



# Spotlight on private wealth

March 2021

THE LATEST  
DEVELOPMENTS  
IN THE PRIVATE  
WEALTH WORLD

**The big question**

**What's new?**

**RPC asks...**

**In the art world...**

**Private wealth  
disputes team**



# Introduction

**Our quarterly update is designed to keep you up to speed with developments in the private wealth world. In this edition we explore charitable gifting, conflicts of interest, potential tax reform and forgeries in the art 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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PLEASE GET IN TOUCH WITH YOUR USUAL RPC CONTACT.**

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# The big question

## When will a court approve trustees' decisions?

**The court has the power to approve trustees' decisions, but a recent case confirms that it will only do so if the trustees have first managed any conflicts of interest.**

Trustees can seek the court's approval of significant decisions involving trusts, such as the distribution of trust assets. If granted, the approval will prevent anyone from bringing a claim against the trustees in respect of that decision. As a result, the court will proceed cautiously before granting approval and will need to be satisfied that:

- the trustees have in fact made the decision for which they seek approval and have power to make that decision
- the trustees have taken account of relevant matters and disregarded irrelevant matters
- the decision is one which a rational trustee could make and is not vitiated by any conflict of interest.

The court will grant approval even if it would have made a different decision to that reached by the trustees, provided the trustees' decision is a proper one.

Trustees often seek the approval of decisions they have taken where there has been disagreement amongst the beneficiaries about the trustees' course of action, or where the decision has significant financial implications. Trustees must explain the reasons for their decision to the court, disclose all material relevant to their decision and provide supporting evidence, such as a valuation report

confirming that a good price has been offered for the property which they intend to sell. If trustees do not obtain the court's approval, they can still implement their decision if they have the power to do so, but they may be exposed to claims for breach of trust by beneficiaries.

In a recent case<sup>1</sup>, the trustees of the will trust of the late architect Dame Zaha Hadid applied to the court for approval of their decision to distribute her estate to particular beneficiaries, including the charity she had established.

The application followed a protracted dispute between the trustees. One of the trustees, Dame Zaha's business partner, had sought to remove the other trustees (Dame Zaha's niece and friends) on the basis that they had allegedly allowed their animosity towards him to influence their decision-making. These proceedings were settled on terms that all parties' costs would be paid from the estate. Despite this, both sides still alleged that the other had acted in breach of fiduciary duty and in conflict of interest - conflicts which arose from, amongst other things, her business partner's position as director of Dame Zaha's architectural practice. The trustees did not seek the court's approval of their decision to settle these proceedings.

Against this background, the court was not persuaded that it should approve the trustees' distribution decision. There were unresolved issues of conflict of interest and a real risk that these vitiated the trustees' decision. The decision appeared to be the compromise of a dispute between the trustees, as opposed to the product of the trustees discharging their obligation to work together to decide the most appropriate distribution. The court was also unwilling to approve the distribution decision without also considering the decision to settle the proceedings to remove trustees, particularly because the settlement provided for the payment of a large sum of costs from the estate.

Whilst the court acknowledged that the distribution of Dame Zaha's estate had been severely delayed, the trustees could still make the distributions without its approval. The resulting risk that claims would be brought by beneficiaries was of the trustees' own making.

Trustees should ensure that they manage any conflicts of interest and have followed a proper decision-making procedure before seeking the court's approval of their decisions.

1. *Schumacher v Clarke and others* [2020] EWHC 3381

# What's new?

## Guidance issued on the remote witnessing of wills

As we reported in our September 2020 edition of Spotlight [here](#), the government has allowed wills to be witnessed remotely through video conferencing until January 2022.

The government has now issued guidance which recommends following five steps to execute a will remotely:

- the front page of the will and signature page should be shown on the video feed and the witnesses should be able to see the testator signing the will (not just their head and shoulders)
- the witnesses should confirm that they can see and hear the testator and acknowledge and understand their role as witnesses
- the will should be sent to the two witnesses for them to sign, ideally within 24 hours of the testator's signature;
- the witnesses should then sign the will and be seen to be doing so by the testator. They are not permitted to sign the will electronically
- if the two witnesses are not physically present with each other, the last step should be repeated for both witnesses –witnesses are not required to be together but this is good practice.

