



COX HALLETT
WILKINSON LIMITED

BARRISTERS AND ATTORNEYS

CEDAR HOUSE
3RD FLOOR
41 CEDAR AVENUE
HAMILTON HM 12
P.O. BOX HM 1561
HAMILTON HMGX

PLANNING FOR THE FUTURE

WILLS, POWER OF ATTORNEY & ESTATE
PLANNING
DEMENTIA BERMUDA

DATE:
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PRESENTED BY:
NATHAN SAMUELS, COUNSEL

COX HALLETT WILKINSON
LIMITED
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AREAS OF FOCUS

- **Powers of Attorney**
- **Wills**
- **Healthcare Directives**
- **Questions to Consider**
- **Estate Planning in the context of Dementia**
- **Receivership**

POWERS OF ATTORNEY

➤ What is a Power of Attorney (PoA)?

❖ A type of Agency Agreement

- > Where person A (the Grantor) gives person B (the Attorney) the power of authority to deal with the Grantor's property and affairs or some specified part of the Grantor's property and affairs in the Grantor's absence.

❖ General vs Specific

- > A general PoA applies to a person's property and affairs in a general way – usually providing authority to deal with the entirety of the Grantor's property and affairs
- > A specific PoA applies to a person's property or affairs in a specified way – usually providing authority that is limited to a specific transaction or event.

❖ Ordinary vs Enduring

- > An ordinary PoA is revoked when the Grantor loses mental capacity
- > An enduring PoA endures throughout the Grantor's subsequent loss of mental capacity

POWERS OF ATTORNEY

➤ How are PoA's used?

❖ Travel PoA

- > Often used in anticipation of or while someone is travelling overseas and is limited to the duration of the travel period.

❖ Transaction PoA

- > Usually, an ordinary and a specific PoA – the power is specific in that it only provides the necessary power to deal with or complete a specific transaction.

❖ Enduring General PoA

- > For estate planning purposes this is the type of PoA that is the most useful – that is because it continues to be effective even after the loss of mental capacity and at the same time gives general or wide powers to the attorney allowing a person's entire estate to be managed even after they have lost their mental capacity.

GENERAL ENDURING POWERS OF ATTORNEY

➤ The General Enduring Power of Attorney for Estate Planning

Purposes:

❖ General (not specific)

- > Usually, your entire estate for an unspecified period of time.

❖ Enduring (not ordinary)

- > Endures (continues to be effective) throughout subsequent loss of mental capacity

❖ The “all-purpose kitchen knife”

- > A general enduring PoA is designed to give the widest powers when you are at your most vulnerable.
- > Making sure your general enduring PoA is drafted to work the way you want it to work is of the utmost importance.

ENDURING POWERS OF ATTORNEY

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➤ LIMITATIONS

- > Abuse of power
- > Misappropriation/ loss of assets
- > May be very difficult to reverse wrongs
- > Ceases upon death (not technically a “succession tool”)

➤ BENEFITS

- > Estate can be managed while overseas
- > Estate can be managed in the event of your physical or mental incapacity
- > Convenience

LAST WILL & TESTAMENT

➤ **What is a Will?**

- ❖ A Will is a document where a person sets out how they would like their estate to be divided between whomever they choose signed by the Testator and witnessed in the presence of two witnesses.

➤ **What happens if you die without making a Will?**

- ❖ Bermuda law determines who inherits the estate of an intestate person. The percentages/shares are determined by law and depend on one's relationship to the deceased.
- ❖ Bermuda law will also determine who can apply to the Court to deal with the administration of an intestate person's estate. This is determined by the reference to family relationships and who stands to inherit.

