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INSIGHT

MAY/JUNE 2021

Welcome to the May/June edition of Poole Alcock Insight

This issue contains articles on:

- Conveyancing - Safe as Houses
- Family – Nuptial Agreements
- Wills and Probate - The Pitfalls of a Home-Made Will
- Employment - Mental Health in the Workplace
- Litigation - Contesting the Validity of a Will

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SAFE AS HOUSES

WRITTEN BY

CHERRY RIDDLESDIN,
PARTNER - HEAD OF RESIDENTIAL CONVEYANCING

Cherry Riddlesdin is a Partner and the Head of the Residential Conveyancing Department at Poole Alcock. Cherry originally joined Poole Alcock in 2005 and qualified in 2007. After spending some time with another prominent law firm, she returned to Poole Alcock in 2014. She is focused on achieving each client's objective, and has a practical, proactive approach.

IF YOU ARE PLANNING A MOVE, OR A REMORTGAGE, PLEASE GET IN TOUCH WITH CHERRY

She and her team would be delighted to help you.

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PROPERTY FRAUD IS AN ONGOING BATTLE FOR ALL CONVEYANCERS, AND SOMETHING WHICH ALL HOMEOWNERS AND PURCHASERS NEED TO BE ALERT TO.

One of the most worrying types of property fraud is when a criminal manages to successfully persuade a buyer, conveyancer and/or a lender into believing they are the true owner of a property, which they then sell or remortgage to get their hands on a huge chunk of cash – leaving the true property owner well and truly out of pocket. Properties that can be most at risk are high value, empty or tenanted properties without a mortgage, but any property can be targeted.

If you are buying, selling or remortgaging a property, your conveyancer will require you to provide evidence of your identity. Many law firms now use online platforms to verify ID, and this has become even more important during the past year – avoiding the need to post original documents or come into the office.

Poole Alcock uses a platform called 'Thirdfort' which operates a range of secure technologies to ensure that the ID documents being provided are true documents, and that the person presenting the documents is the same person as shown in the ID documents. The process is similar to that which you would go through if you were opening an online bank account or downloading the NHS app for instance, and makes use of biometric and cryptographic technology. So however much you may feel you have changed since that passport photo was taken, the app will still know that it is you.

You will be sent an invite to download the app, which will then walk you through the process which includes taking photographs of your documents on your smartphone, and then recording a short video of yourself to confirm that you are the person shown in the ID document.

The pandemic has forced many changes upon all of us and has heightened the reliance on online ID verification. HM Land Registry, at the forefront of the battle against property fraud has confirmed that online ID is often the most resilient form of ID verification and has set out the standards which HMLR believe provide best practice for conveyancers. They call this standard the 'Safe Harbour' standard and requires the user to have a biometric passport – which all current UK passports are – and two pieces of documentation which confirm their address, such as recent utility bills and bank statements, or home insurance policies or driving licences. We are proud to say that our chosen provider, Thirdfort, is working to these standards, and our use of this technology is just one example of how seriously we take your security.

SDLT – NON-RESIDENTS FACE A 2% PREMIUM

A recent change in the law means that any non-UK residents who are purchasing a residential property in England now face a 2% surcharge on their Stamp Duty liability, for any purchase over £40,000.

Crucially, this will depend on your residence, not your nationality. So a UK national who is resident in Spain, for instance, and now purchasing a property in the UK would be liable. Whereas a Spanish citizen, who is resident in the UK would not be.

In addition, if there is more than one purchaser, both (or all) purchasers must be UK residents to avoid the surcharge, unless you are married or civil partners. Spouses, or civil partners, will both be treated as UK residents where they are living together and one member of the couple is a UK resident.

The test to determine whether or not you are a UK resident for the purposes of this tax is different to the normal UK statutory residency test used for income and capital gains tax purposes. For stamp duty purposes, you are considered a UK resident only if you have been, or will be, present in the UK for 183 days during the year before or the year after the purchase. Which means that it could be very easy for someone who travels for work, or who studies abroad to be caught out.

If, at the point of purchase, you have not spent 183 days of the year prior to the purchase in the UK, you will need to pay the surcharge within 14 days of completion of the purchase. If during the following year, you then spend 183 days in the UK to meet the UK-residency test, you would then be able to reclaim the overpayment. Any claim needs to be made within 2 years of the purchase completion date.

If you are purchasing and believe that the surcharge may affect you, speak with your conveyancer as soon as possible. **Call us on 0800 470 0336.**

STAMP DUTY HOLIDAY UPDATE

The 'stamp duty holiday' introduced last summer is coming into its final few months. Having originally been due to end on 31st March this year, the chancellor provided an extension of the full holiday until the end of June, with a tapered further extension until the end of September for properties up to £250,000.

In essence, the holiday meant that whereas ordinarily stamp duty is payable on any purchase over £125,000, this lower limit was temporarily increased to £500,000. From 1st July the threshold reduces to £250,000 before returning to £125,000 on 1st October.