The Law Society has also published its guidance for legal practitioners, testators and witnesses. This stresses that wills should only be witnessed remotely as a last resort, and whether it is appropriate will depend on how urgently the will needs to be signed and whether there is time to pass the original will between the testator and the witnesses as the rules require. The Law Society also recommends that all video-witnessing is recorded, and that the regular post is not used to transfer the will between the testator and witnesses because of potential delays.

## UK decides not to implement EU licensing regulations for cultural property

Post-Brexit, the UK has decided not to adhere to the EU's new import licensing regulations for cultural property. We covered the new regulations in our June 2020 edition of Spotlight [here](#).

In summary:

- the regulation applies to the permanent import of cultural goods made outside the EU
- for high-risk objects, including 'products of archaeological excavations or of discoveries on land or underwater' or 'elements of artistic or historical monuments or archaeological sites which have been dismembered', an export licence is required from the country in which the objects were created or discovered, together with an EU import licence
- for low-risk objects, including zoological or botanical collections, paintings, sculptures and books which are over 200 years old and worth

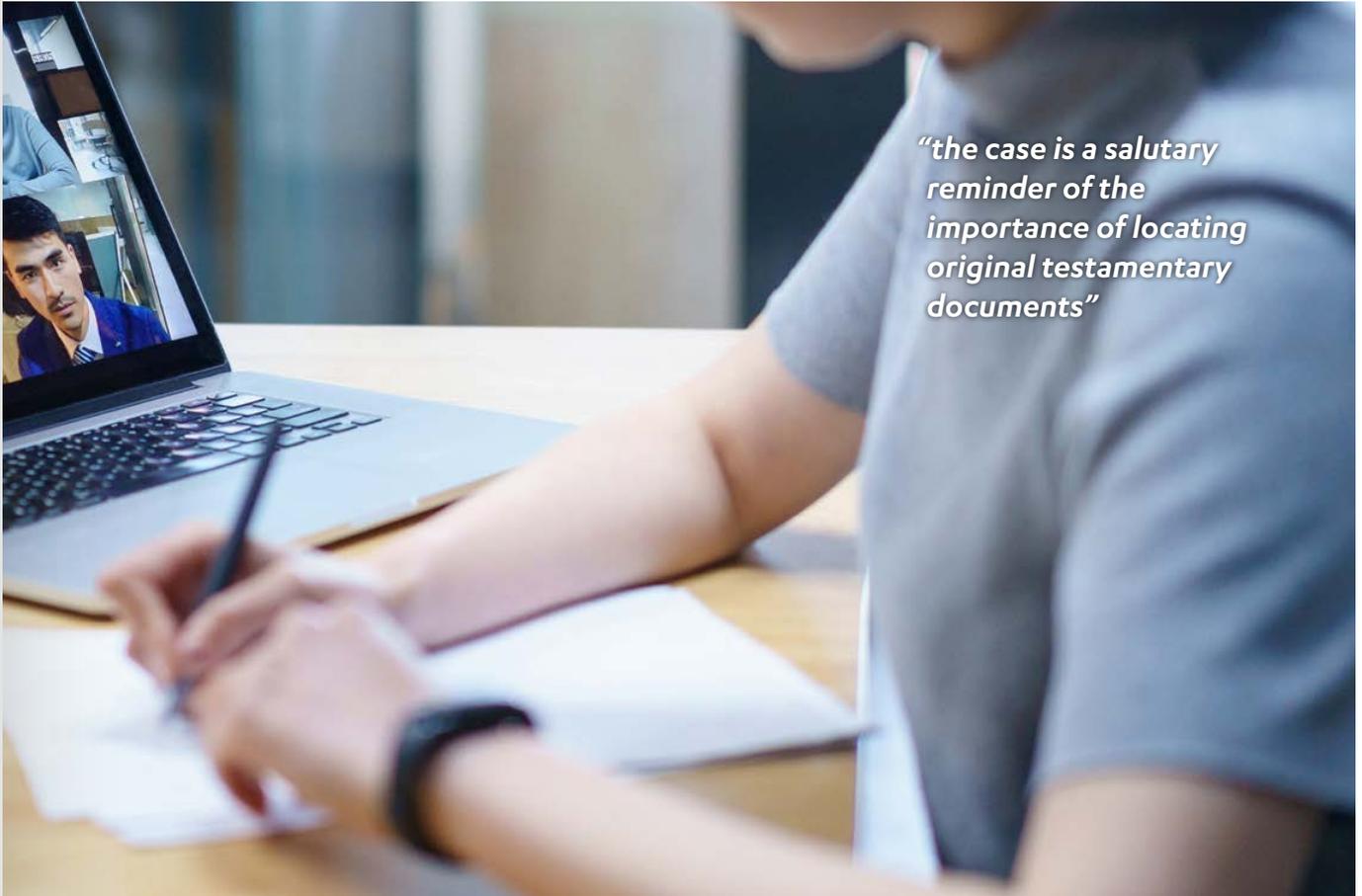
over €18,000, the importer is obliged to sign a declaration stating that the object was lawfully exported from the country of origin and provide a description of the object.

