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THE BAHAMAS: A COMPLETE AND COMPELLING CHOICE

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on The Bahamas financial
services industry

EDITION 3

*'The Bahamas: A World
Contender' and 'Estate
Planning: a Source
of Certainty in
Uncertain Times'*



INTRODUCTION

The Bahamas – where past, present and future meet seamlessly

The Bahamas has managed to remain a competitive financial jurisdiction by staying true to its roots and pedigree, conforming to the highest regulatory standards, keeping abreast of emerging market segments and responding to clients' ever-changing needs.

In this mini-report, we recall the jurisdiction's track record of more than 80 years in financial services. It is now the venue for 270 banks and trust companies, including seven of the world's top eight private banks and 35 of the top 100 global banks, not to mention 800 funds and more than 60 fund administrators.

While other jurisdictions languished during the pandemic years of 2020 and 2021, The Bahamas experienced an avalanche of legislative reform. The *Financial and Corporate Service Providers Act 2020* has revolutionised corporate and administrative services law. The new *Banks and Trust Companies Regulations Act 2020* has consolidated and modernised the law regulating local banks and trust companies. Meanwhile, in the past few years, the jurisdiction has promulgated new laws to meet international standards regarding economic substance, the removal of preferential exemptions and the automatic exchange of tax information with other countries in line with the rules of the European Union and the Organisation for Economic Co-operation and Development. This prompted the EU to remove The Bahamas from its list of uncooperative jurisdictions for tax purposes in March 2020.

We look at the services – all of which spring from the ancient English law of agency – that allow carers to take charge of HNWIs in their golden years or in the event of accidents or mentally debilitating illnesses. The ancient power of attorney has always allowed someone to appoint a relative or someone else to deal with his business affairs. However, an enduring power of attorney – added to the law in the 1990s – lets that person or firm look after the loved one's affairs even after he succumbs to dementia, Alzheimer's disease or some other malady. This discretion is to be found in the robustly drafted *Bahamian Powers of Attorney Act*. Meanwhile, a health care and personal welfare statement or declaration can help members of a wealthy family determine their loved one's preferences about the course of treatment, even if illness or injury has rendered him speechless. Taken together, these instruments of good estate planning are a source of comfort and certainty amid unsettling times.

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ADVERTISING SUPPLEMENT

THE BAHAMAS: A WORLD CONTENDER

* by Wendy Warren, the managing director of Caystone Solutions

By any standards, international financial centres have faced unprecedented challenges over the past several years and even in the most recent months. The Bahamas, however, continues to be among the world's contenders in international financial services.



The ongoing COVID-19 pandemic, recent economic turbulence and never-ending scrutiny by international bodies have intensified the business and competitive environment confronting global financial centres. However, despite these conditions and the associated pressures, The Bahamas continues to be among the world contenders for international

financial services. This resilience is a hallmark of the financial services sector in The Bahamas. No matter the state of the economy, no matter what changes are occurring in the financial services and regulatory landscape, The Bahamas has always maintained its status as a global leader by being able to adapt to the new normal.

Three factors contribute to The Bahamas' hardened resilience and ability to compete successfully on the global stage: it remains true to its roots and pedigree; it has adopted the highest standards for compliance, innovation and client-centric responsiveness; and it is focusing on and embracing developments that are emerging in the New Economy.

This trifold formula has been paramount in the Bahamas' ability to attract and welcome international families, capital and business to its shores. The demand for residences and talent that The Bahamas offers, which is being embraced by family offices and those seeking wealth management services, underscores why the location, regulatory environment and forward-looking legislation of the Bahamas are gaining strength and acceptance as its compelling core attributes.

A JURISDICTION THAT REMAINS TRUE TO ITS ROOTS

The Bahamas is home to more than 270 licensed banks and trust companies, including seven of the world's top eight private banks and 35 of the top 100 global banks. These financial institutions deliver various services, including private banking, trusts, fund administration, accounting, legal, e-commerce, insurance, and corporate and maritime services. North American banks have been doing business in The Bahamas for more than a century, and European and Swiss banks have deep roots established over more than 70 years.

Financial institutions from other regions with growing economies recognise the advantages of operating in The Bahamas. Additionally, there is an excess of 800 funds licensed in The Bahamas and more than 60 fund administrators.

"Financial institutions from regions with growing economies are recognising the advantages of operating in The Bahamas"

With a track record of more than 80 years in financial services, few jurisdictions offer the wealth-management experience of The Bahamas. This heritage is the basis for the robust legal framework cultivated for financial services. Over the decades, this investment climate has been nurtured and a stable and predictable business environment anchored by the thousands of Bahamian professionals who work side by side with expatriate colleagues in the hundreds of service providers that call The Bahamas their home.