The holiday was intended to reignite the housing market after the initial strict lockdowns at the beginning of the pandemic, and it certainly achieved this. The property market has been as busy as many professionals can remember it. Which is great news even though this has also caused many challenges at a time when law firms, lenders, and councils have had to adjust to remote working, often with reduced manpower.

We are now only a few weeks away from the first deadline of 30th June – anybody purchasing for anything over £250,000 will be extremely keen to ensure that their completion goes through before this date. Completing just a day later would mean having to find up to £12,500 more to purchase exactly the same property.

However, getting to completion can sometimes seem tricky. Due to the increased numbers of transactions currently in progress across the country, combined with the fact that many organisations are still working remotely, many transactions are taking much longer than we would normally expect, and getting all parties in a chain to the point of completion is key. Where there is a chain of people moving, every single part of that chain must be ready before anyone can complete. At Poole Alcock we are making huge efforts to try to get as many people as possible moved whilst also protecting our colleagues from the vast pressure and expectation which will be on them.

We believe that clients should certainly expect to hear from us weekly, by phone or email. However, particularly during the run up to the end of the SDLT holiday, it would be really helpful if they could resist calling us to request updates in the meantime – we would like to spend as much time as possible progressing files. Don't feel that you can't call or email us, but please accept that your conveyancing teams are under unprecedented pressure from almost every single client to complete before the end of the holiday. They will deal with your messages, but are likely to respond fully when they are working on your file, rather than responding to individual messages one at a time.

In the meantime, give serious thought to the possibility of a completion after the end of the holiday. If you are buying, what would be your stamp duty liability after that date, and would you be prepared to carry on with your transaction?

Some people – for instance, first time buyers who will still benefit from First Time Buyers Relief after the end of the holiday - may even prefer to complete later: removal companies are likely to be easier to book, and the current Covid restrictions will hopefully have been lifted meaning that friends and family would be able to help you move. If this is you, let us know!

RECENT TESTIMONIALS:

"Nicola Fury and the team were professional and approachable whilst they were dealing with my sale."

Nathan

"From the offset Poole Alcock were friendly, clear & knowledgeable, & up front with the pricing they put forward. It wasn't the easiest process but they were always easy to contact & get advice and they kept me up to date with progress. Ultimately the sale and purchase went without hitch so I was very happy with the service they provided. I'd definitely recommend them to anyone else, and not hesitate to use them again in the future."

Andrew

"I cannot fault the service provided. This is my second conveyancing with you and this process was made as easy and as comfortable as the last. Well done, especially Leanne."

Mrs Davis

"Exceptional service from Tania Zompi's Conveyancing Team. Used them three times now and wouldn't hesitate to go back again. Whoever you speak to on the team, they are so helpful & guided us each time through the complex process."

Sarah

"Highly recommend the professional service of Tania and her team."

Susan Jackson

"Brilliant service from Vicky and her team at the Sandbach office. Professional, helpful, understanding and prompt. Vicky enabled us to complete house purchase in record time at a very stressful and difficult time for our family. Thank you."

James Townsend

Visit our **NEW** Family Law website >

NUPTIAL AGREEMENTS

WRITTEN BY

HELEN STOLLER,
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If you need help to progress your case, to commence a new application, or to discuss any issues you are experiencing- do get in touch with me.

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I'M PLEASED TO SAY THAT I HAVE JUST RECEIVED MY FIRST WEDDING INVITATION IN A LONGTIME- ALBEIT CAUTIOUSLY PLANNED FOR AUGUST 2022.

Nonetheless, wedding celebrations (as we knew them, pre COVID-19) seem to be back on the agenda.

The government roadmap tells us that from the 17th May weddings and civil partnership ceremonies are permitted for up to 30 people, so long as they are held in COVID-19 secure venues. Receptions can also be held with up to 30 guests, either indoors, outdoors, or in a private garden.

At the earliest, the government are looking to remove all restrictions, including on weddings from the 21st June. Which will of course be welcome news to most.

We all know couples, or heard about wannabe newlyweds who spent the entirety of 2020 second guessing when lockdown restrictions may lift sufficiently to allow the 'big day' to go ahead. Others made their wedding work within the rules and enjoyed a smaller, more intimate affair.

I've spoken with a number of fiancées and fiancés this year whose wedding plans were postponed. After a year of unprecedented events, understandably some couples have turned their minds to what may happen beyond the wedding day, should the unthinkable happen and they decide to separate.

My advice is that when planning your wedding/ civil partnership and your future life together, it is the perfect opportunity to also consider your financial situation now and what your expectations would be if you were to separate in the future. Sensible wedding planners have started to add to their 'To do when you say I-do' lists- Speak to solicitor re: pre-nuptial agreement.

It may not feel like a romantic prospect but arguably the best time to reach an agreement about how you would

like each other to be treated financially if you separated is when you love and care for each other, rather than at the end of the relationship when emotions may hamper you in agreeing a financial division.

