



Westgate Point, Westgate, Leeds, LS1 2AX

Tel: 0113 243 6601 / Fax: 0113 234 5088

Web: forwarn.com

email: clientmail@forwarn.com

Autumn Newsletter

FAMILY LAW, DOMESTIC PROPERTY, WILLS, PROBATE AND TAX PLANNING

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Lasting Powers of Attorney (LPAs) for Property and Financial Affairs – Post Registration Problems

There are reports that many people are experiencing difficulties with Lasting Powers of Attorney when they contact banks or other financial institutions to lodge the LPA with them and register the Attorneys interest. Some people, it seems, are now beginning to question the benefit of an LPA.

On some occasions only one Attorney appointed under an LPA can be registered on a cheque book or for internet banking. The other Attorney or Attorneys must always provide instructions in person. This makes the LPA inflexible and leaves Attorneys having to decide who is going to be able to visit the bank. Worse, one or two banks refuse to accept LPAs at all.

None of this was the intention of the Office of the Public Guardian which oversees LPAs. Banks have a duty to protect against financial abuse by third parties. Banks should not question the validity of an LPA once registered by the Office of the Public Guardian.

LPAs were introduced in October 2007 following the implementation of the Mental Capacity Act 2005 and replaced the previous Enduring Powers of Attorney. The latter were vulnerable to tricksters, and there was widespread financial abuse before LPAs came in.

Our advice in attempting to avoid issues on registration at banks and/or financial institutions following receipt of a registered LPA from the Office of the Public Guardian is as follows:

- to try and arrange an appointment or speak to a bank clerk with some expertise in LPAs
- to involve a solicitor experienced in dealing with LPAs if you have difficulties
- if possible take the donor with you to the bank on one occasion, if they are still capable

LPAs – Post Registration Problems

- where possible to visit a larger, city centre branch which often has more experienced staff
- to consider changing banks if they will not help or cause difficulty in allowing an Attorney or Attorneys access to the accounts

Many banks require that the initial registration of an LPA by the attorneys takes place in person in the branch with the attorneys having to supply ID documents in much the same way as they would if opening a new account for themselves personally. Some banks are entirely flexible and even allow attorneys to manage donor's accounts online.

None of the above should detract from the importance of having an LPA. Without an LPA, third party access to a bank account is difficult, if not impossible without obtaining a Deputyship Order from the Court of Protection. This is more expensive in terms of the initial application (£400 for the Court of Protection fees alone) and the Court of Protection also charge annual fees which can be up to £800 per annum depending on how much supervision is required.

It takes 21 weeks to obtain a Deputyship Order. The period for registration of an LPA is 6 to 8 weeks.

Under an LPA a person is choosing who they wish to be their Attorney or Attorneys in the future and how they should act. If a person has become incapacitated they are unfortunately unable to provide such instructions and therefore do not have the control over who would act as their Deputy. An estranged wife or child may therefore become the deputy.

Ford and Warren is happy to provide assistance to Attorneys in respect of the initial stages of registering on accounts with the relevant banks, and generally to assist in all aspects of LPAs and Deputyship Orders.

Saving IHT and Transferring Company Shares into Trust

If you hold shares in a private trading company, it is likely that they benefit from full Inheritance Tax (IHT) relief. This is under threat from the Government. If you transfer your shares into trust, you may protect the full relief currently available. The immediate threat is the next Budget. The current full relief from IHT could be lost from that date if nothing is done.

To benefit from current full relief from IHT on your company shares:

- 1 The company needs to be trading
- 2 You need to have held the shares for 2 years

By transferring your shares into trust, you can retain the full relief from IHT even if legislation changes. The key is to have the shares in a trust before legislation changes.

Property Development Companies

If you have shares in a company that owns properties simply to draw rental income, this is not a trading company and there is no IHT relief. However, if the majority of the company is engaged in building and developing properties, or other trading activities, then reliefs against IHT will normally be available. A majority means a greater share of the net asset value, and profit being in excess of rental income.

What is a trust?

A trust is a way of holding assets on behalf of someone else. If you have a bank account for a child or grandchild who is a minor, you hold the money in trust for that child.

What kind of trust?

Normally, you would use a discretionary trust, which is very flexible? This means that you can influence the running of the trust during your lifetime. You do not need to give up control of the shares completely if you use a trust.

Who should be trustees?

You would ideally choose trustees who you implicitly trust, and who understand something about the shares or about the company.

