

PrivateMatters

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Newsletter from Manches' family and private client team



Welcome to the fourth edition of *PrivateMatters*.

10 TIPS FOR THE BEST ESTATE PLANNING FOR BUSINESS OWNERS

The Manches' private client team have experience in advising business owners on a wide range of issues and can work with you to create bespoke arrangements for your estate. Failure to have well thought out arrangements in place can result in uncertainty, disputes and disruption for the family, business partners and employees. Anna Burnside, head of private client for the Thames Valley gives her top tips for business owners' estate planning.

1. Think about who you would like to benefit from the value of your business. This could be your spouse, children, other family members, friends, employees, or a combination.
2. Identify executors who have the skills to keep your business running during the administration period and if necessary assist in arranging a sale.
3. Minimise your inheritance tax bill by ensuring that your estate can benefit from Business Property Relief to the fullest extent possible and review this regularly.
4. Think about the age at which it will be sensible for children or grandchildren to have access to funds or a shareholding, and about appropriate trustees to support them up until that age.
5. Think about taking steps to protect a child or grandchild's inheritance, particularly in the form of a shareholding in the business, from claims in divorce or bankruptcy.
6. Put in place Lasting Powers of Attorney to allow a spouse, friend or trusted advisor to make decisions about the business and your personal finances on your behalf if you became unable to as a result of an illness or accident.
7. Check that the level of life insurance you have in place is appropriate.
8. Check the nominations or trust arrangements for Keyman insurance and other pension or life insurance lump sums.
9. Ensure that your private client lawyer, commercial lawyers, accountant and investment managers are working collaboratively to give you the best all round advice.
10. Review your Will every two years, or when your family circumstances, business structure or property ownership change.

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PROVIDING FOR DEPENDANT RELATIVES

About one and half million people in Britain have learning difficulties and a further three quarters of a million people are unable to look after themselves due to an illness or an accident such as a brain injury. As a consequence, more and more families find themselves worrying how to provide for their disabled relatives and how they will manage when they are gone. Such people often find it difficult to manage their own financial affairs. Leaving a legacy directly may well leave them vulnerable to unscrupulous people or threaten their entitlement to benefits.

With some forethought and good planning, you can ensure that your disabled relative is well provided for without them having the worry of being responsible for managing their finances. Trusts are an ideal mechanism for achieving this, and can be set up either during your lifetime or through your Will. You can make sure your vulnerable relative benefits whilst someone you trust is responsible for managing the funds. If you do leave money outright to a relative who does not have the mental capacity to run their own financial affairs, they may end up with the Court appointing someone who doesn't know them to administer their affairs. Properly set up, a trust will allow your trustees to ensure that your relative is well provided for, as well as preserving their entitlement to Government benefits.

It is important to choose your trustees carefully as they will be looking after the trust for your relative. In theory, you can have as many trustees as you want, but the more you have the harder it will be for them to agree on the best way of running the trust. However, if there is a house or land included in the trust, then the maximum number of trustees you can have is four. The ideal number is probably two or three trustees. Whilst a relative may be the obvious choice, trustees can also be professionals, such as accountants or solicitors, who can give an independent and informed voice.

If you are considering setting up a trust, there are several different structures you may wish to consider. The first option is a discretionary trust. With a discretionary trust you leave a sum on trust to a defined group of beneficiaries (for example, your children and grandchildren) in which you include the disabled person. A discretionary trust gives the trustees the flexibility to distribute funds according to the beneficiaries' needs at the time. The rest of the money is retained in the trust. None of the beneficiaries has an absolute right to any of the money in the trust, or the income that comes from it, only a right to be considered. Since no beneficiary is entitled to the money, the money and any other assets in the trust will not be taken into account when assessing your disabled relative for means-tested

benefits. The only thing that will be taken into account is any money that has actually been given to your relative. In addition, the trust assets will not be included in the estate of any of the beneficiaries for inheritance tax purposes.

Another option is a "disabled person's trust". This is a special kind of discretionary trust that can be created for someone who is incapable of managing their own affairs or is entitled to disability living allowance (middle or higher rate). With this type of trust, your disabled relative is named as the primary beneficiary and other beneficiaries (such as your other children or siblings) are named in a separate class of beneficiaries.

To qualify for the special inheritance tax treatment of a disabled person's trust, your trustees must pay at least half of any payments to the disabled beneficiary or for their benefit. As these trusts are discretionary in nature and no one beneficiary is entitled to the income or capital, this ensures that the disabled person still qualifies for state benefits and care home funding.

