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MISUSE OF POWERS OF ATTORNEY IS ON THE RISE

It has been reported that the Office of the Public Guardian (OPG) for England and Wales has made over 700 applications to the Court of Protection to censure or remove attorneys in 2018/19. This is a huge increase - the number of legal actions taken against people with power of attorney has more than doubled over the past two years.

Making improper gifts and not acting in the vulnerable person’s best interests were two of the main reasons for having attorneys censured or removed.

Unfortunately, this is only a small proportion of the true figure as most abuse does not come to light until after the death of the donor.

COMMENT

These statistics are concerning but in line with previous comments made by retired Senior Judge at the Court of Protection, Denzil Lush. He told BBC listeners that he would never grant anyone a lasting power of attorney over his financial affairs because of the serious risk of abuse.

Comments made by the firm who applied for the data stated that misconduct among attorneys is very difficult to detect so these numbers are likely to be just the ‘tip of the iceberg'. There are some fundamental questions about how the current system operates and whether there are sufficient safeguards at the point at which people register.

In April 2019, the OPG launched a new safeguarding strategy to protect donors, to include working more closely with adult social services and the NHS.

GIFT TO A JERSEY CHARITY EXEMPT FROM INHERITANCE TAX UNDER EU LAW

The Supreme Court has held that a gift to a Jersey trust qualified for the charitable exemption from IHT on the basis that it would contravene EU law if the relief was denied.

Outright gifts made to qualifying charities, either during lifetime or on death, are exempt from inheritance tax (IHT) by virtue of s23 IHTA 1984. The definition of a qualifying charity for these purposes includes the condition that the charity must be located in, and subject to the jurisdiction of a court in, the UK or an EU Member State.

In the recent case of Routier and Anor v HMRC [2019] UKSC43, the deceased, Mrs Coulter, left her UK estate to a charitable trust registered in Jersey, the country of her domicile. As Jersey is not a Member of the EU, the charity did not meet the conditions for relief and relief was accordingly refused.

Mrs Coulter's executors challenged HMRC's decision, but having lost in the England & Wales High Court in 2014, they then took the case to the Court of Appeal in 2016.

The Court of Appeal (EWCA) agreed that the exemption did not apply and then considered whether the limitation of the IHT exemption represented an unlawful restriction on the free movement of capital between EU Member States and third countries. The EWCA found that, while Jersey should be treated as a third country for the purposes of the relevant EU legislation, HMRC is entitled to refuse to grant relief on gifts to non-UK charities unless there is a mutual assistance agreement between the UK and the country in which the charity is based. As there was none at the time of Mrs Coulter’s death, the EWCA held that the restriction was not unlawful.

However, Mrs Coulter’s executors appealed to the Supreme Court which unanimously decided in their favour, agreeing that Jersey was a third country, that the principle of free movement must be applied and that the refusal of relief under s.23 IHTA 1984 was a restriction on that free movement. Reversing the EWCA decision, the Supreme Court further found that the requirement for a charity to be subject to UK law or the jurisdiction of a UK court for s23 to apply was overridden by EU law - which takes precedence over UK law when inconsistencies arise. If the “gloss” put on the definition of a charity by the UK courts was ignored, there was no requirement under s23 for a charity to be subject to UK law in order to benefit from the exemption.

COMMENT

While on the face of it the outcome of this case provides reassurance to taxpayers who plan to leave legacies to overseas charities, the usefulness of the decision may be short-lived in the light of Brexit, after which breaches of EU law will presumably cease to be relevant to UK IHT.

THE EXTENSION OF CIVIL PARTNERSHIP STATUS TO OPPOSITE-SEX COUPLES – REGULATIONS APPROVED

The Civil Partnership (Opposite-sex Couples) Regulations 2019 have now been approved by Parliament.

The regulations will commence by 2 December. These regulations will allow the first opposite-sex civil partnerships in England and Wales to take place on 31 December, given the usual 28-day notice period.

However, for now, only same-sex couples will be able to convert their civil partnerships to marriage and vice versa.

