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**YOUR FINANCIAL
NEWS**

Talking Wills



I Will

You Will

He/She Will

We Will

They Will



What legacy will you leave behind? Agreed. If you have nothing to leave, you have nothing to Will. But will you be satisfied not leaving anything for your loved ones to inherit?

If you are interested in learning about the pitfalls to avoid when making a Will, and how to prepare and protect your assets then this newsletter is for you. The newsletter features an extract from a Wills Seminar hosted in Montserrat last year by the Montserrat Agency Office, Eastern Caribbean Central Bank.



As we know, where there is a Will there is a way. Let's make a way for those who are coming after us and build a legacy of success. *SLW*

"To mitigate complications and aid in the procedure of devolution of assets after death, a 'Will' has to be well planned and drafted."

[Henrietta Newton Martin](#)

You are invited

**Wills Seminar by David S Brandt
Attorney-at-Law, Brandt & Associates**

All of us have to die sometime. Therefore, just as you make provisions or ought to make provisions for the management of your affairs while you are alive, it is equally important to make provisions for your affairs when you are dead. While you are alive you can change your mind as the situation arises; when you are dead, that's it. You can only speak about your assets through a Will. A Will speaks from death.

Unlike in some other jurisdictions where legislations set out that you have to make provisions for members of your family, in Montserrat you can give it to whoever you like. In my practice, persons have made Wills with substantial provisions for the burial of their dog and the maintenance of their grave after their death. I give that example to show the extent to which you can do what you like with your own. It is important that you make a Will because if you don't, after your death, family who don't even call you

in fifty years will be coming with flowers to say part of your estate is theirs or it may be that during your lifetime you gave your son his portion and if you don't make a Will, when you are dead he might get an equal share again along with other members of his family. **The concept of children asking their parents 'to give me what is mine is not new'. Remember the prodigal son.**

The Laws of Montserrat makes provisions for the validity of a Will. Even if you attempt to make a Will and it is not done according to Law, then when you die there is another Act in Law called the Intestate Estates Act which states how your property should be divided. If there is no family or there are no persons as provided for in the Act, your property goes to the crown as Bona Vacantia so it is important for you to make a Will and it is important for you to have it done properly. The Wills Act of Montserrat Chapter 3 paragraph 8 sets out what you must do in order to make a valid

Will.

You must make a Will not only when you think you are going to die but you should make it when you are young enough and when your mind is astute enough to know who you are going to give your estate to. If you wait until you are so old that your mind is weak, somebody could persuade you to give your property to him/her when you did not really intend to give it to that person. They might come and befriend you, come and take care of you and then next thing you know you give everything to that person. I want to point out that if you want to give it to that person, then it is up to you.

I want to stress that it is only what you own that you can dispose of in your Will. If you say that this building is for me and before you die you give this building to X. When you die I cannot come and say that the building belongs to me. Another thing is that if you own something jointly, at the point of death it belongs to the survivor. The Law describes this as owning it promiscuously. There is another concept which is called *tenancy in common*. i.e. part belongs to you and part belongs to another person. If you register it as such then when you die that part that belongs to you goes to

your estate and the other part goes to the other person who owns it. Many times people go to a bank and put down another person's name as joint tenant. At the time they did not know the legal consequence of that action and when they die the asset accrues to the other person when they did not intend that. Therefore, when you go to the bank you have to make it plain that you are not creating any joint tenancy that the other party is only signing on your instructions specifically; otherwise there might be unintended consequences. It is not only that you must make a Will according to Law but you have to have the mental capacity to make the Will. I have, for the purpose of this discussion, brought with me a case that has been decided by the Eastern Caribbean Supreme Court of Appeal in Grenada. By reading parts of it, you will get an impression as to what the court looks for when deciding whether you have the capacity or not. The person who makes the provision in a Will is known as the testator or testatrix (feminine).

