Your life & the law

Newsletter for private clients

willans

Willans LLP | solicitors

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Latest news from Willans

We're delighted to welcome **Miranda Hawkes** to our wills, trusts & probate team.

A chartered legal executive, Miranda re-joins the firm after leading the wills, trusts & probate department at a Malvern-based firm. Before this, she worked at Willans for five years, latterly as a probate executive.

Miranda, who has almost 10 years' legal experience, is a full member of Solicitors for the Elderly and the Society of Trust & Estate Practitioners (STEP). ■

Read our legal insights on coronavirus. Visit: willans.co.uk/covid19/

Welcome

Welcome to the second edition of 'Your Life & the Law', in which we give a round-up of the latest legal developments which may affect your everyday life, and that of your family. We hope you enjoy the read, and that you are all keeping well during this difficult time.

As always, we'd be pleased to hear from you if we can help you with any of the legal issues covered in this newsletter.

Bridget Redmond managing partner

Legal support during challenging times

We would like to reassure all of our clients that we are here for you during this most challenging time, and our legal services are running as normal.

Having invested heavily in IT and infrastructure over the last few years, we are thankful to have been as well-prepared as possible to minimise any impact on our clients and staff as a result of emergencies such as the COVID-19 outbreak. All of our staff, including lawyers and support staff, are fully-equipped to work from home and are able to conduct work for you as normal. We have put in place procedures for signing and witnessing documents so that we can safely assist clients who wish to, for example, make a will, or review an existing one.

As is the case with most businesses in the UK and worldwide, we're constantly finding new ways to keep in touch with our clients, many of whom will be currently isolated. The means of communication we are using include video calls, along with traditional methods such as phone, email and post.

So, whichever way you find easiest to communicate, please rest assured that we're ready and able to work with you. ■

Who will make decisions about your health and welfare, if you became unable to?

Simon Cook
Partner

Wills, trusts & probate

Partner and head of the wills, trusts & probate team, Simon has 25 years' experience in the field.

He is rated in independent national legal guides *The Legal 500* and *Chambers High Net Worth*.

Though no-one likes to think about losing the ability to manage our own affairs, it can happen. It is important to put arrangements in place so that others can make certain decisions for us in case we become unable to do this ourselves, for example through illness or another type of incapacity.

You can make these arrangements using a lasting power of attorney (LPA), which is a legal document that allows you to nominate one or more people to make decisions on your behalf.

There are two types of LPA – one regarding your property & affairs, and another regarding your health & welfare. The former is very common, the latter is (surprisingly) much less so.

An LPA for health & welfare covers decisions from refusing medical treatment to deciding where the person concerned (the donor) is to live. The donor's family may have the best understanding of the donor's wishes and requirements, such as treatments the donor would accept or refuse, or the type of care the donor should receive.

> "...without a health & welfare LPA, doctors or social services are under no obligation to follow such wishes.."

However, without a health & welfare LPA, doctors or social services are under no obligation to follow such wishes if the donor is no longer able to express those wishes themselves.

As an example, Mr X is a widower with two daughters who do not live locally to him. Mr X had previously put in place an LPA for property & finance, but chose not to proceed with a health & welfare LPA, despite advice to the contrary. Mr X's health subsequently deteriorated and he had to move into a nursing home. Unfortunately, due to dementia he no longer had capacity to make certain decisions for himself. Due to the distance, his daughters found it difficult to visit him, so they proposed that Mr X be moved to a nearer nursing home.

However, the nursing home intervened, because it had to be shown that the move to the new nursing home was in Mr X's best interests for health & welfare reasons. As there was no LPA for health & welfare, and so no attorney for such matters, the local authority had to become involved.

Eventually Mr X did move to the new nursing home, but this was several months after the initial move had been planned. The delay caused much stress, worry and cost for the family, all of which could have been avoided if an LPA for health & welfare had been in place. ■

Simon Cook
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Increase to residence nil rate band allowance

On 6 April, the residence nil rate band allowance will increase to its maximum limit of £175,000.

The residence nil rate band (RNRB) was first introduced in April 2017 to provide individuals with an additional inheritance tax allowance, when their estates exceeded the basic inheritance tax threshold of £325,000 and met certain qualifying conditions. The RNRB has been gradually brought in on a tapered scale over the last four years, and will increase on 6 April from £150,000 to £175,000 per person.

The RNRB is available to individuals whose property, owned and used as their residence, (or the equivalent monetary value) is inherited by their direct descendants on their death either under the terms of their will, or under the laws of intestacy.

For the purposes of the RNRB ,the definition of "direct descendants" is wide-reaching and includes not only lineal descendants but also step children, adopted children, foster children, children whom they are appointed as guardians or special guardians for, as well as the husbands/wives/civil partners of lineal descendants, thus being significant in reducing the chargeable value of many individuals' estates for inheritance tax purposes.

The qualifying conditions for the RNRB are complex however, and easy to miss. In particular, individuals who leave their estates to their children/grandchildren conditional upon them reaching a certain age, or whose homes or a share of their home are held in certain trust arrangements or in the name of a company, or whose estates exceed the value of £2million could be prevented from fully maximising the inheritance tax allowances available to them.

