Viewpoint

- Mixed-Sex Couples Now Have Right to Enter into Civil Partnerships
- Can A Smartphone Resolve a Will Dispute?
- Free Workshop for Executors
- Giving Wisely - What Should Attorneys Consider?

Spring Edition 2020

LW

Welcome to the Spring 2020 Edition of Viewpoint

Michelle Rose - Partner
0117 314 5246
mrose@vwv.co.uk

Recent changes in the law mean that 2020 will be the first year in which mixed-sex couples can choose to enter a civil partnership as an alternative to getting married. You can read more about one couple's case which led to this legislative change in this edition.

Meanwhile, in response to a sharp rise in the investigations carried out by the Office of the Public Guardian into Lasting Powers of Attorney (LPAs), we announced, in our last edition, our free LPA Workshops which ran last autumn. We were delighted to meet so many of you at those. Following their success, we intend to run another free workshop this spring for executors. Please find further details on the enclosed invitation. We hope you will be able to join us.

We also include an article this time on the points attorneys should consider when making gifts on behalf of the person for whom they act.

In January, we were delighted to meet several of our new Inheritance Matters clients at our drinks reception in Birmingham.

Last but not least, we said a fond farewell to Mary McCrorie in our Bristol office, who retired as Partner at the end of last year. Mary remains closely connected with VWV in her capacity as consultant.

I hope that you enjoy this edition and that you will take a few moments to enter our prize draw to win a luxury hamper as I continue to welcome your feedback and comments.

Mixed-Sex Couples Now Have Right to Enter into Civil Partnerships

Until recently, civil partnerships have been reserved for same-sex couples and they represented the only way for many people to formalise their relationship until the introduction of same-sex marriage in 2014.

Under the terms of a civil partnership a couple is entitled to the same legal treatment in terms of tax, pensions, inheritance and next-of-kin arrangements as if they were married.

There are an estimated 3.3 million unmarried couples currently living in England and Wales, and the government predicts that uptake could be as high as 84,000 in the first year.

One Couple's Story Which Led to Change

In October 2014, Rebecca Steinfield and Charles Keidan tried to form a civil partnership at their local town hall, only to be told that because they were not of the same sex, this could not be done. They were advised that civil partnerships were only reserved for couples of the same sex.

Following this, Rebecca and Charles challenged the law in the form of a judicial review. Their case was eventually heard in the Supreme Court in May 2018.

The couple's position was that they had *"deep rooted and genuine ideological objections to marriage"*. Their barrister said matrimony was *"historically heteronormative and patriarchal"* and the couple's objections were *"not frivolous"*.

Following deliberation from the judges in the Supreme Court, they gave the unanimous ruling that the government's refusal to allow mixed-sex couples to enter into civil partnerships was incompatible with human rights law.

How Has the Law Changed?

Following the Supreme Court's ruling, legislation was passed in 2019 allowing for a change in the law in England and Wales. Secondary legislation was required before those provisions could become law, but following recent approval from the House of Lords, the Secretary of State was required to issue the regulations allowing for mixed-sex civil partnerships at the end of last year.

The same reforms will soon be extended to Scotland and Northern Ireland too.

What Is the Basis for This Legal Change?

Traditionally, principles of marriage are rooted within religion and would involve a religious ceremony. However, there are strict rules as to what constitutes a legally-binding marriage which can be restrictive on those wishing to get married outside of a typically religious building.

Some couples, like Rebecca and Charles, feel that the institution of marriage isn't compatible with their beliefs and ideologies. As such, being unable to enter into a civil partnership to secure their rights was viewed as discriminatory.

If you are unsure how this legal change may affect you or you are concerned to determine what your legal rights are currently, or you wish to enter into a civil partnership, please contact Nigel Mears.

Nigel Mears - Partner
0121 227 3731 - nmears@vwv.co.uk

Can a Smartphone Resolve a Will Dispute?

We recently acted for clients who were successful in defending a Will challenge against a relative's estate using video evidence captured on a smartphone. We have outlined the story below.

N's Story

N died leaving three sons. Her eldest son, M, had three daughters, who became involved in a battle with their two uncles over N's last Will and main asset - her flat.

Two years before N died, she decided to exercise her right to buy her council flat in Chiswick, having lived there for 24 years. She didn't have enough money to buy the flat so she borrowed around £140,000 from her three granddaughters.

At that time, N made her last Will, leaving all of her other assets (totalling around £10,000) equally between her three sons.

The Legal Battle

After N's death, two of her sons brought a claim challenging the deed of trust on the grounds that N did not have capacity to execute the trust or that if she did, she was unduly influenced to do so. They also challenged the validity of the Will on similar grounds.

The sons argued that N had suffered from dementia and was delusional at the time she made the deed of trust and the Will (before her fall). If they could prove this through evidence, the flat would not pass to N's youngest granddaughter as the deed of trust would be pronounced invalid. Instead, the flat would be divided between N's three sons if the Will were to be upheld.

However, if the Will also was not upheld, the flat and N's remaining assets would pass in accordance with her 1993 Will which gave a £10,000 legacy to M and divided the residue between the other two sons.

Most importantly, there was video evidence of N signing her last Will and the deed of trust. This, together with the spoken evidence of witnesses, was crucial because there was very little other contemporaneous evidence available from when N was still alive.

