

CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER – ATTORNEYS-AT-LAW



ABOUT



Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.

INTRODUCTION

In this issue we feature articles from our Litigation Department and our Property Department.

Our first article focuses on the issue of sexual harassment in the work environment and discusses the proposed Barbadian legislation, which seeks to redefine and outline the parameters of an employer's responsibilities in relation to sexual harassment policies in the workplace.

At some stage in our lives we have all considered what arrangements we must put place in order to ensure that our loved ones are provided for after we are gone. Our second article revisits the process of estate planning, contemplating one of the concerns for persons preparing their Last Will and Testament. It provides a brief synopsis of some of the ways in which gifts under a last will and testament may fail, underscoring the importance of obtaining legal advice when preparing your will.

Our third article also touches on making arrangements for the future and explores the granting of powers of attorney, how a power of attorney can be automatically revoked and ways in which the welfare of a person who has lost their mental faculties may be addressed.

We hope you enjoy!

~ The e-Newsletter Committee~

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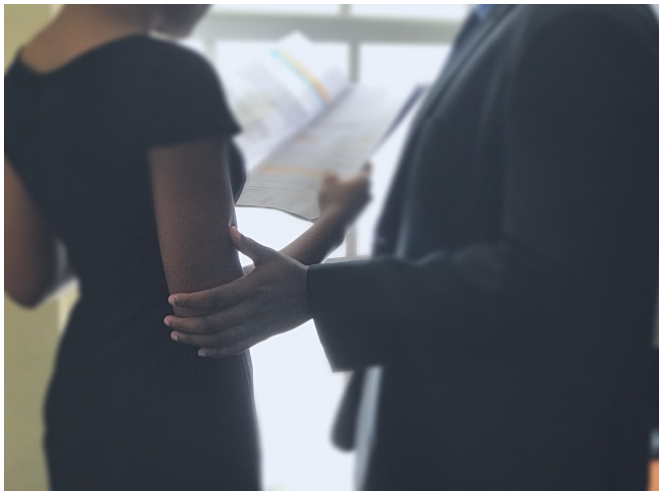
Mr. R. Omari Drakes

Sexual Harassment in the Workplace

By Mr. R. Omari Drakes, Senior Associate

Introduction

In Barbados, sexual harassment in the workplace is currently governed by common law principles. However, with the *Sexual Harassment (Prevention) Bill, 2017*¹ (the "**Bill**") currently being debated in Parliament, and the Minister of Labour's assurance that the Bill will be passed before the next General Election, the issue of sexual harassment in the workplace has become a source of discussion.



What is Sexual Harassment?

In the Supreme Court of Canada case of *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (SCC), [1989] 1 S.C.R. 1252 Chief Justice Brian Dickson in delivering the unanimous decision of the Court defined sexual harassment at paragraph 56 in the following way:

"Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment."

Examples of sexual harassment as established by the common law include but are not limited to:

- i. Quid pro quo, that is the exchange of benefits for sexual favours;
- ii. Unwelcomed touching;
- iii. Unwelcomed flirting; and
- iv. Inappropriate jokes of a sexual nature.

The Bill is intended to refine the broad definition of sexual harassment that exists in the common law. Section 3 of the Bill defines sexual harassment as:

- (a) the use of sexually suggestive words, comments, jokes, gestures or actions that annoy, alarm or abuse a person;
- (b) the initiation of uninvited physical contact with a person;
- (c) the initiation of unwelcomed sexual advances or the requests of sexual favours from a person;
- (d) asking a person intrusive questions that are of a sexual nature that pertain to that person's private life;
- (e) transmitting sexually offensive writing or material of any kind; or
- (f) making sexually offensive telephone calls to a person;
- (g) any other sexually suggestive conduct of an offensive nature in circumstances where a reasonable person would consider the conduct to be offensive.

¹ To the extent that the Bill is presently being debated, it is subject to change.

Sexual Harassment in the Workplace Cont'd...

