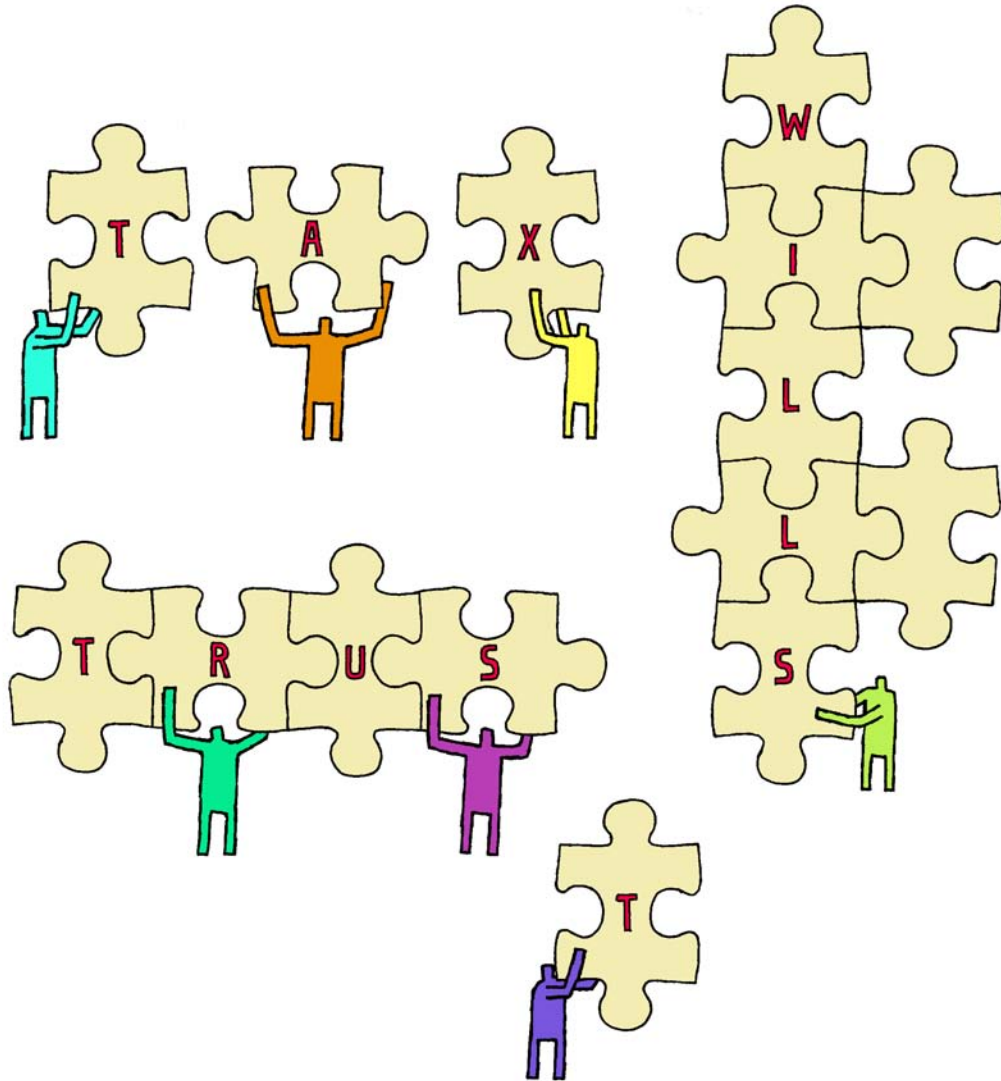


Atholl Browse

Autumn 2009



WELCOME

I am delighted to welcome you to this Autumn edition of Atholl Browse. As the new editor I would like to take this opportunity to thank our former editor, Randall Nicol, for all his hard work and enthusiasm. We wish him a very happy and active retirement.

You will notice that we have changed the format of this newsletter. We hope to share more articles and news items of interest and relevance to you. We are also keen to get your feedback and very much welcome your comments. If there are particular issues that you would like to see comment on in future editions please let us know.

In the face of ongoing challenging economic conditions, the Private Client team has been busier than ever exploring the opportunities for you to carry out some effective tax planning due to depreciating asset values. I very much hope that you will enjoy reading about these.

Susanne Beveridge, Partner

Family Limited Partnerships

A new kid on the block in the world of inheritance tax planning

Whichever party wins the next general election it is unlikely for some years to come that we will see a significant relaxation of the rules on inheritance tax. The government will need to cut costs and maintain or improve its income through taxation to ensure that the country's move out of recession, and into better times, happens as quickly and as smoothly as possible.