There is a third type of trust that clients with dependant disabled relatives could consider, known as a "vulnerable person's trust". These trusts are set up so that the assets can only be used to benefit your vulnerable relative and only they are entitled to the income (or, alternatively, none of the income can be paid out to anyone else). These trusts are entitled to claim special tax treatment. Income tax and capital gains tax is charged at the vulnerable person's marginal tax rate rather than the "trustees" tax rates of 50% for income tax and 28% for capital gains tax.

Both disabled persons' trusts and vulnerable persons' trusts have an inheritance tax advantage over standard discretionary trusts. Gifts into these trusts made during your lifetime are "potentially exempt transfers". This means that there is no tax to pay when you set one up no matter how much you put in the trust, and no ten yearly charge, unlike for a discretionary trust (to the extent that you transfer amounts in excess of your available nil rate band). The downside is that when the disabled person dies, the value of these trusts is included in their estate for calculating inheritance tax, whereas it would not be under a standard discretionary trust.

If you set up a trust, it is advisable to leave your trustees a "letter of wishes" in which you outline what you would like to happen after you die. You can include your wishes regarding pocket money, holidays, extra support, health care and living accommodation. You could also explain why you set up the trust, and include guidance on how it should be used, including how the money should be distributed should your disabled relative die. Although the letter would not be legally binding on your trustees, they would be able to refer to it for guidance.

FOR RICHER OR POORER?

Many of us will have read about the recent decision of the Supreme Court rejecting the appeal of French national, Mr Granatino. Even though the parties in this case are German and French, this Supreme Court ruling may have a big impact on couples now entering into marriage in this country.

In a nutshell, the Court has upheld a prenuptial agreement signed in Germany in 1988, drafted in German by a German lawyer and upon which Mr Granatino had taken no legal advice. The agreement made no provision for future children of the marriage, and for the husband to have no financial claims at all against the wife's wealth or property. No financial disclosure was provided when the agreement was signed. Karin Radmacher was a very wealthy woman and a paper industry heiress worth tens of millions of pounds. Mr Granatino was an investment banker with JP Morgan & Co earning around £120,000 per annum and with no capital to speak of. The agreement was signed at the insistence of Karin Radmacher's father. The couple married in London four months after the agreement was signed, and were married for eight years. They have two daughters aged 11 and 8 and lived during the marriage in New York and in London. After their separation, the wife applied successfully to remove the two girls to Germany and then to Monaco, where they now live. During the marriage, Mr Granatino gave up his career in investment banking and began research in Oxford in biotechnology. He still lives in England.

At the High Court in England, the wife argued that the prenuptial agreement should be upheld. The husband accepted that weight should be given to it, but asked for a lump sum of £7 million. The Judge awarded Mr Granatino a total of £5,560,000 on the basis that this would provide him with an annual income of £110,000 for life and enable him to buy a home in London where the two children could visit him. By now Karin Radmacher was worth at least £50 million with an interest in the family companies that was producing an income of over £2 million per annum. The Judge did not think it was fair to hold the husband to the terms of the prenuptial agreement because under English law the husband had received no independent legal advice, the agreement deprived the husband of all claims, there had been no financial disclosure, no negotiations on the terms and there was no provision for the children. The judge was conscious however that the husband had understood the terms of the agreement when he signed it and therefore restricted his claims.

The Court of Appeal disagreed. They ruled that the Judge should have restricted the husband's claims to those of a father not a husband. The husband then appealed to the Supreme Court.

In its landmark ruling the Court dismissed the Husband's appeal by 8 judges to 1. Much greater weight from now on will be given to prenuptial agreements and provided that such agreements have been freely entered into with a full understanding of their implications, they will be given effect unless it would be unfair to hold the parties to the terms.

But what would now be considered unfair? This is a landmark decision because in this particular case, the husband's needs were not taken into account when deciding whether the agreement was fair or not, as his debts had largely been met, there was generous maintenance for the children and he had use of homes during the children's minority. Most importantly the extent of the wife's wealth was not a factor. So where to from here? If you are contemplating marriage and you are the economically stronger party why would you not now require a prenuptial contract? The Court is likely to uphold it, even without the safeguards that would normally be required. If you are the economically weaker party, it is a tough call. In effect, there is often little negotiation with a prenuptial contract, particularly where it is clear to one of the parties that the marriage will not take place without it. If you are married, it is still possible to regulate the future division of marital assets on divorce by negotiating a post nuptial contract - time to get drafting!



MANCHES FAMILY LAW - "THE 'GO-TO' TEAM!"

We are delighted to announce the return of Kerry Fretwell as partner in our 'go-to' Family Law team.

Kerry returns to Manches from Reading firm Blandy & Blandy, having initially worked for Manches for 13 years in our London office. She was one of the first family lawyers in the UK to train as a Collaborative lawyer and was involved in setting up the London Collaborative Family Law group and later the Reading Collaborative Family Law group.

