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Newsletter

Court of Protection v. Lasting Powers of Attorney?

Press headlines have highlighted flaws in the workings of the so-called “secretive” Court of Protection system designed to look after the affairs of vulnerable people.

Why involve the Court of Protection? Occasionally, the onset of mentally incapacitating illnesses means that people cannot look after their own financial or healthcare affairs. When this happens, an application to appoint a family member or some other person as their Deputy is made. The Court of Protection Order authorises the Deputy to make decisions about, and manage the affairs of a vulnerable person, ensuring that bills, care fees and other expenses can be paid on their behalf.

What is not always made clear is that Deputies can be asked to place significant sums of money in a special account that is run by the Court. This makes it necessary to apply to the Court if large sums are required.

Occasionally, a Court Order may also be necessary to authorise the sale of someone’s home if they move to residential or nursing care.

Media coverage also highlighted the fees the Court levy, the time it takes to obtain authority to manage finances and the need to apply for funds from the special account. This can be several months in each case.

How do you avoid involving the Court of Protection? As long as someone has capacity, a Lasting Power of Attorney (“LPA”) can be the answer. There are two formats – one deals with property and financial affairs, the other health and welfare decisions. The choice of Attorney who acts on your behalf is yours and the law states that the Attorney must act in your best interests. It makes sense to appoint a trusted family member or close friend to make these important financial or health decisions. The Attorney,

effectively, steps into your shoes to deal with the day to day issues that you can no longer cope with. Whilst useful in the event of an emergency or physical disability, an LPA can also be used after the onset of mental incapacity.

Although an LPA must be registered with the Office of the Public Guardian before it is valid, making one is far simpler than an application to the Court of Protection. Once in place, it may not be necessary to use the authority granted by the LPA immediately, but peace of mind that there is someone to help in

the future is added protection for the management of your finances.

The answer is clear. To avoid the risk of not being able to choose who looks after your financial and personal affairs and the potential for Court of Protection delays and fees, making a Lasting Power of Attorney is the obvious route.

If you would like a more detailed chat about LPAs, please contact:

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Is an Agreement to Negotiate Enforceable?

The courts have long held that you can not have a contract to negotiate, and at the end of the contract force the other party to buy or sell – however, the courts have held that an agreement to negotiate i.e. to force the other signing party to enter into negotiations to buy/sell in good faith (and to use reasonable endeavours to conclude a sale) can be legally binding, providing it is sufficiently well defined, there

is an express commitment to use good faith and there is a fixed period to negotiate. This means the seller would be unable to carry on contemporaneous negotiations with a competing buyer - thus giving the buyer the best possible chance to be the first to buy the property / sign the contract.

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- Shares - Refusal to Register

Most Directors have a discretionary power to refuse to register transfers of shares. However, that power must be exercised for a proper purpose, and in good faith i.e. it must be a decision most likely to promote the success of the company. If there is a refusal for any improper or collateral purpose, the court will order the transfer of the shares to be registered. The Companies

Act 2006 changed the law in October 2009 so that Directors must give a written reason for the refusal within 2 months. The Directors will have to give such further information backing up the reason for their refusal as the disgruntled buyer of the shares may reasonably request.

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PROTECTING YOUR PROPERTY FROM FRAUDSTERS

The Land Registry launched a campaign on the 11th January 2010 to help protect homeowners who are most at risk from property fraud, where the title to the property is registered at the Land Registry.

Fraudsters often target properties on which there is no mortgage, and where the owner lives elsewhere. They attempt to acquire ownership of a property by using a forged document to transfer title into their own name, or by impersonating the true owner.

The groups most at risk are those who do not live in their own home such as elderly persons living in residential care, homeowners living abroad and buy-to-let landlords. The Land Registry has said that one way to stop fraudsters is for homeowners to ensure that their contact details are up to date. You can find out more information on how to do this by visiting the Land Registry's website at:

<http://www.landreg.gov.uk/propertyfraud>

or contact our Conveyancing Department and we will be happy to assist.

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WHAT IS PENSION SHARING?

It is a means of balancing up pension assets between a husband and wife who are in the process of divorcing. How does it work? Say the husband has a pension valued at £75,000, and the wife's pension is valued at £25,000. The combined pension value is £100,000. If theirs is what the Courts call 'a long marriage', those pension funds may have to be shared equally between the parties. This means the wife might receive a pension sharing order worth £25,000 from the husband's pension provider.

In reality, no cash changes hands. Money moves on paper from the husband's pension provider, to the wife's chosen pension provider. The wife's fund is then worth £50,000. She can leave her pension fund under the terms of her Will, as it is by then her own money.

Do Courts always make a pension sharing order? No, not if the husband and wife don't want one. The wife (in this example) could trade £'s in a pension fund against cash £'s in the equity of a property. Thus you can get a party to a marriage saying 'I won't touch your pension if you give me a bigger slice of the sale proceeds of the house'. This is what Solicitors call offsetting.

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HAVE WE MISSED THE BOAT?

We mentioned in our December 2009 Newsletter that until recently pre-marital agreements were not legally enforceable in England and Wales. However, now the Courts have agreed that such agreements should be upheld if the parties separate or divorce, some couples may feel they have missed the boat.

Not so! It is possible to enter into a post-marital agreement. The only difference is that the agreement is made after the wedding, rather than before. As with pre-marital agreements, both parties must be frank with each other about their financial circumstances. In addition, there must be reasonable provision in the agreement for the financially weaker party (if there is one).

It is essential for both parties to seek legal advice before proceeding with a post-marital agreement. The Collaborative Law process provides an open, amicable way to discuss the wishes and objectives of both parties, face to face, with their respective solicitors.

Post-marital agreements should allow for potential changes in circumstances, and it is always advisable to regularly provide for its review when, for example a child is born into the marriage.

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MUSIC TO OUR EARS

The Phonographic Performance Limited (PPL) licence fees are collected from businesses to authorise them to play music in pubs, bars, restaurants, cafés, shops, offices and factories. A new pricing structure came into force in 2006 which meant that larger businesses paid up to 400% more (the average increase was 130%). The copyright tribunal has now disapproved of these large increases and ordered that a 10% increase plus inflation was reasonable - the PPL must now pay refunds for over payments since the 1st January 2006 - affecting 1,000's of businesses. Businesses should consider whether they should claim a refund.

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