

ESTABLISHING A BAHAMIAN FOUNDATION

A Foundation Charter (or alternatively a duly executed will) must exist in order to establish a Foundation in The Bahamas. It is the foundation's governing document and, as with a trust deed or articles of association of a company, the Foundation Charter sets out the parameters within which the foundation must be managed and governed.

The Foundation Charter deals with founder retained powers; appointment and removal of the foundation's officer(s), foundation council members, protector(s), beneficiaries; investment powers; dispositive provisions and provisions regarding the amendment and revocation of the charter. Such provisions and other legislative guidelines to the construction of the Foundation Charter are found in section 6 of the Foundations Act which includes provisions such as:

- 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";
- The name and address of the Founder or, the number and place of registration of the legal person and the address in The Bahamas for service if the Founder is a legal person;
- the endowment of the assets to be the initial assets of the foundation upon registration and a statement of those assets;
- a statement as to whether the foundation was established for an indefinite period or for a definite period;
- the name and address in The Bahamas of the Secretary to the foundation (the "Secretary") which must also serve as the address of the registered office of the foundation;
- a statement that the foundation's total assets are not less than US\$10,000.00 or the equivalent in another currency; and
- the signature of the founder or the signature of the authorized person(s) (in case of a legal entity) in the presence of a notary public or the Secretary.

The Foundations Act also creates the option for the Foundation Charter to be supplemented by the addition of foundation articles which can be used for the regulation of any governing body of the foundation. In addition, the foundation articles can provide for the identification of initial, future beneficiaries of a foundation, or remaining beneficiaries upon a winding up of the foundation. More importantly the foundation articles may address the distribution of assets made or to be made by governing bodies of the foundation.

REGISTRATION OF A BAHAMIAN FOUNDATION

Like the incorporation of a Bahamian company, a Bahamian foundation requires the reservation of the foundation name with the Registrar General prior to the submission of the required documentation. Upon reservation the Registrar will confirm that the Foundation name is valid for use and has been reserved for a period of 90 days.

Required Documents for Submission

An application for registration of the foundation need not to include the Foundation Charter and/ or foundation articles, however the application should include a statement signed by the Secretary of the foundation or any licensed financial service provider representing the Foundation which contains extracts from the charter of the foundation as follows:

- Name of the foundation
- Date of Charter and Articles (if any)
- Summary of the foundation's purposes
- Name and address in the Bahamas of the foundation for service of documents
- Name and address of the Secretary
- Name and address of the Foundation Council
- Address of registered office
- Value of initial assets, and
- Period for which the foundation will be active
- A list of the name(s) and address(es) of the Officer(s) of the foundation

In submitting the statement, the application for registration should also include a statutory declaration certifying to the Registrar General's Office that:

- The Foundation Charter contains a statement that the value of the assets of the foundation may not be less than \$10,000.00 or the equivalent in any other currency
- All of the requirements of the Foundations Act in respect of the registration of the foundation have been complied with The Foundation charter or articles may, but need not, be filed with the Registrar General's Office to complete the Registration process.

Upon approval of the documentation required by the Registrar, a Certificate of Registration will then be issued specifying the name and number of the foundation, and herein recognized as a legal entity of The Bahamas.

GOVERNANCE OF A BAHAMIAN FOUNDATION

As with a trust or company, the Bahamian foundation has a slate of key positions that can, or indeed must be filled. The main players are:

The Founder(s)

As mentioned earlier in the series the Founder plays an important part in the establishment of a foundation as he is responsible for the transfer of his assets to the legal ownership of the foundation by way of endowment or will. Prior to Registration, the Founder(s) must appoint at least one person (natural or legal) to be an officer of the foundation. In establishing the foundation the Founder may reserve powers as provided by the foundation charter, and he is also able to be a part of the foundation council, and as a foundation nominee. The Founder is also able to determine the length of time in which the foundation will exist.

