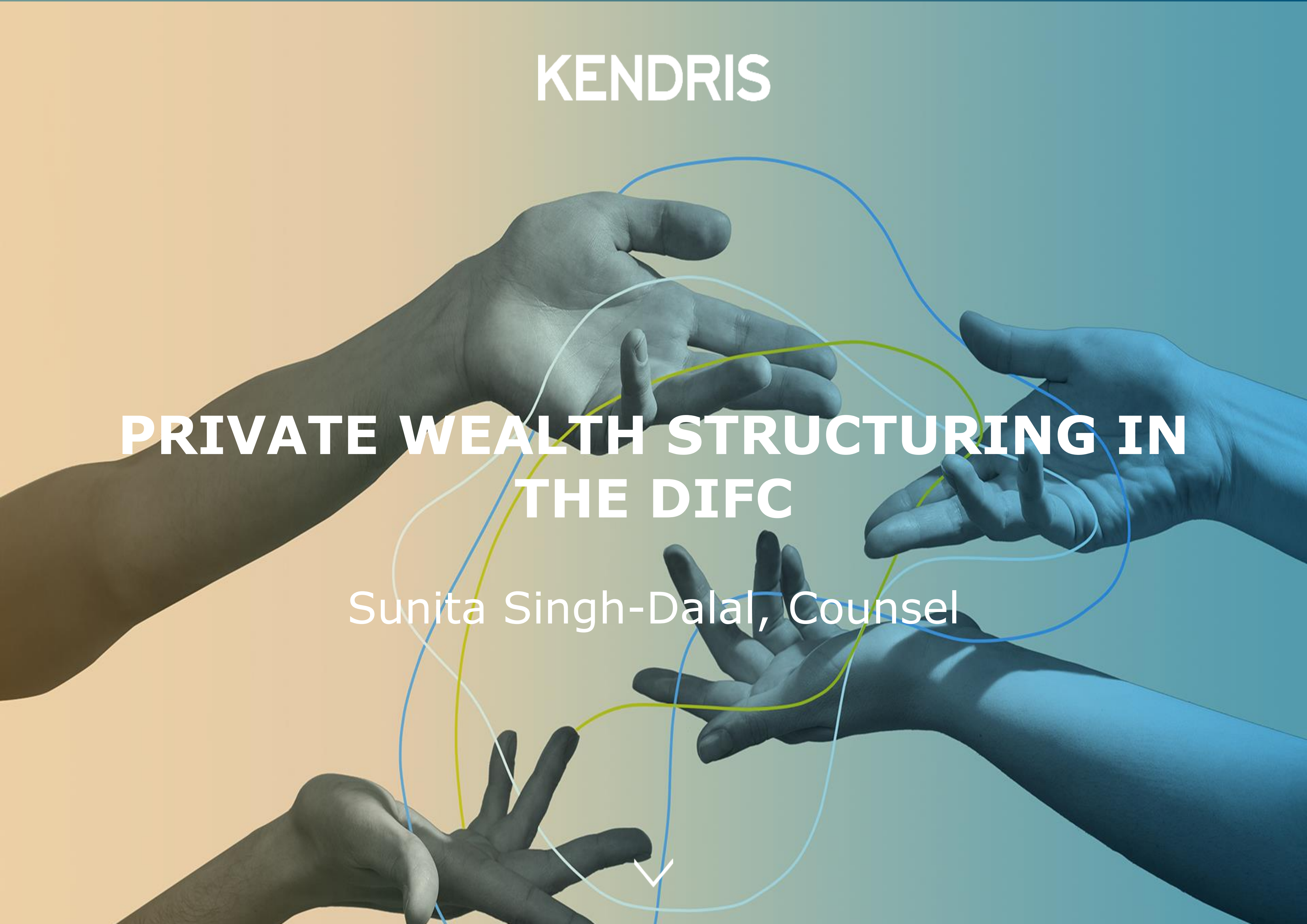

KENDRIS

PRIVATE WEALTH STRUCTURING IN THE DIFC

Sunita Singh-Dalal, Counsel

THE DIFC – Dubai International Financial Centre

- Ranked as the 6th IFC Globally
- Established in 2004
- Regulated by the Dubai Financial Services Authority (DFSA)
- DIFC Courts based on common law with its own codified Laws
- Wills & Probate Registry – Estb in 2015
- Widely used as a centre for regional wealth structuring

The regions most relevant to the DIFC and why?

