RPC

Spotlight on private wealth

July 2021

THE LATEST DEVELOPMENTS IN THE PRIVATE WEALTH WORLD

The big question: What is Beeple mania?

What's new?

RPC asks...

In the art world...

Private wealth disputes team

Welcome to spotlight on private wealth

Our quarterly update is designed to keep you up to speed with developments in the private wealth world. In this edition we explore Beeple mania, conflicts of interest, whether parents have an obligation to provide for their adult children in their will and 'crypto tax'.

We hope you find this helpful and as always, if you would like to know more about the issues covered, or anything else, please get in touch.

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The big question

What is Beeple mania?

On 11 March 2021, a collage created by digital artist Mike Winkelman (known professionally as Beeple) sold at Christie's for US$69m in the first sale of a purely digital artwork in the auction house's history.

"*Everydays: the First 5000 Days*" is a mosaic that arranges 5000 aesthetically similar images in a semi-chronological order to form a grid. If viewed up close, each of the images is a highly detailed digital artwork that follows one of four broad themes: politics, technology, wealth, and horror. Beeple's piece incorporates elements from a wide array of internet subcultures, with many of the later images resembling political satire.

The artwork was also the most expensive piece of digital art ever sold. Much of the value of *Everydays* has been attributed to its sale as a non-fungible token or "NFT", a unique digital file whose authenticity is verified by a digital signature on a blockchain. The fact that *Everydays* was sold as an NFT does not make it immune to reproduction: anyone with an internet connection can visit Beeple's website and view a high-resolution copy of the work. However, holding *Everydays* as an NFT allows the owner to prove he is in possession of the original verified artwork, something that was previously near impossible for digital art collectors. A clear chain of ownership represented on the blockchain means that *Everydays* can change hands without its authenticity being called into question.

The highest bidder for *Everydays* was a cryptocurrency investor, and the NFT speculative market has been booming alongside cryptocurrencies like Bitcoin and Etherium, which Christie's accepted as payment for the piece. Given concerns surrounding the sustainability of blockchain technologies, it is too soon to say whether there will be long-term value in NFT investment.

What's new?

Crypto tax

The Biden administration recently announced that cryptocurrency transfers of more than US$10,000 will have to be reported to the US tax authorities.

These new proposals come amid a tightening of the regulatory environment in relation to crypto and digital currencies.

Here in the UK, HMRC is concerned that some taxpayers have used e-money, value transfer systems and crypto to conceal assets from them. Noobs (amateur traders and investors) do not always fully appreciate the tax implications of their activities. Given the potential for large financial gains to be made (for example, Etherium, the second largest crypto by market capitalisation, rose in value from £140 to almost £3,000 per token over the space of a few months earlier this year), investors need to consider carefully the tax implications of their investments, which may not be straightforward.

Given the increase in popularity of cryptocurrencies it is not surprising that HMRC are beginning to take more of an interest in this area. On 30 March 2021, they published their cryptoassets manual, which expands on and replaces previous HMRC guidance. Anyone involved in transactions involving cryptoassets should review the manual if they wish to glean an insight into HMRC's thinking in this ever-growing area. In addition to providing more clarity on what constitutes a cryptoasset, HMRC have helpfully confirmed that crypto-derivatives will not normally be considered cryptoassets.

It is likely that a crypto transaction that locks in a gain will be treated as a disposal for capital gains tax purposes. Selling cryptoassets for real rather than digital money is clearly a disposal but so is exchanging one type of coin for another, a common feature of crypto investing. In a rising market, every transaction made by an investor is likely to crystallise gains even if they are not turning them into cash.

Generally, profits from crypto-trading will be charged to capital gains tax rather than income tax as most individuals will not be considered to be professional crypto traders. However, should HMRC form the view that professional trading is taking place, any gains will be taxed as income. Income tax will also be payable on interest received on coins that are staked (to give exchanges liquidity) even if the interest is received in the form of other coins. Airdrops given as payment in return for services will also be taxed as income.

