

UPDATE FOR INDIVIDUALS

Mental incapacity – protecting you, protecting your assets

As our bodies live longer, it becomes more likely that our brains will wear out. A time may come when we have to rely on others to manage our affairs and make decisions on our behalf. One of the most helpful things we can do is to make proper provision so those others can act for us safely and efficiently.

It has also been said that “we have a generation of savers at risk of abuse from a generation of must haves” – an over generalisation no doubt, but more and more cases of financial abuse of the elderly are arising where an older person seeks help with their finances e.g. from a child, and the child takes advantage and makes off with the cash. Any arrangements to give others powers regarding our assets and decisions need careful safeguards to protect the interests of all concerned.

So what are the options?

- Do nothing? If you do lose mental capacity no one will automatically have power to act on your behalf and an application to the court to appoint a “deputy” may be required. Expense and delay are likely, dispute between different interested parties is possible and you will have missed the opportunity to ensure that your own wishes are respected.
- Choose homemade remedies? For example, parents are sometimes tempted to transfer assets prematurely to a child for all sorts of reasons. Sometimes the reasons are good, but a transfer simply to enable the child to manage the asset on behalf of a parent following later incapacity may create legal difficulties and can give rise to all manner of misunderstanding, particularly with other family members.
- Make a Lasting Power of Attorney (LPA)? The paperwork may initially appear daunting, but the system is specifically designed to give the needed safeguards.

Lasting Powers of Attorney, which may cover “property and affairs” and/or “personal welfare”, have inbuilt safeguards. In particular, a “certificate provider” must certify at the outset that the maker (“donor”) of the power understands what they are doing, and the power cannot be used at all until it has been registered with the Office of the Public Guardian (OPG). The donor also has various choices including the following:

- Use now or use later? You can specify that the LPA should be available for use immediately (subject to registration) or only in particular circumstances (e.g. when you lose capacity).
- Who should be notified of registration? You can choose who should be notified of an application to register the LPA so they can look out for your interests at that time.
- One or more attorneys? If you appoint more than one attorney you can provide that on some or all matters they must act together whilst on others perhaps they can act independently.
- Conditions and guidance? You can restrict the scope of your attorneys’ authority and the circumstances in which they may act, and you can give guidance as to the considerations they should take into account in exercising their powers.

However, no amount of conditions and regulation can reduce the importance of choosing appropriate attorneys – family members, friends, professionals – in whom you have complete trust.

For further information, see the OPG’s website at www.publicguardian.gov.uk or contact Robert Mitchell, consultant on 01392 685329 or email robert.mitchell@footanstey.com

Deprivation of liberty safeguards

Legal changes which focus on some of the most vulnerable people in our society are due to come into force in April.

The new Deprivation of Liberty Safeguards will protect those living in care homes or hospitals who no longer have the mental capacity to make their own decisions and who need to be cared for in a restrictive way.

Few people would disagree that individuals should only be deprived of their liberty if absolutely necessary and in their best interests. The challenge to carers is how to balance the right to freedom with the need to keep such people safe.

The new safeguards have been created to provide legal protection to those who are vulnerable while setting out the circumstances and the procedures which must be followed where a person can be legally deprived of their liberty. There is no simple definition of deprivation of liberty. The answer is ultimately a question of law and will be assessed on the individual and their particular circumstances.

Examples of a deprivation of liberty include physical restraint and intervention such as the use of bed rails, belts, tables or even blocking a person's movement. The use of locking doors, coded electronic keypads, CCTV and drugs designed to change someone's behaviour can also amount to deprivation of liberty as can forced care, the use of threatening or verbal intimidation, medical restraint or even the use of catheters.



A refusal to discharge a person to a carer can also amount to a deprivation of liberty. If a person is unable to maintain social contacts due to restrictions placed on their access to others or a person loses autonomy because they are under

continuous supervision and control, then this could also be construed as a deprivation of liberty.



Whether a person is free to leave is tested by checking whether staff control a person's care and movement over a significant period.

Restraint may only be used where it is in the best interests to protect the person from harm and is proportionate to the risk of harm. In such circumstances there must be no alternative which is less restrictive and depriving someone of their liberty must never be used as a punishment.

