KingsleySmith
SOLICITORS LLP

Newsletter
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Your quarterly bulletin on legal news & views from Kingsley Smith Solicitors LLP

FAMILY OVERTURNS WILL THAT BENEFITS CARER

Elderly people can become suggestible and it is, regrettably, not uncommon for avaricious people to attempt to influence them for personal gain.

In a recent case in point, an elderly and wheelchair-bound lady altered her will a few months before she died so as to bequeath her £400,000 estate to the son of her carer. Her previous will had left her entire estate to her family.

The family contested the new will, claiming that the woman had fallen under the influence of her carer and was too mentally infirm to resist her.

In addition, more than £400,000 had been withdrawn from the woman's bank account in the three years prior to her death. The evidence of undue influence was sufficient for the judge to rule that the woman's earlier will, made in 2002, should stand. In addition, it is understood that following a police investigation into the depletion of the woman's assets in the final few years of her life, papers have been passed to the Crown Prosecution Service.

This sort of circumstance is a nightmare for the family involved.

If you are concerned about the possibility of people abusing the trust of your elderly relations, please contact us for assistance. It is always better to avoid problems than to deal with the aftermath.

CAREFUL DRIVER NOT RESPONSIBLE FOR DEATH

An unavoidable collision is the secret nightmare of many drivers, especially one in which death or serious injury results.

A recent case will reassure drivers who are careful and obey speed limits that the risk of repercussions as a result of an accident which they can do nothing to prevent may be less than they suppose.

The accident involved a man who had drunk between five and seven pints of beer. He was sitting at a bus stop talking with a friend when suddenly, he got up from the bench and walked into the road. He was hit by a motorist who was driving within the speed limit and with reasonable care. The man is now in a persistent vegetative state.

The injured man's family sued the driver. In court, the judge considered the circumstances at length. He said that it would be 'wholly unreasonable' to conclude that immediately prior to the accident the driver had suddenly stopped being careful. He had no time to react and the only way he could have avoided the accident would have been for him to have anticipated the man's sudden step into the road. The claim was dismissed.

For drivers, this case will provide assurance that if they are careful and law-abiding, they can expect to be protected by the courts from being held responsible for injuries sustained in accidents which they could, in practice, have done little or nothing to avoid.

get ready for compulsory pensions

The Pensions Act 2008 contains provisions which will make it compulsory for an employer to enrol qualifying workers aged between 22 and the state pension age, who earn more than a de minimus amount (currently set at £5,035 per annum) into a pension scheme and to make contributions to the scheme.

The employer will be required to contribute a minimum of 3% of salary and the employee will be required to contribute a minimum of 4% of salary, up to a maximum of (currently) £3,600 per annum.

There will be substantial fines for failure to comply. Clearly, there are likely to be many changes to the provisions between now and the planned implementation dates, but this is a good time to start thinking through the potential impact of the new regime on your business.

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SICKNESS AND HOLIDAY LEAVE

The EU Working Time Directive lays down minimum health and safety requirements for the organisation of working time. The purpose of the entitlement to paid annual leave is to enable a worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave, however, is to enable a worker to recover from illness.

In Pereda v Madrid Movilidad SA, the European Court of Justice has ruled that a Spanish worker who suffered an accident at work, with the result that he was on sick leave for most of the annual leave period allocated to him, had the right, on request, to reschedule his holiday, even if this meant carrying it forward to the following leave year.

This follows the earlier case of Stringer and others v HM Revenue and Customs, which established that the right to take annual leave is not extinguished if an employee is on long-term sick leave. It is up to the national courts to decide whether paid leave can be taken during a period of sickness or whether it should be carried over to another year.
Both decisions have raised questions regarding the operation of the Working Time Regulations 1998 (WTR), which implement the EU Directive into UK law. Under the WTR, if a worker becomes ill just before taking annual leave or during the holiday itself, he or she does not have any automatic right to convert that holiday to sick leave. Also, workers must take a minimum of four weeks' holiday in each leave year.

It will therefore require further case law or a change in the legislation to clarify the situation. The Department for Business, Innovation and Skills has said that it is examining the terms of the judgment and will issue further guidance in due course.

This is a grey area and, until the situation becomes clearer, we recommend that employers seek advice on their individual circumstances.

WHO DECIDES THE LOCATION OF A FUNERAL?

The general rule regarding a person's funeral is that the executor of the estate has the right to make any necessary arrangements. Where there is no will, the person granted the letters of administration of the estate has the right. That seems straightforward and it usually is, but not always.