If you are engaged, or thinking about getting married, it is worth having a chat with a family law specialist to talk about your individual circumstances. It shouldn't be seen as a negative step, but instead a proactive approach to help avoid acrimony in the future.

I've set out below some of the frequently asked questions to help you and your partner to think about whether a nuptial agreement is right for you.

WHAT IS A NUPTIAL AGREEMENT?

A pre-nuptial or pre-civil partnership agreement is a legal agreement between you and your partner before your marriage or civil partnership has taken place. If you are already married/ civil partners, you can enter into a post-nuptial or post-civil partnership agreement.

The agreement usually sets out how you wish to divide your assets if you later separate or divorce. Some nuptial agreements can also detail how you currently arrange your finances and how this will continue or change during the marriage/ civil partnership.

The main objectives of a nuptial agreement are:-

- **CLARIFICATION.** To clarify how you will conduct your financial affairs during the marriage, to enable you both, but especially the financially weaker party, to have transparency at the start of the marriage. This may also assist the financially weaker party to feel financially secure within the marriage.
- **CERTAINTY.** To provide certainty and enable you to formally agree how your assets should be divided if you later separate or divorce.
- **PROTECTION.** To protect assets, such as inherited wealth or pre-marital property, from a later financial claim.
- **COSTS.** To limit scope for uncertain, emotionally draining, and financially costly court proceedings in the event of a future breakdown of the relationship.

WHEN CAN I ENTER INTO A NUPTIAL AGREEMENT?

You should aim to negotiate and agree the terms of the pre-nuptial agreement as far in advance of the wedding/ civil partnership date as is possible. You will both need sufficient time to consider the terms and receive legal advice about the effect of those terms. There should be no last-minute pressure on either of you to agree to the terms because of an impending wedding/ civil partnership date.

Ideally, to give the agreement the strongest chance possible of being upheld you should ensure that the agreement is entered at least 28 days in advance of the wedding/ civil partnership date.

If you are already married/ civil partners, you can still enter a post-nuptial agreement to set out what property is considered non-matrimonial and how you would want the assets to be divided if you were to separate in the future.

ARE NUPTIAL AGREEMENTS BINDING?

Nuptial agreements are not currently legally binding in England and Wales. This means that by entering into a nuptial agreement, you cannot override the court's ability to decide how your finances should be divided on a subsequent divorce/ dissolution.

The court remains able to make financial orders on the breakdown of a marriage/civil partnership, but the court will uphold a nuptial agreement that is freely entered into by each of you with a full appreciation of its implications, unless in the circumstances, it would not be fair to uphold the agreement.

As a result, you could spend considerable time, money and effort negotiating the terms of the nuptial agreement, but find it is not upheld by the court in any future divorce/ dissolution proceedings.

However, in many cases, a nuptial agreement will be taken into account and will have a substantial impact on the Judge's decision. The Supreme Court stated in the 2010 case Radmacher v Granatino that the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

1. Agreement must be freely entered into

This means both you and your partner must enter into the agreement of your own free will, without any pressure from each other or anyone else.

The agreement must be contractually valid and it is unlikely to be upheld if the court finds evidence of a vitiating factor, i.e. mistake, duress, undue influence or misrepresentation. These factors may cast doubt on whether there was free will and lead the court to question the amount of information available to both parties when entering the agreement.

You and your partner should feel you are on an equal footing and freely able to negotiate the terms of the nuptial agreement with one another.

It is also important that you and your partner have sufficient time to consider the terms of the nuptial agreement and receive legal advice about the effect of those terms. Neither you nor your partner should feel under pressure to sign the agreement. You should avoid making the signing of the agreement conditional on an event, such as a renewal of wedding vows, or setting an unrealistic date for signing the agreement as this may lead to last-minute pressure.

The court will take into account individual circumstances such as a party's emotional state at the time of making the agreement and factors such as age and maturity and previous experience of long-term relationships. Such circumstances may inform what pressures a party felt under to sign the agreement. If a court considers the parties entering into a nuptial agreement are mature, with a wealth of life experience and knowledgeable in relation to financial matters, this will enhance the weight to be attributed to the agreement. Conversely, if the parties are young, immature and do not have a wealth of life experience, that may count against the nuptial agreement being given sufficient, or any weight.

The court may also consider whether the marriage would have gone ahead in the absence of a nuptial agreement. If a party would have refused to proceed with the wedding, that may reinforce its weight.

2. Parties must have a full appreciation of the implications of the agreement

You and your partner should be in possession of all the information material to your decision to sign the nuptial agreement before signing it, so that you fully understand the implications of the agreement. To assist you in fully understanding the agreement's implications, you and your partner should both receive specialist family law advice from independent solicitors. This means that you should not both jointly instruct the same lawyer to draft the agreement and provide you both with advice.

The solicitors providing the advice should sign a certificate of advice confirming that they have advised their client appropriately and this will be appended to the nuptial agreement.

You and your partner must also both sign the nuptial agreement confirming you understand that the agreement does not oust the court's discretion to make financial orders. It must also be executed as a deed, meaning it will need to be witnessed by an independent third party.

