

PrivateMatters

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Newsletter from Manches' family and private client team



Welcome to the latest edition of *PrivateMatters*. We hope you find it relevant and interesting and would welcome any feedback on other areas you would like to see addressed in future issues.

Contents

Getting your voice heard after death	01
Estate planning and the family home	02
Who's the daddy?	03
Do not resuscitate	04



GETTING YOUR VOICE HEARD AFTER DEATH

The Inheritance (Provision for Family and Dependents) Act 1975 creates an opportunity for a limited range of claimants who expected to be included in a Will, but who have been left out, or who have been left much less than they expected, to bring a claim against a deceased person's estate. If the Court agrees that reasonable provision has not been made it can effectively re-write the Will and order that funds be paid to the claimant. The extent to which provision will be made will depend on the size of the estate, the circumstances of the applicant and other beneficiaries.

In recent years, where a testator intends to exclude a beneficiary from his Will, he has been encouraged to write a letter of wishes, explaining in his own words why he has chosen to do this. Letters like this are not binding on the deceased's executors, but where they are intended to discourage an Inheritance Act claim, they are valuable evidence of the issues which concerned him at the time when he made his Will and help the Court to reach a decision about what should be done about a particular claim.

The Inheritance Act is not intended merely to console disappointed beneficiaries. Its purpose is to address unfairness and any real need relative to all the circumstances of the estate. It follows that where there is relative need, the Court will not usually support exclusions based on an entirely capricious or unreasonable decisions even if explained in a letter of wishes.

Recently, for example, the Court declined to exclude the daughter of the deceased from benefiting from her estate simply because the daughter had run away from home at 17 to live with her boyfriend (whom her mother disapproved of) and had later given a name to one of her children that her mother objected to, despite the fact that the mother had left a letter of wishes explaining this. (*Ilott v Mitson* (2011) EWCA Civ 346).

Most cases are not this extreme. People may have many reasons for choosing to benefit one group of people rather than another, or choosing a favourite charity over family members and such decisions are usually fairly easy to explain and for the Court to understand. So a decision may be made not so much to exclude someone, as to benefit someone else, e.g. where perhaps the deceased had a child of whose existence the rest of the family was ignorant. It gets more difficult if the decision is based

on the conduct of the individual who is excluded: common examples are that he or she is a wastrel, or has neglected the deceased in his or her old age and infirmity. Here, if the letter is to be effective, it is sensible to be precise about the conduct complained of and if there is evidence in correspondence, or particular events, these should be spelt out in detail and copy documents should be stored with the letter of wishes, or separately, so that the position is made clear.

If you want your decisions to be respected it is important to show how you came to make them. Manches can help with this, contact Anna Burnside on 01865 813659.



ESTATE PLANNING AND THE FAMILY HOME

It is not uncommon for peoples' thoughts to turn to their property when they are considering estate planning and how they might reduce the inheritance tax bill on their deaths. Unfortunately, as most people are

aware, if you give something away but still retain the use of it then the gift is treated for inheritance tax purposes as a "gift with reservation of benefit" and the seven year "clock" does not start to run until you stop using the asset. This is particularly pertinent when you are trying to give away a share of the family home or perhaps a holiday home. Even if you manage to structure any gift in such a way to avoid these "gift with reservation" rules, you could be caught by the "pre-owned asset" tax regime and end up paying an income tax charge on any "benefit" you receive.

Is there any effective way of giving away the family home?

The short answer is - it depends! If you pay a market rent to your son or daughter in respect of the proportion you have given to him or her, then the gift of property will not be treated as a gift with reservation of benefit. Provided you survive for seven years, the value of the share will no longer be included in your estate. There are obvious downsides to this arrangement: the rent will be treated as income in the hands of the son or daughter and, if they are higher or top rate tax payers, they could end up paying 40% or 50% tax on this rent. In addition, it is likely that the portion you give away will no longer qualify for principal private residence relief for capital gains tax purposes. This could result in a large capital gains tax bill later on when the property is sold. Indeed, if it is a second home, depending on the value of the share given away, you could incur a capital gains tax bill when you make the gift to your child or children.

Sharing the property

If, however, you share the property with your son or daughter, this could be very effective for estate planning purposes. Although many people are aware of the gift with reservation of benefit rules, not so many know that there is a "loophole" whereby, if you occupy a property with someone else, you can give them a share of that property without that gift being treated as a gift with reservation of benefit. This will cover gifts of a share of the family home to children who live at home, although if they move out before the seven years are up, the gift will no longer qualify under this exception and the gift with reservation of benefit rules will apply to the gift.

With careful planning this loophole can be particularly useful in the context of a holiday home in order to reduce the value of the parents' estates.

If you would like to explore gifting a share of your home in more detail, please contact Penny Wright on 0118 982 2640.





WHO'S THE DADDY?

The concept of family and parenthood has undergone a seismic shift in the last fifty years. Whether single parent families, separated families, same sex parent families, co-parenting families (friends not in a relationship deciding to have a child/children together) or any number of other combinations, there is no longer a "standard" family set up.

Whilst in the playground the "non-standard" make up of a child's family is less remarkable than ever before, the legal position is far less clear cut. Even the legal definition of the word "parent" has been the subject of recent judicial consideration.

