

ESTATE PLANNING: WILLS

There is no better time than the present to create and implement an estate plan. Having an estate plan means that you have a plan to protect your property and to effectively dispose of it upon your death.

You do not want the law to decide who should get your property in the event of your death but that is exactly what would happen if you do not have an estate plan and, in particular, if you die without a Will (dying “intestate”).

Before dealing with Wills, it is important to note that you can dispose of your property in a number of ways. The method you choose will depend on your personal needs and wishes. For example, in some instances a trust may be preferable to a will if you need to transfer your assets while you are alive and want to avoid probate. You can also consider transferring assets into the joint names of yourself and trusted person. Such joint ownership would have the effect of automatically vesting the property solely in the name of the surviving joint owner upon your death. This is an inexpensive tool and is well suited to spousal situations where the survivor is intended to end up with whole of the property.

However, the most commonly used estate planning tool is the Will. This, as is well known, is a legally binding document in which you set out who is to get what upon your death. Unless you put all of your property into a trust or a joint ownership structure while you are alive, the one absolutely essential thing you want to have in your estate planning tool box is a Will.

Our FAQs below address frequently asked questions concerning Wills. It is vitally important that you follow – to the letter – the formalities for execution of a Will, particularly if you intend to do-it-yourself. If you don’t adhere to these requirements, you run the serious risk of having your Will declared invalid and of no effect.

In order to be valid and effective, a Will **MUST** meet these essential requirements:

- The maker of the Will (the “testator”) must be at least 18 years of age.
- The “testator” must also be of sound mind.

- The Will must be signed by the testator at the “foot” or end of it in the presence of at least two witnesses who must be present at the same time. These witnesses must then sign the Will as witnesses in the presence of the testator and in the presence of each other.

The witnesses should not stand to benefit under the Will. If they do stand to benefit, the gift to them will be invalid.

There are also certain considerations that you should take into account when making a Will. You can download a summary of these issues here, [Matters for Consideration in Making a Will](#).

To illustrate a very basic form of Will, a sample Will may be downloaded here, [Simple Will Sample](#). The sample provides information on what each clause in the Will means.

FREQUENTLY ASKED QUESTIONS

Under the laws of The Bahamas, persons domiciled in The Bahamas as well as persons domiciled in other jurisdictions may dispose of their assets by way of a Bahamian Will. It is also noteworthy that in The Bahamas, there are no forced-heirship laws thus, a person wishing to make a Will under the laws of The Bahamas has complete testamentary freedom to dispose of their assets as they see fit^[1].

1. What constitutes a Will under the laws of The Bahamas?

Answer: While the Wills Act, 2000, (the “Act”), does not provide a definition of what constitutes a Will, in general terms, a Bahamian Will is a declaration in writing executed in accordance with the formalities of the Act^[2] which sets out how the person making it, the testator or testatrix, wants to dispose of their property on death^[3].

2. Who can make a Bahamian Will?

Answer: Any person who is eighteen (18) years or older and of sound disposing mind can make a Bahamian Will.

Sound disposing mind is not defined in the Act but at common (Banks v Goodfellow [1870] LR 5QB 549) it means essentially that the testator/testatrix is capable of making a Will with an understanding of the nature of the business in which he/she is engaged, a recollection of the property he/she means to dispose of, and of the persons who are the

object of his/her bounty, and the manner in which it is to be distributed between them. They also understand that the Will will not take effect until their death.

In other words, the testator/testatrix must fully understand (i) what it means to make a Bahamian Will, (ii) the extent of the property which he/she is disposing of, (iii) who will benefit under the Bahamian Will; and (iv) how they will benefit. If it is suspected that the testator/testatrix is not of sound disposing mind, this could impact the validity of the Will.

3. What should be included in a Bahamian Will?

Answer: The following should be included in a Bahamian Will:

- The full name and address of the testator/testatrix.
- The full names and addresses of executors[4]– it is advisable that there should be an alternative executor in the event that the named executor is unable or unwilling to act.
- The full names and addresses of beneficiaries. The testator/testatrix should indicate whether there are beneficiaries who are minors. This would assist in determining whether a trustee[5] or guardian should be appointed to hold gifts on behalf of the relevant

The testator should also consider ultimate beneficiaries in the event that the named beneficiary in the Bahamian Will is unable (e.g., where the beneficiary predeceases the testator/testatrix) or unwilling to accept his/her gifts.