You and your partner should each provide financial disclosure to be included in the nuptial agreement, setting out your assets, liabilities, income and potential assets such as inheritances and any interests under discretionary trusts. Once you have a full picture of each other's financial situation, you have a context in which to negotiate the terms of the nuptial agreement.

By exchanging full and frank financial disclosure at the outset, in the same way that you would at the end of marriage, it means both of you fully understand what assets each of you have and that you are entering the agreement with complete transparency.

3. It must be fair to hold the parties to the agreement in the circumstances prevailing

Fairness is considered in accordance with section 25 of the Matrimonial Causes Act 1973, which requires judges to consider all of the relevant circumstances of the case when deciding how to divide the parties' finances on a divorce/ dissolution.

A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children and is unlikely to be fair if one party is left in 'a predicament of real need' whilst the other has more than enough to meet their needs.

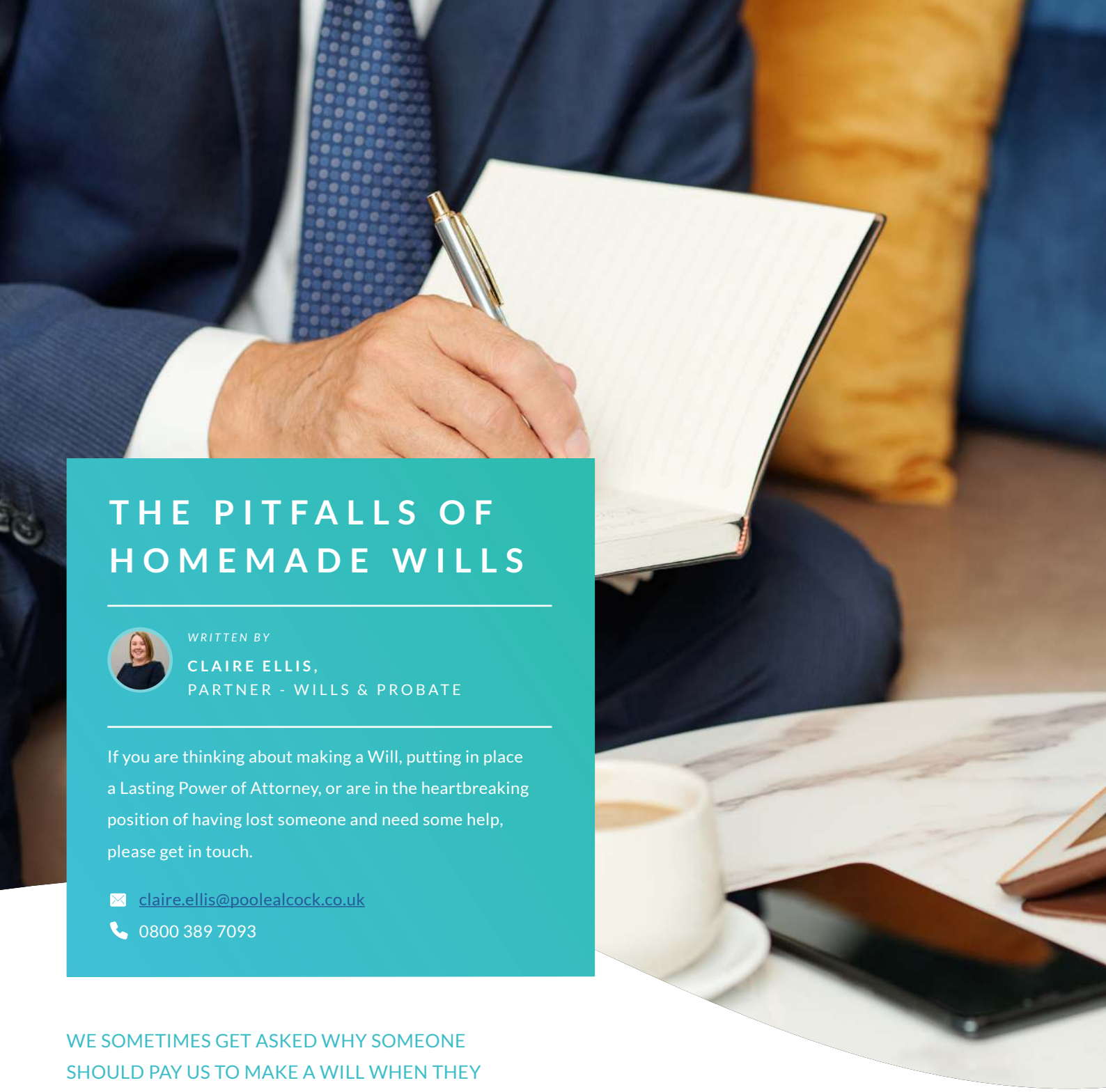
Within the nuptial agreement you may seek to shield family wealth and assets acquired before the marriage and ring-fence non-matrimonial property. This could be property owned by one party before the marriage, or assets a party receives from a third party during the marriage, through lifetime gift or inheritance.

