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Update

Wills, Trusts, Tax & Probate

Welcome to Anthony Gold

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In this issue our team looks at the effects of the Civil Partnership Act in the context of probate and inheritance, the importance of making a tax effective Will and a cautionary tale of recent case law where solicitors have been negligent in failing to see their instructions through to a conclusion. We note that tax revenue from beer and tobacco is outstripping Inheritance Tax; could this be a reflection of the time and effort we now spend grappling with Tax Legislation.

I hope you find the articles informative. Please contact the writers if you would like to know how any issue may affect you. We are happy to have a preliminary discussion without charge.

Client's Capacity

David Wedgwood
Head of Contentious Probate & Trusts

When a bereaved client receives confirmation of what to them is an inexplicable Will, it is understandable that the first reaction is often; "He can't have known what he was doing."

The presumption of capacity, as set down in the case of Symes -v- Green (1853) 1 Sw TR01, is not a heavy one. If a claimant can demonstrate objectively that there are suspicious circumstances surrounding the execution of the Will, the presumption may be rebutted and the burden of proof reversed. In that case executors or beneficiaries do not then have to positively demonstrate the testator's capacity, which will often be very difficult after the death of the testator, more to assuage suspicion.

The test for capacity remains as set out in the leading case of Banks -v- Goodfellow (1870) LR 5QB 549, which examines whether the testator was capable of understanding and appreciating:

1. the nature and effect of the Will in question.

2. the extent of the property of which he was disposing; and

3. the claims to which he ought to give effect.

The Court will draw inferences on the balance of probabilities based on the medical evidence and witness evidence available (see Fuller -v- Strum [2002] WTLR 19).

Unfortunately, a probate action can be commenced within weeks of a caveat being lodged; hence an initial assessment as to the evidence available is advisable prior to entering an Appearance. This will include medical records; available under Section 3(1)(f) of the Access to Health Records Act 1990. However, the best evidence is often not from experts having regard to the records, but from those who had intimate knowledge of the testator at the relevant time. For example in the case of McLintoch -v- Calderwood LTL 4/5/2005, a care assistant was held to be an important witness. This is especially so as a testator's medical condition may fluctuate, with temporary confusion followed by lucid intervals.

Another key witness will be the testator's solicitor from whom early disclosure should be sought. Following Larke -v- Nugus [2000] WTLR 1031, it is now Law Society guidance that a testator's solicitor provide early disclosure direct to a potential Claimant.

Conclusion

If faced with a challenge to a Will, executors and claimants are advised to promptly seek a specialist's advice as to the merits of the case. It is easy to become entrenched in an all too expensive probate action, without having complied with a pre-action protocol or considered early mediation.

Wills, administration of estates and financial provision for same sex couples under the Civil Partnership Act 2004

Yannis Constantine

The Civil Partnership Act 2004 (the 'CPA') came in on 5 December 2005. In the area of Wills, administration of estates and family provision, those clients who are partners or dependants of same sex persons should be aware of the changes brought by the CPA.

The most important of these changes are:

• Effect of a new civil partnership on a Will
If a person enters into a civil partnership, automatic revocation of an existing Will occurs when the partnership is formed. This means the existing Will is treated as if it never existed.

An exception to this rule is where the Will contains sufficient evidence that the maker of the Will, when signing it, was expecting to form a civil partnership with a particular person and that he or she intended that the Will should not be revoked by the formation of the civil partnership.

• Effect of dissolution or annulment of a civil partnership on a Will
A civil partner may have left a Will, but, after the Will was made, a court may have dissolved his/her civil partnership or erased it (by way of an annulment order; for example, due to some illegality). In this case, unless some contrary intention appears in the Will, any property or interest given to the former civil partner shall be ignored and pass as if the former civil partner was dead. Similarly, any provisions in the Will appointing the former civil partner as an executor or trustee will not take effect.

This provision does not affect any right of the former civil partner to apply for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 (see below).

