

A Taste for Adventure

Sheila Hailey, wife and editor to renowned author, Arthur Hailey, tells FOCUS about her famous husband and moving to The Bahamas

Private Client Edition '07

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Sheila Hailey in the garden of her Lyford Cay home in The Bahamas

'Adventure', she called it, and 'coincidence'.

She certainly did not *plan* to marry one of the world's most prolific novelists, or to settle with him at Lyford Cay in The Bahamas. But a life-long love of adventure caused Sheila Marjorie Dunlop, age 21, to board a steam-ship bound for Toronto where, after three months, she met one Mr A F Hailey. She looked back once, but only very briefly; and the rest, as they say, is history.

"It was strictly for the adventure," Sheila explains now of her decision to leave post-war England for Canada. To be honest, it could have turned out very differently: she also had the option of migrating to Australia. British nationals were encouraged to populate the island continent and were offered a one-way ticket for only £10. The emigrants were, however, asked to remain there for at least two years.

"I felt that I wouldn't be fully independent." She chose instead to book herself a £35 one-way sea passage to Toronto—unheard of in 1949, for she was unmarried and had no relatives in 'the New World'. This was not her first major move, howev-

er. She had been evacuated, along with all of the children in London to the country to avoid the buzz bombs and rocket strikes of the second World War. This trip was decidedly different of course, for she traveled of her own volition, and it was here that she would meet the man who was to become *the* Arthur Hailey.

We were flying to The Bahamas and on the plane was E P Taylor who started Lyford Cay. When he found that we planned to move to Nassau, he said, 'well, you have to come out and have a look at Lyford.'

It was refreshing for the first time to hear his voice—clear and crisp and in the King's English. New to Toronto, and working in the stenography department of a Toronto magazine publisher, she took delight in transcribing the letters dictated by the junior executive with the familiar accent.

They married in 1951 after a fascinating courtship, which included several scenes that seemed to be written for the movies (or at least a good novel): Sheila, determined to stick to her original plans to return to London and find an editor's job on Fleet Street, started for home (via New York), leaving Arthur running along the platform at the train station. "You will come back won't you?", he begged.

She did come back and they lived happily in Toronto for 15 years while he became known to the world and she worked diligently as his first editor, wife and mother to their three children. He had penned several successful TV plays and was researching the would-be bestseller novel *Airport* in California's Napa Valley when he sent a telegram to Sheila in Toronto notifying her that he had bought property in wine country and wanted the family to settle there. "He always loved adventure," she says; "he had a habit of making things exciting."

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The information contained in this newsletter 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 newsletter can in no way serve as a substitute in such cases.

For additional copies of FOCUS, please contact Calise Barry at 242 502 5200 or at cbarry@higgsjohnson.com.

Estate Planning for Asset Protection

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Estate planning is the process of accumulating and disposing of an estate to maximise the goals of the estate owner. The ultimate objective is to ensure that the estate passes to its intended beneficiaries in a tax efficient manner, thereby avoiding or minimising probate court involvement.

At common law, an estate comprises tangible assets such as real estate, stocks, bonds and other property, or indeed anything of value to which the deceased person was entitled or had a claim during his or her lifetime.

The property which comprises a deceased person's estate passes by will or, if there is no will through the laws of intestacy. A will is most commonly used for the distribution of assets of a deceased person. Before property can be disposed of pursuant to the terms of a will, the will must be probated. Probate can be a lengthy and expensive process and does not offer some of the protections of a foundation or trust. As a result, modern estate planning looks beyond just writing wills and engages a number of other "tools" including trusts, private trust companies and foundations, each considered below.

Private Trusts

A trust imposes a binding obligation upon a person ("a trustee") to deal with property over which he has control ("the trust property"), for the benefit of persons ("the beneficiaries"), any one of whom may enforce the obligation.

The person who creates the trust ("the settlor") can tailor the terms of the trust to his or her wishes, once the terms are not uncertain or illegal, and thus a trust may be used in a variety of ways. For instance, a trust may be used to provide for the needs of a family, to ensure that a child's future educational and financial needs are met, to preserve a child's inheritance until he or she reaches maturity, or to care for incapacitated beneficiaries.

A settlor may transfer assets to the trust during his lifetime or may provide for assets to be transferred immediately to beneficiaries upon the happening of a certain event, for example the death of the settlor, thereby eliminating the

need for probate or letters of administration when the settlor dies.

Most trusts formed in The Bahamas are private trusts for individual families although Purpose Trusts are also available.