However, the longer that the marriage lasts, the greater chance that the nuptial agreement may not be considered fair, particularly if the family situation at the time of separation is not as it was envisaged within the nuptial agreement.

It is my advice to incorporate a review clause within your agreement so that the agreement can be reviewed when certain events occur, such as the birth of a child, or if one party was to become ill or incapacitated.

Nuptial agreements must be carefully drafted and consideration given to all of the issues as discussed above. If a nuptial agreement does not take into account these issues and is not considered fair, then it is likely to carry little weight and unlikely to be followed by a court in a subsequent divorce/ dissolution.

Our team of family law specialists can talk you through your specific circumstances, discuss the advantages and disadvantages relevant to you and help to ensure that agreeing and finalising a pre-nuptial agreement is one of the least stressful aspects of your wedding planning.



THE PITFALLS OF HOMEMADE WILLS

WRITTEN BY

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If you are thinking about making a Will, putting in place a Lasting Power of Attorney, or are in the heartbreaking position of having lost someone and need some help, please get in touch.

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WE SOMETIMES GET ASKED WHY SOMEONE SHOULD PAY US TO MAKE A WILL WHEN THEY CAN JUST DO IT ON THEIR OWN AT HOME USING AN OFF-THE-SHELF WILL PACK (OR JUST COBBLE ONE TOGETHER THEMSELVES AS A CLIENT OF MINE PUT IT ONE TIME!).

The short answer to this is that in my many years of experience, and with the greatest respect to those who have tried, it's rare that I've seen a homemade Will that doesn't have some sort of issue that could have been avoided with a professionally drawn up Will.

The costs of these mistakes can be high, both financially and emotionally, to families. A carefully and professionally drafted Will is a small investment to ensure that your family is looked after and to make things as easy as possible for them when you are gone.

I've highlighted below some of the most common mistakes we see in homemade Wills, and the problems that can arise.

FLAWED EXECUTION

Though not quite as dramatic as it sounds, the execution of a Will is essential to its validity. This means it must be signed correctly – with the right information included in order to be legally binding.

A lot of homemade Wills that are presented to us are either not signed at all, only signed by the person who made it, or without enough witnesses. Needless to say, all of these problems would render a Will 'invalid' and leave a question mark over the administration of the estate.

We've also come across situations where, on the surface the Will looks valid, but upon digging a little deeper (which the Probate Registry will often do with a homemade Will), you learn that the witnesses actually signed it days after each other, making it invalid. We also see Wills that have been witnessed by family members, which means that gifts to them or anyone else they are related to in the Will can be void.

MISSING CLAUSES

Another common mistake made by non-professionals making a Will, is to not account for certain assets or circumstances.

The most common of these is the residue clause – people will often gift specific assets, including property, items from the house, bank accounts etc, but not include a 'residue' clause. This is what covers any assets not specifically mentioned by other clauses in the Will.

If this is the case then, whilst the Will itself may still be valid, it creates a 'partial intestacy' – meaning a portion of your assets are not covered by your Will. These remaining assets would be distributed in accordance with the Intestacy Rules. This may mean members of your family (who you may not have wanted to inherit) may now be entitled to a share of your estate.

Another common missing clause is the executor appointment. Which, whilst again not automatically invalidating the Will, can cause problems with dealing with the estate and add additional stress and costs to the process for your family.

FORGETTING BENEFICIARIES

One of the easiest mistakes to make is to name a child (or grandchild) in a Will, and forget about the possibility (however remote) that you may in the future have more children (or more grandchildren).

It's also possible to forget about beneficiaries that you deliberately do not want to include. As mentioned above a partial intestacy can sometimes lead to family members you have forgotten about being entitled to benefit. Alternatively, you may consider your step-child as your own. However, if you have not legally adopted them, they will not be included under any reference to 'my children' and may be accidentally excluded because of this.

In addition, forgetting to include appropriate substitute beneficiaries is an easy way to create a 'gap' in your estate if one of them dies before you, if there are no alternate provisions in place.

LACK OF ADVICE

The biggest issue with homemade Wills is that you don't benefit from the additional advice you get from a professional when making a Will. A professionally drawn up Will is so much more than the paper it is written on. The number of times clients have said to me over the years "I never thought of that". My response is always the same, 'that's what I'm here for', to get you to consider things you don't even know you necessarily need to consider.

Because everyone's circumstances are unique – there isn't a 'one size fits all' when it comes to a Will and often it takes exploring your circumstances and asking the all-important question of "what if?" to sometimes realise what you thought you needed or wanted is actually nothing like what you actually need.

Some additional examples of problems that could be avoided if you make a Will taking professional advice rather than 'having a go' yourselves include:

APPOINTING A GUARDIAN FOR A DISABLED BENEFICIARY.