A recent case dealt with the funeral arrangements of a man who died intestate. His divorced parents were jointly entitled to administer his estate. The father wished his son to be buried in the town in which he had lived for several years and in which his brother, most of his friends and also his fiancée lived. The man's mother wanted him to be buried near where she lived.
It took a court hearing to determine that he should be buried in his home town.

In this case, the failure to make a will didn't cause problems over the division of the man's estate, but over the administration of it.

Had he made a will, whoever was appointed executor under it could have decided on, and made the appropriate funeral arrangements, no doubt saving much distress as well as time and money.

There are reasons other than the disposal of property for making a will.

LETTING AGENT'S COMMISSION TERMS UNFAIR

Unclear language in a letting agent's standard terms and conditions has led to a contract being set aside by the High Court.

The case concerned the estate agent Foxtons, which provides a lettings service to private landlords under a standard form of agreement. The Office of Fair Trading (OFT) had applied to the Court for orders against Foxtons for what the OFT deemed to be unfair terms in agreements between the estate agents and various landlords. The terms in question related to renewal commissions.

Foxtons hoped to rely on regulations passed in 1999 relating to unfair terms in consumer contracts. These stipulate that where a term is in 'plain intelligible language', the assessment of fairness of a term shall not relate to the price or remuneration as against the goods or services supplied in exchange.

The Court held, however, that the relevant terms for renewal commission within the old version of Foxtons' contract had not been drafted in plain and intelligible language and so the obligation to pay renewal commission under the relevant terms of the agreement did not escape a fairness test under the regulations.

As far as the actual fairness of the terms was concerned, the Court considered it unlikely that the typical private landlord would expect a repeat bill in year two of a letting and beyond unless the point was spelled out in some way. It was felt that Foxtons had not used a fair and adequate method of bringing the renewal commission clause to the attention of the landlords.

Under the circumstances, the renewal commission clauses of Foxtons' old standard terms and conditions were held to be unfair.

This case illustrates the importance of drafting agreements in clear and precise terms. We can advise you on any property or contract matter.

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DEFAULT RETIREMENT AGE TO REMAIN – FOR NOW

The High Court has handed down its judgment on the challenge to the default retirement age of 65, introduced in 2006 by the Employment Equality (Age) Regulations, which was brought by the charities Age Concern and Help the Aged in conjunction with the Equality and Human Rights Commission.

The challenge was made on the basis that the imposition of the mandatory retirement age meant that the Regulations did not fully implement into UK law EU Council Directive 2000/78, which outlaws age discrimination in employment and vocational training.

The matter was referred to the European Court of Justice, which ruled that a national retirement age may be lawful but must be justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. It is for the national courts to decide whether a mandatory retirement age can be justified as a proportionate means of achieving a legitimate aim.

The High Court has now ruled against the charities, rejecting their challenge on the basis that the Government was able to justify the imposition of the mandatory retirement age at the time it was first introduced in 2006.

However, the decision might have been different had the legislation been introduced now, as the state of the job market has changed considerably. In reaching its decision, the Court took into account the Government's recent announcement that it has decided to bring forward, from 2011 to 2010, its promised review of the default retirement age. Mr Justice Blake said that he could not presently see how 65 could remain as the default retirement age after the review.

More than 260 cases relating to dismissal on the grounds of retirement at age 65 had been stayed pending the High Court's ruling. If the ruling stands, these claims are likely to be dismissed.

There are many workers who wish to continue working after the age of 65 but, for the time being, it is not age discrimination for employers to have in place a compulsory retirement age of 65 or older. However, there are statutory procedures that must be followed, which include giving employees at least six months' notice of their intended date of retirement and notifying them that they have the right to request to continue working beyond either the default retirement age or the normal retirement age set by the employer.

Please contact us for advice on any discrimination law matter.

PROPERTY 'TRY ON' MAY BE A CRIME

An appearance in the criminal court may await a property owner who tried to be too clever with his local planning department.

The owner submitted a planning application to build a barn to store hay. This was granted on the condition that use was limited to the storage of hay or some other agricultural purpose. The building looked, externally, like a hay barn. However, internally it was fitted out as a house. The owner used it as a home from August 2002 onwards. In 2006, he applied for a certificate of lawful use on the ground that the property had been used for four years as a dwelling.

Such applications can be made when the owner can show that the property has been occupied in breach of planning control for the required period of time. The appropriate time limit is four years where there is a breach of operational development or change of use of a building to use as a single dwelling. The council refused to grant the certificate of lawful use. The property owner appealed the decision and the building inspector upheld the appeal. The council then appealed that decision.