The Foundation Council

The existence of a Foundation Council will depend on whether the foundation charter provides for one to be established. 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 Foundation Officers are required to follow the instructions of the Council. The foundation council must ensure that the Foundation complies with the provisions of the Foundation Charter, the foundation articles and the all Bahamian foundation legislation. It also has the power to access the books, records and accounts of the foundation and has further right to:

- be informed of all meetings of the Officers;
- attend and be heard but not vote at meetings of the Officers;
- be included in the circulation of the foundation's business documents when they are circulated to the Officers;
- be informed of any delegation of powers to Officers;
- appoint financial auditor(s) for the foundation accounting records.

The Foundation Officers

The Foundation Officers, in the absence of the Council, are the governing body of the foundation, of which their duties are primarily administrative rather than fiduciary in nature. An Officer of the Foundation may be a legal person. The Act lists those persons who cannot be Officers, such as an undischarged bankrupt. Furthermore Foundation Officers and Auditors of the foundation (and related parties) are not eligible to be appointed as members of the Foundation Council.

Officers are required to 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 Foundation 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 negligence, willful default or

misconduct, fraud or dishonesty. A court also has discretion to relieve an officer from liability.

The Secretary

A Secretary must be appointed in respect of the foundation and must be either a licensee under the Financial and Corporate Service Providers Act or a trust company under the Banks and Trust Companies Regulation Act. If a person ceases to be Secretary, any liability incurred by him while acting as Secretary is still enforceable against him by the foundation. Like a corporate secretary of a company the foundation secretary has a traditionally known variety of functions pertaining to the governance of the foundation which includes legislation compliance, ensuring that all fees are paid up to date, and communicating with the Foundation Council/ Protector/ Protectorate Committee on meetings held by the Foundation Officers.

The Protector/ Protectorate Committee

Should its existence be provided for by the foundation charter The Protector/ Protectorate Committee can play an active or passive role in the governance of the foundation, such as the protector's ability to appoint and remove members of the Foundation Council. Governance powers as delegated by the Foundation Charter may provide for the necessity of the Protector/ Protectorate Committee's consent for decisions made by the Foundation Council on behalf of the foundation itself.

The Beneficiary

Generally speaking a beneficiary is a natural person or legal entity which receives benefits such as assets, payments, etc. from a benefactor, in this case the foundation. A beneficiary who has an interest in some or all of the Foundation's assets must be notified in writing by the Foundation Officer of his interest and is entitled to receive information on request from the Foundation regarding the fulfillment of the objects of the Foundation and to inspect and copy the constitutional documents of the Foundation. Audit report and any minutes of any meetings of the officers of the Foundation Council or any other supervisory body are entitled to be inspected by the beneficiary.

Akin to beneficiaries holding vested interest in a trust, should the Foundation not supply the requested information or allow inspection of the documents by the beneficiary, the beneficiary may apply to the court for an order of compliance.

ADVANTAGES OF A BAHAMIAN FOUNDATION

The Bahamas foundation truly is a hybrid corporate medium, and is a great option to a trust in the right situations. It holds applications as an individual vehicle or as a part of an overall structure, and when used fittingly, can be an extremely useful tool.

Foundations have their origins in civil law countries, where the Church was considered to be a "Divine Foundation" and had the legal capacity to manage assets with which it was endowed. These public foundations were charitable organizations created by individuals for the benefit of society as a whole. Foundations were initially conceptualized for communal purposes.

WHAT IS A FOUNDATION?

The Foundations Act 2004 defines a private foundation as an entity established by a registered foundation charter (the "Charter"). 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).

First, 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).

The Foundation can be used as a corporate vehicle for the holding of private assets endowed on the Foundation for the benefit of the individual 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).

Establishing a foundation is often a preferred choice for individuals who do not feel comfortable using a third party trustee and wishes to maintain an element of control over the assets transferred to the foundation.

