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Your quarterly bulletin on legal news and views from Davies Parsons Solicitors

Legal UPDATE

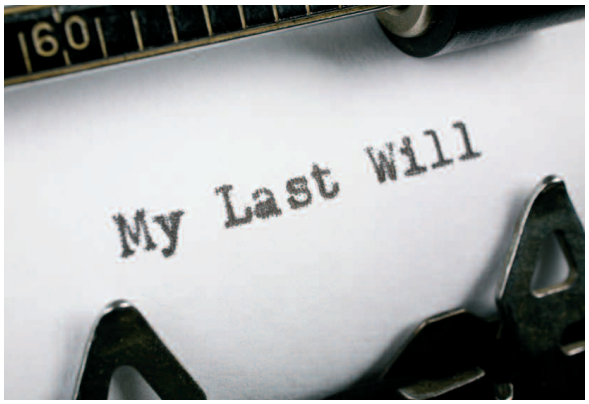
Law Society Demands Formal Qualifications for Will Writers

The Law Society is campaigning to persuade the Government that a change to the law is necessary to protect members of the public from problems caused by using unqualified will writers.

The Law Society wants will writers to have to gain formal qualifications before being able to provide a service to consumers. The Society's President, Linda Lee, said, "The fact that most problems are detected after the individual has died is a strong argument for establishing a robust regulatory framework.

"Many of those calling themselves will writers may have purchased a franchise to do so, and are free to prepare wills without any training or insurance protection."

Unlike solicitors, unregulated will writers do not have to be legally qualified or insured. As there is no regulatory body, there is no mechanism for bringing a complaint, and without insurance there may be no means of redress should things go wrong. Solicitors, on the other hand, are professionally qualified to do the work, are bound by a stringent code of professional conduct and, in the very rare event of a loss to a client, clients



are protected by the solicitor's professional indemnity insurance, which is compulsory.

Hardly a week goes by without another story emerging on the problems caused by wills drafted by unqualified will writers or by the use of home-made or 'form' wills.

If you are seeking to write or amend your will, we provide a professional service at a reasonable cost and give you the peace of mind that comes from having your will drafted by qualified specialists.

But I Did It for Free!

People who do volunteer work should be aware that the fact that they offer their services for free does not mean that they cannot still be liable to other people or even be subject to prosecution in some cases.

An example of the latter was the recent prosecution of a member of a prison monitoring board, who was prosecuted for misconduct in a public office after forming 'personal and inappropriate' relationships with serving prisoners.

The woman appealed against her conviction on the ground that she was an unpaid volunteer and the offence did not therefore apply to her. However, the Court of Appeal ruled that public trust was paramount and the offence was not limited to remunerated office-holders.

Court Will Not Rectify Will Executed in Error

When an obvious error is made, the courts will sometimes be willing to correct the mistake – but not always.

In a recent case, the court was asked to consider wills executed by an elderly couple. Each will was a simple 'mirror will', in which each bequeathed their entire estate to the other and then, on the second death, the whole went to a man they had cared for since he was 15 years old and whom they regarded as their son.

Regrettably, despite witnesses being present, each signed the other's will and the error went unnoticed until they had both died.

The court ruled that despite the fact that this was obviously a mistake, the wills could not be rectified as they had not been executed validly in the first place.

The unfortunate effect of the ruling is that the estate will now be distributed under the intestacy laws, which in this case means that it will pass to the couple's natural children, who had been excluded under the wills, and the couple's intended beneficiary will inherit nothing.

Will Validity Doesn't Depend on Speaking the Language

A recent case shows that the creation of a valid will in English does not depend on the person creating it being able to speak the language.

The situation arose when a woman's daughters contested her will, which left everything to her four sons, arguing that it was invalid because its preparation had required the assistance of a translator. The woman spoke Gujarati, but no English, so a family friend had acted as translator to convey her intentions to the English-speaking will writer.

