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To Will or Not To Will

by Sarah Wallis

To Will or Not To Will

According to Benjamin Franklin: “In this world nothing can be said to be certain, except death and taxes”. Perhaps there are those who would argue about the certainty of taxes but about death, probably none.

If you are domiciled in Guernsey (meaning you live here and intend to remain) or own real estate (land and/or buildings) on the island there are very specific rules which dictate both what happens if you die without making a will (intestate) and what you are allowed to do with your estates both real and personal (everything other than land and buildings) if you do make a will.

On 7 May 2008, The Law Reform (Inheritance and Miscellaneous Provisions) (Guernsey) Law, 2006 ('the new law') came into force. (The new law does not extend to the islands of Alderney or Sark).

The new law makes some fundamental changes to the rules of inheritance in Guernsey and it is perhaps more important than ever to obtain legal advice on whether you need to make a will or amend a will which you have already made.

These principal changes are:

1. Discrimination against illegitimate persons is removed

- Before 7 May 2008, illegitimate children had no automatic rights of inheritance (although they could be specifically included within a will).
- Now illegitimate children will have the same rights of inheritance as legitimate children (those born within a marriage or legally adopted).
- The new law does not have retrospective effect. Therefore, if a will was made before 7 May 2008, illegitimate children can only inherit if they are specifically included (even if you later amend it by codicil(s)).
- You can still favour one child/descendant over another when you make a will (either in relation to your real estate or the disposable part of your personal estate).
- If you die after 7 May 2008 without making a will, legitimate and illegitimate children will be treated equally. (If you do not make a will in respect of your real estate naming your children this could present your heirs with difficulty when they come to sell the house as purchasers will want to be assured that they are your only children).

2. A person can be appointed to dispose of real estate where there are unascertained heirs

- There is now a scheme of administration enabling Guernsey real estate to be sold or otherwise dealt with despite there being some uncertainty as to its ownership.
 - The intended effect is to provide the authority to a person (the administrator) to give good title to a purchaser where otherwise it might not have been possible to sell the property because no-one was able to satisfy a purchaser that he was obtaining good title. This may allow properties which have been left to decay because heirs could not be identified, to be sold and re-developed.
 - The main duty of the administrator (who must be an individual not a body corporate) is to hold the property or its proceeds of sale in trust for the heirs, whoever they may be. He must administer the property pending the sale, sell it and finally distribute the proceeds of sale. In the course of this, he is under a duty to take all reasonable steps to identify the heirs.
 - The administrator is required to hold the proceeds of sale for a minimum period of 6 years (although he can apply to the Court to distribute the proceeds of sale before the 6 year period has elapsed if he thinks he has
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identified all of the heirs), after which period he can apply to the Court for permission to distribute the funds to the heirs.

3. A single will can be made dealing with both real and personal estates

- It is no longer necessary to make separate wills disposing of your real and personal estates. One document can now incorporate both.
- You may prefer to make separate wills if you consider that aspects of your will of personal estate are sensitive as eventually a will of real estate will be registered at the Greffe, i.e. on the public records.
- It is now much simpler to make a will dealing with real estate as it can be signed before any 2 independent witnesses (not beneficiaries of your will, your spouse or children) at any time, and the requirement to sign it before the Jurats of the Royal Court has been removed.

4. Prescription period is reduced

- Any claim in respect of real estate against a person who has acquired it in good faith from the heirs (purchase, gift, inheritance or otherwise) (i.e. where an administrator has not been appointed), must generally be brought within a period of 6 years after the property's acquisition rather than 20 years.

5. Retrait Lignager is abolished

- The right of Retrait Lignager was a right under customary law allowing the blood descendants of the seller of real estate to buy the property back from the purchaser provided that they repaid the purchaser the full purchase price (and certain expenses involved in the purchase) and exercised the right within 30 days of the date of purchase. This has now been abolished.

Sarah Wallis
Advocate
AFR Advocates