By Mr. R. Omari Drakes, Senior Associate

The Need for a Written Sexual Harassment Policy

The Bill places certain requirements on an employer to protect his or her employees from sexual harassment. One such requirement is the implementation of a sexual harassment policy within the workplace. Section 4 of the Bill requires:

- (a) every employer to ensure that there is a clear written policy statement against sexual harassment within the workplace;
- (b) the policy statement be presented to each employee on the commencement of his or her employment; and
- (c) procedures are put in place to assist every employee in understanding the policy statement.

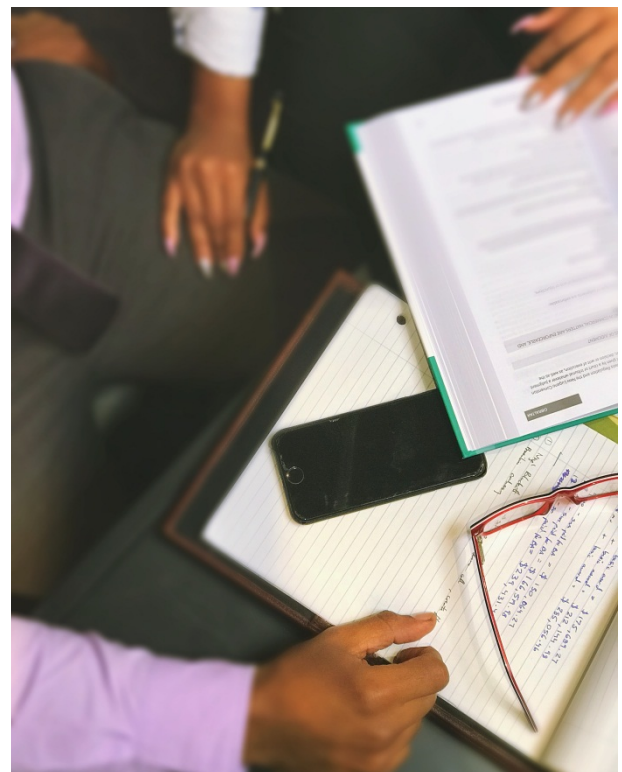
The Bill states that employers will be afforded 6 months from the date that the Bill becomes law, to ensure that the written policy statement against sexual harassment is prepared and presented to each employee.

An employer who fails to comply with these requirements will be guilty of an offence and is liable on summary conviction to a fine of BDS\$5,000 or to imprisonment for a term of 12 months or to both.

Recommendations

Though there is no certainty as to when the Bill will become law, there is nothing preventing an employer from being proactive when it comes to implementing the Bill's requirements.

In light of the challenges faced by many employers when implementing the requirements of the *Employment Rights Act – 2012*, it is recommended that employers obtain legal advice on the Bill as soon as possible. This is particularly so given that a failure to implement certain provisions of the Bill could expose an employer to criminal liability.





Miss Annette Y. Linton

Testamentary Disposition: Failure of Gifts Under a Will

By Miss Annette Y. Linton, Senior Associate

There are a number of instances in which a gift made in a will may fail. In this article we will look at some of the common reasons for a gift to fail in an otherwise valid will. To ensure that your beneficiaries take the benefit under your will that you intend, it is important to take care in the drafting and execution of your will. It is also important to review your will from time to time and update as necessary.

Attestation by beneficiary: A gift to a beneficiary will fail if that beneficiary or his/her spouse is an attesting witness to the will. Section 66(1) of the Succession Act, Cap. 249 of the Laws of Barbados ("**the Succession Act**") provides that "if a person attests the execution of a will, and any devise, bequest, estate, interest, gift or appointment, of or affecting any property (other than charges and directions for the payment of any debts) is given or made by will to that person or his spouse, that devise, bequest, estate, interest, gift or appointment shall, so far only as concerns the person attesting the execution of the will, or the spouse of that person (emphasis added), or any person claiming under that person or spouse, be utterly null and void".

