

Landmarks

IN LIFE

Welcome

"Autumn, the year's last loveliest smile" – so said William Cullen Bryant, the nineteenth century American writer.

In this edition of Landmarks, we hope to share a smile with you through some unusual will bequests. In addition, we highlight opportunities to mitigate tax liabilities and developments in relation to lasting powers of attorney. Finally, we review the topical subject of surrogacy.

As ever, I hope you will find Landmarks of interest. If we can be of any assistance to you in relation to the issues raised, please do contact us.



Geoff Thomas
Partner, Head of
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A thin Sunday for news or an inheritance reality?

In autumn 2007, and in anticipation of a forthcoming election, the Conservatives indicated they planned to increase the nil rate band (NRB) for inheritance tax (IHT) to £1million per person. Many commentators doubted whether this "Super NRB" would be achievable.



The transferable NRB was then conceived as the Labour government's riposte. Introduced on 9 October 2007, the use of the transferable NRB has been well documented. Spouses and civil partners can transfer their NRB allowances so that any part of the NRB not used when the first spouse or civil partner dies is transferred to the surviving spouse or civil partner for use on that death. Typically this means that, on the second death, £650,000 is free from IHT. In certain circumstances this figure can be as high as £1million.

A convenient backtrack?

Since making their Super NRB promise the Tories have been compromised into confirming that this would also be transferable, giving a minimum of £2m tax free in the case of a married couple or civil partners. However, the "credit crunch" has seen a marked change in their approach...

Earlier this year, in what he later referred to as a "thin Sunday" for news, Ken Clarke said that 'cutting IHT would not be a high priority for an incoming Tory government'. He went

Continued overleaf...

Lasting Powers of Attorney - welcome changes

Regular readers of Landmarks will know that Lasting Powers of Attorney (LPAs), which were introduced in 2007 to replace Enduring Powers of Attorney, have been roundly criticised on two fronts.

The first problem was the delay in registration of a LPA at the Office of the Public Guardian, which initially could take up to 12 weeks. This has now been resolved, and the registration time is now closer to the 6 week statutory waiting period.



The other problem was the length and complexity of the form itself – 25 pages, and 64 notes in a separate 10 page document. This too has now been addressed, with the introduction of a much shorter (11 page) Power. At the time of writing, it is intended that the new form will come into effect on 1 October 2009. It will not affect the validity of any powers signed before that date.

How have these changes been achieved? Firstly, the “prescribed information” which took up three pages, has been condensed into one page, with a separate information sheet. Most of the information is now contained in the body of the document itself.

It has been completely re-written in plain English and is, for the main part, easier to understand than before.

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A thin Sunday for news...continued

on to confirm that the Tories were still committed to increasing exemptions on IHT but that the current financial conditions meant that the ambition to increase the band to £1 million was now considered to be an ‘aspiration’. In a later, partial retraction he said ‘we are fully committed to raising the threshold for IHT in the first parliament of a Conservative government. This measure will appear in the manifesto and I support it. We also agree that George Osborne cannot write his first budget until we have seen what we have inherited’. This view was then refined by a statement that confirmed that in future ‘only millionaires would pay IHT’.

The reality

This backtrack is not particularly surprising. The cost of Conservative proposals is estimated at £2bn per year. This would leave a chasm in government finances which would be extremely difficult to fill. Additional taxation of non-doms is one possible solution to fill the taxation void. However, when Labour introduced a £30,000 tax for non-doms who have been here for more than seven years, it created a furore. So any further moves are going to be counter-productive in selling London as the financial and business capital of the world. Add to that the forthcoming world media focus on London, and the UK as forthcoming Olympic host, and the Super NRB may be a distant dream.

The future

It is pretty safe to assume that, whatever happens to the political landscape in the next 12 months, IHT is not going to disappear completely. IHT has been with us for 100 years in various formats, and it would be a brave government who would abolish it. After all, IHT relies on the two certainties of life: death and taxes.

The economic landscape has changed dramatically between Autumn 2007, when George Osborne made his ‘commitment’, and today. David Cameron has also made it clear that the ‘wealthy’ will have to pay their ‘fair share’ during the economic downturn.



The most likely options for a future Conservative government will be to:-

1. Increase the personal NRB to £0.5 million and retain the new transferability rules to give every couple a joint allowance of the promised £1 million; or
2. Increase the personal NRB to £1 million and remove the transferability.

And will the Tories increase the IHT rate from 40%?

What should I do in these uncertain times?

