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news and advice from Birkett Long

March 2011

Financial Advice

More choice over your pension

New pension rules - giving greater flexibility to individuals taking retirement benefits - are expected to be operative from 6 April 2011.

Historically, individuals have had to set up a lifetime annuity or move into an Alternatively Secured Pension (ASP) after 75, but from April pension members can control how and when they take their income. This additional flexibility encourages everyone to save and could be useful for senior managers or high earners.

As an alternative to a lifetime annuity, where parameters accepted at the outset cannot be subsequently changed, investors will be able to use income drawdown or take no income at all for as long as they want.

'Capped drawdown' sets the maximum annual income at broadly equivalent levels to that available from a single life level annuity - a slight reduction on the current maximum allowance of 120% of annuity income. Income limits are age and sex specific and maximum amounts are reviewed every 3 years (previously every 5 years) until 75, then yearly. No minimum income levels apply.
Capped drawdown can have positive implications for tax planning but always seek professional financial advice.

Alternatively, investors can choose the new 'flexible drawdown' option whereby investors over 55 can take as much income as they want from their pension fund providing that they have an additional "secure pension" income of £20,000 a year when they first go into flexible drawdown. The secure income can be from a state pension or other pension schemes and does not need to be inflation proofed. Investment income does not count. Should the pension member die whilst the pension fund is in either form of drawdown, the remaining fund can provide an income for a spouse or dependant, or passed to a beneficiary as a lump sum, subject to a 55% tax charge (currently 82% if paid after the pension holder is 75). No tax applies if the individual is under 75 and is not in drawdown.

Compulsory lifetime annuities have not been changed and will remain the preferred option for many because, unlike drawdown, they provide a secure lifetime income.

For specialist pension and retirement planning advice contact our Financial Services team on 01206 217309 or email mike.cracknell@birkettlong.co.uk

Law Commission consults on pre-nuptial agreements

In the high profile case of Radmacher v Granatino (the German heiress case) the Supreme Court held that the existence of a pre nuptial agreement could have "magnetic importance" in deciding how to divide assets following divorce although, disputes would still need to be resolved on a case by case basis.

Pre nuptial agreements have previously been authoritative, but not determinative, provided husband and wife were both independently advised, had disclosed their assets and undue pressure had not been put on either to sign. A Law Commission consultation asks whether a valid pre nuptial agreement should be the end of the story instead of just one of the factors for a court to take into account.

Currently couples can enter into a pre nuptial agreement only to see it ripped up by the judge at a later date.

Commentators have pointed to the fact that the birth of children, changes to careers, illnesses and a host of other factors could render a seemingly perfectly sensible pre nuptial agreement unfair. Others have suggested that if reasonable needs of both husband and wife can be met, a pre nuptial agreement could validly dispose of the "surplus assets".

**The consultation closes in April and whatever the outcome, and whether you are getting married or separating, it will still pay to take advice.
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Will Disputes

Will you be disinherited?
A guide to the Inheritance (Provision for Family and Dependants) Act

A will can be challenged on many grounds including want of (formal) execution, the testator's capacity (or lack of) and undue influence, but one question we are often asked is: "what can be done when someone has been 'cut out' of an otherwise valid will?".

In many scenarios the answer lies in a piece of legislation called the Inheritance (Provision for Family and Dependants) Act 1975; enacted to prevent the socially unconscionable effects of unrestricted will writing and, sometimes, the effect of the intestacy rules. Put simply, the I(PFD)A affords some protection to those who have been financially dependant on the deceased.

For good reason the Act is restricted to applicants who can demonstrate that they were financially dependant on the deceased and experience shows that the more successful applicants tend to be spouses, ex-spouses, partners (i.e. those living as the husband or wife of the deceased) and children (minors).

If an applicant makes a successful challenge to the will then the I(PFD)A will ensure that "reasonable financial provision" will be made from the estate. The Act sets out a list of factors for which the court should have regard in determining what award should be made; the award can also come in many guises and can include an absolute capital sum, an income from the estate, a life interest in property or a combination of awards.

The legislation allows for two classes of award to be made the standard 'maintenance' award and the higher, non-maintenance standard of provision. With its feet firmly in principles of equity, the Act seeks to do what is right by all the parties; it will not seek to punish other beneficiaries for the testator's choice to prefer them over those financially dependant on the deceased.