Uncertainty: If the subject matter or intended beneficiary of a gift is not clearly identified, that gift may fail for uncertainty. It is important to ensure that the subject matter of a gift is clearly and sufficiently described. A gift of "my best jewellery" would be void for uncertainty of subject. Instead, the specific pieces of jewellery you want to give to the beneficiary should be clearly identified. Similarly, the intended beneficiaries must be accurately and clearly identified to avoid failure of their gifts.

Death of beneficiary: As a will only takes effect from the testator's death, it confers no benefit to beneficiaries prior to the death of the testator.

Therefore, if a beneficiary dies before the testator, the gift to that beneficiary may fail (the doctrine of lapse). There are exceptions to the doctrine of lapse, the most common of which relates to gifts to the testator's children or other issue. Section 83 of the Succession Act states that if a person, being a child or other issue of the testator to whom any property is given, dies in the lifetime of the testator leaving issue who are living at the time of the death of the testator, the gift will not lapse (provided the estate or interest gifted is not determinable at or before the death of that person). Instead the gift will take effect as if the death of that child or issue had happened immediately after the death of the testator, unless a contrary intention appears from the will.



Ademption: Another way in which a gift may fail, is if the testator no longer owns the asset forming the subject matter of the gift or if the asset no longer exists (the doctrine of ademption). The testator may have sold or otherwise disposed of the asset during his lifetime or it may have been lost or destroyed. The beneficiary does not have a right to a cash equivalent or the sale proceeds if the asset was sold or disposed of in the testator's lifetime, nor would he be entitled to claim insurance proceeds if the asset was destroyed, unless the will specifically provided for this.

Testamentary Disposition: Failure of Gifts Under a Will, Cont'd...

By Miss Annette Y. Linton, Senior Associate

Failure by ademption may also occur if there is a change in the substance of the subject matter of a gift. A mere change in name or form would not cause a gift to fail: there must be a change in substance. This is common in corporate acquisitions where shares in one company may be replaced by shares in another company. If a testator by his will made a specific gift of his shares in A Ltd and after making his will A Ltd was bought by B Ltd and the testator received shares in B Ltd in substitution, the gift of the shares in A Ltd would fail. The beneficiary would not have a claim to the shares in B Ltd. This result can be avoided by careful drafting of the will.



Insufficient assets: A gift may also fail because there are not sufficient assets in the estate to satisfy all of the gifts in full. It is important in estate planning to have a clear picture of the value of both your assets and your debts. In administering an estate, an executor must first use the estate's assets to settle the deceased's debts, liabilities and testamentary expenses ("**the estate debts**"). If, after making those payments, there are not sufficient assets to satisfy all of the legacies, then the legacies must be abated. Abatement is a proportional reduction of legacies under a will. There is a statutory order which (in the absence of provisions to the contrary in the testator's will) determines which assets are to be used to satisfy the estate debts and another which determines how legacies are to be abated. Careful estate planning and drafting can prevent or reduce abatement.

The reasons for the failure of gifts addressed in this article are by no means exhaustive. There are a number of other reasons why a gift may fail. The important point to note is that great care is required in drafting and executing a will and that estate planning is an ongoing process. Once you have made a will it is important to be mindful of changing circumstances and to review and discuss your will with your attorney-at-law periodically to determine if it requires updating.

While this article focused on the failure of specific gifts in an otherwise valid will, it is an interesting side note that subsequent marriage revokes a will in its entirety, unless the will was made in contemplation of that marriage and so expressed in the will!



Mrs. Rosalind K. Smith Millar

Powers of Attorney and the Importance of Full Mental Capacity

By Mrs. Rosalind K. Smith Millar, Partner

MENTAL CAPACITY

In our everyday lives, with clear minds, we make decisions about ourselves, our children, our property, our money and so on. Even if the body is too weak to get up and move around, with a clear mind we can instruct others to carry out the tasks that our feeble bodies cannot achieve. We can even plan ahead for the well-being of our families and management or disposition of our property after we die, by making a will.

