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Due Process Prevails

Tara Archer-Glasgow and Audley D. Hanna, Jr.

The Bahamas has been one of a number of select jurisdictions used by high-net-worth individuals to manage their wealth, thus securing its position as one of the leading offshore financial centres. As such, the Bahamas has a constitution and banking legislation that provide for individuals to have a right to privacy in relation to their property and banking affairs. This is a basic principle that arises generally and at common law. Nonetheless, it is important to note that this right is not absolute.

The right to privacy in relation to property and banking affairs has been challenged in the context of mutual legal assistance treaties (MLA treaties) and the incorporation into Bahamian domestic law of various multinational treaties and conventions.

MLA treaties are agreements between governments that allow a requesting country to obtain information from specified entities within the receiving jurisdiction to assist with proceedings in its own courts; meanwhile, convention legislation* facilitates a similar objective among convention states without a specific treaty.

While such requests may extend to various forms of information, individual banking records are often key, as they are typically required in a tracing exercise and/or for the freezing and recovery of assets. While requests for judicial cooperation in relation to banking matters are not new, in

particular with civil proceedings, they have evolved with respect to criminal proceedings and the worldwide shared goal of combating crime and money laundering.

As early as 2003, the Bahamian Supreme Court accepted that**, particularly in the context of the global concerns in relation to terrorism after 11 September 2001, a greater emphasis should be placed on providing judicial assistance to foreign countries with respect to criminal matters. Since then, a number of statutes*** have been enacted or amended to make exceptions to the right to confidentiality where there is a suspicion of criminal activity, including tax crimes.

The Brazilian car wash scandal is an incident that highlights the growing trend to seek cooperation under MLA treaty/ convention legislation and the uncertainty about the scope of such requests in the Bahamas. What initially began as an investigation into money laundering in relation to Petrobras – the Brazilian national oil company – later became characterised as not only the largest corruption scheme in Brazil, but also in the world, as other countries became involved in an unprecedented and intricate web of political and corporate racketeering uncovered by Operacao Lava Jato (Operation Car Wash). It is estimated that the amount of bribes paid out as part of the corruption scheme is in excess of USD 1 billion.

In 2015, the government of Brazil made a request to the government of the Bahamas for assistance in obtaining banking information about a number of individuals and entities. Arising from this request, in early 2016, pursuant to an application made under the Criminal Justice (International Co-operation) Act 2000, an order for disclosure was issued that required a number of local financial institutions to release all the banking records relating to these individuals and companies, including the names and identities of beneficial owners where applicable.

The scope and targets of the request and the order were unusual. In a civil context, requests for banking information must be precise, and the court will not permit a 'fishing expedition' or permit someone to use disclosure merely to establish a case. Nonetheless, in the criminal context, the court has accepted that, by its nature, the investigation of criminal conduct may require that requests for assistance be rather broad. It is usually impermissible to target for disclosure persons who are non-parties to the proceeding, and there must be a very clear reason for doing so for the court to allow an exception to be made. In the criminal context, however, non- parties are afforded less protection, as the court has adopted the view that, where criminality is concerned, as much information as possible should be provided so as to assist the foreign government.

The order for disclosure was made in early 2016 and a number of affected entities and persons sought to challenge the order, in both substance and scope. With regard to substance, none of the parties challenging the order were named as respondents in the local action, as none were accused of any actual wrongdoing in the letter of request. Rather, these entities had merely conducted a very small number of transactions (in all cases fewer than three) with companies indirectly affiliated with one of the respondents. Therefore, each of these entities was a 'non-party', and not accused of any crime. As to scope, the Brazilian request quite broadly sought disclosure of all of the banking records of these entities since the inception of the relevant accounts. This was despite the fact that all the accounts had been operating for many years prior to the transactions giving rise to the Brazilian request with no evidence of any previous connection with any of the named respondents or any illegality.

While the challenge to the order by the non-parties yielded a partially positive result in the permitted scope, with the judge using a 'blue pencil' and significantly restricting the category of information that the banks were required to disclose, the court declined to set the order aside on substantive grounds. Accordingly, the court held that judicial assistance in criminal matters required the utmost degree of cooperation, even where it related to non-parties and where there was a limited connection between the non-parties and the actual persons being investigated.

On the basis that the revised disclosure order remained too expansive, the ruling was appealed to the Bahamian Court of Appeal.

