ALM | LAW.COM PRIVATE CLIENT

THE MONTH

CONTENTS

PAGE ONE

The exclusion of single persons from the international adoption of children is unconstitutional: open doors to the adoption of children by singles
Marta Cenini, Maisto e Associati

PAGE THREE

The New Tax Incentive for Scientific Research and Innovation
Rogério Fernandes Ferreira, RFF Lawyers
Duarte Ornelas Monteiro,RFF Lawyers

PAGE SIX

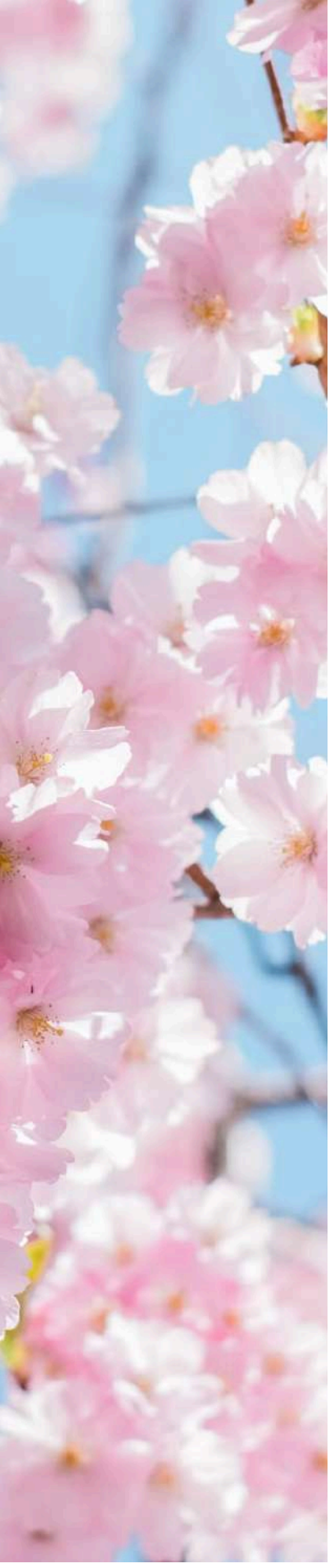
A Question of Trust: The Capacity Conundrum in Global Trusts
Charlotte Fraser, Farrer & Co
Jennifer Ridgeway, Farrer & Co

PAGE EIGHT

HNW Immigration – Addressing Clients' Concerns
Zoe Jacob, Boodle Hatfield

PAGE TEN

Trust Reporting and the Duty to Account: "I Fought the Law and the Law Won"
Michael von Keitz, O'Sullivan Estate Lawyers



THE EXCLUSION OF SINGLE PERSONS FROM THE INTERNATIONAL ADOPTION OF CHILDREN IS UNCONSTITUTIONAL: OPEN DOORS TO THE ADOPTION OF CHILDREN BY SINGLES

Marta Cenini, Maisto e Associati

Singles may adopt children in "a situation of abandonment" - that is to say children without parents - who reside abroad.

This is what is stated in sentence no. 33, released on the 21st March, in which the Italian Constitutional Court declared Article 29-bis, paragraph 1, of Law no. 184 of 1983 (hereinafter, *Adoption law*) constitutionally illegitimate, in the part in which it does not include single persons among those who may adopt a child residing abroad.

The Court, called upon to rule on the international adoption legislation, held that the exclusion of singles conflicts with Articles 2 and 117(1) of the Constitution, the latter in relation Article 8 of the European Convention Human Rights which states that everyone has the right to respect for his private and family life, his home and his correspondence.

The Court stated that Article 29-bis – now declared unlawful - disproportionately restricted the interest of parents to make themselves available with respect to an institution, such as the adoption, which is inspired by a principle of social solidarity to protect the child.

The interest in becoming parents, while not conferring a *right* to adopt, is part of a person's freedom of self-determination and must be considered and balanced, together with the multiple and primary interests of the child, when judging whether the choices made by the legislator (and reflected in the law) are unreasonable and disproportionate or not.

The Court, therefore, found that singles are, in the abstract, suitable to ensure a stable and harmonious environment for the child in a state of abandonment. It is then up to the judge to ascertain, in the specific case, whether the prospective parent is suitable from an emotional point of view to raise a child and his or her ability to educate, instruct and support the child, both morally and financially. This assessment may also consider the aspiring parent's family network of references.