On the death of the testatrix, Ena Albertine Olive Payne, it was discovered that she had made two Wills; the first Will having been executed on 14th December 1982. The second Will was prepared by an attorney at law, Mr. Ashley

Bernardine, and was executed on 6th September 1995 before both Mr. Bernardine and his secretary Ms. Jean Frederick. Both Mr. Bernardine and his secretary were present when the deceased gave instructions for the second Will. The notes containing these instructions which Mr. Bernardine took were not retained by him. At the time of the taking of the instructions the deceased testatrix did not make mention of her 1982 Will or the way in which she distributed her assets in that Will.

The 1982 Will bequeathed all her assets absolutely in equal shares to her nieces, the appellants, and appointed them to be the Executrices of that Will. However the 1995 Will, in which the testatrix revoked all former Wills, codicils and or testamentary dispositions, bequeathed all her assets to the her first cousin and god-son, the respondent. The respondent, along with Mr. Bernardine, were appointed the Executors of this 1995 Will. This second Will was probated and the Supreme Court granted probate to the respondent with power reserved to make a like grant to Mr. Bernardine. The appellants filed a claim for revocation of the said probate and for the Court to pronounce against the validity of the 1995 Will. The appellants contended, amongst other things, that the deceased who was 80

years old at the time she executed the 1995 Will, was exhibiting signs of senility and was suffering from Alzheimer's disease and that she was at the material time in such a condition of mind and memory as to be unable to understand the nature of the act and its effects, or the extent of the property of which she was disposing, or to comprehend and appreciate the claims to which she ought to give effect. The appellants further claimed that the deceased did not execute the Will as the signature on the Will, purporting to be that of the deceased, is not hers as the signature differs significantly and radically from other signatures previously made by the deceased and appearing on official documents signed prior to 1994. The appellants alleged that there were suspicious circumstances surrounding the execution of the 1995 Will and requested inter alia that the Court pronounce in solemn form for the true last Will of the deceased dated 14th December 1982.

Now the testatrix left her estate for the god-son. In her Will prior to the last one she had left her estate to her nieces. So the nieces whom she made provisions for in the first Will did not get anything in the second Will. So they filed a claim for revocation of the said probate and for the court to pronounce against the validity of the 1995 Will.

The court of appeal dismissed the appeal. The court said

The testatrix, at the time of making her 1995 Will, must in the language of the law, be possessed of sound and disposing mind and memory. Her memory may be very imperfect, greatly impaired by age or disease, yet her understanding may be sufficiently sound for many of the ordinary transactions of life. Once the court is able to answer whether the testatrix's mind was sufficiently sound to enable her to know and understand the business in which she was engaged at the time she executed her Will, the testatrix is deemed possessed of adequate testamentary capacity. In the present case, there was sufficient evidence which showed that the deceased was aware of the extent of her property over which she had a power of disposition. There was also evidence as to why she would wish to bestow her bounty on her god-son as opposed to her nieces.

When you are making a Will you must be in sound disposing mind and memory. In other words you do not have to be perfect; you could be sick in mind and body but at the time you are executing the Will you know what you were doing. You know who you want to leave your property for. You know the extent of your

property.

So a lawyer when making a Will for an elderly person has to take precautions. He has to make a note. He has to make sure that someone else is present, and if they are of a particular age and you have any suspicion you have to get a doctor to talk to the person to see if really that person is in the right mind. Because the courts are saying that many times people look as if they are in the right mind but they are not really in the right mind. I say that to show you that the person must be of sound mind. Not perfect mind but have the mental capacity to know what they are doing.

Regarding Wills, section 3 of the Wills Act says what is meant by property.

"It shall be lawful for every person to devise, bequeath and dispose of by his Will in the manner hereafter all real and all personal estate to which he is entitled."

Real property means land. Personal estate means everything else. If you make a Will and you list certain things and you have other things and you do not put a clause at the bottom of the Will as to how whatever property you do not remember should be distributed then it is distributed according to another law. It is a

PART 2

MODE OF MAKING WILLS

Will shall be in writing and signed by testator in presence of two witnesses at one time

7. No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot, or end, thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made, or acknowledged, by the testator in the presence of two, or more, witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

serious matter.

I know cases where the people are so cheap that they go and make the Will themselves and when they make the Will and the Will is challenged then I have to tell the applicants that this Will is no good. The Law sets out what you should do in making a Will, so unless you do it, the Will is void and nothing that you intended to do Will happen.

