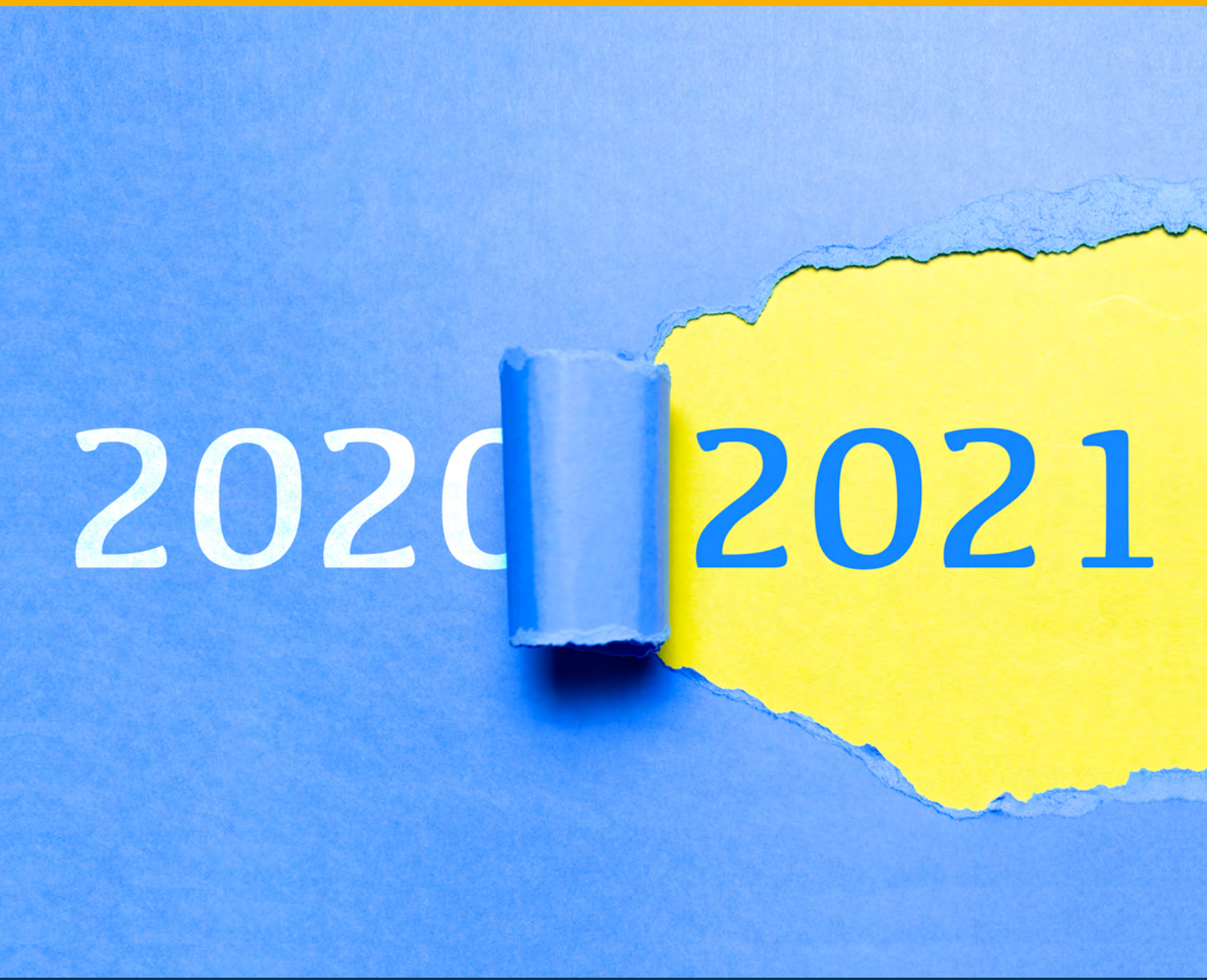
Private Client MAGAZINE

ISSUE 3



Adapt. Endure. Persist.

INTRODUCTION

"An optimist stays up until midnight to see the new year in, a pessimist stays up to see the old year leave"

Bill Vaughan

2021 isn't exactly starting off how we'd hoped but here we are. We remain desperate to return to this so called 'new normal' but for now we continue to adapt. The true success of our growing community is a reflection of the passion and focus of every single person involved and we continue to generate thought provoking content that comes their first hand experiences.

Thank you to our authors, readers and members and our Community Partners for their continued support. We are excited to show what we have planned for later on this year so watch this space….

The ThoughtLeaders4 Private Client Team

Laura Golding
Community Director
07841 974 969
email Laura

James Baldwin-Webb
Private Client Partnerships Director
07841 974 969
email James

Paul Barford
Founder / Director
020 7101 4155
email Paul

Chris Leese
Founder / Director
020 7101 4151
email Chris

Danushka De Alwis
Founder / Director
020 7101 4191
email Danushka

ABOUT ThoughtLeaders4 Private Client

Through our members' focused community, both physical and digital, we assist in personal and firm wide growth.

Working in close partnership with the industry rather than as a seller to it, we focus on delivering technical knowledge and practical insights. We are proud of our deep industry knowledge and the quality of work demonstrated in all our events and services.

Become a member of ThoughtLeaders4 Private Client and...

- Join a community of experts, referrers and peers
- Attend events in all formats
- Interact using our digital Knowledge Hub
- Learn and share expertise through the Community Magazine
- Grow your network and business
- Build relationships through a facilitated Membership directory

CONTENTS

CONTRIBUTORS

Adam Carvalho, **Farrer & Co**
Carrie Gothard, **Macfarlanes**
Chris Phillips, **Grant Thornton UK LLP**
Christopher Groves, **Withers Worldwide LLP**
Dan Sutch, **Grant Thornton UK LLP**
Edward Bennett, **Bedell Cristin**
Emily Bueno, **Mishcon de Reya**
Emma Holland, **Appleby (Guernsey)**
Hannah Davie, **Grant Thornton UK LLP**
Isobel Morton, **Macfarlanes**
James Ward, **Kingsley Napley**
Kate Taylor, **Withers Worldwide LLP**
Lydia Carter, **Bedell Cristin**
Mark Hunter, **Macfarlanes**
Nancy Chien, **Bedell Cristin**
Paula Fry, **Appleby (Guernsey)**
Phineas Hirsch, **Withers Worldwide LLP**
Rachel Davison, **Taylor Wessing**
Richard Field, **Appleby (Guernsey)**
Richard McDermott, **Farrer & Co**
Sarah Foster, **Freeths LLP**
Stephanie Mooney, **Kingsley Napley**

Private Client

Physical Events Calendar 2021

ThoughtLeaders4 Contentious Trusts

7th October 2021
IoD Building
London

ThoughtLeaders4 Jersey

11th October 2021
Royal Yacht Hotel
Jersey

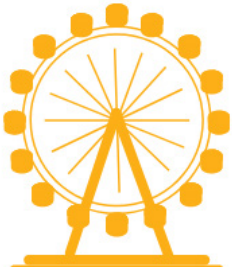
ThoughtLeaders4 Guernsey

13th October 2021
Duke of Richmond
Guernsey

ThoughtLeaders4 x ConTrA Summer School

28th - 27th August 2021
Clare College
Cambridge

NextGen Wealth Summit



8th - 10th September 2021
Syon Park
London

Bringing US Back Together

We appreciate how long it has been since we have all been together. We are counting down the days until we can make this happen and we are proud to announce our first ThoughtLeaders4 Private Client series of events. 2020 reaffirmed how strong our growing community is and how vital knowledge sharing is – imagine what it's going to feel like again in person?

Covid-19 Clause

Book with Clarity

If the event runs on the designated date and any delegate is unable to attend due to:

- Local travel restrictions of the attendee
- Restrictions in the country hosting the event
- Any requirement to self-isolate or quarantine
- General travel restrictions

All bookings will have the option of:

- Sending a replacement at no extra cost
- Transferring to the 2022 date at no extra cost
- A full refund

If the event does not run as scheduled all bookings will have the option of:

- Transferring to the 2022 date at no extra cost
- A full refund

For more information, contact:

laura@thoughtleaders4.com

EXECUTORS NAVIGATING THE "PERFECT (COMPANY) STORM"

Authored by: Emma Holland – Richard Field and Paula Fry – Appleby (Guernsey)

Corporate governance has become one of the most hotly debated topics in recent years. Whether it be board diversity, corporate culture or succession planning, directors across the world have hugely diverse opinions. But what happens when there is no-one to steer the ship?

Companies with sole directors, members, resident agents and company secretaries are less frequently encountered, but cannot be left "in limbo" if the worst is to happen and the sole individual holding those roles dies. Without someone to progress the company's interests, bank accounts are likely to be "frozen", regulatory filings missed and the viability of the substantive business threatened.

This was the novel conundrum facing Guernsey's Royal Court in a recent application brought by Appleby on behalf of an executor. The estate's assets included a number of companies, many of which were left without a director, member, resident agent or company secretary upon the untimely death of their founder. The companies' articles of incorporation (Articles) did not provide for updates to the share registers in these situations.

The Court was asked to exercise for the first time, jurisdiction to rectify the companies' share registers to enable the executor to be listed as a "member". The executor could then exercise rights as a "member", taking steps to appoint directors and company secretaries and otherwise regularise the standing of the companies.

Whilst s.290 of the Companies (Guernsey) Law, 2008 (as amended) provides for the valid transfer of shares by an executor, in the absence of a company secretary, the necessary formalities could not be complied with. The executor was left in something of an unenviable position. In the absence of any other statutory provision to assist, the executor relied on case law to seek the Court's assistance.

The case of Harlequin Chemicals Limited et al v Werner Urban and Anthony Saville et al (Harlequin) confirmed that the Royal Court of Guernsey has jurisdiction to amend the share register of a company in various situations. However, none of the previous cases had envisaged a situation where companies were left "in limbo". The Court was therefore asked to confirm that the scope of the jurisdiction could be extended, or alternatively, that it encompassed an ability to rectify the share register in circumstances where there was no-one to fulfil that role and the Articles of the company did not provide any assistance.

Previous Case Law

Harlequin was decided in 2016 and addressed the validity of the removal of a director in circumstances where a resolution of the shareholders transpired to be invalid on account of the fact that one of the shareholders was not recorded on the company's register of members at the time of the purported resolution.

Harlequin acknowledged that the rectification of a company's share register was a discretionary power of the Court (rather than something which an applicant could invoke as of right), only available in circumstances where there would be no "prejudice" to third parties. Whilst the Court reviewed English authorities covering a number of different situations in which the register might be rectified, it did not specifically address a situation where there was a complete absence of officers, resident agent, company secretary or members.

The Royal Court accepted in Harlequin that the concept of rectification of a Guernsey company's share register could be imported, following English law principles (on the basis that Guernsey company law was derived from, and based on, English company law). This was necessary as under English company law, the court has an express power to order the rectification of a company's share register, which is lacking in Guernsey's Companies Law.

The statutory provision was relied upon in the English case of Ellott v Cimarron UK Limited (Ellott), where the executor of a deceased shareholder brought an application for rectification of a company's share register in circumstances where the shareholder's death meant there was no-one able to progress the company's affairs. Notwithstanding that probate had not been granted, the Court recognised that the company's affairs would be prejudiced if urgent steps were not taken to preserve the viability of the business. It therefore ordered that the share register be updated and that the executor be authorised to do that, in the absence of any company secretary.