A few distinguishing features of a Bahamian private trust are:

- i. *Asset Protection*: Under The Fraudulent Dispositions Act, 1991, the transfer of assets into a Bahamian trust can only be challenged as being intended to defraud creditors if the challenge is brought within two years of the assets being transferred;
- ii. *Relief from Forced Heirship Laws*: The Trusts (Choice of Governing Law) Act, 1989 protects assets held in a Bahamian trust from forced heirship claims or the enforcement of other foreign law rules that are adverse to the free disposition of property. Foreign judgments which relate to heirship or matrimonial claims are unenforceable in a Bahamian Court;
- iii. *Long Trust Period*: Property may remain in a Bahamian trust for up to 150 years;
- iv. *Retention of Powers*: A settlor is allowed to retain certain powers without rendering the trust invalid or causing it to be treated as a will, e.g., to appoint trust property and manage investments; and
- v. *Recognition of the "Protector"*: The Trustee Act gives the often utilised position of 'protector' legislative sanction. The protector provides an additional safeguard for settlors and beneficiaries and may be conferred with any powers including the power to remove trustees, appoint new or additional trustees and exclude any beneficiary of the trust.

Private Trust Companies

Where the settlor wishes family members to retain a degree of involvement in decisions relating to a trust, it may be desirable to utilize a Private Trust Company ("PTC") as trustee of a family trust or of a series of trusts. The main distinction between PTCs and institutional trust companies is that PTCs allow settlors, beneficiaries and trusted family advisers to have more involvement in the administration of a private trust by representation on the board of directors of the PTC. This allows the family to participate actively in decisions by the PTC trustee, including those relating to the control and

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Much of the legislation refers to exemption from taxes, however, it is important to note that at the moment, there are no income or capital taxes in place in The Bahamas.

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Estate Planning cont'd

management of companies owned by the trustee, giving comfort to the settlor that his or her objectives in creating the trust will be met.

Under the new legislation, a licence is not required for the operation of a PTC.

A PTC can also be used as a vehicle to make family members aware of the wealth and business interests owned by the trustees. Moreover, a PTC allows for speedier decision making. The policies and procedures of an institutional trustee may result in delays with regard to distribution requests and investment decisions.

The legislative regime for the administration of PTCs in The Bahamas came into effect on 27 December 2006 when the Central Bank of the Bahamas (Amendment) Act, 2006, the Banks and Trust Companies Regulation (Amendment) Act, 2006, and the Private Trust Companies (Private Trust Companies) Regulations, 2007 came into force. Under this new legislation, a licence is not required for the operation of a Bahamian PTC.

A few distinguishing features of a Bahamian PTC are as follows:

- i. A PTC has the advantage of a perpetual life span;
- ii. A PTC may act as trustee to trusts (including trusts already in existence) settled by persons related by blood or other family relationships ("Designated Persons");
- iii. The beneficiaries may include persons who are not family members of Designated Persons;
- iv. Directors of a PTC are not required to be resident in The Bahamas; and
- v. There is no requirement for a PTC to establish a physical presence in The Bahamas.

Foundations

Foundations may be used to shelter assets from high taxes and maximise asset protection while allowing an individual to maintain control over his assets and provide for the orderly devolution of his worldly goods upon his death. Foundations are often used for tax planning, asset protection, preserving family wealth and preserving confidentiality.

The term "foundation" originated in civil law jurisdictions, where it was used to describe a distinct legal entity. Like a company, it is created by registration in a public registry and the issuance of a certificate of registration. It holds assets in its own name for the purposes set out in its constitutional documents. However, unlike a company, a foundation does not have shareholders. The major distinction between a trust and a foundation is that a foundation's administration and operation are carried out mainly in accordance with contractual rather than fiduciary principles.

The Foundations Act, 2004 (the "Foundations Act") which came into force in The Bahamas on 22 October 2004, provides for the creation of private foundations in The Bahamas. A private foundation is established by a registration of statement. It is a legal entity, able to sue and be sued in its own name, and is resident and domiciled in The Bahamas. Once assets are transferred by the founder, (i.e., the person who provides the initial capital minimum of USD \$10,000) to the Foundation by an endowment, they cease to belong to the founder and become the assets of the foundation, but do not become the property of any beneficiary until they are distributed. Private foundations can be viewed as a hybrid of companies and trusts, combining the best asset protection elements of each.

