

# GUIDE TO WILLS AND ESTATE PLANNING IN BERMUDA

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## PREFACE

This Guide has been produced as an aid to those seeking general information with respect to Wills and estate planning in Bermuda.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the team, using the [contact information](#) provided at the end of this Guide.

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## 1. **WHY MAKE A WILL?**

The law governing succession and taxation seems to be surrounded by more than the average number of myths. Unfortunately, many people have died believing a myth and leaving a legacy of disaster. The law of intestacy (the situation in which a person dies without a Will) is governed by the Succession Act 1974 (**Act**). The Act provides for the distribution of your assets on death when you have not made a Will in a manner that may or may not be acceptable to you. It is important to make a Will and then to review it regularly.

## 2. **THE COST OF MAKING A WILL**

An estimate can generally be obtained in advance. However, if you come prepared to the meeting with your attorney, you can keep the costs down. One way to do this is by completing our Will Questionnaire before your meeting.

## 3. **EXECUTORS**

Your executors are your business managers after your death. They are responsible for applying for probate from the court and distributing your estate in accordance with the directions laid out in your Will. They receive your assets and are responsible for seeing that your debts are paid out of those assets. Your executors normally also become your trustees if there is a trust in your Will, for example where you need someone to manage your assets until your children grow up. It is important to consider whether it is appropriate to designate alternate or co-executors. An executor can also be a beneficiary under your Will. In some instances, it may be advantageous to use a corporate executor.

## 4. **DOMICILE**

You should consider your domicile (where you have your permanent home) and your nationality. If you have a foreign domicile or dual nationality, foreign taxes may have to be paid out of your estate. You should also consider where your assets are located. Some countries, e.g. the USA or UK, charge inheritance tax upon death which may be avoided if certain steps are taken while you are alive. Therefore, seek overseas tax advice from the outset, or have your lawyer assist in taking the advice. Remember to ask whether there are any forced heirship or community property laws which may affect your estate.

## 5. **GUARDIANS FOR YOUR CHILDREN**

Who is going to look after your children if you die while they are still under the age of 18? A direction in your Will naming guardians is legally binding in Bermuda except against a surviving parent, if such parent objects to acting jointly with your appointee. Your guardians and your executors may be the same persons, although we usually recommend some separation of roles for the protection of both your children and your executors.

## 6. **LEGAL OBLIGATIONS**

The court can make proper provision out of your estate for dependants, which includes your spouse, any former spouse, children and grandchildren should you not make adequate provision for them in your Will. Before making or reviewing your Will, we recommend that you draw up a list of those who depend on you to ensure, so far as possible, that you have made proper arrangements to support your dependants after your death.

## 7. **EMERGENCY FUNDS FOR DEPENDENT BENEFICIARIES**

Make sure that (if feasible) there is a fund to which any dependent beneficiary can have access in the event of your sudden death, e.g. life insurance (payable directly to the beneficiary) or a joint bank account.

## 8. **WILL TRUSTS**

If one of the intended beneficiaries of your Will has special needs, for example, is under a legal disability, or has a physical handicap, or a particular problem, e.g. as a result of divorce, alcoholism or drug abuse, you may need to consider structuring your Will in a special way by giving your assets to trustees rather than directly to the beneficiary under a disability. Furthermore, leaving assets to a trustee for minor beneficiaries is a responsible way of ensuring that minors' bequests will be handled by trustees of your choice and distributed in a manner and at a time of your choosing. If circumstances warrant, you can give your trustees discretion as to how beneficiaries may benefit. You can then record, in a non-binding letter of wishes, your views about the treatment of any beneficiary with such a special problem. This is called a discretionary Will trust and has the advantage of flexibility in difficult circumstances (for example, benefiting a second spouse as well as children from a first marriage).

## 9. **FAMILY BUSINESS**

Special consideration must be given to the succession of a family business. If you want your executors to continue to run a business, you must give special powers in your Will, particularly if there is to be an on-going trust for any minors. Alternatively, if the business is to be sold by the executors, it may be appropriate to negotiate a buy/sell agreement with existing 'partners' or employees. Life insurance is often used as a funding mechanism in such arrangements.