In a unanimous ruling made on 17 October 2018 (the 'ruling'), the Bahamian Court of Appeal discharged the disclosure order in its entirety on the basis that the information requested was no longer necessary as the court accepted that the investigation underlying the substance of the request had concluded. Therefore, in essence, any continued request for information

about the 'non-parties' to the main action would be a fishing expedition, which is still , generally, prohibited.

Prior to the ruling, there was no indication, other than ensuring that a request was properly issued, that the Bahamian court would evaluate the merits of a request for assistance. Further, while earlier cases suggested that there may be instances where the court could intervene, there were no reported cases that provided examples. With the ruling, it is evident that the court will consider the continued relevance of the information being sought and will, at least to some degree, consider the scope of the request limited to the content of the letter of request. While there remain some questions as to the extent of Bahamian courts' discretion to decline to give effect to letters of request, it is clear that such discretion does remain with the court.

Further, depending on circumstances, if clients require mutual legal assistance, they should ensure that their letter of request is drafted properly in compliance with the laws of the jurisdiction where it will be issued and that it relates to current proceedings. The courts in the Bahamas remain generally cooperative with international requests once they are in the proper form. If the client, however, is the person whose right to confidentiality is being challenged unfairly, they should take comfort in the ruling, as it demonstrates that the courts in the Bahamas will not act as a rubber stamp and will take away such a right only if due process is followed and there is just cause to do so, supported by evidence and the facts of the particular case.

**Such as the Criminal Justice (International Co -operation) Act 2000, which gives effect to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.*

***In Attorney General of the Commonwealth al The Bahamas v Lucini; [2003] BHS J No 32*

****Such as amendments to the Proceeds of Crime Act 2000 and The Bahamas and the United States of America Tax Information Exchange Agreement Act 2003.*

****Previously published - Due Process Prevails, STEP Journal (Vol 27 Iss7).**

Tara Archer-Glasgow is a highly experienced Dispute Resolution lawyer with more than 20 years of legal experience in all aspects of commercial litigation, with a particular focus on banking and compliance, employment, industrial property and company law.

Audley D. Hanna, Jr. specialises in various areas of Civil and Commercial Litigation, with a particular focus on employment law, admiralty law, insurance law, intellectual property litigation, and personal injury litigation.
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Partner Appointments

Gina M. Berry

Regional Co-Chair - Caribbean & Central America, TerraLex

Tara Archer-Glasgow

Alternative Dispute Resolution Committee - International Trademark Association (INTA)

Christel Sands-Feaste

Director - Bahamas Chamber of Commerce & Employers Confederation

Health Care Directives in the Cayman Islands

Wendy Stenning

In The Cayman Islands has implemented the Health Care Decisions Law, 2019 (the "Law") which allows a mentally competent individual to issue an advanced health care directive (a "directive"). The directive should provide instructions about the nature and extent of medical care should the person become mentally incompetent. It can include consent or refusal for medical procedures and treatments such as cardiopulmonary resuscitation, being placed on a ventilator, or use of a feeding tube.

The paramount principle of the Law is that all questions pertaining to a person's best interest and their corresponding health care are ultimately the responsibility of that person's registered medical practitioner(s). A registered practitioner's ability to determine the health care a person receives will only be superseded where:

- An individual has instructed the denial of his health care in an operative directive;
- The maker of a directive has delegated the decision to another person (a "proxy"); or
- An order is made under the Law that health care is to be denied or such other order with like effect.

The Law provides that an advanced health care directive shall be made by:

- Completing the relevant parts of the form in the Schedule to the Law and following the instructions contained in the form;
- The directive-maker signing the form personally in the presence of two adult witnesses (one of whom must be a doctor that is satisfied that the directive-maker is mentally competent and is freely making the direction and understands its nature and consequences); and
- Both witnesses signing the form.

A person being appointed as a proxy in the directive may not be a witness. Neither may a beneficiary or spouse of a beneficiary of the directive-maker's estate or person with an interest under the directive, be a witness.

The Law does not affect the functions of registered practitioners for the giving of palliative care or a person's right to receive palliative care. The Law specifically states that it does not authorize euthanasia or assisted suicides.

There is provision for the recognition by health care professionals of directives executed in certain specified jurisdictions other than the Cayman Islands.

While it can be difficult for an individual to consider becoming incapacitated and no longer being able to make health care decisions, many find comfort in being able to retain some autonomy through a directive. A directive may open helpful dialogue among a directive-maker, his medical practitioners and those close to the directive-maker, thereby minimizing the potential for difficulties should the time come when one is no longer competent to decide the medical treatment one would wish to receive.

