LASTING POWERS OF ATTORNEY

It has been widely reported that the traditional Enduring Power of Attorney (EPA) is to be replaced by a Lasting Power of Attorney (LPA), once the Mental Capacity Act 2005 (MCA) comes into force in April 2007, but most people are not aware of what the differences will be.

Both types of power of attorney are created so that someone's affairs can be looked after by someone else. In the case of a standard EPA, this is limited to a person's financial affairs, but the LPA will be able to be used to give much wider powers to the attorney. Any EPA or LPA should be undertaken with the advice of a solicitor, as they give considerable rights to the attorney, even in their most limited forms.

This article is a guide to LPAs and their possible uses and pitfalls.

Firstly, it is important to note that an existing EPA will continue to be valid after LPAs are introduced and that EPAs will be able to be written up to April 2007. The EPA contains an important protection that the LPA will not. Under an EPA, if the attorney wishes to take over exclusive handling of the affairs of the creator of the EPA when that person is no longer mentally competent, he or she must apply to the court. Although LPAs will have to be registered when they are to be used, there will no longer be any need to inform anyone when they are to be put into effect, so it will no longer be evident to third parties (e.g. the bank) when a person is no longer able to manage their own affairs.

Under an LPA, the person granting the power of attorney will, when it is created, have to obtain a certificate, signed by a competent witness, stating that they are mentally competent and not making the LPA under the influence of someone else. A wide range of people are deemed to be competent to make such a judgment and witness the document.

An LPA will also allow the appointment of an 'attorney for personal welfare', who will be permitted to decide whether 'life-sustaining treatment' is to be provided when the person granting the power is no longer able to give informed consent. Surprisingly for such an important matter, on the proposed document for LPAs, the Government's form designer has decided that this appointment can be dealt with by the use of a tick-box! Regrettably, the MCA's definition of 'life-sustaining treatment' is also rather vague.

Having a power of attorney in place in case someone can no longer manage their own affairs does have many advantages for the family. Without one, handling what are usually trivial administrative matters on behalf of someone who is no longer competent to do so can become a nightmare. However, the fact that under the new system one tick in a box can give your attorney the power of life and death may make you think twice about writing an LPA. The standard EPA can be written until 2007 and we would recommend that clients who have not already done so give serious consideration to creating an EPA. For many, if not most people, an EPA is probably the better option. If that deadline is missed, care should be taken when creating an LPA to obtain the professional advice of a solicitor in order to ensure that it meets your specific requirements.

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GORDON BROWN ATTACKS TRUSTS

WHAT DOES IT ACTUALLY MEAN?

Chancellor Gordon Brown launched what might reasonably be regarded as an attack on trusts in the Budget announcement earlier in the year, so what are the implications for people who have set up trusts, created trusts in their wills or and considering the future use of trusts.

Firstly, it is important to make sure that the scale of the effect of the proposed changes to tax law is understood. The practical effect is that accumulation and maintenance trusts (A&M) and interest in possession trusts (IIP) will become subject to the 'mainstream' Inheritance Tax (IHT) regime.

Previously, these trusts benefited from there being no charge to IHT on the transfer of assets into the trust provided the transferor survived for seven years after the transfer. Under the new system, these trusts will normally pay IHT at 20% on the value of trust assets transferred to the extent that these exceed the IHT threshold (currently £285,000). Every ten years after the settlement, a further charge of 6% is to be levied on the value of trust assets in the trust over the IHT threshold at that time. If the assets are withdrawn from the trust before the 10-year charge, a proportionate charge will be payable depending on the period of time that has elapsed.

There are certain exceptions to the above rules, the main one of which is that where the beneficiary of the trust becomes entitled to the assets at age 18, the trust will not incur the above tax charges.

The legislation is due to take effect in April 2008, so trustees have some time to consider their tax positions and make any necessary changes to their trust arrangements. However, it should not be forgotten that the '10 year charge' applies in 2008, so will catch a trust settled in 1998, although there will be some variations on this for A&M trusts.

For an IIP trust, the situation is different. These are used when a person has the right to use assets for a period (e.g. for life) and the assets then pass to someone else. In this case, the main problem arises if a beneficiary's interest ends but the trust continues - in which case, it will become liable for the 20% charge.

The Finance Bill has made some concessions - particularly as regards the use of 'will trusts' for a surviving spouse. There is also some amelioration of the impact where trusts are used for children who do not become entitled to the trust assets until after their 18th birthday.

It is sensible for trustees to consider the possible implications for them of these proposals and take appropriate professional advice. This applies also to people who have in the past written life assurance or pension policy 'death in service' benefits into trust.

Please contact us on 01509 217770 for advice on wealth preservation and tax.

IN BRIEF

The Unclaimed Assets Register

Many people have assets which they have forgotten about - old bank accounts, shares or premium bonds for example. If you think you or a relative may have lost track of some assets, a search of the register (which costs £18) may be worthwhile. So far, over £4m of unclaimed assets have been revealed by searches.

For more information, see http://www.uar.co.uk

WILL NOT OVERTURNED BY FAILURE OF MEMORY

A challenge to the will of a retired academic was unsuccessful recently in the Court of Appeal. The lower court had ruled that the will of a professor should be overturned because neither of the witnesses could remember signing it. The will had been created nine years before his death and gave half his estate to his girlfriend, 10 per cent each to his two children and 30 per cent to the charity Guide Dogs for the Blind. The girlfriend could not remember the will being executed due to a personal trauma.

