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Newsletter - Early Autumn 08

In Case They Don't Live Happily Ever After…

If you have family wealth that you wish to protect, the joy at the prospect of one of your children getting married may be tempered somewhat by a touch of trepidation in case the marriage doesn't last, particularly if a large settlement of assets is to be made on the happy couple.

In such circumstances, the use of a pre-nuptial agreement ('pre-nup') is likely to make a great deal of sense. Legally speaking, such agreements are still rather a grey area. However, the judge in a leading case on the subject has most helpfully suggested a number of criteria which would assist the courts in deciding whether or not a pre-nup should be regarded as enforceable.

The most important of these from the perspective of the parties to a pre-nup are:

- Does the spouse being asked to sign the pre-nup understand it?
- Has he or she been properly advised as to its terms?
- Was pressure exerted by one spouse to make the other sign?
- Was there full disclosure of the relevant assets?
- Was pressure exerted by anyone else to make them sign?
- Was the agreement signed willingly?
- Did one spouse exploit a dominant position?
- Was the agreement entered into in the knowledge that there would be a child?
- Has any unforeseen circumstance arisen which would make enforcing the pre-nup unjust?
- Does the order preclude the payment of any periodical payment for maintenance of a spouse and if so, would it be unjust to hold the parties to that agreement?
- Are there grounds for believing that upholding the agreement would be unjust?

For a pre-nup to achieve the desired object, it must be properly drafted and put into place in the correct circumstances. In particular, both parties to it should have the benefit of independent legal advice.

If you are concerned that a relationship might not have a happy ending, we can assist you to help protect your family's assets from the depredations of an ex-spouse.

For more information Contact Anna Baptist on 01992 300333.

Age Discrimination – Young Workers

The Employment Equality (Age) Regulations 2006 make direct and indirect age discrimination illegal in an employment context, unless the treatment can be objectively justified.

The legislation applies to discrimination against young as well as older workers.

Recently, a woman who claimed that she was dismissed for being 'too young' won her claim of age discrimination (Wilkinson v Springwell Engineering Limited).

Leanne Wilkinson was 18 years old when she began working for Springwell Engineering Limited, in Newcastle upon Tyne, as an office administrator. She was dismissed without notice during a three-month probationary period and was asked to leave the premises immediately.

Miss Wilkinson claimed that her employer told her that it needed an older, more experienced person to do the job. Springwell Engineering claimed that she was dismissed on grounds of capability.

The Employment Tribunal upheld Miss Wilkinson's claim. The company had relied on a 'stereotypical' assumption that capability equals experience and experience equals older age. There was also a lack of any 'orthodox procedures' when recruiting Miss Wilkinson and when her employment was terminated.

Miss Wilkinson was awarded £5,000 for injury to feelings, approximately £5,000 for loss of earnings and two weeks' pay because the company had failed to provide her with full written particulars of her employment.

The award was increased by 50 per cent because the employer had failed to follow statutory procedures. In addition, the company was ordered to provide any prospective employers with a truthful reference stating that Miss Wilkinson's dismissal was due to a breach of the age discrimination regulations, not that she was dismissed on capability grounds.

Employers are reminded that employees do not have to have worked for a specified period before they are entitled to bring a claim for discrimination. Equal opportunities training should be given so that stereotypical views linking age with competence do not go unchecked, leaving you open to a claim.

Contact Richard Gvero on 01992 300333 for advice on any employment law matter.

'First class service from a long established and local practice obviously devoted to continuous service of the local community'

HIP Temporary Provisions Extended

The Government announced in May that they were extending the temporary provisions for first day marketing whereby a property can be put on the market without a Home Information Pack (HIP) provided one has been commissioned and paid for and is expected to be in place within 28 days.
Originally, the dispensation was to end for properties marketed after 31 May 2008 but the date has now been postponed to 31 December 2008.

The temporary dispensation that applies to leasehold properties, whereby the only compulsory document in the HIP is a copy of the lease, will also continue until the end of the year. This change has been made because the Government has instituted a new consultation process following industry complaints about the additional costs and delays being experienced when obtaining the documents necessary for inclusion in a HIP for a leasehold property. It is expected that the rules relating to the contents of HIPs for leaseholds may well change significantly between now and 31 December.
If you are buying, selling or letting a property, we can assist you to make sure the necessary legal work is carried out promptly, professionally and economically.

HIPs – Questions Answered

Part-exchanged Properties

With the property market tightening rapidly, a builder is more likely than ever to offer to take the existing property of a buyer in part-exchange for the purchase of a new one. Often, the builder will wish the house being part-exchanged to be put (or remain) on the market between the exchange of contracts and completion of the sale, in the hope that the builder will have the part-exchanged property 'on its books' for as short a time as possible.