Wendy Stenning is a Senior Associate in the firm's Private Client & Wealth Management practice group in the Cayman Islands and provides Will drafting for local and international clients and advises on Probate and Estate administration.
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Associate News

Congratulations to Litigation associate, **Theominique Nottage**, on being elected Co-Chair of Young ICCA, a worldwide arbitration knowledge and skills network for young practitioners. Nottage is the first Bahamian to secure the coveted position.

Jonathan Z. Deal is the newest associate to join the Firm in the private client & wealth management practice group. Deal is located at the Lyford Crescent office in Lyford Cay working under the supervision of seasoned trusts litigator, N. Leroy Smith.

A Thought on Captives

Kamala Richardson

Captive insurance is often, and rather myopically, perceived of as the preserve of multinational conglomerates whose risks may be too complex or too costly to be insured in the commercial insurance market. While there is much truth in this statement, in that captive insurance was pioneered in the context of risk management for large scale commercial structures, that truth undoubtedly belies the utility of captive insurance as an effective tool to manage the copious, and often peculiar, risks faced by high-net-worth and ultra-high-net-worth individuals.

Captive insurance is a form of self-insurance which is conventionally effected through a special purpose vehicle that is licensed to operate as an insurance company. In a commercial context, the captive would be a subsidiary company established by the parent company to provide insurance coverage to the parent and other companies within the group. Premiums would be paid by the parent or other companies to the captive and the captive would, in turn, issue insurance policies to the companies within the group to insure them against the risks associated with their business.

Advantages of Captive Insurance

The use of captive insurance offers comparative advantages not attainable when insurance coverage is provided by traditional insurers including:

Cost Reduction: The premiums charged by the captive would be established with input from the insured and could be set at rates below those available in the traditional insurance market in which premiums take account of the commercial insurer's overhead costs.

Particularized Investments: The investments made by the captive with the premiums received could be invested in a portfolio of assets with a risk allocation which suits the insured's overall investment strategy and desired asset types. In addition, investment income is retained by the captive for the benefit of the insured.

Specialized Insurance Coverage: The captive would devise bespoke insurance policies which cover risks uninsurable in the commercial insurance market with flexible terms more favourable to the insured.

Captive Insurance in Wealth Management

The advantages of captive insurance can also be leveraged in the context of private wealth management. Therefore, unquestionably, a consideration of captive insurance should form a part of a long term, comprehensive wealth and risk management plan.

Let's say you're advising a family comprised of numerous high-net-worth individuals, with a highly diversified asset portfolio containing everything from stocks in Fortune 500 companies to rare artwork. Establishing a captive insurance provider for that family would enable them to insure their otherwise uninsurable assets and retain wealth through investments made by the captive insurance company. The

structuring of a captive could also offer further advantages. For instance, the captive could be owned by a family trust and the income generated from the captive's investments could be distributed to the trust's beneficiaries, thereby creating further opportunity for the transfer of wealth from one generation of the family to another. Additionally, a captive could be a useful adjunct to a family office structure extending the services provided to a family of high-net-worth individuals to include life, healthcare, property and other traditional forms of insurance to family members.

The Bahamas: a jurisdiction of choice for captives

When seeking to establish a captive, the choice of jurisdiction is paramount. The Bahamas' presence in the captive insurance industry dates back to the 1960's.

The regulatory environment in The Bahamas for captive insurance is robust and in tune with current market trends. Insurance legislation in The Bahamas prescribes internationally accepted, yet economical, minimum capital requirements for captives and vests regulatory oversight of captives in the Insurance Commission of The Bahamas, a body which is known to be pragmatic in its approach.

In today's environment, the ability to demonstrate substance is often key. The Bahamas' highly qualified workforce and infrastructure can provide the expertise and premises necessary to establish the captive's physical presence within The Bahamas. This can ensure that the captive is run with optimal efficiency and in accordance with international standards of regulation dictated by bodies such as the OECD and the EU.

****Previously published - STEP Journal (April 2019).**

Kamala Richardson is an Associate in the firm's Private Client & Wealth Management practice group and specializes in wills, estate planning, and matters related to trust law, foundations and company law.
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Litigation Partner Chairs Session at IBA AGM

Global Managing Partner, Oscar N. Johnson, Jr. and litigation partners, Tara Archer-Glasgow and Audley D. Hanna, Jr. attended the annual IBA AGM held in Seoul, Korea.

Hanna, in his role as Chair of the IBA Consumer Litigation committee, organized and co-moderated the Committee's session on product liability cases.

The delegates also attend the TerraLex member firm, Yoon & Yang reception, amongst others.