- Origins of Wealth

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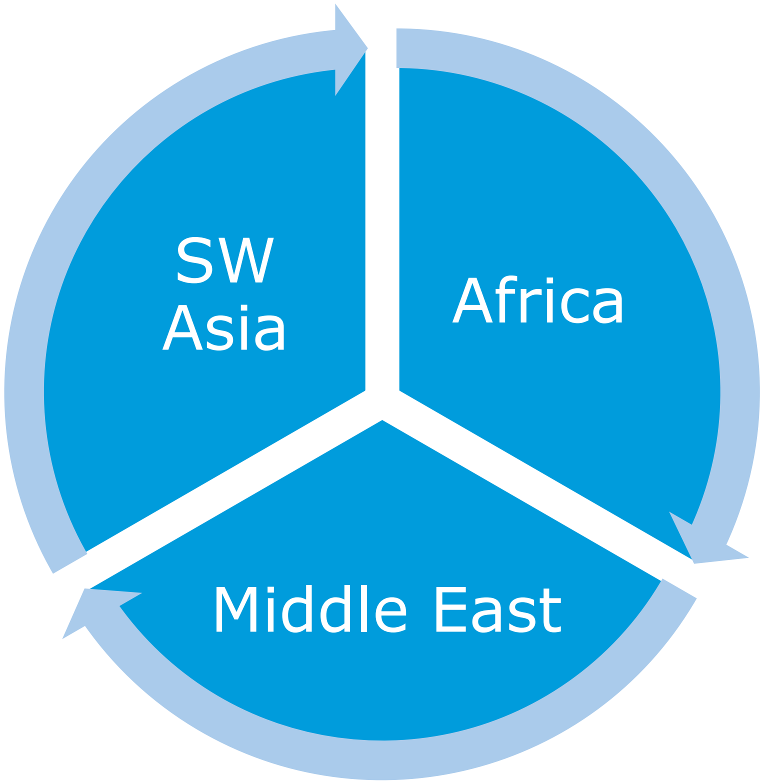
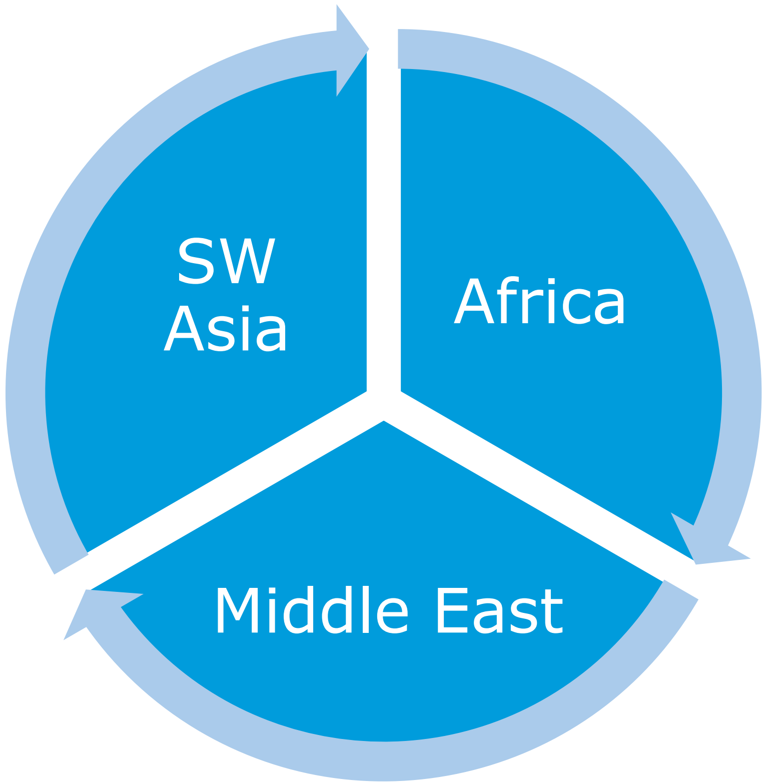
- Origins of Wealth
- Cultural similarities & client sensitivities – emerging trends