It is not possible to appoint a guardian for an adult – so if you want to ensure that a vulnerable beneficiary has someone looking out for them when you are no longer there, it's prudent to take advice from not only a solicitor, but also someone in the care sector or social services.

INHERITANCE TAX BILLS.

The rules around Inheritance tax are complex – and often we will refer clients to accountants and tax specialists for bespoke advice. Making certain provisions in your Will can have a huge impact on whether the tax bill is a lot of money, or (in some cases) no money at all.

CLAIMS FROM DISGRUNTLED FAMILY MEMBERS.

There are 2 ways someone might make a claim against your estate.

The first is the validity of the Will – if the Will is done with a professional solicitor, this is much less likely to attract the attention of someone wanting to dispute whether it was signed correctly.

The second is when spouses or children are disinherited and think they should be entitled to more. Whilst it's difficult to prevent such claims entirely, certain steps can be taken to reduce the risk or the impact of such claim. What these steps are depend on the person – and so it's best to take proper advice if you want peace of mind that you've done all you can to protect your loved ones.

WHAT TO DO NEXT?

If you are thinking of making a Will, and want to ensure that it is valid, and meets your needs appropriately, contact us today on **01270 613939** or by **clicking here**, to arrange to speak to one of our expert Wills and Probate solicitors.

MENTAL HEALTH IN THE WORKPLACE

WRITTEN BY

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This last year, in particular, has been very difficult for a large proportion of the population with many people being furloughed, working from home or losing their jobs entirely amidst a national lockdown.

The Covid-19 pandemic has put increased focus on how employers support the health, safety and wellbeing of their employees. Employers are required, by law, to take as much care for employees as is reasonably practicable – which is why it is so important for employers to be forward thinking and proactive about mental health, as this is an area that is so often overlooked. Everyone should feel comfortable discussing any issues they may have and should be entitled to understanding and compassion within the workplace.

From a legal perspective in England and Wales, the Equality Act 2010 encompasses many mental health illnesses which can be classed as a disability. A range of conditions may qualify an employee for protection under the Equality Act providing there is a mental or physical impairment that has a substantial and long-term effect on their ability to carry out normal day-to-day tasks, where "long term" means that the condition has lasted or is likely to last for 12 months or more. A "substantial" adverse effect on an individual's ability to do normal daily activities is one that is more than a minor or trivial effect. If an employee is taking medication to help them manage their mental health, this will effectively be disregarded when considering whether they meet the definition or not.

If an employee has as disability, as per the Equality Act, an employer has a responsibility to make reasonable adjustments to alleviate any disadvantage (in comparison to other non-disabled employees) suffered as a result of said disability – this also includes those with mental health conditions. Therefore, businesses need to ensure that they abide by their obligations under the Equality Act as a failure to make appropriate reasonable adjustments may amount to disability discrimination. It is important for employers to promote good mental health as well as providing support when an issue emerges. If an employee

feels they can talk openly about mental health, problems are more likely to be resolved and are less likely to escalate.

One common mental health condition within the workplace is stress. Stress isn't always a bad thing and many people will need a little bit of stress to stay focused and driven to overcome new challenges in the workplace - there is a fine line though. Too much stress can leave people feeling drained and overwhelmed. It's when stress exceeds a person's ability to manage it that it stops being helpful and starts to become a problem.

Legally, employers are responsible for the general safety of their employees while at work. Legislation such as the Health and Safety at Work Act 1974 states that an employer must take reasonable steps to make sure workplaces are safe and healthy and to control any identified risks.

In addition, the Management of Health and Safety at Work Regulations 1999 require employers to carry out a "suitable and sufficient" assessment of the risks to the health and safety of their employees. An employer is required to put proper controls in place to avoid these risks, wherever possible. Where it is not possible to avoid risk altogether, steps must be taken to reduce them so far as is "reasonably practicable".

While risk assessments should be carried out, managers should also be prepared to help and support employees experiencing stress.

Although training on mental health can be very useful, a manager should not be expected to be an expert in that field. They should be aware of the signs of stress and be prepared to raise any concerns with the appropriate people but should never make any assumptions. One way this can be done is by making sure employees have regular one-to-ones with their managers, giving them time to talk confidentially about any problems they may be having.

SIGNS OF STRESS CAN INCLUDE;

- Changes in the person's usual behaviour, mood or how they interact with colleagues
- Changes in the standard of their work or focus on tasks
- Appearing tired, anxious or withdrawn and reduced interest in tasks they previously enjoyed
- Changes in appetite and/or increase in smoking and drinking alcohol
- An increase in sickness absences and/or turning up late to work.

It's beneficial if employers create an environment where employees feel able to talk openly about mental health. Employers should be encouraging positive mental health but in order to successfully promote this, managers and employees need to become more informed about mental health in general and what support is available. For example, it may be beneficial to arrange mental health awareness training or workshops or appointing mental health team who employees can talk to seek support.