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Publishing Alert

H & J attorney Heather L. Thompson (centre) is The Bahamas contributor (with Nadia J Taylor, left) to *A Practical Guide to the Transfer of Trusteeships*, scheduled for release in May 2007 by STEP worldwide. The book is of particular relevance to The Bahamas trust industry as it treats various issues that arise in connection with the transfer of trusteeships. Ms. Thompson also discusses "Uses of Private Foundations in The Bahamas with a View to the Proposed Amendments to the Foundations Act, 2004" in *Trusts & Trustees* (with Christie E Cash, right). The article introduces possible uses of the Bahamian foundation and provides an introduction to the proposed amendments to the Bahamian Foundations Act, 2004.

Living and Working in The Bahamas

Kelli K A Ingraham with Jillian T Chase-Jones
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The significant increase in foreign home owners in The Bahamas over the past 10 years has created a need for these individuals to enter the country more easily. The Immigration Act, 1967 and subsequent amendments (the "Act"), codified the laws relating to foreigners living and working within the jurisdiction, balancing the need to expand the economy in order to keep pace with changing economic tides with the need to protect indigenous labour.

A Permanent Residency Permit is valid for the holder's lifetime, unless it is revoked in accordance with the provisions of the Act.

The Bahamian government, in order to promote foreign investment, is encouraging wealthy foreigners to buy or build homes in The Bahamas.

LIVING IN THE BAHAMAS

Presently, non-Bahamians may enter The Bahamas as visitors for an initial period of up to two months. Visitors are not permitted to engage in any form of gainful employment for the duration of their stay. The following are categories of permits which allow non-Bahamians the opportunity to reside for extended periods in The Bahamas:

- Annual Residence Permit;
- Permanent Residency Permit; and
- Homeowner's Residence Card.

Annual Residency

An annual residence permit allows the holder to reside within The Bahamas for periods not exceeding one year, and may be reviewed annually. It allows individuals interested in spending an extended period of time within the country the opportunity to travel abroad and return with easy access during the period of the permit. The annual fee for this permit is \$1,000 for the head-of-household and \$25 for each dependent.

Where the spouse of a Bahamian citizen applies for annual residency, a resident spouse permit may be issued (provided that they have not been married for more than five years). The resident spouse permit is issued for a maxi-

mum of five years; there is a one-time fee of \$250 for the permit.

Permanent Residency

A permanent residency permit allows a non-Bahamian who is over eighteen years of age and of good character to reside and work permanently in The Bahamas. Consideration of permanent residency applications is accelerated for international investors and owners of residences valued at \$500,000 or more. The government fee for this permit is \$10,000 for the main applicant and \$100 for his/her spouse and dependent minors.

Spouses of Bahamian citizens may apply for a Certificate of Permanent Residence with the right to be gainfully employed. In the case of foreign husbands, however, an application can only be made after five years of marriage. A permanent residency permit is valid for the holder's lifetime, unless it is revoked in accordance with the provisions of the Act.

Homeowner's Residence Card

Non-Bahamians who own homes in The Bahamas may apply for an annual homeowner's residence card which bears the holder's picture. Such a permit may be obtained within a few days of purchasing a home in The Bahamas and entitles the owner, spouse and any minor endorsed on the owner's card to enter The Bahamas and reside here for as long as the card is valid. The government fee is \$500 per annum. This card is renewable on an annual basis.

WORKING IN THE BAHAMAS

The Act provides for the issuance of work permits for various periods of time and allows individuals to engage in a variety of employment opportunities. A person seeking to employ a foreign worker should apply to the Director of Immigration, who has an absolute discretion to approve or decline the application.

New Legislation/Regulations in the Pipeline

FOUNDATIONS

As a result of industry experience in working with the Foundations Act, 2004 ("the Act"), a number of changes have been proposed to the legislation. Under consideration are changes to provide for less disclosure of public information, the appointment of a foundation agent, to make a foundation council necessary if there is a foundation agent but no officers of the foundation, and defining more clearly the rights of a beneficiary to information.

Disclosure of Public Information

It is proposed that the names and addresses of the founder and members of the foundation council be kept at the registered office of the foundation and not be a matter of public record.

Foundation Agent

It is proposed that the foundation agent shall be a duly licensed financial and corporate service provider under the Financial and Corporate Services Providers Act or a licensed trust company under the Banks and Trust Companies Regulation Act, but it shall not be an officer of the foundation. If there is a foundation agent, there would be no need for a secretary. The appointment of a person as foundation agent may not be assigned.

Under the proposal, the foundation agent would have the same duties and responsibilities as its secretary relating to anti-money laundering and counterterrorism regulations and ensuring that the foundation complies with statutory requirements. In the event that a foundation which has a foundation agent also has a secretary who does not perform any of the statutory duties prescribed by the Act, such secretary need not be a licensed financial and corporate service provider or trust company under the amendment.

