



# Viewpoint

- Wills Can Now Be Witnessed on Video Calls, But Beware the Pitfalls...
- Do You Need an Attorney for Your Business?
- Possible Capital Gains Tax Changes on the Horizon
- Can Your Will Really Last a Lifetime?

## Welcome to the Winter 2021 Edition of Viewpoint



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This year, it seems particularly apt to reflect on the cyclical nature of the seasons and the thought that "every winter has its spring".

We were certainly cheered recently to connect with so many of you at our Executor Workshop, on 11 November, which was a great success. For those who missed this one, our next Executor Workshop is on 10 February 2021. To book your place on this free workshop or to find out more please contact [events@vww.co.uk](mailto:events@vww.co.uk).

This autumn, we welcomed back Leila Goodarzi from maternity leave. On her return, I am delighted to announce Leila's promotion to Partner, leading our Estates, Tax Planning and Trusts team in Bristol.

In this edition, we are featuring a new topic, Business Lasting Power of Attorneys, which are invaluable documents to help keep your business up and running if you are incapacitated for any reason.

Finally, our winter edition would not be complete without our luxury hamper competition. Please let us know your suggestions and comments to enter, by completing the attached questionnaire and returning it to us by 25 January. The winner will be notified by email or telephone. Good luck!

On behalf of the team here at VWV, I send you all our good wishes for a brighter 2021.

\*H Tuttle



## Wills Can Now Be Witnessed on Video Calls, But Beware the Pitfalls...

### This autumn the Government amended the *Wills Act 1837* in response to COVID-19.

Wills\* made from 31 January 2020 onwards, that are witnessed by video link, will be legal if they comply with all legal requirements. This is a temporary amendment; applying to Wills made up until 31 January 2022.

#### Common Pitfalls to Avoid

Whilst this provides greater flexibility to those who may be shielding at home, executing your Will is still easy to get wrong and it is essential to remember some crucial basics to ensure you do it correctly.

Some recent problems we have seen are:

- **Inconsistent dates** shown on the coversheet and the signing page of the Will. There are usually two places to date your Will when signing it and if these dates are inconsistent, it may result in confusion later on about when the Will was actually executed.
- **Faint signatures.** Make sure the pens you and your witnesses use work well, ideally having black or blue ink. You should sign in one stroke with one pen.
- **Non-independent witnesses.** Your two witnesses should be completely independent from you. This means they should not be family members, or relatives with a different surname. Your witnesses must not be a beneficiary of your Will and must be 18 or older.
- **Incomplete details for witnesses.** Witnesses should ensure that they have signed and printed their full name (not just an initial and a surname), and added their full postal address and occupation.

#### What About the Video Link Part?

Be aware of the following:

- You cannot use pre-recorded video for this process. Live video is required of both signing and witnessing.
- There can only be one Will document. There will be an inevitable delay in its

completion, whilst it is delivered to both your witnesses for them to sign (again by live video link).

- Your Will is not valid until everyone has signed, resulting in an incomplete Will during the lag time. The Government's guidance states that the witnesses should ideally sign within 24 hours. The longer the process takes, the greater the risk of encountering difficulties.
- Electronic signatures are not permitted.

#### Should I Make My Will by Video Link?

It could be more difficult to prove the validity of your Will after your death, if the witnessing, or the way it has been executed has not been done correctly - the risk of which can rise without appropriate professional advice. Homemade Wills made by video link are more at risk potentially to challenges being brought by opportunistic beneficiaries.

Our advice is to only use this newly permitted method of signing and witnessing your Will as a last resort and after having received detailed professional advice on how to comply with the new procedure. Wherever possible, it is preferable to witness your will either in the presence of a qualified practitioner with the appropriate social distancing in place or with them overseeing the process by video link on a separate screen.

**For specialist legal advice on making your Will please contact Leila Goodarzi on 07909 682364.**



### Leila Goodarzi - Partner

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\*Excludes Wills already admitted to Probate.

# Do You Need an Attorney for Your Business?

**Lasting Powers of Attorney (LPAs) have been around for a while, and enable a person to authorise someone else to make decisions on his or her behalf, in the event of physical or mental incapacity.**

There are two types. A Health and Welfare LPA covers decisions relating to medical treatment and care, and a Property and Financial Affairs LPA covers property dealings, pensions, operating bank accounts and so on.

Usually, LPAs are looked at under the 'personal affairs' umbrella, but there is a place for an LPA to deal with financial matters in business too - a Business LPA (BLPA).

be helpful for the donor to make a separate memorandum to set out their wishes and views about the business, as guidance to assist the attorney if the BLPA has to be put into operation.

## **Who to Choose?**

The person chosen needs to be someone who understands the donor's business and how it operates. This could be someone already working in the business itself, assuming there are no conflicts of interest, or a third party from outside, possibly in a related field. The *Mental Capacity Act* Code of Practice advises that an attorney should be trustworthy, competent and reliable, with the skills and ability to carry out the necessary tasks.

## **What If I Don't Have an Attorney?**

At worst, if the Donor loses capacity to run the business, it could cease to operate. The business bank account might be frozen and staff unpaid, contracts uncompleted, and claims made against the company for its failures. In that case, an application would have to be made to the Court of Protection for the appointment of a Deputy, a process which can take many months and is much more expensive and restrictive.

