

Viewpoint

Helping you plan your family's future

Summer edition 2011

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Welcome to our Summer edition of Viewpoint



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Inheritance tax issues never seem to stay long out of the news and this Spring has been no exception. In the Chancellor's 2011 budget, a reduced rate of inheritance tax was announced for those people leaving 10% or more of their total net estate to charity. In such cases the usual 40% rate of tax (levied on any sums left over the £325,000 tax-free allowance), will drop to 36%. This reduction will take effect from 6 April 2012 and we are told to expect a Government consultation document this Summer.

Meanwhile, there are radical changes afoot in Family Law. Mediation is one of the current buzzwords. It offers divorcing or separating couples an alternative to going to Court to finalise their divorce or separation agreements. From 6 April this year, Mediation became a compulsory first step which couples must take to try and resolve their dispute. This is aimed at reducing the number of cases being settled at Court.

I am pleased to say that our Private Client Team has expanded once more, with the arrival of Michael Knowles as a Partner in our London Office. Michael has in fact worked with us before and now rejoins the Team to offer specialist advice in Will drafting, trusts, tax planning and elderly client advice.

Finally, we are delighted to announce that one of our Associates, Fiona Lawrence, in our Bristol Office, has this year gained her ACTAPS accreditation; a specialist qualification for those advising in contested probate and trust matters.

I hope that you enjoy this edition and as ever, would welcome your comments or suggestions for future issues.



The changing status of pre-nuptial agreements

London's reputation as the divorce capital of the world may be about to change. Previously, unlike the UK and the rest of Europe, pre-nuptial contracts had limited impact on divorce settlements, with family Courts relying on the principle that marital assets should be divided equally between the couple. This led to the situation where foreign nationals moved to England for a more lucrative divorce settlement.

The recent high-profile judgment from the Supreme Court (the highest Court in the United Kingdom) in the case of *Radmacher v Granatino* has changed the approach to divorce settlements where there is a pre-nuptial agreement. Pre-nuptial agreements will now be given decisive weight, with the presumption that they can be binding, unless they are unfair, despite the absence of a specific statutory law dealing with pre-nuptial agreements.

The case involved Katrin Radmacher and Nicolas Granatino who married in 1998; Ms Radmacher (a German national) ran a boutique in London and Mr Granatino (a French national) worked for JP Morgan where, at the height of his career, his income was £325,000 per year. They had signed a pre-nuptial agreement in Germany where such agreements are legally binding. This agreement provided that neither party was to benefit from the property of the other on any subsequent divorce. Before and during their marriage Ms Radmacher had inherited a fortune of over £100 million from her family's paper company in Germany whereas Mr Granatino, on his own initiative, had left his work in the city and had embarked on research studies at Oxford. The couple had two children during their marriage.

In their judgment, the Supreme Court found Mr Granatino should be held to the terms of the pre-nuptial agreement, subject to making provision for the needs of the children. The Court emphasised that the key to any financial

settlement is fairness. Therefore the parties must enter into the contract voluntarily; at least 21 days or more before the actual wedding; without there being any undue influence or pressure; with full disclosure of their assets and income and each party must have the opportunity to take legal advice on the agreement. The Court will only disregard a pre-nuptial agreement, if in the circumstances it would be unfair to hold the parties to their agreement.

Following another recent case of *MacLeod v MacLeod*, it is not too late to regulate the division of assets and income on divorce even during the marriage. Indeed post-nuptial agreements are also becoming increasingly popular and can often be more effective, as both parties' intentions may become clearer once they are married. There are now more second marriages, with children and assets to protect from previous marriages. Pre and post-nuptial agreements allow an individual to regulate the consequences of the breakdown of marriage and protect their interests.

This decision is also important for family businesses. It gives the owners the ability to pass shares in a business or other assets to their children, knowing that a pre or post-nuptial agreement allows them to be protected against claims from future spouses or in the case of post-nuptial agreements, the wives or husbands of their children who agree to such an arrangement.

For more information, please contact Andrew Hamilton on 020 7665 0915.



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The benefits of family mediation

Mediation is worth considering for anyone experiencing separation or divorce and now even more so, with the Ministry of Justice encouraging people to attend mediation before going to Court. Mediation is flexible enough to resolve any issues concerning child contact, money or property.

There are several benefits to mediation:

- It is cheaper than going to Court. On average, mediation costs less than half of a Court case.
- The dispute is usually resolved much more quickly. Government statistics show that mediation takes less than a quarter of the time taken by going to Court.
- Mediation is more likely to produce an agreement that both parties can live with over time. This is because it is a voluntary process, whereas cases taken to Court may result in a Judge imposing a solution on one or both the parties.
- Mediation supports the children affected by the separation of their parents, and their views can be taken into account in the process (if agreed by all concerned).

