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CONTESTING A WILL

Many people believe that a Will is absolute...

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Is Stamp Duty Land Tax a Seller's Tax?

Stamp Duty Land Tax (SDLT) is one of those taxes that successive governments have tinkered with over the past 20 years. Prior to Tony Blair's 1997 "New Labour" government, SDLT was a very simple affair. The buyer of a property paid a flat rate of 1% on any property purchased for more than £60,000. Properties purchased for less than that were not charged.

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The Treasury likes SDLT as it is relatively easy to collect. The solicitor acting for a buyer has to pay the SDLT to HM Revenue and Customs before being able to register a buyer's interest in a property at the Land Registry, and so without payment a buyer doesn't get title to the property.

The rise of SDLT

With rising house prices, the government realised this was an easy way to raise taxes and started introducing different SDLT bands depending upon the value of the property. Initially, the maximum rate was 2% for properties worth over £500,000, but the government gradually increased rates. By 2012, houses over £250,000 were charged 3% and the maximum rate for houses over £2,000,000, was 7%.

In 2014, The Chancellor at the time, George Osborne, changed the way SDLT was calculated. It became only payable on the portion of value of the bracket it falls in - so the first £125,000 was at 0% and then the next £125,000 (up to £250,000) at 2% and so on, rising to 12% for the portion of a property price over £1,500,000.

The rising SDLT burden has had an impact on the residential property market, particularly on properties at the upper end of the market. Estate Agents report that the level of SDLT at these higher prices has also contributed to the slowdown in the sale of properties sold at the £1 million + level.

In 2018 SDLT generated total tax receipts of £8.2 billion, but this was a decrease of 8.5% on the year before, and the signs are that receipts in the current tax year have fallen further.

Should SDLT be a seller's tax?

With a stagnating property market and the prospect of falling tax receipts the government has floated the radical idea of changing SDLT so it is paid by the seller rather than the buyer. The thinking behind it is that the current SDLT system imposes an additional cost on buyers that acts as a barrier to entering the property market or rising up the property ladder.

Switching the tax burden to the seller would mean people moving up the property ladder would only pay SDLT on the value of the property they are selling and not the property they are buying.

Property owners who are downsizing will pay more SDLT than they would under the current system, paying even if they didn't buy a new property. The thinking is that because they are downsizing they will be releasing equity from their house and will be able to afford the additional SDLT.

Issues with moving the tax to the seller

Commentators are divided whether such a proposal would have the desired effect of kick-starting the housing market and increasing tax revenues. Detractors say sellers will simply increase the price of a property to factor in the additional costs they will face, or will be less inclined to move at all, thus increasing the stagnation.

One issue which has perhaps not been considered in detail, is that by moving the burden to sellers will mean HM Revenue and Customs will no longer have the certainty of the tax being collected by buyer's solicitors and effectively policed by the Land Registry.

It remains to be seen whether these proposals find their way into force.

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Heather Adams
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Head of Residential Property

CONTESTING A WILL

Many people believe that a Will is absolute and in the majority of cases this is true but, of course, there are exceptions and we are seeing a rise in the number of Wills contested.

English law recognises the principle of 'testamentary freedom' which states that we all have the freedom to leave our assets, by our Wills, to whoever we wish.

This isn't a straightforward area of law, so if you are considering contesting a Will, our specialist team of solicitors will be happy to discuss the matter with you.

In this article we explore the signs to look out for when considering whether a Will is valid and if so, whether it can still be contested.

Is the Will Valid?

There are a number of grounds for contesting the validity of a Will and we touch upon the five most common below.

1 Has the Will been properly executed?

The first ground to consider when reviewing the validity of a Will is whether it was executed (that is, signed and witnessed) correctly.

The requirements of executing a valid Will are set out in section 9 of the Wills Act 1837.

- A Will must be made in writing and signed by the person making it (or, in certain circumstances, by someone on their behalf).
- The person making the Will (the testator) must intend for the Will to be valid when they sign it.
- The testator's signature must be acknowledged in the presence of at least two witnesses who must also sign the Will.