From a business perspective, mental health can affect an employee's morale, work rate, attendance and working relationships. In turn, this will likely impact productivity, staff turnover and reputation. It is therefore imperative that a business adopts a positive approach to mental health. For those employers that choose to ignore the issue, or who undermine the mental health of their staff, risk not only the health of their staff but also expose themselves to commercial and reputational risks too. They might have to invest a considerable amount of time, money and resources in dealing with workplace conflicts – whether this be a workplace grievance or an employee bringing a claim for unfair or constructive dismissal or for disability discrimination under the Equality Act.

FIVE TOP TIPS FOR EMPLOYERS

- Be supportive and encourage employees to be honest about the issues they might be facing by having meaningful conversations. As an employer you must be prepared to listen and show empathy. Make sure that you act on any issues raised by the employee and provide help and support where you can.

- Remind your employees of the support available to them. You may be able to offer them access to employee assistance programmes or confidential counselling. Consider whether you need to refer the employee to an Occupational Health professional.

- Make reasonable adjustments. Even if you are not obliged to do so under the Equality Act, it is still good practice to listen to your employees' needs and offer up solutions where possible (i.e. would flexible working arrangements assist and can this be accommodated?).

- Encourage your employees to take time away from work and have a good work/ life balance. Rest breaks and annual leave are not only a legal entitlement but they are time for an employee to take some time out for other things such as exercise, rest and relaxation.

- Keep the conversation going – mental health needs to form part of your workplace culture, which means you can't just raise the subject of mental health once or display posters in communal areas. You must revisit the topic on a regular basis and ensure all senior members of staff are leading by example.

I hope you've found the above helpful. If you require any advice or support then please do get in touch with a member of the Employment team. We will be happy to discuss this with you further.

CONTESTING THE VALIDITY OF A WILL

WRITTEN BY

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Sarah-Jane joined the Firm in 2016 before becoming Partner and Head of Commercial and Civil Litigation in 2018. Sarah-Jane's career has seen her undertake a "mixed bag" of litigation work, from simple debt recovery actions to complex commercial litigation matters and everything in between.

Sarah-Jane is perfectly placed to help commercial and private clients in resolving any disputes that they may have, being sensitive to the real impacts of litigation (such as time away from other interests, stresses and costs associated with progressing a claim) and offering practical and pragmatic advice to seek a swift resolution to your dispute.

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LOSING A LOVED ONE IS ALWAYS A DIFFICULT THING TO GO THROUGH. IF THERE IS A DISPUTE OVER THEIR WILL OR ESTATE THIS CAN MAKE IT EVEN MORE DIFFICULT.

More often than not, Wills are kept private and individuals don't discuss their affairs with their family, which casts even more uncertainty onto a scenario which may arise after someone is no longer here to discuss their wishes with us. It is vitally important when you have a Will, to make sure those who you want to care for are, in fact, provided for after you pass away.

But what if you think someone's Will doesn't reflect their true wishes or is unusual in its character? If you're thinking about disputing a Will it is important to seek legal advice as soon as possible. Steps can be taken to protect your position and to stop the deceased's estate being administered and distributed in a way that may not be in line with their wishes. Furthermore, there can be specific time limits on making certain types of claim (which will be discussed in a different article in due course), some of which can be quite short. Acting quickly will therefore make sure you get appropriate advice and protect your position, ensuring that you don't lose your right to make a valid claim.

VALIDITY OF A WILL

If there is any doubt over a loved one's final wishes, the obvious place to start would be whether the testamentary document (i.e., the Will) is validly executed. There are a number of factors that need to taken into account when considering the validity of a Will and these include:

- The Will must be in writing and, usually, must be signed by the person making the Will (the Testator).
- The Testator must have signed it with the intention of creating a valid Will.
- Two people must witness the Testator's signature by signing the Will themselves. Those witnesses should ideally be present when the Testator signs.

As such, a Will may be considered invalid if:

- The deceased didn't know about or approve the contents of their Will e.g. they didn't know the document they were asking to sign was intending to be their Will and didn't know the terms contained within it.
- The Will wasn't properly signed or witnessed e.g. there was only one witness.
- The Will was forged e.g. the Testator's signature is not their own.
- The deceased lacked mental capacity when writing their Will.
- The deceased was pressured or manipulated into writing their Will.

The final two are the most common causes of concern and so are developed further below.

It is important to also remember that some practical points may not make the Will invalid, but may cause the Testator's wishes to not take effect. For example, a Will will not make a valid gift to a Witness (i.e. if you witness, say, your father's Will, you will not be able to inherit under it) or a witness's spouse or civil partner. This highlights the importance of making sure that a Will is witnessed by independent people.

It is for these reasons that it is vitally important to get a Will and to get it prepared correctly. Please do not hesitate to speak to a member of our Private Client team to ensure that your affairs are in order.

LACK OF TESTAMENTARY CAPACITY

Part of the requirement for a valid Will is that the Testator must be aware of what they are doing. Case law developed over time and most notably in the case of Banks v Goodfellow (1870) LR 5 QB 549 sets out the legal test to decide whether a Testator has the requisite testamentary capacity to validly execute a Will. A Testator must:

1. Understand the nature of making a Will and its effects. As such, the Testator must appreciate the purpose of the document and what it means. If they do not appreciate that they are making a Will, which is a document that dictates what happens to their belongings or Estate upon death, then it is unlikely that the Will will be valid.

