

Wills and estates in the Cayman Islands

Briefing Summary: Without advance planning the task of determining an individual’s final wishes and administering a deceased’s estate can be time-consuming and expensive. Set out below is a summary of the various ways in which an individual domiciled or with assets or interests in the Cayman Islands can properly protect their position and ensure that their legacy is protected.

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Cayman Islands wills

A will directs how a person's (also known in this context as a “testator”) assets are to be dealt with on their death, and empowers the person’s chosen executors to administer their estate after their death so as to give effect to those wishes. If a person owns Cayman Islands assets in their name whether real estate, shares in a Cayman Islands company or money in a Cayman bank account, then the preparation of a Cayman Islands will is likely to be in their best interests.

Benefits of a Cayman Islands will

- The succession laws of the Cayman Islands are based on the principle of ‘testamentary freedom’, meaning a person who is not incapacitated can leave his or her estate in his or her will to anyone that he or she wishes. A will governing assets located in the Cayman Islands therefore provides certainty as to how those assets are to be divided and distributed on death in accordance with the person’s wishes.
- Without a will a person dies ‘intestate’ and their assets will be distributed in accordance with any applicable intestacy rules and in set proportions (which may not match the person’s wishes). In the Cayman Islands, the Succession Act (Revised) contains statutory rules as to the disposition of an intestate’s estate to family members.

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- A Cayman will can avoid the costly exercise of dealing with an intestate estate and allow for the assets in the person's estate to be properly identified and allocated according to the testator's express wishes (which can depart from the statutory rules if the testator wishes to dispose of his or her estate in a different manner).
- A well-drafted will can also incorporate testamentary trusts to take effect on death and can be designed so that the trustees under the will hold assets for a particular person or persons and for a particular period. The benefits of this include, for example, preventing a family member who is a young adult inheriting vast wealth before they are ready to receive and manage it (by, for example, having the trustees hold it to manage and maintain the family member's lifestyle until he or she is old enough to do so).
- Trusts created within a will can also protect against relationship property issues by leaving assets on trust for an adult family member rather than transferring the assets directly to them. In this way, the assets can be held and managed by a trustee for the benefit of the adult family member, preventing those assets from being caught in relationship property claims.
- A Cayman will can also be particularly beneficial for persons domiciled outside of Cayman who own shares in Cayman companies. Obtaining a grant of probate in respect of a Cayman Islands will (discussed below) authorizes the executor to deal with the Cayman shares independent of the process in the person's country of domicile and without the requirement to have a foreign grant of probate resealed by the court in the Cayman Islands.

Formalities of a Cayman will

The Wills Act (Revised) sets out the basic requirements of a Cayman will. These are broadly that:

- the person making the will is over 18 years old;
- it is made in writing; and
- it is signed in the presence of two witnesses.

In addition, the Formal Validity of Wills (Persons Dying Abroad) Act, (Revised) allows persons domiciled outside of the Cayman Islands to execute a valid foreign will dealing with Cayman moveable property (broadly, anything other than real estate) subject to certain conditions. This is important because it allows people who own shares in Cayman companies or who have interests in Cayman Islands investment funds to easily dispose of their interests on death, even if they die domiciled outside of the Cayman Islands. The new law does not affect the requirements for wills disposing of Cayman immovable property such as real estate.

The testator can specify who is to benefit from their estate in relation to movable property (such as Cayman shares) provided that the will is materially valid; meaning that it complies with the law of the testator's domicile at the date of their death. A will would not meet this requirement if it purported to circumvent forced heirship rules in the testator's domicile.

Cayman Islands estate administration process

Types of grants

When a person dies with assets situated in the Cayman Islands, their personal representatives will need to obtain a grant of representation from the Grand Court of the Cayman Islands (the Grand Court) as formal proof that the person named in the grant has a legal entitlement to take possession of or deal with the deceased's assets. The type of grant needed will depend on whether the deceased has executed a will or not and can be in one of four forms:

- If the deceased left a will the order required is called a grant of probate of the will (**Grant of Probate**) and it is issued to the executor or executors named in the will.
- If the deceased did not make a will before he or she passed (i.e. they died intestate) the grant required is a grant of letters of administration of the deceased's estate (**Letters of Administration**).
- Where a person leaves a will, but that will is invalid for some reason (for example, because of a failure to satisfy the formal requirements set out above or because there is no identifiable executor) the grant sought is a grant of administration with the will annexed.
- When a Grant of Probate or Letters of Administration have been obtained from a foreign court (a **Foreign Grant**), that grant can be resealed by the Grand Court. Once resealed, the Foreign Grant is considered to be of like effect and fully enforceable in Cayman (**Resealing of a Foreign Grant**).

Special leave

An application for a Grant of Probate or Letters of Administration must be made within six months of the date of death, failing which a separate and initial application must be made by the executor or proposed administrator to the Grand Court for special leave to apply out of time. An application for special leave requires preparation of a formal application for leave which is supported by an affidavit confirming: (i) the death of the deceased; (ii) the relationship between the applicant and the deceased; and (iii) the reason for the delay. This application is determined by a Judge of the Grand Court on the papers in Chambers and, if satisfied that it is appropriate to do so, the Grand Court will issue an order granting leave to continue to file an application for a Grant of Probate or Letters of Administration. Filing fees for an application for a Grant of Probate or Letters of Administration (along with other associated court fees) are approximately US\$300.00.

Application for a grant of probate in the Cayman Islands

An application for a grant of probate involves the following:

- Preparing a standard form court application for the Grant of Probate, which is made in the name of the executor specified in the will.