The Court has also highlighted that the guarantees already put in place to protect the child are significant and observed that the current legal and social context is characterized by a significant reduction in adoption applications: the absolute prohibition imposed on singles, thus, could have a negative impact on the effectiveness of the child's right to be raised in a stable and harmonious family environment.

The judgement of the Constitutional Court is groundbreaking: indeed, until now, singles could not be considered "suitable" to adopt a child and the only way for

them to adopt a child was to apply for another kind of adoption, that is the "adoption in special cases" (art. 44, paragraph 1, lett. d), *Adoption law*).

This type of adoption is considered exceptional and does not cut the relationship with the family of origin: indeed, the child is not in the "state of abandonment" and still has a parent. In this case, the child for example can be adopted by the partner of the biological parent (so-called stepchild adoption); recently, this type of adoption has come to the fore in Italy since some Tribunals have used this provision for letting a same-sex partner to adopt a child.

After the judgement of the Constitutional Court, the prospective parent/s (a married couple or a single person) is now allowed to apply to the Tribunal to obtain the declaration of suitability to adopt a child, which is the first necessary step toward international adoption. The Tribunal, with the Social Services, evaluates whether the prospective parent/s are emotionally and materially suitable to educate and raise the child. In case the evaluation is positive, the Tribunal issues a declaration of suitability. Afterwards, the parent/s shall turn to one of the 40 entities- recognized by the Italian government - that deal with international adoptions and ask for the adoption of a child who resides abroad.

Then the process moves to the foreign country: indeed, the children are identified by the country of origin and the adoption procedure is carried out there according to local laws. Not all countries allow a single parent to adopt a child, so there might be a denial from the country of origin.

As said, the judgement of 21st March is innovative and represents a step forward in international adoption and will have an immediate impact on the case where the question started, confirming that case law is often more progressive than legislation. However, there are still some issues that shall be resolved in the next future.

The first one regards the length and the costs of proceedings. Indeed, adopting a child is a very long and fatiguing process that usually lasts to 4 and a half years from the declaration of suitability of the Tribunal, and requires a significant financial effort of adopting parents.

Moreover, the judgement of the Constitutional Court has intervened on international adoption only; so far, singles thus cannot adopt children residing in Italy, which seems an unreasonable disparity to many commentors.

The reason of this difference – which resembles a true discrimination between children residing abroad and children residing in Italy - is based on the fact that in the international adoption, it is the foreign judge that allows the adoption on the basis of his own legislation; the Italian judge, as said, ascertains the suitability of the parent/s and his/her ability to guarantee a peaceful and stable environment to the minor child only. Children residing in Italy, thus, can be adopted only by married couple.

It will be necessary an intervention of the legislation to eliminate this discrimination and – as said – to reduce costs and length of the procedure. Only in this way will it really be possible to affirm solidarity to protect the child and the effectiveness of his or her right to be raised in a stable and harmonious family environment. ■

THE NEW TAX INCENTIVE FOR SCIENTIFIC RESEARCH AND INNOVATION

Rogério Fernandes Ferreira, RFF Lawyers
Duarte Ornelas Monteiro,RFF Lawyers

Portugal has recently introduced a new tax regime aiming to attract highly skilled professionals to specific sectors of its Economy. This initiative, known as the Tax Incentive for Scientific Research and Innovation (IFICI), and commonly called as “NHR 2.0”, was designed to replace the former Non-Habitual Resident (NHR) tax regime and foster an innovation-driven economy.

The legal framework for IFICI was established by the 2024 State Budget Law and further detailed in Ministerial Order 352/2024/1, published on December 23, 2024.

Purpose and scope of IFICI
The IFICI intends to incentivize the development of an Economy focused on innovation and digital transformation, thereby enhancing the competitiveness of Portuguese organizations.

While the name suggests a focus on scientific research and innovation, the regime's scope is broader. It targets individuals who were not tax residents in Portugal in the five years prior to application and who will be carrying out activities that fall within the following categories:

