Spotlight on private wealth

September 2020

Our quarterly update is designed to keep you up to speed with developments in the private wealth world. In this edition we explore forgeries in the art world and will-making, the forfeiture rule and the latest guidance on trusts registration. If you have any feedback on this update or would like to know more about the issues covered, or anything else, please get in touch.

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The big question

Challenging a will – how can you secure the evidence?

If there are suspicions or doubts about the circumstances in which a will was made or the capacity of the testator to make a will, there are ways to find out more. Solicitors are obliged to provide details of their involvement in the preparation of a will, and the court also has powers to help gather information. In a recent case[1], the court took a broad view of the type of documents which an individual was obliged to disclose in order to determine whether a will was valid.

If there is any concern about the circumstances in which a will was made, it is worthwhile entering what is known as a caveat at an early stage at the Probate Service, even before starting investigations. This effectively prevents a grant of probate being issued until any disputes about the validity of a will are resolved. It is also advisable to consider what exactly has caused concern and who might be able to shed light on what happened. Does the signature on the will match that of the testator? Do the gifts made by the will reflect the understanding of the testator's intentions? Was someone putting pressure on the testator to make a will when it was executed?

Whatever the concern, it is likely that there will be relevant information in the records of the solicitor who prepared the will. In certain circumstances a solicitor can provide a concerned individual with a document which:

- explains how the testator was introduced to the solicitor
- contains notes taken at all meetings and telephone calls with the testator
- explains whether the testator showed any signs of confusion and how the solicitor understood that the testator knew that they were making a will
- describes any reasons the testator gave for departing from previous wills, and
- describes the circumstances in which the will was executed and who was present.

Depending on the nature of the concern it can also be worthwhile locating the witnesses to the will, exploring whether the testator's medical records are available or instructing a handwriting expert.

If there is difficulty finding a copy of the will and those who might have it do not co-operate, the court can help, even if there are no ongoing court proceedings. The court has power to order an individual to produce a copy of any will and attend court for questioning if there are reasonable grounds to believe that they have knowledge of a will[2].

Once court proceedings have been issued, the parties to those proceedings are obliged to disclose a copy of any wills in their possession and are likely to be obliged to disclose any other documents which are relevant to the circumstances in which the will was made. The court can also compel non-parties to produce a broad category of documents. In a recent case[3], the testator's siblings were concerned that the testator's signature was forged and that he had lacked mental capacity to make the will and had not approved its contents. They disputed the attempt by the sole beneficiary of the will to admit it to probate and sought the disclosure of documents from one of the testator's friends, who was not a party in the proceedings.

A court can order a non-party to disclose documents where these are likely to be relevant to issues in dispute in the proceedings and their disclosure is necessary to dispose fairly of the claim or save costs. Orders are only made in exceptional circumstances, but in this case the court ordered the testator's friend to disclose broad categories of documents including:

- communications between them, the sole beneficiary and the testator around the time the will was executed

1. *Gardiner v Tabet* [2020] EWHC 1471 (Ch) (12 June 2020)
2. Sections 122 and 123 Senior Courts Act 1981
3. *Gardiner v Tabet [2020] EWHC 1471 (Ch) (12 June 2020)*

Challenging a will – how can you secure the evidence? contd...

- a sample of the testator's signatures, so that a handwriting expert could compare them to the signature on the will
- any draft will or written instructions for a will
- drafts of and written instructions for a tenancy agreement signed shortly after the will was executed. The court considered these might indicate whether the testator had capacity and was able to understand the consequences of his actions at the time
- communications showing the testator's wishes about what should happen to his estate on his death in the months before he died.

The court's approach indicates that it is prepared to exercise its powers to ensure that it has all the information and documents it needs to decide whether a will is valid. This decision may provide a basis to persuade those who hold potentially relevant documents to disclose them voluntarily, without a court order.

There are many ways to gather information about the circumstances in which a will was made, with or without the assistance of the court. It is advisable to consider why these circumstances have caused concern, before deciding what information is needed to address the concern, and how it should be obtained.

What's new?

Fraud and forgery – not an easy challenge

Two recent cases demonstrate the difficulty of challenging wills on the grounds of fraud or forgery.

The court[4] considered a claim brought by the deceased's daughter who had been excluded from her mother's will on the basis that her mother believed her to be a spendthrift and that she would 'fritter' the inheritance away.

The daughter claimed the will was made as a result of "fraudulent calumny". Fraudulent calumny occurs where a beneficiary of a will makes false representations about the character of another potential beneficiary which results in the testator changing their mind about who to benefit in their will. In this case, the daughter asserted that her mother's mind had been 'poisoned' by her brother.

The court did not consider there was sufficient evidence that her brother had induced their mother to change her will for reasons which he knew were false, and dismissed the claim of fraudulent calumny. However, the court agreed with the daughter that her mother had been suffering from an affective personality disorder meaning that the will was invalid because she did not have capacity to make it.

In another case[5], the deceased's uncle applied for a grant of probate pursuant to a will which was purportedly signed by an advisor on the deceased's behalf. The deceased's mother claimed that the will was forged. As the deceased had not signed the will and the will was produced some time after his death, the uncle had to prove that it was validly executed.

The court was satisfied that the will was validly executed and not forged. The contents of the will did not rouse suspicion. There was also no reason why the advisor or witnesses would want to participate in a fraud, and the deceased's conversations with others about the will indicated that he understood it and considered it important.

These cases demonstrate that cogent evidence will be required to demonstrate that a will has been made as a result of fraudulent calumny or that a will has been forged.

4. *Clitheroe v Bond* [2020] EWHC 1185 (Ch)
5. *Re Brunt (Deceased)* [2020] EWHC 1784 (Ch)

What's new?