- Personal and real property.
- Residue clause- A residuary clause is a provision in a Will that disposes any portion of the testator's/testatrix's estate that was not disposed of or not disposed of properly under the Will. The benefit of a residue clause is that it acts as a "saving" clause ensuring that partial intestacy[6] does not arise.
- Instructions regarding funeral and burial or cremation (optional).
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4. What constitutes a duly executed Bahamian Will under Bahamian Law?

Answer: Under section 5 of the Act, the following must be observed:

- The Bahamian Will must be in writing (with limited exceptions).

- The Bahamian Will must be signed by the testator/testatrix at the foot or end of the Will or by someone both in the presence and by the direction of the testator/testatrix.
- The testator's/testatrix's signature must be made or acknowledged by the testator/testatrix's in the presence of two or more witnesses at the same time.
- Each witness may either attest, sign or acknowledge the testator's/testatrix's signature in the presence of the testator but not necessarily in the presence of all other witnesses.
- The beneficiary or spouse of a beneficiary (including an executor who will be remunerated) must not be a witness to the Will.
- It is best practice that each page of the Will (other than the execution page) be initialed at the end of the last word closet to the right margin by the testator and two witnesses.
- The witnesses signing the Will must be competent[7].

In addition to the foregoing requirements, it should be borne in mind that persons domiciled in other jurisdictions can dispose of their assets situate in The Bahamas provided that the Will conforms with the formal requirements from the place of execution and the Act[8].

5. What effect does marriage and/or divorce have on a Bahamian Will?

Answer:

Marriage revokes a Will: The effect of marriage on a Bahamian Will is that it revokes it. There are two options available to a person intending to marry: (i) make a new Will after the marriage or (ii) they can declare in the Will prior to the marriage that it is being made in contemplation of his/her marriage to a particular person and this person is intended to benefit under the Will. This declaration would be recognized as valid under Bahamian law.

Divorce: The dissolution of marriage has the effect of revoking the appointment of a former spouse as executor and also of revoking any gift(s) to a former spouse. The Will is not revoked because of the dissolution of the marriage but it takes effect subject as mentioned above.

6. If I am not domiciled in The Bahamas but I own assets that are situate in The Bahamas, can I make a Bahamian Will?

Answer: Persons domiciled in other jurisdictions with assets situate in The Bahamas can make a Bahamian Will to dispose of them. Under section 7 of the Act, a testator/testatrix is required to expressly declare in his/her Bahamian Will that the laws of The Bahamas shall be the governing law. Such declaration will be valid, effective and conclusive regardless of any other circumstances.

7. What happens if you do not make a Bahamian Will?

Answer: Under the Inheritance Act, 2002, (the “**Inheritance Act**”), the laws of intestacy dictate who inherits the estate of the deceased.

The rules of intestacy are those that determine (i) the persons who are entitled to share in the assets of the deceased and (ii) what percentage of the deceased’s assets those persons are entitled to. This means that spouses and children are generally the first to inherit the estate of the deceased. Accordingly, it is important to note that persons in common law marriages do not benefit under the laws of intestacy.

Common Law Marriages

Under the laws of The Bahamas, namely, the Inheritance Act, common law marriages, or two people simply deciding to cohabit as husband and wife, are not recognized, therefore, persons within this union will not be deemed spouses[9] for the purposes of the Inheritance Act and distribution of the deceased’s property.

8. What does “Probate of Wills” mean?

Answer: Probate is the process of transferring the property and ownership of the testator/testatrix to the person he/she intends to benefit after his/her death. This process is effected through the Probate Registry of the Supreme Court of The Bahamas.

This process begins when the named executor or an administrator[10] applies for a grant of representation which confers the authority on them to administer the estate of the testator/testatrix.

Other Considerations

The information cited above is not exhaustive. There are several other factors that should be considered when making a Bahamian Will. They include the following:

1. Clients should indicate whether they have any previous Wills.
2. Clients should indicate whether they are holding any real and/or personal property as a joint tenant.
3. Extra care should be taken with vulnerable and/or elderly clients.
4. It may be beneficial for the testator/testatrix to use a blue pen when signing a Bahamian Will rather than a black pen as this will help to confirm the original nature of the Will.

Download: [Matters for Consideration in Making a Will](#)

Download: [Simple Will Sample](#)

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CAUTION

We cannot emphasize enough that nothing in this publication, including the Will sample, constitutes legal advice. Indeed, unless it is an extreme emergency, self-help will-making is strongly discouraged. Instead, you should contact us for advice on how a Will should be structured and worded to meet your specific needs and circumstances.