This article looks only at the granting of authority and revocation of authority that takes effect during life, by way of power of attorney; the effect of automatic revocation of the authority to act; and the means to attend to the well-being of persons who have lost the battle for mental capacity and rational thought.

POWERS OF ATTORNEY

Granting a power of attorney

Any adult who is in his right mind, as they say, (the "donor") may grant a power of attorney to another adult (the "donee") to do specific things (a specific power of attorney) or to act generally on his behalf (a general power of attorney), for a limited time or indefinitely.

A power of attorney must be given in writing and duly executed, that is to say, dated, signed and witnessed in accordance with the Evidence Act, Cap. 121 of the Laws of Barbados or the Property Act, Cap. 236 of the Laws of Barbados, and stamped under the Stamp Duty Act, Cap. 91 of the Laws of Barbados.

A power of attorney that affects registered title must be in the prescribed form, and entered on the Land Register for the affected title. Revocation of such a power must also be in the prescribed form.

Powers of attorney that affect land are required to be recorded (in the case of unregistered title) or registered (in the case of registered title) at the Land

Registry. A power of attorney that is unlikely to affect land may also be recorded at the Supreme Court Registry.

Unlike some other jurisdictions, Barbados does not recognise the so-called "durable power of attorney". The durable power of attorney would typically be desired in medical situations where the donor is unable to make his own decisions but has thought ahead to the day when he would need someone pre-selected by him to make those decisions. The durable power of attorney is expressed to remain in force notwithstanding the usual auto-revocation events, which are discussed below.

Revoking a power of attorney

Most powers of attorney are revocable, meaning that the donor can revoke the donee's authority at any time. This is achieved by a written deed of revocation, duly signed, witnessed, dated and stamped. The revocation should also be recorded or registered as the case may be.

A revocable power of attorney may also be automatically revoked by operation of law in the following circumstances:

- Death, bankruptcy or mental disability of the donor;
- Death or mental disability of the donee;
- Effluxion of time, a beautiful phrase that means the specified time for the validity of the power has expired; or
- Completion of the specific task for which power was given, or the inability to complete the task.

However, anyone who makes a payment or does an act in accordance with, in pursuance of, or in reliance on a power of attorney duly recorded or registered, as the case may be, is not liable in respect of the payment or act by reason that before the payment or act the donor had died, become disabled or bankrupt, or has revoked the power if he was unaware of the revocation.

Powers of Attorney and the Importance of Full Mental Capacity, Cont'd...

By Mrs. Rosalind K. Smith Millar, Partner

In some limited circumstances, the power may be expressed to be irrevocable, either for a specified period or until the happening of a certain event. One such instance is where the power is expressed to be given by way of security. In that case the usual auto-revocation events mentioned above do not invalidate the power, and any act done during the currency of the power is as valid as if the auto-revocation event had not happened, whether or not the donee or the persons dealing with him have notice of the event.

MENTAL INCAPACITY

What happens, then, when a power of attorney is automatically revoked by the mental incapacity of the donor? The answer is that some suitable person needs to apply to the High Court, under the Mental Health Act, Cap. 45 of the Laws of Barbados, for a receivership order for the "estate" of the former donor of the power of attorney, who is now called "the patient".

Who should apply? The Court has the discretion to decide to whom a receivership order should be granted, but the natural applicant is the person who is most suitable under the Succession Act – usually the person named as executor in a will made while the patient was compos mentis or the next of kin who would be entitled to inherit the estate if there were no will.

Every person equally so qualified must be notified of the intention to apply for a grant of receivership, and the patient must be served with notice of the application for a receivership order, regardless of the patient's state of mind or physical condition.

In making the order, the High Court must have regard to the requirements of the patient, but must also take into account the interests of his creditors and the desirability of making provision for obligations that may not be legally enforceable.