If you are unsure as to whether your estate will qualify for the RNRB, whether the current provisions of your will meet the RNRB's qualifying conditions, or if you have yet to make a will, please do contact us. ■

Laura Stone
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Laura Stone
Solicitor

Wills, trusts & probate

A solicitor in our *Legal 500*-rated wills, trusts & probate team, Laura helps a wide range of clients, including the elderly and vulnerable, high net worth individuals, executors and attorneys, families and legacy officers.

Is my marriage legal?

The Court of Appeal has recently ruled that an Islamic marriage ceremony falls short of the legal provisions for marriage under English law. As a result, the couple in question were barred from pursuing financial claims against each other upon their separation and the opportunity to account for all the non-monetary contributions normally recognised by the English divorce courts was lost.

Arguably, the problem arises for Islamic marriages only but, with a current trend for wedding ceremonies to take place almost anywhere but a traditional church or register office, it's worth considering what makes a marriage legal under English marriage law.

For both parties to be eligible to marry, they must be over 16 years old (with parental consent if under 18) and single. The marriage venue must be a permanent structure with a roof, and licenced. The ceremony can now be at any time of day or night (although certain faiths discourage marriage at certain times of the year).

For all ceremonies in the UK you need to give notice to your nearest Superintendent Registrar, up to 12 months prior to your set date or no less than 16 days. Before a church wedding takes place, there must be a reading of the banns.

The ceremony must take place in front of a registrar, or person authorised to marry couples, with two witnesses present.

You will also need to produce evidence of your identity. If you are already married and divorced you will need to produce your certificate of decree absolute.

You can write your own vows in a civil ceremony as long as they include the standard statutory declarations of marriage.

So, it is time for a reform of the laws of marriage in the UK? In a society as rich in diversity and culture as ours, surely it should be possible for couples to be free to choose exactly where when and how to formalise their respective "I do's". However, until the laws are changed to put unmarried couples on an equal financial footing to married couples when their relationship breaks down, the cost of getting it wrong far outweighs the benefit of being free to arrange your own marriage ceremony exactly as you might like it. ■

Sharon Giles
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Sharon Giles
Partner
Divorce & family law

Head of the family law team, Sharon specialises in complex financial matters often involving business interests, significant pension resources and/or properties and investments owned abroad.

Executors: don't trip up on income tax rules

Income tax is something we think about regularly during our lifetime, but it is often forgotten about after someone has died.

An executor, as part of their role in administering someone's estate, needs to finalise the deceased person's income tax position. As all bank interest is now paid gross, there will almost always be some income tax to be dealt with.

The executor needs to work out the income tax position in the tax year that the person died up to the date of their death, and for the estate administration period which may span across more than one tax year. They need to report this to HMRC.

In addition, assets of the deceased which are sold during the administration period are subject to capital gains tax (CGT). While capital gains that have arisen during the deceased's lifetime benefits from a tax-free capital gains tax uplift at the date of death, increases in value of the deceased's assets from the date of death to the date of sale are subject to CGT (and benefit from relief on losses incurred). The executor is required to report those gains or losses to HMRC when reporting the income tax position.

Remember, executors are personally liable for any tax due to HMRC on behalf of the deceased. Seeking help from a legal professional will give you peace of mind that you have dealt with all aspects of the estate correctly, and avoid problems arising long after the estate has been distributed to the beneficiaries.

If you would like advice on this issue, please get in touch. ■

Miranda Hawkes
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Miranda Hawkes
Chartered legal executive

Miranda is a Fellow of the Chartered Institute of Legal Executives. She helps clients with all kinds of issues involving wills, trusts and probate.

The probate process explained

Jennifer Cockett
Solicitor

Wills, trusts & probate

Jennifer helps clients with issues such as the preparation of wills, trusts, estate administration, inheritance tax planning and lasting powers of attorney.

When someone dies, you may need to apply for a grant of probate or letters of administration in order to deal with their estate. For ease, references in this article to a 'grant' refer to both grants of probate and/or letters of administration. Whether you need a grant depends on what the assets of the deceased are, how they are owned (i.e. jointly or in sole names) and their values.

If a grant is required, here are the key steps. This is a simplified version - so make sure you take specialised advice.

✓ Identify if there is a will

If there is a will – this will tell you who the executors are and therefore who should be dealing with the estate. It will also tell you who is to benefit from the estate.

If there is no will – there is an intestacy. You will need to look at the intestacy rules to work out who should be dealing with the estate (and also who will benefit).

✓ Identify the assets and liabilities

If you are dealing with an estate, you will need to locate all of the assets and liabilities/debts of the deceased and obtain date of death valuations (this includes valuations of joint assets).

✓ Apply for probate (if required)

This will involve completing an inheritance tax return (short form or long form depending on the complexity of the estate) and making an application to HMRC and the probate registry.

