



ICLG

The International Comparative Legal Guide to:

Private Client 2015

4th Edition

A practical cross-border insight into private client work

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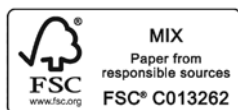
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EDITORIAL

Welcome to the fourth edition of *The International Comparative Legal Guide to: Private Client*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of private client work.

It is divided into two main sections:

Nine general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting private client work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private client laws and regulations in 29 jurisdictions.

All chapters are written by leading private client lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Owen Clutton and Jonathan Conder of Macfarlanes LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Pre-entry Tax Planning

1.1 In Bermuda, what pre-entry estate and gift tax planning can be undertaken?

Bermuda’s system of estate and gift tax is based on stamp duties charged on instruments disposing of real and personal property, regardless of the nationality or domicile of the parties concerned. With limited exceptions, stamp duty is only chargeable on documents dealing with Bermuda dollar denominated, or Bermuda situate assets and therefore from a Bermuda law perspective, no special pre-entry planning is required.

The governing legislation is the Stamp Duties Act 1976. Stamp duty on a deceased’s estate is charged on an *ad valorem* basis on the affidavit of value filed in the Supreme Court leading to a grant of representation. The first \$100,000 of value is exempt and then 5% is charged on the next \$100,000, 10% on the next \$800,000, 15% on the next \$1,000,000, and 20% on any value in excess thereof. No stamp duty is chargeable in respect of foreign currency denominated assets, gifts to a surviving spouse or charity, nor in respect of a residential property owned by a deceased person holding Bermudian status and designated as the deceased’s “family homestead”.

Lifetime gifts of Bermuda assets are also subject to *ad valorem* stamp duty, at the rate of 2% on the first \$100,000 of value, 3% on the next \$400,000, 4% on the next \$500,000, 6% on the next \$500,000 and 7% on any value in excess of \$1,500,000. Voluntary dispositions of non-Bermudian property will carry an *ad valorem* duty of 1% of the amount or value transferred. There is no exemption for lifetime gifts to a spouse or charity, but because of the lower rates of duty applicable, lifetime gifts can be an effective means of reducing the value of an estate for estate planning purposes. Gifts may be made to donees as tenants in common or joint tenants and may be made subject to the reservation of a life interest.

1.2 In Bermuda, what pre-entry income tax planning can be undertaken?

Bermuda does not impose income tax.

1.3 In Bermuda, can pre-entry planning be undertaken for any other taxes?

Bermuda does not impose direct taxation and therefore, there are no pre-entry planning strategies to be followed.

2 Connection Factors

2.1 To what extent is domicile relevant in determining liability to taxation in Bermuda?

Neither domicile, nor residence, are relevant to taxation except in respect of Bermuda dollar denominated or situate assets.

2.2 If domicile is relevant, how is it defined for taxation purposes?

This is not applicable in Bermuda.

2.3 To what extent is residence relevant in determining liability to taxation in Bermuda?

This is not applicable in Bermuda.

2.4 If residence is relevant, how is it defined for taxation purposes?

This is not applicable in Bermuda.

2.5 To what extent is nationality relevant in determining liability to taxation in Bermuda?

Stamp duty forms the basis of “estate tax” in Bermuda. It is the *situs* and denomination of the asset that determines liability to this form of tax, not nationality.

2.6 If nationality is relevant, how is it defined for taxation purposes?

Nationality is a matter of Bermudian status, which is acquired by birth, grant or marriage under the terms of the Bermuda Immigration and Protection Act 1956. Nationality does not determine tax status.

3 General Taxation Regime

3.1 What gift or estate taxes apply that are relevant to persons becoming established in Bermuda?

See question 1.1.

3.2 How and to what extent are persons who become established in Bermuda liable to income tax?

There is no income tax in Bermuda. Pursuant to the Payroll Tax Act 1995 and the Payroll Tax Rates Act 1995, payroll tax is charged quarterly on remuneration paid, given or assessed to every employee and deemed employee by every employer and self-employed person in Bermuda and includes cash and any benefit (including pension contributions, stock options, housing allowance, profit-sharing, etc.). The maximum bracket is 14%, applicable to taxpayers with an annual payroll greater than \$1,000,000 and exempt undertakings. The employer is allowed to withhold no more than 5.25% from the remuneration paid to the employee.

