



Legal Issues Affecting Women

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Women's strides in the last 4 or 5 decades in the business world, in the professions and in commerce, have been unprecedented in history. Gone are the days when women's domain was home and hearth while husband was breadwinner, creator and protector of the family wealth. Today, women amass their own wealth and the issues that have long been the domain of men such as asset protection and estate planning are now of vital concern to women. Are there then any legal issues specific to women? The answer to that is no. The issues that concern women are the same issues that have been of concern to men throughout history and which continue to be of concern today.

The paramount consideration of all women is how should they manage their affairs so that the wealth that they create is protected from:

1. Government taxation
2. Possible lawsuits
3. Claims from former spouse
4. Claims by third parties

This article attempts to give a broad overview of a number of areas of the law with a view to introducing you to some of the issues which you should be thinking about in respect of your own objectives.

1. Domestic Relations

There are different forms of domestic relations ranging from cohabitation to marriage. Broadly speaking, cohabitation between parties does not create any legal rights in either of them as against the assets of the other. Marriage however does create such rights and obligations. Whilst it is relatively easy to get married, it is not so easy to extricate yourself emotionally and financially from a marriage.

Firstly there are no hard and fast rules as to entitlement of assets upon the dissolution of a marriage. The court will first look at all of the facts with a view to determining the extent of the financial resources of each of the parties. The financial resources will include not only the assets created during the marriage, but will also include assets inherited by either of the parties and any windfall obtained by either of the parties. The court will look not only to what the financial resources are at the time of the hearing, but also that which they are likely to have in the foreseeable future. The net which is cast by the legislation is very broad and will include assets such as remainder interests in real property, pensions yet to be received, cash surrender values of life insurance policies etc. Once the court determines the extent of the financial assets, then the court will divide them in an equitable manner bearing in mind the length of the marriage, the contribution made to the family and to financial resources by each of the parties, the financial obligations of each of the parties, their financial resources, the age of the parties, etc.

In the case of a first marriage between parties who married young and created the wealth through their joint efforts during the course of the marriage, the above exercise will in most cases create an equitable distribution of the

assets. In the case of subsequent marriages and in cases where one of the parties is entering the marriage with substantially more wealth than the other then the result of the breakdown of the marriage can be devastating to that party who entered the marriage with the wealth. Please bear in mind that in Bermuda, pre-nuptial agreements are not binding nor do they preclude the courts from making a distribution different from that contemplated by the parties prior to the marriage. Once you are married, the court has an unfettered discretion to step in when an application is made and divide the assets in a manner which the court feels is reasonable in the circumstances, irrespective of what your intentions were when you entered the marriage.

So, if you are entering marriage at a time when you have amassed a substantial amount of wealth which you do not wish to come into accounting if your marriage breaks down, you must turn your mind to this and deal with it prior to the marriage. What can you do to protect those assets?

If you have adult children whom you wish to benefit, you can convey the property to your adult children outright prior to the marriage, retaining for yourself a life interest. This conveyance will have some tax implications but ultimately it will ensure that your children have a present legal interest in your property. The drawback of this is that the debts of your children and any potential claims against your children may affect your enjoyment of the property during your own lifetime. As well, once your children have a legal interest in your real estate, their spouse has a good claim against the value of your child's remainder interest. Because of these drawbacks, the best way of preserving your wealth in those circumstances is to create a trust by which your property will be vested in a trustee and held to your benefit for your life and thereafter to the benefit of your children. This will ensure that any creditors of your children or any claim by spouses of your children cannot get at the asset and will make it more difficult for your own spouse to make a claim against that asset. Bear in mind that the jurisdiction of the court in divorces is far reaching and ultimately the court may consider the trust property to be a financial resource of yours to be brought into accounting. This will depend on the facts of your particular case. Even if the court considers the trust property as your asset, the court will have to reduce the value of that asset by the remainder interest of your children.