Conversions

Civil partnerships were introduced for same-sex couples by the Civil Partnership Act 2004. In 2013, the Marriage (Same Sex Couples) Act 2013 legalised same-sex marriage in England and Wales; and the Marriage and Civil Partnership (Scotland) Act 2014 legalised same-sex marriage in Scotland.

The 2013 Act enables same-sex couples in a civil partnership to convert that partnership into marriage. This was to allow such couples to enter a type of relationship that had not previously been available to them, without first having to dissolve their civil partnership. This right is still available to same-sex couples, even if they formed their civil partnership after the introduction of same-sex marriage. This was to allow for cases where one partner changes gender, as they would not have been able to remain in a same-sex civil partnership and would instead have had to convert that relationship to a marriage.

A consultation document was published in the Summer, 'Civil Partnerships: Next Steps and Consultation on Conversion', seeking views on whether opposite-sex couples should be able to convert their marriage into a civil partnership and vice versa. It also considered whether any changes should be made to the existing right to convert a same-sex civil partnership to a marriage. However, due to the tight timescales, the Government is maintaining the current position, so that only same-sex couples will be able to convert their civil partnerships to marriage. The Government believes this approach avoids making short-term changes that might have to be undone when the longer-term position on conversion rights is decided, following the consultation.

The consultation states that any longer-term changes on conversion are unlikely to come into force until 'later' in 2020, given the need to await the outcome of the consultation and the time needed to make the necessary legislative and operational changes. However, in the final debate on the regulations in the House of Lords, it was confirmed that further regulations will be made early in 2020 in relation to the operational processes for conversions to take place.

Scotland and Northern Ireland

On 25 June, the Scottish Government announced that they would introduce legislation extending civil partnerships to opposite-sex couples, and a Bill was introduced in the Scottish Parliament on 1 October. The Scottish Government's Bill provides for opposite-sex civil partnerships registered in England and Wales to be recognised in Scotland as marriages, initially, and as civil partnerships when those relationships are available in Scotland.

In Northern Ireland, section 8 of the Northern Ireland (Executive Formation etc) Act 2019 places a duty on the Secretary of State to make regulations so that couples in Northern Ireland are eligible to form same-sex marriages and opposite-sex civil partnerships no later than 13 January 2020. The duty came into force on 22 October, after the Northern Ireland Executive did not reform, and Parliament is working closely with the Northern Ireland Office towards the deadline.

Note that the Government has said that it has no intention of extending eligibility to form a civil partnership to family members (such as siblings).

COMMENT

All of the tax consequences of a civil partnership, as we currently know it, will extend to an opposite-sex civil partnership - for example, the inheritance tax (IHT) transferable nil rate band and residence nil rate band, exempt IHT transfers and no gain / no loss transfers for capital gains tax.

The regulations also amend a whole raft of existing law, including some applicable to public sector pension schemes, occupational pension schemes generally, social security provision, the Pension Protection Fund and the Financial Assistance Scheme, to ensure that references to married couples and civil partners work in the new context.

The extension of formal civil partnership status to opposite-sex couples will definitely deliver a benefit to the survivors of pension scheme members. The exact nature of survivors' benefits is subjective and varies by scheme and by category of survivor. The key point though is that survivors' benefits, whatever their exact form, will be available to a wider range of individuals. Whilst this is good news for the survivors in opposite-sex civil partnerships, the corollary is that there will be additional cost and potential funding implications for the schemes affected.

These regulations should act as a spur to occupational pension schemes to review their provisions regarding survivor pensions, which have had, since 2005, to cover those in same-sex civil partnerships. Whilst the regulations do not take the opportunity to remove the post 5 December 2005 pensionable service limitation that was struck down by the July 2017 Supreme Court judgement in Walker v Innospec and others, schemes should ensure that any such limitation is removed from their rules.

OFFSHORE COLLECTIVE INVESTMENT FUNDS – HMRC LETTER TO TAXPAYERS

Clients whose tax affairs are dealt with by HMRC's Wealthy & Mid-Sized Business unit will be receiving letters from HMRC asking them to check that they have correctly declared money received from offshore (overseas) collective investment funds. These letters will include a factsheet that gives more details.