A foundation agent can be excluded from all liability except for fraud or willful misconduct whereas an officer or council member cannot be excluded from liability arising in respect of their acts or omissions which are attributable to fraud, gross negligence, willful misconduct or dishonesty.

Foundation Council

Under the Act, the appointment of a foundation

council is optional. However, where no officers are appointed, the amendment requires that the charter provide for the appointment of a council. Such foundation council may consist of (i) two or more natural persons (ii) a legal person and one or more natural persons, or (iii) a legal person by itself. Council members need not be located in The Bahamas.

The functions of the council would be similar to those of the Board of a company. They include ensuring that the foundation and its officers comply with the charter and articles, and supervising the officers in their management of the foundation. In addition, the council would be entitled to (i) access to the books and records of the foundation, (ii) be informed of all meetings of the officers, (iii) attend and be heard but not vote at such meetings, (iv) be included in the circulation of foundation documents, and (v) be informed of any delegation of powers to an officer.

Rights of a Beneficiary

It is proposed that a beneficiary of a foundation who has a vested interest in the assets of the foundation be given the right to request certain information. Such information would include the charter, the articles, any audit report, and any minutes of any meeting of the officers or the council or other supervisory body. In addition, the proposed amendment would allow for information or documents relating to the vested interest of the beneficiary in which the terms of the foundation or any exercise of power or discretion are to be found and all financial statements of the foundation as they relate to the said beneficiary's interest to be viewed by the vested beneficiary.

The amendment would also give a beneficiary the right to confidentiality. The officers of the council, whether upon request of the other beneficiaries or in the officers' absolute discretion, would take all reasonable steps to secure the confidentiality of other beneficiaries when disclosing the aforementioned information to a beneficiary. Information cannot be disclosed to a third party without the express or implied consent of a beneficiary. If a beneficiary is a minor or is incapacitated the consent of a parent or legal guardian will be required.

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Why Create an Enduring Power of Attorney?

Tracy Wells with Heather L Thompson

Unexpected serious illness or mental incapacity may result in an inability to manage your affairs. Therefore, it may be as sensible for people in the best of health to consider creating an enduring power of attorney ("EPOA"), as it is for them to have an up-to-date will.

What is an EPOA?

An EPOA is a formal document in which you grant someone ("the Attorney") the power to deal with your financial affairs and property. The Attorney must be over 18 years of age. An EPOA can be used as long as it is registered at the Supreme Court Registry of The Bahamas. The EPOA takes effect from the time it is registered unless it specifies that it is only to be used if you become mentally unable to manage your affairs in the future. Essentially, an EPOA allows you to decide who would deal with your affairs if you become mentally incapacitated.

Who can make an EPOA?

Any adult can make an EPOA, as long as he/she understands its legal effect. The test is whether you understand that:

- The Attorney can take complete power over your affairs if you become mentally incapable of managing them yourself;
- The Attorney will, in general, be able to do anything with your property that you could have done;
- The power will continue if you become mentally incapable.

Who should you appoint as your Attorney?

It is important to remember that the person you appoint as your attorney can have complete power over your money, savings, investments and property. If you decide to give the Attorney

general authority with no restrictions, he or she will be able to sign your cheques, pay your bills, deal in your shares or buy and sell houses with the authority you have appointed to them. You should bear in mind that if you become mentally incapable, you will not be able to monitor what he or she is doing. So, when choosing your Attorney, consider how well he or she handles his or her own financial affairs and whether you can trust him or her to act in your best interest. It is important to note that powers of attorney and EPOAs deal only with property and cannot extend to personal care. You should remember that an EPOA is not the equivalent of a living will as present Bahamian law does not provide for such an instrument.

Appointing more than one Attorney

You may also consider appointing more than one Attorney as a safeguard. When you appoint more than one Attorney, you can appoint them jointly so they have to act together or you can appoint them jointly and severally so they act jointly or individually.

When does an EPOA end?

An EPOA ends:

- when you revoke the power (so long as you have the mental capacity at the time); or
- on your death.

No one can predict the future.

Most importantly, the EPOA offers peace of mind. The EPOA may never be used, but it gives you the reassurance that, should mental incapacity occur, your affairs will be managed by someone whom you have personally chosen. The EPOA can save your family the worry and expense of a court application to appoint a receiver to manage your affairs under the Mental Health Act.