3.3 What other direct taxes (if any) apply to persons who become established in Bermuda?

There is no direct taxation in Bermuda.

In addition to stamp duty and payroll tax, discussed above, land tax is charged to persons owning land (or renting for a period in excess of three years), according to the Annual Rental Value (ARV) of the relevant property. This is the notional annual rental value determined by the Land Valuation Department, for the particular property if let unfurnished on the open market. Land taxes are payable in twice-yearly instalments and are based on the ARV of the property, at rates from 0.6% of ARV at the low end to 23% of ARV at the high end.

3.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in Bermuda?

Subject to certain limited duty-free allowances for passengers arriving in Bermuda by air or sea, and in respect of transfer of residence allowance, there are customs duties of 25% (subject to certain exceptions) charged on goods imported into Bermuda pursuant to the Customs Tariff Act 1970. There is no sales tax or VAT.

3.5 Are there any anti-avoidance taxation provisions that apply to the offshore arrangements of persons who have become established in Bermuda?

There are no anti-avoidance tax provisions applicable in Bermuda.

3.6 Is there any general anti-avoidance or anti-abuse rule to counteract tax advantages?

See question 3.5.

The Stamp Duties Act 1976 (as amended) includes a provision confirming that any person, who with intent to evade the payment of duty, executes any instrument in which all the facts and circumstances affecting the liability of an instrument to duty, or the amount of the duty with which an instrument is chargeable, are not truly and fully set forth, or neglects or omits to set forth fully and truly all the facts and circumstances, commits an offence. In addition, any person who practises or is concerned in any fraudulent act, contrivance or device with intent to defraud the Government of any stamp duty commits an offence.

4 Taxation Issues on Inward Investment

4.1 What liabilities are there to direct taxes on the remittance of assets or funds into Bermuda?

There are none. However, cash and negotiable instruments in hand in excess of \$10,000, must be declared to Bermuda Customs on entry to Bermuda.

4.2 What taxes are there on the importation of assets into Bermuda, including excise taxes?

Passengers arriving in Bermuda by air or sea have a duty-free allowance of \$200 per person. Thereafter, customs duties of 25% are charged on goods carried into Bermuda, pursuant to the Customs Tariff Act 1970. Rates are lower on goods imported by air and sea but there is also a wharfage charge of 1.25% on clearance of goods through the airport and seaport. There is a transfer of residence allowance for persons moving to Bermuda, which allows for the duty-free importation of used items for personal and professional use, excluding cars, motorbikes and boats (among other things). The relevant goods must arrive in Bermuda within 90 days of the date on which the importer arrives.

4.3 Are there any particular tax issues in relation to the purchase of residential properties?

The Bermuda Immigration and Protection Act 1956 governs the acquisition of real property by non-Bermudians, which is strictly limited and controlled. Non-Bermudians are only able to purchase property under licence issued by the Government of Bermuda and only in respect of a freehold house with a current ARV of \$177,000, or a long leasehold town-house or apartment at a development identified by the Government, each unit of which has a minimum ARV of \$32,400. Permanent residents of Bermuda may purchase homes with an ARV of \$63,600 or above.

An application must be made to the Government for the licence, supported by character and financial references and payment of a fee. As of February 2013 and for the period ending on 30 September, 2015, licence fees were reduced across the board. The licence fee on purchases of freehold was reduced from 25% of the purchase price of the property to 8%, thereafter rising to 12.5% and licence fees for condominiums dropped from 18% to 6%, rising to 8%. Permanent residents of Bermuda are now treated differently than other foreign purchasers and the applicable licence fee is 4% of the purchase price, rising to 6% at the end of September 2015.

Stamp duty applies to conveyances on sale of real property in Bermuda at the rates set out in paragraph three of question 1.1 above.

5 Succession Planning

5.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in Bermuda?

