RPC

Spotlight on private wealth

November 2021

THE LATEST DEVELOPMENTS IN THE PRIVATE WEALTH WORLD

The big question: When is a will secret?

What's new?

RPC asks...

In the art world...

Private wealth disputes team

Welcome to spotlight on private wealth

This update is designed to keep you up to speed with developments in the private wealth world. In this edition we explore everything from Royal wills to cryptocurrency.

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.

IF YOU WOULD LIKE TO RECEIVE A HARD COPY OF THIS GUIDE, PLEASE GET IN TOUCH WITH YOUR USUAL RPC CONTACT.

Spotlight on private wealth is printed on Fedrigoni Arcoprint, an environmentally sustainable paper made with 100% recycled FSC® fibres. It is completely biodegradable and recyclable.

The big question

When is a will secret?

A court has recently decided to keep Prince Phillip's will secret[1]. We explore why wills are normally a publicly available document and why an exception was made in this instance.

Wills can usually be inspected by the public once a grant of probate is issued. This rule dates back to 1857, and whilst it is unclear why it was introduced, it was suggested in this case that the rationale for the rule is that it:

- helps to ensure that the deceased's wishes are given effect to
- may prompt the disclosure of another more recent will
- notifies potential beneficiaries and those with claims on the estate (such as creditors) of the death.

The court can prevent the publication of a will when it considers that it would be "undesirable or otherwise inappropriate".

The first Royal will to be kept confidential was that of Prince Francis of Teck, the brother of Queen Mary, who died in 1910. The court's decision revealed that a practice has developed of keeping confidential the wills of "senior members" of the Royal family, which have been defined as:

- the Consort of a Sovereign or former Sovereign
- the child of a Sovereign or former Sovereign, and
- a member of the Royal family who, at the time of their death, is first or second in line of succession to the throne or the child of such a person.

As such, Princess Diana's will was not kept confidential and its contents have been widely publicised since her death. Two individuals claiming to be the offspring of the late Princess Margaret attempted to obtain a copy her will (which had been kept confidential)[2], but both were unsuccessful. By contrast, the librarian to the Queen's Archives obtained a copy of the Duke of Windsor's will for the purpose of establishing who held copyright in his papers[3].

The court decided that Prince Phillip's will should be kept confidential because it considered that there was an inherent public interest in protecting the Queen's dignity and that of her close family so that she is able to fulfil her constitutional role. The rationale for publishing wills also did not apply to the Royal family, whose passing is likely to be widely publicised. The court did not consider that the potential historical or journalistic interest in the will, or the transparency into Royal finances that publication may offer, were sufficient reasons to publicise the will. It remains the case that if an individual has a particular interest in reviewing Prince Phillip's will, they can make an application to the court for permission to do so.

Whilst it was not open to the court to change the position on the publication of wills more generally, it did refer to research which indicated that 71% of survey participants considered that the publication of wills should be prohibited. The court also noted that the rule did not have a clear rationale, and that it was an open question whether the rule was still justified or acceptable to the public, particularly in the light of heightened concerns about individual privacy.

The court did not provide any guidance on when it might otherwise be "undesirable or inappropriate" to publish a will but did confirm that this was not a high threshold. The court's decision may encourage more applications to prevent the publication of wills, and it may prompt pressure to be applied to the government to amend the existing legislation so that wills are not routinely published.

1. *Re: The Will of His late Royal Highness The Prince Philip, Duke of Edinburgh* [2021] EWHC 77.
2. *Brown v HM Queen Elizabeth The Queen Mother, The Executors of the Estate of & Ors* [2007] EWHC 1607 and *Re Benmusa* [2017] EWHC 494 *Re Benmusa* [2017] EWHC 494.
3. *In the matter of His Royal Highness the Duke of Windsor (deceased)* [2017] EWHC 2887.

What's new?

Beneficiaries, blessings and *Brown*

The court has agreed that a professional trustee can sell its investments despite strong opposition from beneficiaries[4].

