
Ghana

International Estate Planning Guide Individual Tax and Private Client Committee

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Author's note

Estate planning involves the process of arranging and managing one's assets and affairs to ensure a smooth transfer and distribution of said assets on death. Estate planning typically includes creating a will, establishing trusts, and making decisions regarding beneficiaries and the management of assets. In Ghana, the devolution of property falls under two regimes: testacy and intestacy. A person is said to have died testate where the person left a will before dying. Where a person did not leave a will, that person is said to have died intestate. It follows that estate planning aligns with testacy.

The purpose of proper estate planning is to prevent protracted litigation over the estate, protect the business (assets or shares) of the individual (testator), foster peace for the family of the deceased person, provide an accurate picture of the financial standing of the deceased person, equitably distribute the deceased's property to the rightful beneficiaries, obtain/give proper instructions on the payment of debts owed by the deceased person, ensure that statutory taxes, such as estate duty, are paid on the total wealth of the deceased and, in some cases, provide guidance on how to maximise the deceased's wealth.

Estate planning in Ghana involves a multifaceted legal framework encompassing various aspects, such as wills, estate administration, marital property, tenancies, trusts and taxation. This guide seeks to provide an overview of the estate planning regime in Ghana, addressing key components and considerations within each area.

I. Will formalities and enforcement of foreign wills

In Ghana, the formalities for creating a valid will are outlined in the Wills Act, 1971 (Act 360). This act specifies that, for a will to be valid, it must be in writing, signed by the testator (or by someone else in the testator's presence and at their direction) and witnessed by two or more persons present at the same time. Foreign wills may be enforceable in Ghana if they comply with the formalities prescribed under Ghanaian law or are recognised under international conventions or agreements.

A. The form of last will and testaments

Ghanaian law acknowledges that there is no particular format for wills. It allows for various forms of wills. However, oral wills are generally not recognised as valid. The courts have consistently held that wills must be in writing in order to be enforceable. A will should be done at any time before death. A will must be in writing, signed and witnessed by two people. The will must be signed by the testator or some other person at his/her discretion. A 'signature' includes the making of a mark or thumb print.¹ The signature of the testator/testatrix must be acknowledged by him/her in the presence of two or more witnesses present at the same time.

1. CODICILS

Codicils, which are amendments or additions to an existing will, are recognised under Ghanaian law and must comply with the same formalities as a will.

2. POST-DEATH VARIATIONS

In Ghana, variations to a will after death are generally not allowed. The authenticity of a will is determined by the ceremony of execution required by the Wills Act, 1971 (Act 360). The court does not have the authority to inquire into the testator's true wishes or intentions beyond what is stated in the will. However, it is important to note that the soundness of a testator's mind can be questioned by close relatives who believe that their legitimate expectations have not been fulfilled by the will. In such cases, the burden of proof lies on the party challenging the will to provide strong evidence of mental incapacity or fraud in the execution of the will. If there is a need to administer the estate of a deceased person without a valid will, letters of administration may be issued with the will annexed. The applicant must provide information about the approximate date of death, the condition of the estate and the purpose of the application. It is also worth mentioning that the court has the jurisdiction to review its own pronouncements on the law and correct any mistakes or misapplications. This is done to adapt the law to changing social conditions and reflect socio-political and economic changes in society. This departure from previous judgments is not common practice.

3. THE HAGUE TESTAMENTARY DISPOSITIONS CONVENTION AND FOREIGN WILLS

Ghana is not a party to the Hague Testamentary Dispositions Convention, which simplifies the process of cross-border recognition and enforcement of testamentary dispositions. However, Ghana has adopted this convention by incorporating the agreement in section 15 of the Wills Act, 1971 (Act 360). Section 15 (1) reads: 'A will is properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where at the time of its execution or of the testator's death the testator was domiciled or had habitual residence or in a state of which the testator is a national at either of those times.' In a case where an issue arose regarding whether a will that has been proved in accordance with the internal law of a foreign country can be declared invalid in Ghana, the Ghanaian Court of Appeal cautioned itself to be hesitant in declaring such a will invalid.²

a. Foreign wills

Consequently, the Ghanaian courts have generally upheld the will of a foreigner provided the formalities of execution comply with either the laws of Ghana or the national law of the country where the will was made. If the will of a testator has been proved according to the law of a foreign jurisdiction, then a Court in Ghana would hesitate to declare it invalid and be hesitant to vary or set aside the testator's wishes.