The regions most relevant to the DIFC and why?

- Origins of Wealth
- Cultural similarities & client sensitivities – emerging trends
- Servicing the dynamic market in the region which is growing exponentially
- UAE is now the 6th IFC



A new world for the internationally mobile private client?

UHNWI Populations (US$30m+)				
Country/Territory	**2015**	**2019**	**2020**	**2025**
Middle East	22,872	33,236	29,880	37,241
India	5,428	6,993	6,884	11,198
Saudi Arabia	2,146	6,402	7,020	8,416
UAE	1,818	1,663	1,305	1,592

A new world for the internationally mobile private client?

HNWI Populations (US$1m+)				
Country/Territory	2015	2019	2020	2025
Middle East	812,349	1,259,070	1,117,232	1,445,362
India	280,378	378,898	350,050	611,503
Saudi Arabia	178,023	281,003	239,198	287,115
UAE	171,015	193,641	155,929	205,664

Sharia' law and estate planning in the GCC

Families in the GCC - Typical Characteristics

- Own large & often diverse portfolios
- Prefer to preserve wealth within bloodline
- Sharia' Compliant
- Have existing Offshore Structures
- Next Gen more involved, Tech savvy & pro ESG
- Discretion is important

Overview of Sharia' law

- Forced Heirship
- Different fixed ratios depending on Islamic classification
- Lifetime arrangements are recognised as valid
- Unavoidable if resident in a country that follows Sharia' law
- Unavoidable if client is Muslim and assets are in the GCC (regardless of residence, nationality or domicile)
- Not considered fair and equitable in many modern Muslim business families

Interplay between Wealth Management, Preservation of Assets & Sharia Law

- Historic origin and ownership of business and wealth in the UAE
- Preservation of Assets and Succession of Ownership
- No concept of survivorship in Sharia’ Law
- Forced Heirship and division of estate

Division of Estate Under Sharia' Law

- Distribution of wealth to first degree lineage
- Fixed allocation of estate
- Strict guardianship of minors
- Freedom to freely dispose of only 1/3rd of the estate
- Is this ideal for the modern UAE family Muslim / Non -Muslim owned business empire?

Structure v Will – what's the difference?

Protecting assets and children using a Will

- In the UAE, personally owned assets and children (under the age of 21) can be protected using a Will
- Children (regardless of religion) can also be protected with Guardianship Declarations/Wills, both onshore & in the DIFC
- There are 2 common law options available for non-Muslims in the UAE:
  - ADGM
  - DIFC

Why use a structure?

- Wills are limited:
  - Muslims’ estates governed by Sharia law if held personally at time of death
  - Business continuity issues if deceased is sole director or key shareholder – delays in decision making while probate obtained
  - Assets (including bank accounts) frozen during probate process
- Lifetime creation of structure allows control of who assets pass to and provides long-term ownership solution

Types of structure compared

Single Family Office

- Diversity of asset classes
- Location of assets
- Allows mobility of family members
- Roles assumed cover management, investment advisory, legal and finance
- Structured governance provisions that allow participation of younger family members
- Enables effective succession planning, transition management of assets and facilitates the effective unfettered distribution of assets