The standard award under the I(PFD)A is for "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance". The courts have interpreted this as meaning that the award (if any) should be an amount that it would be "reasonable for the claimant to live on, at neither a luxurious, nor poverty stricken level". Invariably a checklist of the claimant's assets, liabilities and needs (both now and in the future) will be drawn up and the award will have due consideration such to ensure that a successful claimant does not spiral into poverty nor live the "life of Riley".

The higher, non-maintenance, award is reserved for spouses, civil partners and some former spouses/civil partners. In terms of the award, legislation provides that it will be based on what it is "reasonable for the claimant to receive, whether or not that provision is required for that person's maintenance". In other words, spouses (and others who qualify) are not tied by notions of 'maintenance' and, when considering all the relevant factors, the award should be one which a claimant could legitimately expect to receive, opulent lifestyle or not!

The award to a successful claimant will come from the net estate and usually at some form of 'detriment' to the named beneficiaries, but in some cases the provision of an I(PFD)A award can be used to mitigate the Inheritance Tax liability. Whilst tax mitigation should not be used as a ground to bring a claim against the estate for reasonable provision (there are many other possible mechanisms to achieve such aims) it may minimise the 'loss' to the intended beneficiaries.

Claims by those ignored under a will should be brought as soon as possible. The default position is that an I(PFD)A claim should be brought within 6 months from the date of the Grant of Probate unless there are good grounds for bringing claim outside this timeframe. In exceptional cases the court will allow an I(PFD)A claim years after the Grant of Probate. In Re McNulty the application was 3½ years out of time but allowed nonetheless, that said, the sooner the better.

In other words, if you have been 'cut-out' of a will then there is somewhere to turn; Amanda Smallcombe offers expert guidance on bringing a claim under the I(PFD)A and specialises in contested trusts and probate.
Call her on 01206 217395 or
amanda.smallcombe@birkettlong.co.uk

Residential Property

Stamp Duty Land Tax update

A new rate of SDLT

Currently, the highest SDLT rate of 4 per cent applies to purchases where the consideration exceeds £500,000. The Finance Bill 2010 adds a new rate of 5 per cent for residential property transactions where the consideration for the transaction exceeds £1 million.

This new rate only applies to residential purchases where the effective date is on or after 6 April 2011.

All other SDLT rates remain the same.

First time buyers - one year left to take advantage of the exemption

The Finance Bill 2010 has provided a Stamp Duty Land Tax relief where:

1. the effective date of the transaction is on or after 25 March 2010 and before 25 March 2012
2. individual/s jointly purchase a major interest in residential land (therefore excluding corporate bodies, partnerships or trustees)
3. it is the first time the individual/s have purchased such an interest anywhere in the world
4. the consideration is more than £125,000 but less than £250,001
5. the individual/s intends to occupy the property as their main residence

The existing nil rate of SDLT on residential purchases not exceeding £125,000 continues to apply as before and this is not limited to first time buyers.

Tenancy Deposit Scheme Changes

The Tenancy Deposit Scheme (TDS) has been in place since 6 April 2007, when it was brought into force by the Housing Act 2004. It was created to protect deposits paid by tenants who have an Assured Shorthold Tenancy (AST) and provide a fairer system to settle disputes at the end of the tenancy.

Not all deposits are protected by the scheme, only those where the tenant is renting a home from a private landlord or letting agent on or after April 2007, and the tenancy is an AST.

Initially only applying to ASTs defined by the Housing Act 1988 (tenancies where the annual rent is less than £25,000 per annum), changes in October 2010 brought about by the Assured Tenancies (Amendment) (England) Order 2010, meant that the Tenancy Deposit Scheme now applies to more tenancies than it did previously, as the legislation has raised the annual rental threshold for assured shorthold tenancies from £25,000 to £100,000.

The new threshold now applies to existing tenancies where the deposits were taken after 6 April 2007, not just those created after October 2010. This means that a contractual tenancy could have automatically converted to an AST from 1 October 2010. So, landlords holding deposits in respect of existing Common Law Tenancies which continue past 1 October 2010 and have rents between £25,000 and £100,000 will need to not only ensure that their tenant's deposit is placed in one of the three approved schemes but that they have also provided the necessary prescribed information to the tenant.