LAST WILL & TESTAMENT

➤ LIMITATIONS

- > Does not remove the need to probate an estate
- > Does not necessarily change stamp duty

➤ BENEFITS

- > Testamentary freedom to decide:
 - Executors
 - Beneficiaries
 - Guardians
 - Specific Gifts
- > Relatively inexpensive
- > Easily updated with changing circumstances

HEALTHCARE DIRECTIVES

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- **Statement of wishes concerning treatment when in “terminal condition”:** incurable and irreversible condition which will result in death within a short time – intended for circumstances in which you cannot speak for yourself.
- **Includes:**
 - > Living Will – Specific directions to family and medical professionals concerning anticipated medical treatment.
 - > Healthcare Proxy/PoA – Giving power to another person to make medical decisions on your behalf.
 - > DNR – do not resuscitate instructions
- **Usually provided to family, healthcare providers and hospital records**

HEALTHCARE DIRECTIVES

➤ LIMITATIONS

- > Does not extend beyond death
- > Does not allow caregivers to manage decisions beyond doctor's offices or hospitals

➤ BENEFITS

- > Personalized treatment and reduces stress for family in already difficult position
- > Relatively inexpensive
- > Easily updated with changing circumstances

QUESTIONS TO CONSIDER

➤ Questions to Consider when Preparing your Estate Planning Documents:

❖ Who?

❖ What?

❖ Where?

❖ When?

❖ How?

QUESTIONS TO CONSIDER

➤ Preparing your Estate Planning Documents

❖ Who can appoint?

> Legal Capacity

- 18 Years of age
- Of sound mind
- Able to understand what is being granted
- Without undue influence

❖ Who can be appointed?

> Legal Capacity

- 18 Years of age
- Of sound mind
- (Appointment should be communicated)

QUESTIONS TO CONSIDER

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➤ Preparing your Estate Planning Documents

❖ Who should be appointed?

- > Attorney/executor/trustee must act in the best interest of the grantor/beneficiaries.
- > Liable to account via Courts (EPOAs) by anyone with an interest in the grantor's estate – s.11 of the Powers of Attorney Act, 1944.
- > A matter of having the utmost trust in the person(s) being appointed.
- > How many attorneys/executors should be appointed? Do I need substitutes?

QUESTIONS TO CONSIDER

➤ Preparing your Estate Planning Documents

❖ What

- > The grantor/testator must understand what is being granted/gifted (the extent of their estate).
- > PoA can also include power to make healthcare decisions.

❖ Where

- > Possible worldwide application but Bermuda specific.
- > Jurisdiction specific advice should be taken in respect of assets or decisions that need to be made outside of Bermuda.

❖ When

- > Immediate
- > On loss of mental capacity (need for medical certificate?)

QUESTIONS TO CONSIDER

➤ Preparing your Estate Planning Documents

❖ How

- > How do you want your PoA/Will/HD to work?
- > Joint & Several
- > Joint/unanimous
- > By majority
- > Specific Conditions
- > Termination (PoA)

ESTATE PLANNING IN THE CONTEXT OF DEMENTIA

- **Does the client have sufficient mental capacity? Can the client appreciate and/or is the client aware of:**
 - ❖ **The extent of their estate**
 - > Do they know and can they recall with relative accuracy what they own and the value of what they own?
 - ❖ **The nature and effect of their estate planning documents**
 - > They should know why they are preparing these documents.
 - ❖ **The persons for whom they would usually be expected to provide**
 - > A realistic view of their relationships

ESTATE PLANNING IN THE CONTEXT OF DEMENTIA

➤ **Does the client's mental impairment negatively hinder their ability to deal with their estate or their affairs generally?**

RECEIVERSHIP

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➤ A General Overview

- ❖ Usually the “default” approach to dealing with a person’s property and affairs where he/she had lost legal capacity and does not have a valid Enduring Power of Attorney in place
- ❖ Requires an application to be made to the Supreme Court to appoint Receivers for the “patient” – i.e. the person who has lost capacity (mental disorder)

RECEIVERSHIP

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➤ LIMITATIONS

- > Cumbersome and time consuming
- > Requires lawyers to prepare necessary Court documents
- > Can be expensive
- > Need to produce initial and annual accounts

➤ BENEFITS

- > Court Oversight
- > Annual accounts must be prepared and submitted to the court

COMMON ESTATE PLANNING PITFALLS

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- **Waiting until “something happens”.** It may then be too late.
- **Not keeping your “plan” current**
- **Making an unnecessarily complex plan**
- **Lack of special provisions in the estate plan.**
- **What's on paper doesn't match what's on the ground.**



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