If any of these requirements are not met, then the Will was not properly executed and is not valid.

2 Does the testator have capacity to make a Will?

The test to establish whether or not someone has the capacity required to make a Will was set down in a case decided in 1870 (Banks v Goodfellow).

Broadly speaking, a testator is required to be able to:

- Understand the nature and effect of making a Will.
- Understand the extent of the property they are disposing of.
- Consider the claims of the people they might be expected to name in their Will.

The testator should also have no mental disorder that could cause them to make a Will they would not otherwise have made.

If a testator does not satisfy all of these requirements at the time that they gave instructions for the Will, it is likely to be invalid.

3 Did the testator know and approve the contents of their Will?

In very general terms, this relates to whether the testator knew, understood and approved of the contents of the Will at the time they signed it.

4 Was the testator coerced into making the Will?

If a testator was coerced into making the Will in particular terms that they did not want, then the gift obtained by undue influence is liable to be set aside. Successful claims for undue influence are more common in the case of someone who is vulnerable as a result of impaired mental capacity or otherwise failing health.

This is a difficult claim to bring. Persuasion itself is not unlawful, so it needs to be shown that someone has overpowered the testator and caused them to make the Will they made.

5 Is the Will a Forgery?

A less common claim, but one to bear in mind, is whether the testator and witnesses actually signed the Will. If they did not, the Will is not valid.

If the Will is not valid, then the testator's estate will either pass in accordance with a previous Will or under the intestacy rules.

Contesting a valid Will

It is increasingly common for disappointed beneficiaries to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975.

This Act allows certain people (including children of the deceased and cohabitees) to claim reasonable financial provision from the estate.

The Court considers the facts of each case in accordance with set criteria and forms a judgment based on what would constitute reasonable financial provision for the applicant in question.

The court looks very carefully at the specific facts of each case relating to Wills, which makes tailored legal advice particularly important. We have a large team specialising in disputes relating to Wills and estates and, if you have any questions, we would be happy to discuss your circumstances with you.

Speak with one of our Contentious Trust & Probate team.

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Partner, Employment

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Asset Protection Trusts

With life expectancy rates at an all-time high, more and more people are likely to need some assistance in their later years. This leads on-to concerns that their estate will be used to pay for care and that there will be little, or nothing left to pass onto future generations.

The biggest asset is usually the family home and Asset Protection Trusts (APTs) have therefore become very popular as they can assist in protecting the value of a person's home from means testing if the need for care should arise.

Why use Asset Protection Trusts?

If an individual does not qualify for NHS continuing care funding and their estate exceeds £23,250, they will have to meet the costs of their own care which can often run into thousands of pounds per month. In this situation, the family home will be considered as capital unless it is occupied by certain categories of people including a partner, spouse, or an elderly/incapacitated relative.

By using an APT, the person setting up the trust can retain some control over how the property is dealt with rather than making an outright gift. An APT is just a way of describing what a trust can do and these trusts can be set up during a person's lifetime or on death in their Will which is usually much less controversial.

Types of trusts

The most commonly used trusts are:

"Discretionary Trust"

A Discretionary Trust is one where there is a pool of potential beneficiaries and the trustees decide who gets what, when and how much (if anything).

"Interest in Possession Trust"

An Interest in Possession Trust is where the right to capital is separate to the right to income.

The beneficiary, usually a spouse (during their lifetime) will have the right to live in the property rent free or the right to receive rent itself if they are unable to live there, or interest/dividends if the property is sold and the funds invested. On that person's death, the capital will pass to their children.

Setting up a trust

Setting up trusts during a person's lifetime will mean a chargeable transfer for the purposes of Inheritance Tax. If the value of the transfer exceeds the nil rate band (currently £325,000), there will be an immediate charge of 20% on the excess.

Careful consideration should also be given to transferring assets into trusts which the transferor remains entitled to benefit from. Unless the transferor is paying full market rent for the privilege, it could be treated as a gift with reservation of benefit for the purposes of Inheritance Tax and remain in the individual's estate.

