COLLAS CRILL

Collas Crill contributes to Guernsey chapter of International Succession Laws

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Fixed rights of inheritance

Statement of succession laws and rights of inheritance

G8.1

The Bailiwick of Guernsey comprises a number of islands including Guernsey, Alderney and Sark. Succession laws in each of these three islands differ. This chapter is limited only to the laws of succession and rights of inheritance presently in force in the island of Guernsey.

Guernsey law distinguishes between realty (immovable assets, often known as real property or real estate) and personalty (movable assets, often known as personal estate).

Under Guernsey law, the devolution of realty is governed by the laws of the jurisdiction in which that real property is situate. Guernsey's inheritance laws apply to all realty situate in Guernsey, notwithstanding if the deceased was resident or domiciled elsewhere at the date of his death and no matter what his nationality may have been.

Personalty is governed by the laws of the jurisdiction in which the deceased was domiciled at the date of his death. Guernsey laws of inheritance relating to movables do not apply to the estate of an individual who is not domiciled in Guernsey, or to a Guernsey resident who may be domiciled elsewhere other than in Guernsey.

Realty and personalty can be disposed of either by separate wills (which is most common) or by a single will dealing with the entire estate.

A will disposing of personalty will appoint executors and instruct them to pay off any estate debts and testamentary expenses, and it may then specify particular gifts or other dispositions before disposing of the rest of the personal estate (ie the residuary estate). The will may also, for example, create a trust for the benefit of minors or vulnerable persons whereby a third party is appointed as trustee to hold certain assets on behalf of any minors or vulnerable persons for their ultimate benefit. Although referred to as a 'will of personalty', it might also deal with the devolution of realty which is situate outside the island.

There is no statutory requirement to obtain a Grant of Representation (ie a Grant of Probate or Letters of Administration) ('Grant') in Guernsey. Discretion is given to asset holders as to whether or not a Grant must be produced in order to deal with

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the deceased's personal estate assets, however, it is more often than not that a Grant is required in order to minimise any liability that an asset holder will have to the heirs of a deceased's estate.

A separate will of realty relates only to real property situate in the island (provided that the will itself has not been more widely drafted). It does not appoint executors (as an executor has no responsibility in relation to Guernsey realty unless the will of realty specifically leaves the property to them upon trust for sale, ie, an executor named under a will of personalty is given the authority under the will of realty, once appointed as executor, to sell the property and distribute the net proceeds of sale in accordance with the terms of the relevant will). Upon the death of the testator, the will of realty must be registered through the Royal Court of Guernsey (the 'Royal Court') and title to the realty passes to the heirs or legatees named in the will.

On 2 April 2012, the Inheritance (Guernsey) Law 2011 (‘the 2011 Law’) was introduced, abolishing Guernsey's ancient laws of forced heirship (where a certain portion of an individual's estate had to be left to a spouse or descendant) and introducing testamentary freedom accompanied by provision for family and dependents akin to the United Kingdom's Inheritance (Provision for Family and Dependents) Act 1975.

Under the 2011 Law a testator is able to leave both their realty and personalty by will to whomever they wish. This freedom is, however, subject to potential challenges. An applicant who can show that the deceased's estate, either by will or intestacy, did not make reasonable financial provision for them can make a claim against the deceased's estate. Only certain classes of applicants are able to apply, such as the deceased's spouse or civil partner, any of the deceased's children, someone who was treated as a child of the deceased, someone with whom the deceased lived for a period of two years immediately prior to their death or someone who was being maintained by the deceased immediately prior to their death. Claims can only be made against the estate of a person who signed a will after the introduction of the 2011 Law, made a will post 29 June 2010 and stated in it that the 2011 Law was to apply to it or, in the case of an intestate estate, a person who died after the introduction of the 2011 Law. There have been no such claims brought before the Royal Court to date and as such the full effect of the introduction of the ability to make such a claim is not yet known.

Immovable assets

G8.2

Under Guernsey law, the deceased's assets are deemed to be either realty or personalty. This applies not only to tangible objects but also to non-tangible assets such as legal rights of action.

The distinction between real property and personal property is roughly equivalent to the distinction between immovable and movable assets (ie between land and chattels). There are exceptional cases where some movable assets are deemed to be realty.

An Ordinance passed by the Royal Court in January 1852 defined what constituted ‘meubles’ and ‘immeubles’ under Guernsey law. Movable things are personalty (meubles), and land together with the buildings constructed on the land are realty (immeubles). This includes things incorporated in the land or attached to it as permanent fixtures. Certain crops are realty during specified periods of time, and there are things connected with realty which are deemed to be realty (eg a life

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interest (usufruct) in realty, servitudes imposed on land, legal actions in pursuit of a claim to recover realty, and anything lying outside the Bailiwick of Guernsey which is deemed by Guernsey law to be realty).