When choosing your Attorney, consider how well they handle their own financial affairs and whether you can trust them to act in your best interest.

Joker's Focus

Q: What do a failing law student and an alcoholic have in common?

A: Neither of them can pass the bar.

Q: What do you get when you cross the Godfather with a lawyer?

A: An offer you can't understand.

Get SMART on Funds

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NOTE:
 SMART Fund 003
 was transitional, and
 is no longer
 applicable.

In December 2003, with the enactment of the Investment Funds Act (the "IFA"), the SMART® fund was born. The SMART Fund is an investment fund¹ which satisfies the parameters and requirements of a category, class and type of investment fund previously approved by the Securities Commission of The Bahamas (the "Securities Commission"). The acronym, S-M-A-R-T stands for Specific Mandate Alternative Regulatory Test Fund. Presently, there are four templates which have been approved by the Securities Commission for use in structuring your investment fund.

It is important to note that while a SMART Fund is required to satisfy the definition of an investment fund under the IFA, an investment fund seeking to be licensed as a SMART fund is also required to satisfy prerequisites applicable to the individual type of SMART Fund. The prerequisites applicable to each individual SMART Fund are:

SMART Fund 001 – An investment fund where the promoter is a financial institution and the investors in the fund are customers of the promoter and are party to a Discretionary Management Agreement with the promoter.

SMART Fund 002 – An investment fund which has no more than 10 investors who hold equity interests in the fund and each investor is required to be a person who qualifies to invest in a professional fund². The majority of investors must have the power to appoint and remove the operators of the investment fund, which, for the purpose of the IFA, are the directors of a company, the trustee of a trust and the general partner of a partnership.

SMART Fund 004 – An investment fund with a maximum of 5 investors holding equity interests in the fund operating as a private investment company.

SMART Fund 005 – An investment fund with a maximum of 5 investors holding equity interests in the fund and operating as a private investment company; and each investor is required to

be a person who qualifies to invest in a professional fund.

According to *The Bahamas Investor*, (January 2007), The Bahamas Financial Services Board suggests that SMART Funds can be used as follows:

- SMART Fund 001 can be used to provide an investment vehicle for client funds managed by a financial institution under a discretionary management service.
- SMART Fund 002 can be used to provide an incubator structure to generate performance history prior to upgrading the fund license in anticipation of a public offering.
- SMART Fund 004 can be used to create a credible, licensed holding vehicle for a small group of related persons.
- SMART Fund 005 can operate as a private investment structure for individuals and/or families.

Each SMART Fund is required to be licensed as an investment fund under the IFA and such funds can be licensed either by the Securities Commission or an Unrestricted Investment Fund Administrator, provided that such entity is the investment fund administrator of the fund.

The main advantage of structuring your fund as a SMART Fund as opposed to any of the other types of investment fund under the IFA, that is the standard or professional fund, is that in the case of SMART Funds 001, 004 and 005, such funds are not required to have an offering memorandum and in the case of SMART Fund 002, only a term sheet is required, which is in essence, a short form offering memorandum.

Additionally, SMART Funds are not required to be audited annually. In the case of SMART Funds 002, 004 and 005, such funds are not required to be audited annually if all of the holders of equity interest in the fund waive the requirement for the fund to have an annual audit. If the annual audit requirement is waived, the investment fund is required to file semi-annual performance reports with the Securities Commission. *cont'd pg 8*

Smart funds cont'd

The SMART fund 001 is not required to produce annual audited financial statements but in lieu of audited financials, such fund is required to produce annual unaudited financial statements and semi-annual performance reports which have to be filed with the Securities Commission.

Want to make a SMART decision? How about a SMART Fund as your next investment structure of choice.

END NOTES

¹Pursuant to the IFA, an investment fund is a company, trust or partnership with some nexus to The Bahamas, including but not limited to, being incorporated or formed under the laws of The Bahamas which issues equity interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits and gains arising from the acquisition, holding, management or disposal of investments.

²Such persons include (i) a bank or trust company licensed by the Central Bank of The Bahamas or licensed in a prescribed jurisdiction; (ii) any registered broker-dealer or firm registered as a securities investment advisor by the Securities Commission or registered in a prescribed jurisdiction; (iii) any insurance company licensed under the laws of The Bahamas or licensed in a prescribed jurisdiction; (iv) any investment fund licensed or registered under the IFA or regulated in a prescribed jurisdiction, (v) any natural person whose individual net worth or joint net worth with the person's spouse exceeds one million dollars; (vi) any natural person who had an individual income in excess of two hundred thousand dollars in each of the two most recent years or joint income with that person's spouse in excess of three hundred thousand dollars in each of those years and has a reasonable expectation of reaching the same income level in the current year; (vii) any trust with total assets in excess of five million dollars; or (viii) any entity in which all of the equity owners satisfies one of the requirements in (i) – (vii) herein.

