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# Malta

## International Estate Planning Guide

Individual Tax and Private Client Committee

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## I. Wills and disability planning documents

### A. *Will formalities and enforceability of foreign wills*

The general provisions of Maltese law governing wills are those of the Civil Code.<sup>1</sup> The Civil Code provides the definition of a will as being an instrument, revocable of its nature, by which a person, according to the rules laid down by law, disposes, for the time when he or she has ceased to live, of the whole or part of his or her property. Furthermore, a will may contain dispositions by universal title, whereby the testator bequeaths to one or more heirs the whole of his or her property or part thereof; or by singular title, whereby the testator bequeaths his or her property to one or more legatees.

While the law contemplates that there may only be one person who may bequeath by way of a will in one single instrument, the Civil Code does allow for a will to be made up between spouses by way of a will *unica charta*. As a will is by law revocable, the revocation by one of the testators of a will *unica charta* is possible, but the validity of the will remains vis-à-vis the estate of the testator who has not revoked the same will. However, in doing so, and where the testators have bequeathed to each other the ownership of all their property or the greater part thereof, the revoking testator, if he or she survives the other testator, shall forfeit all rights that such a person may have had by virtue of such a will on the estate of the predeceased spouse.

Wills under Maltese law may either be public or secret. A public will is received and published by a notary in the presence of two witnesses (in the same manner as any other notarial instrument, and according to the provisions set out by the Notarial Professions and Notarial Archives Act).<sup>2</sup> This is the case even as regards to the procedures to be followed where the testator may not know how to sign his or her signature and/or write. Heirs, legatees or their relations by consanguinity or affinity within the degree of, and including, an uncle/aunt or nephew/niece may not act as witnesses to the will. The publishing notary is furthermore bound to deliver and register the will at the public registry within 15 days from having received the will. Revocation of the will, whether in whole or in part, must also be done by means of a notarial act to the same effect.

A secret will may be printed, typewritten or written in ink either by the testator or a third person. Where the testator knows how to and can write, the will shall, in all cases, be signed by the testator at the end thereof. If the testator does not know how to or cannot write, any disposition made via the secret will must be made with the assistance of a judge or magistrate. The respective judge or magistrate must read out and explain to the testator the content of the paper that the testator declares to be his or her will and shall enter a declaration at the foot of the will to the effect that the requirements of the law have been complied with and that he or she is satisfied that the content of the paper is in accordance with the intentions of the testator. Such a declaration must be signed and dated by the judge or magistrate. After the will is duly closed off and sealed, the latter shall add on the paper on which the will is written or its envelope a signed declaration to the effect that the paper or envelope contains the will of the person making it.

A notary in receipt of a secret will is bound to draw up an act of delivery, thereby recording the declaration of the testator, on the paper itself on which the will is written or on the paper used as its envelope. The act of delivery must be signed by the testator, witnesses and notary. If the testator declares that he or she does not know how to or cannot write, the notary shall enter such a declaration at the foot of the act and such an entry shall be equivalent to a signature. Within four days from the date of delivery, the notary must

present the will to the court of voluntary jurisdiction for preservation by the registrar of the courts in accordance with the provisions of the Code of Organisation and Civil Procedure.<sup>3</sup>

At any time, the testator may withdraw his or her secret will. If the secret will is still with the notary to whom the testator delivered it, the will must be withdrawn from the same notary; otherwise, if the will has been deposited with the court registry, it may be withdrawn from the registry. Furthermore, a person claiming to have an interest in a secret will may demand the opening of such a will as soon as the death of the testator thereof has been ascertained.

The capacity of the testator is paramount to the validity of a will. Therefore, any person who is subject to incapacity under the provisions of the Civil Code may not dispose of or receive property by will. Persons who are incapable at law of making wills are the following:

- persons who have not reached the age of 16;
- persons who, even if not interdicted, are not capable of understanding and volition, or who, because of some defect or injury, are incapable even through interpreters of expressing their will;
- persons interdicted on grounds of insanity or mental disorder;
- persons, not being interdicted, with a mental disorder or other condition that renders them incapable of managing their own affairs at the time of the will; and
- persons who are interdicted on the ground of prodigality, unless they have been authorised to dispose of their property by the court that has ordered their interdiction, although said persons may, in all cases, revoke any will made by them prior to their interdiction without the authorisation of the court.

Maltese succession law applies to the estate of a deceased person that is domiciled in Malta and to immovable property situated in Malta. In terms of the European Union Succession Regulation (Regulation (EU) No 650/2012), a testator may choose the law of his or her nationality to apply to his or her estate.

