

Viewpoint

Helping you plan your family's future

Summer edition

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Welcome to our Summer edition of Viewpoint



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We have kept a close eye on the new coalition government's plans for private client wealth planning. The announcement that HIPs have been suspended with immediate effect has been well received by many of our clients.

However, the news was not so good for our clients who are looking to sell their investment properties now that CGT has risen to 28% for higher rate tax payers.

There was also disappointment for those preparing their Wills, that the Conservatives' proposal to increase the personal inheritance tax-free allowance to £1 million has been postponed.

In this edition of Viewpoint, we have responded to your request for more information on saving care home fees. Christopher Mills, a Partner in our non-contentious Bristol team, discusses this topic. In our other articles, we describe how a Will can be challenged and how to ensure financial assets are split fairly on divorce.

I am pleased to welcome Julia Hardy as a newly qualified solicitor to our Bristol Team. Julia will continue to advise on contentious probate matters as well as preparing Wills and providing associated tax planning advice. Julia also advises our firm's Family Business clients on trust and tax planning.

I hope that you enjoy this edition of Viewpoint and welcome your comments and suggestions for future editions.

How can a Will be challenged?

Most people are not surprised to learn that, generally speaking, a person is free to dispose of their assets in their Will as they wish. However, it is less well-known that when a Will or the Intestacy Rules (where there is no Will) fail to make reasonable financial provision for a dependant of the deceased, it is possible to legally challenge the Will.

In these cases the Inheritance (Provision for Family and Dependants) Act 1975 provides a safety net for certain groups of people; spouses, civil partners, cohabittees, former spouses or civil partners, children (including adult children) and people who were dependant upon the deceased. These groups of people, (who are known as applicants) are entitled to bring a claim against the Estate for financial provision.

The Act is not designed to correct acts of unfairness, alter dispositions which are unreasonable, reward the just and deserving, or even put into effect what the deceased person would have wanted. Indeed even if the deceased actively tries to exclude somebody in their Will, it is still possible for that person to bring a claim, effectively overturning the Will, if they meet the criteria of the Act. The object of the Act is to bring about a redistribution of the Estate between the applicant and the beneficiaries named in the Will based on their respective financial needs.

The Court will make an award based on what is required for the applicant's reasonable maintenance. Whilst the Act contains a checklist of factors to which the Court should have regard when assessing the amount to be awarded, a useful cross-check is to assess what a spouse would have received on a divorce.

We are seeing an increasing number of successful claims being brought by adult children. Whereas previously, claims were only successful if the applicant could show special circumstances, such as a moral obligation owed by the parent to the child, this is no longer a pre-requisite to bringing a claim. However in practice only the impecunious applicants are likely to succeed, as a Court is unlikely to find that an adult child who is in employment with an earning capacity in the foreseeable future is in need of financial provision from the Estate.

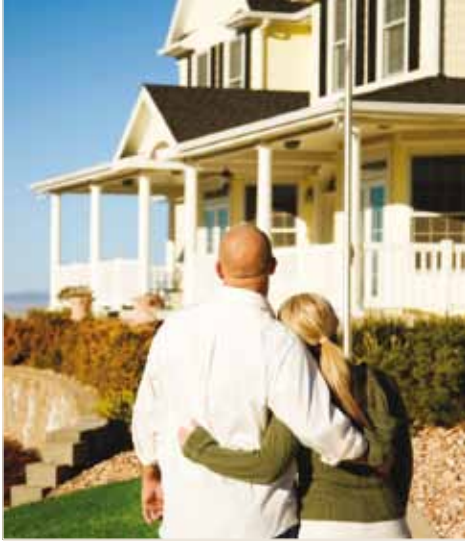
The time limits for bringing a claim are strict – an applicant has 6 months from the date of the Grant of Representation to issue their claim.

What to do if you want to challenge a Will?

If you believe you need to challenge a Will, it is best to take a proactive approach and consult a solicitor at an early stage as there are protocols to follow in notifying the personal representatives of an intended claim. In our experience, most claims result in negotiated settlements rather than proceeding to a fully contested trial. This is because it is generally in everybody's interests to bring matters to a conclusion sooner rather than later.



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Jackie Roe, shares her views on the suspension of HIPS

HIPS were suspended by the new coalition government on 21st May.

This is good news for sellers who can now market their property without incurring the expense of a HIP, although they will still have to produce an Energy Performance Certificate (EPC) before they can go to market. Hopefully this suspension will encourage more people to sell and open up more choice for buyers.