- Teaching in higher education and scientific research
- Qualified jobs (including members of governing bodies) within the scope of contractual benefits to productive investment, under the terms of Chapter II of the Investment Tax Code
- Job positions carried out by tax residents in the autonomous regions of Madeira and Azores islands (subject to regional legislative decree not yet published by the competent authorities)
- Research and development personnel whose costs are eligible for tax incentives, in (continued) accordance with article 37 (1) (b) of the Investment Tax Code
- Positions (including members of governing bodies) in certified startup companies
- Qualified positions in entities carrying out economic activities recognized as relevant to the national economy by the Agency for Investment and Foreign Trade of Portugal (AICEP) or Agency for Competitiveness and Innovation (IAPMEI)
- Highly qualified professions carried out: (i) in companies with relevant applications, in the year in which the corresponding duties started or in the five previous ones, which benefit or have benefitted from the Investment Support Tax Regime, under the terms of the Chapter III of the Investment Tax Code; or (ii) in industrial and service companies, whose

main activity corresponds to one of the activity codes (also called “CAE codes”) defined in the Ministerial Order and which export at least 50% of their turnover, in the year in which the corresponding duties started or in any of the two previous years.

Tax benefits and conditions
Under this regime, net income from employment and self-employment (Categories A and B), earned within the specified activities, is subject to a 20% flat tax rate. This benefit is granted for a period of 10 years, starting from the year of registration as a resident in Portugal.

To be eligible for this tax treatment each year, the taxpayer must be considered a tax resident in Portugal and continue to earn income from one of the listed activities. A taxpayer is considered to be continuously earning income from a listed activity if the new activity begins within six months of the end of the previous one.

Accessing this regime requires prior registration. If registration occurs after the due period, the IFICI tax exemptions on foreign income and the 20% tax rate on employment and self-employment income starts from the year the registration is concluded for the remainder of the legal period. Thus, taxpayers who became residents in Portugal in 2024 and have not yet submitted the IFICI request are still able to do so. The benefit of the regime, however, will apply from the year in which the registration is concluded (income received in 2025 onwards).

In addition to the flat tax rate on employment and self-employment income, the regime also provides a tax exemption for foreign income, excluding pensions, across the following types of income:
Capital income, such as dividends, interest and royalties (Category E)
Rental income derived from moveable and real estate assets (Category F)
Capital gains and investment fund distributions (Category G)
However, income derived from entities in blacklisted jurisdictions, without a permanent establishment in Portugal, is subject to a 35% tax rate.

It is important to note that individuals who have previously benefited from the NHR regime or the Return Program ("Regressar") are not eligible for IFICI. Furthermore, this regime can only be used once per taxpayer and implicates that the taxpayer has Portuguese tax residency.

Ministerial Order 352/2024/1: key regulations
Ministerial Order 352/2024/1 provides the regulatory framework for IFICI. It outlines the registration procedures, eligible professions, and industrial and service activities.

Applicants must submit their enrolment requests by 15 January of the year following their establishment as Portuguese tax residents. For those who became residents in 2024, the deadline was on 15 March 2025.

The Order also specifies the public entities to which the enrolment requests should be submitted, depending on the relevant activity, and the details of the required documentation.

For highly qualified professions, the employing organisation is responsible for verifying the applicant's compliance with the requirements. The organisation must confirm this via the tax authorities web portal by 15 March, with the tax authorities providing the necessary information by the end of February.

Highly qualified professions and eligible organisations
The Ministerial Order defines highly qualified professions based on the Portuguese Classification of Professions (CPP). These include:

- General and executive managers
- Managers of administrative and commercial services
- Production and specialized services managers
- Experts in physics, mathematics, engineering, and related fields
- Industrial and equipment designers
- Physicians
- University and higher education professors
- IT and communication experts
-

Applicants in those professions must hold a doctorate **or** a bachelor's degree with three years of proven professional experience.

The regime applies to highly qualified professions in industrial and service companies that export at least 50% of their turnover and operate within specific CAE codes (activity codes) including:

- Extractive industries
- Manufacturing industries
- Information and communication activities
- Research and development in the physical and natural sciences
- Higher education
- Human health activities

The notice from IAPMEI and AICEP

Following the approval of the IFICI, IAPMEI and AICEP published a notice on 13 February 2025, further defining qualified jobs and economic activities considered strategic for the national economy.

The notice expands the list of qualified jobs and includes the following:

- General and executive managers
- Managers of administrative and commercial services
- Production and specialised services managers
- Directors of hospitality, catering, trade, and other services
- Experts in physics, mathematics, engineering, and similar fields
- Doctors
- University and higher education professors
- Finance and accounting specialists (excluding activity code 2411)
- IT and communication experts
- Film, theatre, television, and radio directors, producers, and stage managers
- Technicians and professionals in science and engineering at an intermediate level

Board members, managers, and general directors of companies are also considered qualified job positions.

