MACKARNESS & LUNT

M&L SOLICITORS

SUMMER 2016 **NEWSLETTER No. 16**

WELCOME TO OUR LATEST NEWSLETTER

CREAM TEA IN A BAG – 8th July 2016

On 8th July we have arranged the perfect way to enjoy the final Friday of Wimbledon and also support The Rowans Hospice. We have arranged for a charity Cream Tea in a Bag with the support of Rodda's Cornish clotted cream and Tiptree Jam and the Cream Tea Society. Please come and collect your bag from the office to enjoy at your leisure. All donations will be for The Rowans Hospice and we hope to see you then.

STAFF UPDATE - CONGRATULATIONS

We are pleased to announce and congratulate Sarah Baker on her marriage to Stephen Brown in June. Sarah will for the time being still use her maiden name but this may well change later on.

LANDLORD AND TENANT NEW LEGISLATION WITH EFFECT FROM 1ST OCTOBER 2015 AND 1ST FEBRUARY 2016

Smoke Alarms and Carbon Monoxide

From 1st October 2015 the smoke alarms and carbon monoxide regulations came into force. There must be at least one smoke alarm installed in every storey of a rental property which is used as living accommodation and a carbon monoxide alarm must be installed in every room used as living accommodation where a solid fuel is used, e.g. open fire, log burning stove etc.

A Landlord is responsible to ensure the alarms are in working order at the commencement of a tenancy, after which it is the tenant's responsibility to make sure that they are tested regularly and remain in working order. There are various penalties for non-compliance including the Local Authorities having the option to levy a fine of up to £5,000.

Right to Rent

The Immigration Act 2004 introduced a pilot scheme which is now rolled out across England from 1st February 2016. Right to Rent simply means the tenant being allowed to occupy residential accommodation in the UK by virtue of their qualifying immigration status. The Act prevents the Landlord from renting their property to adults who do not have the right to stay in the country if the property is for use as their main or only home. Landlords or agents who breach this prohibition may be subject to a civil penalty and/or a custodial sentence.

Notice for Evictions

Notice given to a tenant to vacate a property, known as a Section 21 Notice, is in a new format. The new Section 21 Notice must be used for all new written tenancies created on or after 1st October 2015. There are also additional requirements that must be complied with.

The requirements are as follows:

1. The deposit must have been protected with an authorised Deposit Scheme within 30 days of the commencement of the tenancy and the prescribed information given to the tenant.
2. The property must be in receipt of an HMO (House of Multiple Occupation) licence if this is required.
3. The Landlord must provide the tenants with a current gas safety record where relevant.
4. The Landlord must provide the tenants with a copy of the EPC (Energy Performance Certificate).
5. The Landlord must provide the tenant with a copy of the Help to Rent booklet from the Government web-site.

Failure to comply at the commencement of a Tenancy Agreement will make it impossible for a valid Section 21 Notice to be served. There are also new time limits with regards to the enforcement of a Section 21 Notice, when it can be served etc.

Therefore, anyone commencing a tenancy either as Landlord or Tenant after 1st October 2015 should ensure that they comply with the new regulations. Equally anyone wishing to serve notice on a tenant for a new Tenancy Agreement will need to ensure they comply with the regulations.

Please note that the new legislation, whilst only applying to tenancies commenced after 1st October 2015 at this stage, will relate to all tenancies including those created before 1st October 2015 from 1st October 2018.

REMEMBER YOUR PARTNER, NOT YOUR EX

Unmarried couples should update their wills to ensure if they die their partner isn't left high and dry.

If a couple are not married (or in a civil partnership) and either partner dies without a will, the one left behind may not be a beneficiary of the deceased's estate and could receive nothing. Any assets would probably go to children, possibly to estranged husbands or wives, or even, in the absence of close relatives, the government.

Recently, a legal journal reported on the case of a bereaved woman, whose long-term partner had not updated his will, resulting in his share of the couple's house going to his estranged wife.

The woman, Ms Williams, took the case to court and though the judge ruled in her favour, she said the process had been 'traumatic'. An up-to-date will would have removed a lot of stress and heartache, at a time of bereavement.