ADVANTAGES OF A FOUNDATION

Foundations have several features which make them, in various cases, the preferred option as an estate and inheritance planning tool. It is a distinct legal entity broadly recognized by civil law countries which provides easily recognizable liabilities and accountabilities. Further advantages include:

- Used for private, commercial and charitable purposes;
- The founder's ability to reserve powers as provided by the charter;
- Ownership of assets are placed within the foundation;
- No perpetuity period rules applicable to foundations, which provides for constant, unending succession if that is desired by the founder;

- Changes in a foundation's governing body does not change the legal ownership of the foundation's assets;
- It is able to sue and be sued in its own name.

- The reservation of powers to the founder is unlikely to lead a court to consider a foundation structure as a sham.

Other advantages include:

- No statutory requirement for an external audit unless the foundation's charter so provides;
- A nominee may serve as the founder;
- No need for Council members to be located in The Bahamas;
- In addition to a foundation council, the Bahamian Foundation may have some other governing body or supervisory person, such as a protector;
- The Founder may assign his reserved powers;
- A foundation established in another country may redomicile in The Bahamas and a Bahamian Foundation may redomicile in another country provided that country permits redomiciliation.
- Due to the lack of direct taxes in The Bahamas, Bahamian Foundations are ideal for both cross-border transactions and international estate and inheritance planning. In addition, all foundation officers, council members and other supervisory personnel benefit from statutory indemnification from all liabilities, losses and expenses incurred by a foundation, provided they acted honestly and in good faith.

USE OF FOUNDATIONS

As a hybrid between a trust and a company, a foundation creates unique structuring opportunities. With its ability to be use as a private, commercial and charitable corporate structure, foundations open the door for creative planning strategies. Here are a few examples:

To Retain Vested Interest in Family Companies

A foundation is ideal for family business owners who wish to retain ownership of shares of his/ her company for the benefit of family members employed by the company. By using a private foundation the founder would avoid potential complications which would have taken place if an ordinary trust was used.

Ownership of a Private Trust Company

The topic Private Trust Company (or PTCs) in a previous blog entry (*we invite you to search the **Lex Justis blog** for further information on PTCs*). Through the establishment of a private foundation, ownership of PTC shares by the foundation is possible. Particularly in the case of family held assets, The founder, members of his family and/or his advisors may be elected as directors of XPTC and assume responsibility for the management of XPTC.

In addition the directors of the PTC may take a more aggressive investment approach than an institutional trustee and would be prepared to undertake and possibly save on trust administration expenses. The founder does not, however, own PTC, the foundation does.

For Subordinated Debt

A private foundation may provide confidence regarding the ranking of priority amongst creditors involved in a loan transaction or on the issue of debt securities in insolvency. The charter of the foundation could clearly provide that the rights of one creditor will be subordinated to those of another existing creditor.

For Philanthropic Purposes

For persons/ corporate entities desiring to support a philanthropic purpose which may not be exclusively charitable, a private foundation may be a suitable choice. A founder may wish to endow a foundation whose purpose is to promote efforts to contribute financially to the cure of a medical disease or other charitable humanitarian benefits.

To separate voting and economic benefits

In case of a private foundation, a founder may endow the foundation with non-voting shares of a company for the benefit of his/ her family while personally retaining the company's voting shares. In this case, the foundation will receive the economic benefits from the non-voting shares for the family of a founder while the voting shares continue to be held by the founder in his individual capacity.

For an Employee Share Option Scheme

Foundations can be useful in the context of employee share option schemes. It can be a useful vehicle for repurchasing shares sold by shareholder employees and making them available to other employees interested in purchasing those shares. This is useful for private companies, in which the sales of shareholdings may be very difficult or legally impossible to arrange. There may also be tax advantages for private companies and the employees in certain jurisdictions.

To Hold the Benefit of Warranties and/or Collateral

A private foundation would hold the benefit of warranties for a wider and/or changing class of investors. In cases where a company wishes to borrow funds from a group of lenders, and it

is anticipated that the members of the consortium will change periodically, a foundation can be established in order to proportion the size of the loan for all lenders. As lenders change, they are excluded or added as beneficiaries of the foundation.