The Court's Decision

The Court accepted that it was necessary and appropriate for the executor to request that the Court exercise its discretion to order the rectification of the companies' share registers. Accepting that Harlequin provided it with jurisdiction to order rectification, the Court also accepted that following Ellott, it was appropriate to confirm that the scope of the jurisdiction included the current situation.

Whilst the remedy remains at the Court's discretion, the Court also confirmed that these were appropriate circumstances in which that jurisdiction should be exercised. In the absence of any officers or others to progress the companies' operations, the executor was also the appropriate person to update the registers. The Court noted the lack of any prejudice to any third parties and that delay could be detrimental to the companies, including the risk of being struck off due to a lack of directors/shareholders/resident agents.

The executor is taking steps to regularise the position of the companies, which will in due course be able to continue operating and trading as necessary.

Conclusion

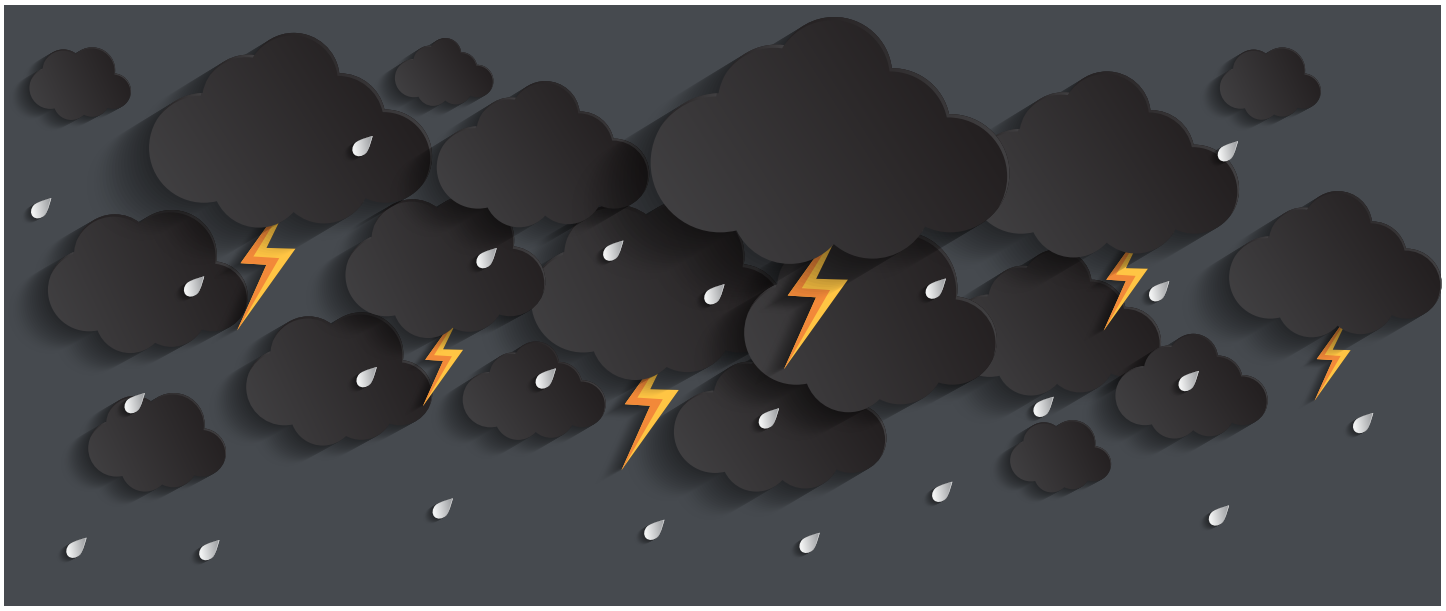
The decision provides comfort to executors, heirs and other personal representatives, faced with the challenges of estate administration. Companies relying on one individual for their continued operation may hold assets of significant value and/or employ people whose livelihoods depend on the viability of the business.

The knowledge that there is a method of putting the companies' affairs back in "good standing", when faced with the challenge of the companies being left "rudderless" will be welcomed. It also serves as a further example of the Court's nimble and pragmatic approach, with the application being heard and determined in short order immediately before the Christmas break.

More widely, the matter also illustrates the importance of reviewing the Articles and/or governance of a Guernsey entity. In particular, attention should be given to the following:

- Is it appropriate to have a sole member, director and resident agent?
- Is there a separate company secretary?
- Do the Articles permit a personal representative to appoint a director?
- Who else has knowledge of the company and its business in order to ensure minimal disruption on the death/incapacity of a sole director/shareholder?
- Does anybody else have authority to operate bank accounts in the event of a sole director's death/incapacity?
- Do the Articles permit shares being left in a will to beneficiaries?
- If shares are held on trust, do the Articles recognise the validity of such a trust?

We recommend that in cases where companies are reliant on a single individual for their governance/operation, the Articles and/or the structure of the companies are reviewed to take account of the issues raised above. Anticipating potential problems in the future could save time, stress and money, if the "perfect storm" situation were to arise.



ESTATE PLANNING 2021 – LOOKING BEYOND COVID-19

Authored by: James Ward and Stephanie Mooney – Kingsley Napley

As we find ourselves in another national lockdown, the New Year presents an opportunity for individuals to review their assets and conduct some succession planning.

Given the events of the past year, it is likely that we are going to see changes to inheritance tax and capital gains tax in the future. The Office of Tax Simplification and the All-Party Parliamentary Group have made a number of suggestions, which I will not go through at length here. However, the following may be of particular relevance to many:

- Aligning Capital Gains Tax ("CGT") rates with income tax rates;
- Removing the CGT uplift on death;
- Removing or curtailing valuable Inheritance Tax ("IHT") reliefs such as Business Relief and Agricultural Relief; and
- Reducing the seven year survival period to five for IHT on gifts and abolishing taper relief.

In light of these proposed changes, here are a few estate planning steps that might be worth considering sooner rather than later:

1. Trigger any chargeable gains now

CGT appears to be an easy target for reform. If you are thinking about giving away or selling assets standing at a significant gain, now may be a more favourable tax climate in which to do this.

2. Take advantage of reliefs such as Business Relief

Business Relief has been under scrutiny for some time. It can be argued that it has strayed from its original purpose of protecting vulnerable family businesses, given that it is available to many large, well-established companies, such as some of those listed on AIM.

We do not know if Business Relief will be around forever, or if it will remain in its current form. It may therefore be worth triggering the relief now through a gift of assets to a trust or other structure for the benefit of the family and future generations.

3. Make gifts

Gifting has always been a straightforward way of reducing a future IHT bill. Outright gifting keeps things simple and involves minimal cost and administration. Such gifts however provide no control or protection for the donor, which is something that has become increasingly important in these uncertain times.

Gifts to a trust or vehicle such as a Family Investment Company can however be very useful options for asset preservation and succession. The current relatively benign tax climate makes these options more affordable.

4. Prepare a Will that is fit for purpose

Asset protection has become more of a focus than ever before. A simple, "everything to the surviving spouse, then to the children" Will may still be appropriate for some. In most cases however, structures such as life interest or discretionary trusts, together with an accompanying letter of wishes, provide maximum flexibility and serve to protect assets for future generations.

Most of the options outlined above are not new. However, as we navigate through these difficult times and question what the future holds, now could be a good time to future-proof your position so far as possible.

PETERS & PETERS

Civil and criminal fraud in the private client context

Our specialist fraud lawyers assist families, high-net worth individuals and wealth advisers on fraud-related disputes in a private client setting.

International criminal and civil fraud services include:

- Global investigations
- Police and prosecutor inquiries
- Private prosecutions
- Bribery and corruption
- Advisor, agent, trustee and employee fraud

International asset tracing and recovery services include:

- Worldwide freezing and disclosure orders
- Injunctions
- Search and seizure
- Passport orders
- Securing and enforcing foreign judgments

"Absolutely first-class...extremely knowledgeable, analytical and thorough"
Chambers and Partners

"One of the first City law firms to develop a key multi-disciplinary approach, allowing the firm to act for corporate and individual clients in fraud-related cases that require both civil and criminal expertise."
The Legal 500

Jonathan Tickner
t: 020 7822 7766 e: jtickner@petersandpeters.com
Maria Cronin / Partner
t: 020 7822 7737 e: mcronin@petersandpeters.com
w: www.petersandpeters.com

CAPACITY & SEXUAL RELATIONS: A RADICAL RE-ASSESSMENT

Authored by: Sarah Williams – Payne Hicks Beach and Martha Gray - Harcourt Chambers

A recent decision by the Court of Appeal in A Local Authority v JB [2020] EWCA Civ 735 has led to a radical re-assessment of the way in which courts should assess capacity and sexual relations in future cases.

Introduction

Assessments of capacity and sexual relations have long been notoriously tricky. S.27 of the MCA 2005 prohibits the court from consenting to sex on an individual's behalf and this has led to a general reluctance to look at the question of capacity around sexual relations in the context of individual relationships, with the court emphasising in numerous cases that the approach should be issue-specific rather than person-specific. As a consequence, the stakes in such cases could not be higher; either P has capacity and is free to enjoy sex with partners of his or her choosing or P does not, with the result that measures will be put in place to prevent P from enjoying one of the most basic and fundamental aspects of human life.

It is therefore understandable that the court has sought, over the years, to keep the test as simple as possible by limiting the list of factors that P needs to be able to understand, retain, use and weigh in order for the court to be satisfied that s/he has capacity in this important area. In doing so, the court has sought to strike an uneasy balance between the autonomy of disabled individuals on the one hand and, on the other, the need to protect those same individuals, many of whom are particularly vulnerable to exploitation, from harm. The earlier authorities introduced a fairly basic test which provided that a capacitous individual ought to be able to show an understanding of the following:

1. The nature and character of sexual intercourse, including the mechanics of the act.
2. That a reasonably foreseeable consequence of sex between a man and a woman is that the woman will become pregnant.
3. That there are health risks involved, particularly sexually transmitted infections and that the risk of infection can be reduced by the taking of precautions such as using a condom.
4. That P's own participation is voluntary and s/he is free to choose whether to have to sex.

Having acknowledged that the ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity, the logical next question was whether the test should also include an understanding of the other partner's consent. However, up until the decision in *JB* the court had consistently declined the invitation to extend the test to include the fact that the other person engaged in sexual activity must be able to, and does in fact, from their words and conduct, consent to such activity. Instead, in a string of earlier decisions (*Local Authority X v MM and another* [2007] EWHC 2003 (Fam), *D Borough Council v B* [2011] EWHC 101 (Fam), *Re TZ* [2013] EWHC 2322 *London Borough of Tower Hamlets v TB* [2014] EWCOP 53) several High Court judges emphasised (often in obiter remarks) that when addressing the question of capacity to consent to sexual relations the court was not assessing individual relationships; the test was issue-specific, not person-specific.

The Facts

The case of JB concerned a 36-year-old man who had a complex diagnosis of autism combined with impaired cognition. JB showed marked problems in a number of areas, including adaptive functioning and social interactions which meant he had a very limited understanding of the emotional state or intentions of others. He had consistently demonstrated disinhibited behaviour towards women and showed a tendency to make advances towards them that were sexualised or otherwise inappropriate. Indeed, there was a reference to a potential sexual assault on a woman in his history which the police had declined to pursue. He was living in a supported residential placement and was subject to a comprehensive care plan which imposed significant restrictions on his access to the local community, his contact with third parties and his access to social media and the internet. These restrictions had been imposed to prevent the man from behaving in a sexually inappropriate manner towards women.