When the property being part-exchanged is already on the market, a Home Information Pack (HIP) will have been prepared. If the HIP received by the builder is 'in date' (i.e. not more than 12 months have passed since the date the property was first marketed), then parts of it can be 'recycled'. In all cases a new sale statement and index would be required. However, the energy performance certificates and Land Registry documents can be reused. Searches cannot be reused in normal circumstances, as the liability for the accuracy of the search cannot be 'passed on'. However, the builder can market the property using the previous documents of title until the change in ownership has been recorded by the Land Registry.

Shared Ownership Properties

If a shared ownership property is being purchased by a sitting tenant, a HIP is not necessary if no marketing of the property has taken place. However, if such a property is being sold on the open market, then a HIP is necessary. Contact Chris Pease on 01992 300333 for advice on HIPs.

Provision of Assistance for Purchase of Shares – Points to Ponder

The provision of assistance by a company for the purchase of its shares has long been a difficult area of law.

The practice was prohibited until the 1981 Companies Act came into force, when a 'whitewash' procedure was introduced which allowed private companies to give financial assistance for the purchase of their shares provided that a number of requirements were met.

The problem with the provision by a company of financial assistance (e.g. a loan) for the purchase of its shares has rested in the possibility that this can, when used without sufficient scruples, undermine the interests of other shareholders and even creditors of the company.

The downside of the equation is that the prevention of such assistance sometimes makes it difficult for shares to be issued and this could be to the detriment of the company. For example, it might be considered to be in the company's interests to offer shares to an executive as an incentive, but the person concerned might be unable to raise the money to buy them. Without setting up a rather complex (and sometimes expensive and/or inappropriate) mechanism, the company's wish to have the executive obtain an interest in its shares might be frustrated.

Relief is now to hand in the form of the Companies Act 2006 which, from October 2008, will allow a private company to provide financial assistance for the purchase of its shares. Public companies are still prohibited from so doing.

The right is not unlimited, however. Protection for shareholders and creditors also now depends on the requirement that the company's directors consider whether the proposed share transaction is consistent with their duty to promote the success of the company for the benefit of the shareholders as a whole. If the proposed share transaction does not achieve that end, the directors cannot authorise it. Their duty also extends to the protection of the creditors – for example, where financial assistance is given for the acquisition of shares in a company which is insolvent, the directors could be found personally liable for any losses to creditors which may result.

Says Liz Gallop, "The relaxation of the rules does give private companies increased flexibility in dealing with their shares. However, it places the ultimate responsibility for any decision to give assistance for the acquisition of shares in the company on the directors who authorised the transaction. It is a burden which should not be discharged lightly and professional advice is recommended before such transactions are carried out. It is also likely that in cases where there is significant bank borrowing, the bank may require extra comfort to ensure its position is protected."

‘ I was amazed that the sale went through so quickly - especially in the current housing market’

No Trust Created Where Intentions Not Clear

When a couple’s conduct over a period of time is consistent with co-ownership of a property, it might be thought that the property would come to belong to them both, no matter what the legal form of ownership may be. Such assumptions are often tested in divorce cases when a property is owned by one or other of the divorcing couple.

Recently, a case came before the Court of Appeal dealing with just such an issue. It involved a dispute over the financial settlement decided by the lower court.

The divorced couple lived in the family farm, which was originally owned by the mother of the husband. Latterly, the husband and his mother had created a partnership to run the farm and the farmhouse was then owned by the two of them as joint tenants.

Early in the couple’s relationship, the wife had helped out with the farming business and took part in business decisions regarding the farm. She received no payment for this. She also bought additional land, which added value to the property, and subsequently operated a successful riding school on the farm. This was initially financed by an interest-free loan from a company owned by her husband. She later incorporated her business.

Following the break-up of their marriage, the wife moved out of the farmhouse and claimed a share in the farm in the divorce settlement. Neither her ex-husband nor his mother had ever raised the question of the wife’s ownership specifically and nor had she. However, she claimed that her right to a share arose because her ex-husband and his mother had conducted themselves in a manner which supported the view that there was a common intention to hold the farm jointly – in legal parlance that a ‘constructive trust’ had arisen in her favour. The judge awarded her a quarter share in the value of the farm. Her ex-husband and mother-in-law appealed.