In court, it was accepted that the property owner had intended to deceive the council from the outset. The court suggested that the owner might have committed a criminal offence by obtaining planning permission by deception. If the offence of deception were proved, then the profit from the crime could be subject to confiscation under the Proceeds of Crime Act 2002.

The court ruled that the certificate should not be granted. Firstly, the construction of the building was not unlawful. It had planning permission and was capable of being used for the allowed purpose. There was therefore no breach of operational development. Secondly, there was no change of use to a dwelling. It has always been used as a dwelling. Accordingly a certificate of lawful use could only be correctly applied for after ten years and the council has until August 2012 to issue an enforcement notice.

In the circumstances, the council is unlikely to miss the opportunity to make an example of the property owner.

In this case, the owner was well and truly 'hoist with his own petard'. Any resolution of the situation is likely to prove expensive. It is always better to get it right first time and be safe rather than sorry so please contact us for planning advice.

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IHT AND THE RECESSION

The recession hasn't brought much favourable comment, but falling asset values do present opportunities for savings on Inheritance Tax (IHT). Here are some ways that you can save IHT when asset prices are depressed.

lifetime gifts

In general, the value for IHT purposes of an asset transferred is its value at the date of transfer. Giving away assets as lifetime gifts when prices are low means that a subsequent increase in value will belong to the new owner.

Consideration should be given to transferring assets when values are low and the 'best' assets to transfer are those which are most likely to show gains.

falling property prices

The IHT on the value of a property can be paid in instalments over 10 years. If, however, a property is sold within four years of death at a price below the

valuation fixed for probate, then the executor can elect for the IHT liability to be recalculated based on the reduced value. Only the executor can make this election, so if the property is passed to a beneficiary and then sold, the election is not available.

When a property is sold, the IHT due becomes payable immediately. Arranging the sale of a property just to save IHT requires careful thought as the costs associated with such a transaction are not inconsiderable. Where a house is transferred to a beneficiary, the base cost of the asset will be the IHT value. Therefore, when the value of such an asset falls, a subsequent sale by the beneficiary may lead to a loss for Capital Gains Tax purposes.

other issues

The other main issue to consider as one gets older is the possible need to fund the cost of long-term care. This is a much greater threat to the wealth of most families than IHT, since the system is, in practical terms, confiscatory.

Planning to protect family wealth and to fund future care needs must be approached with careful thought and knowledge of the relevant law.

Please contact us for advice on this sensitive matter.

TENANT CANNOT FORCE COUNCIL TO DO REPAIRS

The Court of Appeal has recently ruled that a tenant who wishes to purchase his or her property under the 'right to buy' legislation cannot require the landlord to carry out remedial works to the property as a precondition of complying with a notice to complete.

Emma Ryan had sought to force Islington Borough Council to make repairs to her flat, arguing that her request for the repairs to be made was a 'relevant outstanding matter', which had to be dealt with before she could complete the purchase of the flat.

The Court ruled that it was not a natural use of language to include repairs in relevant outstanding matters, which are those which have yet to be determined or agreed.

GUARANTEE CLAUSE NOT LINKED TO ASSIGNEE

With times being tough, unexpected traps in agreements are coming to light with greater regularity. A recent landlord and tenant case shows the sort of thing that can happen if insufficient attention is paid in negotiation to clauses that might seem unimportant at the time.

It is usual for a commercial lease to contain a clause which will bind the tenant to guarantee the payment of the rent and performance of covenants under the lease should it be assigned. In a recent case, a lease was assigned and the new tenant later became insolvent and went into liquidation.

The relevant lease agreement bound the original tenant to guarantee performance during the period the assignee was 'bound by the tenant covenants of the lease'.
The liquidators disclaimed the lease, making no payments, and the landlord sued the tenant under the guarantee.

The tenant claimed that it was not liable for the assignee's rent etc. after the liquidator had disclaimed the lease, the argument being that the assignee was no longer bound by the covenants in the lease and the original tenant could not therefore be bound by them after the lease was disclaimed.

The Court of Appeal did not accept this argument. The original tenant was liable under the guarantee. The liability of the original tenant as guarantor was separate from that of the assignee.

Your potential responsibilities under a guarantee if you assign a lease may not be uppermost in your mind when you are negotiating to take on new rented premises. However, attention to detail pays dividends and, in the present environment, landlords may agree to limit or remove guarantee clauses if pressed.

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