• Civil Partnership Act and the Rules of Intestacy
If a person left no valid Will or if the Will does not dispose of all of his/her estate, the rules of intestacy will apply. If this happens, the Civil Partnership Act ensures that civil partners are treated in the same way as spouses. On the contrary, unlike unmarried couples, cohabiting same sex couples are not recognised under the Rules of Intestacy.

Provided that a civil partner survives his/her late partner by 28 days, he or she will be entitled to claim under the Rules of Intestacy.

• Applications for financial provision outside the Will or the Rules of Intestacy
Provided the deceased was domiciled in England or Wales at the time of his/her death, some clients may be able to apply at Court for reasonable financial provision out of the estate, if not provided for (or not adequately provided for) under a Will (or the rules of intestacy). Such claims are made under the Inheritance (Provision for Family and Dependants) Act [I(PFD)A]1975.

The CPA has made it much easier for same sex partners and their dependants to qualify under the I(PFD)A. Provided they satisfy certain criteria laid down by law, civil partners, former civil partners, cohabiting civil partners, children of the deceased (or persons treated as children by the deceased), all are entitled to apply under the I(PFD)A.

• Civil Partnership and tax implications
Tax Regulations which accompany the Civil Partnership Act have also brought a number of significant changes in tax, including Income Tax, Stamp Duty Tax, Capital Gains Tax and Corporation Tax for civil partners.

Changes in Inheritance Tax are also likely to affect most same sex couples who decide to enter a civil partnership, mainly due to the extension of the spouse exemption to civil partners. Couples are advised to seek specific Inheritance Tax planning advice when making a Will.

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Claims arising from Advice on Wills and Lifetime Gifts

David Wedgwood

The landmark case of White -v- Jones in 1995, where the testator died before a Will was prepared, held an advisor to be liable for the loss suffered by an intended beneficiary. The extent of delay, which might amount to negligence, varies depending on the circumstances. In the case of Strange -v- Redmond [2001] QDC 356, a successful claim was brought on the basis of a delay of two days. In other cases where the need for urgency was not apparent, such as in X -v- Woolcombe Yonge [2001] WTLR 30, failure to produce a new Will within seven days did not amount to a breach of the duty of care.

Whilst good practice must be to give prompt effect to a request to any transfer of value, that will not always be possible. Sometimes this will be the client's fault, as in the case of Atkins -v- Dunn & Baker [2004] WTLR 477, where the solicitor was held not to be negligent. However, where the delay is at the door of the advisor, the client's agreement as to when the work should be completed should be obtained.

Since 1995 there have been incremental increases in the duty advisors owe to ensure an effective transaction. For example, advisors must now ensure that the proper formalities of execution have been complied with, as in the case of Humblestone -v- Martin Tolhurst Partnership [2004] EWHC 151. In Carr-Glynn -v- Frearsons [1999] Ch 326 CA, where there was a failure to sever a joint tenancy, resulting in the property forming the subject of a gift not passing as the testator intended, the specific legatee was successful against the solicitor.

The general rule is that the exposure to a claim depends on the nature of the duty owed to the testator/donor and whether that is complementary to the beneficiary's loss. In the case of Punford -v- Gilberts Accountants [1998] PMLR 763, a firm of accountants who advised in relation to a lifetime gift of property, which rendered a specific devise ineffective, was held not to be liable, as the testator appreciated the effect of that gift. How far that duty to the client extends is also relevant, as shown in the case of Cancer Research Campaign -v- Ernest Brown [1998] PMLR 592, a firm of accountants were held not to be liable for failing to advise properly in relation to a simple method of saving Inheritance Tax on the testator's death.

In Hemmens -v- Wilson Browne [1995] Ch 223 and Hughes -v- Richards [2004] PMLR 740, it was accepted the duty could extend to lifetime transfers. However, partly because donors are often capable of correcting an error, there have been very few findings against advisers.