The local authority applied to the Court of Protection seeking declarations as to JB's capacity in various matters. A single joint expert instructed to assess JB's capacity to consent to sexual relations indicated that he struggled to understand the concept of consent, defining consent as "one party allowing the other party to have sex without the other party complaining". He thought that a woman who had got drunk at a party and had sex with a man was "fair game" for anyone else and was visibly shaken at the idea that a partner would be able to withdraw consent. The expert was clear that JB's ability to understand or weigh highly pertinent factors, in particular the need for the consent of others, in ensuring he engaged in lawful sexual activity was limited. She concluded that, should the test for capacity encompass an understanding of the consent of others, JB would not have capacity. However, applying the test established in the authorities, which did not require an understanding of the other person's consent, she indicated that JB did have the ability to consent to sexual relations. The local authority contended that the information relevant for the purposes of assessing capacity to consent to sexual relations should include an understanding of the other person's consent. If the test were so extended, based on this single factor alone JB would fail but were it to remain

limited to the four matters set out above, he would not. The consequences for JB were therefore highly significant.

The Decision at First Instance

At first instance, Mrs Justice Roberts held that an awareness of one's own consent and the knowledge that one could consent, or refuse, to participate in sexual relations with another person was fundamental to establishing the existence of capacity. She pointed out that this principle had been established in a number of authorities including *B (By Her Litigation Friend, the Official Receiver) v A Local Authority* [2019] EWCA Civ 913, [2019] COPLR 347, *London Borough of Tower Hamlets v TB (By Her Litigation Friend the Official Solicitor) and SA* [2014] EWCOP 53, [2015] COPLR 87, and *London Borough of Southwark v KA (Capacity to Marry)* [2016] EWCOP 20.

However, to argue that a full and complete understanding of the other party's consent to the proposed sexual activity (in terms recognised by the criminal law) was an essential component of capacity to have sexual relations was to confuse the nature or character of a sexual act with its lawfulness. Very great care was needed before imposing on the potentially incapacitous the need to understand quasi-criminal principles and the potential for consent to be withdrawn by the other party at any stage. In Mrs Justice Robert's view, it would set the bar too high and would potentially deprive the incapacitous of a fundamental and basic human right to participate in sexual relations merely because the raising of that bar might provide protection for the incapacitous person or for any victim of non-consensual sex when those consequences were viewed through the prism of the criminal law. Mrs Justice Roberts repeated the observation in earlier cases that decision-making in this context was 'largely visceral rather than cerebral, owing more to instinct and emotion than to analysis'. To expand the test in the manner suggested by the local authority would therefore be to impose on the incapacitous a burden which a capacitous individual may not share and may well be unlikely to discharge.

The Court of Appeal Decision

In a comprehensive judgment, Lord Justice Baker opened with the observation that the court was required to weigh three core principles of public interest when considering the issue of sexual capacity for those with impaired cognition:

'**4.** The first is the principle of autonomy. This principle lies at the heart of the Mental Capacity Act 2005 and the case law under that Act. It underpins the purpose of the UN Convention on the Rights of Persons with Disabilities 2006, as defined in article 1:

> "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

5. The second is the principle that vulnerable people in society must be protected …. Striking a balance between the first and second principles is often the most important aspect of decision making in the Court of Protection. The Mental Capacity Act Code of Practice expresses this in simple terms (at para 2.4):

> "it is important to balance people's right to make a decision with their right to safety and protections when they can't make decisions to protect themselves".

6. [The] third principle, that arises in this case, is that the Mental Capacity Act and the Court of Protection does not exist in a vacuum; they exist as part of a wider system of law and justice. Sexual relations between two people can only take place with the full and ongoing consent of both parties. This principle which has acquired greater recognition in recent years within society at large and within the justice system. The Court of Protection is concerned first and foremost with the individual who is the subject of the proceedings "P". But as part of the wider system for the administration of justice, it must adhere to general principles of law. Furthermore, as a public authority, the Court of Protection has an obligation under S.6 of the Human Rights Act 1998 not to act in a way which is incompatible with a right under the European Convention of Human Rights, as set out in Sch.1 to the Act. Within the court, that obligation usually arises when considering the human rights of P, but it also extends to the rights of others'.

With those three principles in mind, Lord Justice Baker went on to explore the relevant statutory provisions of the MCA 2005 and to detail the development of the case law on the issue of capacity and sexual relations, including that predating the implementation of the MCA 2005. Lord Justice Baker noted that in the earliest case cited, *X City Council v MB and others* [2006] EWHC 168 (Fam), Munby J asked not only whether P had the capacity to consent to sexual relations but also whether P had the ability to choose whether or not to engage in sexual activity. Yet, the latter question had been lost in subsequent cases, which defined the question in terms only of whether P had the capacity to consent to sexual relations. Lord Justice Baker held that such an approach was of little assistance in a case such as this, where it was JB who wished to initiate sexual relations with women, since it invited the court to consider a different question namely, whether P could agree to sexual relations proposed by someone else. The capacity in issue in the present case was not P's capacity to consent to sexual relations but his 'capacity to decide to engage in sexual relations'. In Lord Justice Baker's judgment 'this is how the question of capacity with regard to sexual relations should normally be assessed in most cases'.

With the question reframed in that way, the information relevant to the decision inevitably included the fact that 'any person with whom P engages in sexual relations must be able to consent to such activity and [must] in fact consent to it'. Lord Justice Baker recognised that this was moving on from the previous case law but noted that the scope of information considered relevant when determining an individual's capacity to consent to sexual relations had developed and become more comprehensive over time. That development had merely 'continued in this case'.

In summary, Lord Justice Baker concluded, 'when considering whether, as a result of an impairment of, or disturbance in the functioning of the mind or brain, a person is unable to understand, retain, use or weigh information relevant to a decision whether to engage in sexual relations, the information relevant to the decision may include the following:

i. The sexual nature and character of the act of sexual intercourse, including the mechanics of the act;

ii. The fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;

iii. The fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;

iv. That a reasonably foreseeable consequence of sexual intercourse between a man and a woman is that the woman will become pregnant;

v. That there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom."

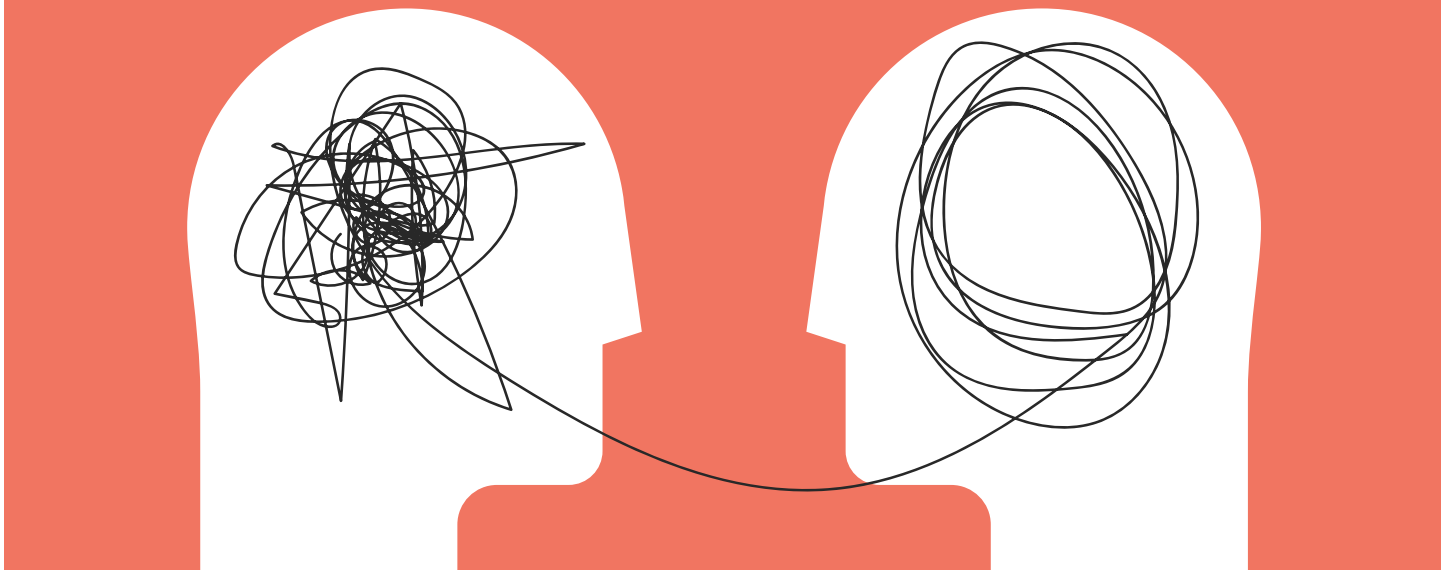
Lord Justice Baker accordingly found himself unable to endorse the approach taken by Mrs Justice Roberts at first instance. He found that she had been heavily influenced by the dicta in earlier cases which had led her to interpret the issues before her 'through the prism of criminal law'. He also rejected the view that capacitous people might have difficulty understanding that you should only have sex with someone who is able to consent and who gives and maintains consent. To Lord Justice Baker's mind this did not 'require a "refined or nuanced analysis"'. What was in question was not whether P understood that a particular partner was consenting on a particular occasion but that P was capable of understanding, as a matter of principle, that a partner should have capacity to consent and should in fact consent to any sexual activity.

Accordingly, Lord Justice Baker set aside the declaration that JB had the capacity to consent to sexual relations and remitted the matter to Mrs Justice Roberts for reconsideration in the light of the Court of Appeal's judgment. In view of the evidence set out in the judgment, however, a finding that JB lacks capacity to decide to engage in sexual relations seems inevitable.

The Implications

The decision in *A Local Authority v JB* [2020] EWCA Civ 735 provides welcome clarity in this complex area. It is notable for recognising the autonomy of P as a sexual being and an initiator of sexual relations. By reframing the question to look at P's capacity to decide to engage in sexual relations it logically follows that P must have an understanding of whether the other person wishes to participate. In practical terms, it will be interesting to see whether changes to the way capacity is assessed on the ground result in changed outcomes for large numbers of individuals affected by the decision. One can certainly see the potential for the decision ushering in a more conservative and risk averse approach to assessments of capacity. An important issue which the judgment does not address, however, is the question of whether the information relevant to the decision of whether to engage in sexual relations must always include all of the matters identified in the judgment or whether a more flexible approach tailored to the individual in question should be preferred. This is an issue raised in numerous recent cases, notably the recent case of *NB v Tower Hamlets and another* [2019] EWCOP 17, and many had hoped that the Court of Appeal would use the opportunity to provide some welcome clarity. That was not to be since the Court of Appeal took the view that it would be prudent to refrain from commenting on the issue without hearing full argument but the decision is unlikely to be the last word. The case of *B (by her litigation friend the OS) v A Local Authority* [2019] EWCA Civ 913 concerning a vulnerable woman's capacity to consent to sexual relations is under appeal to the Supreme Court and it seems likely that this decision may head that way as well.

PREPARING FOR THE UNEXPECTED IN TIMES THAT ARE UNEXPECTED – EXECUTORS AND MENTAL CAPACITY



Authored by: Richard McDermott & Adam Carvalho – Farrer & Co

The duty of care owed and actions required by executors (or the equivalent role outside England and Wales) to the beneficiaries of an estate is integral to the process of administering that estate. But what happens where an executor begins to lose, or has lost, mental capacity?