The regulations are due to be in force by 2025. They are intended to deter illegal trafficking of cultural goods, which are often used in terrorist financing, and will permit officials to "take any appropriate measure" in confiscating cultural goods without EU import licences.

The UK's rejection of the EU regulations is good news for international antique dealers and collectors, many of whom strongly criticised the restrictiveness of the proposed measures and their likely

negative impact on trade. Significantly, the decision also means that one of the most controversial of the measures, which became law in England and Wales in December 2020, will no longer apply. This prohibited the import of any goods into the EU which were removed from the country of origin in breach of the laws of that country, regardless of how long ago those goods were removed.

The US, the world's leading art market, does not have analogous restrictions to the new EU regulations. The UK's decision to follow a similar path may give it a competitive edge over the EU in the international antiques and art markets. However, UK dealers should be aware they will still have to comply with the regime when selling in the EU.



*“the case is a salutary reminder of the importance of locating original testamentary documents”*

## The case of the missing original will

In a recent case, the court set the scene for its judgment by commenting that “If the late Sir Arthur Conan Doyle ... were to write up the events which have led to this present, unhappy litigation, [he] would no doubt have titled the resulting chronicle ‘The Case of the Missing Original Will’.”<sup>2</sup>

The claimant applied to have a photocopy of her late father’s alleged lost will admitted to probate. The original of this handmade will was never located and the claimant asserted that she had found the photocopy whilst clearing out her father’s house. The claimant’s siblings contended that the will had been forged by the claimant. They believed that their late father died intestate, meaning that his estate would be divided between his children in equal shares.

The claimant argued that the burden was on the defendants to establish that the will was a forgery and that the standard of proof was the normal civil standard. The court disagreed and decided that the burden of proving that a will is not a forgery must rest on the party seeking to admit the will to probate, as part of the formal requirements of proving the will was validly executed and witnessed.

Ultimately, the court concluded that the will was a ‘fabricated document’ which had been concocted by the claimant and ordered that the claimant should pay all of her siblings’ costs of the claim. It also invited the Crown Prosecution Service to consider whether a criminal case for fraud should be brought against her. Though the claimant’s conduct in this case was exceptional, the case is a salutary reminder of the importance of locating original testamentary documents.

## RPC asks...

### How do you leave money to charity in a will?

The most straightforward way to leave money to charity is by making a direct gift in a will. Clearly identifying the chosen charity is vital and a failure to do so can result in disputes between potential charitable recipients and in some cases, the court stepping in to identify the intended charity.