In conclusion, there is no water tight way of avoiding assets being taken into account for the purposes of means tested benefits as each case will depend on the circumstances, including the individual's health, finances, other resources and even the law at the time care is needed. Advice should be taken on the best option for that individual concerned.

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Bik-ki Wong
Partner
Head of Wills and Probate

DO TRUSTS REALLY PROTECT FAMILY WEALTH IN THE EVENT OF A DIVORCE?

Trusts can be used as an effective strategy for protecting wealth in the event of a divorce.

However, the English Family Court on divorce has a broad discretion under section 25 of the Matrimonial Causes Act 1973 to consider **"all other financial resources which each of the parties to the marriage has, or, is likely to have in the near future".** This includes considering the extent to which a spouse has been assisted by resources available within a trust.

Whether a spouse's interest in a trust is a relevant factor to be considered by the court, depends on whether the spouse is entitled as of right to receive capital and or income from the trust, or whether the spouse is only entitled to receive benefits at the discretion of the trustees.

Whilst the beneficiary of a discretionary trust has no absolute right to any trust property, depending on the terms of the trust, the trustees may provide funds to the beneficiary as they see fit, including providing nothing at all. The court may want to examine how the trustees have exercised their discretion in the past, and may want to understand the relationship between the spouse and the settlor/trustees.

Often, the trustees or beneficiaries of a discretionary trust may assert during divorce proceedings that they will not exercise their discretion by advancing funds to the beneficiary. It is therefore important to analyse the trust deeds, deeds of variation and 'Letters of Wishes' to analyse whether any distributions have been made in the past and whether it is likely that those distributions will continue in the foreseeable future.

To what extent will the court consider beneficial interests under the trust?

The extent to which the court will take beneficial interests into consideration depends upon the value of the trust, whether capital, loans or income have been paid from the trust in the past which have assisted the couple during their marriage. In some cases, capital may have been advanced to a party to purchase a property which eventually becomes the family home, or income has been paid which augments earned income and standard of living of the parties. In those cases, it is likely that the court may consider the trust as an available resource to be taken into consideration when determining how assets should be divided upon divorce.

If the trust has never advanced or loaned capital or income to the beneficiary, the court may conclude that the trust assets are not an available resource.

The court may look at the reality of the situation: the divorce might generate hard financial need, a change of circumstances, which might prompt the trustees to consider advancing funds to the beneficiary in the near future.

Each particular case is determined on its own facts.

What do courts consider when it comes to the "needs" of the spouse?

Whilst a trust is a "non-matrimonial asset" and can be distinguished from other assets built up by the couple during the course of a marriage, the court may still regard a beneficiary's entitlement or ability to obtain cash or income from a trust as a relevant factor to take into consideration to meet the "needs" of the other spouse.

"Needs" is an elastic concept. What a more affluent spouse "needs" is quite different to the "needs" of a spouse exiting a marriage where the assets are relatively modest. There is no presumption that a spouse is entitled to half the capital or income advanced to the other spouse who is a beneficiary of a trust, as these benefits are not derived from "matrimonial assets" (which are assets built up by the parties together from their own hard work and endeavour during their marriage.)

What if the court determines trust assets are an available resource?

If the court concludes that trust assets are an available resource, the court can deal with this as follows: -

- It can make an order which the beneficiary could not afford to pay without seeking recourse to the trust. In this instance the trustees are encouraged to exercise their discretion reasonably to assist the beneficiary where the interests of the trust or the other beneficiaries would not be damaged unduly. However, this option has inherent problems when it comes to enforcing an order after failure to make payment.
- It is therefore more likely that the court might give a spouse more of the matrimonial assets to compensate him/her for the loss of benefit derived from being married to the beneficiary who can call upon assistance from the trust.

Where all the family assets are locked up in trust, the court will want to see a fair outcome reached. Whilst on the facts of most cases it would be unusual for an order to be made to require funds from a discretionary trust to be made available to meet the needs of the other spouse, the court may take a robust approach where necessary.

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Jane Tenquist
Partner
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