The will was contested by the professor's children, who stood to inherit his entire estate were their claim to be successful. In the lower court, it was considered that on the balance of probabilities the will was not properly executed. Despite the fact that the witnesses were satisfied that the signatures on the will were theirs, the judge considered that since they were not elderly and were in full possession of all their faculties, they would have remembered witnessing the will. The will was therefore ruled invalid. The professor's girlfriend appealed against the decision.

In the Court of Appeal, it was considered that the passage of nine years would be sufficient to explain the lapse of memory. Only the strongest evidence will suffice to show that a will has not been properly executed.

Many cases have been brought which seek to show that wills are not validly executed. We can advise you to make sure your beneficiaries avoid any unnecessary disputes.

WHAT IS A TRUST FUND?

A trust comes into effect when a 'settlor' places money, land or other assets in the hands of trustees. The trustees are the legal owners of the property but are obliged to hold and manage the property for the benefit of a person or a group of people, who are called beneficiaries.

TYPES OF TRUST

Bare Trust

In this type of trust, the beneficiary has an immediate and absolute right to the property in the trust. The trustees have no discretion as to how the fund is managed. The income of these funds is taxed as if it is the income of the beneficiary.

Discretionary Trust

Here the trustees have discretion over to whom and when payments should be made and also whether conditions should be attached. They are usually given discretion as to the investment of the fund. This type of fund may or may not be allowed to accumulate income. Discretionary trusts are taxed as 'relevant property' trusts in accordance with the Inheritance Tax Act 1984 and attract the following taxes:

- an 'entry' tax on lifetime transfers to the fund where the money transferred exceeds the Inheritance Tax (IHT) threshold;
- a 'periodic' tax, levied every ten years, on the value of trust assets which exceed the IHT threshold; and
- an exit charge if funds are withdrawn between ten year anniversaries.

In addition the trust must pay income tax on its income.

Accumulation & Maintenance Trust (A&M)

In an A&M trust, the settlor places money in trust for children/grandchildren until they reach a specified age (maximum age 25), when they become entitled to the trust fund.

Interest in Possession Trust (IIP)

Here, the beneficiary has a right to the income but not the capital of the trust fund. For example, a beneficiary may be allowed to receive the income arising from shares during their lifetime with the shares to go to their children on their death

Prior to the 2006 Budget, IIP trusts and A&M trusts enjoyed special tax treatment. Lifetime transfers did not attract IHT if the settlor survived seven years and the funds did not attract periodic or exit charges. The funds will now be taxed in much the same way as discretionary trusts with certain exemptions, which (fortunately) mean that they will continue to be beneficial to use in many cases for IHT planning in wills.

Trusts still have an important role to play in many circumstances. For financial and tax planning advice, contact us.

HOW INHERITANCE TAX WORKS

Inheritance Tax (IHT) is paid on your estate when you die and also when money is transferred into some trust funds. Some other transfers during one's lifetime may also be subject to IHT. The first £285,000 (2006/7) of the estate is exempt from IHT. This is called the nil rate band. The assets in the estate are valued on death, the nil rate band subtracted and the remainder of the estate is taxed at 40 per cent.

IHT used only to concern the wealthy but the increase in value of residential property in recent years has meant that more and more people now find themselves within its ambit.

There are exemptions from IHT for the following transfers:

- property between spouses or civil partners (not between cohabiting partners);
- money given to institutions such as the National Trust, charities and political parties; and
- gifts in consideration of marriage or civil partnership (within permitted limits), annual gifts to the value of £250 to anyone and gifts which are part of normal household expenditure (such as birthday presents).

You are also allowed to give away up to £3,000 annually which can be carried forward to the next year, if not used in a tax year.

Gifts made 'out of income' are also excluded. These must be of a scale that does not affect the lifestyle of the donor and must normally be regular - an example might be school fees paid by a grandparent.

The following can be used to reduce IHT liability:

- **Potentially Exempt Transfers** (PETs). A gift will cease to be part of a person's estate if they survive seven years after giving it. If they die within seven years then the IHT to be paid will be reduced on a sliding scale depending on the time interval between the gift and the death of the donor;
- **Equity Release.** An equity release scheme (of which there are several types) allows money locked in freeholds to be released. This can be given away as a PET and if the donor survives more than seven years then it will not attract an IHT liability;
- **Life Assurance.** Policies are available which may pay all or some of your IHT liability. Life assurance policies can also be written in such a way that they pass directly to your family and do not become part of your taxable estate;
- **Holding Exempt Assets.** Certain assets (such as shares in AIM-listed companies and in family businesses) are wholly or partially exempt from IHT if certain conditions are met;
- **Trusts.** Trust funds used to be a common way to transfer wealth and could be very effective for minimizing the impact of IHT. The 2006 Budget has made these less attractive but trusts do still have their place in IHT planning.

Whatever action you do take, make sure you obtain good professional advice. In particular, it is essential to have a proper will drafted. We can do this and can also review your assets and advise you of any IHT reliefs which may be available and whether property is held in the most advantageous manner. If your family is facing an IHT burden, we can advise you on the right steps to take.