Under the 2011 Law, a person can leave their realty in their will to whomever they wish. The previous rules of forced heirship have been abolished. All testators are now also able to leave their real property upon trust in their will, should they so wish.

The 2011 Law also modified the order of succession for realty on an intestacy.

Under the 2011 Law, where the deceased leaves a spouse or civil partner but no issue, their spouse or civil partner will inherit the whole of their realty. However, where the deceased also has issue, their spouse or civil partner will inherit half their realty and will also have a right of enjoyment over the remaining half of the matrimonial home. Their issue will inherit the remaining half of the estate, subject to the right of enjoyment of the spouse or civil partner. Where the deceased is not survived by a spouse or civil partner or any issue, then in the first instance their siblings and their respective descendants will inherit the deceased's realty, then it will pass to ascendants, then remoter relatives and finally if there are no remoter relatives the realty will pass to the Crown.

The inclusion of civil partners upon intestacy should be noted. The 2011 Law defines a civil partner as one who has registered as a civil partner of the deceased under the Civil Partnership Act 2004 or who is treated as having done so by registering an overseas relationship within the meaning in that Act. A person is able to waive his rights as a spouse by entering into a pre-nuptial contract.

Where realty is purchased in joint names ‘for themselves and the survivor of them’ the realty in question will, on the death of the first to die, vest automatically in the survivor(s). Where, however, the realty has been purchased by co-owners in ‘undivided shares’, then an undivided share forms a part of the deceased's real estate and will devolve according to his will or, if there is no will, then as on an intestacy.
An adopted child is treated as if he had been born in lawful wedlock provided that Guernsey law recognises an adoption in the jurisdiction in which the child is adopted.

Step-children have no automatic rights to inherit from their step-parent unless specifically included within a Will.

Movable assets

G8.3

The rules of inheritance set out below apply only when the deceased was domiciled in Guernsey at the date of his death.

It should be noted that the rules of inheritance:

1. do not apply to assets held jointly by spouses which, in the absence of contrary intention, will vest in the survivor by virtue of the Husband and Wife (Joint Accounts) (Guernsey) Law 1966;
2. apply only to the net estate. Debts and testamentary expenses are paid out of the gross estate. Any forced heirship entitlements under Guernsey law which benefit the surviving spouse and children (see below) would apply only to the net estate of the movable assets;

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3. may have been modified by marriage contract or judicial separation, the marriage contract having been entered into before the marriage and the judicial separation having been declared either in Guernsey or elsewhere.

Under the 2011 Law, a testator can leave his entire personal estate to whomever he wishes, subject only to the risk of a claim for financial provision. Due to this complete freedom, testators are able to leave their estate in whatever manner they so wish and are now able to place their personal estate upon a variety of different types of trusts in their will.

The 2011 Law has also made certain changes to the order of succession of personalty upon intestacy. Where the deceased leaves a spouse or civil partner but no issue their spouse or civil partner will inherit the whole of their personal estate. However, where the deceased also has issue their spouse or civil partner will inherit half their personal estate and their issue will inherit the remaining half of the estate. Where the deceased is not survived by a spouse or civil partner or any issue, then in the first instance their siblings and their respective descendants will inherit the deceased's realty, then it will pass to ascendants, then remoter relatives and finally if there are no remoter relatives the estate will pass to the Crown. Again note the inclusion of civil partners as per G8.2 above.

How to claim statutory rights of inheritance

Immovables

G8.4

On an intestacy, the heirs of the deceased will automatically inherit his realty. Title to the Guernsey realty will vest in the heirs without any action on their part.

If the deceased made a will dealing with realty, the heirs named in the will inherit the relevant property however an application must be made to the Royal Court for permission to register the will. Any beneficiary named in the will can apply. An application must be signed by an advocate who must confirm that all formalities have been properly concluded and that there is no reason in law why the application should not be granted.

Following the grant of the application, the Greffe (Land Registry) will issue a sealed and certified copy of the Act of Court. The Act forms part of the title of the property.

Movables

G8.5

In Guernsey, Grants are issued by the Guernsey Probate Registry (formerly known as the Ecclesiastical Court of the Bailiwick of Guernsey) ('Probate Registry'). An executor or administrator holding a Grant issued by the Probate Registry can administer and wind up a Guernsey estate with issued legal authority. For smaller estates, the accepted value of which varies between institution, the local asset holder may be willing (but is not obliged) to release the funds to the personal representative, without a Grant being issued, usually in return of the personal representatives completing a personal

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indemnity. In those cases the personal representative can therefore carry out the administration and winding up of the Guernsey estate without a formal Grant being issued by the Probate Registry.