Company

- Simple to create and easy to understand
- Recognised throughout the world
- Limited liability
- Can use different classes of shares and split ownership amongst family members
- BUT need for probate on death of a shareholder

Trust

- *What is a trust?*

- The division of ownership between (i) the legal title which is held by the trustees and (ii) the beneficial (economic) interest which is vested in the beneficiaries

- The trustees must always act in the best interests of the beneficiaries

- Governed by the terms of the trust deed and the prevailing trust law

- Now relatively common for trusts to be able to last in perpetuity

Trusts in the UAE

- UAE Federal Trust Law – Enacted in Sept 2020 (NB: Creation of a Central Trust Register not yet established, so no valid Trust can be established – Arts 47 & 49)
- DIFC Trust Law No 4 of 2018
- ADGM Trusts pursuant to English Law

Foundation

- *What is a foundation?*

- An incorporated body which is able to transact in its own name
- Acts through its council which governs the foundation in accordance with the terms of the foundation's charter and rules
- The assets of a foundation belong to the foundation and it may exercise all the functions of a legal person
- Has a continuous existence until its removal from the register

Trust vs Foundation

- *Which is best?*

	Trust	Foundation
Needs shareholders/ owners	No	No
Limited duration?	Depends on trust law of chosen jurisdiction	No
Incorporated entity?	No	Yes
Need for beneficiaries?	No (purpose trust)	No (can have purpose only)
Duties to beneficiaries	Yes – fiduciary duties	No – council owes duties to foundation only
Can family be involved?	Yes – via PTC/PTF or protector	Yes – via council or guardian
Possible to keep powers for settlor/founder?	Yes – reserved powers trust	Yes – certain rights can be reserved to founder

Choice of jurisdiction

What are the options?

Traditional (offshore) international finance centres such as Mauritius, BVI, Cayman, Jersey, Guernsey, Isle of Man

Midshore: UAE, Singapore, Hong Kong

UK increasing in popularity as holding company jurisdiction

How do you choose a jurisdiction?

- Are there domestic law considerations which need to be taken into account?
  - Restrictions on choice of entity – for example UAE land
  - Restrictions on ownership of that entity – restrictive conditions applicable to infrastructure projects or restricted sectors (oil and gas and finance)
- Where are the family? Where are they prepared to travel to? (see more below re economic substance)
- What information is public in the jurisdiction? Are there public beneficial ownership registers?

The need for substance

Economic substance:

- Introduced in the IFCs and UAE
- 3 key questions:
  - Is your company tax resident in the jurisdiction?
  - Is it carrying on “relevant activities”?
  - Are the core income generating activities (CIGA) carried on in the jurisdiction?

Double Tax Treaties:

- To reduce withholding tax on dividends or interest
- Growing need for substance to access treaty benefits

Structuring UAE assets

Overview of UAE foundations

- In terms of succession planning, a foundation provides a long-term sustainable ownership solution and allows greater flexibility in terms of activities (present & future), in comparison to a standalone corporate structure

- Three Regimes in the UAE:

  - Ras Al Khaimah International Corporate Centre (‘**RAKICC**') RAKICC Foundations Regulations 2019

  - Dubai International Financial Centre ('**DIFC**') Law No.3 of 2018 ('Foundations Law')

  - Abu Dhabi Global Market (‘**ADGM**’) Foundation Regulations 2017 and Foundations (Amendment No.1) Regulations 2018

Overview of a foundation

- An incorporated body which is able to transact in its own name
- Once incorporated at the request of the founder, the foundation **acts through its council** which **governs** the foundation in accordance with the terms of the foundation's **charter and by-laws**
- Unlike a company, there are no shareholders/members of a foundation – **it is effectively ownerless**
- There is no requirement for a foundation to have beneficiaries and if it does their interests are limited and their rights may be restricted. Beneficiaries are called "Qualified Recipients"