Bermuda follows the English common law and doctrines of equity, subject to the overlay of local statute. Bermuda courts will have standing to grant administration of a deceased's estate where the deceased was ordinarily resident or had property in Bermuda at the time of his death. The law of the deceased's domicile will be recognised by the Bermuda courts as governing immovable property.

The Wills Act 1988 is the governing legislation relating to the essential and formal validity of wills in Bermuda. Every person in Bermuda is free to dispose of his or her real and personal property by will as he or she sees fit, though there is no requirement to have a will.

To be valid, the testator must be 18 years of age or over and of sound disposing mind and the will must be in writing, signed at the foot or end thereof by the testator or by some other person in his presence and by his direction. The signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and each witness must attest and sign the will or acknowledge his signature in the presence of the testator (but not necessarily in the presence of the other witness). Holograph wills are permissible, but to be valid must be entirely in the handwriting of the testator (to be proved by the oath of two or more persons well acquainted with his handwriting) and signed at the foot or end thereof by the testator.

An executor may act as a witness to the execution of a will. If a beneficiary (or the spouse of a beneficiary) acts as a witness, the gift to that beneficiary will be void, though the witness may still prove the validity of the will. A creditor may also witness and prove the validity of the will, notwithstanding the charge.

A will is revoked by the testator's marriage, unless a statement is included in the will to the effect that the will was made in contemplation of marriage to that particular person. Provisions in a will made prior to divorce appointing a former spouse as executor or making a gift of property to a former spouse will take effect as if the former spouse had died on the date of divorce. A will is also revoked by another will, by some written instrument executed in the same form as a will or by the testator, or some other person in his presence, and by his direction burning, tearing or otherwise destroying the will with the intention of revoking it.

A will executed outside of Bermuda will be treated as 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 his habitual residence, or in a state of which at either of those times he was a national. Additionally, a will executed on board a vessel or airplane will be valid if it conformed to the internal law of the territory of registration of the vessel or airplane, or that with which it was most closely connected. A will disposing of immovable property will be valid if its execution conformed to the internal law in force where the property is situated. Construction of a will is not altered by reason of any change in the testator's domicile after execution of the will. A foreign will must be admitted to probate, or resealed, in Bermuda.

The Succession Act 1974 governs matters of succession on intestacy (or partial intestacy). Administration of an intestate's estate may be granted to one or more persons interested in the residuary estate. If the intestate leaves only a spouse, the spouse takes the residuary estate absolutely, and if there are only issue, the issue take *per stirpes*. If the intestate leaves a spouse and issue, the spouse takes the personal chattels absolutely, and, in addition, a sum equal to 50% of the value of the residuary estate or \$100,000, whichever is greater, and the balance of the residuary estate is held for the issue *per stirpes*. Thereafter the order of priority is parents, siblings, grandparents, uncles and aunts, failing which, the Crown.

Although there are no fixed rules governing inheritance under Bermuda law, the Succession Act 1974 does provide for application to be made for financial provision out of a deceased's estate. A spouse, former spouse (who has not remarried), child or grandchild, who was being maintained in whole or in part by the deceased, may make application for reasonable financial provision out of the deceased's estate. The court will have regard to the financial resources and

needs of the applicant and all other relevant circumstances. The court also has the power to set aside dispositions at an undervalue made within three years of the death of the deceased and intended to defeat an application for financial provision.

Pursuant to the Children Amendment Act 2002, a child is considered legitimate whether or not born in wedlock and an adopted child is treated as if it was the natural child of its adopted parents.

Bermuda does not recognise the rights of cohabitantes or civil law partners.

5.2 Are there particular rules that apply to real estate held in Bermuda or elsewhere?

See question 4.3.

A non-Bermudian who inherits property from a licence-holder and wishes to keep it will require a licence to hold the property, but the requirement to obtain a licence may be deferred for a period of three years under the Bermuda Immigration and Protection Act 1956.

The Companies Amendment Act 2014 has clarified uncertainty in, and extended the corporate landholding capacity of, local and exempted companies. Both local and exempted companies will now be allowed to purchase specific residential property for employee accommodation or hospitality/recreation. Subject to certain criteria, conditions and restrictions, local and exempted companies will also be allowed to hold commercial property if it is used for the specific purposes of their business, as well as mixed use properties.