In the short term major moves are unlikely because of the present state of government finances. It is more likely that any move towards either of the above scenarios will be made incrementally over a number of years.

Obtaining proper advice and implementing sensible planning and structures is the only way to ensure that all eventualities are covered. Trusts offer an ideal solution, since flexibility can be built in to give the settlor control, whilst reducing the exposure to IHT.

At LA we have a large team, experienced in dealing with all aspects of tax planning and trusts, and we look forward to advising you.

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Furnished holiday lets - disappearing benefits

Earlier this year, our present government, faced in any event with declining tax revenues, was alarmed to find that it was required by European law to extend the tax breaks available to furnished holiday accommodation to properties anywhere in the European Economic Area.

Perhaps, therefore, it is not surprising to find in this year's Finance Act that the favourable income tax and capital gains tax treatment for qualifying furnished holiday lettings has been repealed with effect from 6 April 2010. The inheritance tax advantages, however, remain untouched.

Briefly, the advantages of furnished holiday lettings currently include the ability for taxpayers to claim entrepreneurs' relief from capital gains tax, business property relief from inheritance tax, loss relief against total income, and the rollover of capital gains into the acquisition of other qualifying investments.

These reliefs do not come easily. The property must be available for commercial letting as holiday accommodation for a minimum of 140 days each year, and must actually be let as holiday accommodation for half that time. It must not be let to the same tenant for more than 31 days in seven months of each year. The lettings

are therefore normally for one or two weeks at a time. Critically, for inheritance tax relief, the property owner or agents for the owner must be involved with the holidaying tenants to a significant amount. Tax relief is more readily available if the services provided by the property owner or his agent include meeting and greeting the holidaymakers, organising car hire and day trips, cleaning and laundry, and the supply of a welcome pack of food and basic necessities. Each case will depend upon its particular facts.

This current tax year will be the last year for which a property owner will be able to claim entrepreneurs' relief from capital gains tax on the disposal of a qualifying furnished holiday-let property. Entrepreneurs' relief allows an effective 10% rate of capital gains tax for £1m of lifetime gains on business disposals. This could easily lead to a rush to sell qualifying properties before 5 April 2010; the savings in tax must of course be balanced against any longer-

term increase in the value of the properties. It is considered that attempts to claim this entrepreneurs' relief could affect quite significantly property values in tourist areas such as Bournemouth, Poole and Christchurch. Further west, the approach of the Olympics in 2012 may give rise to different considerations.

Clients should consider whether it would be sensible for them to take the following actions:

- Where residential properties in European Economic Area countries have been let and the qualifying conditions have been met, claims for tax relief can be made for 2007/8 and 2008/9 if the properties were disposed of in those tax years.
- Consider a sideways loss relief claim if a loss resulted from letting in the tax years 2007/8 and 2008/9 of a property situated in the EEA and which would now qualify as a furnished holiday let.
- Consider whether it would be sensible to claim the entrepreneurs' relief from capital gains tax by selling before 6 April 2010.
- Consider very carefully the steps which might be taken to ensure 100% relief from inheritance tax as a result of providing significant services to the holidaying tenants.