#### B. *Will substitutes (revocable trusts or entities)*

The laws of succession under Maltese law are mature and well developed, and provide an efficient manner in which a testator may regulate the succession of his or her assets upon his or her demise. An alternative means of estate planning that finds itself well regulated under Maltese law is the establishment of a trust. The Trusts and Trustees Act<sup>4</sup> is the main instrument regulating trusts and trustees in Malta. The act provides that 'a trust exists where a person (called a trustee) holds, as owner or has vested in him property under an obligation to deal with that property for the benefit of persons (called the beneficiaries), whether or not yet ascertained or in existence, which is not for the benefit only of the trustee, or for a charitable purpose, or for both such benefit and purpose aforesaid'.<sup>5</sup>

Furthermore, while trust property is held by, in the name or under the control of the trustee (both with full power and the duty for which he or she is accountable to administer, employ or dispose of trust property

in accordance with the terms of the trust and as imposed by law), the act specifies that trust property shall constitute a separate fund owned by the trustee. This fund is distinct and separate from the personal property of the trustee and from other property held by that trustee under any other trust. Consequently, the personal creditors of the trustee have no recourse against trust property and such property is recognised as not forming part of the trustee's personal estate upon its insolvency or bankruptcy. Furthermore, trust property does not form part of the matrimonial property of the trustee or his or her spouse, or form part of the trustee's estate upon his or her death.

It is also possible to set up a discretionary trust whereby the trustees are endowed with significant discretionary powers in the manner in which they administer the property of the trust fund, as well the manner and timing of distributions to beneficiaries of the trust. In accordance with the provisions of the act, the terms of a trust may also be varied or revoked if the trust instrument allows for these actions, respectively. In the event that a trust is revoked, the trustee shall hold trust property in trust for the settler absolutely. Therefore, the absolute title of the property shall in the case of revocation revert back to the settler, with the settler being able to alienate or otherwise encumber the property.

A trust may be created either *causa mortis* or *inter vivos*. Therefore, dispositive provisions of a will may provide for the establishment of a trust *causa mortis*, otherwise referred to as a testamentary trust. Where a testamentary trust is established, the testator qua settler establishes the trust by means of his or her last valid will. A testamentary trust must comply with the formalities required for a valid will and must therefore be entered into by public deed before a notary or in a secret will deposited with the relevant court in accordance with the procedures in force for the deposit of secret wills (see section (1)(a)). At the time of death of the testator, succession is opened, the will of the testator is rendered public and the testamentary trust is established.

While the testator may choose to settle either specific assets or all of his or her estate in the testamentary trust, property settled in the trust may in no case exceed the disposable portion of the testator's estate permitted by law. Therefore, where a testator has settled in trust an amount exceeding this disposable portion, the heirs of the settler who are entitled by law to a reserved portion of the estate, namely the descendants and surviving spouse of the testator qua settler, may claim their respective amount of the reserved portion out of the trust assets.

At the time of death of the settler of an *inter vivos* trust (a trust entered into during the lifetime of the settler) and thereafter, trust property shall remain governed by the terms of such a deed with the remaining property of the settler (that was not settled into the trust) being governed by the last valid will of the settler or otherwise by the general rules of succession where there is no will. An *inter vivos* trust may not breach forced heirship rules. In addition, the settler's heirs may claim their reserved portion against trust property if the assets of the trust exceed the settler's disposable portion and the remaining assets of the deceased settler's estate, that is, those not settled into the trust, are not sufficient to satisfy their claim.

In conclusion, trusts provide an effective tool in estate planning. A trust can go a step beyond a will in that it may provide more assurance to the settler that the assets within the trust and the benefits to which the beneficiaries are entitled are more clearly secured and regulated. That being said, the provisions of Maltese law relating to succession will still apply, particularly when it comes to the protection of the reserved portion due to specified heirs of the settler. Therefore, the creation of a trust should always involve an assessment of the implications that the settler's last valid will (if any) and ultimately Maltese

law of succession may bring about.

C. *Powers of attorney, directives and similar disability documents*

The capacity to make a will is indeed central to the validity of the will itself. A major (being a person who has completed his or her 18th birthday) is capable of performing all the acts of civil life in terms of Maltese law, including the making of a will. However, a major who is a person with a mental disorder or other condition that renders him or her incapable of managing his or her own affairs, or who is insane or prodigal may be interdicted or incapacitated from doing certain acts.<sup>6</sup> The disability of persons interdicted is either general in regard to all acts or specific. Indeed, as has been discussed in section (I)(A), while the age requirement at which a person may make a will is lowered to the completion of the persons' 16th birthday, under Maltese law, persons who are interdicted are deemed incapable of making wills unless the interdiction relates to prodigality, in which case, the court ordering the interdiction may also authorise the interdicted person to dispose of his or her property.<sup>7</sup> In addition, persons who are incapable of understanding and volition or are of unsound mind at the time of the will, even if not interdicted, are also deemed incapable of making a will.<sup>8</sup>