In our family team, we regularly work in collaboration with professional organisations such as Bristol Family Mediation. For more information, please contact either Ian Bloxham at Bristol Family Mediation on 0117 929 2002 or Oliver Early on 0117 314 5227.



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In our right minds - when can you not make a Will?

Thanks to significant advances in medical science, the average life expectancy has increased dramatically in the last decade. Sadly, old age is not always accompanied by good health, particularly mental health. Lawyers often see this issue causing more problems when clients come to make their Will.

Capacity to make a Will

It is vital to establish whether a person wishing to make a Will has capacity to do so because if they do not, the document will be invalid. Incapacity can result from any number of different factors, including mental illness, personality disorders, or drug or alcohol use. Incapacity may also be temporary or permanent.

So what is the legal test for capacity? The leading case of *Banks v Goodfellow* sets out the rules. Mr Banks suffered from paranoid schizophrenia and was concerned that a grocer (who was in fact dead) was persecuting him. However, the Court held that this delusion did not have any bearing on the Will made by Mr Banks, so the Will remained valid.

Unlikely as this result may seem, the case established a test, which if met, demonstrates that a person has sufficient legal capacity to make a Will.

It held that a person making a Will must:

- understand the nature of the act of making a Will
- understand the effects of making a Will
- understand the extent of the property of which they are disposing
- appreciate the claims to which they ought to give effect
- not be subject to any "insane delusion" which would influence them in disposing of their property.

There are further provisions which lawyers must refer to under the Mental Capacity Act 2005 when assessing capacity. Furthermore, where capacity is

in doubt or a person is seriously ill, the Will should, ideally, also be witnessed and approved by a medical practitioner.

Statutory Wills

It might be assumed then that if a person has lost capacity there would be no possibility of their making a Will. However, in certain circumstances the Statutory Wills procedure may offer a way forward. These are Wills which are prepared on behalf of the incapacitated person.

They are a last resort, rather than a solution, as the person can no longer give direct instructions for their own Will. Instead, the contents of the Will are based upon what is considered to be in the person's "best interests".

There are several problems with this. Not least, that it begs the question - what is in a person's best interests? If, for instance, a father had become alienated from one of his children because of what he perceived to be an unsuitable marriage and has gone as far as to cut the child out of his previous Wills, is it in his "best interests" to make a Will now, including that child? This is an impossible question as the answer is of course, subjective.

A second problem is that the procedure is complicated, costly and can be protracted.

The key message is to put your affairs in order as early as possible and to ensure that Wills are regularly updated to reflect your wishes.

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Appointing an executor - making the right choice

Choosing who to appoint as your executor is one of the fundamental decisions to make when writing your Will. You are allowed up to four executors and, in our experience, it is best to appoint at least two, in case circumstances change. Your executor can be a trusted friend or family member, or alternatively a professional.

Many people appoint a professional because they are independent of the family circle and are able to act dispassionately and efficiently, leaving the family to grieve and concentrate on other concerns. Furthermore, in the event of a conflict arising over the Will it is best if a professional is involved to deal with the conflict.

What does an executor have to do?

An executor takes responsibility for the deceased's estate. That broadly means that they have to locate, collect in and ultimately distribute the deceased's assets as set out in the Will. Depending on the size and the complexity of the assets involved, this can be a significant amount of work.

One of the key tasks for an executor is to apply to the Probate Registry, which is a division of the Court, for a Grant of Probate. This is the legal document which authorises an executor to take control of the assets, or "step into the deceased's shoes."

Once the Grant is obtained, an executor will pay off any outstanding debts, sell or transfer property where necessary and cash-in other assets, in order to make the money available to distribute to those who are due to inherit under the Will. The Grant is required by all banks and institutions as proof of the executor's authority to deal with the assets.

When it goes wrong

If an executor fails to carry out their legal duties properly, an application can be made to Court for his or her removal. Such applications have been made in the past by beneficiaries against executors where, for example, an executor has failed to identify all the assets of the estate. The Court will generally intervene and remove an executor, who is in breach of their duties, if it is deemed to be in the best interests of the beneficiaries to do so. The Court will then appoint a replacement executor.

Recent cases have shown that a breakdown in relations between an executor and the beneficiaries is not in itself sufficient grounds to remove an executor unless it is likely to have a significantly detrimental affect on the administration of the estate.

What to do if it goes wrong

A pragmatic approach is recommended. Practical steps to take, include holding a family meeting following an agenda of points to try and reach agreement on. It is also commonplace for executors to appoint professionals to carry out the administration for them, which can ease the burden.

However, in some cases, there is little option but to apply to Court for the removal of the executor. As a result we offer an additional service, The Veale Wasbrough Executor & Trustee Company, who are professional solicitors can be appointed as your executors and trustees. This service has proved a very popular and low cost choice with our clients for many years.



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