A family trust was set up to benefit the wife and son of a deceased businessman. The trust held shares in a company established by the businessman to trade in home equity release arrangements, and these represented 25% of the trust's value. The professional trustee decided to sell shares in the company to increase tax efficiency and the diversity of the trust's investment portfolio. The son objected, partly because the company had been founded by his father, but also because he believed it would be more profitable to retain the shares. He sought to prevent the trustees from selling the shares.

The court agreed that the shares could be sold. It decided that the professional trustee did not need to obtain advice from an investment manager or a valuation of each asset held by the company before selling the shares, as the son claimed. The court considered that it was also reasonable for the trustee to have taken into account the fact that the Financial Conduct Authority was investigating home equity release schemes. The trustee had rightly considered the views of the son, but it had also been correct not to give these views decisive weight.

The court has the power to approve decisions made by trustees concerning significant trust assets and this case demonstrates that it will do so, even if beneficiaries object to the trustees' decision.

A complex family affair

The court has recently unpicked some knotty issues arising in the administration of an English and Indian estate worth over £35 million.

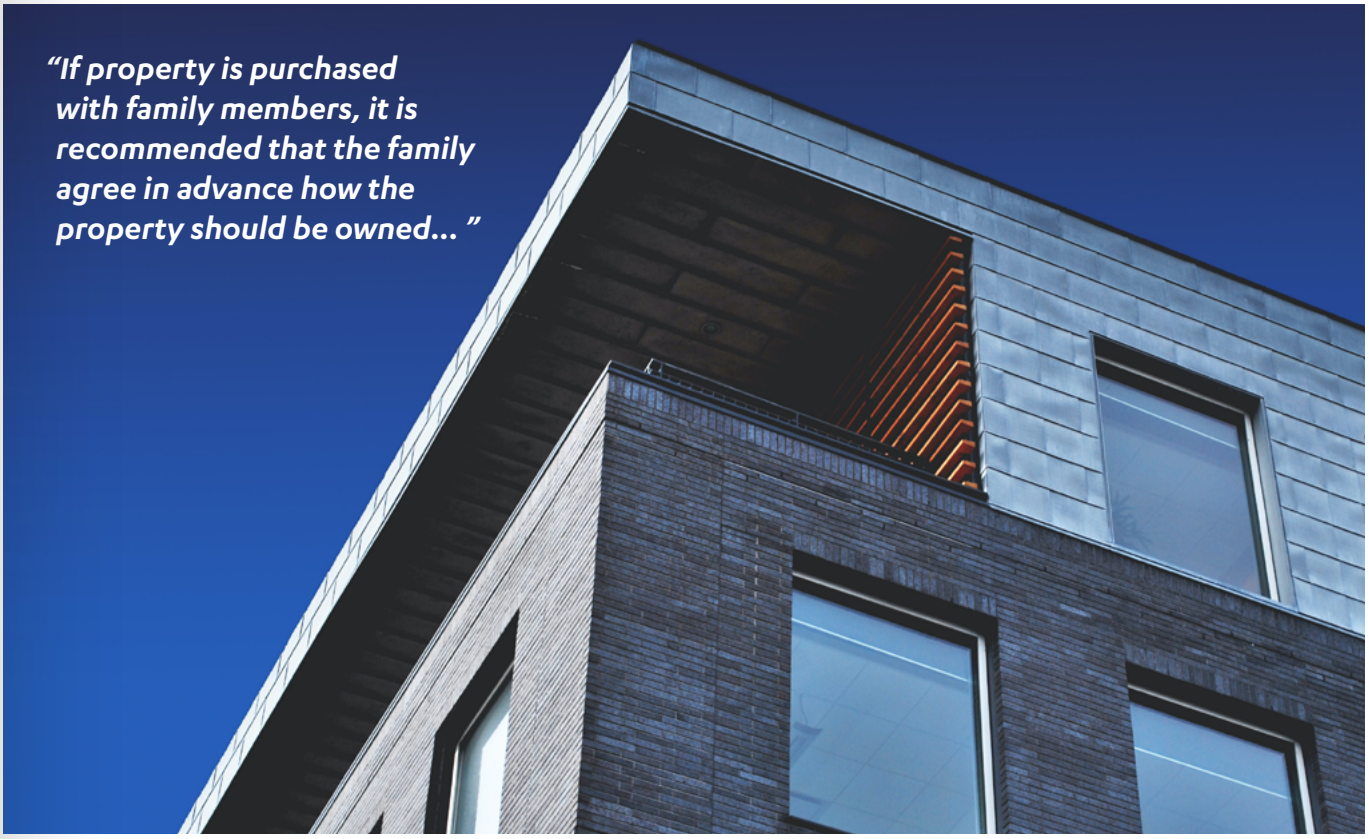
The deceased left four wills and there was a dispute between the deceased's widow and family about which of these wills was valid. The court rejected the widow's claim that the last will was forged because the deceased's sister had provided sufficient evidence that it was authentic. In particular, the widow claimed that the clause which revoked earlier wills was not intended to have that effect. The court disagreed. Though a broad range of evidence could be used to help the court decide what was meant by the clause, the court decided that it would require very clear evidence that the clause was not intended to have its literal meaning.

