Gard & Co Private Client Department

Estate Planning

Estate planning refers to the advice individuals and couples can take in relation to how they hold and deal with their assets in their lifetime and after their deaths.

It covers.

1. Making Wills
2. Financial Planning and IHT mitigation
3. Trusts
4. Putting in place lasting Powers of Attorney

Wills

Wills v Intestacy

Wills offer certainty as regards decisions, control of assets and how they are distributed. Up to a point they can also assist in reducing inheritance tax.

Executors

Beneficiaries (Classes, age, trusts)

Guardians

Gifts etc

New legislation on making wills.

The legislation recognises that:

'An increasing number of people have sought to make wills during the Covid 19 pandemic, but for people shielding or self-isolating it is extremely challenging to follow the normal legalities of making a will - namely it being witnessed by two people'.

In response to this the law (the Wills Act 1837) has been amended to state that whilst this legislation is in force, the 'presence' of those making and witnessing wills includes a virtual presence, via video-link, as an alternative to physical presence.

The legislation will apply to wills made since 31 January 2020, the date of the first registered Covid-19 case in England and Wales, except:

The legislation will apply to wills made up to two years from when the legislation comes into force (so until 31 January 2022), however this can be shortened or extended if deemed necessary, in line with the approach adopted for other coronavirus legislative measures. The advice remains that where people can make wills in the conventional way they should continue to do so.

Marriage and Wills, it is important to remember that marriage revokes a will so if marriage is likely then a special clause can be added so that the Will is not void.

Intestacy

If you have no Will or even of your will cannot be found, then you are intestate. It is possible to even have a partial intestacy where your will fails to deal with all of your assets correctly. Intestacy means how your estate is administrated and who gets what is defined by statute law which can inevitably lead to hardship for some. Children also will inherit at 18 which may not be ideal.

The statutory legacy is the sum to which a surviving spouse/civil partner is entitled from the estate when the deceased died intestate (without having made a valid will) with children. Schedule 1 to the Act mandates a period under which a new fixed net sum for statutory legacy should be set. The last statutory legacy rate was set on 11 October 2014 at £250,000.

The new sum of £270,000 took effect from 6 February 2020.

The Inheritance and Trustees' Powers Act 2014 (The Act) implemented most of the reforms recommended in a Law Commission Report 'Intestacy and family provision claims on death' published in 2011. The Act sought to modernise and simplify the law to create a fairer and more comprehensible set of rules governing the distribution of estates of deceased persons and to amend the law relating to the powers of trustees.

The spouse or civil partner receives all chattels absolutely.

The spouse or civil partner receives a statutory legacy free of inheritance tax (IHT) and costs plus gross interest from death until payment. If the residuary estate is worth less than £250,000, the spouse or civil partner receives everything, and the issue receive nothing. The value of the statutory legacy increases from £250,000 to £270,000 for deaths on or after 6 February 2020.

The rest of the residuary estate is split equally into two halves. The spouse or civil partner takes one half absolutely and the issue take the other half on the statutory trusts.

A cohabitant who was not the spouse or civil partner of an intestate has no entitlement under the intestacy rules. They may, however, be able to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 (Inheritance Act 1975)

Likewise, stepchildren receive nothing.

Financial Planning and IHT mitigation

Avoidance and not evasion!

How much you pay depends on the value of the deceased's estate – which is valued based on their assets (cash in the bank, investments, property or business, vehicles, playouts from life insurance policies), minus any debts.

Importantly, there is normally no tax to pay if:

Either the value of your estate is below £325,000;

Or you leave everything over £325,000 to your spouse, civil partner, a charity, or a community amateur sports club.

If neither of the above applies, your estate will be taxed at 40% on anything above the £325,000 threshold when you die (or 36% if you leave at least 10% of the net value to a charity in your will).

In the tax year 2020/21, no inheritance tax is due on the first £325,000 of an estate, with 40% normally being charged on any amount above that. However, what is charged will be less if you leave behind your home to your direct descendants, e.g., children or grandchildren. This is because you will then have two tax-free allowances:

£325,000 - this is the basic IHT allowance, which still applies.