There is a sound and proven infrastructure in place that has been built and modernised over the last 20 years. This has facilitated a highly competitive and market-responsive set of financial service offerings and has, at the same time, allowed The Bahamas to move forward in a very confident fashion into the New Economy and its various elements.

One of the critical elements of the Bahamas infrastructure is a solid public-private partnership where communication is open and frank among all three participants involved with this agenda: government, regulator and private sector. This public-private partnership facilitates our engagement in creating and investing in our wealth management pedigree and areas of new economies such as digital assets, carbon credits, and ESG-relevant solutions.

THE HIGHEST STANDARDS FOR INNOVATION, CLIENT-CENTRIC RESPONSIVENESS AND COMPLIANCE

After 2000, as a financial centre, The Bahamas had to become more conscious of and proactive in reflecting global norms. As a result, our regulatory foundation has become vital. From a worldwide connectivity perspective, we see this transition paying dividends today in

light of what we endured in the past two decades. It has been a dynamic period in that we have had to be fearless in striking the right balance between being compliant and aggressive. We will tweak if we perceive a need to tweak, but we will not stand still. We will always be responsive and reflect the needs of our clients and our partners.

Foundations are a prime example of this fearlessness. When The Bahamas made specific changes to facilitate the introduction of foundations, we received significant pushback. Some people said: "Wait a minute – foundations – are these not tools for inappropriate behaviour?"

However, we were very confident that our regime was sufficiently strong to provide a robust, well-regulated environment in which foundations could be used appropriately. The perception of foundations might have been negative elsewhere, but now that some ten years have passed, we can see that other common law jurisdictions have followed suit.

Although 2020 and 2021 have been unprecedented years for many industries, they have brought in a host of new and amended regulations for local financial and corporate service providers who carry the potential to transform the very landscape of the industry in The Bahamas.

The *Financial and Corporate Service Providers Act 2020* enhances the legal and regulatory framework for those who provide corporate and administrative services. Meanwhile, the new *Banks and Trust Companies Regulations Act 2020* consolidates and modernises the law that regulates local banks and trust companies and enhances governing powers for The Central Bank of The Bahamas. The introduction of the new *Investment Funds Act 2019*, which further improves the regulatory framework of Bahamian investment funds, allows for the appointment of international fund administrators and generally rationalises the responsibilities of all the key parties.

"If we perceive a need to tweak, we will tweak, but we will not stand still"

From the perspective of a level playing field, The Bahamas has passed a compendium of legislation within the past few years to meet international standards regarding economic substance, the removal of preferential exemptions and the automatic exchange of tax information to meet the European Union's and OECD's criteria for tax matters. This resulted in the EU removing The Bahamas from its list of uncooperative jurisdictions for tax purposes in March 2020. In addition, The Bahamas maintains the highest standards in the fight against money laundering, terrorist financing and other identified risks and therefore has been making significant strides in the fight against financial crime.

The anti-money laundering, counter-financing of terrorism and counter-proliferation legislative, regulatory and enforcement landscapes have been thoroughly reviewed and strengthened, with The Bahamas being deemed compliant or largely compliant with 38 out of 40 standards established by the Financial Action Task Force (FATF).

The Office of The Bahamas Attorney General will be submitting a re-rating of the final two of the FATF's 40 Recommendations to the Caribbean FATF – one addressing not-for-profits and another addressing the effective regulation and supervision/monitoring of virtual asset services providers or VASPs, working with the Securi-

ties Commission of The Bahamas on the latter. These latest changes ensure compliance with all 40 of the FATF's recommendations.

All of these efforts enhance the risk profile of The Bahamas as an international financial centre, making it an attractive jurisdiction for financial services.

THE NEW ECONOMY

Despite the recent turmoil in the crypto market, The Bahamas remains bullish about the mid-to-long-term prospects of digital assets. It was one of the first countries in the world to introduce a digital currency in the form of the Bahamian Sand Dollar. The recently-introduced *Digital Assets and Regulatory Exchange Act 2020 (DARE)* was developed with a view to how we approach the broader picture. *DARE* is not a single stand-alone solution but rather a coming-together of the overall features of the jurisdiction, such as private banking and funds, the better to establish a broader-based FinTech capability. It is just the latest example of the strength and flexibility of the jurisdiction, the weaving together of elements to create a financial services fabric that is durable and responsive.

The emergence of The Bahamas as a digital assets hub has resulted in companies such as FTX establishing their global headquarters in Nassau and has generated a strong interest in Bahamian corporate vehicles that can house the operations of digital-asset businesses.