6 Trusts and Foundations

6.1 Are trusts recognised in Bermuda?

Trusts are recognised in Bermuda and the governing legislation comprises of the Trustee Act 1975, which has been largely adapted from English law, the Trusts (Special Provisions) Act 1989, the Trusts (Special Provisions) Amendment Act 2014 and the Trustee Amendment Act 2014. By virtue of the UK Recognition of Trusts Act 1987 (Overseas Territories) Order 1989, trusts from other common law jurisdictions and certain types of similar concepts that apply in civil law jurisdictions are recognised in Bermuda.

The Trusts (Special Provisions) Act 1989 defines the term "trust" as the legal relationship created *inter vivos* or on death, by a "settlor" when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. According to the Act, a trust has the following characteristics, namely, the assets constitute a separate fund and are not a part of the trustee's own estate; title to the trust stands in the name of the trustee or in the name of another person on behalf of the trustee; and the trustee has the power and the duty in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The 1989 Act allows for the creation of non-charitable purpose trusts, where the purposes for which the trust are created are sufficiently certain to allow the trust to be carried out, lawful and not contrary to public policy.

The Trusts (Special Provisions) Amendment Act 2014 establishes that the reservation by the settlor for himself, or the grant to any other person in a trust, instrument of any limited beneficial interest in trust property or any of the powers listed in the Act (which include, but are not limited to: the power to revoke, vary or amend the trust; direct the appointment of trust property; give directions; restrict the exercise of powers by the trustee; appoint trustees, a protector or enforcer; and add or remove from the class of beneficiaries) will

not invalidate the trust, prevent the trust taking effect according to its terms or cause any or all of the trust property to form part of the estate of the settlor for probate purposes. The Act further provides that a trustee who has acted, or refrained from acting, in compliance with, or as a result of, an exercise of such powers shall not by reason of such compliance commit a breach of trust, equitable or fiduciary duty. The Act applies to trusts created before or after its commencement date.

The Trustee Amendment Act 2014 has confirmed that where it is satisfied to the court in relation to the exercise of a fiduciary power that certain conditions are met, the court may set aside the exercise of the power and make such consequential orders as it thinks fit. The necessary conditions are that the person who holds the power did not take into account one or more considerations (whether of fact or law or both) that were relevant to the exercise of the power, or took into account considerations that were irrelevant to the exercise of the power and but for that, would not have exercised the power, or would have exercised the power on a different occasion or in a different manner. The Act thereby preserves the rule in *Re Hastings Bass* as it was applied before the 2013 decision of the UK Supreme Court in *Pitt v Holt* and *Futter v Futter*.

Bermuda trusts may be discretionary, fixed, charitable or for non-charitable purposes and resulting, implied and constructive trusts are recognised. There is no registration of trusts in Bermuda and all information passing between settlor and trustee is confidential, except by intervention of the court. For trusts created after 1 August 2009, the rule against perpetuities has been abolished by the Perpetuities and Accumulations Act 2009, except in respect of interests in Bermuda land.

6.2 If trusts are recognised in Bermuda, how are they taxed in Bermuda?

See question 1.1.

The Stamp Duties Act applies an *ad valorem* tax on settlements of Bermuda real and personal property. The first \$50,000 of value is exempt from duty, the next \$150,000 of value is charged at 5%, the next \$800,000 at 10% and any value in excess thereof at 15%. "Instruments of Addition" are also subject to stamp duty up to the point at which the total amount of any duty paid on Bermuda property by way of Instrument of Addition equals \$7,750 in total, at the rate of 5%. The next \$500,000 is charged at the rate of 10% and any value in excess at 15%. There is a charge of 1/10% of the value of non-Bermuda property added and a nominal charge on supplemental trust documents, subject to certain exemptions for instruments to which a local trustee or an international business (as defined by the Stamp Duties (International Businesses Relief) Act 1990) is a party.