For those professions, taxpayers must hold at least a post-secondary non-higher qualification with credits for pursuing higher education or a diploma as a higher professional technician. Regulated professions also require proof of compliance with applicable legal requirements.

AICEP and IAPMEI also recognize additional economic activities as relevant to the national economy, including:

- Extractive industries
- Manufacturing industries
- Electricity, gas, steam, hot and cold water, and air conditioning
- Construction
- Accommodation, catering, and similar activities
- Information and communication activities
- Financial and insurance activities
- Consulting, scientific, technical, and similar activities
- Administrative and support service activities
- Education
- Human health and social support activities

Additionally, economic activities developed within the scope of investment projects recognized as having Potential National Interest (PIN) or as Investment Projects for the Interior (PII) are also considered of national importance and are compliant with this new special tax regime.

For fund management activities, companies must possess a valid license issued by the Portuguese Securities Market Commission (CMVM) or be directly/indirectly owned by an entity with a valid fund management license from an EU/EEA country.

Challenges and conclusion

The implementation of the IFICI regime is expected to present practical challenges, even with the regulatory framework provided by the Ministerial Order. The novelty of the regime and the involvement of multiple entities may lead to initial difficulties. Adjustments to the Tax Authorities' IT systems are also necessary for compliance with the registration procedures.

Despite these challenges, the tax benefits offered by IFICI, including the exemption on non-Portuguese income and the 20% flat tax rate, are highly appealing. While the regime has a strict scope regarding eligible taxpayers and activities, it presents a significant opportunity to attract highly skilled professionals and boost Portugal's economy. ■

A QUESTION OF TRUST: THE CAPACITY CONUNDRUM IN GLOBAL TRUSTS

Charlotte Fraser, Farrer & Co
Jennifer Ridgeway, Farrer & Co

There is nothing new in the concept of diminishing capacity. Cultural references abound, from Chaucer's 14th century Miller whose bawdy, drunken story reflects judgement impaired by excessive alcohol consumption, to the 21st century patriarch Logan Roy of Succession, whose declining health is the backdrop to the power struggle between his family members for control of his business empire, Waystar Royco.

Although concerns about capacity have persisted for generations, we as trust advisers have seen a sharp rise in recent years in disputes where the loss of capacity of a settlor, protector or beneficiary of a trust is central to the emerging conflict. We have launched a video series "A Question of Trust: The Capacity Conundrum in Global Trusts" to explore these issues, the impact of diminishing capacity on decision-making in the context of trusts, and the ways in which fiduciaries and practitioners can assist.

The increase in disputes in this area should come as no surprise. Many international trust structures were set up 30 to 40 years ago by those who were in their peak wealth-building years then, but who will now be approaching the age when cognitive decline becomes increasingly prevalent.

There is no doubt that we have seen increased focus on and awareness of mental health conditions over the last few years, particularly following the COVID-19 pandemic. However, this awareness is a relatively modern phenomenon.

Discussions around settlors, protectors or beneficiaries losing capacity probably was not at the forefront of everyone's minds 30 or 40 years ago, when these international trust structures were set up. As a result, trust documents may not be drafted to deal with issues arising when a decision-maker has diminished capacity, such as the steps a fiduciary should take, how capacity should be addressed, and which country's law should apply. Where there are multiple jurisdictions involved, there may be a number of different potentially applicable laws, and the challenge will be to identify which country's is the appropriate one.

Of course, capacity covers more than just capacity in the mental acuity sense. Decision-making can be impaired through loss of free will, for example where someone has become frail and vulnerable and may be subject to undue influence or coercive control, or perhaps where someone is 'incommunicado' through detention. Our video series examines different types of capacity and considers how fiduciaries can help to mitigate the risk of flawed decision making.

Another major problem is communication. The founders of immense wealth are usually highly sophisticated, intelligent and educated individuals, who are not only extremely adept at masking any diminishing capacity but are also used to influencing and controlling the power dynamic. They are, in a sense, the 'elder' of their social and business hierarchy. Diminishing capacity may be difficult to accept and, therefore, to recognise. The individual experiencing it may be unaware of their own decline, or others may help them mask their

problems. Any conversations around the issue will require a highly sensitive approach.