2. The implications of marriage on pre-existing children

Once you are married, the children of any previous relationship who live with you and are treated as part of the family become children of your family. Upon the breakdown of the marriage, the husband has obligations in terms of maintenance for children of the family whether or not they are his biological children. Obviously the court will bear in mind any other party (i.e. the biological parent who may also have an obligation to maintain the child). The point is that even if the child is not yours, by virtue of the marriage, you may acquire obligations to financially maintain the child upon divorce. Maintenance for minor children whether the child is born within the marriage or the child is not born within a marriage will continue until the child reaches the age of 18 or completes his or her full-time education, whichever is the latter. As a result of recent amendments in the Affiliation Act, parents of children born out of wedlock have the same obligations to maintain, as do parents of children born within marriage.

3. Implications of marriage on the non-Bermudian spouse

At present, spouses of Bermudians are able to work freely in Bermuda without

the need of obtaining a work permit. Spouses of Bermudians can compete equally with Bermudians for all job opportunities. Spouses of Bermudians however cannot operate their own business, and if a business is incorporated, a non-Bermudian whether spouse or not can only hold 40% of the shares. Once a separation occurs between married parties, there is an obligation on the part of the non-Bermudian spouse to advise the Department of Immigration of the separation. The employment rights as a spouse of a Bermudian will at that point be curtailed.

In respect of obtaining your status, non-Bermudian spouses are eligible for their status as of right after 10 years of marriage and 7 years of residency in Bermuda, both of which must have occurred prior to the presentation of the application. If you obtain your status during marriage, a subsequent divorce will not disentitle you to continued enjoyment of Bermuda status.

In respect of your children, bear in mind that children born to Bermudians do not automatically obtain Bermuda status. Children born to persons possessing Bermuda status are deemed to possess Bermuda status and an application must be made between their 18th and 21st birthday in order for them to receive status.

4. Real property and the non-Bermudian spouse

As you all are probably aware, property in Bermuda cannot be owned by non-Bermudians save in the instance where the annual rental value of the property exceeds \$126,000. Fortunately for the non-Bermudian spouse, the Department of Immigration has in place a policy statement relieving the non-Bermudian spouse from the rigours of the Bermuda Immigration and Protection Act. It is the current policy of the Bermuda Government that a non-Bermudian spouse can own property jointly with the Bermudian spouse. As well, a person who has been a non-Bermudian spouse within a period of 3 years from the date of making an application to own property is exempted from the prohibition. What this means is that if your spouse dies, you have a 3-year grace period within which to apply to own the real estate owned by your spouse at his death. Similarly, if you divorce your Bermudian spouse, you have a 3-year grace period within which to apply to own the real property owned by your spouse. This 3-year grace period also applies to a non-Bermudian child of a Bermudian.

5. Estate Planning

The term estate planning is a catch-all umbrella phrase which incorporates a number of areas of the law which cumulatively deal with your prime objective to preserve your wealth and keep it out of the hands of third parties who would make claims against it, whether those third parties be government tax collectors, etc.

The first and obvious method of estate planning is to draw a will. A will is a document which sets out what your intentions are in relation to your property after your death. Who gets what? It is important to draw a will because in the absence of a will, your estate will be divided in accordance with the Succession Act. That Act is inflexible and will divide your assets irrespective of your intentions. If you die without a will and you have been separated from your husband for many years not intending to benefit him, he will in fact get half of your estate if you have children, and all of it if you do not. The Succession Act sets out a number of scenarios, the first being that if you die leaving a spouse only, your spouse will get all of your estate. If you die leaving a spouse and children, your spouse will get half of your estate, and your

children will get half of your estate divided equally amongst them.

Please also bear in mind that marriage invalidates a pre-existing will. If you have a will giving everything to your children and you remarry, your will is automatically invalidated. In those circumstances, if you die the day after your marriage your estate will go 50% to your spouse, 50% to your children. Unlike marriage however, divorce DOES NOT invalidate your will. If you have named your spouse as your primary beneficiary in your will, the fact that you have divorced your spouse does not invalidate your will. If you die the day after you get your divorce, your spouse will benefit in accordance with the provisions set out in your will. The rule to remember is make a new will when you get married, make a new will when you get divorced.

Aside from setting out your testamentary wishes, you can also, through your will, appoint a guardian for your minor children. This is particularly important to divorced parties where the testator has custody of the minor children and does not want the other parent to obtain sole custody upon death. There may be very good reasons for this and your will allows you to appoint a guardian for your children who will then act as a joint custodian with your former spouse. Indeed, an appointment of a guardian will allow the guardian to apply to the court for a sole custody order. In the appropriate circumstances the court may grant custody to the guardian rather than the surviving parent.