At the same time, The Bahamas, always faithful to its market-responsive DNA, is keeping pace with other developments in its drive to be a globally important hub for digital assets. The capital markets regulator – the Securities Commission of The Bahamas – is spearheading a raft of initiatives to advance this transformation, including amendments to *DARE* that will address key developments that have emerged since its promulgation.

However, the new Bahamian economy involves much more than leadership in digital assets and companies being incorporated into the country's wide range of financial service providers. The sector's sustainability has implications for the broader economy. The diversity within the financial services sector in terms of product offerings contributes meaningfully to the livelihood of the Bahamian people and the country's economy. This contribution will become more pronounced as the country pivots to invest in diversification, focusing on the "blue and orange" economies, which have been identified as pathways for more significant economic expansion, new business opportunities and wealth creation for Bahamians and international investors alike.

The Bahamas is looking to modernise its fishing industry by generating ocean sciences and marine conservation opportunities while sustainably developing marine biotechnology, aquaculture and deep-sea exploration initiatives. Renewable energy industries are also on the horizon. Meanwhile, as a vital component of the Bahamian economy, the tourist sector is looking to design a new tourism model which fully integrates culture and the creative industry in The Bahamas.

Tourism and financial services actively support these initiatives domestically and internationally, foreshadowing the time when the country's traditional economic engines link up with and engage the country's New Economy, with benefits accruing to both.

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ADVERTISING SUPPLEMENT

ESTATE PLANNING: A SOURCE OF CERTAINTY IN UNCERTAIN TIMES

***By Sharmon Ingraham, a Partner at Higgs & Johnson**

When a high-net-worth individual becomes incapacitated, her indisposition can interrupt the smooth management of her resources and can even cause discord between members of her family. Good estate planning – at which Bahamian lawyers and financial coaches are adept – can anticipate these problems, usually through the creation of a will, an enduring power of attorney and/or a health care and personal care declaration.



These documents – which can be used in combination with each other – enforce the wishes and directions of the person in question during any period of incapacity, whether physical or mental. The individual, known in some cases as the donor, might be unable to communicate with people because she has had a stroke or an accident or because medical

treatment has incapacitated her. She may be in 'lockdown' at a time when her business requires hands-on management. One of her offspring might have been trying to convince her to fund a business venture before her debilitating accident occurred, but other relatives might be trying to prevent this from happening now that the accident has happened. Her relatives, alternatively, might be vying to control her resources in the absence of any clear legal arrangements to cope with her incapacity. It is also likely that she will eventually grow old and cease to be able to decide where she ought to live, who should look after her and who should take charge of her business. The purpose of the documents is to forestall these problems by enforcing written decisions that the donor made before her incapacity.

The pandemic has brought much uncertainty into wealthy people's lives. They are not able to predict its future course but they can, at least, plan for the future of their wealth and (in the event of incapacity) of their everyday lives. They are more anxious to do so now than they were before the outbreak. Many have made it a priority to organise their affairs, taking steps to have their wishes documented and ready to be effected if necessary. Many people consider wills to be the only documents that they need to help them organise their estates.

Although the creation of a will is a prudent step, it is effective only between the date of death and the moment when the estate is wound up. To make sure that somebody is in charge of things when the high-net-worth individual is still alive but cannot express her wishes very well, she ought to tell her lawyers to prepare other documents while she is still capable. They should pay special attention to

the creation of powers of attorney, enduring powers of attorney and health care and personal welfare declarations. These are all parts of proper estate planning.

A POWER OF ATTORNEY

The law of agency comes into play when someone engages someone else to act on her behalf. The ancient power of attorney is founded in this sector of the law. It gives a person appointed by its terms the authority to deal with the financial and business affairs of another. The donor in question may – or may not – give this power to a relative. She might grant it to that person generally or she might limit it to a specific transaction or time frame. This traditional power of attorney, in its original format and usage, is terminated by any period during which the donor is mentally incapacitated – perhaps if she suffers from a mental disorder, dementia or Alzheimer's disease. There is, however, a more recent version of the power in British and Bahamian law.

AN ENDURING POWER OF ATTORNEY

An enduring power of attorney, created by the *Powers of Attorney Act, Chapter 81, Statute Law of The Bahamas*, makes it possible for a power of attorney to remain in existence and valid after a person has become mentally incapacitated. The use of powers of attorney and enduring powers of attorney permits the financial and business affairs of the donor to continue uninterrupted during periods of absence, confinement, quarantine or incapability and enables the donee to act on her behalf.

“The pandemic has brought much uncertainty into wealthy people's lives”

A health care or personal welfare declaration enables the donor to convey her wishes and desires regarding medical treatment, the extent of any medical intervention and her personal care. In relation to periods of confinement, quarantine or inability, whether as a result of health concerns, restricted movement or otherwise, these additional documents can ensure that the plans and aspirations of the donor are discerned and fulfilled.

