

WEALTH MANAGEMENT & PLANNING SEMINAR
SEABREEZE BALLROOM, SUPERCLUB BREEZES
TALK ON BAHAMIAN WILLS

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The subject of estate planning covers an exceptionally wide and varied area. What aspects of estate planning you choose depend on your needs. The most basic form of estate planning is surely the preparation of a Will. It is on this subject that I will focus my remarks this afternoon.

What is a Will?

A Will, as we all know, is the declaration of how you want your property to be dealt with upon your death. A Will does not take effect until death. In other words, a Will has no legal validity while you are alive. As a result, you can change your Will as many times as you like before your death. This inherent flexibility should give you some degree of comfort.

A word about testamentary capacity:-if you are 18 years old or older and of sound mind you can prepare your own Will. You really do not have to go to a lawyer or Justice of the Peace to do it. Whether or not you prepare your own Will, the following formalities must be complied with in order for the Will to be valid:

- the Will must be in writing and
- signed at the foot or end of the last page by the person (a testator/testatrix) making it.
- The testator must sign the Will in the presence of two witnesses.

- All three persons must be present at the same time. This is very important. There are many cases where persons who wanted to challenge the validity of a Will were able to do so on the basis that this formality was not followed. The rationale behind this formality, of course, is to limit the occurrence of forgeries by having two persons say that they saw the testator sign the Will of his own volition.

It should be noted that any person you intend to benefit under the Will should not witness the Will otherwise the gift to that person will be void.

You should appoint someone to be the executor of your Will. This person (usually a trusted friend or relative but could be a trust company for example) will be responsible for probating your Will upon your death, the general administration of your estate including ensuring that the persons entitled under your Will obtain their respective gifts after probate.

It should be borne in mind that an executor is entitled to receive as remuneration, out of the assets of the estate of the deceased, a certain percentage (the percentage varies depending on the value of the estate) of the value of the estate under Section 19 of the Administration of Estates Act, 2002. My recommendation is that if you do not wish for your executor to be remunerated under the provisions of the Administration of Estates Act, 2002 that you specifically set out the amount you wish for your executor to receive or the formula for remuneration and/or specifically exclude the provisions of that Act.

Even though you can prepare your own Will, it is my recommendation that you obtain the services of a lawyer to assist you. The very last thing you want is to have a Will that does not

effectively dispose of your property in the manner you want or to the persons you want it to go to.

Before you make your Will, take an inventory of your assets. Some examples are:

- your real estate (eg. house)
- your car
- furniture
- life insurance policies
- money in bank accounts
- shares in companies
- employee pension schemes
- personal effects (eg. expensive jewelry and the like)

You should bear in mind that any property that you own jointly with your spouse or anyone else cannot be willed. The rule of law is that the person surviving gets the property that was owned jointly.

Your Will does not have to set out specifically what your assets are if you are leaving everything to one or more persons. You should, however, give your executor your list of assets so that that person will know exactly what the Will was intended to cover.

It is important that you let the lawyer know whether you have infant children (18 years and under). The lawyer will probably advise you to appoint not only a guardian of your infant children, but a trustee who will hold the property intended for your children on trust to maintain them until the children attain 18 years or until they attain some other later age you stipulate.

I have also seen cases where parents who are concerned about particular children, say a child on drugs, make provision in the Will for that child's maintenance and benefit, through a trustee, until the trustees are able to determine in their discretion whether the child is capable of taking an outright gift.

For those of you who are planning to get married, please bear in mind that unless you specifically say that your Will is made in contemplation of your marriage, your marriage will revoke the Will. This could have serious consequences in a case where your "old" Will provided for someone like your mother. If your Will is revoked by marriage and you do not put a new Will in place, your property would devolve on intestacy to your next of kin and your next of kin would be your new spouse. Your mother would be left with nothing.

It should also be borne in mind that a Will is also probably the most cost effective estate planning tool there is. Lawyers fees for preparing a simple Will will not generally exceed about \$350.00. Of course you could always prepare your own Will and save yourself even this expense.