Overview of a foundation

Council

Founder

Once incorporated, the foundation **acts through its council** which **governs** the foundation in accordance with the terms of the foundation's **charter and by-laws**

Qualified Recipients

Assets

Foundation

- An incorporated body which is able to transact in its own name
- Unlike a company, there are no shareholders/members of a foundation – **it is effectively ownerless**

Overview of a foundation

- The council can be held to account by the appointment of a **guardian,** who may be given the **power to approve or veto** any specified actions of the council
- The founder or family members can be council members, or the family members could act (via a corporate entity or committee) as **guardian** of the foundation
- Once incorporated, the name of the foundation and the details of the council members, founder and guardian (if any) **will be entered on the Register** maintained by the Registrar

Control mechanisms and the guardian

- The By laws of a foundation can give rights to the founder
- Alternatively the founder or family members can be council members, or the family members could act (via a corporate entity or committee) as **guardian** of the foundation
- A guardian can be an **individual** or a **corporate entity.** It is also possible for the founder to be appointed as guardian
- The guardian has an extremely important role in ensuring that the foundation council be held to account. Under the by-laws, the guardian may be given the **power to approve or veto** any specified actions of the council

The founder and the contributor

- Details of the beneficial owners (direct or indirect, economic or governance control exceeding **25%**) of any corporate founder must be provided to the DIFC/ADGM/RAKICC Registry(s) when applying to establish a foundation

- The Registry has confirmed that such information is **kept confidential** and does **not appear on the registry** (in respect of the foundation)

- In addition to the founder, any person or entity which adds assets to the foundation is known as a **contributor**

- The contributor **does not** automatically get the same rights as that of a founder

The council

- The Council of the foundation is similar to the board of directors of a company and provides the day-to-day management of the foundation. The council members are disclosed on the Register
- Every foundation must have a council to administer its assets and to carry out its objects. It is not possible for the guardian to be a council member, but beyond this, there are no other restrictions on the composition of the council

Underlying companies – DIFC Prescribed Companies, RAKICC, DMCC and JAFZA Offshore Companies

- Due to the restrictions on ownership of Dubai real estate, it is necessary to use domestic corporate entities to hold UAE real estate, if not to be directly owned by the foundation
- These can be DIFC Prescribed Companies ("**PC**"). PC's do not need their own physical office space and have a simplified and cost effective set up process, making use of a registered agent to comply with the regulatory requirements – **KENDRIS Corporate Services (DIFC) Ltd**
- Shares of existing RAKICC or JAFZA Offshore companies, (previously used for owning property in Dubai), can also be transferred into a DIFC Foundation
- It is also possible to similarly transfer ownership of a DMCC, RAKICC or JAFZA Offshore company that owns Dubai property, to a DIFC Foundation or to a DIFC Prescribed Company (provided the Prescribed Company is wholly owned by a DIFC Foundation)