DID YOU KNOW... Transferring Real Estate To Trustees Will Attract Stamp Duty

Many of our clients hold real estate in The Bahamas, either in their own names or through a corporate vehicle and wish for various reasons to transfer the shares of the company or the property itself to trustees of a trust.

Whilst this is possible, where the trust has beneficiaries other than the beneficial owner(s) of the property or the company, this will trigger stamp duty liability under section 28D of the Stamp (Amendment) Act which came into force 30 June 2005. One of the advantages of a

trust is the avoidance of the costs and delays of obtaining probate in The Bahamas. A client may, therefore, find himself weighing the costs of probate proceedings against the stamp duty costs which can be as high as 10% of the consideration for the transfer of the land and the construction of a residence. It should be noted, however, that a subsequent transfer of the shares or real estate to a beneficiary under a trust is exempt from stamp duty. Where property is being transferred to a non-resident trust, a permit from the Bahamas Investments Board will be required.

HIGGS & JOHNSON Named in Euromoney Private Banking Survey 2007



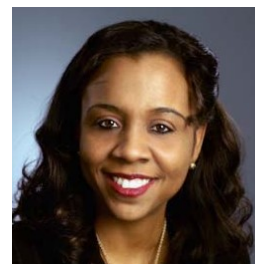
In 2006 H & J was the only Bahamas based law firm short-listed for the international Society of Trust & Estate Practitioners' (STEP) Offshore Legal Team of the Year Award. H & J is currently ranked as a Tier 1 law firm by independent global legal directories *Chambers and Partners Global Guide* and *Euromoney IFLR 1000*.

Higgs & Johnson (H & J) has been selected 'Best in Inheritance & Succession Planning (Caribbean)', according to the 2007 Private Banking Survey conducted by *Euromoney Magazine*, a premier business magazine for the global financial community.

The publication's renowned annual survey of the wealth management industry, now in its fifth year, reflects the responses of 558 global private banks and wealth managers, and ranks 994 institutions in 55 countries by the quality and quantity of services offered. The survey, which is read by over 100,000 people worldwide, includes peer and competitor perceptions of the best performers in over 60 client and product categories. The highest ranked firms are recognised as the top service providers in their respective niches by country and expertise.

"It is a great honour for our firm and for our Private Client and Wealth Management Group in particular to receive this type of honour," said H & J Managing Partner, John K F Delaney.

Private Wealth Group partner, Heather L Thompson added: "Our clients expect sound and reliable counsel on a wide range of structures, and we are pleased to be able to offer them tailored estate planning and wealth protection solutions that help them secure their families' future."



Tara A.A. Archer



N Leroy Smith

HIGGS & JOHNSON Welcomes New Partners

Tara A A Archer is a member of the firm's Litigation Practice Group. Her practice is concentrated in the areas of international and commercial litigation, banking and compliance law, employment law and admiralty law. She has appeared as counsel or co-counsel in a number of important international and local cases, including, most recently, Globe-X Canadiana Limited and Globe-X Management Limited, Americas International Bank, Imperium Bank Ltd, IC Mutual Limited, BSI Overseas (Bahamas) Limited and Suisse Security Bank & Trust Limited.

N Leroy Smith joined Higgs & Johnson in 2000 and is a practitioner in the firm's Litigation Practice Group. He has had a particular focus on all facets of trust law, including representing fiduciaries and individual clients (both private and institutional) in a range of trust and estate litigation; and advising international and local institutional clients in the drafting and administration of Bahamian trusts. In addition, Leroy has significant experience working in contentious and non-contentious commercial matters, telecommunications law and maritime law.