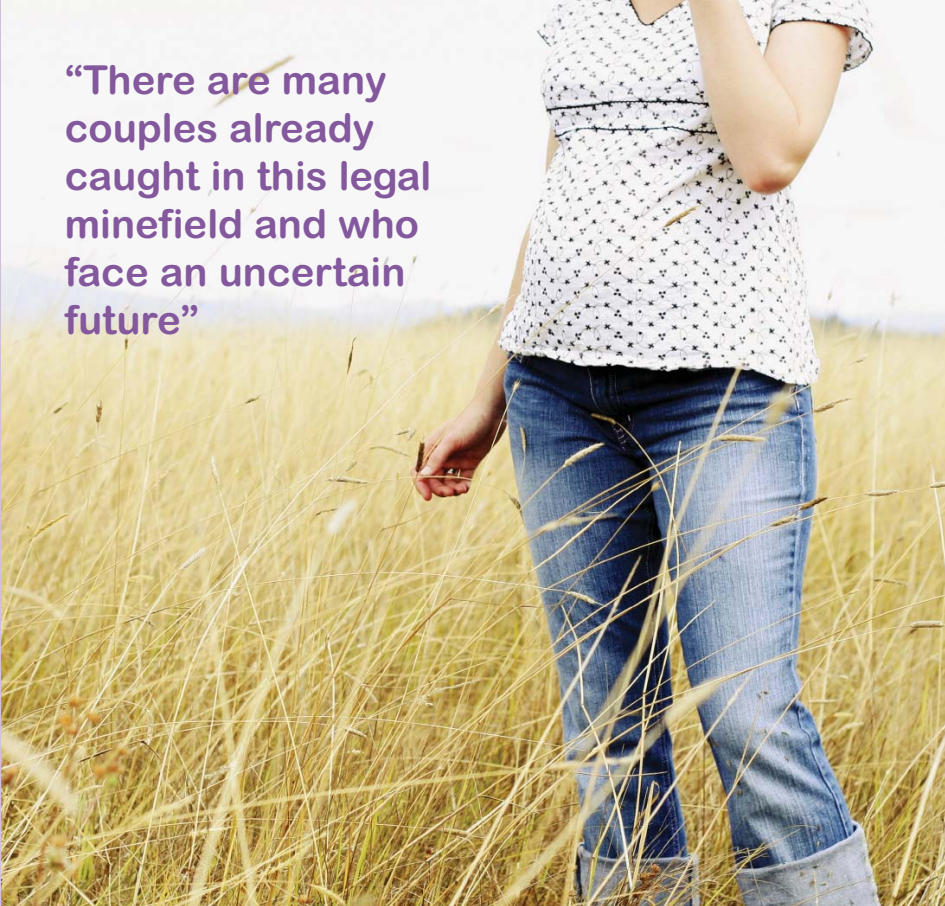
The tax and property experts in Lester Aldridge LLP will be very happy to discuss any particular issues arising from this article.



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Foreign surrogacy

The demand for surrogacy is rising and the use of surrogacy as a form of fertility treatment is becoming more high profile.



“There are many couples already caught in this legal minefield and who face an uncertain future”

For many years, English law has adopted a middle ground approach to surrogacy, acknowledging the need for surrogacy as a last hope for infertile couples but balancing it against a public policy against commercialised reproduction.

One of the main principles of existing surrogacy law has been to restrict the payment of more than reasonable expenses to surrogate mothers so as to avoid the exploitation of surrogate mothers and commodification of children and to uphold the main objective that reproduction should not be bought and sold.

However this approach is now noticeably inadequate since the restrictions put in place by the current surrogacy laws are driving couples abroad. As a result many are unknowingly falling foul of the law here, with very serious consequences.

A legal minefield

English couples conceiving abroad using a married surrogate have no legal relationship with their surrogate born child. Under English law, the legal parents are the surrogate and her husband. If she is unmarried then the legal father will be the commissioning father as long as his sperm



was used to conceive. The commissioning parents will have no right to care for the child here, will be contravening immigration law on returning to the UK with the surrogate born child and will not be able to confer their British status to their child. In addition, they are likely to have paid more than reasonable expenses if their payments to the surrogate mother contained any element of ‘compensation’. This will mean that they will have to persuade a Judge to authorise those payments when making their application for a parental order to reassign legal parenthood from the surrogate parents to the commissioning parents.

Currently, many people learn of these legal difficulties after conception or birth and then face dealing with these emotional and stressful problems in what should be one of the most joyous times in their lives. There are almost certainly many couples already caught in this legal minefield and who face an uncertain future and there will undoubtedly be others who have already slipped through the immigration net unaware that they have no relationship with their child.

Advice at an early stage

It is therefore vital that couples are made aware of the potential legal pitfalls of looking abroad for surrogacy treatment. There needs to be better access to good quality information. Fertility clinics, the government and lawyers need to do more to communicate the issues effectively to those contemplating or undergoing surrogacy.

An experienced practitioner in the fertility team at Lester Aldridge will be able to provide you with advice as to how the current law affects you.

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Lasting Powers of Attorney - welcome changes...continued

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The form itself is much more user-friendly. Gone are the dreaded tick boxes – to miss one could mean rejection of the Power as invalid.

There are several other changes: there are optional continuation sheets for certain scenarios. The new form goes back to the old phrase of appointing attorneys “jointly” or “jointly and severally” instead of “together” or “together and independently”.

The new form is to be welcomed. It is still rather wordy, compared with the old EPA, but, hopefully, people will find it much easier to understand than the previous LPA form. Nevertheless, we still believe that most people will find professional guidance helpful.

If you wish to sign a LPA, please do contact us and we shall be happy to help with completion of the forms and the registration process.