Grants are made by application to the Probate Registry, which sits every Friday. Persons taking out a Grant are required to swear on oath that they will administer the estate according to law and provide a true inventory of the estate when they have completed their duties.

In the first instance, Grants are issued to executor(s) named in the deceased's last will. If the named executor(s) is/are unable or unwilling to act, then the person entitled to the residue of the deceased's personal estate is entitled to apply for the Grant and wind up the estate. In the absence of any will, and if the deceased was ordinarily resident in Guernsey, then the person first entitled to administer those assets would be the surviving spouse followed by any adult children (in order of seniority) and then any adult grandchildren (in order of seniority). Individuals can renounce their right to a Grant should they not wish to undertake the administration of the estate.

A person claiming to be entitled to the whole or part of the deceased's personal estate should apply to the executor or administrator for his entitlement. A copy of the Grant can be obtained from the Probate Registry.

Where a Grant has first been issued in a foreign jurisdiction, a Grant can be issued in Guernsey to enable the foreign executor or administrator to administer the Guernsey estate.

How to challenge succession

G8.6

Where the succession to movables is in dispute, a person can enter a caveat with the Probate Registry. A caveat will prevent the issue of a Grant whilst it remains in place. Once lodged, a caveat subsists for a period of six months. At the end of the six-month period, it can be renewed. A fee of approximately £50 is payable upon the caveat being lodged and upon each, and any, renewal.

The Probate Registry will, with the permission of the caveator, issue a limited grant to enable an estate to be administered and the debts to be paid. Such limited grant will not allow the executors or administrators to distribute the estate.

Any proceedings challenging the succession or the right to the issue of a Grant must be brought before the Royal Court by virtue of the Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law 1994. The Probate Registry does not have jurisdiction to settle disputes. Proceedings will be brought by the aggrieved party either against the putative executors or administrators, or otherwise against those who are claiming to have an entitlement in the estate.

Similarly, proceedings relating to a disputed claim to immovable property must be brought in the Royal Court. Such proceedings should be brought against those who are claiming to be entitled to the real property.

Following the introduction of the 2011 Law, certain categories of individuals are able to apply for financial provision, subject to evidencing that the deceased's estate has not made reasonable financial provision for them.

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The class of claimants is limited to a spouse or civil partner; a former spouse or former civil partner who has not formed a subsequent marriage or civil partnership; a cohabitee living with the deceased for in excess of two years in the same household and as spouse or civil partner; a child; any person treated by the deceased as a child of the family; or any person who was immediately before the death of the deceased was being maintained by the deceased.

Claims must be brought within six months of the deceased's date of death, unless the Royal Court's permission is obtained to allow claims after this date.

When considering claims, the Royal Court will consider the financial resources and needs, both at the present time and in the future, of the applicant and of the beneficiaries of the estate. The Royal Court will also take into consideration the obligations and responsibilities of the deceased towards any applicant or beneficiary of the estate, the size and nature of the deceased's net estate, any physical and mental disabilities of the applicant or any beneficiary, and any other matter which the court might consider relevant, including the conduct of any party. The Royal Court has wide powers to make a variety of orders, including the transfer of property and payment of lump sums of money, having taken in to account a wide range of matters which are described in the 2011 Law.

Ability to benefit charities

G8.7

Subject to any entitlements of a surviving spouse and children as set out at G8.2 and G8.3 above relating to Guernsey's rules of forced heirship, which may still apply where Wills were made prior to 2 April 2012, a person is able to benefit a charity by will. The charity can be a local or overseas entity.

In April 2022, new charities legislation in Guernsey came into force, replacing the Charities and Non Profit Organisations (Registration) (Guernsey) Law 2008 which previously regulated charities and non-profit organisations (NPOs).

This new legislation provides a definition of a charity, as being;

1. any organisation of which its purpose is charitable, or, purposes are purely ancillary or incidental to any of its charitable purposes; and the organisation provides or intends to provide benefit for the public or a section of the public in Guernsey, Alderney or elsewhere to a reasonable degree in giving effect to its purposes.

An individual also falls within the definition of a charity if the person has been entrusted with a property or fund and the income from that property or fund:

1. is applicable only to purposes that are charitable purposes or purposes that are purely ancillary or incidental to any of those charitable purposes; and
2. provides or is intended to provide benefit for the public or a section of the public in Guernsey, Alderney or elsewhere to a reasonable degree.

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It is usual to provide in any will that the receipt of the treasurer or other proper officer of the relevant charity shall be sufficient to discharge the executors.

Treatment of lifetime gifts in calculating inheritance rights

G8.8

Whilst individuals now have complete freedom to leave their estate to whomever they wish, a testator who has concerns over the possibility of a claim being made against his estate for financial provision may wish to attempt to circumvent this by making a lifetime gift to individuals.