## 10. **INFORMATION FOR EXECUTORS AND FAMILY**

Much time and money is often lost after a person's death by executors having to search for assets. It is advisable to prepare a list of your assets and place a copy of it with your Will. You should keep this accessible and updated at least annually. The list should include: (a) property owned jointly and where the deeds are located (b) property owned by trustees and where the deeds are located and (c) property you have given away during your lifetime.

## 11. **EXERCISE YOUR OWN FREE WILL**

Make sure when you execute your Will that you are exercising your own free will and not signing under pressure from any person.

## 12. **BURIAL WISHES**

You may have special burial wishes or wishes concerning the donation of your organs to science or for beneficial purposes. These may be included in your Will. However, it is best to have communicated your wishes directly to your executors and family members to ensure that your wishes are immediately known. In practice, your Will may not be read until at least several days after your death.

## 13. **PUBLICITY**

After your death, your original Will will be submitted to the Supreme Court of Bermuda in order to obtain Probate. Once the Will has been probated it becomes a public document forever open to public inspection. It is, therefore, very important to consider carefully what you say in your Will.

#### 14. **SIGNING**

The legal requirements for signing a Will are strictly defined and cannot be deviated from in any circumstances. It is important to ensure that you fully understand your Will and for you to sign it in the presence of two independent witnesses who are not themselves or their spouses receiving any benefit under your Will. The witnesses will then sign their names and acknowledge that they saw you sign. It is highly recommended that your Will only be signed under the supervision of your attorney.

#### 15. **REVIEW**

Review your Will on a regular basis. When doing so, bear in mind changes in circumstances, i.e. births, deaths, inheritances, divorces, gifts, the transfer of assets to family or trusts, changes in domicile, nationality or government policies. Marriage automatically revokes a Will, unless you have signed a Will made in contemplation of a particular marriage. You will, therefore, need to make a new Will just before, or just after, getting married. Your Will is not revoked by a divorce but any appointment of your former spouse as executor or trustee of your Will and any property or interest left to your former spouse under your Will, will be treated as if your former spouse had died before you. Furthermore, if you have appointed your spouse to be the guardian of your children in your Will, this appointment will be revoked on divorce or annulment of the marriage, unless your former spouse is also the parent (whether naturally or by adoption) of your children.

#### 16. **LIVING WILL**

If you do not wish to be kept alive by artificial means, then it is best to execute a **Living Will** or Health Care Directive giving directions to your family doctor and the hospital. Living Wills are not given statutory effect but they are recognised by the courts and should be used if you have strong views regarding actions to be taken in relation to your health and medical care. A Living Will is a very important guide to your family and doctor. The Living Will may appoint a health care proxy and tells your doctors from whom they are to seek directions concerning decisions of medical intervention and care. Ensure that your family members, family doctor and the hospital are aware of the existence of the Living Will and the location of the original. They may need it in the event of treatment abroad as a Living Will is legally recognised in most other countries particularly in North America and in the UK. It is important to prepare and sign an updated Living Will frequently, as some foreign states or countries only recognise a Living Will which is less than say a year old. King Edward Hospital, and most hospitals in the USA, now require a Living Will to be submitted on each occasion of an admission, to be kept with the hospital's admission records, and that if you do not have one available the hospital will ask the patient to complete and sign the hospital's own Living Will form.

#### 17. **ILLNESS/ENDURING POWER OF ATTORNEY**

It is possible to execute an Enduring Power of Attorney, in addition to your Will, to cover the situation where you become physically or mentally incapable of managing your financial affairs. You may appoint a trusted friend or relative to make and execute decisions for you, while you are indisposed. It may be revoked in the event that you regain capacity. An Enduring Power of Attorney does not affect the provisions of your Will. Should you become incapacitated, without having executed an Enduring Power of Attorney, your next of kin would have to be appointed your Receiver by the court. Under a Receivership Order accounts must be filed with the Registrar of the Supreme Court on an annual basis, or more frequently if the Court considers it prudent to do so. An Enduring Power of Attorney is a quicker, less expensive, less stressful, and more convenient method than a Receivership Order and it maintains privacy. It is also a more secure arrangement than the holding of a joint bank account, where abuse may go

undetected or, where the terms of your Will may not be carried out with respect to the assets in a joint bank account.