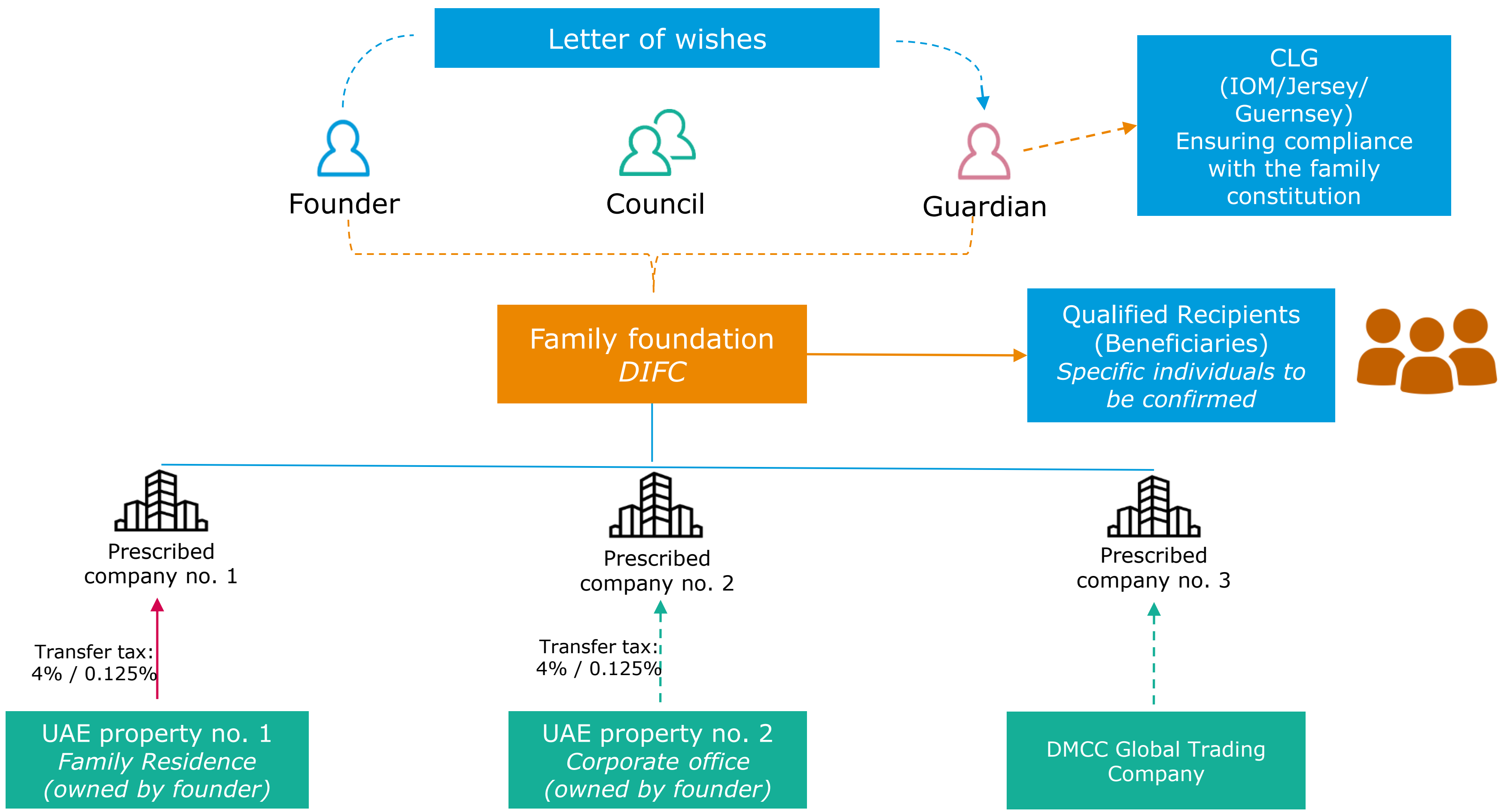
Transfers of Dubai real estate assets into the foundation

Transfer Tax (Oqood)