It is, however, important to note that, under the 2011 Law, the Royal Court has the ability to undo any gifts made six years prior to the testator's death which were intended to defeat a claim for financial provision. However, as no claims have yet been brought in front of the Guernsey courts for financial provision, the full extent to which such gifts will be challenged is not yet clear.

Cross-border issues

Ability to create trusts under local law

G8.9

By virtue of the provisions of the Trusts (Guernsey) Law 2007 ('the Trusts Law'), any person can establish a trust under Guernsey law.

A trust exists if a person (a 'trustee') holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his own estate:

1. for the benefit of another person (a 'beneficiary'), whether or not yet ascertained or in existence;
2. for any purpose which is not for the benefit only of the trustee.

A Guernsey trust can be established by residents and non-residents alike. There are no limitations on the ability to create a Guernsey trust. The Trusts Law also applies to trusts created by will.

Section 14(3) of the Trusts Law provides that no Guernsey trust is void or voidable or invalid if that trust avoids or defeats any rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person by way of foreign heirship rights.

Recognition of foreign trusts

G8.10

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Guernsey law recognises the validity of foreign trusts. Part IV, sections 66–77 of the Trusts Law, contain provisions as to both Guernsey and foreign trusts. The provisions include the powers of the court, upon application, to make orders as to the execution, administration or enforcement of a trust, or concerning a trustee, beneficiary or the trust property.

The sections of the Law also cover such matters as the bankruptcy of trustees, following trust property, limitation periods and prescription.

Use of companies

G8.11

A Guernsey trust can own shares in companies registered in Guernsey or elsewhere. Trustees commonly use a corporate vehicle to own realty or to hold investment portfolios and other assets. Corporate ownership can often make the administration, management and ownership of assets easier than if the assets were owned in the name of trustees.

The use of companies can also aid the disposal of assets by transferring the shares in the companies.

Choice of law to govern succession

G8.12

As outlined at G8.1 above, Guernsey laws of succession relating to movables do not apply to the estate of an individual who is not domiciled in Guernsey, or to a Guernsey resident who may be domiciled elsewhere other than in Guernsey.

Guernsey, in common with other jurisdictions, does not have a statutory definition of ‘domicile’. The Island’s courts would be expected to give it the meaning attributed to it by the principles of private international law.

A person seeking to avoid the provisions as to the succession of real or personal property under Guernsey law might choose to place assets in trust in the names of trustees. There is no statutory restriction on so doing, however, if done within six years of the testator's death such disposition may be undone if a claim for financial provision is made under the 2011 Law. Alternatively, assets may be put into the name of a company and the shares in the company disposed of. Shares in a company constitute personal property (movable assets) under Guernsey Law. In this way, real property in Guernsey can be disposed of as if it were personalty.

Local recognition of foreign court orders

G8.13

The only statutory provision for the recognition of foreign court orders under Guernsey law is the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (the 'Reciprocal Enforcement Law'). Pursuant to this legislation, a foreign judgment can be registered in and sued upon in Guernsey. The defences available to the judgment debtor are limited to certain procedural

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and technical issues as set out in the 1957 Law. These are, for example, that the judgment debtor did not receive notice of the proceedings being taken in the foreign jurisdiction before judgment was given against him.

The jurisdictions to which the 1957 Law applies at present are the United Kingdom, the Isle of Man, The Netherlands, Surinam, Netherlands Antilles, Israel, Italy and Jersey.

Where registration is not available under the Reciprocal Enforcement Law, foreign judgments may be recognisable and enforceable under the common law regime. In insolvency cases, a person appointed as a liquidator or receiver in England can apply to the Guernsey court for aid pursuant to the Insolvency Act 1986 (Guernsey) Order of 1989. The court will recognise the appointment under the insolvency legislation in the United Kingdom.

As stated in G8.5 above, a person who is sworn as an executor or administrator in a foreign jurisdiction may need to obtain a Grant issued by the Probate Registry in Guernsey in order to administer an estate in Guernsey.

In the case of small balances (of, say, less than £5,000–£10,000) held by banks in Guernsey, or smaller holdings of stocks, shares or units in unit trusts, the bank or the investment manager may be prepared to accept an indemnity from the foreign executor or administrator, or indeed from the deceased's spouse, upon production of the original will without requiring the issue of a Guernsey Grant. The acceptance of such indemnities is wholly a matter for the institution that holds the asset. It cannot be forced to accept an indemnity and whether or not a Grant is to be obtained remains a matter in the asset holder's discretion.

Information publicly available after death

G8.14

By application to the Probate Registry, a person can obtain a copy of the Grant which, in the case of probate, will normally have a copy of the will of the deceased attached. The value of the relevant estate is not publicly available.