It is sometimes even possible to correct a mistake even after the death of a client, through the rectification of a Will. The conflicting cases of Walker -v- Medlicott and Horsfall -v- Haywards both in 1999, deal with when it is reasonable to expect disappointed beneficiaries to mitigate their loss through rectification.

In conclusion, it can be said that the number and extent of these type of claims are likely to grow on an incremental basis. Hence advisors need to consider, not only their duty to their client, but also the position of third party intended beneficiaries.

Where the money is

Christopher McNeill

Following the recent increase of the rate of interest on unpaid Inheritance Tax (up to 4% PA from 6.9.06) HRMC has now published its statistics for revenue raised in 2005/06 (£397.97bn) and its projections for 2006/07 (£424.38bn) – an annual increase of 6.6%.

The big earners for next year will of course still be Income Tax, National Insurance Contributions and VAT, followed by Corporation Tax and Fuel Duties.

But where does the remaining £46.4bn come from – Inheritance Tax? Capital Gains Tax? Far from it. The Capital Taxes will produce just £7.39bn between them, while tobacco duties alone are to raise £8bn and beer and wine duties another £5.6bn.

In the 1930's death duties raised about 13% of total annual revenue at a time when 75% of the population died with less than £100 to their name – the tax genuinely did affect the wealthy. Inheritance Tax itself (£3.5bn), for all the discussion it excites, will produce just 0.84% of next year's Budget. Stamp duties, on the other hand, are set to rise by 11.4% to £12.1bn, with hardly a murmur.

Contact us

If you would like further information or would like a confidential discussion on how Anthony Gold's Wills, Trusts, Tax & Probate team can help you, please contact your usual Anthony Gold contact or call Robert Perret on **0800 389 2374**

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For further information on all the services we provide visit **www.anthonygold.co.uk or call us free on 0800 389 2374**

Nil Rate Band Discretionary Will Trusts

Christopher McNeill

In a climate of high property prices and efforts by the Chancellor to clamp down on what he deems to be artificial schemes to save inheritance tax, one of the few uncontroversial routes for tax planning left to married couples, and now civil partners, is the creation in their Wills of the 'nil-rate band discretionary Will trust', in fact, the Finance Act 2006 actually opens up new possibilities for the use of such trusts.

Where the estate on death exceeds the current threshold of £285,000 (the nil rate band) the balance is charged to Inheritance Tax at 40%. Since spouses and civil partners are exempt on what they receive from each other, leaving all to the survivor on the first death effectively wastes one nil rate band.

In the right circumstances, the nil rate band trust scheme can provide couples with a flexible way to significantly reduce the eventual IHT bill, while still allowing the survivor the chance to benefit from all the assets which the spouses presently enjoy between them. Under such a scheme, couples need to set up a trust in their Wills, effective on the death of the first of them, into which pass assets of up to the level of the prevailing nil rate band at that date.

A variety of assets can be placed into the trust, including simply an IOU or the benefit of a charge over the first estate in order to maximise the assets available to the survivor. Such assets might include a share in the marital home, as well as investments or buy-to-let property. For the arrangement to work most effectively, each estate should have sufficient assets to use the IHT-free amount and some equalisation of assets may be required. If jointly owned property is used, it must be owned by the couple as tenants in common rather than as joint tenants. This is so that the deceased's interest in the property does not pass automatically to the survivor but could instead pass to the trust set up under the Will.

The flexibility of the trust itself allows the trustees, who can include the surviving spouse or civil partner, to exercise their discretion to decide which beneficiaries (these will usually include the survivor, children and grandchildren – and possibly their spouses and civil partners) will receive the income and capital from the trust. Put simply the aim of the exercise is to allow the trust assets to benefit the family without the capital value being liable to Inheritance Tax on the second death. The sort of savings that can be made are considerable and highlight the advantages of some simple tax planning. Where the value of the nil rate band is used in full, the saving on the second death amounts to £114,000 (40% of £285,000). For a fuller explanation and a step by step example illustrating how the saving can be made we provide an information sheet on Inheritance Tax Planning for Married Couples and Civil Partners.

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