Birketts

Clear Legal Advice

WELCOME TO THE AUTUMN 2021 ISSUE OF

Private Lives

IN THIS ISSUE

Welcome to the autumn 2021 edition of Private Lives, our newsletter covering the key legal and tax issues that individuals face.

Jessica Godfrey-Withey
Associate
01473 406282
jessica-godfrey-withey@birketts.co.uk

Welcome to the autumn 2021 edition of *Private Lives*.

Dare we say it but are things starting to return to normal? The last few months have seen the reinstatement of weddings without restrictions, an increase in the number of people double vaccinated and ultimately a return to the office. Whilst the likes of Zoom will continue to hold a place in office life, it wasn't, nor will it ever, be a replacement for face-to-face meetings!

The Stamp Duty holiday has seen a substantial increase in the number of properties on the market, with homes selling for well over the quoted asking price. Whilst travel abroad may have been tricky, the time spent in lockdown has encouraged individuals with assets abroad to think about succession planning. In order to guide you through the process Tobias Gleed-Owen has given us some points for consideration, whilst Katie Gibson-Green comments on the proposed changes to the Lasting Power of Attorney process. Meanwhile, Katherine Webber examines the future of trust registration post-COVID. Finally, the Court of Protection Team have set out their practice with a useful getting to know them section.

Birketts have also been encouraging staff to support EACH by raising money through a variety of challenges. Members of the team have set out the challenges undertaken and the money raised later in this edition.

We hope this is a useful, interesting and helpful edition and as always, welcome any comments or questions that you have.

The Government consultation on Lasting Powers of Attorney

Katie Gibson-Green
Associate
01245 211319
katie-gibson-green@birketts.co.uk

There is currently a Government consultation in progress surrounding Lasting Powers of Attorney (LPA). LPAs were introduced in 2007 by the Mental Capacity Act, and replaced the old-style Enduring Power of Attorney.

They were designed to provide more flexibility and greater protection to the person entering into the power. For an LPA to be valid, it must be signed as a deed, meaning that the donor must sign the LPA in front of an independent witness. The document must also be signed by a 'certificate provider' to confirm that the donor has understood the contents of the LPA, and that there is no undue pressure on the donor, and no fraud being committed. The document also has to be signed by each attorney named in the LPA.

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It is argued that in the 14 years since LPAs were introduced, technology has advanced and become more widely used and accessible, and as such the next step being considered is to introduce a fully-automated service for completing and registering LPAs, in what would be a cost saving exercise. It is also said that it would increase efficiency in registering the documents compared to the current system.

However, concerns have been raised as to the safeguarding provisions, and to ensure that the most vulnerable are still protected in an adequate way. Any updated system will need to protect donors from possible abuse. There also needs to be easy access for those who cannot or do not want to use the digital service.

In 2019, the Law Commission published its paper 'Electronic Execution of Documents'. The report specifically highlighted that: "In the case of lasting powers of attorney, it is clear that the Office of the Public Guardian (OPG) … should consider what is sufficiently secure and reliable for donors before introducing any system using electronic signatures."

Consideration is also being given as to whether a dedicated faster service should be introduced for those who need LPAs registered urgently.

To achieve this, several proposals have been put forward in the consultation, which include how technology can be used to support remote witnessing, or whether the need for a witness should be removed altogether, to widen the OPG's powers so they can verify an individual's ID, to consider how people can object to LPAs being registered, and how long they have to raise an objection. Consideration is also being given as to whether a dedicated faster service should be introduced for those who need LPAs registered urgently.

The consultation runs for 12 weeks until 13 October 2021.

The aims of the OPG and the Ministry of Justice are to increase safeguards, especially for the donor, to improve the process of making and registering an LPA and to achieve sustainability for the OPG whilst keeping LPAs as affordable as possible.

To implement the changes being considered, the provisions of the Mental Capacity Act 2005 and supporting secondary legislation will need to be amended, and this is also being considered as part of the consultation process.