Organ Donation and the Question of Consent - A Cayman Perspective

Wendy Stenning

The Cayman Islands implemented The Human Tissue Transplant Law, 2013 (the "Transplant Law") on 31 July 2018, to regulate the donation of organs and human tissue in the Cayman Islands for medical purposes. While this advance in legislation has been long awaited and welcomed by most, organ donation creates many legal and ethical challenges.

A key issue related to organ donation is what should constitute consent on the part of an organ donor. The question of how consent should be legally determined is a complex and emotive issue. Free, voluntary and informed consent from the organ donor is generally acknowledged as key for organ donation to ethically proceed. The immense need for organ transplants has caused many jurisdictions to move away from this principle. This article explores some of the concerns regarding the question of consent in relation to organ donation, and discusses the Cayman Islands approach to this complex issue.

Deemed Consent

Severe shortages in organs available for transplant have caused many jurisdictions to adopt a "deemed consent" approach. In those jurisdictions, rather than having an "opt in" system of consent, instead one must "opt out" if one does not wish to be an organ donor.

A key argument for supporting the push for the deemed consent approach is that while surveys in some jurisdictions show an overwhelming majority of persons in support of organ donation, many of those same persons never take the step to register as an organ donor, resulting in a low donation rate. On the other hand, it would be morally wrong for those with religious or other personal reasons for objecting to organ donation to have their wishes ignored if they should fail, for whatever reason, (e.g. ignorance of the law) to officially opt out. What about those persons who are simply undecided?

The deemed consent approach also raises legal and ethical questions for other groups of persons. What happens to minors or others suffering from incapacity that are not legally capable of consenting and by the same token are not capable of opting out? What about those persons only temporarily resident or vacationing who die in a jurisdiction where deemed consent applies, in circumstances leaving them with organs capable of transplant?

England is one jurisdiction that is transitioning to a deemed consent approach. The Organ Donation (Deemed Consent Act) 2019 ("the Act") has been approved by Parliament and will come into effect in April 2020. The Act provides that the deemed consent approach will not apply to: (i) persons under eighteen years of age, (ii) persons who have not been ordinarily resident in England for a period of at least twelve months immediately prior to death, and (iii) persons who did not have the capacity to consent for a significant period before death. For those other persons who have not formally opted in or out under the English registration system, if a family member provides information immediately before death that would lead a reasonable person to conclude that the person concerned would not have consented, no organ donation should proceed.

While England has positively sought to legally address ethical concerns relating to the deemed consent approach, one can imagine situations in which it is possible that even with these safeguards in place, a donation from a person who would have opted out or conversely who would have opted in, may have their wishes denied. Is it realistic to expect that family members really will get it right or even to assume that everyone has family members?

The Cayman Islands have taken a more conservative approach under the Transplant Law. In accordance with the Transplant Law, the Cayman Islands Government appointed individuals to the Human Tissue Transplant Council ("the Council"). Under the Human Tissue Donation and Transplant Regulations, 2018, one of the functions of the Council is to maintain a Tissue Donation Register for the Cayman Islands. The Council shall only register a person as a donor if it is satisfied that the person –

- is an adult;
- is not suffering from a mental disorder that renders the person incapable of understanding the nature and consequences of the donation;
- is making the donation voluntarily; and

- is adequately informed about and understands the nature and consequences of the donation.

The Human Tissue Donation Register maintained by the Council shall be the only human tissue register having legal validity for purposes of a donation in the Islands.

Organ Trafficking

The severe shortage in organs available for donation has also raised a deeper issue relating to consent as organ trafficking and transplant tourism has emerged in response to this challenge**. Organ donation has started to take a commercial route whereby people donate their organs in exchange for cash. It is argued that persons deciding to sell an organ are, after all, making the decision voluntarily. Unfortunately, it is believed that the reality is that many times a decision to donate a kidney is due to the donor being in financial distress. One has to question how free, voluntary and informed their decision really is in such cases. Are they aware of the jeopardy in which they are putting their health and the risk of death? If there were financial means or other support available to them would they really make a decision to donate an organ in exchange for cash?

The Cayman Islands have adopted a conservative approach that prohibits commercial dealing in human tissue but it does allow some flexibility to cover reasonable costs associated with certain aspects of the transplant process and the Council can approve the purchase of tissue if special circumstances exist.

The Transplant Law generally prohibits trading in human tissue including organs. It provides inter alia that a person shall not –
(a) buy, agree to buy, offer to buy, hold himself out as being willing to buy, or inquire whether a person is willing to buy, or inquire whether a person is willing to sell tissue;
(b) give or receive benefits for the supply of, or for an offer to supply tissue; or
(c) initiate or negotiate any arrangement involving the giving of benefits for the supply of, or for an offer to supply, tissue.