As the popularity of crypto-trading and cryptocurrencies continues to grow, there will inevitably be a greater focus by HMRC on this area. The bottom line is that taxpayers are required to declare their taxable gains and payments on all types of crypto assets, including exchange, utility and security tokens and stable coins. HMRC are actively engaged with exchanges seeking information about their customers. Those found to have not paid the correct amount of tax are likely to face substantial penalties.

"Given the increase in popularity of cryptocurrencies it is not surprising that HMRC are beginning to take more of an interest in this area."

A word of warning for conflicted trustees

It goes without saying that trustees should avoid placing themselves in a position where there is a potential conflict between their fiduciary duties as trustee and their personal interests.

In a recent case, a trustee set up a company in direct competition with the company owned by the trust which generated most of the trust's income.[1] His co-trustees secured a court order removing him as a trustee.

The trustee (who was also a beneficiary under the trust) claimed the removal was motivated by hostility and was intended to deprive him of benefit under the trust. Whilst a breakdown in personal relations is not usually a reason to remove a trustee, the court decided that in this case there was a real risk that this hostility would affect the administration of the trust. It did not matter whether the trust's company had suffered loss because the competing business had been set up. The fact that the trustee had started this business meant that the other trustees could not discuss the trust's business without disclosing information which could be used by a competitor. As such, it was not possible for the trustees to work together.

This case highlights the importance of managing trustees' conflicts of interest and confirms that trustees can take steps to remove conflicted trustees before damage is caused to the trust.

When does someone have capacity to make a will?

The court has decided that the traditional test for deciding whether someone has capacity to make a will, known as the *Banks v Goodfellow* test, was correct and that the statutory test for capacity did not apply.[2]

A mother had made two wills, which benefitted her son and largely excluded her daughter. The daughter claimed that her mother had suffered from a grief disorder which meant that she did not have capacity to make a will. She argued the *Banks v Goodfellow* test applied, meaning that the son had to prove their mother **had** capacity. The son claimed the wills were valid and that the statutory test for capacity applied, which meant that the daughter had to prove that their mother **did not have** capacity to make the wills.

The court decided that the statutory test only applies when considering whether someone has capacity during their lifetime, for example to make decisions about their health and care. As such, the *Banks v Goodfellow* test applied and the son had to prove their mother had capacity to make the wills. Applying this test, the court asked whether she: (i) understood the nature of making a will and its effect; (ii) understood the extent of her property; (iii) had an awareness of whom she would be expected to provide for in the will; and (iv) was free from any delusion of the mind. Applying this test, the court decided the mother did not have capacity to make her will because she was suffering from a grief disorder.

1. *Manton v Manton* [2021] EWHC 125
2. *Re Clitheroe* [2021] EWHC 1102

RPC asks...

Do parents have an obligation to provide for their adult children in their will?

The short answer is "probably not". The court has recently rejected a claim by two adult daughters to a share of their merchant banker father's estate.[3]

He had decided not to provide them with further financial help in his lifetime or in his will and they had not planned their lives expecting such assistance. The court considered that their financial needs could be met by an adjustment in lifestyle, not by payment from his estate.

When can adult children ask the court to help?

Children can apply to the court for reasonable financial provision from a parent's estate if they have not been properly provided for either in a will or by the rules which apply if no will is made.[4] They need to show that they have not been provided with reasonable financial provision for their maintenance and that it is objectively unreasonable for them to receive nothing more. If the court decides that such provision has not been made, it has broad powers and can award payments of capital or income, transfer property and set up trusts.

Claims by adult children have increased in recent years as a result of a decision in which the court awarded £50,000 to an adult daughter who had been estranged from her mother for 26 years and was dependent on state benefits.[5] This was despite the fact that her mother had left her out of her will and had instead left her estate to three animal charities, making it clear that she did not want her daughter to receive anything from her estate.

What happened?

In this recent case, the father's will left his estate to his second wife and made no provision for his daughters (aged 39 and 40). His daughters had had a comfortable upbringing and he gave them funds to purchase property, leading them apparently to refer to him as the "chequebook". Since then, he had made clear that they could not expect anything further and they had married, divorced and purchased property without his help. One daughter cared for her autistic daughter and the other held a senior position at Sotheby's. They were not able to sustain the lifestyle they led and their relationship with their father and stepmother had been tumultuous. They asked the court to provide them with a share of their father's estate.