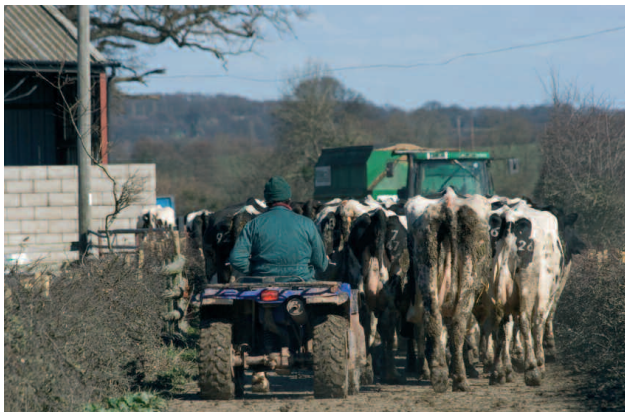
The woman's daughters argued that their mother did not understand the effect of her will and that she had intended to divide her £200,000 estate equally between her seven children.

Judge David Hodge did not accept their argument, concluding that he was 'satisfied on the evidence that she did know and approve of the contents of her will'.

It is perfectly possible for a person who speaks no English to create a valid will under English law, provided they understand and approve of its provisions.

Making a will need not be expensive and will ensure that your property is distributed according to your wishes after your death. Please contact us for further information or advice.

Easement Established by Use Limited to Actual Use



When land is used over a long period of time by persons other than the owner of the land, they may acquire an easement (a legal right to use the land). Easements can also be acquired by express agreement, in which case the rights of use over the land will depend on the agreement. In cases where an easement comes into existence as a result of use, the rights of use are less clear, however.

Recently, a dispute arose over the right of way over a private road, which had been used by a farmer for more than 20 years. The County Court held that the use was effectively unlimited as far as his agricultural purposes were concerned. Since this included driving stock along the road, the owners of adjacent properties opposed it and appealed the decision.

The critical point was that although the use of the road by the farmer for pedestrian and vehicular access had been shown to have been permitted for more than 20 years – thus establishing the general right of easement – the use for driving stock had not. Since this had a greater impact on the owners of the adjacent properties than pedestrian or vehicular access, the High Court ruled that the right of easement did not include the right to drive stock along the road.

Allowing other people free use of your land for a long period can mean that you lose the right to prevent such use. If you have concerns about others using your land, we can advise you of the appropriate steps to take.

Bankruptcy Annulled on the Ground of Disability

A woman who was suffering from a chronic mental illness and had developed a phobia of opening mail had her bankruptcy annulled by the High Court recently after HM Revenue and Customs (HMRC) were judged to have breached their duties under the Disability Discrimination Act 1995.

The woman's hobby was breeding horses and HMRC were advised by an informer that she was running a business. As is usual in such cases, HMRC sent tax returns for completion and, when these were not returned, raised assessments totalling nearly £200,000.

When payment was not forthcoming, HMRC served the woman with a statutory demand for payment and, when that remained unpaid, obtained a bankruptcy order against her, despite the fact that her mother had written to them explaining the situation.

In court, the woman was ruled to lack the mental capacity to deal with the statutory demand or the subsequent procedures leading to her bankruptcy. HMRC's failure to make reasonable adjustments (as required by the Act) in order to deal with her was found to be in breach of the Act. The bankruptcy order was therefore set aside.

Public bodies are required by law to make reasonable adjustments so that disabled people do not suffer a disadvantage connected with their disability.

Trust Assets Included in Divorce Settlement

Assets not 'owned' by a person, such as assets held in trust, can sometimes be looked on as part of the wealth of a person when making a financial settlement on divorce.

In a recent decision, a woman won a £4.5 million divorce settlement, which included £1.5 million from a trust fund that her former husband had sought to exclude from the calculation.

The husband's resources were assessed at around £6 million without the trust fund. He proposed a settlement of £3 million. His ex-wife, however, wanted to aggregate the husband's assets with resources from two trust funds having an approximate value of £14.5 million. She claimed an award amounting to £6.5 million.

Detailed evidence about the trusts was in short supply, as the Jersey company acting as trustee to the funds did not supply much information when ordered by the court. The husband stated that he had set up the trust funds with assets from his father, on behalf of his parents, sister and the family's charitable foundation. He claimed that his interest in the funds was subordinate to the other beneficiaries. The wife claimed that the funds were in reality assets readily available to the husband.

