private trust company is for its shares to be held by a foundation, which is an entity that is separate and distinct from all of the interested parties. A foundation can simultaneously act as the owner and manager of the family office. A *'foundation'* is a self-owned structure that has been endowed by a beneficial owner to be utilized for persons or purposes as detailed in its statutes. A foundation does not have owners, instead it is a legal person and can bring and defend legal actions. A foundation does have a management board to act on its behalf, but the foundation itself is the contracting party. The beneficial owner and family can be appointed to the management board of the foundation and play an active daily role ensuring continuity of the family office while

Family office owned and managed via a Purpose Trust.



maintaining legal distance between their actions and that of the foundation.<sup>8</sup>

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### Nevis' Multiform Foundations Ordinance

Foundation legislation now exists in several offshore jurisdictions throughout the World and may be established in Nevis under the Multiform Foundations Ordinance, 2004 (the MFO).<sup>9</sup> The MFO

is so titled because foundations founded thereunder, which are known as 'multiform foundations', may for management purposes, assume the form of a trust, a company, a limited liability company, a partnership, or that of a standard foundation.<sup>10</sup> The MFO allows the establishment of new entities and also enables pre-existing foreign foundations, and foreign and domestic business structures to continue, transfer, consolidate or merge into a multiform foundation.<sup>11</sup> Redomiciliation to Nevis will not extinguish an existing legal action; the former overseas foundation will remain liable for any ongoing litigation.<sup>12</sup>

### Governing documents and choice of law

The governing documents of a multiform foundation or its 'by-laws' allows the structure to have a level of

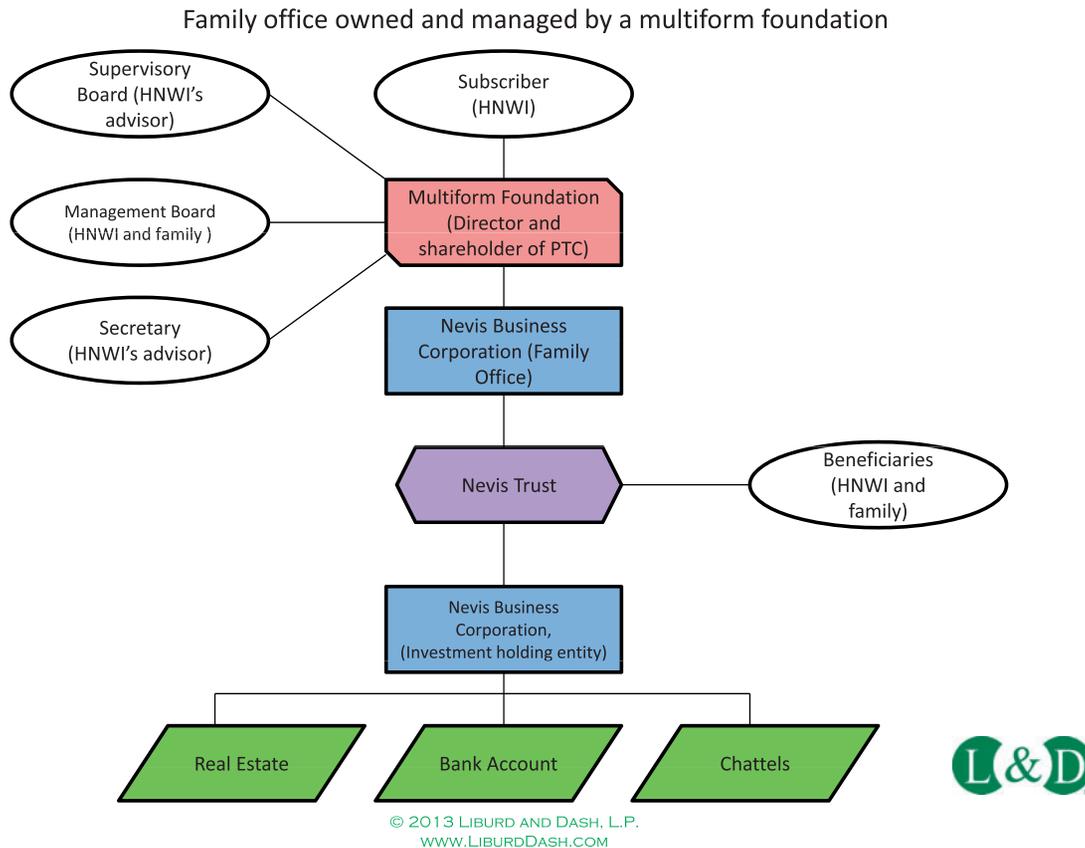
8. The beneficial owner and family can be appointed to the management board of a foundation if it has been established for persons or purposes, which is permissible under the MFO, but which needs to be reviewed on a case by case basis in other jurisdictions.