The Civil Code also provides for the possibility of a person to be considered to be unworthy at law and therefore incapable of receiving property under a will. Such persons include any person who has wilfully killed or attempted to kill the testator or his or her spouse; has charged the testator or his or her spouse before a competent authority with a crime punishable with imprisonment of which he or she knew the testator or his or her spouse to be innocent; and has compelled or fraudulently induced the testator to make his or her will or to make or alter any testamentary disposition, or prevented the testator from making a new will or from revoking the will already made, or suppressed, falsified or fraudulently concealed the will and any person who has been an accomplice in any of the said acts. Furthermore, where a tutor or curator has been appointed to administer the property of another person, the tutor or curator cannot benefit under a will made during the tutorship or curatorship period by the person under his or her charge, unless the tutor or curator is the ascendant or descendant, brother, uncle, nephew, cousin or spouse of the person making the will.<sup>9</sup> Likewise, members of monastic orders or religious corporations of regulars are prohibited from disposing of or receiving under a will after taking vows in the religious order or corporation, as the case may be, unless and until such persons are lawfully released from their vows.<sup>10</sup>

## II. **Estate administration**

A. *Overview of administration procedures*

The Civil Code's general provisions on succession provide that an 'inheritance' is the estate of a person deceased and it devolves either by the disposition of a person or, in the absence of any such disposition, by operation of law.<sup>11</sup> In light of the foregoing, administration procedures contemplated under Maltese law are similar to probate, the latter being the legal process of administering the estate of a deceased person by resolving all claims and distributing the deceased person's property under a will that has been declared valid by a probate court. The Maltese Civil Code does not refer to such administration procedures per se because probate administration is not in itself enshrined in Maltese law.

The Civil Code provides for the formalities and procedures to be observed when drawing up wills and

disposing of an inheritance. These include provisions addressing, inter alia, the validity of wills, opening and publication of wills, testate and intestate succession, testamentary executors, vacant inheritance and the appointment of curators, the reserved portion and the rights of the surviving spouse.

A testator is empowered by law to appoint one or more testamentary executors.<sup>12</sup> The appointment and office are regulated accordingly. A testamentary executor must be confirmed by the court of voluntary jurisdiction before taking on the administration of the estate,<sup>13</sup> barring urgent matters in the interest of estate preservation.<sup>14</sup> Prior to the court confirming the testamentary executor, the latter must have entered into a recognisance in the records of the court, including the hypothecation of his or her property to be registered in the Public Registry, declaring to faithfully carry into effect the will of the testator and to render an account of his or her administration every year or once only as the court shall direct according to the circumstances.<sup>15</sup>

For the purposes of paying the debts of the estate or discharging legacies, the testator is also empowered, solely in the absence or insufficiency of funds in the estate, to collect sums owed to the estate or, in default, sell estate property. Such sales must be made by public auction, unless the heirs agree or the court allows the sales to be made otherwise than by auction on application of the executor.<sup>16</sup> In this case, the heirs may also prevent the sale of such property by offering the means by which to pay the debts and discharge the legacies.

The law also contemplates the appointment of more than one testamentary executor. All executors are deemed to act conjointly, unless the testator specifies in the will that the executors are to act separately on distinct matters. An executor may renounce his or her office at any time, even in cases where the executor has already commenced to act, and may also be removed from office upon good cause being shown.<sup>17</sup>

In the case of the death, absence, renunciation or illness of the sole executor or of all executors, where more than one is appointed, the execution of the vests either in the heirs directly, unless the court of voluntary jurisdiction, with the consent of the heirs, or the court of contentious jurisdiction, for just cause on the demand of any interested party, confers the office of executor upon another person.<sup>18</sup>

In conclusion, the law contemplates the concept of the administration of testate succession through the optional appointment of testamentary executors. Ultimately, and in the absence of the appointment of such an executor, it falls upon the heirs to execute the testamentary succession from which they are to benefit.

#### B. *Intestate succession and forced heirship*

Intestate succession (*ab intestato*) is governed by Subtitle 2 of Part 2 of the Civil Code. Article 788 states that, where there is no valid will, where the testator has not disposed of the whole of his or her estate; where the heirs-institute are unwilling or unable to accept the inheritance; or where the right of accretion<sup>19</sup> among the co-heirs does not arise, intestate succession takes place, wholly or in part by operation of law. Intestate succession is granted in favour of the descendants, ascendants, collateral relatives and spouse of the deceased, and the government of Malta by the terms of the Civil Code. In regulating succession among relations, the law takes into consideration the proximity of the relationship and does not consider either the prerogative of the line or origin of property, except in cases expressly laid down by law. Succession *ab intestato* takes place in the following circumstances:

- where the deceased has left children or their descendants *and* a spouse, succession devolves as to one moiety upon the children and other descendants, and as to the other moiety upon the spouse;
- where the deceased has left children or other descendants but no spouse, succession devolves upon the children and other descendants;
- where the deceased has left no children or other descendants but is survived by a spouse, succession devolves on the spouse;
- where the deceased has left neither children or other descendants, nor a spouse, succession shall devolve:
  - if there is an ascendant or ascendants and no direct collaterals (brothers and sisters, whether half, full or adopted, and their descendants), to the nearest ascendant or ascendants;
  - if there is an ascendant or ascendants and direct collaterals, one moiety to the nearest ascendant or ascendants and the other moiety to the direct collaterals (brothers and sisters succeed *per capita*, while their descendants succeed *per stirpes*);
  - if there is no ascendant or ascendants but there are direct collaterals, to the direct collaterals; and
  - if there is no ascendant or ascendants nor direct collaterals, to the nearest collateral in whatever line such collateral may be.

