



Honor Et Integritas

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LEGAL GUIDE

Private Foundations

For more information

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The information contained in this guide is provided for the general interest of our readers, but is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. This guide can in no way serve as a substitute in such cases.

Introduction

The Foundations Act 2004 (the "Act") came into force in The Bahamas on October 22nd, 2004. The Act provides for the creation of a private foundation in The Bahamas. Foundations have their origins in civil law countries, where the Church was a "Divine Foundation" and had the legal capacity to manage assets with which it was endowed. These public foundations were non-profit, charitable organizations created by individuals for the benefit of society as a whole.

In 1926, Liechtenstein created the Family Foundation by the Law of Persons and Companies. Family Foundations, unlike public foundations, were designed for the personal benefit of members of one or more families. Based on the Family Foundation, in 1995 (Law No. 25 1995) the government of Panama developed the Panama Private Interest Foundation, and although the Panama Private Interest Foundation served as a conceptual model for the private foundation in The Bahamas, the Bahamian foundation law is more detailed.

What is a Foundation?

The Act defines a private foundation (the "Foundation") as an entity established by a foundation charter (the "Charter") and which is registered. It is a legal entity, is resident and domiciled in The Bahamas and is able to sue and be sued in its own name (s. 3).

Once assets are transferred by the founder (the "Founder") to the Foundation by way of an endowment, they cease to belong to the Founder and do not become the property of any beneficiary until they are distributed. The Foundation manages the assets, investing them or otherwise, in accordance with the objects or purposes specified in the Charter by the Founder (s. 3).

Purpose of a Foundation

The Foundation can be used as a vehicle for the holding of private assets endowed on the Foundation for the benefit of identified persons or classes of persons. The Foundation may, if necessary for the proper management of the assets, buy and sell assets and engage in any other administrative activity not prohibited by law; however, business transactions must be secondary to the main purpose of the Foundation (s. 4).

Establishment

In order to establish a Foundation in The Bahamas there must be: (i) a foundation charter (or a duly executed will); (ii) registration; and (iii) the issuance of a Certificate of Registration. Once these requirements are fulfilled, the Foundation is formed.

The Charter

The Act requires the Charter document of the Foundation to include (s. 6):

1. the name of the Foundation with the word "Foundation" in English or in a foreign language (at the discretion of the Registrar) as the last word of the name; the name of the Foundation is restricted by the Act; it cannot include certain terms such as "limited" (s. 17);
2. The name and address of the Founder or, if the Founder is a legal person, the number and place of registration of the legal person and the address in The Bahamas for service of documents on the Founder;
3. the purpose(s) and objects of the Foundation;
4. the endowment of the assets to be the initial assets of the Foundation upon registration and a statement of those assets;
5. the designation of the beneficiary or the identification of a body by which the beneficiary can be ascertained, or a statement that the foundation has been formed to benefit the public at large;
6. a statement as to whether the Foundation was established for an indefinite period or for a definite period; and if for a definite period, a statement of the length of the period.
7. the name and address in The Bahamas of the Secretary to the Foundation (the "Secretary") and the address of the registered office in The Bahamas of the Foundation, which must be the same address as the Secretary;
8. a statement that the Foundation's total assets are not less than US\$10,000 or the equivalent in another currency; and
9. the signature of the Founder in the presence of a notary public or the Secretary or, if the

Founder is a legal person, the signature of the authorised person(s) in the presence of a notary public or the Secretary.

The Charter may include, *inter alia*, the reservation of rights or powers to the Founder.

Articles

The Foundation Articles (the "Articles") also called Regulations or Byelaws are optional. If the Founder chooses to have Articles, they can provide, *inter alia*, for:

1. the distribution of assets made or to be made by the governing bodies of the Foundation;
2. the identification of any initial beneficiaries or any to be designated at a later date of the Foundation;
3. the identification of the remaining beneficiary upon a winding up of the Foundation; and
4. the regulation of any governing bodies of the Foundation.