The deceased's son also claimed that his father had promised to transfer to him properties in return for his work in the family business. The court was unpersuaded that his father's promises had been determinative of the son's decision to join the family business, and in any case were not sufficient to justify transferring properties which would otherwise be owned by the deceased's widow.

The effect of the court's decision is that the deceased's English estate will be distributed in accordance with the rules which apply if no will is made, because the last will only disposed of the deceased's estate in India. As a number of the deceased's children claim that he never divorced his previous wife, the court now has to decide whether the widow's marriage to the deceased was valid.

The case is a reminder of the issues which can arise when an estate is administered, and also how difficult it can be to prove that a will has been forged.

4. *Brown v New Quadrant Trust Corporation Ltd* [2021] EWHC 1731.
5. *Sangha v Sangha* [2021] EWHC 1599 (Ch).



A father, a son and a house in Sutton

The Court of Appeal has decided not to rectify the transfer of a property into the ownership of a father and his son and is a reminder of the potential pitfalls of purchasing property with family members.

A father and his son purchased a house in Sutton together. The son did not contribute to the purchase price but was listed as a joint owner to help his father obtain a mortgage. The transfer form included an express declaration that they held the property in equal shares. The father applied to the court to rectify the form to exclude his son from holding any interest in the property.

To rectify a document it is necessary to show that the parties had a "common continuing intention" at the time the document was executed as to what the document should say which, as a result of an error, was not reflected in the document itself.

The court refused to rectify the transfer form, so the father and son remained joint owners of the property. There was no evidence that they had ever discussed or considered ownership or what the transfer form should say. Whilst the father never expected to have complete ownership and the son did not expect to receive half of the property, they had not reached an agreement on any alternative ownership arrangements. In practice, the son had been paying the mortgage on the property, which meant that he had been unable to purchase a house with his wife. This had not been envisaged at the time the property was purchased.

If property is purchased with family members, it is recommended that the family agree in advance how the property should be owned and obtain professional advice to ensure that the decision is correctly documented.

6. *Ralph v Ralph* [2021] EWCA Civ 1106.

RPC asks...

When can you replace a personal representative?

The court has recently confirmed that a major falling out amongst the deceased's family which obstructs the administration of the estate is a reason to remove a personal representative[7].

A personal representative has legal authority to administer a deceased's estate and is either appointed in a will (and called an executor) or in accordance with the rules which are applied if there is no will (and called an administrator). A court has the power to remove personal representatives if it considers they are not acting impartially and in the best interests of the beneficiaries.

In a recent and unusual case, the deceased appointed seven of his children as executors in his will. One of the deceased's four widows was also appointed as an administrator, having sworn a document confirming the deceased died without leaving a will. She then attempted to transfer two properties, which the deceased had placed into trust shortly before his death, into her own name.

The relationship between the administrator and the deceased's family had broken down, and the executors appointed by his will sought the removal of the administrator. The court agreed that she should be removed because she had failed to transfer the properties out of her name as she had agreed to do. The court also confirmed that personal representatives can be removed if there is disharmony amongst beneficiaries which prevents the estate from being administered correctly.