6. Death duties

Whilst it is important to make a will in order to ensure that your assets flow to the beneficiaries whom you wish to benefit, it is vital to bear in mind that upon death all assets which form part of your estate are taxable. The rate of tax of a deceased's estate varies from time to time and is subject to change by amendment to The Stamp Duties by the government of the day. Indeed, in the last couple of years we have had an increase to the stamp duties payable on the estate of a deceased, which have increased the maximum rate from 10% to 15%. Presently, the first \$50,000.00 of the estate is tax-free. The next \$150,000.00 is taxed at 5%, the next \$800,000.00 at 10% and anything over \$1-million is taxed at 15%. As you can see, if you die and the value of your estate is \$1-million for instance, your beneficiaries will pay \$87,000.00 in stamp duty. If your estate is worth say \$1.5-million, your beneficiaries will pay almost double that i.e. \$162,500.00. Because of the substantial taxation of estates, it is wise to turn your mind to methods of reducing the duty payable by your beneficiaries upon your death. How can you do this?

One way is to leave all of your assets, whatever they may be to your surviving spouse. At present, a surviving spouse pays no tax on the estate of the deceased spouse. If you draw your will leaving everything to your spouse however, and your spouse predeceases you then your estate will automatically go to your surviving children and they will then have to pay the tax.

Another way of alleviating the tax is to convey the property to your children during your lifetime, reserving to yourself a life interest. This is often done for the purposes of estate planning. Whilst this accomplishes the goal of taking the asset out of your estate, it creates other problems which can potentially be devastating during your lifetime. For instance, once you convey your property to your children you have in fact divested yourself of it even though you continue to retain your life interest. What this means is that if you should have a change of circumstance or simply a change of heart, and wish to sell that asset and use the proceeds in some other way or if you just want to spend it

during your lifetime, you will be barred from doing so. As well, any judgments against your children form a lien on the real property. The value of the remainder interest of your children is capable of being calculated and any person who claims against the assets of your child whether that be a creditor or a former spouse of your child, will be able to make a claim against the value of the reversionary interest of your child in the real property.

The best and most foolproof method by far of effecting good estate planning is the trust vehicle.

7. What is a trust?

A trust vehicle is nothing more than a conveyance of the legal title of property to a third party to hold for the benefit of your beneficiaries. When you convey your property to a trustee, you yourself can be one of the beneficiaries named in the class of beneficiaries. The beauty of this legal vehicle is that it allows you to divest yourself during your lifetime of your assets so that those assets do not form a part of your estate after your death, but at the same time allows you to enjoy the benefit of your assets during your lifetime and to control who will enjoy the assets after your death. There are a myriad of benefits to the trust structure.

First and foremost, once the trust is established it is established for all time and you do not have to subsequently pay any additional money for the set up of additional trust structures. You can put further assets into the trust without incurring any additional expense other than the stamp duty on the conveyance.

You must all be wondering what is the benefit if you are going to be paying stamp duty to get the asset into the trust in any event. The advantage is substantial. The duty on a conveyance or transfer of property whether that property be real property or otherwise, is taxed at a far lower rate than the duty payable on the death of a deceased. For instance, if you purchase a real property that is worth say \$500,000.00, you will pay duty upon that purchase of \$14,000.00. If you die the day after you purchase the property, your estate would pay additional duty of \$37,500.00. If the property which you purchased was worth \$1-million, upon purchasing it the stamp duty which you would pay would be \$34,000.00. If you died and left it to your estate, your estate would pay additional duty of \$87,000.00 on that very same property.

At the time that you purchase real property, you will have to pay the stamp duty; there is no way around that. The question is will your beneficiaries pay stamp duty upon your death. It makes no difference to the stamp duty payable upon purchase whether you take the property in your own name, or whether you convey the property to your trustees for your benefit. If you convey the property to yourself in your own name, when you die your estate will pay additional tax on that property based on the value of it at the date of your death. If you convey the property to your trustees for your benefit and for the benefit of your children, when you die your beneficiaries will get the property without having to pay one penny in tax. The benefit is obvious.