- Drafting an affidavit in support of the application sworn by the executor covering certain prescribed matters such as: (i) the date of death; (ii) the place of domicile of the deceased; (iii) their marital status; and (iv) their heirs. The affidavit must also confirm the property in the Cayman Islands and the estimated value of that property.
- Annexing to the supporting affidavit the original will, or a certified copy of the will, and the death certificate.

If the application is to reseal a Foreign Grant of Probate then it will also need to include a court issued copy of the Foreign Grant, it and may also require the filing of an affidavit of foreign law in support of the application sworn by a lawyer practicing in the country in which the Foreign Grant was issued confirming that the foreign will is a valid will.

The application will be dealt with by a Judge in Chambers on the papers without the need for a hearing and it usually takes two to four months for the Grand Court to review and grant this type of order.

Application for Letters of Administration with or without the will annexed

The application for Letters of Administration is broadly similar to that required for a Grant of Probate described above in that it requires the filing of a standard application, an explanatory affidavit in support covering the matters set out above and the inclusion of the death certificate (and the will if the deceased left one). In addition, the application must be supported by a bond for double the amount of the sworn value of the estate (unless the court thinks fit to reduce the amount) with one or more sureties. If the application is to reseal a Foreign Grant of Letters of Administration, then an affidavit of foreign law confirming that the person appointed as administrator was validly appointed under the laws of that country will also be required.

These applications are also dealt with on the papers (without the need for a hearing) and will usually take a similar amount of time to an application for a Grant of Probate.

Once the grant has been obtained

Once the relevant grant has been obtained, the executor/administrator will have six months from the date of the grant to file an inventory of the estate. Within 12 months of the date of the grant, an affidavit must be filed by the executor or administrator confirming the administration of the Cayman estate is complete.

Court and legal fees

The fee for applying for a Grant of Probate, Letters of Administration or Resealing of a Foreign Grant is approximately US\$300 which includes the application filing fee and costs associated with the filing of the affidavit in support of the application.

Legal fees are additional and will depend upon the estate in question and the complexity of the matter (including whether extensive liaison with foreign family representatives and attorneys is required).

Trusts as an alternative

An individual who wishes to avoid the time and costs of probate altogether might consider, as an alternative, the creation of lifetime trusts as a succession planning tool.

Assuming the trust is irrevocable and there is no allegation of the trust being formed to defeat creditors, following transfer to the trustee the assets settled on the trust will no longer form part of that person's estate and therefore that person's death will have no impact on the trust assets. As a result, the assets are unlikely to be subjected to attack by personal creditors of the settlor or impacted by forced heirship rules that may exist in the place of the deceased's domicile, a position bolstered by the existence of the Cayman Islands' firewall legislation.

A less common alternative is the creation of a "pour-over will", whereby the deceased's residuary estate is transferred to an existing trust (created during their lifetime). However, it is important to note that because the deceased has not transferred their assets to trustees in their lifetime the persons appointed as executors under the will are first required to obtain a Grant of Probate from the Grand Court before they can transfer the residuary to be held on the terms of the existing trust.

Advance health care directives

When considering estate planning tools, it is also important to think about what other steps can be taken during an individual's lifetime in order to properly record his or her wishes.

The Health Care Decisions Act (Revised) (the **HD Act**) specifies a procedure by which an individual can complete an "**Advance Health Care Directive**" in order to express his or her wishes as to the forms of medical treatment that should (or should not) be administered in the event of very serious or terminal illness. The intention behind the HD Act is to give individuals living in the Cayman Islands greater autonomy over their healthcare in the event of their incapacity.

The HD Act provides for a mentally competent individual to issue an advanced health care directive (a Directive) that sets out the individual's instructions in respect of the nature and extent of medical care they are to receive in the event that they become mentally incompetent. A template form of Directive is included in the HD Act. The Directive can cover things such as the individual's decision as to whether or not they should be put on long-term life support, or include an order not to resuscitate them in specific situations.

The Directive allows for the appointment of one or more people as proxies to make other medical decisions for the individual, should he or she become mentally incapable. To be legally appointed as a proxy, the person must be an adult and be mentally competent. Should the proxy holder die or renounce their duty once the patient is mentally incompetent the patient's doctor automatically becomes the decision maker.

To take effect the Directive must be witnessed by two individuals, including the doctor who is certifying mental capacity. A person who is being appointed as a proxy, a beneficiary or spouse of a beneficiary of the directive-makers' estate or any other person with an interest under the Direction cannot be a witness. Importantly, there is also provision for the recognition of health care directives executed in certain specified jurisdictions other than the Cayman Islands.

Conclusion

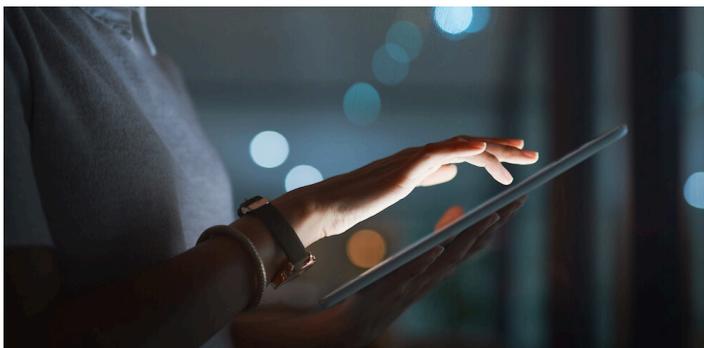
What is right for each person in terms of testamentary arrangements and the expression of final wishes will depend on a wide range of factors, and there is no one size fits all solution. Estate and succession planning should be viewed as an evolving process, rather than one in which a plan is put in place and forgotten about despite changes in personal and family circumstances. Putting in place arrangements in the Cayman Islands that clearly express an individual's last wishes and identify an individual's assets is a good first step, and one which will make the process of estate administration far less time consuming and burdensome in the long run for those left behind.

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