In order to be effective, wills disposing of realty must be registered at the Greffe (Land Registry) in Guernsey—see G8.4 above. Until registered they are of no effect. The Greffe is a public registry and the wills and other documentation registered there are available for public inspection during normal business hours.

Formalities

Formalities required for a valid, local will

G8.15

A person signing wills in Guernsey may either make separate wills for real property (immovables) and personal property (movables) or a combined will dealing with both. Wills must be in writing.

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Under the Law Reform (Inheritance and Miscellaneous Provisions) (Guernsey) Law, 2006, which came into effect in Guernsey on 7 May 2008, (the '2006 Law'), all wills must be signed in the presence of two witnesses (aged 14 years and over), both present at the same time, who must also sign the will. The testator's spouse or descendants, or any beneficiary or their spouse, would lose the right to any gift under the testator's will if they witnessed the same. Prior to the 2006 Law, wills dealing with realty had to be signed before two Jurats of the Royal Court and a testator may still choose to have a will of realty witnessed in this way.

An exception to the above rules for wills of personalty is a holographic will. Such a will does not need to be witnessed. It must be in the handwriting of the deceased, dated and signed at its foot.

These formalities are set out in the *Loi sur les Successions* of 1840, the law on the *Testaments de Meubles* of 1847 and the 2006 Law.

At the current time, if signed outside the Island of Guernsey a will can dispose of both real and personal property, provided the formalities in respect of attestation are observed.

Recognition of foreign wills

G8.16

Wills which have been made outside the jurisdiction but which are submitted for probate in Guernsey will be recognised if they have been executed in accordance with the formalities required for a valid will as set out in G8.15 above.

In addition, by virtue of the Execution of Wills (Bailiwick of Guernsey) Law 1994, a will, whether disposing of real or personal property or both, shall be regarded as properly executed if its execution conforms to the internal law in force:

1. in the territory where it was executed;
2. in the territory where, at the time of its execution or of the testator’s death, the testator was domiciled or had his habitual residence;
3. in a state of which, at either of those times, the testator was a national; or
4. in so far as the will disposes of real property, in the territory where the property is situated.

There are additional provisions in respect of wills executed on board a vessel or aircraft, and wills that exercise a power of appointment.

Separate wills

G8.17

It has become increasingly common to make a separate will in respect of Guernsey assets where the testator is resident in another jurisdiction.

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A separate Guernsey will may make provision for:

1. the payment of testamentary expenses and debts arising in Guernsey;
2. the appointment of local (as opposed to foreign) executors to administer the Guernsey estate;
3. the devolution of the Guernsey estate in a particular way which might differ from the way in which the remainder of the testator's assets may be bequeathed.

The making of a separate Guernsey will does not, of course, override any restrictions on the testator's freedom of testamentary disposition under the law of his domicile at the date of his death. It would be open to a member of the testator's family, or other person entitled under the law of his domicile to any part of his estate, to challenge the entitlements under the Guernsey will should they believe the Guernsey will's terms conflict with any relevant and applicable laws.

Revocation

G8.18

A Guernsey will can be revoked by a subsequent will that contains an appropriate revocation clause. Any document which purports to revoke an earlier will must fulfil the requirements for the valid execution of wills as set out in G8.15 and G8.16 above.

A Guernsey will can also be revoked by the physical destruction of the will by the testator whose intention is to revoke it.

A will can also be revoked by the making of a new will outside Guernsey, if the new will contains general revocation provisions in respect of any previous testamentary disposition which the testator may have made. In this regard it is important to take care when making a foreign will to ensure that the Guernsey will is not inadvertently revoked.

Probate formalities

G8.19

The probate jurisdiction in Guernsey is administered by the Probate Registry. The court sits at 9.30 am each Friday. The business of the court is administered by the Registrar and Deputy Registrars of the Probate Registry. The court is presided over by the Dean of Guernsey or, in his absence, by a Vice-Dean or Assistant Commissary.

Executors are sworn before the court. An executor will ordinarily attend in person, but if unable to do so (for reason such as absence from the Island) will be able to swear the oath by post. The executor is asked to identify the will as being the last will of the deceased as far as the executor knows and believes. If there is no will, the administrator will be asked to confirm that as far as he is aware the deceased died without leaving a will. The executor/administrator is asked to swear or affirm an oath to administer the estate according to law and to exhibit a true inventory of the estate whenever required by law so to do.

Once this oath has been taken, the executor/administrator departs from the court and the grant of probate/letters of administration is subsequently issued by the Registrar or Deputy Registrar.

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The Grant is usually available on the Monday or Tuesday following the Friday on which the oath is taken by the executor/administrator. The Grant is accompanied by a note of court fees. The original will is retained in the court records.