Legal Parenthood and Parental Responsibility

Legal Parenthood and Parental Responsibility are two different concepts. A child can only have two legal parents. However, there is no limit on the amount of people who can obtain Parental Responsibility (that is the bundle of rights and responsibilities for the child). An adult can have Parental Responsibility for a child, without being that child's legal parent. Parental Responsibility can only be obtained after the birth of the child by agreement with all those who already hold it, or by Order of the Court (either by way of Parental Responsibility Order, or by way of a Residency Order - an order that the child lives with an individual, and which automatically confers Parental Responsibility on that person).

Biological parents

A child's mother has always had automatic Parental Responsibility and legal parenthood for her child. A man married to her at the time of the child's birth has also always automatically received those rights, unless his paternity is successfully disputed. A biological father will automatically have legal parenthood of the child, but not Parental Responsibility, if unmarried and he is not named on the birth certificate. A biological father who subsequently marries the child's mother gains Parental Responsibility at that stage. Since December 2003, an unmarried father acquires Parental Responsibility if he is registered on the child's birth certificate as the father.

Same sex parents

A birth mother will have Parental Responsibility and legal parenthood for her child, as set out above. Her partner is able to acquire those rights if she is the Civil Partner of the birth mother at the time of the child's birth (and provided that the child is conceived artificially and with her consent). If the second parent is not the Civil Partner of the birth mother, and

provided the child has been conceived at a UK licensed clinic, the mother's partner can (with the birth mother's consent) be named on the birth certificate as the second parent of the child, and can acquire legal parenthood and Parental Responsibility for the child, in the same way as an unmarried father.

A man in a same sex relationship who fathers a child, whether the intention is to raise the child within his same sex relationship or in a different context, will have to have his name on the birth certificate of the child (or obtain a court order) in order to obtain Parental Responsibility for that child. He will automatically have legal parenthood as a known biological father, unless the circumstances are such that two other people have legal parenthood for the child (e.g. the child was born to a mother who is married to another man or in a civil partnership at the time of the birth). The partner of the biological father can enter into a Parental Responsibility Agreement with the child's biological parents (or, again, by application to the court) but cannot become the legal parent of the child unless by way of adoption or obtaining a court order.

Adoption

Becoming a child's adoptive parents brings with it both Parental Responsibility and legal parenthood. On adoption, both the legal parenthood and the Parental Responsibilities of the child's biological parents are extinguished.

Co-parents

As families become ever more diverse, new arrangements are becoming more and more common. Most recently the phenomenon of co-parenting has been in the spotlight. Co-parents are usually friends (although sometimes individuals who find one another via the internet) who decide to have a child together, to bring up outside a traditional relationship. Typically, they will agree with whom the child is to live, and agree the extent to which the other parent will be involved in the child's life and major decisions, before conception. The Parental Responsibility and legal parenthood in these arrangements will be determined by the individual circumstances.

As can be seen, this is an area which is constantly developing and complicated. The law is being forced to adapt and deal with ever more diverse sets of circumstances. The courts will usually do their utmost, within the constraints of the law, to achieve a "fair" outcome, and one which is in the best interests of the child concerned.

If you are concerned by any of the issues raised here, please contact Jane Mitchell on 01865 722106



DO NOT RESUSCITATE

Norfolk pensioner Joy Tomkin's decision to avoid life sustaining treatment may not be an unusual one, but the way in which she has chosen to communicate this decision certainly is. The 81 year old has had the words "do not resuscitate" tattooed onto her chest, and in case this is missed, the letters "PTO" tattooed on to her back. She is not seriously ill at present, and is quoted as saying "I'm quite happy if I wake up in the morning, but if I don't I'm just as happy".

Many people have strong views about what sort of medical treatment is right for them to receive, and what sort of treatment is not. In particular, many people feel that being kept alive artificially is not right for them or their family.

In these circumstances, there are two (more conventional) ways to express these views. Firstly, a living will, or advance direction, can be made. This is a written statement setting out the treatment which should not be given and the circumstances in which the direction will apply. Provided that the patient had mental capacity at the time when the living will was signed, their refusal of treatment will remain valid.

Alternatively, a Lasting Power of Attorney for Health and Welfare can be made. These were introduced in 2007 and allow the donor to give authority to one or more people to make healthcare

decisions on his or her behalf. If the donor was to lose mental capacity, a registered Lasting Power of Attorney for Health and Welfare gives the attorney the authority to make decisions about where he or she should live, what care should be given, who should be allowed to visit and whether consent to treatment should be given. If the donor would like to restrict these powers then the power can be limited.

Attorneys are not appointed under a Lasting Power of Attorney for Health and Welfare in order to follow anticipatory instructions, but instead to make a decision themselves about what, taking into account the circumstances and all available information, is in the donor's best interests. While discussions with the donor before mental capacity was lost will unquestionably be helpful, the attorneys must use their own judgement. For this reason a properly drawn up power should always include authority to view social care and medical notes before reaching a decision.

Both living wills and Lasting Powers of Attorney are subject to extremely strict requirements in order to be valid, and deal with such critical issues that very careful consideration and professional advice are essential.

Contact Fiona Wheeler on 01865 813780 for a free, no-obligation discussion of your personal circumstances and the suitability of living wills and Lasting Powers of Attorney for you or a member of your family.

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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.

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