6.3 If trusts are recognised, how are trusts affected by succession and forced heirship rules in Bermuda?

The Trusts (Special Provisions) Act 1989 provides that a trust will be governed by the law chosen by the settlor. Where no governing law has been chosen, the trust will be governed by the law with which it is most closely connected and for these purposes, regard is had to the forum of administration of the trust, the *situs* of the trust fund, the place of residence/business of the trust and the objects of the trust. The governing law governs the validity of the trust, its construction, effects and all aspects of administration. The Bermuda Supreme Court will have jurisdiction where a trustee is resident in Bermuda, where the administration of the trust is carried on in Bermuda, where any trust property is situate in Bermuda and in other cases deemed appropriate.

Bermuda law will govern the question of the settlor's capacity to create an *inter vivos* trust of movable property. The law of the settlor's domicile will govern the settlor's capacity to create a testamentary trust of movable property. Finally, the settlor's capacity to create a trust of immovable property will be determined by the *lex situs* of that property. Where a trust is validly created under the laws of Bermuda, the court will not:

- vary it or set it aside;
- hold the disposition of property into trust void, voidable, or defective for any reason;
- question the capacity of the settlor; and/or
- subject the trustee, nor any beneficiary, to any liability or deprive them of any rights,

by reason that the law of another jurisdiction prohibits or does not recognise the concept of a trust, or the trust or disposition avoids or defeats another jurisdiction's laws governing forced heirship or matrimonial or creditors' rights. A foreign judgment will not be recognised, enforced or found to give rise to any estoppel insofar as it is inconsistent with the above.

6.4 Are foundations recognised in Bermuda?

Bermuda has no foundations law. The concept of a foundation, in the broad sense of a charitable or philanthropic entity supported by endowments, is recognised but provided for through the use of trusts and companies limited by guarantee.

6.5 If foundations are recognised, how are they taxed in Bermuda?

This is not applicable in Bermuda.

6.6 If foundations are recognised, how are foundations affected by succession and forced heirship rules in Bermuda?

This is not applicable in Bermuda.

7 Immigration Issues

7.1 What restrictions or qualifications does Bermuda impose for entry into the country?

Bermuda has a tightly controlled immigration policy. No visa is required for any visitors to Bermuda having a valid passport, and proof of right of abode, in the United States, Canada and the United Kingdom or any other countries not specifically identified by the Bermuda Government. A tourist may visit Bermuda with a return or onward ticket for up to 90 days, but this period may be extended for a further 90 days.

A non-Bermudian may reside and work in Bermuda provided they hold a valid work permit, which may be temporary, periodic or full, in the latter case, for a period up to five years. There is a new category of 10-year permit for positions in job categories designated as critical to Bermuda. Generally these will be key-man positions where a company's continued presence in Bermuda necessitates the long-term employment of the relevant employee or where Bermudian applicants are highly unlikely. There are also a variety of short-term permits available for athletes and entertainers.

A non-Bermudian may apply for a residence certificate provided he or she is over 50 years of age, retired, is able to provide evidence

of sufficient financial means and has either been employed for at least five years in Bermuda prior to the application, or is a property owner in Bermuda.

7.2 Does Bermuda have any investor and other special categories for entry?

This is not applicable in Bermuda.

7.3 What are the requirements in Bermuda in order to qualify for nationality?

A person may acquire Bermudian status by birth, grant or marriage. Status is acquired by birth, where the individual is a Commonwealth citizen, born of a parent with Bermudian status, and in the case of birth outside Bermuda, that parent was, at the time of the birth, domiciled in Bermuda. There are limited and circumscribed categories for status by grant. Status may be acquired through marriage on application to the Minister responsible for immigration, but only upon satisfaction of certain conditions, including 10 years of marriage and seven years of residence. Certain persons holding permanent residence certificates, who have been resident in Bermuda since 1989, have also been found eligible for Bermuda status as a consequence of a Supreme Court ruling in May 2014.

7.4 Are there any taxation implications in obtaining nationality in Bermuda?

There are none.

8 Taxation of Corporate Vehicles

8.1 What is the test for a corporation to be taxable in Bermuda?

Annual government fees are charged in respect of all companies, based on their level of “assessable capital”.