Where the deceased is not survived by any of the persons entitled to succeed under the rules laid down in the Civil Code, inheritance shall devolve upon the Government of Malta.

The law seeks to protect the interests of the descendants and spouse (where applicable) of the deceased by reserving a portion of the estate of the deceased in their favour from which they may claim. In terms of Article 615(1) of the Civil Code, the 'reserved portion' is defined as the right on the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased. This right is deemed by law to be a credit of the value of the reserved portion against the estate of the deceased. Such credit accrues interest from the date of the opening of succession if the reserved portion is claimed within two years from such a date or from the expiry of a judicial act if the claim is made after the expiration of the said period of two years. However, the court may decide not to award interest or award a reduced rate of interest if the circumstances of the case so require.

The reserved portion due to all children (whether conceived or born in wedlock or out of wedlock, or adopted) is set at one-third of the value of the estate if such children are not more than four in number, or one-half of such value if there are five or more children. The reserved portion is divided in equal shares among the children who participate in it, unless there is only one child who would, in that case, receive the whole of the aforementioned third part.<sup>20</sup> The term 'children' also includes the descendants of the children of whatever degree.



The reserved portion may not be encumbered by the testator with any burden or condition. It is calculated with reference to the entire estate, after deducting the debts due by the estate and funeral expenses, and must include all the property disposed of by the testator under gratuitous title, even in contemplation of marriage, in favour of any persons whomsoever, with the exception of such expenses as may have been incurred for the education of any of the children or other descendants. In calculating the share of the reserved portion due to any child, all things received thereby from the testator shall be imputed as subject to collation in terms of law. Any property bequeathed by will is to be considered when calculating the reserved portion. It is furthermore not possible for a person to renounce any testamentary disposition and also be able claim the reserved portion, except when such testamentary disposition is made in usufruct or consists of the right of use or habitation, a life annuity or an annuity for a limited time.

Besides the grounds on which a person may become unworthy to inherit (as discussed in section (l)(c)), the law also provides grounds for disherison (or 'disinheritance'). The persons entitled by law to the reserved portion may be deprived thereof by a specific declaration of the testator on any of the grounds specified by the Civil Code, which must be stated in the will.<sup>21</sup> These grounds include:

- if the descendant has, without reason, refused maintenance to the testator;
- if, where the testator has become insane, the descendant has abandoned him or her without providing for his or her care in any manner;
- if, where the descendant could release the testator from prison, he or she has failed to do so without reasonable ground;
- if the descendant has struck the testator or otherwise been guilty of cruelty towards him or her;
- if the descendant has been guilty of grievous injury against the testator;
- if the descendant is a prostitute without the connivance of the testator; and
- in any case in which the testator, by reason of the marriage of the descendant, shall have been declared free from the obligation of supplying maintenance to such a descendant in terms of the respective provisions at law.<sup>22</sup>

The other form of 'forced heirship' contemplated by the Civil Code is embodied in provisions relating to the rights of the surviving spouse. Articles 631 and 632 quantify the rights of the surviving spouse over the estate of the deceased as one-fourth of the value of the estate in full ownership if the deceased is survived by children or other descendants; and one-third of the value of the estate in full ownership if there are no such children or descendants. Furthermore, the surviving spouse has the right of habitation in the principal residence if occupied at the time of the death of the predeceased spouse.

### C. *Marital property*

Subtitle 3 of title 5 of the Civil Code addresses the community of acquests which, in terms of Article 1316 of the Code, is established *ipso jure* between two spouses celebrating marriage in Malta. Indeed, the spouses could enter into a pre-nuptial contract, doing away with the community of acquests, if

desired.

In terms of Article 1320 of the Civil Code, the community of acquests principally comprises:

- all that is acquired by each of the spouses by the exercise of their work or industry;
- the fruits of the property of each of the spouses, including the fruits of property settled as a dowry or subject to entail, whether any of the spouses possessed the property before the marriage or whether the property has come to either of them under any succession, donation or other title, provided such property shall not have been given or bequeathed on conditions that the fruits thereof shall not form part of the acquests;
- saving any provisions of the Civil Code to the contrary, the fruits of property of the children as is subject to the legal usufruct of any one of their parents;
- any property acquired with money or other things derived from the acquests, even though such property is so acquired in the name of only one of the spouses;
- any property acquired with money or other things that either of the spouses possessed before the marriage, or which, after the celebration of the marriage, have come to one of them under any donation, succession or other title, even though such property may have been so acquired in the name of such a spouse, saving the right of such a spouse to deduct the sum disbursed for the acquisition of such property; and
- fortuitous winnings made by either or both spouses and a part of a treasure trove found by either of the spouses, as is by law assigned to the finder, whether such a spouse has found the treasure trove in his or her own tenement, or in the tenement of the other spouse or a third party.