The applicable law for the execution of a will is influenced by the personal law of the testator, such as customary law, Mohammedan law if Muslim, common law or the law of another jurisdiction. In the absence of any specific provision as to which laws should govern the devolution of property in Ghana, Ghanaian law is the applicable law.

It is advisable for a foreigner who has landed property in Ghana or property governed by Ghanaian law to make a will in Ghana. The advantage of this is that, once the will is proved and admitted to probate, the administration of the deceased foreigner's estate can commence immediately. However, where a foreign will has been admitted to probate in the jurisdiction in which it was made, that foreign will must also be proved

and admitted to probate in Ghana before the estate to which it applies can be administered.

The physical presence of a foreign testator in Ghana is required to make a written will. The testator must sign or acknowledge his/her signature in the presence of two or more witnesses who are present at the same time. The will can also be signed on the testator's behalf in the testator's presence with two or more witnesses present. The witnesses are also required to attest and sign the will in the presence of the testator, but no legal form of attestation is necessary.

B. Will substitutes (trusts)

Trusts and entities can serve as alternatives to wills for estate planning purposes. They allow for the transfer of assets either during the settler's lifetime (living trust) or transfer after the death of the settler in instances where the trust is contained in the will of the settler and comes into effect on the death of the settler when the will is administered to probate (testamentary trust). The validity of testamentary trusts is contingent on the validity of the will that embodies them. Regarding testamentary trusts, the Ghanaian courts have noted that a trustee must be directly appointed by the will to specific property for the benefit of certain beneficiaries.³ Trusts can provide flexibility and privacy in the estate distribution.

Generally, where property is devised to minors in a will, there must be a trust with specific conditions or instructions as to how or when the properties should be transferred to them for their use. Trusts typically provide that the money or properties bequeathed be held in trust for the minors until they attain the age of majority (ie, 21 years). This implies that the trustee must hold the properties in trust for the minors or on their behalf, until the minor(s) become of age. At the appointed time or when all the conditions specified under the trust have been met, the trustee will then transfer the properties to the named beneficiaries or minors.

C. Powers of attorney, directives and similar disability documents

Powers of attorney and directives enable individuals to appoint agents to make decisions on their behalf in the event of incapacity. These documents are essential components of disability planning and can ensure that a person's affairs are managed according to his/her wishes. In estate planning, discussions on power of attorney usually arise where a person who is showing early signs of disability or incapacitation will need another to act on his/her behalf when the person is unable to do so him/herself.

II. Estate administration

A. Overview of administration procedures

Estate administration in Ghana involves the collection, management and distribution of a deceased person's assets. The process typically includes identifying heirs, paying debts and taxes, and transferring assets to beneficiaries. It focuses on determining how an individual's assets or estate will be managed, preserved or distributed after death, as well as how the individual's financial obligations will be managed in the event

of death, payment of outstanding debts, funeral expenses, distribution of properties to heirs and the like.

1. ADMINISTRATION OF THE ESTATE

The administration of the estate refers to actions necessary to guide an estate through the statutorily mandated processes. It is overseen by an executor or administrator appointed by the court whose responsibilities include gathering and valuing assets, settling debts and taxes, and distributing the estate according to the will or intestacy laws. Ghanaian law is quite emphatic that, in relation to immovable property, the law of the place where the property is located is applicable.