Other than annual government fees, there are no corporate taxes in Bermuda. An “exempted undertaking” (being any one of an exempted company, permit company, exempted partnership or exempted unit trust scheme as defined by the Exempted Undertaking Tax Protection Act 1966) may apply to the Minister of Finance for an assurance that, in the event of there being enacted in Bermuda any legislation imposing tax computed on profits or income, any capital asset, gain or appreciation, or any tax in the nature of estate duty or inheritance tax, that the imposition of any such tax will not be applicable to the exempted undertaking, or to any of its operations or the shares, debentures or other obligations of the undertaking. It should be noted that such an assurance will not prevent the application of any such tax to persons ordinarily resident in Bermuda or in respect of land leased to the relevant undertaking. Currently, a tax assurance certificate is effective until 31 March 2035.

8.2 How are branches of foreign corporations taxed in Bermuda?

See question 8.1.

9 Tax Treaties

9.1 Has Bermuda entered into income tax and capital gains tax treaties and, if so, what is their impact?

Bermuda does not impose direct taxation, but relies instead on customs duties, stamp duties and payroll, corporate, passenger and property taxes, as well as a variety of government fees. As a consequence, Bermuda has not entered into double tax treaties with other countries.

In 1986 Bermuda entered the USA Bermuda Tax Convention Act 1986, which dealt with the taxation of certain insurance profits and provided for mutual assistance in tax matters, specifically the exchange of information relating to the prevention of fraud and tax evasion and the carrying out of fiscal laws. Subsequently, Bermuda and the US entered into a Competent Authorities Agreement, which extended the exchange of information beyond matters related strictly to fraud and tax evasion, so as to cover also civil (tax administration) matters. The requirement that information be provided is limited by certain rights of confidentiality and subject to a procedure designed to ensure the Convention is not used as a means for a fishing expedition.

The UK Foreign and Commonwealth Office has allowed Bermuda to negotiate its own agreements for the exchange of information on tax matters, starting with the 1986 Convention, through the Exchange of Information Agreement on Tax Matters in 1988 with the US, the International Cooperation (Tax Information Exchange Agreements) Act 2005 with Australia and the Tax Information Exchange Arrangement 2007 with the UK. Bermuda implemented domestic legislation in the form of the International Cooperation (Tax Exchange Information Agreements) (Bermuda) Act 2005 in an effort to be fully compliant with OECD standards.

Bermuda was an active member of the OECD Working Group on Effective Exchange of Information, as part of the OECD Global Forum on Taxation, and participated in the development of the OECD Model TIEA. It continues to expand its network of agreements, and to date, has entered agreements with some 38 countries. Generally, Bermuda’s exchange of information agreements protect disclosure of certain information, including information subject to attorney-client privilege or business, industrial and professional secrets, as well as information the disclosure of which would be contrary to public policy.

In furtherance of the international goal of cooperation in tax matters and the elimination of harmful tax practices, Bermuda signed a Model 2 FATCA IGA with the US on 4 August 2013, providing for the reporting of all financial accounts held by US persons. A similar agreement has been entered into with the UK.

9.2 Do the income tax and capital gains tax treaties generally follow the OECD or another model?

See question 9.1.

9.3 Has Bermuda entered into estate and gift tax treaties and, if so, what is their impact?

This is not applicable in Bermuda.

9.4 Do the estate or gift tax treaties generally follow the OECD or another model?

This is not applicable in Bermuda.



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Jane Collis is a Senior Associate in the property and private client practice group, specialising in estate planning, wills, international and domestic trusts and probate. Jane began her working career as a private client attorney in the trusts and estates department of Appleby, Spurling & Kempe. In 1995 she assumed the position of Managing Director and Legal Counsel of St. George's Trust Company. In 1999, Jane opted for a change of pace and set herself up as an independent practitioner offering estate planning advice, wills, and trust and corporate services to a small group of high-net-worth clients. She left Bermuda in 2009 to live in Canada and has recently returned to Bermuda to resume her legal practice.



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Bermuda



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