£175,000 - since 2015 you have also been able to take advantage of something called the 'residence nil rate band', commonly known as the 'main residence' band. This is an additional allowance you will receive ON TOP of the existing £325,000 inheritance tax allowance if you pass on a main residence to your children or grandchildren.

This means inheritance tax might not be due on the first £500,000 of your estate (£325,000 + £175,000), depending on who you leave your home to. However:

The £175,000 main residence allowance only applies if your estate is worth less than £2 million.

On estates worth £2 million or more, the main residence allowance will decrease by £1 for every £2 above £2 million that the deceased's estate is worth.

When you die, assets left to your spouse or registered civil partner, provided they are living in the UK, are exempt from inheritance tax.

On top of this, your partner's inheritance tax allowance rises by the percentage of your allowance that you did not use, meaning together a couple can currently leave £1m tax-free (2 x £325,000 tax-free allowance + 2 x £175,000 main residence allowance).

Applying for the use of the two potential transferable nil rate bands is done by your executors, Wills do not need to be amended if you want to capture both, but Wills do need to be considered in case they create a problem in claiming.

The Residence Nil Rate Band will be transferable between spouses and civil partners on death, much like the standard nil rate band. It is the unused percentage of the RNRB from the estate of the first to die which can be claimed on the second death.

This is irrespective of when the first death occurred or whether they owned residential property at their death. There will always be an additional 100% RNRB unless the first spouse's estate was greater than £2M.

The RNRB is only available where the main residence passes to children (including adopted, foster or stepchildren) or linear descendants on death.

The residence nil rate band may be lost if the family home passes into trust, for example, the property is placed into a discretionary will trust for the benefit of the children or grandchildren.

However, some trusts for the benefit for children and grandchildren will not result in a loss of the allowance. If the trust gives a child or grandchild an absolute interest or interest in possession in the home the RNRB can still be claimed. Other trusts such as Bereaved Minor

Trusts, 18 - 25 Trusts and Disabled Persons' Trusts will also retain the additional nil rate band.

The family home does not need to be owned at death to qualify. This is of help to those who may have downsized or sold their property to move into residential care or a relative's home.

The RNRB will still be available provided that:

The property disposed of was owned by the individual and it would have qualified for the RNRB had the individual retained it.

The replacement property and/or assets form part of the estate and pass to descendants.

Downsizing or the disposal of the property must take place after 8 July 2015. But there is no time limit on the period between the disposal and when death occurs.

Only one residential property will qualify. It will be down to the personal representatives to nominate which residential property should qualify if there is more than one in the estate.

A property which was never a residence of the deceased, such as buy-to-lets, cannot be nominated.

We do not offer any financial advice but feel it is important to have some understanding of what can be done regarding IHT mitigation. Financial advisers will be able to assess all your assets and income and advise in the round about mitigation and put in place a plan of action.

Advice on relevant investments can be beneficial and in particular the use of business property relief investments which offer a potential reduction in IHT within 2 years.

Trusts

Lifetime and Will Trusts

The government and HMRC are it appears always at odds with the use of trusts for tax avoidance purposes. The legislation is ever more complex and changes frequently. Having said that the use of trusts still has an important place in both lifetime and post death planning.

It remains sound advice that any parents that has a disabled child should still consider the sue of a vulnerable person trust or even a discretionary trust in their Wills. This would prevent assets passing to the child who may need benefits etc. This type of trust would not affect their ability to apply for benefits. Children with fincial or matrimonial problems can also benefit by not receiving their shares absolutely putting this share of the estate ‘up for grabs’ buy creditors and spouses/partners etc.

Creating life-time trust as a vehicle to hold pension pots and death in service benefits can also be useful to possibly prevent large sums of money passing to the survivor and creating IHT problems.

Gifting

Money given away before you die is still usually counted as part of your estate unless you live for a further seven years or more after making the gift. These are referred to as being potentially exempt transfers or PETs.