You may choose trustees who are family members. However, with a trust for company shares it is often more important for them to be able to take the right decisions on your behalf, than that they are a close relative. If they are both, that is fine.

Influence and Letters of wishes

The way you influence the decision-making by the trustees is by making a separate letter of wishes. Through this, you can influence the actions and decisions the trustees take. You can also amend the letter of wishes over time, while you are alive.

You can also keep shares in your name, and maintain control through the shares you own. However, you will only preserve the full relief from IHT through the shares in the trust.

Receiving an income after creating the trust

You may lose your right to dividend income if you put all your shares into trust. However, it is possible to maintain an income in a different form through a service agreement.

Pitfalls

The dividends payable on the shares will be taxed at 42.5%.

In addition, the shares need to be retained in a trading company. If the shares stop being used in trading activities for more than a short period, they may lose their relief from IHT.

If the shares are turned into cash, then a small amount of IHT may be payable every 10 years, at 6%. But this is only paid on cash assets over the Nil Rate Band (or tax-free amount) of £325,000.

Summary

There is a real advantage of considering a trust for shares you hold in a private trading company. If you have shares worth £1 million, and the rate of relief from IHT soon drops to 50%, then the trust will have saved you £200,000.

However, there are advantages and disadvantages, and you need to know more about the pitfalls before you follow this route. There is also the question of the cost. Please contact Ben Lowe on 0113 2436601 or at ben.lowe@forwarn.com if you wish to know more

Environmental Reports

We have obtained an Environmental Report on each property we deal with on behalf of a purchaser for many years now, since the introduction of the contaminated land regime. Under part 11A of the Environmental Act 1995 which came into force in England on 1 April 2000 and Wales on 15 September 2001 such reports are recommended.

There is a risk to all property that the land upon which the property is built may have environmental issues. Land contamination can go back many years and arise from previous uses of the land. Examples are :

- there was previously a petrol station built on the land and the petrol tanks are still in situ buried beneath the surface
- the land could have been used as a grave yard for dead animals
- a water course could run under the surface of the land.

Whilst the contaminated land regime sets out liability for the contamination of the land and compensation for remediation, the key issue is to protect the client against buying a property with any environmental issues. We follow Law Society recommendations and request an Environmental Report on each and every property purchase we deal with.

The Council of Mortgage Lenders Handbook section 5.2.4. provides guidance on the required searches. Without an Environmental search it is impossible to fully advise and protect the client against any potential or real environmental issues affecting the land and ultimately the property.

The Environmental report will contain a professional opinion on the level of environmental risk either confirming the property has "passed" or has to be "referred".

If a passed certificate is given the chartered environmental surveyor considers the property would not be designated as "contaminated land" within the meaning of Part 11A of the Environmental Protection Act 1990.

If a referred result is given then further investigation action is required. This may involve contacting the local authority, original builder, the NHBC (if applicable) and the planning authority for the area. It may be the case that specialist investigations of the land will need to be carried out and remediation works required.

Pre Nuptial Agreements - *Rachmacher v Granatino*

No doubt you will have seen the headlines in the news recently about the wealthy German heiress who's pre nuptial agreement has just been upheld by the Supreme Court. In that case the wife was estimated to be worth some £100 million. She and her husband-to-be entered into an agreement 3 months before they were married. This held that should they separate he would not seek to claim anything from her for himself.

The full judgment of the Supreme Court runs to some 195 paragraphs over 70 pages. Here we attempt to summarise, in 4 lines, what this actually means for couples contemplating marriage.

The case does NOT mean that pre nuptial agreements should, as a matter of law, always be binding. However:

- For agreements entered into before marriage after 20 October 2010;
- Where the agreement has been entered into voluntarily and with a full understanding of its implications;
- Without undue pressure or material lack of disclosure, information or advice;
- The court is likely to consider it is fair to hold the parties to that agreement.

So not the radical change in law that the press have perhaps portrayed but a significant shift to bring England & Wales into line with Europe and the US. The Law Commission is currently reviewing the status and enforceability of such agreements and is expected to report with detailed proposals for legislative reform that Parliament can consider soon.

There are some very specific requirements that must be adhered to if the agreement has any prospect of being upheld. It is therefore extremely important that considered legal advice is obtained in relation to your particular circumstances. To make an appointment with one of our specialist Family Law lawyers please contact Paul Milligan.