

KEY ISSUES IN THIS EDITION

- Divorce and the Downturn
- The new Intestacy rules
- Challenging testator's Will
- Retention of Title clauses in contracts
- Access for repairs

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Divorce and the Downturn

Financial agreements on divorce can take a wide variety of forms and, in a time of economic downturn, how you choose to divide your assets demands particular thought. Financial agreements entered into now may turn out to be inappropriate if circumstances change, therefore thought needs to be given to this possibility when deciding what form the financial arrangements on divorce should take.

When children are involved, a common way of providing for them is by way of periodical payments. Varying the amount paid each week or month under a periodical payment order is relatively easy to achieve compared with varying capital settlements, which are difficult to adjust. The court can suspend, vary or discharge any provision for a periodical payment order. If you do wish to make an application to alter a periodical payment order, it is important to do so promptly. The court has the power to backdate any alterations it makes to the order but will normally only do so from the date the application was made. It does, however, have to take into account any changes in circumstance since the original order was made. It is possible to apply for a downward or upward variation of periodical payments.

Another common problem in a recession occurs when the ex-spouse

When best laid plans turn out to be not that good, the result can often be a mess. Such was the case when a woman was persuaded that the best way to avoid a considerable Inheritance Tax (IHT) liability on her late husband's estate was to execute a deed by which she would vary his will.

Wills can be varied in most circumstances if all the beneficiaries agree to

falls into arrears with their payments. If this happens and there is an outstanding variation application to alter an order, any application to enforce payment of arrears will be put on hold until the outcome of the variation application is known.

Failing to pay money due under an order will mean that you are in contempt of court, so if you are applying to vary an order whilst in arrears, the court can use its discretion to refuse to hear the application or impose conditions upon you.

In the current economic climate, the court is likely to be sympathetic with regard to problems involving the payment of a lump sum due. The court can adjust the timing of lump sum to be paid in instalments but are unlikely to adjust the actual amount due.

Although people's financial situations



can change rapidly, the courts will only allow an appeal of an order out of

time in respect of capital sums if specific conditions are met. The new event justifying the need to change an order may have occurred within a relatively short time of the order being made and a change to the order must not prejudice a third party. However, these conditions do not include a change in financial circumstances arising from the recession. This also works in reverse – i.e. a divorce settlement agreed in a time of economic downturn will not be altered if the economy booms. Once a capital sum is settled, economic fluctuations are not a basis for appeal.

Renegotiation of an agreement will be difficult even if you attempt to do this before an order is made. The current economic situation is likely to make the courts more sympathetic to the idea that husbands and wives should share the risk of holding assets that are subject to rapid changes in value (such as a business or shares). This may lead to a couple having shared interests long after they are divorced. It may also be more difficult to achieve a 'clean break', as neither party may be willing to give up an interest in the 'copper-bottomed' assets. If a couple does agree that one of them should have less risky assets whilst the other keeps the interest in the riskier ones, then the variation in risk is likely to be reflected in the respective proportion of the total assets retained by each.

Contact **the family team** for advice on any matrimonial issue.

Best Laid Plans...

the variation within a stipulated time period. To be effective, such arrangements cannot be made 'for consideration in money or money's worth'.

Regrettably, the reasoning behind the deed of variation was flawed, with the result that an IHT liability resulted.

Fortunately for the woman, the court

accepted that she had no knowledge of tax and little appreciation of the effect of the documents she was asked to sign. The variation to the will was therefore set aside.

Says **Chris Dewhurst**, "Estate planning can be a complex business and difficulties such as this are best avoided altogether by keeping your will under regular review and making any necessary amendments with the benefit of professional advice."

Making Retention of Title Work

Prior to the recession, Retention of Title (RoT) clauses probably received less attention than they should have from many businesses. However, RoT is now back in the spotlight.

An effective RoT clause will normally allow you to recover the goods you have supplied (assuming they are identifiable and have not been incorporated within other goods) if they are not paid for.

If you are worried about the ability of your customers to pay for the goods you supply, here is a short guide to making

RoT clauses operate effectively:

Make sure it is clear in your terms of trade that title in the goods you sell does not pass to the buyer until they are paid for and that your customer is aware that this is the case;

Make sure all goods are signed for and confirmed as being in good condition on arrival;

Make sure separate deliveries of goods are identifiable if possible – this will help if some goods are paid for and others of the same

type are not. Use of an 'all monies' clause (in which title to goods only passes when the account is fully paid) may be of assistance; and

Make sure that any issues regarding quality are dealt with promptly and are fully documented, so the fact that there are no outstanding issues relating to the goods supplied is well evidenced.

If any of your customers are starting to become 'difficult payers', take advice before the situation becomes critical.

What You Can't Access You Can't Repair



Sometimes, the courts are called upon to decide matters which are so obvious that the mind boggles as to how a case was brought in the first place.

A recent case involving a local council is just such a puzzle. The council was concerned that the dilapidated state of part of a building was impairing the visual amenity of the area. It therefore served a notice on the occupants requiring

them to take remedial steps to repair the elevations of the upper floors of the building. The notice was served by the council on the ground floor and basement tenants (the ground floor and basement not being in disrepair) as well as the tenants of the upper floors (which were dilapidated) and the freeholder.

The council accepted that the ground floor and basement tenants had no control over the condition of the upper floors but refused to withdraw the enforcement notices issued against them, so the matter ended up in court.

The court ruled that when serving such a notice, the land in respect of

which the owner and occupier might be served with a notice must be the same as the land in relation to which remedial works were needed and that the notice could only relate to the part of the property which was having an adverse impact on the amenity of the area. The ground floor and first floor tenants did not occupy the relevant part of the property and the notices served on them were therefore quashed.