People you give gifts to will be charged inheritance tax (on a sliding scale up to a maximum of 40%) if you give away more than £325,000 in the seven years before your death – therefore early planning of how to pass on your assets is important.

You can give £3,000 away each tax year inheritance tax-free. The first £3,000 given away each tax year is completely ignored as part of your estate and therefore not subject to inheritance tax if you die. If you do not give it away one year, you can carry it forward for one tax year (no more) and use it then.

Gifts to charities and political parties are inheritance tax-free. Leaving money to that cats' home is at least efficient tax planning!

You can give £250 each year to everyone you know. Gifts of up to £250 per person each tax year are excluded from inheritance tax and are not counted toward the £3,000 annual gift exemption. For example, someone with 12 grandchildren could give each of them £250 annually as a birthday present and it would not be counted as part of the estate. However, you could not combine gifts on the same person e.g., if you have already gifted someone your £3,000 annual gift exemption, you could not then also gift them this annual £250 gift.

You can give away money from income without having to pay tax (as long as it does not affect your lifestyle). Inheritance tax is a tax on your assets. However, if you have an income (pension or earnings for example) and you give money regularly from that which leaves you enough income not to affect your lifestyle, then it is exempt.

If not IHT what else to worry about!

Care home fee planning

For those estate below the IHT threshold there is the obvious benefit of not paying any IHT, however, an issue for many of our clients is the risk care fees make to their estate and beneficiaries. With costs typically between £30-40,000 annually for care a lot of estates will suffer significantly leaving little to be passed to children etc.

The drawer back of straight forward wills that leave everything to each other is that one of you then will own the entire estate which puts it all up for grabs if care costs are needed.

Using Trusts

Instead of leaving everything to each other you could separate assets so that you own your own share of the estate. (joint owners to tenants in common) this way assets then pass through your Wills and not through survivorship. Its possible ton leave for example your half share of the house for your spouse/partners to live in and seu during their lifetime and then to your chosen beneficiaries on their deaths. As they do not then own all of the house what is in trust is protected from being used for care. Typically, it is the house that is left this way, but it can also include cash assets, but you must bear in mind that the survivors only have a use over these assets not the capital value, so what in trust cannot be spent other than any income generated.

Its possible to utilise debt loan scheme type wills that can allow capital to be given to the survivor for their absolute use subject to an IOU to pay back to the trust on their deaths.

This type of planning will not fall foul of the deprivation of assets rules of the local authority.

If someone intentionally reduces their assets - such as money, property, or income - so these will not be included in the financial assessment for care home fees, this is known as ‘deprivation of assets’. If your local council concludes you have deliberately reduced your assets to avoid paying care home fees, they may still calculate your fees as if you still owned the assets.

Powers of Attorney

Lasting power of attorney (LPA)

There are two types of LPA: one for health and care and one for financial decisions. The LPA for health and care can only be used if you lose mental capacity. The one for financial decisions can be used straight after it has been registered.

Enduring power of attorney

This is what lasting power of attorney used to be called up until 2007, except it was only for property and finances.

Ordinary power of attorney

For decisions about your finances only – but is only valid while you still have mental capacity.

Why have them in place?

Again, as with making a Will it is about decision making. Even if you are married to someone who loses capacity it does not mean you can take control of their financial affairs within an LPA. This is even more important if a house owned as tenants in common needed to be sold. They can even be important for those who work for themselves or in partnership where a loss of capacity even temporarily could affect the running of a business.

If you lose mental capacity, unless you have already filled in the Power of Attorney forms, your loved ones will need to apply through court to become 'deputy', a long and expensive process.

Instead, you can nominate a trusted friend or relative before you lose capacity, by setting up a Lasting Power of Attorney (LPA). You can appoint one or more representatives to act for you and can determine how they work together to make decisions on your behalf.

Robert Butler is a solicitor and partner at Gard & Co Solicitor. He is head of the private client department and specialises in Wills Trust and Probate disputes and is a member of the Association of Contentious Trusts and Probate Specialists. His team deals with all aspects of estate planning and estate administration, will writing, powers of attorney, court of protection and trusts.

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