The question is an important consideration generally, particularly if the loss of capacity is permanent (eg arising from disability or disease). But loss of capacity can also be sudden and temporary due to illness or critical care, something which is particularly relevant in the prevailing circumstances of the devastating COVID-19 pandemic. Regardless of how it arises, unfortunately capacity can be lost very suddenly. If no preparation is made, the probate process could effectively be frozen until complex (and often expensive) solutions are found.

In this article we examine (i) the risks associated with an executor losing mental capacity, (ii) the steps which can be taken to remove an executor who has lost capacity, and (iii) practical steps which can be taken to reduce the risk of any loss to an estate if an executor does lose capacity.

1. The risks associated with an executor losing capacity

It can be difficult a) to define capacity; and b) to identify when a person has lost capacity, despite both being discussed at length in legislation and case law. For example, if an executor is unwell in hospital with COVID-19 and on medication, do they have capacity to make urgent decisions about an estate?

If, however, it is the case that there is a loss of capacity, then this can lead to significant issues arising in the administration of an estate, such as:

Poor administration

The executor may no longer be able to understand their obligations, fail to take necessary advice and/or fail to take appropriate decisions in the administration of the estate, or not be physically and mentally well enough to do what is needed in their role. Executors have to comply with a host of responsibilities and failing to carry out tasks properly can cause immediate difficulties (eg late filing of tax returns or applications for probate) or serious long-term problems.

Financial loss caused by risk taking

An executor who is losing or has lost capacity may take excessive risks with investing, administering or protecting estate property. Specifically, this is, very sadly, a hallmark of early stage dementia.

Heightened tensions

Whether caused by one of the issues set out above, or simply by an unwell executor being in a position of trusted responsibility, tensions can emerge or boil over between co-executors and/or beneficiaries which can only be

handled in imperfect circumstances. In the context of the administration and the loss of a loved one, this would only exacerbate what is already a very difficult time.

Risk to co-executors

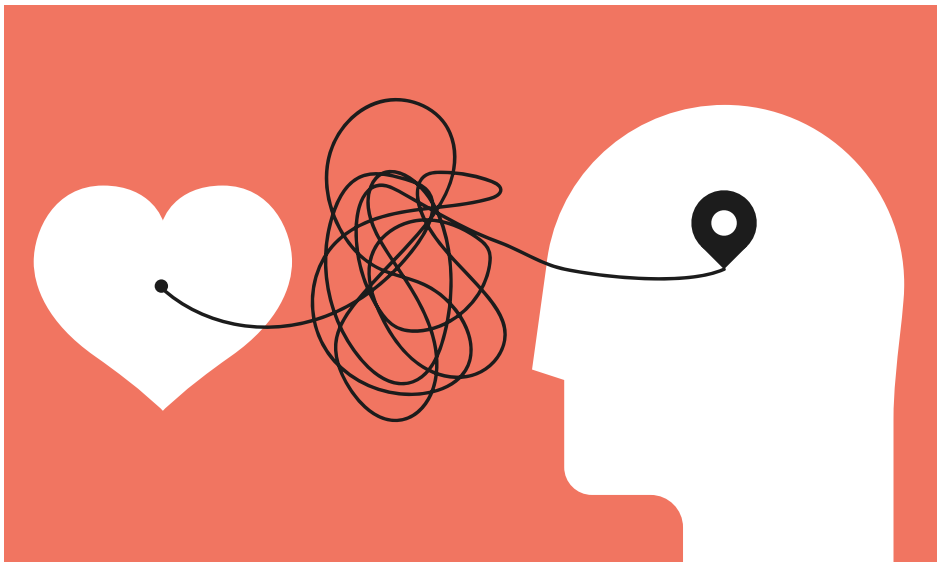
Importantly, co-executors must understand that they may also be held liable for the failures of a co-executor who is losing capacity, so it is important that any situation is addressed promptly.

Good preparation and prompt action on discovering failing capacity can circumvent, or at lease limit, the risk of the above.

2. Practicalities: removing an executor who has lost capacity

In England and Wales, the method of removing an executor who has lost capacity depends on (i) whether there is a Grant of Probate, (ii) how many executors the Will appoints, and (iii) whether the executor in question has made a Lasting Power of Attorney for financial decisions (LPA). This is a technical area where early and detailed advice is required to ensure issues do not arise and specific advice should be taken in all relevant jurisdictions.

The situation is even more complicated where the executor is also a trustee, and if the testamentary trust established by Will does not make provision for resolving the situation when a trustee is losing capacity (though this situation is often addressed in standalone trust documents). This can lead to a standstill in relation to the administration of the trust, which can be further exacerbated if decisions cannot be made without the unanimous agreement of the trustees (which is the default situation in English law trusts).



3. Practicalities: steps to limit the risks

Loss of capacity is, by nature, difficult to anticipate (particularly bearing in mind the current times), but one can take a number of practical steps to reduce the risks associated with an executor losing capacity, and to minimise the damage which loss of capacity can cause to the beneficiaries of an estate:

When drafting a trust or Will, the person making the Will should appoint two or more executors, at least one of whom is younger than them and/or in good health. They could also consider appointing a professional trustee or trust company in the role of executor (and trustee, if applicable). Either way, the key is to ensure the document has resilience to changes in future circumstances.

- Clients should review their Will regularly, especially if their circumstances or those of their proposed executors have changed, and consider whether any change in circumstances necessitates a change in executors.
- If clients are beneficiaries or co-executors, and they notice that an executor is losing capacity, they should consider asking them to resign before the executor in question loses the ability to do so. This conversation would obviously need to be handled with considerable care and is therefore best had as early as possible.
- Once an executor has lost capacity, all necessary steps should be taken to replace them as soon as possible.

Conclusions

This is a complex – and often highly emotional – area of law, and dependent on individual circumstances. If you do encounter a situation in which an executor has lost capacity you should seek specialist legal advice as early as possible, to manage the risks.

Whilst this article has focused on executors who lose mental capacity, many of the practical points will also apply to executors who lose physical capacity (eg where a serious illness or car accident incapacitates them for a significant period) but still retain mental capacity. This can cause issues for the probate process, particularly in the short term in the wake of an unexpected illness. Steps can be taken in these difficult circumstances to ensure the probate process can continue, so we would urge executors and beneficiaries alike to take prompt action and to discuss whether the executor feels able to carry on their role as best they can.

ARC
ASSET RISK CONSULTANTS

www.assetrisk.com

Supporting Durrell & Jersey Zoo

Jersey Zoo is the heartbeat of the Durrell Wildlife Conservation Trust. All of their conservation work around the globe is underpinned by the zoo. Despite their hardest efforts, the present pandemic is having a devastating effect on the income of Durrell.

When they wrote to inform us that their global conservation program and 61-year history of saving species and habitats from the brink of extinction was in real danger due to the financial impact of the pandemic on Jersey Zoo, we asked how we could help.

After discussions with Durrell, we are delighted that ARC is now the proud sponsor of their Blue Poison Dart Frogs display.

Find out more about the Durrell Wildlife Conservation Trust, their work and the frogs on their website **www.durrell.org**

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)

Native to Suriname

The poison frogs of Central and South America are famous for their toxic secretions, used by native communities when hunting. The poisons are not made by the frogs themselves, but are taken up from their diet of invertebrates, which have in turn ingested plant chemicals. However, in captivity the poison decreases considerably in strength as the food chain needed to supply them with their raw materials does not exist.

The frogs' bright colours advertise their poisonous nature. The blue poison frog's pattern of black spots on a blue background is particularly striking and varies from individual to individual. After they metamorphose into tadpoles, the male carries the young on his back to a small pool, water trapped in a hole or a bromeliad, where they develop into frogs after 10-12 weeks.

With the world's amphibians in crisis, captive populations are vital to conservation efforts.

Extremely sensitive to environmental change, amphibians give us early warning of problems that might be due to global warming, pollution and so on. The blue poison frog, like many others, is threatened with extinction.

Durrell has successfully bred this species, and their biosecure facilities at the Trust's headquarters in Jersey will enable them to continue studying and breeding the blue poison dart frog and other threatened amphibians in captivity, developing techniques to help slow their decline.

Asset Risk Consultants Limited
7 New Street
St Peter Port
Guernsey GY1 2PF

Asset Risk Consultants (Jersey) Limited
Charter Place
23-27 Seaton Place
Jersey JE2 3QL

Asset Risk Consultants (UK) Limited
46 Chancery Lane
London
WC2A 1JE

25 asset risk consultants 1995–2020

Love your Zoo

JERSEY FOUNDATIONS

THE IMPACT OF THE FINANCIAL SERVICES (DISCLOSURE AND PROVISION OF INFORMATION) (JERSEY) LAW 2020

Authored by: Nancy Chien, Edward Bennett, Lydia Carter - Bedell Cristin

The Financial Services (Disclosure and Provision of Information) (Jersey) **Law** 2020 (the "Law") is expected to came into force on 1 December 2020 and it will affect a number of entities, including Jersey foundations.

General overview of the Law

This briefing focuses on the impact of the Law on foundations.

The Law is intended to address recommendation 24 of the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation issued by the Financial Action Task Force.

Recommendation 24 requires jurisdictions to "ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities."

In addition to the Law, secondary legislation will be passed. This will take the form of regulations and an order:

- The draft Financial Services (Disclosure and Provision of Information) (Jersey) Regulations 202- (the "**Regulations**") have been lodged with the Jersey legislative assembly for approval and are expected to be passed on 1 December 2020.
- The Financial Services (Disclosure and Provision of Information) (Jersey) Order 202- (the "**Order**") is also expected to be made on 1 December 2020. A draft of the Order has previously been issued for public consultation.

This briefing assumes that the Regulations are passed in their current form and that the Order will be made in the form circulated for public consultation.

How will the Law affect foundations?

The Law requires information relating to a foundation's beneficial owners to be disclosed to the Jersey Financial Services Commission (the "**JFSC**") on its incorporation. Please see below for further discussion on who would be regarded as beneficial owners. It is important to note that information on beneficial ownership will **not** be made available to the public.

In addition, on incorporation, a foundation will have to disclose to the JFSC details as to its significant persons. A significant person is defined in relation to a foundation as being a member of the council. This information will be made available to the public.

Beneficial owners

The Law defines beneficial owner as "an individual who ultimately owns or controls the entity, or the individual on whose behalf a transaction is being conducted by the entity, including an individual who exercises ultimate effective control over the entity."

The Law confirms that "ultimate effective control over an entity, includes ownership or control exercised through a chain of ownership or by means of control other than direct control."

In the context of a foundation, it is likely that the beneficial owners would be the following: the person who ultimately settles funds on the foundation (although this person may not be the same person as the founder), the guardian, the council members and any beneficiaries. More details should be available once JFSC guidance is published.

The JFSC already collects beneficial ownership information from a range

of Jersey entities using the Control of Borrowing (Jersey) Order 1958 (the "**1958 Order**"). Foundations are not caught by the 1958 Order and therefore foundations have previously not been obliged to disclose beneficial ownership information to the JFSC. The Law now requires such disclosure.

Amendments to the Foundations (Jersey) Law 2009 (the "Foundations Law")

The Law amends the Foundations Law.

Currently, the regulations of a foundation are not made publicly available. The regulations of a foundation may be likened to the articles of association of a company and detail the internal administrative arrangements relating to a foundation.

Under the new arrangements, "abridged regulations" will be submitted with an application for incorporation of a foundation and these "abridged regulations" will be made publically available.