The Court may make a wide range of detailed orders with respect to the property and affairs of the patient. These may include orders to do or secure anything that appears necessary or expedient for the maintenance or benefit of the patient or members of his family, and otherwise for administering the patient's affairs.

The order may concern, among other things:

- the control, management, acquisition or disposition of the patient's property;
- carrying on his business, trade or profession;
- fulfilment of contractual obligations;
- the conduct of legal proceedings (including presumption of death of his spouse, separation or divorce);
- the dissolution of a partnership; and
- the execution of the patient's will.



The receiver will be required to file periodic accounts of his stewardship to the Court. The Court may appoint medical and legal visitors (i.e. a doctor and/or an Attorney-at-Law) to visit the patient periodically and report directly to the Court on any relevant matters the Court may require, the best interest of the patient being a paramount concern.

In a future article, we hope to examine the tricky situation of events that straddle the threshold of incapacity or death, such as instructions validly given by an attorney before death or mental incapacity, but not carried out until some later time when the power of attorney has become invalid or has expired.

ATTORNEY PROFILE

Mrs. Richelle M. Nichols, Senior Associate

In this issue we continue our series of profiles of the firm's associates. We profile Mrs. Richelle Nichols, one of our senior associates in the Litigation Department.



Richelle Nichols (née Connell), most outstanding law student from the Barbados Community College for the academic years 2002-2003 and 2003-2004, pursued legal studies at the University of the West Indies, Cave Hill Campus in Barbados where she was born. She graduated in 2007 from that institution with a Bachelor of Laws (Hons.) degree. She then completed the Legal Education Certificate at the Hugh Wooding Law School in Trinidad and Tobago in 2009 and was called to the Barbados Bar in that same year. Richelle joined the firm in 2009 as an Associate in the Litigation Department where she specialises in civil, corporate and commercial litigation, family law, labour and employment law and manages the firm's personal injury portfolio. She also attained a certificate in Alternative Dispute Resolution (ADR) from the Stitt Feld Handy Group upon completion of the University of Windsor Faculty of Law/ Stitt Feld Handy Group ADR Workshop in 2011 and a certificate from Central Law Training, accredited by the Association of Personal Injury Lawyers (APIL) upon completion of a course on Personal Injury in 2017.

CGF NEWS

Seminars and Conferences

In August the Barbados Branch of the Society of Trust and Estate Practitioners' ("STEP") and the Bar Association, through a collaborative effort, offered a Workshop on Trust and Will Drafting. The workshop was conducted by Mr. Christopher J. McKenzie TEP, Partner of O'Neal Webster, a law firm in the British Virgin Islands.

The workshop highlighted drafting mistakes that may occur in the preparation of Trust Deeds and Wills and the legal implications of these mistakes. Participants were able to discuss alternate drafting language that ensured their client's interests were adequately protected and their instructions free from challenge.

In attendance were Mrs. Rosalind Smith, Partner in our Property Department, as well as associates Mrs. Laverne Ochoa-Clarke and Miss Lanasia Nicholas.

Members of the firm's Corporate and Commercial Departments attended the "What Businesses Need to Know About BPS and DTAs" seminar on September 1st, 2017, held at the Savannah Beach Hotel, Hastings, Christ Church, giving persons the opportunity to be updated by the Hon. Donville Inniss, Minister of Industry, International Business, Commerce and Small Business Development; the Central Bank of Barbados; the Financial Services Commission and the International Business Division on the country's progress with the Organisation for Economic Co-operation and Development ("OECD").

Our Mrs. Nicola Berry, Partner in the Commercial Department attended an InvestBarbados International Business Seminar, as a delegate at the Hyatt Regency in downtown Toronto, Canada on September 28th, 2017. The seminar had a number of Canadian Investors in attendance and there were various presentations covering a wide range of topics, which sought to highlight Barbados as a preferred international financial centre for Canadian investors including captive insurance options for risk management and the International Securities Market ("ISM") of the

Seminars and Conferences, Cont'd



Pictured: Mrs. Nicola A Berry at the
Toronto Stock Exchange, Canada

Barbados Stock Exchange. Nicola's attendance was primarily for the purpose of highlighting the work of our affiliated company, ListAssist Services (Barbados) Ltd, a listing sponsor for the ISM. ListAssist assists entities which wish to list on the ISM with the listing process and the preparation of their listing document. While in Toronto, Nicola also had the opportunity to visit with the Toronto Stock Exchange.