The fee payable upon the issue of the grant is approximately 0.35 per cent of the value of the estate. If the first grant of probate/letters of administration is issued in Guernsey, the fee is calculated on the value of the personal estate worldwide. If the Grant issued in Guernsey is subsequent to a foreign grant, then the fee is calculated on the value of the Guernsey estate only.

Executors

G8.20

The duties of an executor or administrator are set out in the Loi relative aux Executeurs Testamentaires et aux Administrateurs des Successions de Personnes Decedées of 1930.

An executor/administrator must pay all liabilities of which he has notice. If the estate is insufficient to pay all liabilities, then the executor/administrator will not be liable for the shortfall.

Under normal circumstances any person who has a claim against the estate of a deceased individual has up to six years from the date of death during which to take steps for the recovery of such claims from the appointed executor/administrator. However, provision has been made under the terms of the 'Loi relative aux Préscriptions' 1890 (amended by The Prescription (Amendment) (Guernsey) Law 1997)) for an executor/administrator to limit their liability for such claims to a period of three months by making two publications in appropriate terms in the local Island newspaper. At the expiration of that period the executor/administrator can distribute the estate only having regard to claims of which they have had notice within that time period. If a creditor fails to notify the executor/administrator within the three-month timeframe that creditor can still follow the property into the hands of the recipient (ie the estate beneficiary(s)).

When he has concluded the administration, it is not necessary for the executor to lodge a copy of his accounts with the Probate Registry. An executor should send copies of the estate accounts to the residuary beneficiaries. If, however, there is any suggestion of impropriety on the part of the executor/administrator, then the Probate Registry can call upon him to produce a copy of the estate accounts. The Registrar can do so if he has cause to believe that an estate has been incorrectly administered or there has been undue delay in administering it.

Should there be any dispute between an executor or a beneficiary, or if the executor should wish to receive judicial direction as to the way in which he should perform his duties, then application must be made to the Royal Court and not to the Probate Registry. This is by virtue of the provisions of the Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law 1994 (see G8.6 above). If the matter requiring interpretation or directions from the court concerns the administration of trusts arising under a will, then the executor can apply to the court pursuant to the relevant provisions of the Trusts (Guernsey) Law 2007, as amended, in particular section 69.

An executor cannot charge for his services unless he is expressly permitted to do so by the terms of the will.

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If an executor named in the will is not able to take office, perhaps because he has predeceased the testator or is incapacitated, then an administrator will be sworn to administer the estate with the will annexed. The administrator is the nearest family member in order of seniority to the deceased (see G8.5 above). The Probate Registry will give guidance as to the person who should be sworn as the administrator in such circumstances.

Heirs

G8.21

As wills of personalty are a matter of public record once they have been admitted to probate, a beneficiary is at liberty to apply to the Probate Registry for a copy of the will in order to establish his entitlement.

If the deceased was domiciled in Guernsey at the date of his death, a spouse, child or remoter descendant of a deceased may have a statutory entitlement in the estate that is not identified by the will (see G8.2 and G8.3 above).

If the deceased made a will of realty, then it must be registered at the Greffe (Land Registry) in the Island (see G8.4 above). That register is a matter of public record and therefore any person can examine the register of wills. Individuals can thereby establish whether or not they have become entitled to any part of the deceased's real property.

In reference to wills dealing with both realty and personalty, as a will disposing of realty must be registered at the Greffe, the will becomes a public document once registered. Individuals may continue to make two separate wills as they may not want details such as specific monetary or personal gifts or burial requirements to be openly available for inspection on public record.

If the deceased died intestate (post 2 April 2012) without making a will of realty, then his property will be inherited in accordance with the provisions of the 2011 Law as set out in G8.2 above. In such circumstances, an heir will only be able to identify whether or not he has any entitlement by tracing his relationship to the deceased through a family tree. Collateral succession under Guernsey law is particularly complex. In some instances ancestors have moved abroad and it has proved impossible to identify the full extent of the heirs entitled or to trace them. As a result some properties in Guernsey have become difficult to convey. Deaths prior to 2 April 2012 will be governed by differing rules of intestacy.

The 2006 Law resolved some of the difficulties relating to identifying all of the heirs to realty by introducing a system of 'administration orders'. An heir, Her Majesty's Procureur or a legal guardian of an heir will be able to apply to the Royal Court to have an administrator appointed who will (once appointed) have title to the deceased's property vested in him so he can sell the property, give good title to any purchaser, and then hold the proceeds of sale pending tracing all of the heirs to the realty who will have a share in the proceeds of sale. In some circumstances, he will have to hold the proceeds of sale for up to six years (the prescription period for realty) and then seek the Court's permission to distribute the proceeds to those established as being entitled to them however it is also possible to ask the Royal Court for an immediate vesting of the realty or the immediately distribution of the net proceeds of sale.