Under Articles 12-14 of the Foundations Law, the regulations of a foundation must provide for the following:

- The establishment of the council.
- The appointment, retirement, removal and remuneration of council members.
- The decision making process and functions of the council (including whether such functions may be delegated).
- The procedure for the appointment of a qualified person to the council.
- Provisions relating to the guardian.

Under the new arrangements, the above information must be contained in the "abridged regulations". However, the "abridged regulations" are defined so that they do not include (i) any information by which a person can be identified or (ii) any other information prescribed by secondary legislation.

Therefore, a foundation will have:

- a set of "full regulations" which are not made publicly available; and
- a set of "abridged regulations" which:
  - are made publicly available;
  - contain key elements taken from the full regulations;
  - but which are prepared to exclude information by which a person can be identified.

The Foundations Law is also being amended to allow the JFSC to publish guidance on the information that should be included in, or excluded from, "abridged regulations".

Foundations will need to carefully review "abridged regulations" to ensure that all information by which a person can be identified is excluded. By not identifying persons in this way, the confidentiality of foundations can be maintained and respected. Pending guidance from the JFSC, it is likely that information can be excluded from "abridged regulations" by simply redacting the relevant provisions.

What happens if there is any change in information?

If there is any change in beneficial owner information or significant person information, this has to be notified by the foundation not later than 21 days after the foundation becomes aware of it.

Annual confirmation statements

Every foundation must file an annual confirmation statement with the JFSC.

The annual confirmation statement must be filed between the 1st January and the end of February in each year.

It will verify that the beneficial owner information and significant person information remains accurate.

Nominated persons

Every foundation must appoint a nominated person.

A nominated person acts as the main interface with the JFSC for the purposes of the Law. The nominated person is authorised by the foundation to provide the information required under the Law to the JFSC (including annual confirmation statements).

The nominated person is also authorised to provide other information to the JFSC or the Companies registrar under the Foundations Law.

The Law regulates who may be a nominated person. The following could be appointed:

- a trust company regulated by the JFSC;
- a significant person who is ordinarily resident in Jersey; and
- a lawyer or accountant who is ordinarily resident in Jersey (and who is regulated by the Proceeds of Crime (Jersey) Law 1999).

A member of the council who is ordinarily resident in Jersey could therefore be appointed to this role.

Existing foundations – transitional provisions

The Law does not just apply to newly incorporated foundations.

Under the transitional arrangements of the Law, all existing foundations will need to do the following:

- notify the JFSC of the appointment of a nominated person;
- file "abridged regulations"; and
- notify the JFSC of the information that will be contained in the annual confirmation statement (i.e. the foundation's beneficial owner information and significant person information).

This has to be done not later than 3 months after the Law coming into force.

Beneficial owner information: private information

Jersey has committed as a jurisdiction to adhere to international standards on the disclosure of beneficial ownership information. Pending international standards being settled, there are no proposals to make any beneficial ownership information publicly available.

Permitted disclosure

Beneficial owner information and other information may be disclosed to combat money laundering and terrorism.

Under the Law, a local competent authority may at the request of a foreign competent authority:

- facilitate access by the foreign competent authority to information held by the local competent authority;
- exchange information with the foreign competent authority on shareholders, including nominee shareholders; and
- obtain beneficial owner information on behalf of the foreign competent authority.

A "local competent authority" includes the JFSC, the Joint Financial Crimes Unit of the States of Jersey Police Force, the Attorney General and the Minister for External Relations.

A "foreign competent authority" is a public authority exercising functions or having responsibility for anti-money laundering and counter terrorism measures in a jurisdiction outside Jersey.

The Law also allows disclosure of information in other situations. These include disclosure to a law enforcement agency for the purpose of the investigation or prosecution of an offence.

Significant person information: public information

As regards a significant person who is an individual, it is envisaged that the following details will be made publicly available:

- the name of the person;
- the month and year of the person's date of birth;
- an address for correspondence to the person;
- the person's nationality, and
- the person's occupation.

It should be noted that for security purposes, the full date of birth of a significant person will not be made publicly available. In addition, the address for correspondence may be different from the significant person's residential address.

Under the Law, a nominated person may apply to the JFSC for information about a particular person (the "subject") to be kept private. The grounds for the application are as follows:

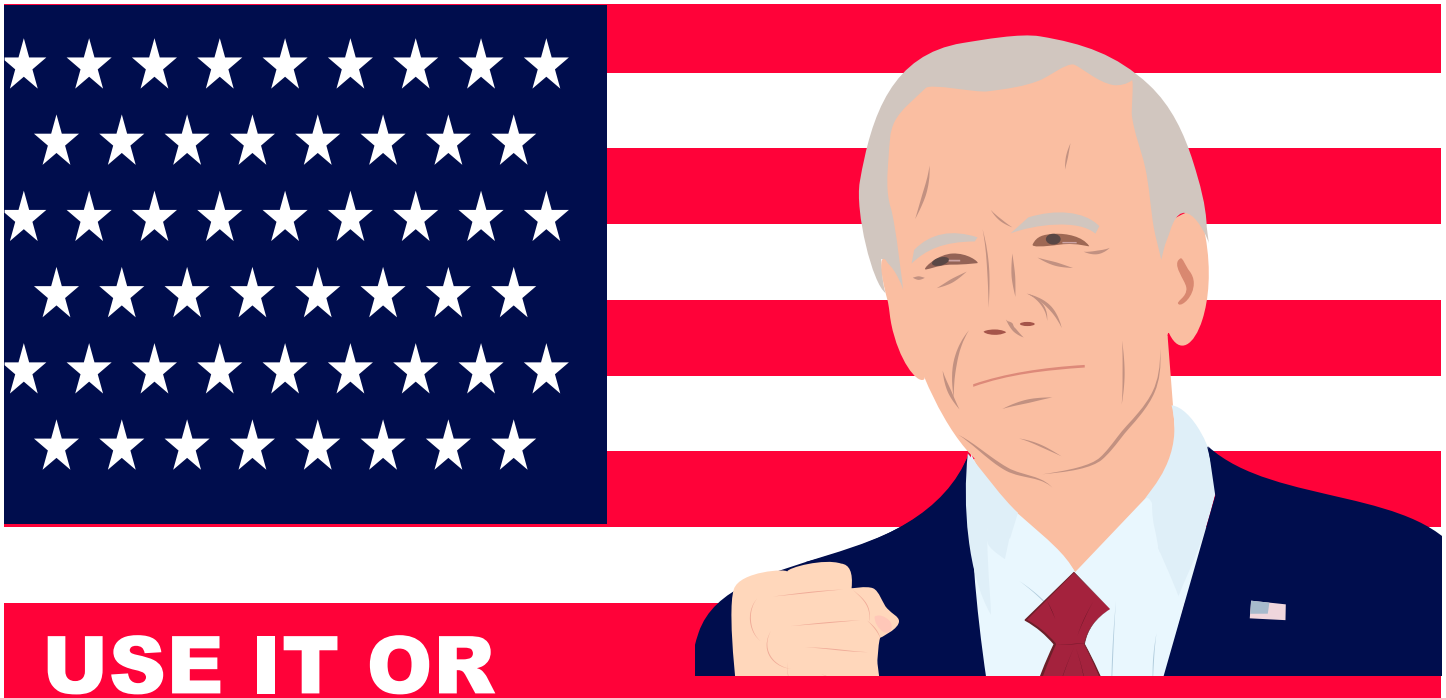
- if the subject considers that there is a serious risk that the subject, or a person who lives with or is related to the subject, will be subjected to violence, intimidation or physical or mental harm as a result of the information being made available for public inspection;
- if the subject considers that there is a serious risk of damage or threat to property as a result of the information being made available for public inspection;
- if the information relates to a subject who lacks capacity to manage their own affairs; or
- if there are exceptional circumstances that justify the making of the application.
- Depending on the circumstances, it may be appropriate to make such an application in relation to a significant person of a foundation.

Next steps

Existing foundations will have until **1 March 2021** to:

- appoint a nominated person;
- provide the required beneficial owner information and significant person information to the JFSC; and
- provide their abridged regulations to the JFSC.

Whilst guidance on the "abridged regulations" has not yet been released, we recommend that existing foundations should begin the process of preparing their "abridged regulations" now given the imminent deadline of 1 March 2021. Thought should be given as to whether any redaction will be necessary or whether any other amendments may be required. Our team of experts would be very happy to assist you with this process and can advise on the solutions that are available.



USE IT OR LOSE IT, BUT BEWARE THE UK

Authored by: Rachel Davison – Taylor Wessing

A whirlwind of estate planning is being carried out for US individuals since the Biden election win. There are a number of potential traps to navigate when planning for dual US/UK residents and nationals. What should you be aware of when advising on estate planning for US individuals with links to the UK?

Flurry of US estate planning after Biden 2020 election win

Many US tax and estate advisers are frantically busy following the US election win by Joe Biden. That win promises to bring with it significant tax changes (and likely rate hikes) in the US.

For US tax and estate advisers, the focus has been on the various hints and proposals on tax reforms referred to in the course of the Biden campaign. Many see these proposals as the inevitable reversal by the Democratic, newly inaugurated President Biden, of President Trump's tax rule changes (implemented by the Tax Jobs and Cuts Act 2017).

Set within the context of the significantly increased US national debt caused by the ongoing COVID crisis, it's clear that there is likely to be more appetite to tax UHNW individuals in the US in the coming months and years.

The flipping of the Senate to Democrat will give the Biden administration more – albeit certainly not unlimited – latitude to make changes to the US tax code. Although the extent of what Biden will be able to achieve is unclear, one thing is almost certain: the tax burden assumed by wealthy Americans is only likely to increase in the coming years.

Possible tax changes during Biden Presidency

What then, are some of the possible US tax changes coming down the pipeline after Joe Biden's Inauguration as the 46th US President on 20 January 2021?

A few specific proposals are as follows:

- Reduction of the current historically high Federal estate and gift tax lifetime exemption of $11.58m. Reducing to closer to $5.5m and possibly lower has been discussed.
- Elimination of the step-up in basis for inherited assets, with the effect of possible tax charges on latent gains on death.
- Doubling of the rate of tax (from 10.5% to 21%) charged on income of controlled foreign companies ie non-US businesses owned or controlled by relevant US individuals or businesses.
- If some or all of these rule changes are implemented in the US this will have a significant impact for both Americans living in the UK (and abroad generally), as well as for UK individuals resident and/or domiciled in the US.

Gifts to trusts by US individuals

"Use it or lose it" is the current refrain of the US advisor talking to UHNW clients, this being a recommendation to make use of the client's unused US estate and gift tax exemption in case the Biden administration reduces this from the current amount of $11.58m.

One common planning route is for the wealthy US client to make a completed gift to a trust of assets of a value within his or her unused gift and estate tax exemption. Where problems can arise is when that US client is also treated as UK domiciled. The gift to the trust –

which may make total sense from a US estate tax perspective – runs the risk of triggering an immediate UK inheritance tax (IHT) liability for the client, as well as ongoing IHT charges for the trustees of the recipient trust.

- Potential immediate 20% inheritance tax charge on gift into trust (subject to any reliefs).
- Ongoing IHT charges for trustees.

Risk of tainting UK protected trusts

In 2017 significant changes were made to UK tax legislation affecting the way in which UK resident non-domiciliaries, as well as trusts created by them, are taxed in the UK.

