Hewitsons Private Wealth

LEGAL UPDATE

Absolute Client Focus

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Courts will vary Trustees' powers where it benefits the Trust

Clare Colacicchi
Partner

The High Court recently held that a trust document created by the 11th Duke of Marlborough for his descendants should be varied using the court's administrative powers to deal with trust property (section 57 Trustee Act 1925), because it would benefit the Trust and its beneficiaries.

The Trust created in 1986 consisted of 166 acres of agricultural land in Woodstock. The Trustees sought new powers to allow them to enter into a deed of covenant to pay part of the proceeds of sale of the Woodstock land to a charity company. The Trustees also sought the court's permission to allow retiring trustees to be discharged, even if only one trustee would remain.

The High Court held that the trust deed could be amended using the court's administrative powers because the court was satisfied that the Trustees did not have the proposed power and that the proposed power was needed to manage the Trust. The court also considered the effect of the variation

on the beneficiaries, and concluded that it was practical for the power to be granted.

The Variation of Trusts Act 1958 empowers the court to approve any arrangement which varies or revokes all or part of the trust settlement, provided that the arrangement would benefit any minor, incapable adult and any potential unknown beneficiary. This case highlights that in addition to the Variation of Trusts Act, the court can vary the Trust using its general administrative powers.

Hewitsons have acted on several similar cases. If you are acting as a Trustee and would like advice on how to vary the Trust, please contact Clare Colacicchi on 01604 463317 or click here to email Clare.

Jersey residents can now create Lasting Powers of Attorney

Carolyn Bagley
Partner

The Capacity and Self Determination (Jersey) Law 2016 which came into effect on 1 October 2018 introduced the concept of Lasting Powers of Attorney (LPA) into Jersey law.

An LPA is a document which allows an adult with mental capacity (the Donor) to choose another person(s) (the Attorney(s)) to make decisions on his or her behalf. There are two types of LPAs known as Property and Financial Affairs LPA (PFA LPA) and Health and Welfare LPA (HW LPA).

The PFA LPA allows attorneys to make decisions concerning the donor's finances, before and after they have lost mental capacity. The HW LPA allows the attorneys to make decisions on the donor's health and care needs, only if they have lost capacity. An individual with mental capacity can make one or both LPA.

Previously, Jersey residents could only appoint an attorney to assist with their finances through a general power of attorney. The general power of attorney was limited in use and was immediately invalid when the donor lost mental capacity – a major disadvantage. Thus, where a Jersey resident lacked capacity a Curator had to be appointed by the Royal Court to manage their affairs – an unwanted expense and inconvenience for the relatives.

The new legislation brings Jersey mental capacity law in line with English law by allowing Jersey residents to create LPAs to manage their finances, their health and care needs and to apply for a Statutory Will for someone who is not capable of making a Will themselves.

English LPAs that are correctly registered with the Office of Public Guardian (OPG) were recognised in Jersey only where it has been re-registered with the Jersey Royal Courts. The new legislation removes this additional burden and states any registered powers of attorney within the British Islands will have effect as an LPA created and registered in Jersey.

If you would like advice on English LPAs and/or you have assets in Jersey jurisdiction, please contact either Carolyn Bagley, Bernadette O'Reilly or Francesca Rossi.

Occupation is a requirement for Principal Residence Relief

Eric Wardle
Chartered Accountant

Where Principal Residence Relief (PRR) applies, a taxpayer who sells their main residence does not have to pay capital gains tax (CGT) on the sale.

A recent Upper Tribunal decision held that a homeowner could not claim PRR for the period where he was not living in the property, despite there being an exemption which can cover a period of non-occupancy while a house is being prepared for occupation.

In 2006, Mr Higgins paid the deposit on a flat at St Pancras Station which was being built by a developer. The flat was not finished until January 2010 when Mr Higgins moved in. Exactly two years after, he sold the flat. Mr Higgins claimed CGT relief for the whole period of purchase (from 2006). HMRC disagreed and charged Mr Higgins with CGT liability for the pro rata period before he moved into the property in January 2010.

The Upper Tribunal held in favour of HMRC and stated that Mr Higgins' flat was taxable from the moment he exchanged contracts, but PRR only applies from the moment he started occupying the property (subject to a statutory period for renovation which did not cover the whole period) .

If you are considering purchasing or selling a property and would like advice on the tax implications, please contact Eric Wardle on 01604 463110 or click here to email Eric.

House Sales/ Reporting Requirements – Use the white space note!

Elaine Morgan
Senior Tax & Trust Manager

HMRC are vigilant regarding all property transactions, and over time its breadth of property information has grown. HMRC now keeps accurate records of taxpayers who:

- own multiple properties;
- have sold a property in the tax year;
- or have not declared any gains on the sale of a property.

HMRC enquires extend to the application of the Principal Residence Relief (PRR). PRR applies where an individual sells their home and provides an exemption from capital gains tax (CGT). Taxpayers should keep accurate records to prove PRR applies, or risk being called (along with their advisers) to provide evidence that no capital gains tax is due. It is advised that a 'white space note' should be used to notify HMRC where PRR applies, and this should provide some protection against unexpected future penalties should HMRC disagree about the application of PRR.

Where the taxpayer owns multiple properties, making a main residence election is not sufficient. Evidence must be

provided to support the claim that the sold property was the principal residence – this includes evidence of the taxpayer's personal circumstances i.e. proof of residence at address.