President of the Law Society Jonathan Smithers said:
'This case is an important reminder for unmarried couples to make sure they have a valid and up-to-date will, and to seek expert legal advice regarding any co-owned property, if they intend their current partner to inherit upon their death.

'Making a will is extremely important. Solicitors have the necessary qualifications and training to address the often complex issues associated with drafting a will and can help ensure that your estate is left to those who you wish to inherit after your death.'

PROPOSED PROBATE FEES INCREASE

Farmers will be disproportionately hit by the recently proposed reforms to probate fees.

The reforms, which mean that probate fees increase in proportion to the size of an estate instead of at a flat fee, have been criticised as a stealth inheritance tax. It also means that bereaved families could find themselves in a catch-22 situation where they cannot afford to pay probate fees until they have received their inheritance.

Farming families are likely to be unduly affected because valuations attached to woodland and infrastructure, as well as the farm house itself can often mean that a farm is valued at above two million pounds for inheritance tax purposes, even if the day-to-day farm itself is at subsistence level. This means that the family inheriting the estate will have to find the money for these enormous fees, as well as, in many cases, pay inheritance tax.

In many cases, this will mean those seeking to administer agricultural estates will need to borrow against their own assets, not least because as bridging loans to cover inheritance tax are no longer widely available, it stands to reason that the banks may not be willing to make provisions for those needing to pay Grant of Probate fees. It has the potential to be financially catastrophic for this sector.

When an estate is worth more than £325,000 and falls into the 40% Inheritance Tax bracket, as so many farming estates do, there is already a considerable financial imperative to transfer assets at least seven years before death, and that’s before we even begin to consider the issue of care home fees.

These new rules may result in increased pressure from family members to transfer property many years before they expect to die, an act which would leave them extremely vulnerable financially in the final years of life, as well as, of course, meaning that the government may not be able to use the estates of older people to subsidise fees for things like residential homes, something that is certainly not in the interest of the state.

MENTAL CAPACITY

In order to leave a valid will, you need to have mental capacity at the time you sign the will, right? Wrong.

The recent, sad case of Burns v Burns [2016] EWCA Civ 37 once again shows that setting aside a will on the ground that the testator lacked capacity can be difficult, and should be approached with caution.

The facts were fairly simple. Eva Burns, who died in May 2010, owned a 50% share in her home. The other 50% belonged to her son, Colin Burns. There was no dispute about this ownership arrangement.

Eva left a 2005 will providing that her 50% share should be divided equally between her two sons, Colin and Anthony. Anthony challenged the 2005 will on the basis that Eva lacked capacity at the date the will was executed. If the 2005 will were to fail, a will of 2003 would be admitted to probate. The 2003 will left Eva's entire share of her home to Anthony alone. As at the date of the trial, the financial difference between the parties was agreed to be around only £26,000.

In the period until 2003, Anthony had lived with Eva, but left as a result of an argument with his brother. After Anthony's departure, Colin began to play an increasingly important role in his mother's welfare. She was at this stage 83 years old. In November 2004, Eva gave handwritten instructions to a solicitor that she would like to change her will so as to benefit her children equally (and to revoke a power of attorney in favour of Anthony and grant one in favour of Colin).

The will was drafted and approved by Eva in December 2004, and she apparently intended to execute it at around that time but did not follow up immediately. Instead, there was then a period during which Eva's mental health declined, and there was a good deal of evidence in this regard in the form of the mini-mental state examinations and other contemporaneous assessments, as well as expert opinion heard by the first instance judge. By the time the will came to be executed in July 2005, there was significant evidence that Eva lacked capacity (albeit that there was no formal finding to this effect).

The decision at first instance, upheld on appeal, was that the will was 2005 will was valid notwithstanding the issues regarding Eva's capacity at the time of execution. This was based on the case of Parker v Felgate [1883] 8 PD 171 which held that a will which has been drawn up in accordance with a testator's instructions at a time that they had capacity, will not be invalid if it is subsequently executed at a time when the testator lacked capacity, so long as the testator understands at the time of execution that what they are signing is that will.