Says **Richard Hodby** "In this case, the tenants could not have rectified the dilapidations even if they had wanted to, as the upper floors of the building were not within their control. Fortunately for them, the court saw sense."

Will Stands Despite Family Challenge

It is often the case that families consider they are entitled to inherit the estate of a relative, but in most cases people are free to distribute their assets as they see fit.

In a recent court case in Bristol, the niece and nephew of an elderly man claimed that his will – which left the bulk of his estate to two brothers, with whom he had been friends for years, and the rest of his estate to charity – was a forgery.

The man had suffered a stroke in 2001 and was visited regularly by the brothers

until he died of natural causes in 2007, aged 90. The court heard evidence that he had not seen his niece or nephew for many years, but the brothers were frequent visitors. The man's accountant testified that she had been told that he intended to give his estate to the brothers and both the witnesses to his will testified that he had asked them to witness his signature.

Faced with such solid evidence, the court concluded that the will was valid and rejected the claim of the

niece and nephew.

Says **Nick Bingham** "Had the man used a firm of solicitors to make the new will and arranged for a copy to be retained by them, the case would almost certainly never have come to court in the first place. In this case, the winding-up of the estate was delayed for a long time by the challenge to the will. We can help make sure that your estate is administered efficiently and without unnecessary delay."

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'What Happens if I Don't Make a Will?'

If someone dies without making a valid will, they are said to have died intestate. Should this situation arise, the estate and possessions of the deceased person will be divided according to rules set out in the Administration of Estates Act 1925.

It is important that you do not assume that because you are married or in a civil partnership your spouse or civil partner will automatically inherit all your property even if you have not made a will. As of 1 February 2009, the basic rule is that if you die intestate, your spouse or civil partner will receive your chattels and the first £250,000 of the estate if there are children and the first £450,000 if there are none.

Where the estate is worth more than the statutory legacy, the position becomes more complicated.

If you have children, your spouse or civil partner will receive £250,000 and a life interest in half of the remainder

of the estate. On his or her death, this passes to your children. Your children receive the other half of the remainder of the estate when they reach 18 or when they marry.

If you do not have children, your spouse or civil partner will receive £450,000 plus half the balance of the remainder of the estate. The remaining half of the balance goes to other family members in a strict order of legal precedence.

It is important to be aware that the intestacy rules do not recognise a deceased person's step-children, only their natural, adopted or illegitimate children.

Although the rules afford some protection to married couples and civil partners, it is recommended that you both have a will in order to ensure that your wishes are carried out. Remember, marriage or civil partnership automatically invalidates any existing will.

Entitlement under the intestacy rules only applies to couples who are married or in a civil partnership. Couples who are co-habiting have no protection. If you are co-habiting with your partner and wish for them to benefit financially upon your death, it is essential to make a will to this effect. Otherwise, your estate will pass to your relatives or, where there are none, to the Crown – unless your partner can make a claim for financial provision to be made on the ground that they were financially dependent on you.

Whatever your situation, the making of a will not only ensures that your wishes are complied with, but it can also help to minimise the tax burden when you die. In addition, it is normally possible to administer a testate estate more quickly than one that is intestate.

Contact [Chris Dewhurst](#) or [Lyn Tomlins](#) if you would like to discuss making or changing a will.

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Unexpected Behaviour Means Harm Not Foreseeable

The decision in a recent case will come as a relief to dog owners.

It involved a dog named Hector, a two-year-old Great Dane. Hector had been mistreated as a puppy, which occasionally led him to bark at the sight of strangers. Otherwise, he was a gentle dog.

In 2004, Hector had been let off his lead by his owner, who thought that no one else was in the vicinity. Unfortunately, a runner was passing and Hector unexpectedly jumped up at him. As Hector weighs more than 12 stone, this knocked the runner over and he broke his ankle as a result. He sued Hector's owner for being negligent in his handling of the dog and was awarded dam-

ages by the court. In the view of the court, Hector's owner had taken insufficient care to ensure there was no one else in the immediate area before letting him off the lead.

The owner appealed, arguing that he would have kept Hector on his lead had he known there was anyone else nearby and that since Hector had no prior history of jumping up at people, his handling of the dog was reasonable in the circumstances.

The decision in the Court of Appeal turned on the question of what the appropriate standard of care is in such circumstances. The key issue is that to find a person negligent, it is necessary for the

court to be satisfied that a reasonable person would consider that, as a result of his actions or omissions, there was a possibility of injury resulting which was sufficiently probable to be anticipated.

The Court of Appeal concluded that a reasonable person would not have anticipated that physical injury to another person would occur in the circumstances.

Whilst the decision will be welcomed by dog owners, it is nevertheless worth bearing in mind that had the circumstances been different, Hector's owner could have found himself having to meet a substantial claim.

Oops! I just didn't know my own strength



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Community
Legal Service



Welcome to Challenor Gardiner

Challenor Gardiner is based in the centre of Oxford. We can trace our roots back to 1851, since when we have provided a comprehensive legal service to University, business and private clients.

We strive to provide all our clients with a friendly, supportive, and professional service.

The law touches nearly every aspect of our lives. We will help you through the legal process as smoothly and efficiently as we can.

Need help with your Will?

We prepare wills—one less thing to worry about.

Property

Moving house is a very important time. Use our experienced staff to give you peace of mind.

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Let us help with your lease renewal or sale of your business.

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Owed money or have a contractual dispute? Let us help recover your debt or resolve your claim.

Relationship breakdown

We will help you to resolve the many problems which arise.

Family

Our specialist solicitors will guide and support you.

Probate

Helping you sort out a loved one's estate efficiently and sympathetically.

Housing

Assisting landlords and tenants through this complex area.

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