Registration

To register the Foundation, the following documents must be submitted to the Registrar with the application for registration and fees:

1. a statement signed by the secretary or attorney that includes the following particulars: the Foundation name, the date of the Charter, the Foundation purpose(s) and objects; the name and address of the Founder, Secretary, the Foundation Council (the "Council") and registered office; a statement that the Foundation's assets are not less than US\$10,000.00 or the equivalent in another currency;
2. a list containing the names and addresses of the first officers of the Foundation;
3. a statutory declaration by the Secretary or assisting attorney of compliance with the Act.

It is important to note that the Charter and Articles do not need to be filed with the Registrar.

Officers

Prior to Registration, the Founder(s) must appoint at least one person (natural or legal) to be an officer (an “Officer” or in the plural “the Officers”) of the Foundation. An Officer of the Foundation may be a legal person. The Act lists those persons who cannot be Officers, such as an undischarged bankrupt (s. 10).

The Officers, in the absence of the Council, are the governing body of the Foundation. Their duties are primarily administrative rather than fiduciary in nature. Officers must exercise reasonable care and skill in the conduct of the affairs of the Foundation, including exercising due care and skill in the management and investment of the Foundation assets, and must act in accordance with the Charter and Articles. No officer of the Foundation shall be personally responsible for any liability of the Foundation unless the liability is incurred as a result of his own gross (s.33(1) negligence, wilful default or misconduct, fraud or dishonesty. A court also has discretion to relieve an officer from liability (s.33 (5).

Secretary

A Secretary must be appointed in respect of the Foundation; the Secretary is an officer of the Foundation. If a person ceases to be Secretary, any liability incurred by him while acting as Secretary is still enforceable against him by the Foundation. The Secretary must be either (i) duly licensed as a provider of financial and corporate services under the Financial and Corporate Service Providers Act or as a trust company under the Banks and Trust Companies Regulation Act. The regulatory oversight of the Foundation will be conducted by the Regulator that has licensed the Secretary (s.2 (14).

Foundation Council

If the Charter provides for a Council, it may consist of two or more natural persons, a legal person and one or more natural persons or a legal person by itself. The Council must ensure that the Foundation complies with the provisions of the Charter, the Articles and the Act. The Officers are required to follow the instructions of the Council. The Council has the power to access the

books, records and accounts of the Foundation. It has the further right to (s.15):

1. be informed of all meetings of the Officers;
2. attend and be heard but not vote at meetings;
3. be included in the circulation of the Foundation’s business documents when they are circulated to the Officers;
4. be informed of any delegation of powers to Officers;
5. appoint an auditor.

Officers and auditors of the Foundation (and related parties) are not eligible to be appointed as members of the Foundation Council (s-14(3).

Registered Office

Prior to registration, the Foundation must have a registered office in The Bahamas, which is to be the address of the Secretary.

Capacity

The validity of an act done by the Foundation cannot be challenged on the grounds that it is outside the ambit of the Charter. However, a member of the Foundation or a beneficiary can bring proceedings to prevent acts which are beyond the capacity of the Foundation (s. 26).

Meetings

The Foundation is required to hold at least one meeting of the Officers each year (the “Annual Meeting”) (s. 35(1)). The Founder(s), members of the Council and any other supervisory person are required to be notified of the annual meeting.

Beneficiary’s right to information

A beneficiary who has an interest in all or some of the Foundation’s assets must be notified in writing by the officer of his interest and is entitled to receive information on request from the Foundation regarding the fulfilment of the objects of the Foundation and to inspect and copy the constitutional documents of the Foundation, any audit report and any minutes of any meetings of the

officers of the Foundation Council or any other supervisory body.

A beneficiary may apply to the court for an order of compliance if the Foundation does not supply the requested information or allow inspection of the documents.

As the assets of a foundation are its own, it appears that the entitlement of the beneficiaries to information is akin to those of beneficiaries with a vested interest under a trust.

Financial Records

The Act requires the Foundation to keep proper books of account at the registered office or some other location designated by the officers with respect to:

1. all sums of money received, expended and distributed;
2. all sales and purchases;
3. all assets and liabilities (s. 42).