Veteran Real Estate Attorney Retires

Attorney Roland J Lowe has announced his retirement from HIGGS & JOHNSON, effective 30 April 2007. Mr. Lowe has practised with the Firm for more than 30 years, starting as an articled law student in 1974. He was called to the Bahamas Bar in 1976 and became a Partner in 1978. During his outstanding career, Mr. Lowe headed HIGGS & JOHNSON'S Conveyancing Department and trained a number of attorneys in real estate law. Over the years he has earned a reputation as a preeminent real estate attorney in The Bahamas. He has established an excellent legacy for all of our lawyers, and the Real Estate Group in particular. We owe him a great debt of gratitude, and wish him the very best in his retirement. **H&J**

Estate Planning cont'd

A few distinguishing features of a Bahamian foundation are as follows:

- i. *Confidentiality*: All persons connected with the management of the foundation i.e. officers, protectors, members of the foundation council, members of any governing body, any other supervisory person, including its counsel and attorney, have a duty of confidentiality to the foundation and the beneficiaries. If they breach that duty, 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;
- ii. *No Forced Heirship Claims*: The Foundations Act contains provisions similar to those in the Trusts (Choice of Governing Law) Act with respect to the non-recognition and enforcement of forced heirship claims;
- iii. *Protection from Challenges*: The charter and articles of the foundation may provide for a beneficiary to forfeit his benefit if he challenges the establishment of the foundation, the endowment of the foundation's charter or articles, or any decision of the foundation council or any other supervisory body; and
- iv. *Beneficiaries*: A foundation may but does not need to have beneficiaries, and can be established for a purpose or purposes.

Founder:

The person who provides the initial capital minimum of USD \$10,000 to the Foundation.

Tax Considerations

A. Trusts

No income tax, capital gains tax, estate tax, inheritance tax, succession tax, gift tax, rate, duty, levy or other charge is payable by any beneficiary of a trust who is treated as non-resident for exchange control purposes in respect of any distribution to him by the trustee of any trust.

In addition, where all of the beneficiaries of a trust are non-resident for exchange control purposes, the trust is exempt from stamp duty with respect to (a) all deeds and other written instruments of appointment made pursuant to the trust; (b) all deeds and other written instruments by which assets are transferred to or from the trustee of the trust, and (c) all instruments relating to the transfer of beneficial interests in the trust.

The above exemptions do not apply to any trust which (a) owns land in The Bahamas or (b) carries on a business or trade in The Bahamas.

B. PTCs

A PTC may be incorporated under either the provisions of the Companies Act or the International Business Companies Act.

i. International Business Companies Act

If a PTC is an International Business Company (IBC), it is not subject to (a) any business licence fee, income tax, corporation tax, capital gains tax, withholding tax or any other tax on income or distributions or (b) any estate, inheritance, succession or gift tax, rate, duty, levy or other charge in relation to its shares, debts or other securities. This does not apply if any shareholder of the IBC is resident for exchange control purposes.

Additionally, an IBC is exempt from the payment of stamp duty on all transactions in respect of its shares, debts or securities and all other transactions relating to its business except for stamp duty in respect of transactions relating to real property situate in The Bahamas.

ii. Companies Act

If a PTC is incorporated under the Companies Act, 1992, it is not subject to any income tax, corporation tax, capital gains tax or any other tax on income or distributions. No estate, inheritance, succession or gift tax would be payable in The Bahamas on transactions with respect to the shares, debts or securities of the Companies Act PTC.

The Companies Act PTC will, however, be obligated to pay stamp duty for every transaction comprising a sale of business in The Bahamas insofar as it consists of personalty other than cash and deposit accounts. The definition of the sale of a business includes the direct or indirect transfer of shares in a company.

C. Foundations

Much like a Bahamian trust, a foundation is exempt from the payment of any business licence fee, income tax, capital gains tax or any other tax on income or distribution accruing to or derived from such foundation or in connection with any transaction to which that foundation is a party. However, if the founder or any of the beneficiaries are resident for exchange control purposes or if the foundation's assets include Bahamian real property or personalty, these exemptions do not apply.



Philip C Dunkley



Léon R Potier



N Leroy Smith



Portia J Nicholson



Kelli K A Ingraham

HIGGS & JOHNSON at Lyford Cay... Capable, Convenient, Client-focused



Established in 1999, our second office at Lyford Cay is renowned for its work with private clientele. Senior Partner Philip C Dunkley leads a team of five specialists attuned to the corporate and commercial needs of international clients and high net worth individuals resident in the exclusive Lyford community.

The group works in tandem with colleagues across all four HIGGS & JOHNSON offices in New Providence, Grand Bahama and Abaco to deliver personal and reliable service to our clients. The practice at Lyford focuses on areas of work including Real Estate, Immigration, Commercial Law, Trusts, Banking and Securitisation.

Philip C Dunkley, Senior Partner, specialises in complex commercial and chancery litigation, appearing in many of the leading commercial cases at the Bahamas Bar, including the BCCI and Grupo Torras cases and the Oracle Fund liquidation. He is the firm's Litigation Practice Group chair.