Why did the court refuse the children's claim?

The court decided that the father had no legal obligation to support his adult children. The daughters did not need funds from their father's estate and their living costs could be met by a change in lifestyle. They had not made any life decisions in the expectation that they would receive something from their father. The fact that their stepmother did not need provision from the estate did not alter the court's conclusion; he had chosen to leave his estate to her. Similarly, the fact that one daughter had a disabled child was not significant because a claim could not be brought on that child's behalf.

How should adult children make a claim?

Claims by adult children are difficult and success is likely to depend on the needs of the child and their relationship with their parent. If you are contemplating a claim, thorough preparation is essential:

- An application can be made either before a grant of probate is issued or within six months after issue so seek legal advice as soon as possible
- Gather evidence of any maintenance provided by the parent, their relationship with their children and the financial resources of the children and any beneficiaries
- Before starting potentially expensive and uncertain court proceedings, contact the executors of the will to see if they will agree to provision being made from the estate.

3. *Miles and another v Shearer* [2021] EWHC 1000
4. Inheritance (Provision for Family and Dependants) Act 1975
5. *Illott v The Blue Cross and others* [2017] EWCA 2182

When will the court perfect an imperfect gift?

The court can sometimes decide that gifts of property have been validly made even when all the steps needed to transfer the property have not been taken. In a recent case, the court considered whether the gift of property by one co-owner to another should be treated as having been validly made.[6]

The co-owner executed a transfer deed transferring their interest in the property to their recipient co-owner because they had been accused of benefit fraud for failing to declare this interest. The transfer deed was never registered with the Land Registry and so the transfer was not legally valid.

Nevertheless, the court decided that this transfer should be treated as having been validly made, such that the property was held on trust for the recipient. The co-owner had shown the recipient a copy of the transfer deed, and the court considered it was likely that the recipient believed that the property was theirs. As such, it would be unconscionable to allow the co-owner to change their mind even though they had chosen not to register the transfer of the property or enabled the recipient to do so.

Whilst the court can intervene to "perfect" an "imperfect" gift of property, the circumstances of this case were unusual and it is always advisable to check, when a gift of property is made, that the formalities for transferring property have been complied with.

What is *donatio mortis causa*?

The safest way to ensure that your estate passes in accordance with your wishes is to make a valid will. However, a will is not required if a gift qualifies as a "*donatio mortis causa*".

A *donatio mortis causa* is made if someone contemplates their impending death, makes a gift which will only take effect when they die and gives the intended recipient control over the property subject to the gift.[7] A recent case demonstrates that a court will only recognise that a *donatio mortis causa* has been made in very limited circumstances.[8]

In that case an elderly couple made wills leaving their property to each other. The wife died first, and when the husband died without having made a new will, his estate passed to his next of kin. The wife's siblings claimed that the couple had intended to give them two gifts of cash and the couple's house.

Shortly before she died, the wife had made a note to remind her husband to write a new will and to give two gifts of cash to her siblings. The court decided she was merely expressing a wish that the husband was to incorporate cash gifts into a new will; the note was not a gift of cash to her siblings. Although the husband had allowed his wife's sister to take the deeds to the couple's property and told her that he wanted her to have the house, the court decided that this gift was not made in contemplation of death. He was unwell at the time but died of an unexpected heart attack. As such, the siblings were not entitled to either the house or the cash.

6. *Khan v Mahmood* [2021] EWHC 597 (Ch)
7. These requirements come from the lead judgment in *King v Dubrey* [2016] Ch 221
8. *Davey & Anor v Bailey & Ors* [2021] EWHC 445 (Ch)