The consultation runs for 12 weeks until 13 October 2021. Full details of the consultation can be found on gov.uk by searching 'Modernising Lasting Powers of Attorney'.

Lucy Edwards
Solicitor
01473 921713
lucy-edwards@birketts.co.uk

What is an appropriation?

With the property market continuing to go from strength to strength, as a Personal Representative dealing with a deceased's person estate, you may find yourself in a position where the deceased's home sells for significantly more than the value as at the date of death, resulting in capital gains tax (CGT) becoming payable.

But what is capital gains tax and what steps should a Personal Representative consider taking in order to mitigate any tax liability?

What is capital gains tax?

CGT is a tax on the profit when certain assets that have increased in value are sold or disposed of...

CGT is a tax on the profit when certain assets that have increased in value are sold or disposed of (e.g. gifted). It's the gain the estate makes that's taxed, not the amount of money the estate receives. When administering an estate, the gain is calculated as the difference between the value of the asset as at the date of death and the value of the sale proceeds.

CGT only applies to the sale or disposal of certain types of assets, for example, property, personal items worth more than £6,000 or shares that are not in an ISA.

The gain may be reduced by certain allowable deductions, for example, legal and estate agent fees and expenditure incurred in enhancing the value of the asset. In addition, as with individuals, the estate has an annual allowance to CGT which is currently £12,300 which, provided the estate has not made any other gains during the relevant tax year, can

be used to offset the gain. If the gain exceeds the annual allowance, an estate pays CGT at the higher rate which is 28% for residential property or 20% on other chargeable assets.

So, are there any steps a Personal Representative should consider taking when the gain made looks set to exceed the estate's annual allowance?

"In order to mitigate the amount of CGT payable, an executor can consider 'appropriating' assets, or shares of the same, to one or more of the beneficiaries...

Appropriation

In order to mitigate the amount of CGT payable, an executor can consider 'appropriating' assets, or shares of the same, to one or more of the beneficiaries in order to make use of more than one annual allowance for CGT.

An appropriation is a conscious decision made by a Personal Representative to take an asset out of the general pool of assets within the estate and transfer the equity in that asset to a specified beneficiary. The estate will still retain the legal title, however, the beneficial title will belong to the beneficiary. The asset appropriated to the beneficiary will be treated as having been appropriated in satisfaction of, or in part satisfaction of, their interest in the estate i.e. the beneficiary will be deemed to have received part of their entitlement to the estate.

"Once the asset (or a share of the same) has been appropriated, any gain made on the sale of the asset (or a share of the same) will be treated as the beneficiary's for CGT purposes.

Once the asset (or a share of the same) has been appropriated, any gain made on the sale of the asset (or a share of the same) will be treated as the beneficiary's for CGT purposes. The beneficiary's annual allowance can therefore be used against their share of the gain and any gain exceeding the annual allowance will be taxed at the beneficiary's rate of tax. This can be particularly beneficial if the beneficiary is a lower rate tax payer as any gain will be taxed at 20% (for residential property) or 10% (for other chargeable gains).

If, for example, the deceased's home were selling for a gain that exceeded the estate's annual allowance, the Personal Representative could consider appropriating, say, a 50% share of the property to the beneficiary whilst the estate retains the remaining 50% share. 50% of the gain will then be treated as having been made by the estate and the remaining 50% as having been made by the beneficiary. The gain will therefore be spread across two annual allowances which could significantly reduce the amount of CGT payable.

For now, our advice is check whether you are impacted and if so, keep an active eye on proceedings. We will of course follow up with further articles in *Private Lives* as details become clearer – be sure to subscribe to keep up to date!

Tobias Gleed-Owen
Associate
01223 643123
tobias-gleed-owen@birketts.co.uk

How to make an English Will if you own foreign assets

The Birketts International Private Client Team can assist you in considering offshore assets, trusts and other foreign legal considerations when making an English Will.