Michael Vaughan – High Court declines to rectify contract to prevent tax charge

RPC's tax team explores the court's recent decision in a claim brought by England's former cricket captain here.

Forfeiting the Forfeiture Rule

It is a well-established principle that an individual should not acquire a benefit under a will if they were involved in the unlawful killing of the testator. This is known as the forfeiture rule. However, the rigid application of this rule can lead to perverse outcomes as the court recognised in a recent case[6].

In that case Mrs Amos was involved in a traffic collision in which her husband was killed. Mrs Amos admitted death by dangerous driving. She stood to benefit under her husband's will and receive his share of the family home.

The court's starting point was that causing the death by dangerous driving would attract the forfeiture rule, and Mrs Amos would lose her inheritance. However, the court had discretion to limit the application of the rule if justice required it, taking into account all the circumstances of the case. The court decided that Mrs Amos suffered a momentary albeit significant lapse of concentration; it would be disproportionate to remove her entitlement to her husband's share in their home. The forfeiture rule still applied in this case, but its effect was modified in the interests of justice.

6. *Amos v Mancini* [2020] EWHC 1063 (Ch)

RPC asks...

Trusts Register – what's the latest?

The UK government has published regulations to implement the proposed changes to HMRC's Trusts Registration Service (TRS) following MLD5.

The TRS was launched in 2017. MLD5 provides that all UK resident express trusts and some non-UK trusts must register with the TRS irrespective of whether they have incurred a tax liability in the UK.

The regulations offer some clarity on how MLD5 will be implemented and provide that:

a non-UK trust is only obliged to register if it has one UK resident trustee and either enters into a new business relationship with a UK service provider or acquires real estate in the UK.

- nominees and bare trustees will be obliged to register (subject to limited exceptions).
- joint owners of UK property held on trust are not obliged to register if the legal and beneficial owners are the same.
- will trusts only need to be registered if they remain in existence for more than two years after the death of the individual.
- third parties will be able to access information on the register if they show they have an interest in doing so, such as a concern that the trust has been used for money laundering or terrorist financing.

Trusts which have UK tax liabilities should register either by 5 October or 31 January (after the end of the tax year in which the tax liability arises). For trusts that do not have UK tax liabilities, the earliest date for registration is 10 March 2022, as it not yet possible to register these using TRS. We expect HMRC to provide guidance on these regulations in the coming months, and in the meantime it has produced an update on the functions which are available on the TRS.

RPC asks...

Remote execution of wills – enough control?

The Government has announced new legislation to allow wills to be witnessed remotely by video, simplifying a process which has been complicated by social distancing measures.

Under current legislation, a will is only valid if it is signed by the person making it (the testator) in the presence of two witnesses, who must each then sign the will in the presence of the testator. Our last edition of Spotlight outlined some of the creative ways in which testators have been complying with these execution formalities whilst observing social distancing, with wills being held in place by windscreen wipers and signed on car bonnets and witnessed through windows or over fences.

The Government has responded to concerns raised by the Law Society about the difficulties faced by some members of the public in trying to make their wills. Legislation is expected shortly to amend the existing law to make it permissible for a will to be witnessed remotely through video conferencing facilities. The law will have retrospective effect from 31 January 2020, and the change is expected to remain in place until 31 January 2022 or for as long as it is deemed necessary.

The legislation has yet to be finalised, but the Government has indicated that the appropriate process will be one in which the two witnesses view the will being executed by video before the will is circulated to the witnesses, and their signatures are viewed by the testator. The type of video-conferencing facility is not important, but the testator and witnesses must have a clear line of sight of the writing of the signature. Witnessing pre-recorded videos of wills being executed is not permissible, and the government has decided not to allow electronic signatures or counterpart wills.

Where possible, signing before witnesses in person is likely remain the preferred option for executing a will, as it minimises the risk the will could be challenged later. However, the flexibility offered by this proposed change is a welcome response from the Government to a public health issue which has both complicated the process for executing wills, whilst simultaneously driving demand for them.

And finally in the art world...

Genuine Gaugin? The saga continues

At the beginning of this year, Head with Horns, a wooden sculpture bought and exhibited by the J. Paul Getty Museum of Los Angeles, and previously thought to be a work by French artist Gauguin, was discredited. The decision to attribute the piece to an "unknown" artist instead came as a result of significant new evidence which had not been available at the point of acquisition.

Hot on the heels of this discovery two major US museums, the National Gallery of Art in Washington, DC, and the Museum of Fine Arts, Boston, are both investigating claims that their Gauguin paintings may also be fakes. The works in question are The Invocation and Women and a White Horse (both 1903) and are currently accepted as being legitimate works painted by Gauguin on the Marquesas Islands before his death. A spokesperson for the National Gallery of Arts has highlighted the difficulties around identifying legitimate works from Gauguin's later years – he was frequently ill and there are few records of his production on the Marquesas.Both museums are considering scientific analysis to determine the issue.

Across the pond, curators at the British Museum assisted UK border forces investigating the legitimacy of the supposed Mesopotamian era artefacts seized in two metal trunks at Heathrow. Upon inspection, the clay cuneiform tablets were exposed as fakes. Although perhaps not acknowledged as frequently as it should be, the British Museum confirms that there are "more fakes in circulation than genuine articles". These recent high-profile examples of fake works of art serve not only as testament to the often impressive quality of these works, but also as a warning to buyers to be cautious and diligent when investigating the source of a piece.

The RPC 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. Drawing on extensive tax, asset management and commercial expertise, we can help resolve any type of dispute, from family settlements and inheritance issues to conflicts over assets, including art and valuables. We have a global reach with offices in London, Hong Kong and Singapore, and access to the TerraLex network of lawyers in over 100 jurisdictions.

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