Ultimately, if properly drafted, a Will can effectively address your basic estate planning needs. It will ensure that the persons you want to benefit in fact do so.

Intestacy

If you die without a Will, or if your Will does not completely dispose of all of your estate (partial intestacy) your property devolves to the persons the law determines should succeed to your estate. The legal term for this is "intestacy".

As many of you probably know, a new Inheritance Act was passed in 2002. I do not propose to have a discourse about the entire Act, but we can focus on three main areas which I think impact in some way all of us:

- (i) the Act abolished the old feudal laws that put the male line first to the complete exclusion of the female line, certainly in relation to real estate;
- (ii) the entitlement of illegitimate children; and
- (iii) the abolition of dower and the establishment of the right of the surviving spouse to occupy the matrimonial home.

On the first point, the male line is no longer preferred. Prior to the Inheritance Act, 2002, if a man predeceased his wife and children without having made a Will the wife would have received 1/3 interest in the real estate and upon her death the real estate would go to the eldest lawful male son of the deceased husband and if none his next closest male relative be that person the deceased's father, brother or uncle. Any female children would simply be knocked out of the picture.

The present position as set out in the Inheritance Act, 2002 is that if a married man dies without a Will, leaving a wife and children, the wife gets one half of the real estate and the children share the remaining half.

As regards unmarried single mothers and illegitimate children, it is noted that unmarried women do not have any entitlement to any part of their children's father's estate. The mother can, however, apply to the court on behalf of any child that was dependent on the deceased father. The mother can do this whether or not there was a Will.

If the man is unmarried at the time of death, a dependent child will be entitled to a share in the estate of the father. However, if the man is married at the time of his death, a child born out of wedlock is not entitled to a share in his estate unless there is in place an order under the Affiliation Proceedings Act declaring the man to be the father of the child or the man declared he was the father under the Births and Deaths Registration Act and such child had been dependent on the father up to his death. If the foregoing is not in place, the father must have provided for these children by Will in order for them to benefit. This is much better than it was before where children born out of wedlock were termed “illegitimate” and simply got nothing if they were not specifically provided for. The concept of illegitimacy has been abolished under the Status of Children Act, 2002 so that all children are lawful children in law. They will, however, have to show how they are “dependents” of the father, but at least now they have the right to be heard and considered.

Another thing to be borne in mind as far as married people are concerned, is that if a husband did not provide for his wife adequately in his Will and they were living together as man and wife for at least 12 months before his death the wife can apply to the court for an order for financial support and the court will decide whether or not she needs the financial support.

The third main area is dower. Dower referred to the entitlement of a widow to a life interest in one third of the real property of her deceased husband. The interest did not actually vest until the death of the husband but in advising husbands and wives that the wife had to renounce her dower interest before a man could sell his real property, it was acknowledged that the wife had a present right to a future interest. Many wives have refused to sign and the husbands have been forced to pay them out for their

interest in the property before the husband could dispose of the property.

What the new Act purports to do is to replace the dower rights with the right to occupy the matrimonial home. It should be noted that the right to occupy the matrimonial home without fear of being evicted is also conferred on husbands.

If someone else on the death of the spouse became entitled under the deceased's Will to the matrimonial home, that person would need to make an application to the court for an order regulating how the wife exercises her right to occupy. The court will look at all of the circumstances of the case and may, based on the needs of the spouse and any children of the deceased, make such order as it thinks just (eg. if the surviving spouse has considerable means the Court may require him or her to make payments to the person entitled under the Will as compensation for the loss suffered by right of occupation).

It is to be noted that the right to occupy is subject to any mortgage over the property that existed prior to the deceased spouse's death so the surviving spouse will have to continue to make mortgage payments otherwise the mortgagee or bank can exercise its power of sale to pay off the debt to it. This notwithstanding, the surviving spouse's right to occupy represents a "charge" over the property and as a result the surviving spouse cannot be arbitrarily evicted from the matrimonial home without a court order.

CONCLUSION

The Will is an important estate planning tool and can eliminate the inevitable confusion that arises when someone dies intestate.

Every industry professional should, even if they have nothing else, have a Will.