The court had to consider the extent to which the trust funds represented resources available to the husband. In considering the matter, the judge relied on the question of whether, if the husband were to request an advance from the trust, the trustee would be likely to give it to him. This question was answered in the affirmative and the judge further concluded that, in funding an award to the wife, the interests of the other beneficiaries of the trust would not be appreciably damaged.

The husband was therefore ordered to pay £4.5 million to the wife, plus a substantial contribution to her costs.

We can assist you in negotiations on the many legal and financial issues arising on relationship break-up.

Tax Co-operation in the EU

New regulations are being introduced in January 2012, based on the EU Directive on administrative co-operation in the field of taxation, which will:

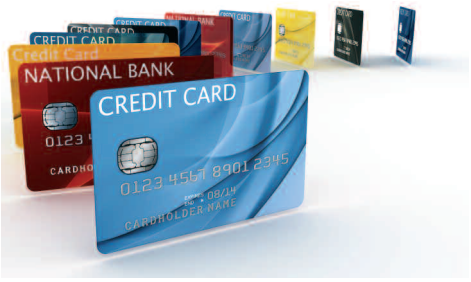
- extend the scope of the current Directive to include all national taxes and duties, local taxes and motor taxes;
- allow tax officials from one Member State to attend or participate in administrative enquiries in another Member State;
- permit information exchanged to be used more widely than at present, subject to certain restrictions; and
- permit a range of national bodies to engage in the mutual assistance process under the general oversight of a Central Liaison Office.

In simple terms, the idea is to make sure taxes owed anywhere in the EU can be pursued in any other Member State.

Non-residence and domiciliary issues are important for a variety of taxes, especially Inheritance Tax. Moving to another country may postpone, but not solve, current tax problems and may create new tax complexities.

Credit Card Agreement Enforceable

Following the failure of his bid to overturn a High Court decision dismissing his appeal against a 2009 judgment in the Willesden County Court, a credit card debtor has been ordered to repay his debt to the bank.



Patrick Brophy took his case to the Court of Appeal, alleging that a credit card agreement he signed was unenforceable under the Consumer Credit Act 1974. When he applied for the credit card in 1994, the terms and conditions of the agreement were included on the reverse of the application form. Accordingly, it constituted one document for the purposes of the Consumer Credit Act. The form clearly stated that it was a 'Credit agreement regulated by the Consumer Credit Act 1974' between HFC Bank Ltd. and 'you, the customer named below'. The application also stated that 'You agree that we may make such enquiries and searches and obtain such references about you as we consider appropriate from any person, including any credit reference agency, at any time prior to or during the period of this agreement or whilst monies are owing under it'. The form included a further statement that 'This is a credit agreement regulated by the Consumer Credit Act 1974. Sign it only if you want to be legally bound by its terms'.

Mr Brophy argued that there was no intention to create legal relations as there was no certainty as to whether he would be granted credit and, if so, in what amount. It was further argued that the application form was simply an agreement to allow HFC to investigate his credit rating and that unless HFC returned a true copy of the agreement stating the credit limit, there was no agreement.

It was held in the Court of Appeal, however, that the purpose of the relevant sections of the application form was to fix the manner in which the credit limit should be determined, not to specify its precise terms. The manner in which the credit limit would be determined in this case was by notification to the debtor. How HFC decided what the limit should be was a matter entirely for itself. By signing and returning the credit card application form, the debtor agreed to accept whatever credit limit the bank chose to allow him. The application form, when executed by HFC, became the agreement under which it made credit available to Mr Brophy. The appeal was therefore dismissed.

Attempts made over the years to avoid payment of credit card debt by alleging technical breaches of the Consumer Credit Act have almost always been unsuccessful.

If you have difficulty with debts, we may be able to help you negotiate an agreement with your creditors. Contact us for advice.

Davies Parsons Allchurch

For Further Information On This Newsletter
Or To Discuss Any Other Legal Problems

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