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Mr Nelson Dance danced successfully on ice

Our Revenue authorities have surprisingly decided not to appeal against a recent decision concerning the application of agricultural and business property relief from inheritance tax. Curiously, neither were any steps taken in this year's Finance Act to nullify the decision, which is very favourable to the taxpayer.

Most observers thought that Mr Nelson Dance was indeed dancing on thin ice when he transferred two cottages and part of a farm to the trustees of a family settlement, and claimed that no inheritance tax was payable because of the availability of business property relief. Critically, he did not transfer the farming business itself. Tax practitioners had long understood that business property relief did not apply to transfers of individual assets of a business. It was always thought that the relief applied only to the transfer of a whole of a business or an interest in a business.

The land transferred by Mr Nelson Dance to the family settlement qualified as agricultural property. Agricultural property relief from inheritance tax applies, however, only to the

agricultural value, as opposed to any development value, of the land. Following the Nelson Dance case, it is now apparent that, provided all the other relevant conditions are satisfied, 100% relief from inheritance tax will apply, not only to the agricultural value of land, but also to the development value of land, even though the whole of a business or an interest in a business has not been transferred. Business property relief relieves the full value of the land used in the business, including hope value.

Planning opportunities

The outcome of this case opens the way for more planning opportunities, not least in the hope of avoiding the heavy entry charge to inheritance tax for transfers into trust. Transfers to settlements which exceed the transferor's available nil rate band, currently £325,000, normally attract inheritance tax at 20% of the excess over the nil rate band. Where, however, the gifted assets qualify for business or agricultural property relief, then the 20% tax charge will not apply, no matter how valuable are the assets which are gifted. It is therefore open to a taxpayer to dispose of an asset in a business, rather than the business (or a share in the business) itself, in order to remove value from his estate. The Nelson Dance decision is consequently particularly useful in forestalling the loss of business property relief where there is a prospect that a hybrid business, holding some investments, may fail the 'wholly or mainly' test.

The Tax and Trusts Team is thoroughly experienced in Inheritance tax mitigation and we would welcome the opportunity to discuss any proposals which may make good use of Mr Nelson Dance's venture onto ice.



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And to my loving wife I leave.....my bed!

Imagine if your spouse's parting gift to you in their will was their "second best bed." Not very Mills & Boon is it?

However, this was the lasting legacy which William Shakespeare left in his will to his second wife, Anne Hathaway.

Shakespeare is by no means alone. Here are some other unusual clauses which people have included in their wills:

Sir Francis Drake

Asked that his 2 favourite ships be sunk near to where his coffin was buried at sea.

Charles Dickens

Requested that those attending his funeral wear "no scarf, cloak, black bow, long hatband or other such revolting absurdity."

Heinrich Heine (Poet)

Left entire estate to his wife on the condition that she remarried as "then there will be at least one man to regret my death."

Juan Potomachi

Left over \$50,000 dollars to the Teatro Dramatico Theatre on one condition, namely, that that his skull be used in their productions of Hamlet.

(With thanks to the National Archives)

On a more serious note, if the bard had died today could his wife have done anything about her legacy? Put simply, yes - if a surviving spouse finds things difficult financially today, he or she can issue a claim for "reasonable financial provision" under the Inheritance (Provision for Family and Dependents) Act 1975.

The 1975 Act permits certain family members and financial dependants to ask the court either to give them a legacy (if they have been completely omitted from a will) or to increase the amount which they are due to receive.

What amounts to "reasonable financial provision" depends on a number of factors which the court will take into account, for example, their financial position, the value of the estate and the financial position of the beneficiaries who are named in the will.



Such a claim can effectively re-write the terms of a will. However, just because someone qualifies to bring a claim is by no means an automatic guarantee that he or she will receive anything from the estate. The final decision is entirely up to the court based on the evidence which it hears.

So, if an estate can be challenged in this way, why bother to make a will at all? It is always better to leave a formal record of your wishes, as this will assist a court when considering any future claims. Dying intestate (without making a will) means that your estate will be distributed without your wishes being taken into account.

If you highlight to your solicitor anyone who you think may bring a claim, safeguards can be employed (during your lifetime) to reduce the risk of this occurring in the event of your

death. At Lester Aldridge we have a specialist Contentious Trust & Probate Team who can provide this type of advice.

The best means of prevention is to address any potential problems at the time your will is made.

It is also vital to review regularly your position under the 1975 Act as your circumstances change and (if appropriate) update your will, for example, if you begin to co-habit, have children or re-marry. An out-of-date will can be as bad as leaving no will at all!

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