By elimination, all that does not form part of the community of acquests as defined by law constitutes the paraphernal property of the respective spouse and as such, the ownership and administration thereof vest exclusively in the spouse to whom the property belongs. In the ambit of succession, it is not uncommon for spouses to make a will in the same instrument known as a will *unica charta* (see section (I)(A)). A will *unica charta* may be made to the mutual benefit of the spouses or to the benefit of any third party. It is drawn up in such a manner that provisions with regard to the estate of one of the testators are kept separate from those containing provisions referring to the estate of the other spouse. An intrinsic feature of this form of will is the forfeiture of rights in the case of the revocation of the will by either spouse. Article 593 of the Civil Code states that, where, by a will *unica charta*, the testators have bequeathed to each other the ownership of all their property or the greater part thereof with the express and specific condition that if one of the testators revokes such a bequest he or she shall forfeit any right in his or her favour from such a joint will, the survivor, who shall revoke the will with regard to such a bequest, shall forfeit all rights that he or she may have had in virtue of such a will on the estate of the predeceased spouse.

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

Survivorship accounts and payable on death accounts as such do not typically feature under Maltese law. The latter appear, albeit indirectly, in the provisions on life insurance contracts in the Civil Code,

particularly Article 1712C, which allows a policy holder to elect that the proceeds or any benefit from a contract of life insurance, whether payable on a definite maturity date or on the death of the insured, including any surrender value, be payable to one or more named beneficiaries.

### **III. Trusts, foundations and other planning structures**

#### **A. Common techniques**

The Maltese legal system contemplates a number of legal arrangements that may be utilised in estate planning. Trusts and wills, as have been discussed in section I, are prime examples of this and are perhaps the most common form of estate planning tools utilised under Maltese law. Furthermore, Maltese law also provides for the establishment and regulation of foundations.<sup>23</sup> The Maltese foundation is an attractive option in terms of estate planning because foundations tend to combine certain characteristics from both limited liability companies and trust arrangements.

Importantly, Maltese foundations, even if they have similar characteristics to trusts, are, unlike trust arrangements, considered to be separate legal entities, that is, they possess legal personality in terms of Maltese law. Furthermore, foundations are treated as companies for the purposes of Maltese income tax legislation,<sup>24</sup> unless the administrators of the respective foundation elect to have that foundation irrevocably taxed as a trust.<sup>25</sup>

Foundations may be constituted both *inter vivos* by means of a public deed or by a last will and testament. Upon the registration of the deed of foundation with the Registrar for Legal Persons, the respective foundation is attributed with legal personality under Maltese law. Both foundations and trusts are legal arrangements that are constituted with the purpose of creating a patrimony that is separate and distinct from that of the founder, administrator or beneficiaries. Said patrimony is administered by fiduciaries for the benefit of a beneficiary or beneficiaries. In the same way that a trust is administered by one or more trustees who may be bestowed with discretion in the way that they carry out that administration, a foundation is administered by its board of administrators, who are bestowed with discretion in the exercise of their fiduciary role. However, a major difference lies in the fact that the foundation, as a legal person, is the owner of its assets, whereas the trustees of a trust are the legal owners of trust property.

The similarities to the trust concept also extend to the functioning of the entity with parties similar to those one would expect to see in a trust. For example, the concept of the founder providing an initial endowment is comparable to the settler settling property on trust. Recipients of the beneficial interest of either arrangement are referred to as the beneficiaries, and generally have similar rights and obligations vis-à-vis the entity or arrangement.

Generally, two types of foundations are recognised by Maltese law. The first, and most common, is the public or purpose foundation, which is established for charitable, philanthropic or other such social purposes. Private foundations are established for the specific benefit of one or more identified persons or classes of persons. The term of existence of a foundation is generally limited to 100 years, with limited exceptions.

As discussed earlier, the standard treatment of a foundation for Maltese income tax purposes is the same as that of limited liability companies, unless the administrators of the foundation elect to have the foundation treated as a trust. The taxable income of the foundation is therefore subject to the standard

corporate income tax rate of 35 per cent, with any deductions applicable to companies also being applicable to foundations. The transfer of beneficial interest in a foundation is treated similarly to the transfer of shares in a company, and distributions of beneficial interest to beneficiaries are furthermore treated as the distribution of profit to shareholders. Because of this, the beneficiaries would therefore be entitled to claim tax refunds (eg, the 6/7ths refund) that would normally be applicable to shareholders of Maltese companies receiving dividend distributions. Foundations may also have segregated cells in terms of Maltese law. This allows different assets to be segregated from the general patrimony and any other segregated assets. Said assets may then be reserved and directed towards a specified purpose, or dedicated to the exclusive benefit of specific beneficiaries, all within the same single foundation.