2. PROBATE CERTIFICATE OR GRANT OF LETTERS OF ADMINISTRATION

A probate certificate or letters of administration may be issued/granted by the High Court to confirm the authority of the executor or administrator to act on behalf of the estate. The courts will issue probate to an executor when a person dies leaving a valid will. Probate is a certificate that authorises the executor to act on behalf of the deceased person. The executor must settle the debts of the deceased, and has access to the bank accounts and all other properties of the deceased. The executor must share the property in accordance with the will. The courts will grant letters of administration when a person dies without making a will.

3. EXECUTOR AND ADMINISTRATOR

An executor is named in the will and has the responsibility to carry out the testator's wishes. An administrator is appointed by the court when there is no valid will or when the named executor is unable or unwilling to serve.

B. Intestate succession and forced heirship

When a person dies without a valid will, intestate succession laws govern the distribution of their estate. The Intestate Succession Act, 1985 (PNDCL 111) applies automatically, subject to the rules of private international law, to both foreigners and citizens of Ghana who die leaving assets in Ghana, but do not make a will. In Ghana, these laws prescribe the order of priority for distributing assets among surviving relatives, which might include forced heirship rights for certain family members in some specific communities. The determination of forced heirship or inheritance rights in Ghana depend on the particular case, and the application of customary law and principles of succession.

1. INTESTATE SUCCESSION

Intestate succession occurs when a person dies without a will or when the will is deemed invalid. In such cases, the estate is distributed according to the laws of intestacy. In Ghana, the Intestate Succession Law was enacted primarily because legal dispensation at the time had been overtaken by changes in the Ghanaian family system, that is, the rising importance and prominence of the nuclear family and tensions between that family (nuclear family) and the then-traditional family generally recognised by all customs. In customary law, there was very little protection for a surviving spouse. Neither spouse had a right to the property of the other, and children in a matrilineal system had no more than a right to maintenance by their father's

customary successor and a right to reside in their father's house subject to good behaviour. This changed with the enactment of the Intestate Succession Law.

Under the current intestate dispensation (with the enactment of the Intestate Succession Law), only the spouse, child, parent and extended family have an automatic right to share in the estate of the deceased. All other persons will be required to prove their right to share in the estate.⁴ The Intestate Succession Act was enacted to give the nuclear family a greater portion of the estate of the deceased person.

2. STATUTORY DIVISION

Statutory division refers to the distribution of the estate according to specific rules and formulas outlined in the law, particularly in cases of intestacy or when the will is silent on certain matters. In Ghana, the Intestate Succession Law provides the fractional distributions. For easier understanding, this author has converted the fractions to percentages.

Where the deceased is survived by a spouse and child/children, the surviving spouse and child/children of the deceased are jointly entitled to 75 per cent of the properties (18.75 per cent and 56.25 per cent, respectively). The remaining 25 per cent goes to the surviving parents and extended family (12.5 per cent and 12.5 per cent, respectively).

Where the deceased has no children and is survived by a spouse(s), the spouse is entitled to 50 per cent of the properties, and the remaining 50 per cent is shared between the deceased's parents and extended family (25 per cent and 25 per cent, respectively).

Where the deceased is survived by a child/children but no surviving spouse(s), then the child/children are entitled to 75 per cent of the properties, and the remaining 25 per cent goes to the parents and extended family (12.5 per cent and 12.5 per cent, respectively).

Where the deceased has no spouse or children, then the surviving parents, if any, are entitled to 75 per cent of the properties, and the remaining 25 per cent goes to the extended family.

3. FORCED HEIRSHIP RIGHTS

Forced heirship refers to the legal principle that certain family members are entitled to inherit a portion of an estate, regardless of the deceased's wishes. In Ghana, the concept of forced heirship is not explicitly recognised in legislation or case law. However, there are cases where the courts have considered the rights of family members to inherit property based on customary law and principles of succession. Forced heirship rights ensure that certain family members, such as spouses and children, are entitled to a portion of the deceased's estate, regardless of the provisions of the will.