For this very same reason, when you purchase life insurance, never name your estate as the beneficiary. If you have a trust, name your trustees as your beneficiaries and upon your death the insurance proceeds will automatically be paid to your trustees free and clear of any stamp duty and will be held by your trustees for the benefit of your beneficiaries tax free.

The Stamp Duties Act which governs taxation relating to transfers and

conveyance of property relates only to Bermuda Dollar assets. If your assets are non-Bermudian (i.e. if you have a property in a foreign jurisdiction), that property can be conveyed into your trust without incurring any tax whatsoever. Similarly, if you have foreign currency accounts in Bermuda, your foreign currency can be conveyed or transferred into the trust without any stamp duty being incurred. Once your assets are in the trust, not only will your beneficiaries receive the benefit of the asset without paying death duty, but also the assets in the trust will be placed out of the reach of third party claimants. Third party claimants include former spouses of your children who would potentially have a claim against your assets if those assets were either left to your children in your will or conveyed to your children during your lifetime.

What does such estate planning cost? Well the cost of setting up a trust will vary depending on whom you use but the range is around the \$2,500.00 mark. It may also be necessary to set up a limited liability company as a vehicle in order to put in place the structure that will meet your requirements and satisfy your goals. The cost of set-up however is small in comparison to the ultimate benefit, which you and your estate will derive from such a structure. It is nothing more than insurance for the future. Once a trust structure is set up, you will have to decide whether you wish to employ professional trustees to administer the trust, in which case you will incur an annual administration fee which will range again between \$2,000.00 and \$4,000.00 per annum. You are not bound to use a professional trustee. You may choose to use a lay trustee such as a friend or a relative or another trusted person without incurring the expenses. The difficulty is that lay trustees often times do not behave in a professional manner.

8. Limited liability companies

Many women in our day and age are businesswomen who have built their business from the ground up. For those women who engage in such entrepreneurial endeavours, they will have concerns relating to liabilities which may arise out of the operation of their business. For this reason, all women who have business enterprises should consider incorporating their business and setting up a limited liability company. The limited liability company has a variety of benefits to the entrepreneur. The biggest benefit is that the liabilities of the limited liability company are limited to the assets of the business. If the company fails, creditors will be able to look only to the business assets of the company to recover any outstanding debt and will not be able to pursue you personally and attach your personal assets. Bear in mind however, that if you borrow money to commence your business enterprise, in most circumstances, the bank will require your personal guarantee and will seek and obtain security on your personal assets. If your business does not succeed the bank will seek to execute on your personal guarantee and will not be limited in those circumstances to the assets of your company. The process of incorporation of a business endeavour undoubtedly adds an air of professionalism to the business venture and presents the business to colleagues, banking institutions and potential purchasers with a high standard of professionalism.

The vehicles referred to, in particular the setting up of a trust and the incorporation of a company, will both result in initial expenses and annual administrative expense. In many instances, people who are starting out and purchasing their starter home or commencing a speculative business venture will say to themselves "I don't have enough money" or "my assets are not worth enough to put into a trust". The best time to put an asset into a trust is when it is not worth a lot of money. You will bear the expenses of transferring

the property into the trust at the inception. Therefore the best time to put it into the trust is when it is not worth a lot of money. If you buy a dilapidated starter home which has great potential for future renovations and improvement, put it in the trust when it is not worth a lot of money. Don't wait until the \$300,000.00 ruin that you purchased is turned into a \$1.5-million substantial home. The cost of transferring that property into the trust when it is worth \$1.5-million is substantially more than the cost of putting it into the trust when it was only worth \$300,000.00.

Similarly, the cost of putting 12,000 shares of a start-up company into a trust is minimal. Once the company is up and running and is successful and worth a substantial amount of money, the cost of putting it into the trust at that point becomes prohibitive. So even though it might cost you a little more at the beginning, the benefits will far outweigh that expense as the property and the asset increases in value.