#### B. *Fiduciary duties (trustees, board members, directors, etc)*

Under Maltese law, fiduciary obligations may arise by virtue of law, contract, quasi-contract, unilateral declarations, including wills, trusts, assumption of office or behaviour. The primary legislation regulating the legal concept of fiduciary obligations is the Civil Code.<sup>26</sup> In terms of the applicable provisions of the Civil Code, fiduciary obligations are created whenever a person owes a duty to protect the interests of another; has registered in his or her name, holds or exercises control, or has powers of disposition over property for the benefit of another; or receives information from another person subject to a duty of confidentiality.<sup>27</sup>

The obligations that are incumbent on a fiduciary in terms of law must be carried out with the utmost good faith and honesty. Among the fiduciary's duties is the duty to exercise the diligence of a *bonus pater familias* in the performance of his or her fiduciary obligations.<sup>28</sup> Importantly, where fiduciaries are vested with ownership; or have registered in their names, hold, exercise control or have powers of disposition over property subject to fiduciary obligations, such property constitutes a distinct and separate patrimony, and shall not be subject to the claims or rights of action of the fiduciary's personal creditors, or his or her spouse or heirs, unless specifically provided for in terms of law.<sup>29</sup>

While the Civil Code provides general provisions relating to fiduciary relationships, certain fiduciary relationships are further governed by specific laws. For example, in terms of the Trusts and Trustees Act,<sup>30</sup> trusts create fiduciary obligations on the trustee in favour of the beneficiary or beneficiaries of the trust in relation to trust property.<sup>31</sup> The administrators of foundations are likewise deemed to be fiduciaries and therefore owe fiduciary duties as laid down by provisions of the Civil Code specific to foundations.

Similarly, the director of a company is also deemed to be a fiduciary as a result of the office held and the role carried out within the company. A director is duty bound to act in the best interests of the company of which he or she has been appointed director. While the directors of a company are generally afforded a certain level of discretion in order to be able to exercise the role more effectively for the benefit of the company, Maltese company law seeks to further safeguard that benefit by outlining the general duties of company directors<sup>32</sup> in exercising their role. A director of a company is therefore bound to act honestly and in good faith in the best interests of the company.<sup>33</sup> Another intrinsic concept of the fiduciary relationship is present here in that the assets of the director form a separate and distinct patrimony from that of the company. Therefore, the assets of the director may not be claimed against by the creditors of the company, except in limited circumstances, such as wrongful or fraudulent trading.

#### C. *Treatment of foreign trusts and foundations*

The laws applicable to trusts in Malta provide that, wherever the proper law of a trust is the law of Malta, the validity of the trust, its construction, its effects and the administration of the trust shall be governed by Maltese laws applicable to trusts, notwithstanding any other law.<sup>34</sup> As Malta is a member of the Hague Convention on the Law Applicable to Trusts and their Recognition, when the proper law of a trust is not Maltese law, the proper law of the trust shall prevail and be given effect in Malta.<sup>35</sup>

Furthermore, where a Maltese trust is governed by Maltese law, the trust must abide by domestic mandatory rules that cannot be derogated from by a voluntary act, and such rules shall prevail over the terms of the trust, unless expressly permitted by applicable law.<sup>36</sup> However, when a trust is governed by Maltese law and has no connection to Malta by reason of the domicile of the settler at the time of the settlement of property on trust or the situs of the property, when immovable, the trust shall not be required to comply with the mandatory rules.

#### **IV. Taxation**

##### *A. Domicile and residency*

Malta asserts its jurisdiction to tax on the basis of territoriality, residence, domicile and remittance. The concepts of residence and domicile in terms of Maltese law are determined on the basis of the facts and circumstances that may be applicable to specific persons. While the term 'resident in Malta' is provided with a definition at law, the concept of domicile is not specifically defined in the Income Tax Acts.

Article 2 of the Income Tax Act (chapter 123 of the Laws of Malta) provides a collective definition of the term 'resident in Malta':

"resident in Malta" when applied to an individual means an individual who resides in Malta except for such temporary absences as to the Commissioner [for Inland Revenue] may seem reasonable and not inconsistent with the claim of such individual to be resident in Malta; when applied to a body of persons, means any body of persons the control and management of whose business are exercised in Malta, provided that a company incorporated in Malta... shall be resident in Malta from... where the management and control of the business of the company is exercised outside Malta'.

While the law provides a definition of the term 'resident in Malta', the definition itself bestows the Commissioner for Revenue with significant discretion in determining whether or not an individual is resident in Malta. In this regard, the definition of residence for the purposes of the Income Tax Acts, and insofar as this relates to individual persons, has developed outside of that found in Article 2 of the Income Tax Act.