With international mobility on the rise, it is increasingly common for our clients to have connections with many other countries. Those wishing to make an English Will are often confronted with a long list of foreign considerations which they and their advisors must take into account as part of the Will-making process. With 193 countries currently recognised by the United Nations, most with their own unique legal framework, tax rules and practical considerations, this can be a daunting process.

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This article is intended only to scratch the surface of the iceberg, by addressing some of the key questions that we often discuss with our clients.

1. One Will or multiple Wills?

This is often the first question we are asked by clients who hold assets in more than one state. Most jurisdictions will recognise the validity of an English Will (though it is important to check the rules of each state in question) and it is often possible for a client to create an English Will to govern the succession of their entire worldwide estate. Whether this is advisable will depend on the client's particular circumstances, and the location and nature of their offshore assets.

There have been many cases where a Will made in, say, England unintentionally revokes a previous Will made in a foreign country (or vice versa) causing the client to be unknowingly partially intestate.

The main attraction of making a single Will is that the process is usually simpler and quicker, and many clients prefer to use a single document to set out their testamentary wishes. Having only one Will also avoids any possibility for conflict and contradiction between Wills. There have been many cases where a Will made in, say, England unintentionally revokes a previous Will made in a foreign country (or vice versa) causing the client to be unknowingly partially intestate.

The main disadvantage of having a single Will is that it can complicate and lengthen the process of administering an estate after death. The Will needs to be proved by the courts in each state where assets are located (especially where the client holds land), which usually means that the foreign court processes can only begin once the English probate has been granted. This process often requires translations, and foreign courts and lawyers may raise difficulties when asked to implement unfamiliar English-style Wills, and interpret English legal concepts. For instance, many jurisdictions do not have any concept of executors or of trusts, and the inclusion of these in the worldwide Will can produce unexpected outcomes. By contrast, if separate local Wills are in place for each jurisdiction, it is usually possible for the administration to proceed in each state simultaneously and more smoothly.

2. Does the Will have to be signed in England?

Traditionally most clients visit their solicitor to sign their Will but, whilst this is still common, we are now often asked to post a Will to a client to sign at home. This is especially true in the modern age of video-meetings where many clients may never physically visit their solicitor's office.

Special considerations apply if the testator is not going to sign the Will in England, because a Will executed abroad will only be valid for use in England if it is prepared in accordance with the law of:

- the territory where the testator was domiciled, either at the time of its execution or at the time of their death, or
- the territory where the testator had their habitual residence either at the time of its execution or at the time of their death, or
- a state of which, either at the time of its execution or at the time of their death, they were a national.

If the Will is prepared so as to comply with foreign law, it will be necessary to take local advice to ensure the Will is valid.

If the Will is prepared so as to comply with foreign law, it will be necessary to take local advice to ensure the Will is valid. After death, the English court will require evidence that the Will is indeed valid under the rules of the relevant foreign state.

Concepts of domicile and habitual residence (as well as UK 'statutory residence') are worthy of articles in themselves (and indeed many books have been devoted to these topics alone). We often advise on these concepts as they will have a major impact on (a) the law applicable to the succession of a person's estate, and (b) tax.

3. Which country's laws will apply to my estate?

Choice of law is a separate question to validity of a Will. It is possible (and quite common) for a foreign court to accept an English Will as being valid, but nevertheless to apply their own local law to govern how the Will is implemented. This may have a very significant impact – many states have mandatory "forced heirship" provisions which restrict the choices available to testators regarding the distribution of their estates, usually stipulating certain minimum sums or percentages that must pass to a surviving spouse and children. If local forced heirship laws apply, then any contradictory provisions in a Will will be disapplied.

The law applicable to a Will will often also determine the law applicable to govern any trust created by the Will.

The law applicable to a Will will often also determine the law applicable to govern any trust created by the Will. Since many states do not recognise trusts, this is often a crucial question.

English law does not allow testators to choose which law applies to govern their Will. Instead, the succession of English immovable property (i.e. land and buildings) will always be governed by English law, where the succession of movables (including most other types of asset) will be governed by the law of the state in which the testator was domiciled at the date of their death.