9. Foundations Act, 2003.

10. Multiform Foundations Ordinance, 2004 s 10 (9).

11. *ibid*, s 62 (1).

12. *ibid*, s 66.



flexibility, as it can choose a law other than the MFO to govern either all or a portion of the entity.<sup>13</sup> A multiform foundation may be formed to benefit persons; however there is no requirement for a registered entity to name a beneficiary.

## Management and taxes

The business and affairs of a multiform foundation must be managed by the management board that must administer the entity's assets in accordance with its by-laws.<sup>14</sup> The multiform foundation must appoint a secretary and may at its option appoint a supervisory board.<sup>15</sup> The MFO exempts the multiform foundation, any associated persons and any

possible beneficiaries from the payment of taxes in Nevis. At its option, the multiform foundation may advise the Registrar that it intends to become tax-resident and will pay taxes at a maximum rate of one percent.<sup>16</sup>

## Unenforceability of foreign judgments

Similar to any legal action against a Nevis trust, a lawsuit that is brought against a multiform foundation must be brought in the High Court.<sup>17</sup> The MFO provides that all proceedings, other than criminal matters will be conducted in the Judge's chambers and any details will not be published without the consent of the Judge.<sup>18</sup>

13. *ibid*, s 6 (4).

14. *ibid*, s 23 (2).

15. *ibid*, s 18, 21

16. *ibid*, s 93.

17. *ibid*, s 46 (1).

18. *ibid*, s 113 (2).

## Limitations period

The MFO provides an attractive statute of limitations provision for debtors. Under the MFO, any amounts 'subscribed' to the multiform foundation will not be fraudulent, if the subscription occurred after one year from the date that the creditor's cause of action accrued or the subscription occurred before the creditor's cause of action accrued.<sup>19</sup> If the subscription occurred before the expiration of one year before the creditor's cause of action accrued and creditor failed to bring action before the expiration of six months since the subscription took place, the subscription will also not be considered fraudulent.<sup>20</sup>

## Conclusion

The use of a family office is the best method for high net-worth families to play an active role in the management and administration of their trust structures. A family office that is owned by multiform foundation allows families to have the opportunity to become involved in the legal and constructive ownership of their trust structures while engaging in the management of the entity and enjoying the benefits of creditor protection and privacy.

A family office incorporated as a Nevis business corporation that is owned and managed by a Nevis

multiform foundation provides many benefits to all interested parties. There is no licensing requirement for private trust companies and the entity may charge fees to its clients, if it wishes to do so. There is also no limit to the number of trusts for which a Nevis family office can act as trustee and no requirement that there be a relationship between any trusts that are administered, however, as a general rule, private trust companies must limit their services to a specific clientele.

A family office enjoys a high level of confidentiality when it is owned and managed by a foundation. A foundation is a self-owned structure and a legal person which can bring and defend legal actions. A multiform foundation established under the laws of Nevis can assume the form of a standard foundation, or may be structured as a more recognized entity for management and administration purposes.

The laws of Nevis do not recognize foreign judgments against an international trust, a multiform foundation or any person with an interest therein, all legal action must be brought in the High Court of the Federation. Nevis' law provides an attractive statute of limitations for debtors who have any relationship with a multiform foundation. Depending on the situation, any amount subscribed will not be considered fraudulent if, the subscription occurred for up to one year from the date that the creditor's cause of action accrued.

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19. *ibid*, s 108 (3) (a) and (4).

20. *ibid*, s 108 (3) (b).