**If you need support with setting up a Business LPA, or need advice on an existing one, please contact Rachael Armstrong on 07879 630734.**

**“ The person chosen needs to be someone who understands the donor's business and how it operates. ”**

## **Using a BLPA**

A BLPA enables partners in a business, members of an LLP, sole traders and directors to ensure that if a key decision maker is unable to act, someone else can do so. The person making the BLPA (the 'donor') can specify what tasks the attorney can undertake, for example entering into business contracts, dealing with staff, managing business assets and so on. Essentially, these are matters relating to running the business, as opposed to working for it. When using a BLPA, the attorney must act in the best interests of the donor and the business, and the donor can specify in the BLPA the decisions he or she would want the attorney to be able to make. It can also

## **I Already Have an LPA - Why Do I Need a BLPA?**

An attorney appointed under a personal Property and Financial Affairs LPA can take business decisions, but does that person have the necessary skills to do so? A BLPA enables the donor to appoint someone specifically for the purpose of taking business decisions, and that appointment takes precedence over the personal LPA for matters relating to the business. The attorney appointed under the personal LPA can then concentrate on the personal affairs of the donor, without the additional complications of running a business.



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## **Possible Capital Gains Tax Changes on the Horizon - What Could This Mean?**

If the recommendations of a recent report by the Office of Tax Simplification (OTS) are adopted, more people may have to pay capital gains tax (CGT) when they dispose of assets. The report, commissioned by Chancellor Rishi Sunak, has proposed bringing the rates for CGT into line with income tax rates. The report also recommends scrapping the tax-free uplift in asset values on death.

The annual tax-free allowance for capital gains is currently £12,300. The OTS report estimates that reducing this allowance to £5,000 each year would double the number of taxpayers who would become liable to pay CGT.

Aligning the CGT rates with income tax rates would be a way of ensuring that the same rate of tax was

paid by individuals and business owners regardless of whether funds received were treated as income or capital proceeds.

At present there is a CGT-free 'rebasings' (or revaluing) of assets on the death of the owner, so that beneficiaries receive the asset at the updated value. The OTS report recommends a 'no gain, no loss' approach, so that the beneficiary is treated as having acquired the asset at the 'historic' (original) base cost of the person who has died. The report also recommends an extension of the availability of holdover relief, so that CGT becomes payable only when an asset is sold, and not when it is transferred as a gift.

# Can Your Will Really Last a Lifetime?

Wills can ordinarily be re-written countless times to meet your changing needs because preparing a new Will invalidates any made before it.\*

However, the recent case of *Legg v Burton* demonstrates how sometimes, a Will really can last a lifetime. The case involved June Clark, who died leaving 14 Wills. June and husband Bernard had made their Wills in July 2000, leaving everything to the survivor of them and on the survivor's death to their two daughters, Ann and Lynn equally.

## A Promise Set in Stone

At the time they made their Wills, June and Bernard promised each other that they would never change the terms of their Wills. They both wanted to pass their home and the remainder of their estates to their daughters. As they put it, they wanted this "set in stone."

Their two daughters were with them when they made their Wills. After the solicitor had left, they asked their dad what would happen if either changed their minds after the other had died. Bernard reassured his daughters they had already promised each other they would not change their minds. Both daughters told the court that June had overheard this conversation from the other room and had shouted through from the kitchen: "No I bloody won't change it either!".

## Changing Wishes

Bernard died the following year and June initially relied on her two daughters a lot. However, over time and for reasons including the sad death of Ann's own daughter, June came to rely more on her grandsons and one of their partners.

As a result, she made 13 more Wills following Bernard's death, each one progressively giving more to her grandsons and the partner, and less to Ann and Lynn, save for the last Will which rowed back a little. June's last Will of December 2014 left Ann and Lynn just small cash legacies. The rest, including the house, went to the grandsons and partner.

June died two years later in 2016. Following June's death, the grandsons considered that the December 2014 Will was valid, but Ann and Lynn claimed that the July 2000 Will should be upheld, and their mum's estate should pass to them.

## First Will Upheld

The Judge found that the promise that June and Bernard had made to each other amounted to a legally binding agreement. The doctrine of mutual Wills was employed,

meaning that the July 2000 Will was upheld, despite the 13 other Wills that had been written after it. The Judge considered all the evidence and found that:

*"Mr and Mrs Clark expressly promised each other that having made their Wills in the form they had they would not revoke them."*

The Judge went on to find that Mrs Clark "... was not free unilaterally to alter her Will and make a new one inconsistent with that of July 2000..."

The agreement became eternally binding on Bernard's death. June and Bernard could have agreed to alter or rip-up their Mutual Wills whilst Bernard was alive if they had wished to (if they both retained mental capacity to do so). However, once Bernard had died, June was locked into the legally binding agreement she had made with Bernard and was no longer free to alter it.

## Consider Carefully and Review Regularly

It can be tempting to predict the future and enter into a mutual Will to future-proof it. We advise to consider this very carefully and seek specialist advice because of the limitations imposed. Alternatively, regularly review your Will especially when big life events happen such as marriage, the birth of children, death, divorce and property acquisition, to be sure it meets your continuing needs.

**If you think you may have entered into a mutual Will and require expert advice, please contact Fiona Lawrence on 07909 901370.**



**Fiona Lawrence - Partner**

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\* Marriage also automatically invalidates Wills made prior to marriage unless a clause specifies this is not the case and subject to any validity challenges to a Will.

## 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?*

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