Is it all a mistake?

In two recent cases the court has confirmed that it is difficult to set aside trusts on the basis that a mistake was made when the trust was established . The decisions highlight that a court will require compelling evidence that there was a mistake when the trust was set up before amending its terms.

A successful businessman was advised to set up three offshore discretionary trusts to hold his personal and company assets, as part of a tax avoidance scheme. After the purported tax benefits of the scheme were challenged by HMRC, he sought to set aside the trusts on the basis that when he set up the trusts, he was mistaken in relation to the beneficiaries and true tax consequences of the trusts. However, when the court examined the evidence, it found that when the trusts were set up he was indifferent about the risks of being mistaken about the tax efficacy of the scheme. As such, the court decided that he had accepted the risk that the scheme would fail and declined to unwind the trusts.

In another case, the court decided that an employee benefit trust could not be set aside, acknowledging that this had "devastating consequences" for the family which had set up the trust. The court found that the family made no mistake about the nature of the trust and its beneficiaries. Although the family thought that the trust could be unwound if it did not provide the anticipated tax benefits, the court decided they had made a misprediction about the consequences if the scheme went "wrong" which was not a basis to unwind the scheme altogether. The fact that with the benefit of hindsight the family would not now enter into such an arrangement, did not mean that they were mistaken when the trust was established.

7. *Otubu & Ors v Otubu (Re Estate of Godfrey Itse Mene Otubu)* [2021] EWHC 1354 (Ch)
8. *Riverside Healthcare Ltd v Bay Trust International Ltd & ors* [2021] EWHC 2086 (Ch) and *Bhaur v Equity First Trustees (Nevis) Limited)* [2021] EWHC 2581.

Is HMRC targeting cryptocurrency?

HMRC has announced it will launch a new 'nudge letter' campaign that will target UK taxpayers who may have failed to pay tax due in respect of their cryptoassets.

HMRC has in recent years adopted a strategy of sending targeted communications to taxpayers whose tax affairs it suspects may not be in order. The nudge letters offer the recipients an opportunity to engage with HMRC to remedy the suspected defect outside the normal enquiry process.

HMRC are now increasingly armed with more and more data, gathered from crypto exchanges and other sources, meaning that investigations into the UK tax affairs of crypto investors are likely to increase.

The tax treatment of cryptoassets can be complicated and uncertain. In our experience, some crypto investors overlook certain fundamentals, such as when a gain might be realised (e.g. when switching from one cryptoasset to another). There are other technical issues to consider, such as the situs of cryptoassets and the impact on disposals for non-UK domicilaries.

Whilst the latest nudge letters will not contain any specific accusations, recipients should assume that they are being targeted on the basis of actual data held by HMRC. Failure to take action, or to respond appropriately, is likely to result in HMRC commencing a formal investigation. Anyone who receives a nudge letter, or who may be generally concerned about their tax position in respect of cryptoassets, should seek appropriate expert advice.

And finally in the art world...

Back to normal? The re-opening of the art market

After 18 months of cancelled and postponed art fairs and the proportion of sales made at fairs falling to just 7%, the industry is hoping autumn art fairs mark a return to normality.

Art Basel 2021 returned in September after three pandemic postponements and was the first major in-person international art fair to be held in Europe since March 2020. Photo London had a strong turnout and Frieze London and Frieze Masters were both sold out.

The picture painted by the mid-year review of the art market by Art Basel and UBS is mixed. Sales have picked up for larger dealers and employment in the sector is growing. However, smaller dealers are still under pressure and 45% of all dealers reported a decline in sales in 2021. Millennial collectors are continuing to drive an increase in the median sale prices achieved. Younger buyers are also likely to be responsible for the growth in the purchase of digital art and sales via non-fungible token platforms. Dealers are currently prioritising relationships with existing collectors, online sales and art fairs, with art fairs becoming their main focus over the next couple of years- it remains to be seen whether these fairs will bring the market "back to normal".

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