An heir or beneficiary who is aggrieved by the way in which an executor has conducted the administration of an estate can complain to the Probate Registry. In the event of default on the part of the executor it may be necessary to bring proceedings

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against him before the Royal Court. Likewise, an heir or beneficiary who wishes to challenge the validity of a will must bring proceedings in the Royal Court.

Tax

Introduction

G8.22

The only tax levied in Guernsey is income tax. There are no capital taxes, inheritance taxes or estate duties. Income tax for individuals is charged at a flat rate of 20 per cent. Personal allowances below which tax is not payable are available although these are subject to abatement depending upon income. Tax capping, by statute is available in respect of foreign and Guernsey source income. A specific global tax cap of £60,000 is available to new residents of the Island in certain circumstances.

Relevance of residence, nationality, citizenship and domicile

G8.23

Liability to income tax in Guernsey arises according to residence. Nationality, citizenship and domicile are irrelevant for Guernsey tax purposes. Persons resident but not solely or principally resident may elect to pay the standard charge of £40,000 that is considered to meet any tax liability in Guernsey upon non-Guernsey source income as well as being set against tax arising upon Guernsey source income of up to £200,000. Persons solely or principally resident are liable to pay income tax on their worldwide income, subject to election for specific tax caps that may be available. Tax on Guernsey property income is generally charged in addition to any tax caps.

No income tax is payable on the income of an estate unless the beneficiaries are resident in Guernsey for tax purposes or the income arises from Guernsey sources (excluding Guernsey bank interest as this is considered foreign income). Guernsey source bank interest is paid gross to both residents and non-residents alike.

Tax on lifetime gifts

G8.24

There is no Guernsey tax payable on a lifetime gift made by a Guernsey resident. An individual resident in Guernsey should take care that they are not subject to such a tax in a jurisdiction in which they were previously resident or domiciled (deemed or otherwise).

Tax on death

G8.25

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As there are no capital taxes in Guernsey, there is no tax payable on death. The assets devolve to the beneficiaries free of tax. Again, care should be taken such that exposure does not arise in a jurisdiction of former tax residence or domicile (deemed or otherwise).

Jurisdiction of tax charge

G8.26

Tax payable by non-Guernsey residents is generally only in respect of Guernsey source rental income as most other Guernsey source income, paid to a non-Guernsey resident may be made gross. A charity recognised as such by the Director of Revenue Services in Guernsey is not liable to pay tax on income arising in the Island or elsewhere, with the exception of Guernsey source rental income.

Recognition of foreign taxes

G8.27

Guernsey has full double tax agreements and partial agreements in place that include the provision for sharing tax information with certain foreign jurisdictions. Guernsey has also entered into FATCA agreements and is a signatory to Common Reporting Standards.

Who is liable for the tax?

G8.28

An executor is liable for the tax which would have been payable by the deceased.

On the death of an individual, all rights, duties and liabilities under the Income Tax (Guernsey) Law 1975, as amended, arising before his death which would have attached to him had he not died, and any liability to be charged with or to pay tax or a penalty or surcharge to which he would have been subject if he had not died, pass to his personal representative. The amount of tax or penalty or surcharge payable by the personal representative is a debt due from and payable out of the estate of the deceased.

An assessment or an additional assessment of any income arising before death cannot be made, and penalty proceedings cannot be instituted, later than the end of the third year of charge following that in which an individual died.

With regard to the income of the beneficiaries, an executor may be charged to income tax at the standard rate in respect of any income which he is entitled to receive on behalf of any person, or which is derived from property vested in him. This does not, however, affect the liability of the person beneficially entitled to such income to be charged in his own name.

It is normal practice that approximately six weeks after the date of death, the Guernsey Revenue Service will send a letter addressed to the personal representatives of the deceased asking for information in respect of the deceased's income from

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1 January in that year to the date of death and income accrued during the period of administration. They will also request the names and addresses of all the beneficiaries whether they be specific cash legatees or residuary beneficiaries.

If a beneficiary is resident for tax purposes in Guernsey, then any income arising from the part of the estate that he receives is subject to Guernsey income tax in his hands. The Guernsey resident beneficiary should declare such income on his tax return.

Lasting powers of attorney

Introduction

G8.29

On 30 March 2022, the States of Deliberation approved the introduction of the Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022, meaning that from 1 April 2022, Guernsey residents have been able to put in place Lasting Powers of Attorney ('LPAs') so that decisions about their health and financial affairs can be dealt with by individuals that they themselves trust and have selected, in the event that they were to lose capacity.

What is an LPA?

G8.30

An LPA is a legal document (a type of power of attorney) under which an individual (the 'Grantor') can give the authority to another individual (their 'Attorney') to take actions on their behalf. This authority will continue even if the Grantor no longer has capacity.