HMRC has supplied the Chartered Institute of Taxation (CIOT) with a briefing note with some background information about the mailing, and a sample letter that taxpayers included in the mailing can expect to receive.

HMRC's briefing note and sample letter both centre around offshore funds that have been approved by HMRC as Reporting Funds and Non-Reporting Funds, and how an investor should report income and gains from such funds on their 2018/19 tax return.

The letter also sets out how a taxpayer can amend their 2018/19 tax return if they have already submitted it, but now think that it is not correct based on this HMRC guidance.

According to HMRC, its letter is an educational piece giving individuals advice on how to complete their tax return and which pages they need to visit to ensure they report this income correctly, although HMRC acknowledges that some 'customers' may be concerned about being contacted.

HMRC also adds that it has taken steps to create and update internal learning and support resources so that its caseworkers are better equipped to handle any issues that may arise in this area.

CHRISTA ACKROYD LOSES IR35 APPEAL

Another BBC presenter loses an IR35 case against HMRC. This was a case where the presenter was deemed to be under the 'control' of the end client.

The Christa Ackroyd case - Christa Ackroyd Media Ltd v The Commissioners for Her Majesty's Revenue and Customs: [2019] UKUT 0326 (TCC)

In 2018, the First-tier Tribunal (FTT) published its decision that this BBC presenter was caught by IR35. The BBC (the end client) had the right to control what services Christa Ackroyd would provide (via her personal services company Christina Ackroyd Media Limited).

Ackroyd appealed on the grounds that the FTT had erred in law in reaching the conclusion that the BBC had a sufficient degree of control over the provision of services by her to satisfy the control requirement necessary for an employment relationship (IR35).

However, the Upper-tier Tribunal has now decided the FTT was right to decide that she was subject to IR35 because of BBC control.

Ackroyd had no line manager and was not subject to appraisals by the BBC which, her QC pointed out, lacked 'effective sanctions' to control her. However, the BBC had ultimate editorial control having, for example, first call over her services for up to 225 days a year. The BBC could require her not only to work on a particular day, but also it could direct what work she did.

It is widely known that a number of organisations and supporting freelancers and contractors are requesting a halt to the roll out of the IR35 reforms.

The Association of Taxation Technicians (ATT) has just called for the reforms to be delayed by 12 months, due to the recent cancellation of the 6 November Budget, their argument essentially being that the delay to the Budget and Finance Bill will mean businesses will have to wait longer for the final legislation, potentially leaving them with a greatly reduced timeframe in which to adapt to the changes.

However, the legislation has already been drafted and HMRC has also produced a large amount of guidance material, as set out in its latest Agent Update.

HMRC says it will launch an enhanced version of the CEST (Check Employment Status for Tax) tool before the end of the year, adding that it will stand by the results given by the current tool provided the information entered is accurate and it is used in accordance with its guidance.

OTS REVIEW OF TAX FOR SMALLER BUSINESSES – AN UPDATE

In May, the Office of Tax Simplification (OTS) published a paper focusing on ways to simplify the everyday experience of businesses dealing with tax, particularly for smaller businesses – which, for the purposes of this review, the OTS described as being businesses with fewer than 10 employees and an annual turnover of less than £2 million.

The review covered events such as:

- starting up in business,
- registering for and paying tax,
- taking on a first employee, and
- dealing with more complex tax matters as the business grows.

Just before Parliament was dissolved, Jesse Norman MP responded on behalf of the Chancellor to say that the Government had accepted the majority of the OTS's ten core recommendations. A table produced by the Government sets out its response to each of the recommendations and what action is being taken by HMRC.

For example, in relation to the OTS request that HMRC review tax payment processes across core taxes and regimes, with a view to aligning and streamlining them, it has given the following response:

"Accept – HMRC will align and streamline payment processes across different taxes. HMRC has made organisational changes that are supporting a programme of work to do this, working to a payment strategy delivering a consistent and straightforward set of HMRC payments processes."