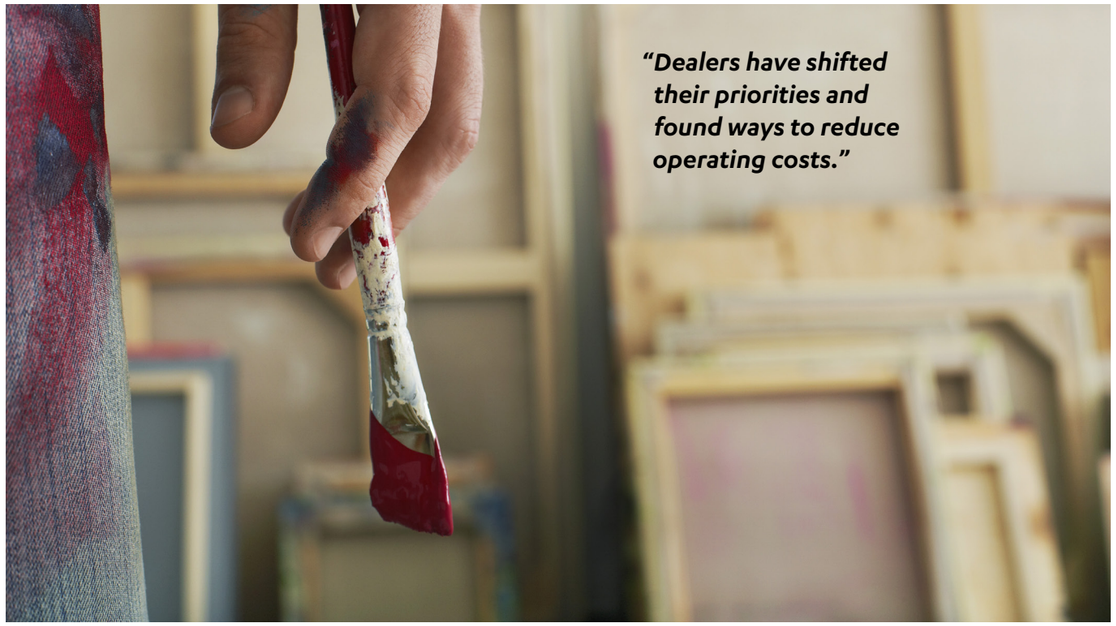
And finally in the art world...

The Art Basel and UBS Global Art Market Report

The Art Basel and UBS Global Art Market Report[9] is an annual global art market analysis.

What are its key takeaways for 2020?

- Unsurprisingly, the three major art hubs (China, UK, and the US) all suffered a decline in sales, with the global sale of art and antiques down 22% in 2020 compared to 2019. However, the pandemic does not appear to have increased the influence of any other markets; the UK, the US, and China accounted for 82% of value of global sales in 2020.
- Of the 365 global art fairs planned for 2020, 61% of them were cancelled, whilst the remainder either held live events (37%) or a hybrid (2%) alternative event. Online sales accounted for 25% of sales in 2020, increasing from 9% in 2019. 90% of high net worth collectors visited an online viewing room for an art fair or gallery in 2020. However, the diversification to online sales has not penetrated "big ticket" items; almost 70% of online sales were between US$5,000 and US$250,000 compared to offline sales, where almost 60% were over US$1m.
- Dealers have shifted their priorities and found ways to reduce operating costs. This included focusing on maintaining their existing client base and using online sales. These enabled some dealers to maintain profitability. 28% of dealers were more profitable than they had been in 2019 and 18% of dealers managed to maintain a stable level of net profit, despite the fact that the aggregate value of dealer sales declined 20% in 2020.
- There are some reasons for optimism. 66% of high net worth collectors reported that the pandemic had increased their interest in collecting, with the majority intending to purchase more works in 2021.



9. Click here.

Private wealth disputes team

Disputes can get complex. As one of the few top law firms handling private wealth litigation, our large team of lawyers has an impressive track record of handling disputes both in and out of court. We act for trustees, family offices and other asset and wealth holders and commonly act against HMRC.

Key contacts

Adam Craggs
Partner, Tax disputes
+44 20 3060 6421
adam.craggs@rpc.co.uk

Geraldine Elliott
Partner, Private wealth and trusts disputes
+44 20 3060 6435
geraldine.elliott@rpc.co.uk

Davina Given
Partner, Commercial and banking litigation
+44 20 3060 6534
davina.given@rpc.co.uk

Emma West
Senior Associate, Private wealth and trusts disputes
+44 20 3060 6508
emma.west@rpc.co.uk

rpc.co.uk