4. DISINHERITED SPOUSE

In a will, a testator/testatrix has the right to dispose of his/her estate (immovable and movable property) as he/she so chooses. In some instances, the testator/testatrix may leave an inadequate provision of his/her estate to his/her spouse and children or, in other instances, disinherit his/her spouse and children entirely in the will. If this happens, an application can be made in court for a reasonable provision of the estate of the testator, even if the spouse and children are explicitly excluded from the will and despite the provisions of the will.^{5,6} The spouse must establish that he/she was legally married to the deceased testator/testatrix immediately before his/her death and must also show that the deceased was maintaining him/her (the spouse) before his/her death.

C. Marital property

1. COMMUNITY OF PROPERTY REGIME

'Marital property' or 'spousal property' is property acquired by a couple during the subsistence of their marriage. When a spouse acquires property solely before marriage, such property cannot be called 'marital property' or 'spousal property' *stricto sensu*, to be distributed under the provisions of Article 22 (3) of the 1992 Constitution of Ghana.

2. MARRIAGE CONDITIONS

Marriage conditions refer to the terms agreed by spouses regarding the ownership and management of property during the marriage. These conditions may include prenuptial or postnuptial agreements. There are no laws in Ghana that specifically speak to the legality of prenuptial agreements between parties and there have been debates surrounding their legality.

3. SAME-SEX COUPLES

The laws of Ghana do not recognise same-sex marriage or civil partnerships, and as such, there are no specific provisions regarding marital property rights for same-sex couples.

4. MATRIMONIAL

Matrimonial property refers to assets acquired by spouses during the course of their marriage. In Ghana, the ownership and management of matrimonial property are generally governed by law, personal agreements or court decisions. Ghana has recently consolidated and harmonised its land law.⁷ A vital provision that has already generated debate among lawyers and law students is the restriction on spouses to transfer land. The statute appears to demonstrate the attitude of the legislature towards prenuptial agreements in recent times. Law-makers measured their words by ensuring that the properties of spouses that were acquired prior to the marriage were not included in the application of the above statute.

In Ghana, any properties acquired by spouses in their own right remain separate throughout their marriage and do not become jointly owned. If a husband buys property in the name of his wife, the husband is presumed to have intended the

property as a gift for his wife. This can, however, be rebutted by cogent evidence to show that a gift was never intended and the husband wanted to retain a beneficial interest. If a husband can show that he made a substantial contribution to the acquisition of property in the name of his wife, he could obtain an order of the court decreeing that his wife holds the title deeds to the property in trust for himself

D. Tenancies, survivorship accounts and payable-on-death accounts

Tenancies, survivorship accounts and payable-on-death accounts are mechanisms for transferring assets outside the probate process. These arrangements allow for the automatic transfer of ownership to designated beneficiaries on the death of the account holder or property owner.

III. Trusts and other planning structures

A. Common techniques

Trusts, foundations and other planning structures are commonly used in estate planning to achieve various objectives, such as asset protection, tax planning and charitable giving.

B. Fiduciary duties

Fiduciary duties govern the actions of trustees, board members, directors and other individuals responsible for managing trust or foundation assets. These duties include loyalty, prudence and accountability to beneficiaries.

C. Treatment of foreign trusts and foundations

Ghanaian law may recognise and enforce foreign trusts and foundations, subject to certain conditions and requirements, including compliance with local laws and regulations.

IV. Taxation

A. Domicile and residency

Taxation in Ghana is based on domicile and residency status. Generally, residents are taxed on their worldwide income, while non-residents are taxed only on income derived from Ghana.

B. Gift, estate and inheritance taxes

Most property in Ghana can be given freely to anyone during the lifetime of its owner. The requirements are: the donor must be the legal owner of the gift; the donor must have the age, mental capacity and intention to make the gift; and the gift must be delivered to and accepted by the donee during the lifetime of the donor.