To avoid breaching the new code, carers should examine the causes and reasons for restraint i.e. physical discomfort may explain restlessness, disorientation may be caused by medication or anxiousness may be because the person feels his or her needs are not met.

The CSCI (Commission for Social Care Inspection) recommend that care homes should minimise situations where restraints are necessary by, for example, using verbal communication to calm residents or therapeutic approaches such as massages or herbal remedies.

Procedures are set out under the new deprivation of liberty safeguards for when a care home or hospital has to obtain specific authorisation in the event that a person needs to be restrained, contrary to their rights to liberty.

If you are a carer or a family member and would like further advice on these procedures or advice in general on this subject, then please contact Asha Beswetherick, solicitor on 01752 675021 or email asha.beswetherick@footanstey.com

Enforcing divorce orders in the credit crunch

Whatever is happening in the economy, it is a sad fact of life that divorce goes on. One of the consequences of a recession is that even when the division of assets is agreed, that is only half the battle. You then have to implement the court order.

Often this involves selling a property or other assets. But what happens if this takes time or one person will not cooperate?

The first decision to make, regrettably, is one on costs. Is it worth the expense of enforcement or are you throwing good money after bad?

Next you need to think about property. If the other side is in occupation and not cooperating you can seek an order requiring them to leave the house and you can occupy it and/or arrange the sale. Alternatively if a property has not sold for some time you can seek an order for it to be sold by auction. This is more risky in the current climate and you should set a reserve price to avoid it selling under its value.

Similar rules apply to other assets, i.e. shares, policies, vehicles etc. If it is necessary to obtain cash, seek an order for sale, but be careful about the value of such assets in the current market.



If money is not needed immediately but you just want to ensure you end up with your fair share, another option is a charging order. This is where somebody has property, be it house or land. You can put a charge over that property. It is like a mortgage, but it does not require monthly instalments. However, you at least have the security for your money. Even if other creditors go after them or they are made bankrupt you are a secure creditor. The key is to make sure the property is worth enough to pay the money owed to you. If it is not paid after a time you can look to seek an order that the property is sold.

If the money owed is a small sum and the other person has few assets, you can seek an attachment of earnings order. Here an employer is required to pay money out of their wages before paying the money to the employee. Obviously, for this to work the person has to be in regular employment.

Getting more technical you can apply for a judgment summons. Here, if the individual fails to pay they can be sent to prison. This is persuasive where people have the money to pay, but are not keen on handing it over! It also has the advantage that the money is still due, even if they have been sent to prison. Another variation on this is bankruptcy, but this can be devastating and could cause much bigger problems for all those involved.

There are various options open to obtain money due under an order. In a recession the two key points are, does the person have assets of value to meet the debt and what is the cost of the enforcement method chosen, i.e. is it worth it!



For more information call Mark Chanter, partner on 01872 243346 or email mark.chanter@footanstey.com

“ROLL UP” with caution

Now that the housing party is over, it's time to clear up. Equity release schemes are one product that many are looking to as an alternative option rather than selling. But how risky is this option?

What is an Equity Release Scheme?

It is a way of releasing equity from your home as an alternative to selling your property, particularly aimed at the over 55's who are approaching retirement and who own their own property. It is particularly attractive to those who are “asset rich but income poor” as the equity in your home is turned into income. The equity release scheme provider will loan you a lump sum, which you receive either in one go or by monthly payments, in return for a charge over or actual ownership of your property.

There are two types of scheme, a Lifetime Mortgage or Reversion Plans

Lifetime Mortgages

You effectively ‘re-mortgage’ your property and interest is rolled up until it is repaid when the last surviving owner either moves into residential care, sells or dies (a trigger event). You will not be paying monthly repayments but you will have “compound interest”. This means the debt over the property “rolls up” and increases over a period of years until one of the trigger events calls for the loan to be repaid.

Reversion Plans

This is where a percentage of the property is sold to a private company known as a reversion company in return for a cash lump sum, an income or both. Like the lifetime mortgage there are no repayments until you move to alternative accommodation or die. You will live in the property rent free for the rest of your life. The reversion company will then receive the proceeds of sale, depending on what share of the property you have sold. In some cases, the percentage owned by the reversion company increases each year until there is only 1% left to you and your estate.

The advantages of both schemes are that you have a lump sum to enjoy with no monthly repayments, and possible inheritance tax savings but the disadvantages are profound.