In a recent case<sup>3</sup>, gifts were made to the “British Racing Drivers’ Club Benevolent Fund” and the “Cancer Research Fund”, both of which were named incorrectly in the will and did not exist. The solicitors’ original file was inaccessible so there was no record of the donor’s intentions. The court construed the donor’s words in context and decided to grant the gift to the sole motor sport charity under the British Racing Drivers’ Club. The gift to the Cancer Research Fund was construed as meaning a gift for the purpose of cancer research so the executor could donate to a charity they chose for that general purpose.

In order to ensure a gift gets to the right place, registered charities should be identified using their registered name or number, and unregistered charities carefully described. Wills should be regularly reviewed to ensure named charities remain identifiable and have not merged, changed their name or been wound up. It is also possible to specify that another charity should benefit in the event the gift to the favoured charity fails for some reason. Gifts can be left to charity for a specific purpose, but preferences are best identified in a letter of wishes accompanying the will in case the activities of the charity change over time so that it is not possible to fulfil this purpose.

It is also worth remembering that gifting to charity has some tax benefits. Gifts to UK charities that are established exclusively for charitable purposes or community amateur sports clubs are exempt from inheritance tax. Additional tax exemptions arise where 10% or more of the net estate is left to charity – the estate will be taxed at 36% instead of the standard 40% rate.



3. *Knipe v British Racing Drivers’ Motor Sport Charity and others* [2020] EWHC 3295 (Ch)

## Reform of CGT and IHT- on the horizon?

The All-Party Parliamentary Group for Inheritance & Intergenerational Fairness has published a report proposing radical changes to inheritance tax. This followed a report by the Office of Tax Simplification proposing more modest reforms of Capital Gains Tax.

The APPG proposed that the current IHT tax regime be replaced with a flat-rate gift tax payable on both lifetime transfers and on death. The standard rate would be 10%, increasing to a rate of 20% on death for estates in excess of £2 million. The existing 100% relief on spousal gifts and charitable donations would remain; however the other reliefs would be abolished, including Business Property Relief and Agricultural Property Relief. The nil rate band would be removed and replaced with a single annual exemption of £30,000 for gifts and an allowance of £325,000 on death.

The APPG's other proposals include that:

- gifts in excess of £10,000 would require compulsory electronic reporting
- the concept of domicile as a connecting factor for IHT would be abolished. Instead, IHT would apply to individuals resident in the UK for 10 out of the preceding 15 years. Trusts created by such individuals would also be subject to IHT and gifts to trusts would be taxed in the same way as gifts to individuals.
- The CGT uplift on death would be abolished.

The OTS's proposals were more modest and focussed on aligning CGT rates with higher income tax rates. Similarly, they address the boundary issues between CGT and income tax. For example, they propose taxing share-based employment remuneration schemes at income tax rates. They also propose reform of exemptions and reliefs by:

- reducing the annual exemption of £12,300 for CGT to around £2,000 to £3,000
- abolishing Investors' Relief
- replacing Business Asset Disposal Relief (formerly Entrepreneurs' Relief) with a relief targeted at assisting individuals at retirement.

It also shares the APPG's view that the CGT uplift on death should be abolished.

Watch this space for details of any implementation of the proposed reforms.