In 1894 the first "modern" set of rules was introduced to tax wealth on death. Since then there has been a plethora of changes to the rules and regulations. However, every government of whatever hue has been happy with the several billion pounds the tax produces while being relatively inexpensive to collect.

Over the years there have been many "schemes" which have purported to be tax avoidance plans and many of these have been put to the sword by the Inland Revenue who saw them as overly aggressive tax planning. It is apparent from what the Prime Minister and other world leaders are saying that there is a strong intention on the part of governments not to allow extreme tax avoidance schemes, or offshore tax shelters, or ignore secret bank accounts which result in appropriate tax not being paid.

Having said all that, what remains to the tax planner are the rules and regulations which exist in general law and which are available to ensure that a client's assets are organised to pay the minimum amount of tax.

Brodies LLP has developed the Family Limited Partnership with a view to doing just that. We looked closely at the law of partnership following changes made to the inheritance tax treatment of trusts which were introduced in 2006. The idea was to try to find an alternative to trusts which would provide a vehicle for control of family assets for various members of the family who, for reasons of youth or incapacity, were not thought suitable to hold the assets themselves.

The general idea is that a partnership will be established to hold investment funds for various family members. There will be restrictions on family members withdrawing funds and on who controls the investment of partnership funds. The practical result may be similar to a trust arrangement but it will not be subject to the inheritance tax consequences of trusts following the Finance Act 2006.

Inheritance tax planning is still fairly straightforward for couples who have £1m or so but thereafter, particularly where there are children or grandchildren involved, the tax planner's armoury was significantly reduced following the Finance Act 2006. The Family Limited Partnership which Brodies has developed is now a significant addition to that armoury. This new tax kid on the block is not for everyone but if you own several millions of assets, if you are concerned about inheritance tax, if you have beneficiaries to protect and if you wish to retain control of the investment of the assets you have an option in the Family Limited Partnership.

Hugh Stevens, Partner

**"Brodies LLP combines modern commercial thinking
with excellent client service."**

Judges panel, STEP Awards 2009/10

Brodies LLP Awards 2009



'UK & Ireland Regional Legal Team of the Year'
STEP Private Client Awards 2009/10



Brodies - Family Limited Partnerships
'Innovators Award' finalist
Scottish Financial Enterprise Award 2009



'Private Client Firm of the Year'
The Law Awards of Scotland 2009



'UK Private Client Team of the Year' finalist
The Lawyer Awards 2009

'Commended' for Client Service, Financial Times Innovative Lawyers 2009

Trusts and will planning for disabled beneficiaries

Families with a disabled relative will, understandably, be anxious to ensure that on their death, the disabled person will be adequately provided for. This is of particular concern when the disabled person is unable to live independently.

The traditional will, which leaves everything to the surviving spouse in the first instance and then equally to all the children, may not therefore be appropriate. This article looks at what arrangements might be suitable.

The word child, in this note, refers not only to children under 16 but also to adult sons and daughters. For example, the child who inherits may -

- not be capable of handling large sums of money
- be in care which is funded by the local authority
- only have income from state benefits

If they were to inherit, consideration would need to be given to issues such as -

- Is there an appointed guardian? Has a substitute guardian been appointed in case the guardian is unable to act?
- Can the child's inheritance be preserved or will it be eroded by care home fees?
- Likewise, can the child's means tested benefits be preserved?

Case Study

Take, for example, John. He is 30 and is a permanent resident in a care home. He does not have legal capacity.

His grandmother has died leaving him a ¼ share in a house and £50,000 in cash. His siblings have inherited the other shares of the house, and they have decided to rent out the property.

John does not currently pay for his care and receives means tested benefits. He does not have a financial guardian. John now has capital which exceeds the current limits (£22,500) - meaning that he is no longer entitled to assistance with care costs and his means tested benefits will be lost.

When his capital is reduced to £22,500 he will again be entitled to such assistance.

Similarly, when his capital is reduced to £16,000 he may be entitled to some means tested benefits.

Succession Reform

The Law Commission has recently published a paper with proposals on how to reform the law on succession.

Currently legal rights claimed by a spouse, civil partner or child relate to a share of the moveable estate only. One proposal is to lose the distinction between moveable and heritable property when calculating legal rights. This may be a concern to those who own businesses such as farms.

However, these are only proposals and things could still change. The proposals highlight, once again, the importance of having an up to date will in place to express your wishes clearly.

However, the local authority, when undertaking the financial assessment, is likely to consider the value of the property. John does not have access to this cash; how will he be able to pay for care if his contribution exceeds his income?