The compounding debt or share in the property will literally ‘eat into the equity’ in the property. Unlike a normal mortgage which will decrease in its value over the years, this will increase. This could mean that by the time it comes to sell the property, there will be no net proceeds of sale to pocket. Certainly not value for money.

There is no doubt that both types of equity release mortgages can be expensive, leaving you with little or no equity in your home and bound by inflexible mortgage conditions.

Another point to bear in mind, particularly in the current economic climate is that the attraction of equity release mortgages are based on the premise that the value of your home will exceed the loan and that property prices will increase.

Alternative Options

You should think carefully and consider other options before proceeding with any equity release mortgage. In particular, speak to your family who may be able to help you out financially, or may appreciate knowing that you are going ahead with the scheme. You may be able to obtain government grants or sell part of your property to raise capital. Perhaps think about down sizing, or if you want to stay where you are, maybe look into having a lodger who could also help you out with day to day tasks. Remember a lodger would have the additional benefit of tax relief on the income you receive.

Finally, don't forget to always speak to an independent financial advisor who can carry out a financial health check for you prior to proceeding.

For further information or advice contact Asha Beswetherick, solicitor on 01752 675021 or email asha.beswetherick@footanstey.com



Are you getting the most out of your holiday home?

Inheritance tax (IHT) is a tax on a person's estate and on certain lifetime transfers. The maximum rate of IHT is currently 40%.



Inheritance Tax

Business property relief (BPR) can provide a reduction of either 50% or 100% in the net value of any property qualifying for the relief. Therefore, where an asset qualifies for BPR, half or the whole of its value is relieved from IHT.

One type of asset which may qualify for 100% BPR is furnished holiday lettings (FHL). Essentially, property let as a holiday home.

To qualify as FHL the following conditions must be met:

- 1.** the property must be situated in the UK
- 2.** the property must be available for lettings to the general public for a minimum of 140 days each year
- 3.** the property must actually be let for at least 70 days each year; and
- 4.** for seven months of the year, the property cannot be let for more than 31 consecutive days to the same tenant. Lettings of more than 31 days will not count as holiday lettings for the purposes of 1 and 2 above
- 5.** the property must be let as FHL accommodation.

To qualify for 100% BPR you need to have owned the property for at least two years.

HMRC may well challenge claims for 100% BPR on FHL but will normally allow relief where:

- 1.** the lets are short-term, typically for one or two weeks; and
- 2.** the owner is substantially involved with the holidaymakers in terms of their activities on and off the premises.

If services are provided by the owner, such as cleaning, bed linen and towels, welcome packs of groceries and local information, this will help to comply with point two above.

Services can be provided through the use of an agent but you must retain overall control. It is important to keep up to date records of the different services being provided.

Capital gains tax

Since 6 April 2008 capital gains tax is charged at a flat rate of 18% for individuals. However, entrepreneurs' relief may be available on the sale of FHL to reduce the effective tax rate to 10% on gains up to £1m. You may also be able to roll over a gain on the sale of FHL and if you gift it out of your estate you may be eligible for gifts hold-over relief in respect of any gain made.

Income tax

An advantage of FHL is that if you make a loss it can be offset against your other income in the same year, rather than against future profits as is the case with other rental businesses. Loan interest on the property is deductible against income, as are various expenses such as cleaning or gardening fees.

If you let your holiday property it is wise to review the way you run your letting. Check now whether you will be able to take advantage of the various tax reliefs available or whether you need to make adjustments to your lettings. Your property may not be able to qualify for relief, in which case you could consider taking advantage of the decrease in property values produced by the credit crunch and gift your property out of your estate while its value is low.

For further information or tax advice, contact Malcolm Emery, associate on 01392 685233 or email malcolm.emery@footanstey.com

Buy now while stocks last!

Making investments through the enterprise investment scheme (EIS) offers individuals the opportunity to postpone paying capital gains tax (CGT) and benefit from the new lower CGT rate introduced on 6 April 2008.

From this date, CGT is charged at a flat rate of 18% (ignoring the annual exemption). Prior to this, individuals paid CGT at rates of up to 40%.

This offers some investors the opportunity to save CGT (at rates of up to 22%) on capital gains realised before 6 April 2008, but deferred through EIS CGT deferral relief.