By contrast, most European states follow the EU Succession Regulation which allows testators to choose the law of any state in which they are a national to govern the succession of their entire estate. If the English Will is intended to cover assets in an EU state, then it is common to include a choice of law clause.

Georgia Robertson
Associate
01473 406240
georgia-robertson@birketts.co.uk

Emma Rees
Solicitor
01630 756447
emma-rees@birketts.co.uk

Chay Clark
Trainee Solicitor
01245 211390
chay-clark@birketts.co.uk

Fundraising for EACH

Birketts' chosen charity for 2021 is East Anglia's Children's Hospices (EACH) which helps children and young people with life-threatening conditions, providing care and support for the children and their families. Their work includes providing specialist nursing care, symptom management nursing, short breaks and wellbeing activities.

The firm has therefore participated in a wide range of fundraising activities, including bake sales, auctions, cycles and cinema nights. Here, a few members of the Private Client Team share their experiences of various fundraising events throughout the year.

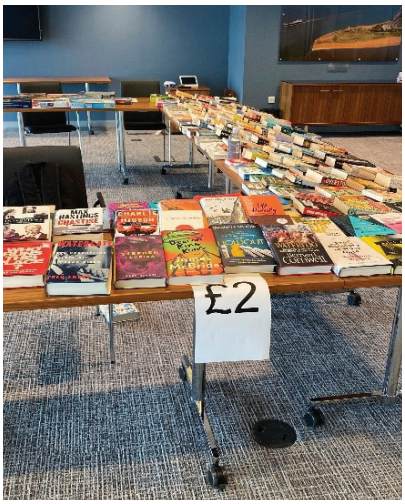
The firm's aim is to raise at least £35,100 in 2021, which is the annual salary of a Clinical Nurse Specialist. EACH currently has 11 of these nurses, providing vital support to the children and their families, but demand for their services sadly continues to increase.

Georgia Robertson

One such event was the Ipswich Private Client Team's recent book sale. Colleagues across the Ipswich office kindly donated hundreds of books, including novels, non-fiction books, children's books and cookbooks, which were then sold at the book sale over an afternoon in August. We raised a fantastic £262.90 on the day and any remaining books will be donated to the EACH charity shops across East Anglia.

"The firm's aim is to raise at least £35,100 in 2021, which is the annual salary of a Clinical Nurse Specialist.

"Whilst the walk involved lots of picturesque views, there also was a daunting 150 metres alongside the A12 and the team were glad to be back in the fields after that section of the trip!



Chay Clark

On 15 July 2021 the Private Client Team embarked on a charity walk with a target of 184km – the distance between EACH's three East Anglian hospices. The team of 14 set off from the Ipswich office at 9:15am, lead by organisers Katherine Webber and Sarah Humphries. A scenic walk from Ipswich to Flatford Mill was planned before heading to Manningtree station for the return journey home. Whilst the walk involved lots of picturesque views, there also was a daunting 150 metres alongside the A12 and the team were glad to be back in the fields after that section of the trip!

Following a slight detour of a few kilometres, the team decided to stop in Bentley for lunch. Following a drop of a location pin, reinforcements quickly arrived with the help of Lucy Edwards and Jane Wilkins, who were kindly holding down the fort in the office. After refuelling and realising they had already nearly achieved their target kilometres, the team decided to make their way directly to Manningtree. The last leg of the journey encompassed lots of sheep, some sore muscles and a few blisters but the team made time for a well-earned drink before heading back to the office. The team walked a total of 20km each, meaning they smashed their target of 184km and increased the fundraising pot to £25,840.

Emma Rees

A Norwich office lead for the firm's 2021 fundraising partnership with EACH, on 17 July Emma coordinated a team of 11 colleagues, including three members of Private Client Advisory Team Norwich, to take part in EACH's Pier to Pier Challenge. The challenge saw the team trekking 33 miles in 10hrs 15mins along the multi-terrain – sand, shingle, path and dunes – coastal trail from Great Yarmouth to Cromer, on what turned out to be one of the hottest days of the year!