Section 4 Powers of Attorney Act, which introduced enduring powers of attorney into the law of The Bahamas, provides:

“(1) The authority of a donee given by an instrument creating a power of attorney that:

- provides that the authority is to continue notwithstanding any mental incapacity of the donor; and
- is signed by the donor and a witness to the signature of the donor, other than the donee or the spouse of the donee, is not terminated by reason only of the subsequent mental incapacity of the donor that would but for this Act terminate the authority.”

The *Powers of Attorney Rules*, established in accordance with the Act, go into more detail. The instrument must be drawn up in a certain way. Both the person who appoints someone to deal with her financial and business affairs and the person(s) she is appointing must sign it. It must then be lodged at the Supreme Court Registry. From then on, subject to any restrictions in the document, the appointed person(s) may use it and rely on it.

If, however, someone has to make decisions about health care and personal care, a power of attorney or an enduring power of attorney cannot apply. The scope of the authority derived from an enduring power of attorney is limited to property, business and financial matters. If it is desirable to convey wishes or instructions for medical or health-care decisions or other personal matters, these ought to be set out in a statement that declares the person’s directions.

A HEALTH CARE AND PERSONAL WELFARE DECLARATION

Many people consider it unthinkable and/or inhumane to be placed on machines or given other methods of treatment to sustain bodily functions when there is no detectable brain function, while other people want every medical resource to be available to sustain life for as long as possible. A health care and personal welfare statement or declaration can help members of a family determine their loved one’s position with regard to such treatment.

In some jurisdictions, such documents are termed ‘living wills’ or ‘advanced directives’ and are supported by legislation enacted for that purpose. There is, as yet, no Act in The Bahamas that mentions or permits the creation of such instruments specifically, but a person can declare her wishes in accordance with the *Oaths Act, Chapter 60, Statute Law of The Bahamas* with the aim of preventing uncertainty and conflict from plaguing her family after she becomes vulnerable.

“Many people want every medical resource to be available to sustain life for as long as possible”

In creating a health care declaration, one may derive guidance from the decisions of the courts of the United Kingdom. When considering the issuance of such instruments regarding medical treatment, Lord Donaldson of the English Court of Appeal held, in *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, that:

“An adult patient who, like Miss T, suffers from no mental incapacity, has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the

treatments being offered...This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent.”

In another English case, *Re C (adult: refusal of medical treatment)* [1994] 1 All ER 819, it was held that the court may exercise its inherent jurisdiction and rule, through an injunction or a declaration, that an individual is capable of refusing or consenting to medical treatment. This can include future medical treatment.

Finally, Mr Justice Munby stated in *HE v A Hospital NHS Trust and another* [2003] EWHC 1017 (Fam):

“I can summarise the law as follows:

- There are no formal requirements for a valid advance directive. An advance directive need not be either in or evidenced in writing. An advance directive may be oral or in writing.
- There are no formal requirements for the revocation of an advanced directive.
- An advance directive is inherently revocable. Any condition in an advance directive purporting to make it irrevocable...and any provision in an advance directive purporting to impose formal or other conditions upon its revocation, is contrary to public policy and void.
- The existence and continuing validity and applicability of an advance directive is a question of fact. Whether an advance directive has been revoked or has for some other reason ceased to be operative is a question of fact.
- The burden of proof is on those who seek to establish the existence and continuing validity and applicability of an advance directive.
- Where life is at stake, the evidence must be scrutinised with especial care. Clear and convincing proof is required.
- If there is doubt, that doubt falls to be resolved in favour of the preservation of life.”

This makes it clear that it is permissible for someone to make directions for medical and health care as well as for personal care. For certainty and ease of reference, the authorisation ought to be in writing. There is no reported Bahamian case law on the issue as yet, but the expression of a person’s wishes, instructions and directions for medical treatment at some time in the future when she cannot communicate instructions verbally can help members of her family and medical professionals draw up a treatment plan. If the declaration addresses personal care, her wishes regarding such matters as living arrangements (whether to receive care at home or go to a residential institution) will help her family avoid conflict about “where grandma should live.”

Good estate planning can offset problems that might arise when the donor is away from home for a long time. By creating a will, an enduring power of attorney and/or a health care and personal care declaration, she can ensure that her wishes and directions are clearly discerned and effected during any periods of incapacity, whether physical or mental. The existence of such essential estate-planning documents can also ward off conflict and discord in her family. They are a source of comfort and certainty in the midst of uncertain and unsettling times.

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