The person who makes a Will must be 21 years and over. If you are not 21 years or older you cannot make a Will. Section 6 of the Laws of Montserrat states 'no Will made by a person under the age of 21 years shall be valid' and section 7 states 'no Will shall be valid unless it is in writing'. So you can't make it by tape. Section 7 further states that it must be 'Executed in the matter

hereafter mentioned'. So it not only must be in writing but it must be executed in the manner in which the law says it should be executed. That is to say, 'it shall be signed at the foot, or end, thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made, or acknowledged, by the testator in the presence of two, or more, witnesses present at the same time'. So in other words you can't make your Will now in the presence of one person and later on during the day call someone to witness it even if they know your signature. You, the testator, must be in the presence of two or more witnesses, present at the same time; and the witnesses have to sign in the presence of the testator.

I have had to execute a Will

disposing with substantial property and certain words were not put at the end and so the witnesses had to swear an affidavit to say how the Will was executed. The persons who thought that they should benefit more challenged the Will and so we had to take remedial steps and have the persons who witnessed the Will swear the substance of what the Act said. i.e. It was signed in both of their presence and the testator saw them signed it.

You remember I said the section talks about in writing. What is in writing? Sometimes a lay man reads something where one word is used and he does not understand that it has legal significance to something else. The Interpretation Act says what 'in writing' means. 'In writing in every act expressions referring to writing shall unless the contrary intention appears in the act it shall be construed as methods of printing, photography and other modes of representing or reproducing words in a visible form.'

What makes a good Will a good Will? A Will may be signed by the testator with his name, his initials or his mark. The testator's mark whether accompanied by his name or not

is sufficient. The mark may be made with pen or with some other instrument. The mark must be made in the presence of the witnesses and before the witnesses sign. So it is possible if you can't read and write to make your mark. But you must be in the presence of the witnesses and before the witnesses sign. You recall in that section we spoke not only about signing by the testator but also about acknowledgment by the testator. Acknowledgment of the testator's signature may be made expressly by words or by implication by the testator producing the Will with his signature, visibly, apparent on the face of it to the witnesses who must be present together. So the signature is on the document and acknowledged by the testator. In the first instance we talked about signing; now we talk about acknowledgment. So he has his signature on the document, shows it to the witnesses and say this is my signature. There is a case where the person signed the Will and some other witness came and said 'I met him there and I signed'. Once the witness says I met him there and I signed that means that he did not witness the signature.

Section 13 of the Act speaks about the competency.

Will not to be void on account of incompetency of attesting witness

13. If any person, who shall attest the execution of a Will, shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such Will shall not on that account be invalid.

Once the testator signs it, the Will is valid.

But I have to warn you section 14 of the Act says if you are a witness to the Will any gift in the Will to you shall be void.

Gifts to attesting witness void

14. If any person shall attest the execution of any Will, to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting, any real or personal estate other than and except charges and directions for the payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of

such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will. (*Amended by Act 8 of 1966*)

The Law says it must be uninfluenced by anybody. So if you are to benefit from the Will you cannot witness the Will. However if you are an executor of the Will you can witness the Will because nothing is left in there for you.

I want to stress also that when you are making a Will choose the right person to manage your affairs after your die; because that person stands in your place. Suppose you leave the house for John Browne. The executor can sell it. John Browne cannot come and say the sale is invalid. He has to look to the executor for the money and if the executor has spent off the money John can't get it. The executor stands in your place and you have to make sure that that person is a person of integrity. I know of a situation where a mother appointed one of her sons to be the executor of the estate and the mother has died over 15 years ago and the son has not yet distributed the estate. He has gone and rented out the land, and cut it up and sell it. The only way the person can get their

rights is to go to court and ask the court for him to account or ask the court to remove him as executor and appoint somebody else. Sometimes in our little society somebody might say, 'oh he is my brother I don't want to go to court for that'.

Can a person's finger print validate a Will?

Yes. That is considered a mark. Once it is done in the presence of witnesses.