The Transplant Law does not prevent the giving of reasonable costs associated with –
(a) the importation and exportation of tissue into and out of the Islands;
(b) the transportation, removal, evaluation, storage and processing of tissue to, from or at a tissue bank; and
(c) the distribution from a tissue bank of tissue removed in accordance with the Transplant Law.

The Council may, by a permit in writing, authorize a person to buy tissue from the body of another person subject to such conditions and restrictions as may be specified in the permit, if the Council considers it desirable by reason of special circumstances to do so.

Implementation of the Organ Donation System

While the Transplant Law is now in effect, there is still much work to be done. The Council continues to work on developing a framework that establishes criteria and guiding principles that regulate the local human tissue transplant centres. The Ministry of Health for the Islands has expressed its commitment to engaging with the pubic to address cultural attitudes and fears surrounding organ donation and to keep the public informed as the organ transplant process develops.

The Cayman Islands has taken a momentous step in its legal and medical history by implementing legislation to allow organ donation and transplant locally. The Islands have taken the approach that free, voluntary and informed consent by adults with full capacity during their lifetime is necessary. There are those that may say it does not go far enough to address the urgent local and international need for organ donors. Nonetheless, for a country with a very small but transient and culturally diverse population that is only just beginning its journey in the world of organ donation, this is a sound approach and a mammoth step forward. As the Ministry of Health seeks to educate the public about organ donation, it is hoped that the Transplant Law will be embraced leading to the registration of significant numbers of persons as organ donors.

**See paragraph 11.1 of Organs for Transplants: A report from the Organ Donation Taskforce, Organ Donation Taskforce, Department of Health, UK published in January 2008*

***Transplant ethics under scrutiny – responsibilities of all medical professionals, Croat Med J 2013 Feb; 54 (1) 71-74, Torsten Trey, Arthur L. Caplan, and Jacob Lavee*

****Previously published - TerraLex Connections, December 2019 issue**

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Annual Client Seminar 2019

HIGGS & JOHNSON hosted its annual client seminar under the theme *'Fast- Forward: Regulation, Legislation & Application'*. The seminar delivered thought-provoking sessions on topical issues with a focus on financial services, technology and digital currencies. This year's theme addressed the importance of being proactive in this rapidly changing environment.

Partner and chair of the Private Client & Wealth Management practice group, Dr. Earl A. Cash, in his welcome remarks, spoke to the '*advancement of technology…how it continues to change at a rapid pace, launching us into an era that will be unlike any other before it*'.

Opening remarks were given by the Deputy Prime Minister and Minister of Finance, the Hon. K. Peter Turnquest. Deputy Prime Minister Turnquest charged those in attendance to '*embrace the call to innovate; explore and expand into new markets; embrace new technologies; and carve out new ways to add value*.'

Bahamas Associate, Andre Hill, summarized the recent legislative changes affecting the legal landscape in The Bahamas with regards to the recently enacted Register of Beneficial Ownership Act, 2018. Bahamas Partner and Chair of the Financial Services and Securities practice groups, Christel Sands-Feaste alongside Cayman partner, Francine Bryce provided a comparative analysis of the economic substance requirements introduced in The Bahamas and Cayman Islands. Jeremy Stephen, Lecturer at the University of the West Indies – Cave Hill campus, identified the regulatory and economic challenges in light of the rising use of technology. Associates, Kamala Richardson and Nia Rolle, highlighted viable vehicles in wealth management – specifically the advantages of the Private Trust Company.

A panel discussion on The Bahamas' potential accession to full World Trade Organization (WTO) membership concluded the morning session. Bahamas Partner, Michael F. L. Allen chaired this segment fielding questions to the panel of experts, Jeffrey Beckles – Chief Executive Officer of The Bahamas Chamber of Commerce and Employers' Confederation; Dr. Allan Wright – Senior Country Economist of the Inter-American Development Bank; and Bahamas commercial partner, Portia J. Nicholson. Commentary by both the panelists and attendees facilitated a lively and productive discussion on the WTO including predictions for the future.

The seminar concluded with an informative and engaging presentation on Project Sand Dollar by lunch time guest speaker, Jay Joe – Chief Executive Officer of NZIA Limited, the company contracted by the Central Bank of The Bahamas to fulfill ambitions of developing a digital version of the Bahamian dollar.