In practice, an analogous reference to Malta's definition of a 'temporary resident', that is, a person who is in Malta for some temporary purpose only and not with any intent to establish [his or her] residence therein and who has not actually resided in Malta at one or more times for a period equal in the whole to six months in [a year],<sup>37</sup> has resulted in the generally accepted principle that an individual is deemed to be resident in Malta if that person spends six months in Malta in a given year.<sup>38</sup> Subsequent guidance issued by the Commissioner for Revenue on this matter has cemented this general rule, and provides more insight into the interpretation of residence, 'ordinary residence' and domicile.<sup>39</sup>

The guidance issued by the Commissioner for Revenue provides that residence does not depend on nationality or any other civil status, but is a question of fact, and a person may be resident in Malta even if he or she is also resident in another country for tax purposes. Furthermore, presence in Malta for more than 183 days in any particular year amounts to residence in Malta for that year, regardless of the purpose and nature of the individual's stay in Malta. However, individuals who intend to stay in Malta are therefore deemed to be resident from the date of their arrival, regardless of the duration of their stay in Malta.<sup>40</sup>

A person is then deemed to be 'ordinarily resident' in Malta if he or she lives in Malta on a permanent or indefinite basis. This treatment applies to both persons who exceed the 183-day threshold in Malta (and who do so over a long period) and also to persons who do not exceed that threshold if said person comes to Malta regularly, and establishes personal and economic ties in Malta. Likewise, an ordinary resident of Malta would be deemed to lose his or her residence status if the resident left Malta permanently or indefinitely. Temporary absence may also lead to a loss of residence status if such absence is deemed to be inconsistent with a residence status.<sup>41</sup>

Domicile, on the other hand, is deemed to be based on both the individual's presence in Malta and that the individual considers his or her permanent home to be Malta, that is, the place where the individual belongs, which implies stronger ties with the country than residence. This does not depend on nationality and no individual may be without a domicile.<sup>42</sup>

The Commissioner for Revenue's guidance recognises the concepts of domicile of origin and domicile of choice. Domicile of origin is acquired at birth and is normally attributed as being the domicile of the parents of the individual, regardless of where the individual is born. Domicile of origin may be changed, whereby the individual acquires a domicile of choice, when the individual takes up residence in a country with the intention of making that country his or her permanent home. Therefore, even long periods of stay in a country do not result in a domicile of choice if the individual in question ultimately has the intention of leaving that country and returning to his or her country of domicile or settling somewhere else. Ultimately an individual who, having acquired a domicile of choice, loses that domicile without acquiring another domicile of choice is deemed to have reverted to his or her domicile of origin.<sup>43</sup>

#### B. *Gift, estate and inheritance taxes*

There are no inheritance, gift or estate taxes in Malta. However, duty is payable on the transfer of immovable property or any real right thereon, including transfers *causa mortis*, in terms of the Duty on Documents and Transfers Act.<sup>44</sup> In this regard, the duty payable is five per cent (or more specifically €5 for every €100 or part thereof) of the amount or value of the consideration for the transfer or the value of the property, whichever is higher. Donations are treated in the same manner as 'gifts', which, barring some exceptions,<sup>45</sup> shall be considered as deemed sales made at the market value of the property at the time of transfer, and therefore are subject to any applicable capital gains derived on the transfer of immovable property.

#### C. *Taxes on income and capital*

In accordance with Malta's tax jurisdiction rules, which are the general bases on which an individual is liable to Maltese income tax on a worldwide basis, the remittance basis or territorial basis is that individual's residence and domicile. Consequently, individuals who are ordinarily resident and domiciled

in Malta are taxed on a worldwide basis,<sup>46</sup> that is, on income and capital gains regardless of where they arise or where they are received. The worldwide basis of taxation also applies to individual spouses living together, to the extent that at least one of the spouses is ordinarily resident and domiciled in Malta.

Individuals who are ordinarily resident but not domiciled in Malta, and vice versa, are taxed on a source and remittance basis. Therefore, such individuals shall be liable to tax on all income arising in Malta (regardless of where the income is received) and income arising outside of Malta to the extent that this is received in or remitted to Malta. Capital gains arising outside of Malta are not subject to Maltese tax, whether or not they are received in or remitted to Malta. This treatment is subject in most cases to an annual minimum tax payment of €5,000.