9. Purchase of real estate

One of the biggest purchases that most of us will make will be the purchase of our home. The purchase of real property often times is undertaken with less care than the purchase of consumer goods. The golden rule of purchasing real estate is to ask questions. When you buy a car you test-drive it. If you want to buy a dress, you try it on. When you buy a house, often times you do nothing more than have a cursory walk through with the real estate agent. You must ask questions to satisfy yourself of what you are buying. Ask questions of the real estate agent, but remember the real estate agent is the agent of the vendor and acts for the vendor, not for you. Ask questions of the vendors tenants if there are tenants in the house. They will know the property and they will know whether the electrical wiring is up to par, whether the toilets flush and work properly, etc. Ask an architect or a surveyor about the property and the development potential of the property if you are thinking of renovating or improving the property. Make your own inspection over a number of visits. If you see the property on a weekend, you may never know until you purchase the property that the road in front of the house is a thoroughfare for heavy trucks making their way to the neighbouring quarry Monday to Friday. Finally, ask questions of your attorney. How much will this actually cost you? Aside from the purchase price, you must also be aware that there will be a cost associated with the legal fees, the stamp duty on closing and if you are borrowing money to facilitate the purchase, there will be a negotiation or finders fee charged by the bank.

The best time to discuss these matters with your attorney is before you sign the Sales Agreement. Once you have signed the Sales Agreement, you are legally bound by it and you can only get out of it by the mutual agreement of you and the vendor. Once your attorney has explained all of the terms of the Sales Agreement to you and has ensured that your verbal agreement with the vendor is incorporated into the Sales Agreement, your attorney will give you the go-ahead to sign the Sales Agreement. Thereafter, your attorney will conduct the requisite searches to ensure that you will be obtaining clear title, that the vendor has good title to pass to you and that the property referred to in the description meets and coincides with what you have seen upon visual inspection, that there are no judgments or liens against the property and that there are no encumbrances such as rights-of-way, easements, etc. on the property that you are not aware of.

Finally, when you instruct your attorneys, you must turn your mind to the issue of whose name will go on the deeds. In whose name will the property be

conveyed? Is it the intention that the property should be conveyed jointly between you and your spouse? If the intention is to own the property together, you must then turn your mind to the issue of whether you will hold the property as joint tenants or tenants-in-common.

Joint tenancy results in a right of survivorship. So if you and your spouse purchase property as joint tenants, when one of you dies the other one will automatically obtain the whole of the property and there will be no stamp duty payable. If you take the property as tenants-in-common, each of you will own one-half and each of you will be at liberty to divest yourself of your half as you deem fit.

This is particularly important when you are contemplating marriage. If you are entering a second marriage where you have pre-existing children, you may wish to ensure that your half interest of any property you purchase with your new spouse will be available to your children upon your death, rather than to your spouse. These are issues which you must deal with at the time that you take title.

If your spouse does not agree that your name should be put on the title deeds for whatever reason, you should not be signing the mortgage documents, nor should you be guaranteeing the mortgage debt. Bear in mind that the banks when they are advancing funds wish to obtain as much security as possible for the debt. In circumstances where parties are married, they want to obtain a joint and several guarantee on the debt. If however, your name is not on the title deeds, do not guarantee the debt.

If you are a non-Bermudian, special application will have to be made to the Department of Immigration in order for you to obtain a license to own the property jointly with your spouse. This is not an extraordinary application and according to the policy of government, such permission is given as a matter of policy.

Hopefully the above gives you an overview of the various areas of the law which you should be turning your mind to when considering your estate planning and the preservation of your wealth for your benefit and the benefit of the people that you wish to benefit in the future. One of the most important words of advice is to know what is happening in your financial life. Often times one of the spouses will be in control of the family purse strings. If you are not the spouse in control, you should at least be in the know. If your spouse dies, you must know where the assets are, what they are and what you are entitled to upon your spouse's death. Ask questions. Does your spouse have life insurance? Who insures your spouse's life? Who is the beneficiary of the insurance policy? If it is his estate, discuss with your spouse the possibility of naming a specific beneficiary. How much money does your spouse earn and does he have any life insurance policies with his employer? You should know where the assets are, what bank accounts there are, what investment accounts there are, etc. This is important not only in circumstances where your spouse passes away but also where the marriage terminates. Much time, effort and money is often expended following the breakdown of the marriage trying to determine what the assets are. Such expenses can be greatly alleviated if you do your homework.

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