

Private Client Newsletter

Lasting Powers of Attorney

1 October 2009 marked the second anniversary of Lasting Powers of Attorney ("LPAs") and also saw the introduction of new, revised LPA forms. LPAs are therefore topical and were one of the subjects discussed at the recent Rollits seminar "Back to basics – Planning your Financial Affairs".

For those unfamiliar with LPAs, they are a legal document allowing a person (called "the Donor") to appoint one or more persons ("the Attorneys") to make decisions and take actions on the Donor's behalf in the future, usually if the Donor ever loses mental capacity.

Briefly, there are two types of LPA – one to delegate decisions about property and financial affairs and another for personal welfare and healthcare matters. The two types are made on separate documents and you can make both, or just one, as you wish.

You may be familiar with Enduring Powers of Attorney (or "EPAs") which had a similar function with regard to financial affairs. LPAs have replaced EPAs and it is no longer possible to make an EPA after 1 October 2007. If you have a valid pre-October 07 EPA, however, this will continue to be valid.

LPAs have to be registered at the Office of the Public Guardian ("OPG") before they can be used. Registration is completely independent of whether the Donor has mental capacity. An LPA can be registered at any time after being made. Once registered, a Health and Welfare LPA can only ever be used by the Attorneys if the Donor lacks capacity. A Property and Financial Affairs LPA can, once registered, be used when the Donor lacks capacity or whilst the Donor still has capacity (like an ordinary Power of Attorney) if the Donor wishes.

When LPAs were introduced they were not warmly welcomed – it was feared they would be too complicated and expensive. Various problems emerged, for example, the forms were very long (25 pages each) and not user friendly. There were delays at the OPG and in some cases it was taking over 3 months to register an LPA, which should take 6 weeks.



A public consultation was launched and the good news is that things have improved. There are fewer delays at the OPG and the new forms introduced on 1 October 2009 are shorter and more user friendly. Also the LPA registration fee was reduced from £150 per document to £120.

Creating an LPA does still take longer than an EPA, but there are good reasons for this. LPAs are actually more wide-ranging, giving more choice and protection for the Donor. For example:-

- The option of appointing Attorneys for health and personal welfare matters is entirely new and has never before been available.
- The LPA must be signed by an independent "Certificate Provider". Their role is to discuss the LPA with the Donor and confirm that the Donor understands the LPA and is not under any undue pressure to make it. This is an important new safeguard.
- The Donor can now choose who is notified when their LPA is registered. With EPAs there was no choice.
- It is easier to appoint a replacement Attorney

LPAs brought these, and other, advantages. LPAs are now the only way you can appoint an Attorney to act if you lose mental capacity and so are a vital part of Estate Planning. LPAs can avoid the complications and costs that arise where a person loses mental capacity without having appointed Attorneys. Most importantly, LPAs bring peace of mind, knowing that if you lost mental capacity, your financial or personal affairs would be dealt with by someone you have chosen, someone you trust and who knows your wishes.

If you are interested in LPAs, we would be more than happy to discuss them with you generally or with regard to your personal circumstances. Please contact Sue Brad on 01904 688504 or email susan.brad@rollits.com

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Use of trusts for estate planning

In spite of its Dickensian image, the family trust continues to be an extremely useful and flexible tool for estate planning, whether it be for asset protection, income streaming or to mitigate the effects of capital taxation.

It was initially thought that the changes to the tax treatment of Trusts announced in the 2006 Budget sounded the Death Knell for private trusts, and indeed, some of the advantages previously enjoyed have been lost. However, with the passage of time, it has become clear that there is still much to be gained through the use of trusts as part of a well thought-out estate planning scheme.

Whilst the scope for creating trusts containing cash or traditional investments has now effectively been limited to the value of an individual's Inheritance Tax ("IHT") allowance (£325,000 in 2009/10), if an immediate charge to IHT is to be avoided, there are no such constraints placed upon settlements containing assets that qualify for relief from IHT such as Business or Agricultural property. The fact that the IHT rules allow gifts into



trust to fall out of account after 7 years also gives scope for trusts to be "topped-up" at regular intervals meaning that substantial sums can be settled over relatively short periods, particularly where each spouse ensures that regular use in made of the individual IHT allowance. These types of trusts can be of particular benefit to grandparents wishing to provide for grandchildren, for example to pay tuition fees.