## 18. FOREIGN TAX CONSIDERATIONS

If you or any family member has dual nationality, or if you have foreign assets or spend a significant amount of time in a foreign country, it is vital to get appropriate tax advice as some countries' tax legislation can have far-reaching effects.

## 19. SUMMARY

When making your Will, think about:

- executors/trustees;
- beneficiaries;
- assets (whether they are owned solely or jointly), gifts in your lifetime and debts owed to you;
- Guardians for children, special provisions for children and emergency funds for dependent beneficiaries and persons to whom you have legal obligations;
- trusts;
- burial wishes and donation of organs;
- a Living Will;
- an Enduring Power of Attorney;
- tax considerations where there are assets outside of Bermuda;
- stamp duty; and
- succession of a family business.

## 20. STAMP DUTY

In respect of Bermuda property only, the estate stamp duty payable on the Affidavit of Value, filed after your death when your executors apply for Probate, is as follows:

On the first \$100,000:	Nil
On the next \$100,000:	5%
On the next \$800,000:	10%
On the next \$1,000,000:	15%
Thereafter:	20%

Gifts to spouses, Bermuda charities, and gifts of foreign real and personal property under a Will remain exempt from duty on death. Savings in stamp duty may be affected by converting as many assets as feasible to foreign currency assets. Shares in local companies, having no more than five shareholders where at least 75% of the assets are foreign and 85% of the net income is foreign-derived, are also free of estate stamp duty.

Estate stamp duty is not payable on the passing of the value of a single residential property in Bermuda where that property is designated as the deceased's primary family homestead. Estate stamp duty will continue to apply for additional properties owned at the time of death.

## 21. PERPETUITIES AND ACCUMULATIONS

The Perpetuities and Accumulations Act 2009 (**2009 Act**) abolished the rule against perpetuities and excessive accumulations in relation to instruments taking effect on or after 1 August 2009, except to the extent that the instrument or power of appointment relates to land in Bermuda. Previously, the maximum perpetuity period was 100 years. It is now possible to create a perpetual trust. Therefore, a Bermuda trust may be used to **tie up** property (except Bermuda land) indefinitely, permitting persons, including wealthy families, to establish perpetual dynastic Bermuda trusts that may be more beneficial from an estate and tax planning perspective.

The 2009 Act is not retrospective but does contemplate that a trustee, or other interested person, may wish to apply to the Bermuda courts to extend the trust period of a pre-August 2009 trust to more than 100 years. Therefore, it is advised that those individuals who have executed their Wills prior to 1 August 2009 re-execute their Wills in order to benefit from the 2009 Act or perhaps review their Wills to determine whether a testamentary dynastic trust is more appropriate to satisfy the testator's wishes.

The 2009 Act also abolished the restrictions on accumulation of income by trustees, allowing trustees to accumulate trust income for such period as they think appropriate, having regard to the particular needs of the trust in question.

## 22. TRUSTS

Assets may be settled in trust for an indefinite period of time (except for land in Bermuda), providing privacy and long-term estate planning protection. Moreover, the assets will be immediately available for the benefit of chosen beneficiaries, without the necessity of applying for Probate which can prove both lengthy and expensive.

The rate of stamp duty payable on the settlement of Bermuda property to Bermuda trusts is as follows:

\$250 plus:

On the first \$50,000:	Nil
On the next \$150,000:	5%
On the next \$800,000:	10%
Over \$1,000,000:	15%

The rate applicable on the addition or subsequent transfer of Bermuda property to a Bermuda trust is as follows:

Up to the point at which the total amount of any duty paid on Bermuda property equals:

\$7,750 in the aggregate:	5%
On the next \$500,000:	10%
Thereafter:	15%

Despite the applicable stamp duty, there are still advantages in settling assets in trust. For example, settling assets in trust protects against the possibility that rates of stamp duty or property values, or both, may increase prior to death. Assets in trust are protected for children and/or grandchildren as they mature

and may reduce creditors' claims and matrimonial and dependants' claims, provided that the terms of the trust contemplate such administration claims.