Ghana imposes taxes on gifts and estates and/or inheritance although the rates and thresholds may vary depending on the relationship between the donor/deceased and the recipient/heir.

1. ESTATE AND/OR INHERITANCE TAX

On a successful application for probate or letters of administration in respect of a deceased's estate, the applicants will be required to pay estate duty before a certificate will be issued to enable them to carry out their duties as executors/administrators of the deceased's estate. Estate duty refers to the statutory fees paid by the applicant(s). It is usually three per cent of the value of the entire estate of the deceased.

With regards to trusts, a trust is taxed separately from the beneficiaries of the trust. Where a group of persons are trustees for more than one trust, the income of each trust is calculated separately. In calculating the tax liability of a trust, the trust is treated as an entity. The amount received and expenditure incurred by a trust or trustee is the amount received and expenditure incurred by the trust. An asset owned or liability owed by a trust or trustee is an asset or liability of the trust.

The distribution of a resident trust is tax exempt if the distribution is in the hands of the beneficiary. The distribution of a non-resident trust is included in calculating the income of the beneficiary. A gain on the disposal of the interest of a beneficiary in a trust is included in calculating the income of the beneficiary.

2. GIFT TAX

Gift tax is imposed on the transfer of assets during the donor's lifetime, with certain exemptions and allowances.

Gift tax according to Income Tax Act, 2015 Act 896, is when a person receives a gift in respect of his/her employment, business and/or investment other than under a will on intestacy or by way of transfer to the spouse, child or parent of that person. Any such gift is taxable under the income tax law. Accordingly, devises under a will or on intestacy are exempt from taxation under Ghanaian law.

3. CALCULATION OF INHERITANCE AND GIFT TAX

The calculation of inheritance and gift tax is based on the fair market value of the transferred assets at the time of the gift or death, subject to applicable deductions and exemptions.

4. TAX-FREE ALLOWANCES

Ghana provides tax-free allowances and exemptions for certain gifts and/or inheritance.

5. STAMP DUTY EXEMPTIONS

Stamp duty is tax imposed on documents or specific instruments brought into being for the purpose of recording transactions. The duty is imposed on a wide range of

instruments or documents. Some of the notable exemptions in line with this guide include:

- transfer of property under will or other instruments relating to testamentary dispositions;
- probate, letters of administration and vesting assents;
- transfers and covenants to charities; and
- transfers made on gifts *inter vivos* (between the living) from one spouse to another or from a parent to a child or from a child to a parent.

V. Conclusion

In conclusion, the estate planning regime in Ghana serves as a critical framework for individuals to proactively manage their assets and affairs, ensuring a seamless transition of wealth to their chosen beneficiaries on their demise. Through mechanisms such as wills, trusts and decisions on asset management, individuals can secure their legacies and safeguard the interests of their loved ones. Additionally, estate planning facilitates an accurate assessment of the deceased's financial standing, promotes equitable distribution of assets and ensures compliance with tax obligations, including estate duties.

Furthermore, by providing guidance on wealth maximisation strategies and highlighting potential tax exemptions, estate planning empowers individuals to optimise their financial legacies for future generations. As Ghana continues to evolve economically and socially, the importance of robust estate planning practices cannot be overstated, serving as a cornerstone for financial security and intergenerational wealth preservation.

Notes

¹ Interpretation Act, 2009, Act 792.

² Larney (Deceased), *Larney v Affutu-Narney* [1972] 2 GLR, 488.

³ *Afranie II v Quarcoo And Another* [1992–93] 4 GBR 1451–1510 SC.

⁴ Intestate Succession Act, 1985 – PNDCL 111.

⁵ S 13, Wills Act 1971, Act 360.

⁶ Art 22, 1992 Constitution of Ghana.

⁷ Land Act, 2020 (Act 1036).