The EIS was introduced to encourage investment in small trading companies by offering investors certain tax breaks. The EIS offers income tax relief (at a rate of 20%) on investments of up to £500,000 per annum. In addition, an investor can defer capital gains realised within a certain period of the EIS investment being made.

The rules relating to the EIS are complex but may broadly be summarised as follows:

- The investor must subscribe for ordinary shares in the EIS company and pay for their shares in cash
- The EIS company must carry on a qualifying trade and use the subscription monies (within a certain period) for the benefit of its trade
- The investor (together with their associates) must not own more than 30% of the company's ordinary share capital
- The investor must not receive value from the company.

If all of the qualifying conditions are met, any gain arising on the disposal of the EIS shares will be exempt from CGT. Any capital gains postponed through EIS CGT deferral relief would fall into charge in the year of assessment in which the EIS shares are disposed of.

Example

On 1 December 2008, Mr North subscribes for ordinary shares in Big Breeze Limited and invests £100,000. Mr North owns 25% of the company. On 6 October 2007 Mr North realised a capital gain of £100,000. Mr North has the choice to pay capital gains at 40% on the gain or defer it by claiming EIS CGT deferral relief.

Mr North's position is as follows:

	£
Investment	100,000
Less income tax relief (£100,000 at 20%)	(20,000)
Capital gains tax deferral relief (£100,000 at 40%)	(40,000)
Net cost of investment	60,000

On 1 December 2012, Mr North disposes of his shares in Big Breeze Limited for £500,000. The capital gain on the disposal of the EIS shares is exempt from CGT. The capital gain (ie £100,000) deferred through EIS CGT deferral relief falls into charge during the 2012/13 tax year. Assuming tax rates remain unchanged, Mr North will pay CGT of £18,000 (being £100,000 at 18%) on the gain compared to £40,000 if the gain had been taxed in 2007/08 (ie a tax saving of £22,000).

EIS CGT deferral relief may also be claimed by investors owning more than 30% of the company although income tax relief is not available on their investment and any gain on the disposal of the EIS shares will be liable to CGT.

For further information on EIS and CGT, contact Sarah Anderson, solicitor on 01752 675105 or email sarah.anderson@footanstey.com

Care Free?

Everybody knows that the cost of paying for residential care in a care home can be enormous. Weekly fees can range from £350 to £1,000.

Of course all those receiving care services are entitled to receive a contribution towards the payment of fees from the Local Authority, following a financial assessment, if the assessed value of their capital savings is below £22,250. If the total value of savings falls below £13,500 then the local authority will meet the full cost of care and no contribution will be required from your capital, although you will still be required to contribute an amount from your income.

Unfortunately, many people who own their own home and do not have a dependent relative living there will be well outside of those capital limits and will be required to pay for their care in full.

But there is another aspect to consider. If your primary need for care is 'a health care need' then under the new national framework you could be entitled to receive free care from the Primary Care Trust of the NHS (PCT) regardless of your financial situation. This is known as 'free NHS continuing health care'.

Your eligibility is assessed against a national eligibility criteria which looks at all aspects of your mental and physical health care needs. The level of need is recorded and then a decision is taken regarding eligibility. The level of your financial means is irrelevant when deciding upon eligibility. The decision is made purely on your health.

Discretionary will trusts

The 'transferable nil-rate band' introduced by the Chancellor on 9 October 2007 now means, provided certain conditions are met, that the combined estates of many married couples (and civil partners) can benefit from an inheritance tax (IHT) allowance of up to £624,000 (£650,000 after 6 April 2009) on the death of the survivor.

Prior to 9 October 2007, where married couples left everything to each other the first-to-die's nil rate band (NRB) allowance, currently £312,000 (£325,000 after 6 April 2009), would be unused and therefore wasted. To overcome this, many wills, drawn up with a view to mitigating IHT, utilised the NRB allowance on the first death by including a nil rate band discretionary trust.

As a result of the changes in the law, the intervening 17 months have seen many couples 'simplify' their wills by removing the NRB discretionary trusts. However, there are still several circumstances where discretionary will trusts can form an important part of successful estate planning by mitigating IHT and protecting assets to pass on to the next generation.