However, if the capacity of the key decision-maker is in question, the administration of a trust can grind to a halt. Crucial, time-sensitive decisions may be put on hold and, in the worst cases, conflict can erupt as stakeholders seek to fill the power vacuum. This situation can be complicated further where there is a company within the structure and the key decision-maker is central to the company. If the company starts to drift, and the trustee allows the situation to continue, it could be said that the trustee failed in its duty to steward the company. Can a trustee rely on an exoneration clause in these circumstances?

These are some of the many issues we address in our seven-part video series. The videos are solutions-focused, recognising that in an increasingly complex economic, political and cultural landscape, it's incumbent upon us as a sector to look forward, future proofing our trusts. Some practical tips offered in the video series include:

- Be aware that capacity is decision specific and non-linear, fluctuating according to many factors including medication, the time of day, or physical frailty. The best thing a trustee can do is take practical steps to make sure that any decision made is as robust as possible. Face-to-face meetings will be crucial, and decision-makers should be asked open questions about the decision they are taking, to show that they can explain the decision and have thought about its consequences.

- Issues of addiction are particularly delicate. Fiduciaries may note increased financial spend, perhaps coinciding with time spent with new contacts. Where a beneficiary suffers addiction issues and is making unusual financial requests of the trustees, the issue cannot be ignored, although there is no question that raising concerns with the beneficiary can be very difficult indeed. A proportionate response rather than a draconian disempowering of the beneficiary may be advised, combined with sensitive and delicate communication.

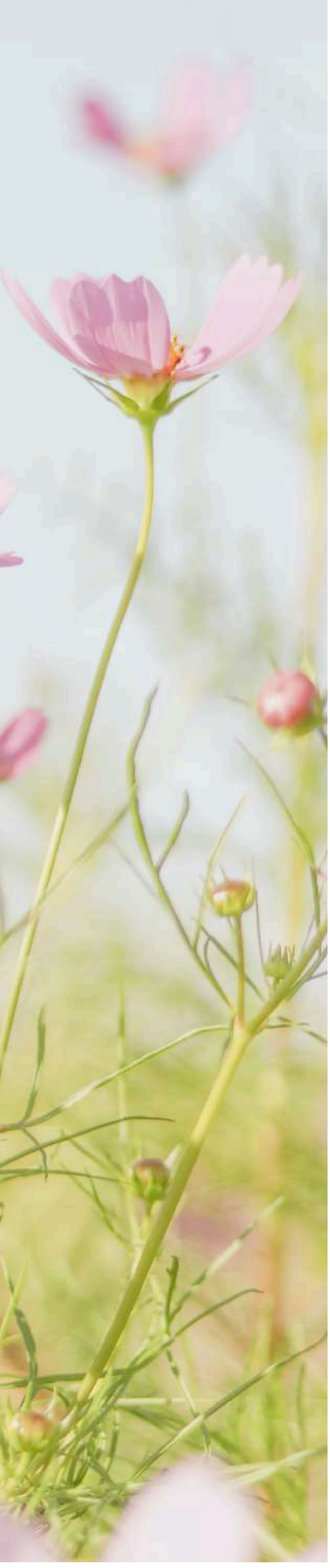
- Take a holistic approach. Involving others can provide a lifeline for fiduciaries. A capacity assessment with a medical professional is of course the gold standard, but this may not always be possible. Building relationships with the decision-maker or a beneficiary's other advisers, such as accountants, lawyers, investment managers, family and friends, will be critical in securing additional support for the decision-maker. However, this must be done in a way that complies with duties of confidentiality.

- Normalise the conversation around capacity. Checking in regularly on specific issues, including capacity, should help to standardise discussion of the issue, so that when concerns do arise they can be more easily addressed.

- Drafting at the outset with capacity in mind is crucial for any modern trust structure. This should include properly setting out what happens when someone in the trust structure loses capacity, what tests should be applied and who should assess capacity, as well as considering which country's laws will apply.

- Be sensitive and forward thinking about potential conflicts. Plan for generational change and communicate with all stakeholders within the structure in a way that mitigates the risk of conflict as far as possible. Consider the use of protector committees and avoid sole directorships where there are corporate entities within the structure.

- Don't ignore the issue. Be proactive, trust your instincts, and be prepared to address issues before they escalate.



HNW IMMIGRATION – ADDRESSING CLIENTS' CONCERNS

Zoe Jacob, Boodle Hatfield
This article was first published by Family Wealth Report in April 2025.

HNW individuals, contrary to certain media narratives, still want to relocate to the UK. What immigration routes exist for this population cohort, and what are the optimal structures for them?