The following is a summary of the prescribed information for the purposes of section 213(5) of the Housing Act 2004:

- details of the paid deposit, the address of the property to which the tenancy relates, and the name, address, telephone number, email address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit;
- the circumstances when all or part of the deposit shall be retained by the landlord
- confirmation (in the form of a certificate signed by the landlord) that the information provided is correct, and that the tenant has been given the opportunity to sign any document containing this information
- any information contained in a leaflet supplied by the scheme administrator to the landlord which explains the operation of the relevant Housing Act provisions.

In the event of non compliance, a landlord can no longer rely on Section 21 of the Housing Act 1988 (whereby they are able to give 2 months' notice to recover possession) and may now face a claim in the County Court from a tenant requesting that the deposit is either placed into one of the three approved schemes or that it is returned in full and a claim for statutory compensation of 3 times the amount, which should have been put into the scheme.

There are still relatively few reported cases considering how strictly the provisions relating to the Tenancy Deposit Scheme are being interpreted and in particular there are questions as to whether the landlord can avoid the penalties as long as he has complied with the scheme requirements by the time he reaches the court. However either way, landlords who do not comply with the scheme could be ordered to pay the tenant's legal costs as well as their own in addition to the statutory compensation.

Contact Emma Wraight on 01245 453849 or emma.wraight@birkettlong.co.uk

Wills, Trusts and Tax

Cross Border Estates

With a growing trend for people owning properties abroad its never been more important to ensure that you have the relevant documents in place to deal with your estate when you die.

When someone dies domiciled in England & Wales, the inheritance tax (IHT) rules state that all assets, including those held abroad, will be included in your estate for IHT purposes. The devolution (distribution) of foreign property i.e. land, is often subject to local succession taxes and to the local laws of entitlement which may overwrite the terms of the English will. For example, in Scotland, Spain and France a stated proportion of the testator's (the person who has died) estate passes automatically (and not by will) to certain relations. In the USA and Scandinavian countries there is 'community of property' provision for spouses and in Portugal and Poland they do not recognise trusts. In England and Wales however, a testator has freedom to leave assets to whom he or she wishes.

Transfer of property between spouses both domiciled in the UK is free of IHT due to 'spouse exemption'. However, it must be borne in mind that transfers from a UK domiciled spouse to a non-UK domiciled spouse are only exempt up to a cumulative limit of £55,000.

When property is owned outside of England and Wales but you are UK domiciled the actual distribution, i.e. where the property will pass, it is dealt with in accordance with the law of the country where that land/property is situated. There is a common misconception that a will made in England or Wales will cover property abroad but this is usually not the case.

Wills are a very important tool to help you specify to whom you wish your estate to pass when you die. In general, you should have a will prepared in the country where your property is situated, but you should be careful that a second will does not revoke the earlier one.

Legal advice should be taken to ensure that your property and assets are distributed in accordance with your wishes and intentions.

Secret Trusts

Secret Trusts have been used to conceal gifts on death from public scrutiny.

When someone dies, a Grant of Probate (if obtained) makes that person's will a public document, available for public scrutiny. Originally, Secret Trusts were used for mistresses and illegitimate children and consist of two types: Fully Secret Trusts and Half Secret Trusts.

A Fully Secret Trust is where on the face of the will the gift in the will is an absolute gift but in reality the beneficiary is not entitled to the gift but is holding it on trust for the true beneficiary. As the trust does not appear on the face of the will, the public are unaware of the true beneficiary. For example: A has an illegitimate child Z, of which A's wife has no knowledge. A wishes to leave £50,000 to Z but if the gift were mentioned in the will this would cause upset to A's wife. Therefore, before making his will, A obtains his sister B's agreement that if A leaves £50,000 to B in the will, B will hold it on trust for Z.

For a Fully Secret Trust to be valid there must be evidence of the trust. There must be a binding obligation imposed on the secret trustee to carry out the testator's wishes. The fact of the trust and it's terms must be communicated to the secret trustee before the testator dies. Acceptance of the trust by the secret trustee must also take place.

Half Secret Trusts are where the testator leaves property to a person as trustee on the face of the will but the true beneficiary/ies are secret, i.e. the testator has transferred property to X 'as trustee for the purposes communicated to him'

For a Half Secret Trust to be valid the following must apply:

1. The terms of trust must be communicated to the trustee;
2. Communication must be made before or at the same time as making the will;
3. Acceptance by the trustee must be before or at the same time as the making of the will.

Contact Emma Waters on 01245 453833 or emma.waters@birkettlong.co.uk

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