October 15-21, 2017 was International Business Week 2017 in Barbados and members of the Corporate and Commercial Departments of the firm attended the two-day conference at the Lloyd Erskine Sandiford Centre. Our attorneys had the opportunity to network with stakeholders in the industry while staying abreast of the most recent developments in international business and technology that impact the way business is conducted.

As a sponsor of the event, the firm is delighted to have played a role in another successful instalment of the conference.

On October 12, 2017 Ms. Gillian Clarke, Partner in the Corporate Department, Mr. Kevin Boyce, Partner in the Litigation Department, Mrs. Nicola Berry, Partner in the Commercial Department, Miss Ruth Henry and Mr. Dario Welch, both associates in the Property Department attended the launch of the Arbitration and Mediation Court of the Caribbean ("AMCC") at the Walled Garden of the

CGF NEWS Cont'd...

Barbados Museum and Historical Society. The AMCC is a non-profit institution which offers a range of Alternative Dispute Resolution mechanisms to clients in Barbados, clients throughout the Caribbean and also to international clients. At the event a keynote address in support of the initiative was presented by Sir Dennis Byron, the President of the Caribbean Court of Justice.



Pictured: Miss Ruth Henry, Mr. Dario Welch, Mrs. Nicola Berry and Mr. Kevin Boyce

Community Outreach Initiative

We all read about and saw the pictures of the severe devastation caused Hurricane Irma and Hurricane Maria in our neighbouring islands.

Throughout the month of September, in an effort to assist those affected, our firm worked with the Caribbean Disaster Emergency Management Agency ("CDEMA") to provide monetary donations to facilitate the purchase of essential supplies to assist our neighbours as they rebuild their lives. The Staff responded enthusiastically to this initiative and we were able to submit our donations to assist our brothers and sisters who were affected by the hurricanes.

We thank all who contributed and continue to keep our neighbouring islands in our prayers.

Staff Activities

The firm's Staff Committee organised another enjoyable after work karaoke and lime, which was held on September 29, 2017. We all look forward to next year's musical renditions.

Events

On Sunday, October 1, 2017, staff members of Clarke Gittens Farmer once again showed their support for the fight against breast cancer by participating in The Barbados Cancer Society Breast Screening Programme's 'Walk for the Cure – National Walk for Breast Cancer Awareness'. The Walk/Run is one of the activities organised by the Barbados Cancer Society during its Breast Cancer awareness month in October.



Pictured: Staff and family members partaking in the 'Walk for the Cure' charity event

Condolences

Clarke Gittens Farmer extends sincere condolences to the families and loved ones of our fallen colleagues:

- Sir Clifford Husbands, former Governor General of Barbados, former Director of Public Prosecutions, Supreme Court Judge, Justice of Appeal and Chief Justice;
- Charles Leacock, Q.C, former Director of Public Prosecutions;
- Theodore Walcott, Q.C. a former magistrate, who also acted as a High Court Judge; and
- Eli Edwards, former magistrate, prosecutor, police officer and public counsel

May they rest in peace and rise in glory.

CGF POINT OF LAW

CGF POINT OF LAW published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

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Partners: Managing Partner: Mr. Ramon O. Alleyne. Senior Partner: Mr. T. David Gittens, Q.C. Other Partners: Mr. Stephen W. Farmer, Q.C., Miss Gillian M. H. Clarke, Mrs. Savitri C. B. C. St. John, Ms. Debbie A. P. Fraser, Mrs. Rosalind K. Smith Millar, Mr. Kevin J. Boyce and Mrs. Nicola A. Berry.

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