For complete security – use a professional!

For advice on the Capital Gains implication on the purchase or sale of your property, please contact Elaine Morgan on 01604 463120 or click here to email Elaine.

Warning: Only trust regulated firms with your life savings!

Tiffany Benson
Associate

Universal Wealth Preservation (Universal) was an unregulated company that set up trusts, handled investment and produced Wills – often appointing themselves as executors and trustees. They held seminars persuading clients they could help them avoid paying inheritance tax and care home fees. The company was dissolved in early 2018, and Suffolk Constabulary announced an investigation on suspicion of fraud by two individuals connected with the firm.

Unfortunately, Universal clients now face the prospect they are unlikely to retrieve original documents or to recover cash assets. The business premises have been closed, the company website taken down and difficulties remain in contacting Universal.

The reality is that little to no client protection exist where unregulated firms (i.e. not authorised by Solicitors Regulation Authority (SRA) or the Financial Conduct Authority (FCA)) are used. Unregulated companies do not have the appropriate insurance or training and are not answerable to any organisation – so such service provider should be avoided. It should be noted that such unregulated companies are legally allowed to use the terms lawyer, or legal services, to advertise themselves. Only the word "solicitor" is regulated and so you should be wary of "lawyers" – are they regulated solicitors?

The Society of Trust and Estate Practitioners (STEP) - a professional body promoting training and high professional standards in the private wealth sector - advises Universal clients to:

- Seek independent legal advice from experienced trust and estate practitioners to put things right before it is too late to do so.
- Check whether LPAs have been registered with the Office of Public Guardian. If so, cancel LPAs which appoint Universal as attorneys.
- Create new Wills and LPAs, where there is still sufficient mental capacity and seek specialist advice where there is not.

- In the situation where a Universal director was appointed as executor and their customer has died, contact the Probate Registry who can exercise special court powers to appoint new executors.
- Make a report to Action Fraud quoting 'Operation Ardent', if appropriate.

The trust and estate planning sector is not regulated in England and Wales, which means anyone can set themselves up to advice on Wills and estate planning, regardless of whether or not they are qualified, trained, insured or regulated. The Universal situation highlights the importance of using regulated firms to protect your assets. Where a regulated firm is closed or investigated, client's assets remain protected and can be recovered.

For more information on the STEP guidance, click here. If you have been affected by the Universal situation and would like advice, please contact Tiffany Benson on 01604 463340 or click here to email Tiffany.

Transferring foreign assets

Carolyn Bagley
Partner

Many individuals hold bank accounts in different jurisdictions like England, Jersey, Singapore and Dubai. These accounts are part of the individual's assets and will form part of their estate on death. A recent judgement in the Jersey courts highlights the importance of knowing the foreign rules when transferring cash in a foreign bank account.

Bank accounts are considered 'movable assets'. This means that the money in that account must be distributed in accordance with the inheritance laws of the country where the deceased had their domicile (permanent home country). If an individual is domiciled in England, the English courts would uphold an English Will of worldwide movables (foreign bank accounts). However, getting those foreign banks and courts to obey the English court order is not always easy.

The Jersey case concerned a large international bank which paid money out of the deceased's Jersey account without first insisting on a Jersey Grant being obtained. The distribution would have been different. Similar to the UK system, a Grant of Probate is needed there as authority for the Personal Representatives to deal with the deceased's estate. Banks have a responsibility to release funds to the right person and the Grant provides this evidence. As a result of the bank's failure to require the Grant, they were fined £25,000. It serves to highlight that advice should be taken on the effect on your Will, and indeed on your domicile status, before acquiring assets abroad.

Where a person dies owning assets in two or more countries, it is usually necessary for a Grant of Probate or its equivalent to be obtained in both or all of the countries where the assets are located. Certain countries allow a Grant of Probate from the "home" country to be 're-sealed' in the other country and this saves the cost of going through the entire process separately. Generally this applies to English Grants being resealed by Commonwealth countries.

For more details on domicile and countries where resealing is possible, please contact either Carolyn Bagley, Bernadette O'Reilly or Francesca Rossi.

"Dormant"/ Pilot Trusts now also need registering in 2020.

Elaine Morgan
Senior Tax & Trust Manager

The UK Trust Registration Service (TRS) was established to register all *express trusts* (i.e. an arrangement with a clear and deliberate intention to create a trust) in the UK. Originally it included only those trusts which have a *tax consequence*. A *tax consequence* means that the trust is liable to pay one of the following taxes: Income Tax, Capital Gains Tax, Inheritance Tax, Stamp Duty Land Tax or stamp duty reserve tax. However, in June 2017, a new EU Directive (5AMLD) removed the tax consequence requirement and provides that the TRS must register all express trusts from 10 March 2020.

This means all trusts in the UK may now have to be registered. This will include" dormant trusts" or those which do not yet have active assets, such as life insurance policy trusts, discounted gift trusts (and perhaps even some assets owned jointly.

Offshore trusts created by non-EU residents which relate to UK properties and business will also have to be registered. It is estimated that around two million trusts will be affected.

Details of the trust's beneficial owners – including settlor(s), trustees and beneficiaries – and the value of the assets at the start of the trust must be disclosed on the trust register. Once registered, the trustees must ensure that the trust's details on the register are accurate and kept upto date.

If you are a trustee of an express trust, please contact Elaine Morgan on 01604 463120 or click here to email Elaine for advice on registering the Trust.

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