Following the announcement of the 6 April 2025 tax changes, the dominant media message has been one of a net outflow of wealth from the UK. In our experience, however, there is still considerable inbound HNW immigration to the UK, driven by a combination of factors. This includes geopolitics, climate change, the relative strength of certain foreign currencies and the continuing popularity of the UK's leading private schools.

The lack of an immigration route based on investment, and the ever-increasing restrictions on bringing domestic staff to the UK, means that nuanced, personalised advice is required to facilitate these cross-border moves. With that in mind, this article addresses three questions that frequently arise at the outset of the immigration process and the factors that influence the answer to each.

I have received a job offer from a UK company in which I am a significant shareholder. Does my interest in that company prevent them from sponsoring my "Skilled Worker" visa?
The short answer to this question is no. A Skilled Worker migrant can be sponsored by a company which they own, wholly or in part. In reality, however, the considerations are more nuanced. A key question which arises in this context is whether the fact that the individual is a shareholder casts doubt on the genuineness of the role they have been offered by the UK company.

Key questions for clients in this position include "are there other UK-based employees of the company?", "does the company comply with its other legal duties as an employer?", and "is there someone in the UK company who can monitor the proposed Skilled Worker's activity?"
The individual must be able to establish that the sponsor has a genuine need for the job described. The proposed sponsored employee must also have the appropriate skills, qualifications and experience needed for the role they intend to undertake in the UK. If this can be established then, subject to meeting the other criteria for a "Skilled Worker" visa, the fact of the shares being held by the applicant, should not prove a barrier to success.

The most recent statement of changes to the Immigration Rules, which come into force from 9 April 2025, also makes explicit that the Skilled Worker migrant's salary cannot be paid from their own investment in the company. Precisely how this change will be implemented remains to be seen.

If I don't want to be tied to working for one company in the UK, what are the available options?
For actors and musicians, as well as the founders and key employees of tech companies, the answer to this question is often to apply for a "Global Talent" visa. This process involves obtaining endorsement from an industry specific "endorsing body" as an individual with either "exceptional promise" or "exceptional talent." For performers this body is the Arts Council England and for those in the tech sector this is Tech Nation. Once endorsement has been obtained the individual can apply for a visa which, if granted, gives them the freedom to work freely in the UK in either a self-employed or employed capacity, within their field of expertise. For performers, this means the ability to take on creative projects without restriction. For tech entrepreneurs this mitigates the risk of tying their ability to remain in the UK to a job opportunity in a field familiar with mass layoffs.

Other options that do not involve sponsorship by a UK company include the "Ancestry" visa, which is often an excellent option for those from Commonwealth jurisdictions with historic family ties to the UK. The "High Potential Individual" visa or the "Youth Mobility" visa are also well-suited to next-gen HNW individuals wishing to come to the UK for a few years following graduation.

How can I bring my nanny with me to the UK?
Changes to the "Skilled Worker" visa category, which removed nannies from the list of eligible skilled professions, and more recent changes that have excluded companies from sponsoring staff who will be employed in a "personal capacity," means that a route used by several HNW families to bring their overseas nannies with them to the UK, is no longer available.

It is therefore now necessary to examine the nanny's UK immigration position more holistically, as well as the options available to that specific individual. One possible alternative for nannies genuinely intending to study in the UK, is for the nanny to obtain a "Student" visa which is sponsored by a UK Higher Educational Institution. On this route, however, there are limits to the hours a nanny can work (often 20-hours per week during term-time and full-time during the university holidays. Depending on their personal situation and family history, the nanny may also be able to apply for an "Ancestry" visa or a "Partner" visa based on their relationship with a British citizen or person settled in the UK.

Another option, which works well for globally mobile families, is a six-month "Overseas Domestic Worker" visa which allows the nanny to travel with the family to the UK. If the family will not be making the UK their main home, this is relatively straightforward. If the family will be relocating permanently to the UK but needs the nanny in position to help settle the children in their new home, this application can be made on a discretionary basis.

Conclusion
In conclusion, HNW interest in relocation to the UK remains high and there are still many immigration routes available to facilitate this. Which route will work best for an individual will depend on their unique personal circumstances. The earlier professional advice is sought, the greater the likelihood of a smooth migration journey. ■

TRUST REPORTING AND THE DUTY TO ACCOUNT: "I FOUGHT THE LAW AND THE LAW WON"

Michael von Keitz, O'Sullivan Estate Lawyers

All Trustees, whether Estate Trustees or otherwise, have a duty to account to the beneficiaries on whose behalf a trust is being managed. That is to say, those vested with the power to manage property on behalf of others are obligated to provide to the beneficiaries an accounting of their dealings, particularly financial dealings, with the assets and liabilities of the trust or estate.