Those rule changes were wide-reaching; however, they did afford certain protections from immediate UK taxation to foreign (ie non-UK) income and capital gains realised in the trust, as long as certain conditions are met on an ongoing basis for the trust. Significantly, however, those protections from immediate UK taxation will fall away for all time for a previously protected trust if the relevant conditions are not met at any time.

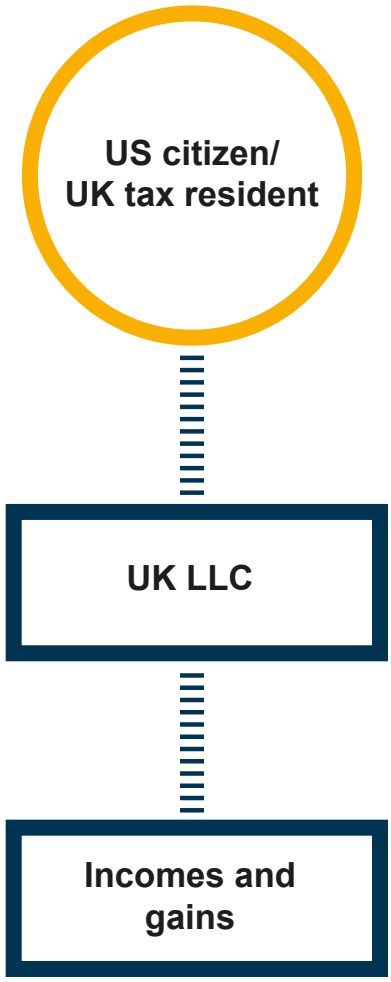
By way of illustration, a trust can lose its UK protected trust status forever as a result of something as simple as the Deemed Domiciled settlor entering into a loan arrangement with the trustees on terms that do not fall within the very prescriptive parameters of the relevant UK anti avoidance legislation. This can have catastrophic UK tax consequences for that Deemed Domiciled settlor.

- Potential immediate 20% IHT charge on gift to trust.
- Trust loses 'protected' status with effect that all trusts income and gains taxable on settlor as they arise.

Potential double taxation nightmare

Planning being implemented for the US client ahead of any tax changes may involve the sale or other restructuring of US corporate entities. Another familiar trap for the unwary advisor of US clients with links to the UK arises from the potential mismatch in the tax treatment of certain US corporate entities (for example, LLCs and S-Corps) as between the US and the UK.

In the worst-case scenario this can result in income and capital gains of the US corporate entity being subject to tax in both the US and the UK.



- Subject to US income tax on share of income and gains as they arise.
- Potentially subject to UK tax on distribution from LLC and on disposal of interest in the LLC.

The above should serve as a reminder of the need to take care and seek specialist UK advice when advising clients with links to the UK. This is particularly the case in the current climate of US tax driven planning being carried out in relative haste, in anticipation of the possible US tax changes being enacted by President Biden. Our Private Wealth team would be happy to speak with you about any of your concerns, queries, or specific challenges being faced by your clients.

Radcliffe Chambers

Radcliffe Chambers Private Client

"Fresh and forward-thinking."

(Chancery: Traditional, Chambers High Net Worth 2019)

We have a longstanding reputation as a leading barristers' chambers for private client disputes and advisory work. Our members are recognised for their excellence across a wide range of issues affecting individuals, including trusts and estate planning, wills and probate, court of protection proceedings, charities, tax and property.

We have extensive experience working with private clients and their advisers in the UK and internationally, and we pride ourselves on taking a collaborative approach to everything we do, supported by a deep understanding of the sectors and jurisdictions in which we operate.

E: clerks@radcliffechambers.com
www.radcliffechambers.com

T: +44 (0)20 7831 0081
F: +44 (0)20 7405 2560

UK WEALTH TAX COMMISSION PUBLISHES REPORT

Authored by: Christopher Groves, Phineas Hirsch and Kate Taylor – Withers Worldwide LLP

The self-appointed 'Wealth Tax Commission' has published a report recommending a one-off wealth tax on total wealth above £500,000 per individual (£1 million per couple), payable over five years. The authors of the report do not state what the rate should be, but note that if it were levied at 5%, £260bn could be raised for the government to address the rising costs of the covid-19 pandemic.

The tax proposed by the report would apply to all worldwide assets of UK residents, including main residence and pensions but subject to the deduction of debts such as mortgages. Trust assets would be included where the settlor is UK resident in the year that the tax is levied, regardless of whether the settlor is excluded under the terms of the trust deed, and the trustees would have primary liability with the settlor having a secondary liability. Non-UK residents would only be liable to wealth tax on UK real estate and not other UK assets.

We have previously addressed the possibility of a wealth tax since the onset of the pandemic in March 2020 when it became clear that there would be significant economic fall-out.

As we discussed here, wealth taxes must be implemented with caution. The report predicts significant revenue from the suggested one-off tax, but if wealthy individuals choose to leave a jurisdiction because of the introduction of, or threat of, a wealth tax, then there will be a significant impact on economic activity not to mention minimal revenue generated. The decisions by James Dyson and Jim Radcliffe to establish their factories outside the UK provide clear evidence of the fact that wealth creators will "vote with their feet".

The report fails to consider that a wealth tax could refer to a broad range of taxes. In May of this year, we suggested there were three possible options for a new wealth tax, in addition to an one-off tax: a property tax, a reduction in the annual capital gains tax allowance or increase in capital gains tax rates, and abolishing higher-rate tax reliefs for pension contributions. A change to the capital gains tax regime in particular has been the focus of recent attention following the Office of Tax Simplification's report, published in November, which we discussed here. We have also discussed other options for changes to taxation that the government may consider, including changes to income tax, national insurance, and VAT.

By considerably narrowing the scope of what can be considered a wealth tax, the report presents an extreme proposal which we do not consider requires much further consideration. Wealth tax as a concept is one that is worthy of serious consideration and one which could well have its place in a progressive tax system. It is a shame that the opportunity was not taken to consider a wealth tax in the context of a wider package in a way that could stimulate a reasoned debate about how to tax wealth and address the economic impact of the pandemic.

It's worth noting of course that the UK already has a wealth tax, albeit one that currently falls on occupiers rather than owners, the Council Tax. Focussing on an expansion of the Council tax, putting the liability on owners rather than occupiers, adopting a pre-existing valuation system and allowing the revenues to pass to Councils to fund the increasing burden of social care may have been a more practical way forward, but perhaps insufficiently radical for the purposes of this Commission.

France, of course, which has spent many years refining its wealth tax to balance the burdens of payment and administration with the revenues raised has an annual wealth tax applied solely to real estate valued above €1.3m at a rate of up to 1.5%. Simple.

It is important to note that the report was not commissioned by the government or any official body. Chancellor Rishi Sunak has clearly indicated he does not support a wealth tax and shortly this report will be consigned to history, to live on only in cross references in obscure academic papers.

PRESUMPTION OF ADVANCEMENT

GIFTS TO ADULT CHILDREN

Authored by: Mark Hunter, Isobel Morton with contributions from trainee solicitor Carrie Gothard – Macfarlanes

Where one person transfers property to another without gaining anything in return, a resulting trust arises. However, where a person transfers property to a child or spouse, the property is presumed to be a gift by way of advancement.

Background

In Re Levy [1960] Ch. 346 it was explained that this "is based on the concept that where a property is transferred to a person to whom the transferor has an obligation to support, it is presumed to be an advance of the interest the dependent might reasonably expect to receive on the death of the transferor". The presumption of advancement can be rebutted relatively easily by documentary evidence that no gift was intended.

In Canada, the Nova Scotia Supreme Court held in Pecore v. Pecore, 2007 SCC 17 that the presumption should not apply in respect of independent adult children. The court commented that parental support obligations in law usually end when the child ceases to be a minor, and indeed in later life the adult child may have imposed upon them the obligation to support their parents. The presumption of advancement with regard to gratuitous transfers from parent to child was limited to transfers by parents to minor children.

"Where one person transfers property to another without gaining anything in return, a resulting trust arises. However, where a person transfers property to a child or spouse, the property is presumed to be a gift by way of advancement."

Kent v Kent

The recent case of Kent v. Kent, 2020 ONCA 390 (CanLII) determined that a transfer from mother to daughter raised the presumption of a resulting trust in a situation where there was lack of consideration.

The facts were as follows. A mother (M) bought a property as sole purchaser in 1983. In 1996 she transferred title to herself and J, her adult daughter, as joint tenants for nominal consideration. M continued to live alone at the property until 2008, when J, her husband, G, and their children moved in. The family lived with M at the property until J's death in 2014 on a rent-free basis. G was the sole beneficiary of J's estate. After J died, G continued to live with M at the property on a rent-free basis. M moved into long-term care in 2015 but continued to pay all the expenses for the property until she died in 2016.

M had made a 1978 will naming J as the sole beneficiary. If J predeceased M, J's living children would be the beneficiaries. In 2015, M made a new will naming J and G's children as trustees and leaving the property to G and her two grandchildren in equal parts (one third each). After J died, M had registered a survivorship application putting the title of the property solely into her name.

On M's death, G claimed that he was entitled to half of the property as the sole beneficiary under J's will, and a further third of the remaining half under M's will. He claimed that his children were each only entitled to one sixth. His children maintained that they each were entitled to one third of the property.

It was held that the 1996 transfer of title was not a gift. Pecore was applied and there was a presumption of a resulting trust. M's 1978 will did not rebut the presumption of a resulting trust. It was made two decades before the 1996 transfer and it served as no evidence of M's intention in 1996. M's actions in making a new will in 2015 and transferring the property back into her name after J died by way of survivorship application was evidence that she believed she was the sole owner of the property and not evidence of a change of intention.

G had further argued that when he and J moved in to the property it became a "matrimonial home" under the Family Law Act (R.S.O. 1990, c. F.3) in Ontario. This would mean that the joint tenancy would have been deemed severed immediately before J's death and her half would devolve to G. He claimed this rebutted the presumption of a resulting trust. However, the court did not accept G's submission. G and J did occupy the property as their family residence beginning in 2008; however, J did not have the requisite "interest" in the property in order to qualify it as a matrimonial home. The transfer for nominal consideration raised the presumption of resulting trust instead.

Presumption of advancement in the English courts

Conversely, under English law, the courts have been more willing to uphold the presumption of advancement.

In Wood v Watkin [2019] EWHC 1311 (Ch) the High Court held that a presumption of advancement could arise even where the donee was an adult child of the donor and financially independent of their parent.

Moreover, in Kelly v Kelly [2020] 3 WLUK 94, the High Court held that the presumption of advancement was not rebutted where there was no documentary evidence that a father's purchase of a property for his son was a loan and not a gift. The father was held to have given inconsistent evidence and there was no mention of a loan in any of the documents exchanged between father and son. Although there were witnesses who gave consistent evidence of their honest understanding that the purchase was a loan, that was after the fact. While the presumption of advancement is considered to be weak and easily rebutted, the lack of documentary evidence meant that it could not be rebutted in this case.

The presumption of advancement may be abolished altogether in England and Wales if section 199 of the Equality Act 2010 is brought into force. However there is no sign of this happening at the moment.

Conclusion

What these cases highlight is the need to ensure that the intention behind any transfer of property within a family is accurately recorded at the time as it is difficult to predict whether the presumption of advancement will be applied in any given case. A clear statement of intention will avoid expensive litigation and will prevent property ending up with the wrong person.