2. Understand the extent of the property of which he is disposing. This relates to someone having comprehension as to the size of their estate and their belongings. For example, if someone decides to leave their multimillion-pound property portfolio to their niece thinking it was a token gift and only leaving £1,000 gift to their child, thinking that was a large legacy, the Testator may be considered to not have fully appreciated the extent of their estate.

3. Be able to comprehend and appreciate the claims to which he ought to give effect. Whilst there is no legal obligation upon a Testator to leave their estate in any certain way (in England and Wales, a Testator has testamentary freedom to leave their estate to whomever they wish), a Testator must be aware of any moral obligations they may have, for example to provide for disabled children or minors. In most circumstances, if an individual does not wish to leave any of their estate to someone who may have a moral claim, it is usual for a letter of wishes to be prepared so that it can be exhibited that the claim was considered and the reasons for not making provision. If the decision to not leave a gift to a close family member is not explained, it can often lead an anticipated beneficiary looking to challenge the Will.

4. Have no disorder of the mind that perverts his sense of right or prevents the exercise of his natural faculties in disposing of his property by will. If someone has, for example, advanced dementia or has severe learning difficulties, and this is well recorded within their medical records, it may be difficult to assess how someone may have had the requisite capacity to make a Will at that time. It is not a complete bar, especially if someone has only just been diagnosed with a degenerative disease and capacity is not, at that stage, a problem, but someone's medical records are often obtained in validity claims to assess any underlying medical reasons why someone may lack the requisite capacity as at the date of making a Will. In such circumstances, if prepared by a solicitor, a note as to an individual's capacity, or a formal medical report may be obtained to assist in this regard.

If it is proved that someone lacked the requisite capacity, the Will won't be valid and the Testator's earlier Will (if there was one, or an Intestacy) will take effect. As such, it is often important to consider any earlier Wills in cases such as this, as this will be the position if a claim is successful.

PRESSURE AND MANIPULATION

If someone was pressurised into making a Will a certain way, or manipulated to think about a potential beneficiary in a certain way, this will often invalidate a Will.

Examples of direct undue influence may include preparing a homemade Will for the Testator and forcing them to sign it, often directing someone's estate to the influencer or away from someone else, whatever may be in that person's interest. Most of the time, cases are not that clear cut or strongly evidenced to be able to assert this, but it may be that, coupled with other aspects of, for example, a breach of trust position or some element of doubt as to a Testator's capacity, it can be part of someone's allegation as to why a Will may not be valid.

Gentle manipulation or persuasion are more likely to occur. For example, as is often the case, a child cares for an elderly relative whilst a sibling may be at the other end of the country or the other side of the world and is simply unable to assist on a day-to-day basis. The attending child regularly passes comment about how the other sibling doesn't care or love their parent as they never ring or don't visit. Over time, the drip-feeding of comments may help persuade someone to leave their estate to the "caring" child to the exclusion of (or vastly reduced interest being left to) the other child. Had it not been for this manipulation, and earlier discussions may have indicated that the estate was to be split equally between the two, the absent child may well have a claim as to validity (bearing in mind, of course, that leaving an inflated share of your estate to a child who has assisted in later life on a regular basis is not, in itself, an unsurprising desire or an immediate indication as to validity of the Will so executed). Again, gathering evidence to prove this may be difficult, but witness evidence from friends or neighbours may be key to ascertaining the true facts.

CONCLUSION

Mounting a claim to contest the validity of the Will may be easier in cases where, for example, there is ample contemporaneous medical record evidence indicating that the deceased lacked the requisite testamentary capacity to produce a valid Will. As you can see, this will be much harder to argue in cases where there are suspicions of undue influence or manipulation as evidence is often much more difficult to come by.

It is vitally important, throughout all of this consideration, to bear in mind the underlying principle of testamentary freedom. In England and Wales, a Testator can dispose of his or her Estate in any way they wish – there are no legal obligations to comply with. So, even if someone has a large, loving family, there is nothing stopping that individual, if they have the requisite capacity, in distributing their estate to various charities or more distant relatives. It is often a trigger to consider someone's capacity, but it doesn't necessarily mean that the Will is invalid or subject to challenge. There is a presumption that a Testator has the requisite capacity and it is up to the claimant to prove otherwise, hence the importance of making sure there is adequate evidence to support your position. Preliminary steps such as obtaining medical records or witness statements or obtaining a Will-writer's file may help to guide you as to whether there is anything more than suspicion in relation to a set of circumstances.

If you have any concerns about the validity of a deceased's Will, or you feel that a Will does not make adequate provision for you (which will be the subject of a subsequent article), then please get in touch with a member of our Litigation team who will be happy to advise on your specific circumstances.

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