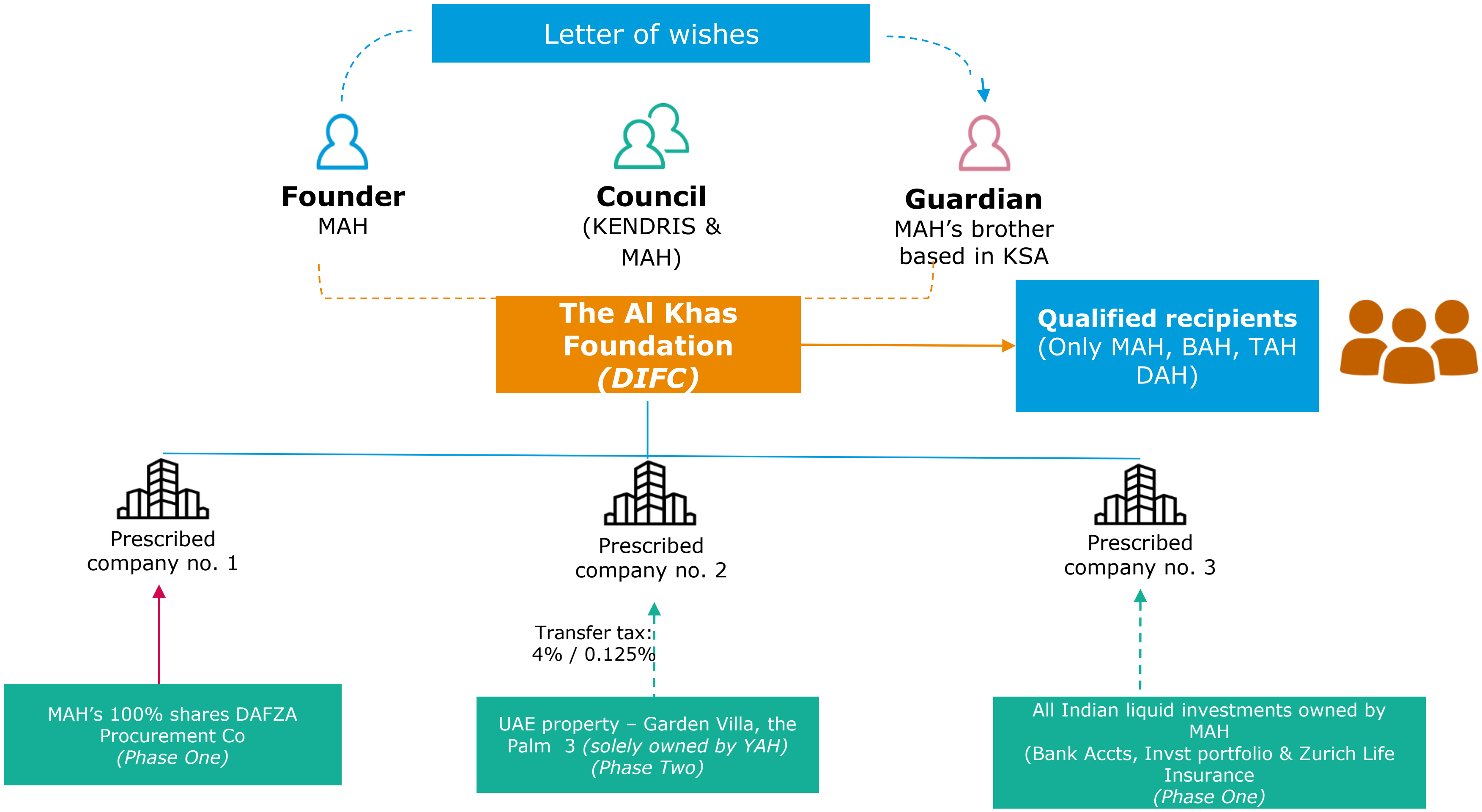
- Ordinarily any property transfer in Dubai attracts a tax liability of **4% of the current market value** of the said property at the time of the transfer.
- A change of ownership of the shares of an entity which owns Dubai real estate can trigger the same transfer tax liability.
- However if the transferor and transferee are first degree lineage ("**FDL**") i.e. spouses, parents, or offspring, then there is a Shari'a compliant process which can be followed which *should* be able to **reduce this tax liability to 0.125%.**
- This can also apply where property is transferred from one corporate entity to another, provided the first degree lineage is maintained.

Recent examples of wealth structuring in the DIFC

- *Succession planning for the Family Business, Segregation of Assets & Family Governance*



Proposed Structure for Family AH - DIFC Foundation & Prescribed Companies - September 2021



Contacts

Sunita Singh-Dalal

Counsel

T: +971 4 4073929
M: +971 50 384 2410 / +971 52 477 7768
E: sunita.singh-dalal@shlegal.com

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