Private Client

Physical Events Calendar 2021

ThoughtLeaders4 Contentious Trusts

7th October 2021
IoD Building
London

ThoughtLeaders4 Jersey

11th October 2021
Royal Yacht Hotel
Jersey

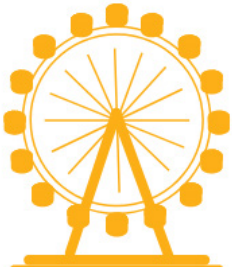
ThoughtLeaders4 Guernsey

13th October 2021
Duke of Richmond
Guernsey

ThoughtLeaders4 x ConTrA Summer School

28th - 27th August 2021
Clare College
Cambridge

NextGen Wealth Summit



8th - 10th September 2021
Syon Park
London

Bringing US Back Together

We appreciate how long it has been since we have all been together. We are counting down the days until we can make this happen and we are proud to announce our first ThoughtLeaders4 Private Client series of events. 2020 reaffirmed how strong our growing community is and how vital knowledge sharing is – imagine what it's going to feel like again in person?

Covid-19 Clause

Book with Clarity

If the event runs on the designated date and any delegate is unable to attend due to:

- Local travel restrictions of the attendee
- Restrictions in the country hosting the event
- Any requirement to self-isolate or quarantine
- General travel restrictions

All bookings will have the option of:

- Sending a replacement at no extra cost
- Transferring to the 2022 date at no extra cost
- A full refund

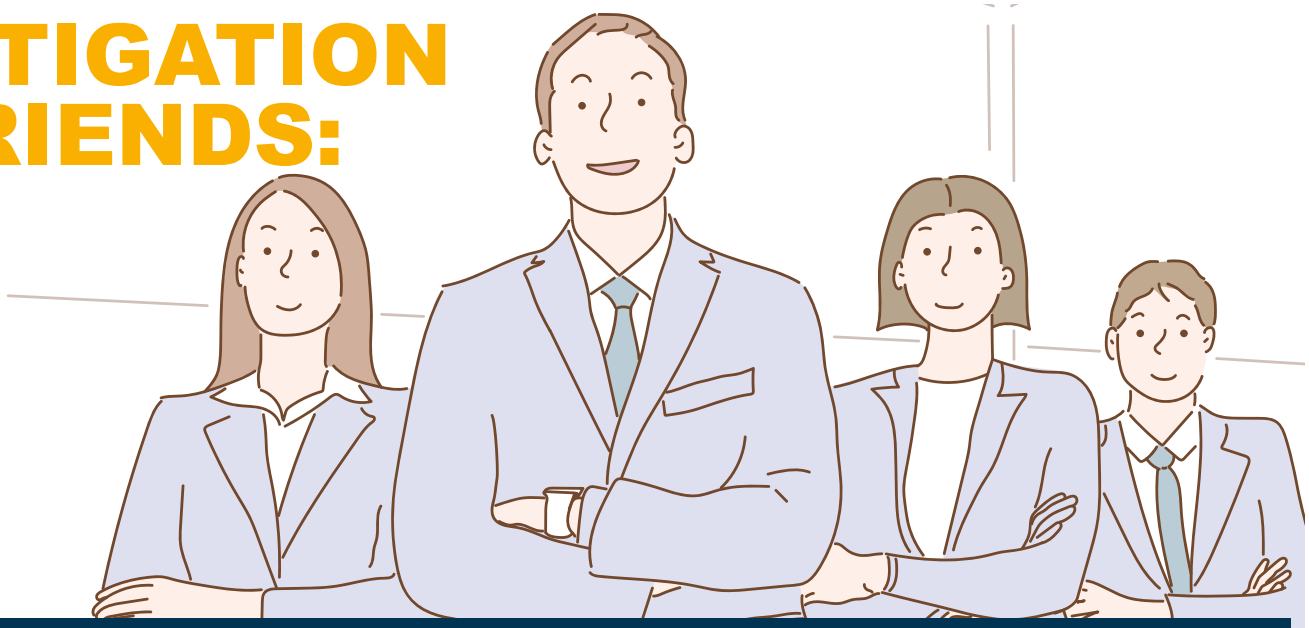
If the event does not run as scheduled all bookings will have the option of:

- Transferring to the 2022 date at no extra cost
- A full refund

For more information, contact:

laura@thoughtleaders4.com

LITIGATION FRIENDS:



WHO WOULD WANT TO BE ONE?

Authored by: Sarah Foster - Freeths LLP

Litigation friends are required when a person lacks capacity to participate in court proceedings. That will be because that person is (a) a child [under the age of 18] or (b) lacks the mental capacity to be involved with or without a solicitor [known as a protected party].

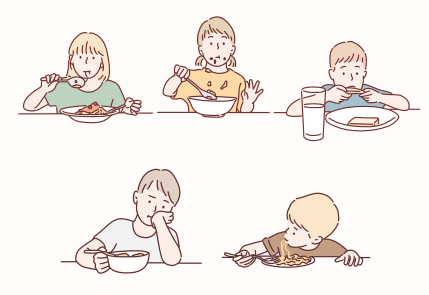
Litigation friends are often a parent, family member or friend. But, sometimes a solicitor is appointed or a Court of Protection deputy. Where there's still no one suitable, willing and able to act, the court may ask the Official Solicitor to step in but only if there is money available to pay the Official Solicitor's costs.

And, it is that issue of costs which is often uppermost in a potential litigation friend's mind if approached to be one. Whilst a litigation friend who incurs costs or expenses on behalf of a child or protected person is in principle entitled to recover such reasonable costs and expenses from any money recovered [CPR Part 21.12], what is the position if a costs order is made against that child or protected person? Whilst a litigation friend is not named as a party to the proceedings, does the fact that s/he is acting on behalf of a liable party mean that the litigation friend then has to pay the costs personally?

It was that issue and others which the Court of Appeal recently considered in the case of Glover v Barker [2020] EWCA Civ 1112.

Facts

Mr Barker was a wealthy and successful businessman. He was also a father to five children by three mothers: Tom and Freya (twins and the children of Mrs Glover, the appellant); Euan and Rowan; and Lauren.



In the late 1990's, Mr Barker wanted to sell his business. To do so in a tax efficient way, he was advised to create an employee benefit trust and a sub-trust, the principal beneficiaries of which included the five children. That scheme was ultimately successfully challenged by HMRC, however, and Mr Barker ended up paying about £11.3M in tax.

Mr Barker then brought proceedings against, amongst others, the trustee and Euan (purporting to act on behalf of all 5 children via a solicitor litigation friend). He sought to unravel the ineffective trusts, and to recover the assets which he had transferred into it. Those proceedings were compromised on terms requiring money to be settled in both the employee benefit trust and the sub-trust, with the balance being held for Mr Barker absolutely.

In 2014, that settlement was approved by the court – as it had to be as Euan was a minor – and the proceedings were stayed. At that time, however, Tom and Freya knew nothing about the proceedings or about the compromise, and the court was not informed of their ignorance (of which the court was subsequently highly critical).

In 2017, Tom and Freya (acting via Mrs Glover as litigation friend) sought an order to be added as defendants to the stayed proceedings and for a declaration that the compromise was not binding on them. Given that the trust deeds could have been rescinded, however, that application was dismissed. The twins would not have had any claim against the trustee, and were therefore better off under the compromise than not. Mr Barker, the trustee and Euan then applied for Mrs Glover to be added to the proceedings so that they could obtain a costs order against her.

The first instance costs decision ….

was given by Morgan J in 2019, who added Mrs Glover as a party and then ordered her to pay the respondents' costs of the twins' application. He refused, however, to make a costs order against Tom and Freya.

In reaching this decision, he examined a very long line of authorities concerning "litigation friends" dating back to 1727. He concluded that the litigation friend of a child claimant would generally be responsible for the costs that would otherwise be ordered against the child/ protected party. He also rejected the submission that it was not appropriate to make an order for costs against the litigation friend of the child defendant in the absence of gross misconduct, concluding that "although one has regard to all the circumstances of the case, claimants and defendants are generally treated in the same way".

The matter of costs was therefore one for his discretion (regardless of whether the twins should be categorised as claimants or defendants) and that discretion would be exercised in favour of the respondents. That was because (i) the twins' application had had no merit and (ii) that, for the purposes of s.51 of the Senior Courts Act 1981 (which provides for costs to be ordered against a non-party), Mrs Glover had controlled the proceedings and stood indirectly to benefit from them.

Court of Appeal decision

Mrs Glover appealed against the costs orders made against her. In allowing the appeal, the Court of Appeal held in August 2020 that:

1. there was an important distinction to be drawn between the liability for costs of claimant's litigation friends and that of defendant's litigation friends;

2. the issue of whether to make a costs order against a claimant's litigation friend was unlikely to arise in practice. That is because the CPR require a claimant's litigation friend to undertake to pay any costs ordered against the child or protected person as a precondition to their appointment. But, where no costs order is made against a party (and therefore the undertaking does not bite), the common law position is that a claimant's litigation friend will remain liable for costs, subject to the discretion retained by the court which must be exercised justly;

3. the position of defendants' litigation friends was, however, different. They will not be required to bear costs in the absence of gross misconduct, even if the litigation friend controlled the defence of a successful claim. As a matter of policy, if a defendant's litigation friend were usually vulnerable to an adverse costs order "that would deter suitable individuals from taking on the role";

4. if it was not entirely clear whether the child/ protected party was a claimant or defendant (as here), the costs need not be governed by a simple characterisation of the party. Instead, the court should engage in a "substance over form" analysis to determine the true position of the child or protected party and therefore the litigation friend; and

5. On the facts, the Court of Appeal decided that the circumstances of Tom and Freya's participation made it more appropriate to apply the approach of defendant's litigation friends. Although named as claimants that was only because they had not been named as defendants in the first place. The circumstances did not justify making an adverse costs order against Mrs Glover personally, and therefore the costs orders against her were set aside.

Discussion points

In allowing the appeal in this case, the Court of Appeal were obviously concerned to ensure that children/ protected parties who are named as defendants to proceedings are able to obtain representation from a litigation friend who is not put off by a potential costs order against them. But, the court may still make a defendant's litigation friend personally liable for costs where s/he is guilty of bad faith, unreasonable behaviour and/or where s/he has a prospect of personal benefit. In circumstances where costs litigation is obviously a growth industry, it will be interesting to see how this develops.

Resolving private client disputes

Our aim is to work collaboratively and strategically with legal teams to achieve the best possible outcome for clients.

We know that when clients are dealing with personal disputes, whether this is following the death of a family member or a family fall out, they often become emotionally charged and sometimes extremely acrimonious. But we also know that with the right team in place, who have experience in assisting and managing these complex and sensitive matters, resolution and recovery strategies can be implemented to ensure the dispute is successful resolved for your client.

To find out more about resolving these disputes and our work in high value asset recovery and enforcement, please do get in touch.

