

Spotlight on private wealth

October 2023

THE LATEST
DEVELOPMENTS
IN THE PRIVATE
WEALTH WORLD

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Welcome to spotlight on private wealth

This update is designed to keep you up to date with developments in the private wealth world. In this edition we explore everything from making a will to art which is out of this world.

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

When can trustees charge ahead?

Administering a trust can be a time intensive and costly exercise. We consider when trustees can charge for their time, and what beneficiaries can do if they are concerned about the trustees' fees.

When can trustees charge for their time?

The starting point is that trustees are entitled to be reimbursed for the costs and expenses they incur in the course of their appointment but are not entitled to charge for the time they have spent acting as trustee. Both professional and lay trustees can charge for their time if the court orders it, the trust deed allows it, or the beneficiaries agree.

It is typical for modern trust deeds to contain a clause allowing professional trustees to charge for their services; it is much less common to find equivalent provision for lay trustees. The trust deed may contain a cap on the amounts that can be charged, or a scale of fees.

Professional trustees have a statutory right to charge for their services in certain circumstances, even if these services are administrative and do not involve the exercise of their particular professional skill. Trust corporations can charge for their services and trustees who are not trust corporations can charge for their services if the other trustees agree.

If the trust deed does not permit it, a court will only allow a lay trustee to charge for their services in exceptional circumstances

where the court considers it is necessary for the proper administration of the trust, for example, where the trustee has some special skill which would be useful in discharging their obligations.

What can you do if a trustee charges too much for their services?

Some trust deeds contain a mechanism for beneficiaries to challenge a trustee's fees, though this is fairly unusual. If beneficiaries decide that they do want to challenge the trustee's fees, they can bring a claim to the court asking the trustee to account for the fees they have charged. The reasonableness of the fees may be assessed by the court or (for example) by an independent accountant. If a challenge to the fees is unsuccessful the beneficiaries may be obliged to pay some or all of the trustee's costs of that claim.

The fact that a trustee has breached the terms of the trust does not necessarily deprive them of the right to charge for their services. For example, if they have sold trust property without the power to do so, they may still be able to charge fees for administering the trust, but they are unlikely to be able to recover the charges they have incurred in relation to that sale.

What's new?

Companies House issues guidance on the Register of Overseas Entities

It is now over a year since the Register of Overseas Entities was launched on 1 August 2022, requiring overseas entities to register with Companies House.

Companies House has recently published guidance on its enforcement powers for entities which fail to register or to keep their registered information accurate and regularly updated. These include restrictions on the entity's ability to deal with property, civil financial penalties and referral for prosecution.

If an entity is not registered it will not be given an Overseas Entity ID. Without this, it will be unable to purchase UK

property and will also be restricted from selling, leasing, or raising charges over land it already owns. If the entity fails to file an updated statement every year, this ID will be invalidated and the same consequences apply.

Civil penalties may be imposed for less serious failures. The size of a penalty will depend on the entity's culpability and the harm involved. The penalties for companies that failed to register by the

end of January 2023 are fixed between £10,000 and £50,000 per property, depending on the property value.

In cases of serious failures (such as knowingly submitting false information to the Register) Companies House may refer the entity for criminal prosecution. Every officer of the defaulting entity is also potentially liable to prosecution which, if successful, may result in a prison sentence, fine or both being imposed by the court.

Court clarifies requirements for validly executing a will

The Court of Appeal has clarified the requirements for validly executing a will¹.

These are that: (1) the testator signs the will; (2) the signature is made or acknowledged in the presence of both witnesses together; and (3) the witnesses confirm that they have witnessed this signature by signing the will themselves (even if they do not do so at the same time).

In *Re Sangha*, the testator died leaving substantial assets in England and India. He made a will in 2007 dealing with both his English and Indian assets. He made another will in 2016 which stated that his earlier wills were cancelled, and which only disposed of his Indian assets.

A dispute arose about whether the 2016 will had validly revoked the 2007 will. The

court decided that it had. The wording of the 2016 will was very clear, and there was no evidence that the testator did not intend it to have this effect, or that the 2016 will should only be confined to the testator's English property. The 2016 will had also been validly executed, even though the witnesses had not signed the will at the same time.

1. *Re Sangha (Deceased)* [2023] EWCA Civ 660.

What do you do when there are competing claims to an estate?

The Inheritance (Provision for Family and Dependents) Act 1975 allows, in certain circumstances, individuals to make claims for reasonable financial provision from a deceased's estate.

In some cases there are competing claims to the estate and insufficient assets to satisfy all of those claims.

In a recent case, the court had to consider competing claims by a wife and an adult daughter, from a previous marriage, who had significant disabilities². The court's first consideration was the welfare of the minor children still being cared for by the wife, and for that reason she was awarded funds to purchase a new home. The balance of

the estate was insufficient to provide an ongoing income for the wife, or to fund the care which the adult daughter required. The court split the remainder of the estate between the wife and adult daughter. The court decided this would enable the adult daughter to receive some therapy, and the wife to meet her living expenses for a few years. It declined to make any provision for an adult son, who was able to work and was not in need of accommodation.

When do you have capacity to make a will?

A will is only valid if the testator has mental capacity at the time it is made.

In a recent case, a testator had made six wills between 2010 to 2020³. Members of his family who were excluded from inheritance by a later will argued that the testator had had dementia for several years and had not had the mental capacity to make the later will.

The court decided that whilst the later will may be considered unfair, it was

nonetheless valid. When a will is rational and properly executed it is presumed that the person making it had capacity to do so. An individual will have capacity to make a will if they have a clear understanding of the nature and the effect of the will, the extent of their property and of the claims upon them. In this case, the testator's solicitors confirmed that they

had explained the terms of the will to the testator, who had understood it. Further, the testator's medical records did not indicate that he lacked capacity.

The court also confirmed the later will was validly executed even though the testator had signed it in his car, with the two witnesses watching from the outside.

2. *Amnir v Bala* [2023] EWHC 1054.

3. *Baker v Hewston* [2023] EWHC 1145.

And finally in the art world...

Art that is out of this world

Lunar Codex, dearMoon and Orbital Reflector have set their sights on joining past projects in the stars by sending art, and even artists, into space.

Samuel Peralta plans to send art from over 30,000 contributors to the moon via four time capsules forming the Lunar Codex⁴. These capsules will accompany NASA's expeditions delivering scientific equipment for its Artemis moon landing programme. Combining traditional analogue media with digital formats, the Codex will comprise visual art, music and poetry created since 2010. Codex artwork was onboard Artemis test flights last year and the first capsule is expected to launch in later this year.

Launching art beyond the atmosphere is not new. The earliest artwork believed to be sent to the moon was the 1969 Moon Museum⁵ which included a tiny ceramic tile of artwork produced by sculptor Forrest Myers covertly attached to the Apollo 12 spacecraft. In 1977 the Golden Record⁶ attached to Voyager 1 and 2 also collected earth's life and culture onto a gold-plated

record ready for anyone exploring space to find and listen to⁶. Recent curations have included using the International Space Station to host a variety of different artworks⁷ and The Last Pictures' disc of one hundred photographs attached to an existing orbital satellite⁸.

Unsurprisingly, sending art into space is not always easy. Orbital Reflector, a sculpture intended to sit above and be visible from earth,⁹ remains grounded amongst controversy on whether it is a worthwhile addition to already cluttered satellite space¹⁰. However, entrepreneur Yusaku Maezawa's dearMoon¹¹ project is set for take-off in 2024 and will bring a payload of eight artists on a week-long trip to the moon and back. Combining space tourism and art may be a lucrative next-step for similar projects.

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.

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