It is also possible for Bermudian residents to convert fairly substantial amounts of Bermuda dollar cash to foreign currency. Foreign currency assets may be transferred to a trust without payment of stamp duty.

### 23. **NON-BERMUDA PROPERTY**

Non-Bermuda property settled on a Bermuda trust remains free of duty, provided that at least one of the trustees is a Bermuda resident, regardless of the nationality of the person transferring the property to trust.

### 24. **LIFETIME GIFTS**

Lifetime gifts of certain Bermuda assets, e.g. homes and shares are subject to stamp duty regardless of the nationality of the person making the gift. In certain circumstances if gifts are made outside Bermuda and are not intended to be enforced in Bermuda, then stamp duty may not be charged on the transfer. Gifts between spouses are dutiable, except in cases where such gifts are made on death.

Rates of stamp duty on all non-cash gifts are charged on the market value of the property as follows:

On the first \$100,000:	2%
On the next \$400,000:	3%
On the next \$500,000:	4%
On the next \$500,000:	6%
Over \$1,500,000:	7%

Stamp duty with respect to lifetime transfers of non-Bermuda dollar assets is set at 1% of the value of the asset, up to a defined maximum.

There are several things to consider when making gifts or holding assets jointly. Some of the downsides to this course of action are:

- creditors of the recipient may claim the value of the asset in satisfaction of debts;
- the asset could be claimed as a matrimonial asset by the spouse of the recipient in divorce proceedings;
- freedom to dispose of the asset is lost, which may become a significant disadvantage if capital and income are later needed for maintenance of the original owner. Furthermore, the original owner loses the right to have the asset returned without the recipient's consent, or to gift it to another person;
- where a bank account is held jointly, the new joint holder may withdraw funds, for their own use, to the detriment of the original sole owner;
- if the recipient signs a declaration confirming that they hold the asset to the order of the original owner, this declaration may bring the asset back into the original owner's estate for tax purposes;
- the gifts or joint ownership may defeat the terms of the original owner's Will; and
- tax will have been paid on the initial transfer and yet further duty on the value of the asset may be payable if the recipient dies first, or on the death of the original owner who retained a life interest. Additionally, if the recipient dies first, without having embarked on careful estate planning, the

original owner may have to share the ownership of the asset with the recipient's spouse and children.

## 25. **JOINT OWNERSHIP**

On death, stamp duty is only payable on the Affidavit of Value filed for Probate purposes. If all your assets are jointly held, ownership automatically passes to the survivor. Therefore, the need to file an Affidavit of Value does not arise and no stamp duty is payable.

However, unless the jointly held assets are intended to be an immediate gift to the joint holder, this planning opportunity carries with it considerable risk. Lifetime control and freedom of disposition of the assets is permanently lost. For this reason, such an arrangement should only be entered into where all parties involved understand and honour the arrangement.

## 26. **OWNERSHIP OF BERMUDA PROPERTY BY NON-BERMUDIANS**

Where a non-Bermudian owns property in Bermuda, care should be taken to ensure that the property is properly disposed of on death. Great care must be exercised where non-Bermudians are beneficiaries or executors/trustees of Bermuda estates. Briefly a non-Bermudian executor/trustee or a non-Bermudian beneficiary will be required to obtain a licence/deferral certificate before the Bermuda property can be disposed of whether the Bermuda property was left to them by Will or on an intestacy. Where real estate is left in trust for a non-Bermudian, the Government's current policies regarding ownership and inheritance of property by non-Bermudians must be examined carefully to ascertain whether the licence to hold the property in trust will be granted or not. The final decision always rests with the Minister. If a licence is not sought or granted, then the trustees have to dispose of the property within one year or three years of the death of the testator or lifetime beneficiary depending on the circumstances of the case. Extensions to the period may be granted once for an additional period not exceeding the original period, at the discretion of the Minister. Where the real property value and contents are substantial, a number of mechanisms may be used to reduce the impact of stamp duty. These mechanisms are most easily implemented at the time of purchase.

For more specific advice on wills and estate planning in Bermuda, we invite you to contact one of the following:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).