She is a member of Resolution's training committee and has organised conferences and training courses for other family lawyers and lectured to over 400 family judges at their judicial training. Kerry states, *"I'm thrilled to be part of the new Thames Valley Family Law team and look forward to working closely with my colleagues in Oxford and London"*.

Jane Mitchell, Partner and Head of the Family Law team added, *"We are delighted that Kerry is returning to Manches. This is an exciting opportunity to develop further our practice in the Thames Valley. We expect to see some new challenges in Family Law and with our expanding team we are very well placed to meet them"*. The team is further strengthened by the appointment of Camilla Lovell-Hoare as an Associate in the department.

DISCLOSURE IN FAMILY CASES

During the financial proceedings ancillary to a divorce, both spouses are under a duty of full and frank disclosure of their financial positions. Under the old "Hildebrand" Rules, the Court would not penalise a party who, believing their spouse had assets which they were not disclosing, took copies of confidential documents and used them in the financial proceedings before the Court. Thus the party who considered salting away hidden assets was susceptible to stray documentary evidence ending up in the hands of their spouse, who could use them as evidence in financial proceedings. While the use of force in removal of documents was never condoned, even documents wrongfully obtained could be admitted as evidence, although this could lead to sanctions in the form of orders for costs or findings of litigation misconduct. In short, the Hildebrand rules provided the financially weaker party with a self-help remedy in the event that the financially stronger party did not make full disclosure.

The recent case of *Imerman*, however, has ruled that this license to spouses to copy and otherwise remove confidential documents belonging to the other party is unlawful. This applies not only to those documents which are kept under lock and key (or their electronic equivalent), but also to those which are kept, for example, in the study, or in a personal filing cabinet, or - in some cases - those which are left lying around in communal areas. The case of *Imerman* focussed on a large number of documents which were stored on the husband's computers, kept in an office that he had shared with the wife's brother. In that case, the brother

had owned not only the office, but also the server on which the computer operated and stored the information. Nevertheless, the Judge ruled that removing or copying the information from the system was a breach of confidence. Such a duty of confidence could arise between husband and wife, even when documents were not marked to be confidential. The Court also held that a document would be confidential if its contents are and were (or ought to have been) appreciated to be confidential by the party who took or copied the document. Breach of that confidence may result in a civil suit being brought against the spouse who takes or copies the documents.

Instead, a party may rely on his or her memory of the documents, or apply for a search order, which (although subject to relatively stringent pre-conditions) has the power to force disclosure of documents. To be of any use in the prevention of disposal of "incriminating" documents, such an order must be applied for relatively early on in proceedings, thus potentially raising the temperature of cases.

The upshot in relation to matrimonial proceedings is, as yet, unclear. The reliance on memory of confidential documents and a remedy of search orders seem to be inadequate when a party is faced with a spouse who refuses to give full disclosure. What is clear, however, is that parties who believe their spouse is hiding assets must not remove or copy documents belonging to the spouse under suspicion, whether in communal areas of the house or not, as they may be liable for civil action or even criminal charges if they do. Moreover, solicitors who keep documents of this nature sent to them by their clients could be liable themselves.

MANCHES

For further information please contact:

Jane Mitchell	Family	Tel: 01865 722106	Email: jane.mitchell@manches.com
Kerry Fretwell	Family	Tel: 0118 982 2640	Email: kerry.fretwell@manches.com
Alexandra Lewis	Family	Tel: 01865 722106	Email: alexandra.lewis@manches.com
Anna Burnside	Private Client	Tel: 01865 722106	Email: anna.burnside@manches.com
Tom Gilman	Private Client	Tel: 01865 722106	Email: tom.gilman@manches.com

Manches is a leading law firm in Oxford, Reading and London. We advise on all aspects of personal law including family, tax and trusts, Will writing and residential conveyancing. We also advise clients on all areas of business law, including property, corporate, dispute resolution, employment, intellectual property and technology law.

This newsletter is intended merely to provide a summary of the law in this area. It is not intended to provide legal advice for specific cases.

Manches LLP
9400 Garsington Road
Oxford Business Park
Oxford
OX4 2HN
Tel: +44 (0) 1865 722106
Fax: +44(0) 1865 201012

Manches LLP
Davidson House
Forbury Square
Reading
RG1 3EU
Tel: +44 (0) 118 982 2640
Fax: +44 (0) 118 900 1831

Manches LLP
Aldwych House
81 Aldwych
London
WC2B 4RP
Tel: +44 (0) 20 7404 4433
Fax: +44 (0) 20 7430 1133