IHT mitigation:

- Where assets are likely to grow at a faster rate than the nil rate band (and the growth is unlikely to be needed by the surviving spouse) by placing the assets into a discretionary trust the growth can take place outside the survivor's estate and escape a charge to IHT on the survivor's death.
- Where an estate comprises agricultural and/or business property it may be advantageous to make full use of the available reliefs on the first death by putting such assets into a discretionary trust. If the property in question is later sold the cash received (which no longer qualifies for the relief) will fall outside of the survivor's estate for IHT purposes.

Asset protection:

- In the case of second marriages it can be difficult to strike a balance between providing for the surviving spouse and

ensuring that children from the earlier marriage ultimately receive their inheritance. A well drafted discretionary will trust can allow sufficient flexibility to ensure that the surviving spouse is provided for whilst protecting assets to pass on to the next generation.

- Couples wishing to protect the family home (or other assets) from future liability for local authority care home fees can use a discretionary will trust on the first death to ring-fence the first to die's share in the family home. This share then falls outside of the survivor's estate when assessing care home fee contributions.
- If your intended beneficiaries are experiencing matrimonial or financial difficulties an outright inheritance may be unwelcome. The trustees of a discretionary trust can take into account factors such as this and ensure that all distributions are made at the appropriate time.

We recommend wills are kept under regular review to ensure they best reflect your personal circumstances and changes in the law. For further information or advice contact Tom Biddick, solicitor on 01392 685252 or email tom.biddick@footanstey.com



If you are eligible then the cost of your care may be met in full by the PCT. This can be invaluable for anyone needing help, whether they are elderly, disabled or injured as a result of an accident. Care does not have to be provided in a residential setting and funding can be awarded for care received at home.

This could save you or your family thousands of pounds and ensure that assets are preserved for the future. There is also no compromise to be made on quality as the PCT are obliged to consider preserving the status quo when awarding continuing care. So, if you or a loved one is currently paying for their care then you should obtain further advice and check your eligibility to receive the same care for free. PCT's and Social Services departments are complicated, making it difficult to find out information

or to negotiate. It is therefore always a good idea to obtain sound legal advice.

Foot Anstey has an Elderly Care team dedicated to providing robust, comprehensive and sympathetic legal advice for older people, their relatives and carers. If you would like to know more about any of the issues raised then you should contact Jeanette Roberts, solicitor on 01752 675089 or email jeanette.roberts@footanstey.com for a free initial telephone discussion

Emergency remedies for child abduction

Of all the issues arising from the breakdown in a relationship, those that can cause the most upset are when children become the subject of litigation.

Particularly stressful is when there is an emergency concerning a child being snatched or where there is a threat to take a child out of the country.

The normal process consists of creating dialogue and enabling independent workers from an organisation called CAFCASS to engage with the disagreeing parents. They prepare reports for the courts on what is in the best interests of the child. In emergencies this is set to one side.

Several emergency remedies can be pursued, including the possibility of criminal action. So consulting a specialist family solicitor immediately is an important step to take.

Courts can be asked for an urgent order confirming that the child is to live with a particular person (a residence order).

If it is known where the child at risk is living, the court can have the child returned to the main carer. But where an address is unknown, the court can order a person who may know the child's whereabouts (e.g. a grandparent) to provide information which will help find the child. This approach can also be linked with another application asking the police to recover the child.

Alternatively, the High Court can make a location and collection order. A court officer called the Tipstaff is empowered to obtain information, find and return the

child to the appropriate parent. Failure to cooperate with the Tipstaff can lead to a person being arrested.

Such orders will be sought without informing the person who has taken the child. Careful preparation by a solicitor can ensure that orders are obtained swiftly, often on the same day the applications are made.

Once the child is returned, the speed of the case slows and the other parent has a right to be heard at subsequent court hearings.

To reduce the threat of a snatched child being taken overseas the system of "Port Alerts" has been created. Once the police have been informed of an attempt to remove the child from the country, they can alert all other police forces and immigration officers who will then monitor ports to ensure that the child is not removed.

Even if the child is taken out of the country all is not lost. Treaties are in place to ensure that the child is returned to the country it lives, although the issues are complex.

Having been involved in cases concerning abduction we can vouch for the speed of the system and can happily say that all the children involved in these particular cases have been returned to their primary carer promptly.

For more information, please contact Greg Yates, consultant on 01752 675536 or email greg.yates@footanstey.com

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