The Act prescribes the information which must be set out in the books of account (s.43, s.44, s. 45, 46) and the signing of the Foundation's balance sheet (s.47).

Seal

A Foundation may, but is not required to, have a seal for use in The Bahamas (s. 29). If the Foundation has a seal, it must be affixed in the presence of an officer of the Foundation.

Confidentiality

Any person connected with the management of the Foundation, i.e. an Officer, a protector, a member of the Foundation Council, a member of any other governing body of a foundation, any other supervisory person, a counsel and attorney

for a foundation or an auditor of a foundation, has a duty of confidentiality to the Foundation and the beneficiaries and a breach of the duty will mean that such persons may be liable on summary conviction to a maximum fine of

\$50,000 or to imprisonment for a term not exceeding 3 years.

Forced Heirship

The Act (s. 68) contains similar provisions to those in the Trusts (Choice of Governing Law) Act, with respect to the non-recognition and enforcement of forced heirship claims.

Life of Foundation

A Foundation may be established for an indefinite or a definite period.

Indemnification

The Act provides for the indemnification of every Officer, Council Member, other supervisory person and protector of the Foundation who acts honestly and in good faith against all costs, charges, losses, expenses and liabilities incurred by him in the performance of his duties; the amount required for the indemnification attaches as a lien on the property of the Foundation, which has priority over other claims of the Foundation (s. 65). The indemnity is not available where such person has been guilty of gross negligence, wilful default or misconduct, fraud or dishonesty.

In Terrorem Provisions

The Act permits the Charter or Articles of the Foundation to provide for a beneficiary to forfeit his benefit if he challenges the establishment of the Foundation, the endowment of the Foundation's assets, the Charter or Articles or any decision of the Council or other supervisory persons (s. 66).

The Act also provides for the administration of assets, redomiciliation, liquidation, restoration and the ability to allow for instruments of disposition to a beneficiary to include restrictions against alienation.

Certificate of Good Standing

A Certificate of Good Standing (the "Certificate") can be obtained from the Registrar to certify that the name of the Foundation is on the register and that the Foundation has paid all applicable fees.

The Certificate would also indicate whether or not the Foundation is in the process of being liquidated, wound up, dissolved or removed from the register.

Removal and Restoration to the Register

If the Registrar has reason to believe that the Foundation registered under the Act no longer satisfies the requirements set out in s. 4(1) and 5, the Registrar must serve on the Foundation a notice that the name of the Foundation may be removed from the register. The Act then prescribes a procedure which allows the Foundation to respond to the notice. Failing a satisfactory reply, the Registrar will remove the name of the Foundation from the register (s. 54). There is also a process for restoration (s. 55).

Penalty

An officer of a foundation will be guilty of an offence punishable on conviction by a fine of \$10,000 or imprisonment for 2 years or both if he:

- i. falsely represents the financial position of the Foundation to anyone;
- ii. withholds financial information to which any person is entitled; and
- iii. falsifies any document to be delivered to the Registrar or required to be prepared in respect of the Foundation (s.72).

Uses

There is no doubt that private wealth advisers will see many advantages to the use of foundations. These include: charitable purposes, estate planning, preservation of family wealth and confidentiality.

Conclusion

The Act has positioned The Bahamas as one of the first common law jurisdictions to enable private foundations. Private foundations can be viewed as a hybrid of companies and trusts, combining the best asset protection elements of each.



By Heather L. Thompson
Partner

Heather L. Thompson is a partner at Higgs & Johnson in Nassau with extensive experience in foundations, international trust and company administration, counselling individual and corporate clients on the creation of trusts and ownership structures, and giving advice to trust companies on the development of new services and issues arising in trust administration. She has served as a consultant on several important pieces of financial services legislation, including Acts relating to Purpose Trust Foundations and Private Trust Companies. Her practice also includes wills, applications for probate, estates administration, issues in company law and international commercial contracts. Heather is a founding member and past chairperson of the Society of Trust and Estate Practitioners (STEP) in The Bahamas and a former member of STEP's Council. In 2003 the Bahamas Financial Services Board named her Executive of the Year.