In addition, careful use of the generous

IHT exemption given to regular gifts made out of surplus income can also allow substantial sums to build up in trusts in appropriate circumstances, and at Rollits we have been looking at ways in which this exemption can be used to mitigate IHT in relation to assets (for example investment properties) which would not ordinarily qualify for relief.

If you are interested in discussing this topic further please contact John Lane on 01904 688506 or email john.lane@rollits.com

Will drafting and the transferable nil rate band

The pre-budget statement made on 9 October 2007 introduced the "transferable nil rate band". Before the pre-budget statement it was common practice for both parties to a marriage or civil partnership to execute Wills which provided for a legacy of the first party's nil rate band into a discretionary trust. The residue of the estate passed to the survivor absolutely.

The purpose of such Wills was to make use of both parties available inheritance tax allowances ("nil rate bands") and to mitigate the potential inheritance tax liability on the death of the survivor.

This concept of the transferable nil rate band applies when one party to a marriage or civil partnership dies and the amount of their taxable estate does not use up all of the nil rate band. In such circumstances the unused part of the nil rate band can be transferred to the estate of the survivor. The survivor's estate can benefit from up to two full nil rate bands at the rate applicable on the survivor's death. The current nil rate

band for 2009/2010 is £325,000, so if none of the first party's nil rate band is used on death and the survivor has their own full nil rate band available then such survivor's estate may have a combined nil rate band of £650,000. Please note the nil rate band is due to increase to £350,000 in April 2010.

It has been said that the introduction of the transferable nil rate band has rendered such discretionary trusts redundant as an inheritance tax planning tool. However, in some circumstances this may not be correct. In addition, the flexibility available from a well drafted discretionary trust can offer other planning opportunities.

Such discretionary trusts are still an effective means of protecting assets from local authority charges for residential care fees. A discretionary trust of the nil rate band may also be used to retain part of the first party's estate and to shield such part from children or grandchildren on the death of the survivor. This may be beneficial if there is a wayward child or grandchild in the family and there is a real concern about what may happen to any assets received by such child or grandchild.

It is important that you review your Wills on a regular basis, particularly following a significant change in your own personal circumstances. As can be

Pre-Nuptial and Post-Nuptial Agreements update

Pre and Post-Nuptial Agreements have hit the headlines following two recent Court cases.

Pre-Nuptial Agreements

Whilst the law presently states that Pre-Nuptial Agreements are not enforceable, a carefully worded document is still taken into account when dividing assets at the time of divorce. In July 2009 however, Katrin Radmacher successfully persuaded the Court of Appeal to uphold her Pre-Nuptial Agreement thereby preserving wealth she inherited from her family.

Whenever there is inequality of age, wealth or circumstance between prospective spouses, a Pre-Nuptial Agreement is a form of insurance against an event that everyone hopes will never happen.

As demonstrated by the Radmacher case the judiciary increasingly support documented financial arrangements made between people who fully understand the consequences of their



agreements in the event of a subsequent divorce.

The Law Commission are presently considering the issue of Post and Pre-Nuptial Agreements with a view to drawing up a draft Parliamentary Bill by 2012.

The Conservative Party have announced that if they form the next Government they will change the law to make Pre-Nuptial Agreements binding.

A Pre-Nuptial Agreement is a contract that protects and preserves family wealth thereby providing peace of mind and comfort to everyone involved.

Post-Nuptial Agreements

The law already states that Post-Nuptial Agreements are binding. This was confirmed by the Privy Council decision of MacLeod v MacLeod in December 2008.

A Post-Nuptial Agreement is a written agreement setting out financial arrangements agreed between a married couple including payment of monies, disposition and use of property. Only if there is a change of

circumstance, or there is inadequate provision for children, can the Court vary these arrangements. Mr and Mrs MacLeod's Post-Nuptial Agreement confirmed the detail of their Pre-Nuptial Agreement and therefore they were bound by the terms of both Agreements.