Article 4 of the Income Tax Act provides that the total taxable income of an individual comprises his or her aggregate income (after allowing for exemptions and allowable deductions), including gains or profit derived from a trade, business, profession or vocation; employment or office;<sup>47</sup> dividends, premiums, interest or discounts; any pension, charge, annuity or annual payment; rent, royalties, premiums and any other profit arising from property; and specific capital gains. Gains on the transfer of specified capital assets are aggregated with a person's other income, and the total of the income and capital gains is charged to income tax at the applicable progressive rates, the highest being 35 per cent. However, differing tax rates (or outright exemptions) may apply to specific cases, such as the following:

- exemptions in the case of the aforementioned transfers of immovable property by way of donation to specified persons, including spouses, registered cohabitants, descendants and/or ascendants;
- rates of eight per cent or ten per cent final withholding tax on the value of the immovable property (the latter if the property was acquired before 1 January 2004 and a promise of sale or transfer was not registered prior to 17 November 2014);
- reduced rate of five per cent withholding tax on the value of the property transferred for qualifying properties, such as those situated in designated urban conservation areas;
- reduced rates of zero per cent or two per cent on certain transfers of residential property;
- capital gains taxes of seven per cent or 12 per cent (on the gain or difference in value from the date of the original acquisition to the date of transfer) in certain cases at the option of the taxpayer;
- a flat rate of 15 per cent on income from a qualifying contract received by a beneficiary consisting of income subject to tax under Article 4 of the Income Tax Act of a minimum of €75,000 (exclusive of fringe benefits) and consisting of emoluments from an eligible office;<sup>48</sup> and
- a 15 per cent flat rate of tax on remittances of income by beneficiaries of Malta's Residence Programme Rules and Global Residence Programme Rules (subject in both cases to a minimum annual tax payment of €15,000).

## Notes

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<sup>1</sup> C 16 of the Laws of Malta.

<sup>2</sup> C 55 of the Laws of Malta.

<sup>3</sup> C 12 of the Laws of Malta.

<sup>4</sup> C 331 of the Laws of Malta.

<sup>5</sup> *Ibid*, Art 3(1).

<sup>6</sup> The Civil Code, c 16 of the Laws of Malta, Art 189(1).

<sup>7</sup> *Ibid*, Art 597(e).

<sup>8</sup> *Ibid*, Art 597(b).

<sup>9</sup> *Ibid*, Art 609.

<sup>10</sup> *Ibid*, Art 611.

<sup>11</sup> *Ibid*, Art 585.

<sup>12</sup> *Ibid*, Art 762.

<sup>13</sup> *Ibid*, Art 765.

<sup>14</sup> *Ibid*, Art 769.

<sup>15</sup> *Ibid*, Art 766.

<sup>16</sup> *Ibid*, Art 771.

<sup>17</sup> *Ibid*, Art 776.

<sup>18</sup> *Ibid*, Art 778.

<sup>19</sup> Where two or more persons have been instituted heirs or named as legatees conjointly, and any one of such persons predeceases the testator; is incapable of receiving or refuses the inheritance or legacy or has no right thereto owing to the non-fulfilment of the condition under which he or she was so instituted or named, and the share of such a person, with the obligations and burdens attaching to it, accrue to that of the other co-heirs or co-legatees.

<sup>20</sup> *Ibid*, Art 616.

<sup>21</sup> *Ibid*, Art 622.

<sup>22</sup> *Ibid*, Art 623.

<sup>23</sup> The Civil Code, c 16 of the Laws of Malta, Second Schedule, Title III, Sub-Title II.

<sup>24</sup> Foundations (Income Tax) Regulations, Subsidiary Legislation 123.114, Regulation 3.

<sup>25</sup> *Ibid*, Regulation 4.

<sup>26</sup> C 16 of the Laws of Malta.

<sup>27</sup> *Ibid*, Art 1124A(1).

<sup>28</sup> *Ibid*, Art 1124A(4).

<sup>29</sup> *Ibid*, Art 1124C(1).

<sup>30</sup> C 331 of the Laws of Malta.

<sup>31</sup> *Ibid*, Art 3(6).

<sup>32</sup> The Companies Act, c 386 of the Laws of Malta, Art 136A.

<sup>33</sup> *Ibid*, Art 136A(1).

<sup>34</sup> The Trusts and Trustees Act, c 331 of the Laws of Malta, Art 6(1).

<sup>35</sup> *Ibid*, Art 6(2).

<sup>36</sup> *Ibid*, Art 6A(1).

<sup>37</sup> Income Tax Act, c 123 of the Laws of Malta, Art 13.

<sup>38</sup> Vide Board of Special Commissioners Case number 13/63, decided 14 December 1963.

<sup>39</sup> Guidance Note: The Remittance Basis of Taxation for Individuals under the Income Tax Act, Commissioner for Revenue, 28 March 2019.

<sup>40</sup> *Ibid*, s 2.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*, s 3.

<sup>43</sup> *Ibid*.

<sup>44</sup> C 364 of the Laws of Malta.

<sup>45</sup> Namely donations to a spouse, cohabitant, descendant or ascendant in the direct line and their respective spouses or, in the absence of descendants, to brothers or sisters and their descendants; and donations to approved philanthropic institutions.

<sup>46</sup> As are 'long-term' and 'permanent' residents, as defined by the Income Tax Act.

<sup>47</sup> Which includes fringe benefits.

<sup>48</sup> Highly Qualified Persons Rules, Subsidiary Legislation 123.126.