Léon R Potier, Partner, has broad experience in commercial law, with particular emphasis on Conveyancing and Real Property Law. Educated in his native England, he is a member of the Bars

of England & Wales and of the Turks and Caicos Islands. He has practised in The Bahamas since 1961.

N Leroy Smith, recently named a **Partner** of the firm, is also based at Lyford Cay. See his profile at 'HIGGS & JOHNSON Welcomes New Partners' (page 9).

Portia J Nicholson, Associate, is a Corporate and Commercial lawyer with experience in Jamaica and The Bahamas as both in-house counsel and solo practitioner. Before entering private practice, she was Director of the National Bank of Jamaica's Portfolio Management Unit, managing the bank's long term investment portfolio and chairing the Strategic Planning Committee. She had previously prepared legal documentation for the bank's privatisation in the 1990s.

Kelli K A Ingraham, Associate, specialises in Commercial Litigation and Real Property & Conveyancing. Kelli holds a Bachelor of Arts degree in Economics from the University of Western Ontario and an LL.B from the University of Sussex. She attended Bar School at the Inns of Court School of Law. In 2005, Kelli was called to the Bars of England & Wales, and The Bahamas.

At the time of publication, the amendments had been passed by both houses of parliament, but were not yet in force

New Legislation cont'd

Funding a Foundation

Under the present legislation, it would seem that assets of at least US\$10,000 must be transferred to the foundation before it is registered. This has caused some practical difficulty in establishing the foundation because many banks do not wish to open an account for a foundation until it is registered. The amendment would make it clear that assets need not be transferred until after registration although there will be a commitment in the charter by the founder to transfer the assets.

Financial Records

The form in which financial statements must be kept has been greatly simplified. A foundation need only keep such financial statements accounts and records as the officers consider necessary or desirable to reflect the financial position of the foundation.

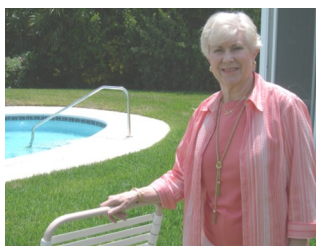
Model Charter

Given the fact that many practitioners are now more familiar with foundations, and also to reflect the proposed changes in the legislation, a revised version of the charter would replace the existing model.

PURPOSE TRUSTS

The private industry has made recommendations to the government for a change to the Purpose Trust Act, 2004 which would make it clear that, as with Cayman Star Trusts, individuals can benefit from an authorised purpose trust irrespective of whether they are connected or associated with any of the authorised purposes.

A Taste for Adventure cont'd



"Once you've made the decision to leave the place where you were born, and to leave the family you grew up with because you're looking for adventure or something different, it doesn't phase you to change countries again," she says, explaining the relative ease with which she was able to relocate to the United States. "That first move was my biggest adventure, so everything after that was easy sailing as it were."

The success of *Airport* prompted the couple's next move to The Bahamas. "We didn't know anyone here at all," Sheila says. "We just decided to take a chance because The Bahamas offered tax advantages and because it was near to North America, which my husband was writing about; it worked out extremely well."

"We were flying from Toronto to The Bahamas and on the plane was E P Taylor who started Lyford Cay. When he found out that we were planning to move to Nassau, he said, 'well, you have to come out and have a look at Lyford.'" Sheila and Arthur bought their first lot in the exclusive community in 1970 for \$35,000 and a second a few years later for \$40,000.

The Hailey residence now comprises 440 sq ft of canal frontage and has hosted dinner parties for international celebrities and local personalities. "Originally, we had no intention to stay but we

loved it here and found no reason to move."

Lyford Cay was home to the Haileys for almost four decades. The gated community and the rest of the literary world mourned the passing of Arthur in 2004, following a stroke eight weeks earlier that noticeably slowed the fastidious and meticulous writer who spent a disciplined three years conceptualizing, researching and writing each novel. "Arthur was a great storyteller," Sheila reminisces. "He had the ability to get several plots going at the same time. He made the reader want to turn the page; he was a master at that."

Today, almost three years on, Sheila's home at Lyford Cay tells the story of fifty-five years of life with Arthur: she is surrounded by memories—the enduring and oft-photographed bright yellow tiled flooring that stretches from wall to wall in the porch and entry hall; Arthur's study, chock full of bound manuscripts and translations of his novels in dozens of foreign languages; artwork the couple collected from their various travels over the years; and clusters of progressive portraits of their children (and Arthur's children from a previous marriage).

Driven by adventure, Sheila crossed the Atlantic and Niagara Falls to make The Bahamas her home.



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