To ensure that Pre and Post Nuptial Agreements are not challenged due to material non-disclosure or misrepresentation both parties should receive legal advice as to the effect of the Agreement and full financial disclosure should be exchanged.

If these requirements are met, couples can determine between themselves what they consider to be a fair division of assets and other financial provision in the event of a marital break down.

Signing a Pre Nup before and a Post Nup after the marriage could save upset and cost for everyone.

For advice in relation to preparing a Pre or Post-Nuptial Agreement please contact Sheridan Ball on 01482 337361 or email sheridan.ball@rollits.com



seen from the above paragraphs the introduction of the transferable nil rate band may help to reduce the potential inheritance tax liability, but there are still reasons why you may wish to retain the discretionary trust of the nil rate band in your Wills.

For further information or to review your existing arrangements please contact Richard Whittaker on 01482 337220 or email richard.whittaker@rollits.com

Cohabitation agreements

It is increasingly common for couples to choose to live together rather than marry. Before living together couples rarely consider the financial and legal ramifications of that decision. If that relationship subsequently breaks down then there is a completely separate statutory regime to deal with the consequences of that separation as opposed to divorcing couples. There is no such thing as a common law husband and wife.

The Matrimonial Causes Act 1973 provides statutory protection to couples divorcing and allows the Court to assist in addressing all aspects of financial claims between a husband and wife. This can include resolving sharing income, distribution of capital assets and pension claims. There is no equivalent protection for cohabitants.



The existing situation

Where there are minor children then the Children Act 1989 will allow the Court to intervene and settle, for example, where children will live, the time they will spend with their other parent and with specific issues such as removal from the jurisdiction and schooling. Schedule 1 to the Act gives the Court the ability to deal with financial arrangements for children, for example in making lump sum payments to the parent with care to provide for specific expenditure, payment of school fees and even to settle property upon the other parent to enable them to provide a home for their children whilst in their minority.

As between the couple themselves there are limited possibilities. They may need to fall back to claims under the Trust of Land and Appointment of Trustees Act 1996. If a claim can be established then the Act allows the Court to fix interests in land and deal with any proceeds of sale.

Example 1: Annette and Bob decide to live together. Bob owns his own home

and it is agreed that Annette will give him £50,000 to pay for an extension to the property. The money is paid into Bob's bank account and thereafter used to pay the builders and other associated work on the property. If Annette and Bob then separate Annette would have a good expectation to receive her £50,000 back, possibly establish a percentage interest in the house which over time may have accumulated value. In those circumstances there is a clear paper trail and in all likelihood the claim Annette makes would succeed.

Example 2: Annette and Bob decide to live together in Bob's house. Bob pays the mortgage and Annette makes no capital contribution towards the property but on a monthly basis Annette gives Bob £500 towards electric bills, other utilities and food, etc. If Annette and Bob separate after say 10 years could Annette establish a claim against the property? In all likelihood this would turn on whether or not Annette could persuade a Judge that her contribution was referable to the property rather than general living expenses.

In these cases it is all an issue of interpretation and a sometimes arbitrary decision by the Judge hearing the case. The costs are prohibitive, cases can take substantial time to conclude and there is absolutely no guarantee as to the outcome.

What are the alternatives?

Increasingly there is a trend towards couples making Cohabitation Agreements to provide clear evidence of what the couple intended to do and how their financial arrangements are to be dealt with for the period of their relationship and after separation.

The Cohabitation Agreement needs to be in writing but does not need to be in any particular format. Ideally both parties should have separate legal advice and the Agreement itself can be as extensive or limited as suits

a particular circumstance. A properly drafted Cohabitation Agreement is clear and unambiguous and will be binding on the couple in the event of their separation. The terms will be enforceable by the Court. The benefits are that they provide certainty to allow a couple to avoid unpleasant and costly proceedings. They are equally, if not more valuable if the aim is to safeguard assets or family wealth, ie to avoid potential future claims. Where there is an inequality in financial position between a couple contemplating cohabitation then an agreement in writing at the outset could be crucial.

For more info contact Karen Myles on 01904 688507 or email karen.myles@rollits.com

Information

If you have any queries on any articles in this newsletter please contact:
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email john.lane@rollits.com

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