We help you resolve disputes through:

- Intelligence and research
- Expert witness services
- Valuations
- Asset tracing and management services
- Formal appointments to deceased estates
- Insolvency appointments
- Debt enforcement and recovery strategies

Visit grantthornton.co.uk to find out more, or contact:

Hannah Davie
Director
T +44 (0)20 7865 2849
E hannah.davie@uk.gt.com

Grant Thornton

DS1947

HIDDEN TREASURES - PROVIDING INSIGHTFUL, RELEVANT INTELLIGENCE TO CLIENTS ENABLING THEM TO MAKE BETTER INFORMED AND STRATEGIC DECISIONS

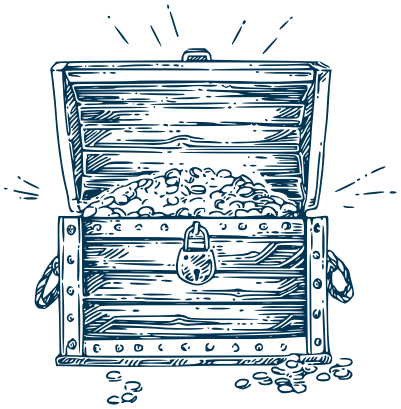
Authored by: Chris Phillips, Dan Sutch and Hannah Davie - Grant Thornton UK LLP

These really are the most extraordinary and strangest of times. No sooner did we think that the world might just be getting back to some kind of normal, then here we are again, back at ground zero, confused and bewildered as to when this will all end. For many these are desperate times, for others an opportunity, never more so than in the Private Clients arena where the cloud of COVID has created a perfect storm, affecting client's commercial activities, investments, family and matrimonial status.

Whilst for some enterprising and lucky individuals, who have successfully timed their investments and entrepreneurial commitments to perfection, you feel these are the fortunate few. For many within the Private Client family, you sense that these next few months will require difficult decision to be made and for some may prove to be 'make or break'. COVID is agnostic to wealth, status, and position but clarity of thought and access to relevant, timely, reliable and quality information will, arguably, prove more valuable to those who need it now than would otherwise have been in the recent past.

Whilst not necessarily on the lips or immediately on the minds of many, Corporate Intelligence can be an effective way of providing insightful, relevant information and intelligence to make better informed and strategic decisions in these challenging times. It is a service that in some sectors is widely discussed but generally not well known about or understood. The best tools, software and analysts, with data that may historically only have been accessed by government agencies, makes Corporate Intelligence an interesting and exciting place to be.

As most readers will be keenly aware, intelligence requirements vary considerably depending on the lay-client or situation. Nevertheless, with the increasing uncertainty that COVID has brought, many of our recent conversations with clients have been around reactive intelligence gathering, helping parties to respond appropriately to difficult situations and take the right steps in the recovery of funds.



Reactive intelligence

Recent work on a trust and estates dispute for an expert solicitor team, focussed on tracing assets held by a family estate as part of pre-litigation intelligence gathering. Such work is critical when considering legal strategy, funding, insurance options and negotiation tactics.

An asset tracing or means investigation may require a number of tools and techniques to be deployed, combining a variety of skills in open source intelligence gathering, human source enquiries and document and data analysis, which might include:

- Using visualisation and conceptual clustering tools, to identify likely assets from seized email accounts or documents.
- Examination of web domain infrastructure to reveal links between subjects and other connected entities.
- Mapping of online social networks to investigate 'real-world' links between subjects and other persons of interest.
- Monitoring of public social media posts to establish details of the subjects' lifestyle, recent movements and trophy assets.

- Comprehensive searches of statutory and commercial databases, together with targeted 'open source' research to establish the extent of a subject's property assets in the UK and abroad.

A comprehensive and well-constructed means report can be an effective tool to support negotiations or present to court. Use of visualisations such as charts, graphs and maps can be used to good effect to demonstrate complex concepts and summarise lengthy narrative. In several recent cases early identification of assets has helped to make better informed funding and strategy decisions and paved the way for robust negotiations and prompt recoveries.

Of course, corporate intelligence engagements can be pro-active instead of re-active to help clients navigate a myriad of estate planning considerations or deal with commercial uncertainties head-on.

Pro-active research

Consider the potential impact of timely and accurate intelligence around estate and investment planning, personnel vetting and media exposure. Here the objective is to help clients identify, manage and avoid risk in the coming months and years.

This type of diligence work must be proportionate and tailored to address the most significant risks but might include:

- Multi-lingual media research to accurately profile a subject and ascertain details of their activities and media profile.
- Corporate and regulatory record analysis to establish links, measure recent performance and identify compliance 'red flags'.
- Enquiries and interviews with sources in industry to establish background and reputation.
- 'Red Team' research to profile a client's exposure to cyber and social engineering attacks or identify threats to privacy.

Given what is often at stake when investing in new people and businesses, it is critical that clients have confidence in the background, conduct and exposure of those around them. The same intelligence gathering process can be used defensively, switching the focus to identify vulnerabilities and potential exploits to pro-actively protect the clients' interests.

However, the corporate intelligence process is used, the goal is always consistent, to provide accurate, timely and cost-effective intelligence to assist clients in making better informed strategic decisions. The methods may change but the intention is always to add value to the existing knowledge position with robust analysis and supporting information.

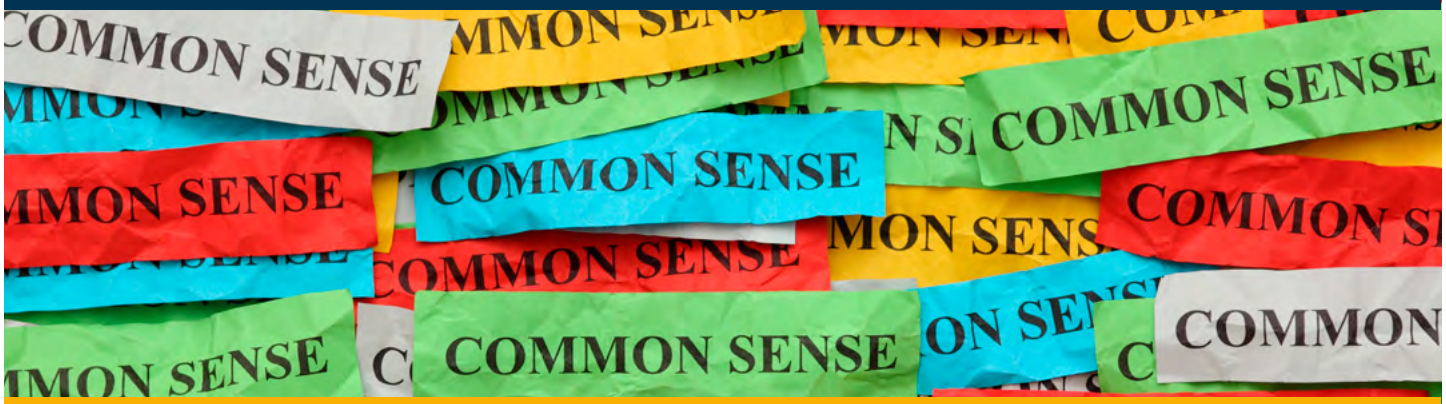
Onshore and Offshore collaboration

As our world reacts to unprecedented events, we are seeing our clients respond with increasing diversification and ever more varied needs.
The requirement for cross-border collaboration between expert teams increases daily.

Grant Thornton's investment in its offshore presence has led to seamless collaboration between assignment teams and an offshore-compatible offering to clients. The same is true of the corporate intelligence service, which benefits significantly from the input of in-country experts to complement the London based team and provide a truly global reach in support of our clients' multi-national needs.

As the effects of governmental cash-injections and lockdown bounce-back begin to wear off for clients and their businesses, the need to make critical and timely decisions will become unavoidable. By making best use of a corporate intelligence process, you can fore-arm your clients with the knowledge they need to take robust and confident action as part of their successful first-steps into the post-COVID world.

PROPRIETARY ESTOPPEL:



THE COMMON SENSE CONTINUES

Authored by: Emily Bueno - Mishcon de Reya

Proprietary estoppel, despite having a jargonistic name, is a common sense doctrine, developed in recognition of the fact that people do not live their lives in ways that lawyers advise – that is, by formalising agreements with the assistance of qualified professionals. It recognises that where there has been (a) an assurance of sufficient clarity in relation to the assuror's property (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of her reasonable reliance then an "equity" in favour of the claimant arises.

This doctrine has developed, and is continuing to develop, to ensure a fair result is achieved. For example, the assurance neither need be recorded in writing, nor explicated by the assuror: for example, in *Thorner v Major* [2009] UKHL 18, despite the assuror's oral remarks about the claimant inheriting the farm in question being "*oblique*" these did not fail to be sufficiently clear for the purposes of the doctrine, since the assuror, Peter, was "*taciturn*" and "*in the habit of saying so little, it was scarcely to be expected that he would ever address the matter directly*". These assurances were "*clear enough*" to the claimant "*whom he was addressing and who had years of experience in interpreting what he said and did, to form a reasbonable view that Peter was giving him an assurance that he was to inherit the farm and that he could rely on it.*"

Furthermore, the satisfaction of the "equity" – if a proprietary estoppel is established – is done so in a proportional way, taking into account all the relevant circumstances. Therefore, in *Jennings v Rice* [2002] EWCA Civ 159, it was held that it would be disproportionate to reward the claimant, Mr Jennings, who provided significant assistance without pay to the deceased (Mrs Royle) during the closing years of her life, his expectation of Mrs Royle's house and its contents, worth at least £435,000. Instead, he was awarded £200,000 on the basis that to reward "*an employee on the scale of £420,000 was excessive*", the comparison of "*the cost of full-time nursing care, [of] £200,000, with the value of the house*", the fact that "*Mr Jennings would probably need £150,000 to buy a house*" and the fact that the quality of assurance was somewhat ambiguous, Mrs Royle saying she would "*see him all right*".

Furthermore, the detriment need not be quantifiable in monetary terms; hard work over a long period, during which other opportunities are not pursued, in reliance on a promise, can be enough to create an award significantly higher than the value of the labour. For example, in *Habberfield v Habberfield* [2019] EWCA Civ 890, the claimant, Lucy, suffered a quantifiable detriment of £220,000 in reliance on a promise that she would be given the family farm, but was awarded £1,170,000 in light of the fact that "*the three decades of her life that Lucy spent on the farm are not susceptible of quantification.*"

A more recent High Court case, *Wills v Sowray* [2020] EWHC 939 (Ch) has underscored the common-sense impetus of the doctrine. In this case, one of the claimant's, Matthew Mills, sought a declaration that the beneficial interest in a farm was held by him. Matthew argued that he suffered detriment because, among other reasons he expended money on work on the farm, including on spraying. The defendant – the daughter of the owner of the farmer, Tony, who was hoping to inherit it under the intestacy rules – challenged this on the basis that this did not result in a benefit to her father. The judge gave short shrift to this argument, stating "*the court is concerned with considering the detriment to Matthew and not whether there was a benefit to Tony as a result of the spraying or indeed any other item of detriment relied upon by Matthew*". This makes sense – consider the following hypothetical example that underscores the correctness of this approach: A mother makes a clear promise to her daughter she will in inherit a cottage that she (the mother) does not use; in reliance on that promise the daughter spends a significant amount of time and money ensuring the cottage does not fall into disrepair. To hold that an equity does not arise because the mother never used the cottage would gainsay natural justice.

What these cases show is that the courts are willing to ensure that common sense and fairness prevails, notwithstanding the lack of a formalised agreement.

ThoughtLeaders Private Client

Meet ThoughtLeaders

Laura Golding
Community Director
07841 974 969
email Laura

James Baldwin-Webb
Private Client Partnerships Director
07841 974 969
email James

Paul Barford
Founder / Director
020 7101 4155
email Paul

Chris Leese
Founder / Director
020 7101 4151
email Chris

Danushka De Alwis
Founder / Director
020 7101 4191
email Danushka

Our Private Client Community Partners:

asset risk consultants — advising clients since 1995 — 25 asset risk consultants 1995-2020

ConTrA

Grant Thornton

IBSA International Business Structuring Association

LALIVE

PCD Club

PETERS & PETERS

Radcliffe Chambers