The letter adds that officials will continue to update the OTS on progress on its eighteen additional recommendations. Of course, any progress may depend on the result of the 12 December election.

ROUND UP OF RECENT TPR ACTIVITY

Safer pensions for 16 million savers – 5 November 2019

The Pension Regulator (TPR) states that 16 million pension pots are now better protected thanks to the new requirement for master trusts pension schemes to be authorised.

The new safeguards were introduced on 1 October 2018 and all existing schemes had to meet new standards or otherwise close. The final existing scheme has now been authorised. There are now 37 authorised master trusts, down from the 90 schemes that were available before the new rules were introduced.

To gain authorisation schemes had to prove they were run by fit and proper people, had sufficient financial reserves and robust plans and systems in place.

Authorised master trusts will continue to be supervised and will have to submit an annual supervisory return.

Any new master trusts will have to be authorised by the TPR before opening for business and will be subject to intensive supervision in the first years of business.

22 years of pension savings gone in 24 hours – 8 November 2019

The TPR are working with the Financial Conduct Authority (FCA) on a joint ScamSmart campaign to encourage people to protect their lifetime of savings.

The average amount lost to scams in 2018 was £82,000 which the regulators estimate could take 22 years for a saver to build in a pension.

New research showed almost one in four people (24%) surveyed admitted to taking less than 24 hours to decide on a pension offer.

The research also showed the more highly educated the person the more likely they are to fall for a pension scam. Those with a university degree are 40% more likely to accept an offer of a free pension review from a company they have not previously dealt with. They are also 21% more likely to take up an offer to access their pension early.

Trustee admits defrauding charity pension scheme – 11 November 2019

Patrick Mclarry admitted taking funds from the pension scheme, Yateley Industries for the Disabled, and using them to buy homes in France and Hampshire for himself and his wife. He pleaded guilty of defrauding the scheme out of more than £250,000.

Mclarry was both chief executive and chairman of the charity as well as a director of the corporate trustee of the scheme when he committed the fraud. He took the money between March 2012 and February 2013 and tried to cover his tracks by forging documents, lying to TPR investigators and refusing to hand over vital evidence.

The Judge, Andrew Barnett, told McLarry "It is a serious matter and the only outcome is a substantial prison sentence."

The TPR will now seek a confiscation order to force Mclarry to hand back all of the money he took from the pension scheme.

DIGITAL SERVICES TAX – MORE INTERNATIONAL PROGRESS

The UK Government is introducing the Digital Services Tax (DST) from April 2020, to ensure certain digital businesses pay tax reflecting the value they derive from UK users. However, further progress is being made at an international level.

The Government has been consulting on draft legislation to introduce a new Digital Services Tax (DST). However, the DST was always intended to ultimately be a temporary tax, to be replaced by a comprehensive global solution.

The OECD has now published draft proposals for a global minimum business-tax rate aimed at preventing multinationals, especially in the digital economy, moving their profits into low-tax jurisdictions.

The so-called Pillar Two proposal is part of the OECD's base erosion and profit shifting (BEPS) initiative. It has emerged from a collaboration of more than 130 countries, the Inclusive Framework on BEPS, formed in January 2019 to develop ideas on a 'without prejudice basis'. This means it does not represent a consensus view of these countries, but only a first draft to invite feedback. The level at which the minimum tax rate will be set is to be discussed by the participating countries once the proposal's other key elements are fully developed.

Comments are requested by 2 December, and the OECD says that it will particularly welcome views on three aspects of the plan:

- the use of financial accounts as a starting point for determining the tax base;
- the extent to which a multinational enterprise can combine income and taxes from different sources in determining the effective (blended) tax rate on such income; and
- stakeholders' views on any carve-outs and thresholds that might be considered as part of the proposal.

The legislation implementing the UK's DST is currently due to take effect from 1 April 2020.

INCOME WITHDRAWAL RATE FOR NOVEMBER 2019

The appropriate gilt yield, used to determine the 'relevant annuity rate' from HMRC's tables for an adult member commencing income withdrawals (or reaching an income withdrawal review date), in November 2019 is 1.0%.