Viewing this, the judge was able to form a clear impression that N was stubborn and determined and he could see that she had not been influenced by anybody. The judge stated in his judgment that it was *"clear beyond peradventure that she knew and understood perfectly well what she was signing".*

The two sons were unsuccessful in their will challenge claim because the judge was not satisfied by their evidence which he found was *"illogical, irrational and incoherent".*

With the increase in the use of smartphones it will be interesting to see whether reliance upon video evidence will increase over the course of time.

> ***"With the increase in the use of smartphones, it will be interesting to see whether reliance on video evidence will increase over the course of time."***

Deed of Trust

N also executed a deed of trust, just for her flat. The deed of trust was to ensure that, whilst N was alive, she and her youngest granddaughter owned half the flat each, and that after N's death, the whole flat would pass to her granddaughter.

Sadly, in August 2015 N had a fall, which resulted in her losing the ability to make decisions for herself. Following the advice of medical staff she was admitted to a nursing home where she remained until she died.

The two sons' arguments were not accepted by M or his three daughters and the case came to court for trial.

How Did VWV Help?

We undertook a full investigation of the evidence, and found that there was a lot of video evidence of conversations that N had had with various family members. These demonstrated that N was determined to buy her flat and that she was equally determined in wanting to leave it to her youngest granddaughter.

If you're concerned about a Will, contact Fiona Lawrence for specialist legal advice at your earliest convenience.

Fiona Lawrence - Partner
0117 314 5389 - flawrence@vwv.co.uk

Free Executor Workshop This Spring

The role of an executor is a demanding one and carries with it onerous duties and responsibilities.

Have you been appointed as executor under a Will and are unsure of what your role is and whether you can enlist help? Or perhaps you are yet to make a Will and need some guidance about who you should appoint.

Come along to one of our specialist free executor workshops this spring where we will provide the answers to the questions you have as well as guide you through the administration process which can often seem daunting.

Please find further details on the enclosed invitation.

Giving Wisely - What Should Attorneys Consider?

In 2018/19, the Office of the Public Guardian (OPG) recorded a 55% increase in applications to the Court of Protection (COP) to censure or remove attorneys. Improper gift-making and not acting in the donor's best interest were the two main concerns.

A property and financial affairs Lasting Power of Attorney, or an old-style Enduring Power of Attorney, grants an attorney authority to make decisions that help protect the financial interests of the donor, but attorneys must take care when using this authority.

What Constitutes a Gift?

Gifts typically involve giving money or possessions to relations and friends on birthdays, weddings, or other occasions. The law sees donations to charity as gifts. However, attorneys may have to decide about less common gifts where issues may arise, such as paying school fees, making interest-free loans (where the waived interest is the gift), or creating a trust of the donor's property.

Is the Gift Reasonable?

This can be hard to determine. There is no precise definition of what makes a gift 'reasonable'. An attorney should look broadly at the effect the gift will have on the donor's current and future financial situation, and consider whether the gift is in the donor's best interests. Some factors to consider are:

- whether the gift is affordable
- whether the donor would have made gifts of this size
- the donor's life expectancy and whether funds may be needed for future care costs
- how the gift might interfere with legacies in the donor's Will
- whether the donor would have supported the charitable cause, for gifts to charities

Limits on an Attorney's Authority

Attorneys should always check that there are no specific or general restrictions in the Power of Attorney document that restrict their authority to make gifts. Attorneys must also take into consideration the relevant statutory principles of the *Mental Capacity Act 2005* and the OPG guidance on gifts.

Most importantly, attorneys must act in the best interests of the donor by making decisions that they consider the donor would have made themselves.

If the attorney is in doubt or believes a proposed gift falls outside their authority, the attorney should apply to the COP for approval before making the gift.

Whilst the COP recognises limited circumstances when an attorney may make larger gifts without making a court application, these circumstances are specific and advice should therefore be taken before proceeding.

Consulting the Donor

A point often overlooked is that the attorney should consult the donor about the gift, if they can. The attorney should encourage the donor to participate in the decision if possible. This is useful even if the donor lacks capacity, as involving them in any decision about making a gift helps to ensure that an attorney is acting in the donor's best interests.

Whether you are acting as an attorney or are looking to make an LPA, we can provide advice to help you understand the implications and restrictions involved. Contact Michael Knowles for more advice.

Michael Knowles - Partner
020 7665 0903 - mknowles@vwv.co.uk

Find Out More About Our Services

Please contact Michelle Rose if you would like to receive a copy of the below:

- *Lasting Powers of Attorney* - losing mental capacity could happen to anyone, at any time
- *A Guide for Attorneys* - learn more about your duties as an attorney
- *Family Matters* - guidance on matrimonial and family issues
- *Five Good Reasons to Review Your Will*
- *Ten Good Reasons Why You Should Choose VWV to Prepare Your Will*
- *Private Wealth Planning for You and Your Family*
- *What Happens to Your Digital Assets When You Die?*

Receive Viewpoint by Email

Would you like to receive Viewpoint by email rather than hard copy?

If so, please contact Laura Loveridge on 0117 314 5371 or lloveridge@vwv.co.uk.

@VWVPrivClient