Will a financial guardian require to be appointed? If so, this would involve considerable time, and expense.

All these factors considered, is it possible for a family member to leave funds to the disabled party without damaging his benefit arrangements?

Small legacy (less than £6,000)

If the amounts are small they are unlikely to affect any financial arrangements which the disabled person has in place. Consideration should be given, if there is no attorney / guardian, to leaving the legacy to a suitable individual who will use these funds for the disabled person's benefit.

Other legacies

There is no doubt that if there are substantial funds to be left to the disabled person, a discretionary trust should be considered. Such a trust would enable your appointed trustees (the persons responsible for administering the money) to distribute the funds in a way that most benefits the disabled person and avoids any adverse consequences.

Substantial sums could also be distributed to the disabled person without the requirement for a guardianship order, therefore saving time and expense.

Those who are wealthy may also wish to consider lifetime planning. A disabled trust would offer tax benefits to the person gifting the sums while also benefiting the disabled person.

Those who are familiar with benefits will know that the rules are by no means coherent and are continually changing. In each individual case, attention should be paid to the child's particular circumstances when considering the most suitable option.

Professional advice should always be sought to ensure that your affairs are dealt with in the best way. An up to date will fully reflecting the individual circumstances is therefore essential.

Karen Phillips, Senior Solicitor

Are you a charity that straddles the border?

There have been recent changes to the regulation of cross border charities. It is important that charities in England and Wales which require to be entered or are already entered on the Scottish Charity Register meet the new regulatory requirements. If you are a trustee of a charity who is affected by this please get in touch for further information.

Who will look after the kids?

In most cases as a parent, you have legal rights and responsibilities in relation to your children until they are 16. But what would happen to your children if you were no longer here? We explore the practicalities of appointing a guardian to your children in your will and discuss what might be appropriate in different circumstances.

I'm married so they will always have someone

If you are married it may be that your spouse would look after your children if you were not here; but what if something happened to you both? Admittedly this is not a pleasant thought, but something that you should consider when making your will.

You can appoint a guardian to your children only in the event that both you and your spouse are no longer around. By doing this it will not be left to the court to decide, which would involve uncertainty and expense.

We are not married - what about our children?

Unlike a child's mother, unmarried fathers have not always had automatic rights and responsibilities. If this applies to you, then you may require to obtain parental rights and responsibilities by either obtaining what is known as a 'section 4' agreement, or by applying to the court. This depends when the child was born. You will need these rights and responsibilities before you are able to appoint a guardian.

Other situations

If you are divorced, separated or a single parent, appointing a guardian is a way of helping you to maintain a degree of control in the event of your death.

However, those appointed must be willing to work alongside the surviving parent or guardian because, if agreement cannot be reached, the court may need to decide what is best for your child.

The second edition of "Drafting Wills in Scotland" co-authored by Andrew Dalglish, Alan Barr and Hugh Stevens was published at the start of the year. The book has been described as the "bible" for will writing in Scotland.

Articles by:



Susanne Beveridge
Partner and Editor

0131 656 0218
susanne.beveridge@brodies.com



Hugh Stevens
Partner

0131 656 0240
hugh.stevens@brodies.com



Karen Phillips
Senior Solicitor

0131 656 0285
karen.phillips@brodies.com

Why is it so important that it is in my will?

Appointing a guardian in your will gives that person full parental rights and responsibilities, allowing them to look after your children as you would. However, if it is left to the courts to decide who looks after your children, it can be both a lengthy and costly process removing all control and choice from you.

How difficult is it to appoint a guardian?

Appointing a guardian in your will is straightforward. If you do not have a will then getting one in place is your starting point. If you do have a will that does not appoint a guardian to your children or the appointment is outdated, then a review is advisable. There may be other changes you wish to make at the same time.

Who should I appoint?

This is a big decision but one that you, rather than the courts, should make. Who would be fit to take on this role and would take into account your wishes? You should also consider the practicalities. Would the children's grandparents really be fit to look after them full-time? Would it be best to appoint a couple rather than separate individuals?

It is advisable to consult those concerned to see whether they would be willing to take on this role should it ever be required.

No will?

If you do not have a will, it will not only be up to the court to decide who is appointed guardian if your estate passes to your children (and it is over a certain amount), the court will also determine how to administer it.

However, if you do have a will, you could incorporate a trust for your children allowing you to specify how you would like the funds to benefit your children and at what age they should receive funds.

Having a will in place means you have control and choice. The last thing you want is for matters to be left to the courts to determine, as no one knows your children better than you do.

Susanne Beveridge, Partner