There are two types of LPAs:

1. health and welfare LPAs: these enable decisions to be made about personal wellbeing, for example, where an individual resides and what medical treatment they receive; and
2. property and financial affairs LPAs: these enable decisions to be made about financial affairs, for example, paying bills and managing bank accounts.

A Health and Welfare LPA will only have effect where the Grantor lacks, or the Attorney reasonably believes that the Grantor lacks, capacity.

A Property and Financial Affairs LPA can be used by an Attorney either once the Grantor has lost capacity or where capacity is not in question, depending on the Grantor's wishes.

An individual can make one type of LPA or both.

Who can make an LPA?

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G8.31

An individual who has reached the age of 16 can make an LPA if they have capacity to do so. In short, this means that the Grantor must be able to understand what an LPA is and what decisions or actions the Attorney(s) will be able to make or take on his behalf.

Who can be appointed as your attorney?

G8.32

An Attorney can be any individual who has reached the age of 18 and who has not had any form of bankruptcy proceedings issued against them in the 10 years preceding their appointment.

Where the power relates to a Property and Financial Affairs LPA, a person holding a full fiduciary licence under Guernsey law can also be appointed to act as an Attorney.

More than one Attorney can be appointed and the Grantor can specify that his Attorneys have to act together, independently, or together on some matters and independently on others.

What decisions can be made by an attorney?

G8.33

The decisions that an Attorney can make will be governed by the terms of the LPA and all Attorneys will always have a duty to act in the best interests of the Grantor. It will therefore be important to give careful attention to the powers given to an Attorney when putting an LPA in place and an Attorney must be familiar with the key principle of acting in an individual's ‘best interests’ as outlined under the law and associated guidance.

There are some restrictions as to what an Attorney is able to do in any circumstance. For example, a Property and Financial Affairs LPA does not give the Attorney the power to make gifts from the Grantor's estate. It may be possible however, subject to any conditions or restrictions in the LPA itself, for an Attorney to make gifts on customary occasions to persons (including the Attorney) to whom the Grantor is related, or connected with, or to any charity to which the Grantor made, or might have been expected to make, gifts whilst they had capacity (if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the Grantor's estate).

Where the Grantor does not have capacity, there are also restrictions on an Attorney's power to sell the Grantor's interest in houses and/or land that they may own and acting outside those restrictions will be a criminal offence.

Attorneys should therefore ensure that they are clear as to their role, responsibilities and powers before taking up such an appointment.

How do you make an attorney?

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G8.34

Application forms for registering LPAs are available to be downloaded from the Royal Court of Guernsey website or available for collection from the Greffe. It is not necessary to use a lawyer or Advocate to prepare an LPA however some individuals still choose to do so.

Forms should be completed and submitted to the Greffe before appointments are then arranged for the LPAs to be registered by the registration staff.

Once an LPA is created, it will not be effective until it has been registered.

The Court will charge a fee of £88 for the registration of one LPA or if an individual wishes to make both a Health and Welfare and Property and Financial Affairs LPA the fee will be £110 if registered at the same time.

No further fees will be charged by the Court if it becomes necessary to activate the LPA.

When can an LPA be used?

G8.35

A Property and Financial Affairs LPA can be used by an Attorney either:

1. only once the Grantor has lost capacity; or
2. whilst the Grantor has capacity in accordance with the Grantor's wishes and then once capacity has been lost.

A Health and Welfare LPA will only take effect when the Grantor has lost capacity or the Attorney reasonably believes that the Grantor has lost capacity.

If the Grantor has lost capacity to make relevant health and welfare decisions or to manage their property and financial affairs, then the Lasting Power of Attorney will need to be activated before it can be used by the Attorney(s).

The Attorney must request a capacity assessment to establish whether the Grantor has capacity to make the relevant decision. The capacity assessment can be completed by the Grantor’s GP, consultant, or other health or social care professional, prescribed by regulations. The professional who completes the capacity assessment will complete a certificate to state that the Grantor does not have capacity to make the relevant decision and therefore the LPA can be activated.

The Attorney will then need to make an application to HM Greffier on the relevant form to activate the LPA. If HM Greffier is satisfied that the Grantor has been assessed to lack capacity, such that the LPA can be activated, the Register of Lasting Powers of Attorney will be updated and the LPA will be activated. The Attorney will then receive an activation certificate and be able to make relevant decisions in accordance with the LPA.

Can an LPA be revoked?

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G8.36

An LPA can be cancelled and revoked at any time by the Grantor, provided that they retain capacity. They will need to contact HM Greffier in order to do so.

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COLLAS CRILL

For more information please contact:

Joanne Seal

Group Partner | Guernsey

t: +44 (0) 1481 734261 | **e:** joanne.seal@collascrill.com

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