How do you treat where there is no Will ? Does the surviving spouse acquire the property owned by the passing spouse? What are the rights of the spouse and offspring in the absence of a Will?

There is the Administration of Estate Act which sets out how the property goes in cases like that. It is not because you are my spouse it means when I die, you get the estate. Many times you would hear about disputes between husband and wife as to who owns the property. If the husband puts the name of the wife on the property and says it is jointly owned - That is it. Once you put the name of your spouse on the property you can't take it off as you like. The other party whose name you are taking off has to agree to the name being taken off. If you jointly own the property

you can't tell the other person to get out. The only way you can put out your spouse is if he/she abuses you and you go to the court, and the court makes an order that he/she must go to some other place.

You mention that the testator must acknowledge his or her signature in the presence of the witnesses. How do you ensure that the testator knows and understands what he is signing to?

That is the role of the lawyer. The lawyer would have to ask the testator a series of questions: Have you ever made any Will before? He can't remember. Do you have any family? He can't remember. Do you have any property? He can't remember where the property is. (*I am just giving obvious examples*) In a case like that you have to call a medical doctor; not one that can check you if you have a problem with your hand, but one that deals with the mind. The doctor Will then give a medical opinion in relation to the testator's capacity.

If you are less than 21 how do you make provisions for disposing of your property by Will

If you are less than 21 you don't have the capacity to dispose of

your property by Will. That responsibility falls on your parents. You have to be 21 or older to make a Will. You can own property at any age but you can't give it away by Will.

How do you treat with a video recording?

That is not in writing. It is not a visible form of producing words.

What was the verdict in the case?

The court held that the 1995 Will was valid. The lawyer had carried through the transaction as the lady had explained to the lawyer. The lawyer testified that the lady had indicated she had given her nieces their due already. This cousin had lived with her for years and had taken care of her.

Can you co-own a Will?

Yes you can have a mutual Will. However, one person can't revoke it. If you are going to tear it up both persons have to tear it up at the same time.

In this day and age where everything is digital and electronic there are precedence that can be found online, what is your opinion about going on line and getting a Will precedence and executing it?

A Will has to be in accordance

with the law of the jurisdiction. So a Will might be valid in America but for you who are domiciled here in Montserrat, it may have problems.

What if the executor does not carry out the terms of the Will?

When you are an executor you are supposed to go to the court and sign a bond to say that if you do not carry out the terms of the Will the beneficiary can come after you personally. Normally the registrar puts in twice the value of the assets so if you are the executor and you allow something else to happen contrary to what the Will says I, as the beneficiary, can go after you personally.

What if the executor dies?

If you have a residuary clause, the person who is willed the residual estate can apply to be the executor. Many times the Will says I give this to X, Y Z. Whatever remains I give it to John Browne. John Browne can apply to be the executor.

In the absence of a Will and both parents die, is it automatic that the children inherit and how would that be done?

The Intestate Act of Montserrat says how the assets will be divided in such cases.

Where There is a Will

There is a Way



A farmer died leaving his 17 horses to his 3 sons.

When his sons opened up the Will it read:

My eldest son should get 1/2 (half) of total horses;

My middle son should be given 1/3rd (one-third) of the total horses;

My youngest son should be given 1/9th (one-ninth) of the total horses.

As it's impossible to divide 17 into half or 17 by 3 or 17 by 9, the three sons started to fight with each other. So, they decided to go to a farmer friend who they considered quite smart, to see if he could work it out for them.

The farmer friend read the Will patiently, after giving due thought, he brought one of his own horses over and added it to the 17. That increased the total to 18 horses.

Now, he divided the horses according to their father's Will.

Half of 18 = 9. So he gave the eldest son 9 horses.

1/3rd of 18 = 6. So he gave the middle son 6 horses.

1/9th of 18 = 2. So he gave the youngest son 2 horses.

Now add up how many horses they have:

Eldest son.....9

Middle son.....6

Youngest son...2

TOTAL IS.....17.

Now this leaves one horse over, so the farmer friend takes his horse back to his farm.

Problem Solved!

The Eighteenth Horse