

# Making a Will is part of prudent estate planning

Leah Scott & George Jones, 8 January 2007

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Death is not a pleasant topic to discuss – particularly when it is your own. Very few people are comfortable with facing up to their own mortality, and consequently, find it difficult to prepare a Will.

In Bermuda, only one out of every three people successfully executes a Will. When you die having made a Will, you will have died "testate"; however, when you die without having made a Will, you will have died "intestate".

The consequences of not making a Will are that your assets will be distributed in accordance with the provisions of the Succession Act 1974 ("the Act"), which determines the order of succession to real and personal property upon intestacy or partial intestacy. The right to benefit from intestacy depends on your relationship with the deceased. Generally an estate is shared by relatives in the highest category to the exclusion of relatives in a lower category.

The Act does not recognise the rights of a 'common law' or same sex spouse, and does not distinguish between those spouses who live together as husband and wife and those that do not. The legislation can produce some unusual results due to the definitions of "spouse" and "children". Pursuant to the Children Amendment Act 2002 legitimate, adopted and illegitimate children are treated the same for the purposes of deceased succession. The Act also extends the entitlement to a child *en ventre sa mère* (conceived but not born at the time of the intestate's death) at the date of death.

Let's look at some examples of how your assets would be distributed if you die without a Will.

Where the deceased has a surviving spouse, but no children and no parent or brother or sister of the whole blood (i.e., relationship by blood - by descent from the same parents) or any children/descendants of a brother or sister, the residuary estate passes to the surviving spouse absolutely. If there is a surviving spouse and child, parent, or full sibling the surviving spouse receives all personal chattels absolutely and the residuary estate of the deceased amounting to half of the value of the residuary estate (including the personal chattels, or \$100,000, whichever is the greater amount). The balance of the residuary estate remaining is held in trust for the children/descendants of the deceased. If the residuary estate has a value below \$100,000, the surviving spouse receives the entire estate and the children/descendants receive nothing.

Where there are no children/descendants but a parent, or brother or sister or any children of the brother or the sister, then the surviving spouse takes all the personal chattels absolutely, and in addition, two-thirds of the residuary estate or \$150,000, whichever is greater. The balance of the residuary estate (i.e. one-third) is held on trust for the parents of the deceased in equal shares or the surviving parent if there is one. Where there is no parent alive, then the one-third of the residuary estate will be held for brothers and sisters of the whole blood of the deceased or if any brother or sister is dead, it will be held for their descendants.

If you die and have no surviving spouse, your estate will be left to:

- your descendants on intestacy trusts; but, if none, to
- your parents equally if both are alive; or
- your surviving parent, if just one is alive; but, if none, to
- your full brothers and sisters (and their surviving children or descendants if they predecease living surviving children or descendants then alive) on trust, or to
- your half brothers and sisters (and their surviving children or descendants if they predecease living surviving children or descendants then alive) on the intestacy trusts, but, if none, to
- your grandparents, equally if more than one; but if none, to
- your full uncles and aunts (and their surviving children or descendants if they predecease living surviving children or descendants then alive) on the intestacy trusts; but if none to
- the Government as bona vacantia. The Government may, out of this property, provide for your dependants and other persons for whom you might reasonably have been expected to make provision – or any other person whom the Government is satisfied has a legal, equitable or moral claim to the estate.

As you can see, when you do not make a Will, you leave behind a state of chaos that has to be sorted out by lawyers and the Court. This can and frequently does result in significant costs to your estate, including death taxes, which may have been avoided had you engaged in prudent estate planning.

**Attorneys George N H Jones and Leah K Scott are members of the Wills & Estates Practice Group of Appleby Hunter Bailhache. A copy of this column is available on the firm's web site at [www.applebyglobal.com](http://www.applebyglobal.com).**

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## The Right People. The Right Places.

### **Bermuda**

Canon's Court  
22 Victoria Street  
PO Box HM 1179  
Hamilton HM EX  
Bermuda  
Tel +441 295 2244  
Fax +441 292 8666

### **Hong Kong**

5511 The Center  
99 Queen's Road Central  
Central  
Hong Kong  
Tel +852 2523 8123  
Fax +852 2524 5548

### **British Virgin Islands**

Palm Grove House  
PO Box 3190  
Road Town  
Tortola  
British Virgin Islands  
Tel +284 494 4742  
Fax +284 494 7279

### **Jersey**

PO Box 207  
13-14 Esplanade  
St Helier, Jersey  
JE1 1BD  
Channel Islands  
Tel +44 (0) 1534 888777  
Fax +44 (0) 1534 888778

### **Cayman Islands**

Clifton House  
75 Fort Street  
PO Box 190 GT  
Grand Cayman  
Cayman Islands  
Tel +345 949 4900  
Fax +345 949 4901

### **London**

2nd Floor  
2 Royal Exchange Bldgs  
London  
EC3V 3LF  
United Kingdom  
Tel +44 (0) 20 7283 6061  
Fax +44 (0) 20 7469 0540