In the Court of Appeal, the judge took a different view, holding that the conduct of the parties did not necessarily prove the fact that the ex-wife was intended to have a beneficial interest in the farm. In the absence of any legal agreement regarding the ex-wife’s ownership of the farm, he could not see how encouragement of the horse-riding business or her minor role in the farming business could be interpreted as constituting sufficient evidence that a constructive trust had been created. In any event, her claim would be counterbalanced by the support she was given when setting up her business.

Says Graham Field “In truth, claims of this nature can be a bit of a lottery and much will depend on the availability of contemporary evidence of the intentions of the parties involved. The simplest way to avoid an appearance in court is to make sure that the intentions of the parties are properly evidenced in the first instance so that, in the event of a later dispute, the position can be readily resolved.

For futher advice contact Graham Field on 01992 300333.

When is a Lease Created?

Tenants have significant rights compared with occupiers of premises whose occupation is by virtue of a licence

So it is sometimes important to be sure of the basis of occupation and to be aware of the fact that tenants’ rights can be created in some circumstances when a formal lease has not been signed.

This is because the Law of Property Act 1954 (Section 54) provides that a lease can come into being without the need for the preparation of a written lease. There are certain conditions which apply in such circumstances, which are, in simplified terms, that:

- The lease cannot exceed three years;
- The term starts when the lease is put into effect (i.e. not later)
- The rent is the market rent for the premises.

Recently, an appeal was heard from tenants who were occupying premises paying a rent of approximately one third of the market rate under a one-page agreement which was not properly executed as a lease, but which they claimed was sufficient to constitute a lease under Section 54. They claimed that as a result they had security of tenure when a new purchaser of the freehold of the unit they let sought to evict them from the premises.

The case went to the Court of Appeal, which concluded that the tenants did not have a lease under Section 54 as the requirement that the rent payable was equivalent to a market rent was not met. Accordingly, the arrangement could be terminated on demand.

“Had the rent payable been close to the market rent, the decision may well have been different,” says Richard Taylor. “A landlord who had driven a harder bargain to start with might have found himself with a property that had a sitting tenant and was therefore more difficult to sell as a result. It makes sense in cases in which premises are occupied on an informal basis to put the arrangements in proper form so that questions such as this can be dealt with speedily.”

For more information on leases contact Richard Taylor on 01992 300333.

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Shared Intentions Determine Ownership

The danger of cohabiting without making an express agreement as to how the title to property is to be held has again been underlined by a recent case.

It concerned a woman who had lived with a man for several years in a house which was registered in their joint names and financed by a mortgage. However, there was no document recording the couple's respective shares in the ownership of the property. The man had paid the deposit on the house from his own funds and also paid the mortgage repayments. He also paid other costs relating to the property, such as rates and utility bills. The couple had children and the woman, who worked, spent the majority of her income on them and the maintenance of the family.

The couple drew up wills leaving their estates to one another.

When their relationship broke down, the man argued that whilst he intended that his partner should inherit the property on his death, he had not intended it to be owned in equal shares. In court the judge decided that ownership of the house should be apportioned by the respective contributions of each party to its purchase. Since the woman had made no contribution, her share was nil. She appealed to the Court of Appeal, asserting that a beneficial joint tenancy had been created with her rightful share being 50 per cent. The man argued that his intention had been only that she would inherit the property if he predeceased her and they were still a couple on his death.

The Court of Appeal found that the judge in the lower court had erred in considering the couple's respective contributions to the cost of the property as representing their intentions with regard to its ownership. The fact that the property was jointly owned justified the assumption that both were beneficial owners. The ownership split had to be determined by the intentions of each party and the important issue was that the relevant intention was the intention understood by the other party. Furthermore, the respective contributions of each party could not be conclusive. The man's intentions were not made clear. His argument that his partner's share should be a lesser sum did not rest on logic and he could not demonstrate that the couple had shared the common intention that her share should be other than a half of the total.

In this case, had there been documentation created when the property was purchased to show how it should be owned, there would have been little room for dispute. The fact that there was no evidence of any such agreement made it possible for the case to go all the way to the Court of Appeal.

If you are buying a property with someone else, having the agreed ownership documented when it is purchased is inexpensive and easy to do. Contact Anna Baptist for advice on 01992300333.

Longmores Event

Our 'Keep it in the Family' Seminar

Longmores regularly hold Keep it in the Family seminars aimed at anyone concerned about their retirement years, suggesting ways in which assets might be protected from Inheritance Tax and nursing home fees.

We hold these seminars regularly throughout the year, so if you would like to be informed of our next seminar then simply telephone Nicole Windross on 01992 300333 or email her on nicole@longmores-solicitors.co.uk with your details and she will send you an invitation.

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