Around 100 people took part in all, setting off bright and early from Great Yarmouth Pier at 7:00am. After refuelling and tending to sore feet at four designated stops en route, the team finally arrived at Cromer Pier at 7:00pm, welcomed by a much appreciated round of applause. The Pier to Pier Challenge was a real test of endurance, owing to the distance covered, the miles of sandy beach walking and the scorching summer sunshine. In total, the team's efforts raised over £4,000 to contribute towards the firm's EACH partnership running total for 2021.

"I didn't know you did that..." Court of Protection Team

Jennie Kingham
Senior Associate
(Chartered Legal Executive)
01473 921748
jennie-kingham@birketts.co.uk

Katie Mayes
Associate (Chartered Legal Executive)
01473 921750
katie-mayes@birketts.co.uk

Catherine Frost
Associate (Chartered Legal Executive)
01473 921751
catherine-frost@birketts.co.uk

Whilst the vast majority of our work involves proceedings before the Court of Protection, the team at Birketts also advises in relation to Continuing Healthcare Funding.

What is CHC Funding?

CHC Funding (NHS Continuing Healthcare Funding) is a fully-funded package of care which is awarded by the NHS depending on whether a person's primary need is a health need (irrespective of financial circumstances). The Department of Health produced the National framework for NHS continuing healthcare and NHS-funded nursing care to help decide eligibility for NHS continuing healthcare. If you are eligible and receive care in your own home or in a care home, the services are funded by the NHS at no cost to you. It is important to distinguish NHS Continuing Healthcare from funding from the local authority, the latter being means tested based on your financial circumstances.

Applying for NHS continuing healthcare can be quite complex. Typically, individuals are normally assessed by a healthcare professional using the continuing healthcare checklist to decide whether it is appropriate to undertake a full assessment.

If required, a further assessment will be carried out by a multi-disciplinary team of two or more health or social care professionals. The information gathered will thereafter be used to complete a Decision Support Tool. Assessments are based on an individual's healthcare need; as such there is not one particular condition that will meet the criteria in every case.

If you wish to challenge a CHC funding decision, the framework referred to above provides broad guidelines to the clinical commissioning groups (CCGs) as to how they should address appeals.

Reasons to appeal may include:

- You suspect that fundamental information was incorrect, missing or not considered at the time of the Decision Support Tool meeting
- You do not agree that the correct recommendation on CHC funding eligibility was made following the Decision Support Tool meeting
- You do not consider the process took place in accordance with the National Framework.

Birketts' Court of Protection Team has extensive experience with healthcare appeal applications and can provide advice on the following:

- Current applications
- Previous DST/checklist assessments
- Outcomes of local NHS panel meetings
- Making written representations or attending assessment meetings and panel hearings on your behalf
- Alternative routes to securing funding for care if appropriate.

Charity Trustee Induction and Refresher Virtual Training via Zoom

The Charities Team is delighted to share the news that this popular and successful training seminar is going virtual and will now be delivered via Zoom four times per year. Taking the training online means that location is now no barrier to attendance and we can welcome more delegates than ever before.

The sessions are designed to provide charity trustees with the essential legal training necessary to enable them to comply with law and best practice in fulfilling their duties and furthering the success of the charity.

The training is delivered by Liz Brownsell and Sonya O'Reilly – both experienced and highly regarded presenters – as an interactive 'workshop' style session, utilising case studies and various other small group exercises.

Limited spaces are available for our final session on Thursday 14 October, at a cost of only £50 plus VAT per delegate.

The seminar is split into two sections: the first half will be delivered during a two-hour morning session (9:00am – 11:00am) and the second half will be delivered in a two-hour afternoon session (1:30pm – 3:30pm). Details of other Charities events can be found at Birketts.co.uk/events.

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Cambridge:
01223 326600

Chelmsford:
01245 211211

Ipswich:
01473 232300

London:
0203 553 4888

Norwich:
01603 232300

For a full list of office and contact details please visit

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