# And finally in the art world...

## New technologies combat art fraud

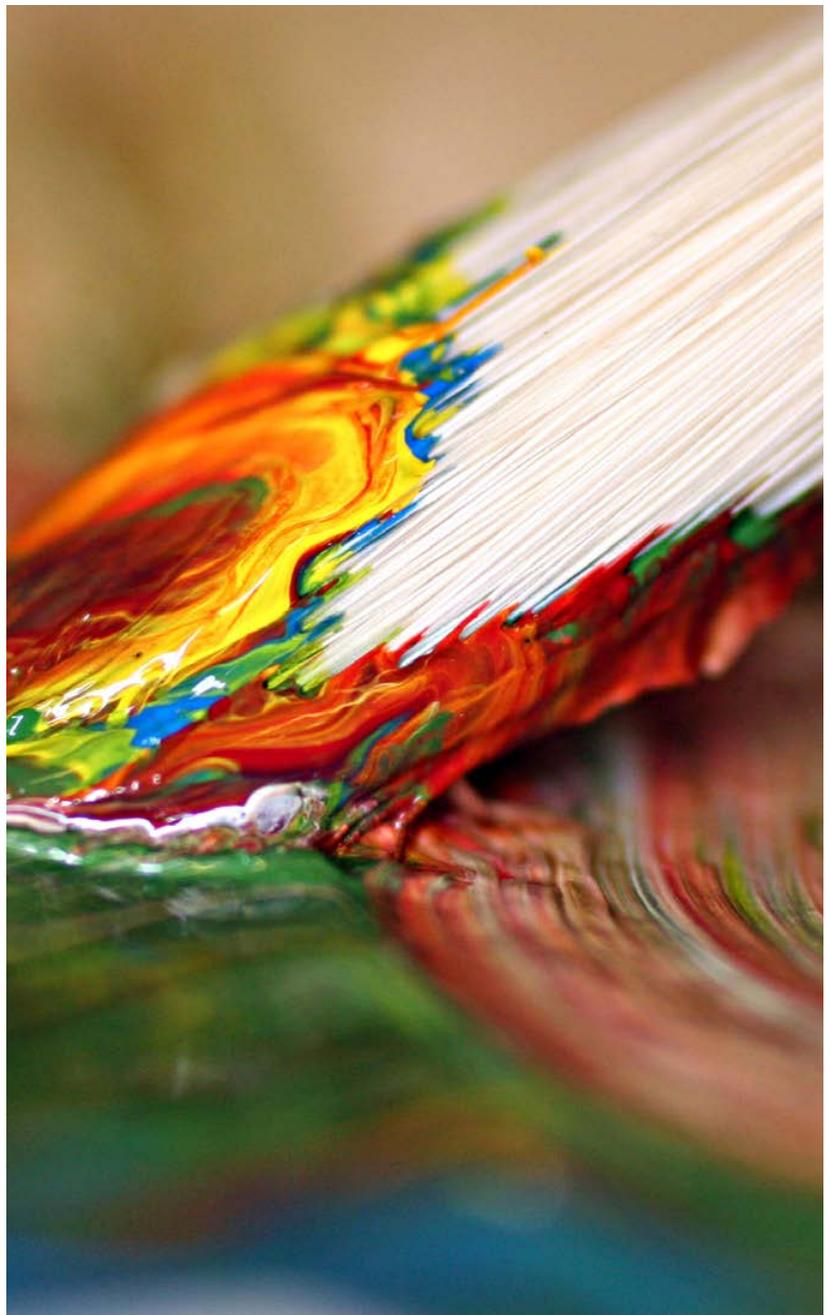
**New technologies are emerging to assist institutions, galleries and law enforcement officials to identify stolen and forged art works.**

Fakes and forgeries are prevalent in the art industry and traditional methods of establishing authenticity include consulting provenance documents and industry experts, as well as forensically examining pieces using a variety of technologies. For example, a forgery of a Portrait of a Woman by Francisco de Goya was unveiled as a fake when an x-ray revealed another (more recent) painting underneath. Other techniques include optical imaging, infrared and radiocarbon dating.

Technology is becoming more sophisticated. Eric Fischl has personally championed an authentication system that would permit artists to sign their works with traces of synthetic DNA. The DNA is specific to each work and includes an encrypted link between the object and a database storing the authenticating information, readable by anyone in the art industry through the use of scanners. The system has already received US\$2 million in funding.

German IT experts are also developing apps including “KIKU”, which uses artificial intelligence to identify from a photo whether an antiquity has been stolen. The app has already attracted funding of €500,000 from a government programme and there are hopes that the app will be able to help customs officials to check whether provenance documents are genuine.

Although these technologies lay the groundwork to combat forgeries, they are not yet a complete answer and are unlikely to replace traditional methods for establishing authenticity for some time.



# 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



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