Oftentimes, the duty to account is satisfied informally. The Trustee(s) enjoy the confidence of the beneficiaries, on the strength of summary financial information they provide to them, and are released and on certain matters indemnified through the execution of releases and indemnities by each such beneficiary. Note that it is beyond the scope of this blog post to discuss the related distribution of the assets of a trust or estate, including considerations such as first obtaining a Clearance Certificate or those related to claiming Executor's Compensation.

Formal Satisfaction of the Duty to Account

The Rules of Civil Procedure set out the nature of and requirements to pass accounts. That is to say, the process for formal – or judicial – review of a Trustee's accounting, what we call a "passing of accounts", is subject to specific requirements as to form and content.

A formal passing of accounts is not a strict requirement. Such a proceeding typically arises where one or more beneficiaries object to the informal financial information provided by the Trustee, such that a judicial determination becomes necessary. Otherwise, where the Public Guardian and Trustee or the Office of the Children's Lawyer are involved, passings of accounts are commonplace. Of note, however, any party with a financial interest in the trust or estate can compel a passing of accounts by obtaining a court order.

As the term "accounts" implies, the exercise is largely a question of accounting – identifying and categorizing items such as original assets, original liabilities, assets held, assets distributed, assets received, liabilities outstanding, etc. These are generally filtered through four categories: capital receipts, capital disbursements, revenue receipts, and revenue disbursements. Where called upon to provide information related to particular transactions, the Trustee will be expected to have diligently kept records, such that he or she is in a position to provide vouchers as necessary (e.g., bank statements, receipts, etc.).

The Standard of Recordkeeping Required for an Estate Trustee

and the Standard of Care with Respect to a Trustee's Duty to Account

Baran v Cranston, 2022 ONSC 6636, provides a helpful refresher on the standard of recordkeeping required of an Estate Trustee and the standard of care with respect to a Trustee's duty to account.

As stated at paragraph 14 of Baran, "the standard of care for an estate trustee is the standard of care of a person of ordinary care and diligence in managing their own affairs". Thankfully, this standard is not one of perfection, as, per paragraph 16 of Baran, an "estate trustee [is] not required to obtain a receipt for every expense in order to allow her to be reimbursed for expenses she incurred, where she produced accurate accounts for all expenses, which were incurred for the benefit of the estate, along with [...] corroborating documents."

A common sense approach guides the determination as to whether a Trustee has met the standard of recordkeeping required of him or her and the standard of care expected with respect to his or her duty to account.

Failure to Comply with an Order to Pass Accounts

To emphasize the gravity of the duty to account, consider the case of Estate of Nordby, 2023 ONSC 821, where an Estate Trustee was imprisoned for contempt when he failed to comply with an order to pass accounts.

In Nordby, the Estate Trustee was the father of the deceased and grandfather to the beneficiaries. Mr. Nordby obtained a Certificate of Appointment of Estate Trustee with a Will on October 30, 2013, was ordered to pass accounts on April 12, 2017, and was found in contempt of the Order on September 28, 2022.

The Office of the Children's Lawyer, acting as litigation guardian for the Estate Trustee's minor grandson, demonstrated immense patience and restraint, attempting for several years to have the Estate Trustee comply with the 2017 Order. Even the 2022 Order showed grace – the contempt could be purged if accounts were passed within 60 days of the Order.

Notwithstanding the foregoing, Mr. Nordby seemingly took his duty lightly and, as a result, was ordered to be imprisoned for five days to, per paragraph 33 of the instant case, "make Mr. Nordby and the public 'sit up and take notice.'"

Like the song lyric goes, Mr. Nordby "fought the law—and the law won."

The role of Trustee can be both an immense privilege and an immense responsibility. When navigating the duties arising, it is prudent to consult with a qualified trust and estate lawyer.

The comments offered in this article are meant to be general in nature, are limited to the law of Ontario, Canada, and are not intended to provide legal or tax advice on any individual situation. Before taking any action involving your individual situation, you should seek legal advice to ensure it is appropriate to your personal circumstances. ■

PRIVATE CLIENT

GLOBAL ELITE