Many of the HIPS that we have come across in recent months included searches which were well out-of-date, making the pack of little use to buyers, which did nothing to speed up the sale process.

Some of our clients have also found themselves in the extremely unfortunate position of having to pay for searches twice. For example, searches have been required for a HIP on the sale not only of the client's own property, but also for the property being purchased, where the searches had expired. This is because there was no obligation on the seller to renew them.

I consider that the combination of low interest rates, the suspension of HIPs and an improvement in the availability of mortgage lending is good news for sellers and buyers alike. Hopefully a good summer will allow the green shoots of recovery to flourish.



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Divorcing your assets

High profile divorces are never far from the headlines and Cheryl Cole's multi-million pound divorce from footballer Ashley Cole, who has recently been occupied in the England team's bid for the World Cup, must rank as the highest profile divorce of Summer 2010!

For the rest of us, the division of assets in divorce can be confined to the everyday needs of the parties involved. Questions which the Court will typically focus on are - should the matrimonial home be sold? If so, how much of the proceeds should go to each of the parties in order to enable them to purchase new homes?

The objective in reaching financial arrangements on divorce is to achieve a "fair outcome" - a laudable principle, which is less helpful in practice. The way to achieve a fair outcome is to start at an equal division of assets, then consider whether there is any reason why that should change. The main influencing factor for deciding on the division will be the needs of the parties. Where the marital assets are greater than the needs of the parties then the Court can look at any justification for one party obtaining a greater share than the other.

A common scenario that we see is divorcing couples aged mid to late 40s. The wife may have stayed at home looking after the children who are now at university or left home and the husband may have, for example, built up a successful engineering business which he sells to a larger concern. Suddenly, the parties find themselves comfortable for the first time in their lives, money in the bank, the children off their hands and a long retirement to look forward to.

At this point there is a big change in both the husband and wife's lives and that often leads to re-assessment of their circumstances. The question for the Court then is - does the husband, who went out to work everyday and built up the business deserve to retain the lion's share of the marital assets or does the wife have an equal claim to the assets?

The short answer is that in such a case the starting point will be an equal division of the marital assets. If there is no suggestion that there was property owned before the marriage took place (or before the parties started cohabiting) or that after separation, steps were taken that increased their wealth then, once both parties needs are met, the division of assets is likely to be equal. Having said this, other factors, such as the length of the marriage can alter this outcome in some cases.

Why is the breadwinner not entitled to more? In short, the homemaker's contribution is considered to be an equal one unless there is something "stellar" in the contribution of the breadwinner to warrant that. Simply working hard for 30 years is not considered to be a "stellar" contribution. An interesting example of the type of "stellar" contribution which would have led to the breadwinner getting more of the assets is that of a certain Mr Charman, who claimed that thin plastic would be useful as rubbish bags and went on to put them on a roll and sell them in the supermarket! In that case Mr Charman was able to retain the lion's share of the fortune of the marriage.



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Planning for long term care

Community care and care home fees

The regulations in relation to paying for permanent residential care are rapidly evolving and becoming more complex. Although not yet enacted, the Personal Care at Home Bill received Royal Assent in April 2010. Individuals needing non-residential care who are assessed to have “high needs” will receive free personal care from April 2011.

Most people would prefer to remain and receive care in their own home and this is a principle objective of community care. In practice, how much assistance you receive from your local authority will continue to depend on both meeting the eligibility criteria and the extent of your need for services.

This applies both to community care costs and residential and nursing home fees.

How we can help

Local authorities apply a means-based testing process to assess what level of contribution will be expected from an individual and there are strict Deprivation of Assets Rules in place, which are designed to catch out individuals from trying to deliberately gift property out of their Estates to avoid paying care home fees.

We are experienced in advising our clients on how to navigate their way through this minefield of regulation and we can offer advice on providing solutions, such as setting up trust settlements in order to legitimately maximize the protection of assets from paying large bills for care home fees.

In advising our clients we typically help with providing answers to the following questions:

- Should you be charged and how much should you pay?
- Will your spouse or partner be expected to pay towards your care?
- Will your spouse, partner or other relative be able to continue to live in your family home?
- How should the assets be valued?
- Can you take out insurance to pay for your care?
- Should you make an advance decision, setting out your health care wishes in the event that you become unable to communicate them?
- Should you update your Will and how can you plan to pass on assets to your family by gifts during your lifetime?

For a population with an increasing life expectancy, these issues are becoming more relevant to a growing number of us. It is therefore more important than ever to ensure that these issues are well thought through and prepared for.



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