Therefore, in these circumstances, having Banks v Goodfellow, which is the case in which mental capacity is normally based, is not necessary at the time that a will is signed. The usual considerations concerning understanding the act of disposing of property, the extent of one's estate, the claims on one's bounty do not necessarily need to be addressed.

It was therefore not relevant whether Eva had full capacity in July 2005. It was sufficient that she did at the time that she gave instructions for the will to be prepared in December 2004, and merely that she understood that she was executing her will at the later date. The Court also found that Eva knew and approved of the contents of her will.

It is also noteworthy that the Court was critical of the solicitor who drafted the will for ignoring (and being ignorant of) the "golden rule" in relation to producing wills for the

elderly or infirm, for failing to ask open questions, for failing to consider the attendance of a medical professional in relation to the drafting or execution of the will, for missing papers in the will file and for failing to find out about a previous will. Despite this, the evidence was not sufficient to invalidate the will, although the Court indicated a different result might have been possible if the will itself had been a more complex document.

The case is a good example of how difficult it can be to succeed in a testamentary challenge on the basis of a lack of testamentary capacity, and in particular to consider carefully the chronology of events in relation to the drafting, as well as the execution, of the will. There may be more than one date at which the testator's mental capacity falls to be considered and determined.

RETIREMENT

Retirees in ten years' time are going to be forced to choose more mundane options compared to their parents, when it comes to what they spend their savings on according to a report.

The report titled "Citizen 2025" by Barcan & Kirby says that whilst current retirees are managing to save a "somewhat dumfounding" £49 billion a year, current and future retirees will soon be choosing the less exciting option when it comes to what to do with it.

The report states people more often than not underestimate their life expectancy, and care home costs could well reach £70,000 a year by 2035 presenting a huge problem for those currently in their 40s.

When the Beatles first sang 'When I'm 64', retirement for most people was short-lived or not reached at all. In years to come, the principal financial challenge will be funding a work/life balance and then funding proper care.

40% of elderly people are also predicted to have some sort of mental capacity issue by 2025.

Over the coming 10 years we can expect more retirees to start SKIing (Spending the Kids' Inheritance). Not on round-the-world cruises, dream cars or speedboats, but on more mundane matters as they come to realise that they need to significantly increase the amount they have saved to fund retirement living and possibly the cost of later life care.

With one million of the population likely to be suffering with dementia in 2025, we should expect a significant rise in the number of people putting in place lasting Powers of Attorney for both finances and health and welfare decisions. Indeed, we've noticed an increasing number of people coming to us before dementia is even a near-term prospect for them.

For those without Powers of Attorney in place, going through the Court of Protection can be a lengthy, costly and time-consuming experience. People need to be made aware of the importance of writing a Will and – as they live longer – the need to update it. Simply writing a Will is not enough and we're increasingly seeing Wills being challenged on incapacity grounds.

LIONS MESSAGE IN A BOTTLE

Lions Message in a Bottle is a simple, but effective, way to keep essential personal and medical details where they can be found in an emergency – the fridge.

The bottles are supplied **FREE** of charge thanks to generous donations from the public and businesses.

More than 5 million **FREE** Message in a Bottle kits have been distributed by Lions Clubs British Isles & Ireland in recent years to people with conditions such as diabetes, allergies, disabilities and life-threatening illnesses.

Lions clubs supply the bottles to health centres, doctors' surgeries and chemists. They are also available direct from Lions clubs – contact them for more information.

Paramedics, police, fire-fighters and social services support this life-saving initiative and know to look in the fridge when they see the Lions Message in a Bottle stickers.
The Lions Message in a Bottle initiative is praised by hundreds of emergency services personnel.

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I would be interested in future newsletters

Name **…….**

Address or e-mail address **…….**

Return to: 16 High Street, Petersfield, Hampshire GU32 3JJ Tel No: 01730 265111
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If you do **NOT** wish to receive any further updates or communications from us, please notify Diane Anderson by e-mail dianeanderson@macklunt.co.uk or phone on 01730 265111.