✓ Collect the assets and pay creditors

Once you have obtained the grant, you will need to send this to the various asset providers and complete their individual requirements to collect in the assets. From these assets, you will need to ensure that you settle any liabilities.

✓ Complete other administrative tasks

For example, finalising the estate accounts showing what has happened to the assets from the date of death to distribution, as well as completing any final income tax returns, etc.

✓ Distribute the estate

This may be as simple as transferring cash across to beneficiaries, or it may require transfers of land, etc.

You should be confident at this stage that all of the above steps have been taken, as once you have released the assets and are no longer in control of them, you won't have any funds to settle any liabilities which come to light after you have distributed the estate. If you have any concerns about liabilities or claims that you may not be aware of, there are insurance policies etc. that you can put in place to protect yourself.

If you would like more information about the probate process, please contact our wills, trusts and probate team. ■

Jennifer Cockett
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Freeholders: check leases before you say 'yes' to alterations

Many leasehold properties have a lease which contains rules known as 'restrictive covenants'.

These restrictive covenants can vary, but typically say that the lessee (flat owner) mustn't make structural changes to the property. At the same time, however, these leases generally require the lessor (landlord) to enforce the covenants in *all* the leases against *all* the other lessees (owners of the other flats in the block, for example).

The other flat owners in theory should be able to rely on the landlord to enforce the covenants. So, if a landlord allows one lessee to breach their lease, they are then obliged to ensure the covenants in all the other leases of other leaseholders are being complied with.

If this were allowed, then in theory, lessors could grant consent for any breach and avoid its obligations to have to take enforcement action. This would leave other flat owners with little recourse, should other flat owners in the building not comply with the terms of their lease.

This has recently been put to the courts in *Duval v 11-13 Randolph Crescent Ltd (2018)* and decided by the Court of Appeal this was a breach of the landlord's covenant.

Whether this view will be upheld is undecided as permission has been granted for it to be referred to the Supreme Court. It does, however, raise questions for now. Not only could it affect landlord's obligations but also the desire to buy leasehold property as potentially consent for alterations could not be granted.

If we can help you with any of this, please get in touch. ■

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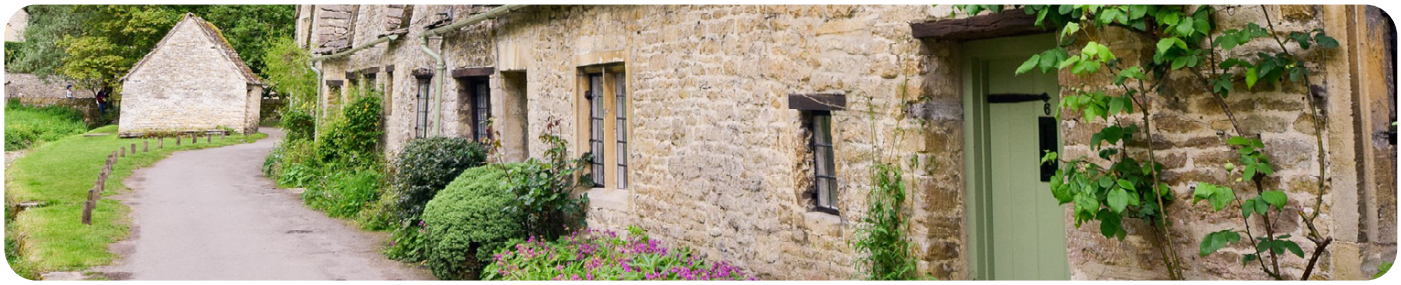
Héloïse Brittain
Conveyancer

Residential property

Héloïse is a graduate member of the Chartered Institute of Legal Executives.



Suzanne O'Riordan
Senior associate, conveyancer

Residential property

Suzanne leads our residential property team and has been a conveyancer since 1994.

New EPC rules on the horizon for listed buildings

Domestic Minimum Energy Efficiency Standards (MEES) refer to the minimum energy rating on an Energy Performance Certificate (EPC) which is the requirement for a rating of E or above for residential properties.

Changes are on the horizon in terms of energy performance criteria and if you are intending to sell or rent out your property, you must ensure you can comply.

All properties sold or rented in England and Wales (with the partial exemption of listed buildings) have long had to have a valid EPC certificate (which are valid for 10 years).

As of 1st April, a non-exempt residential property cannot be sold or privately rented unless it has an EPC rating of E or above. Buy-to-let mortgages will also be likely impossible to obtain if the rating is not E or above, potentially impacting the buy-to-let market.

Traditionally, listed buildings have not needed an EPC. However, this is only a partial exemption. In order for the listed building to be fully exempt, the requirements to meet the minimum standard must "unacceptably alter their character or appearance". These changes may be obvious (e.g. UPVC windows replacing traditional sash) but are not always so.

Notably, it has been suggested that in order to assess whether a listed building requires an EPC, an EPC needs to be carried out to highlight the suggested improvements. This can leave the situation unclear. ■

Suzanne O'Riordan
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What happens if someone dies without leaving a will?

The 'rules of intestacy' are the rules that govern what happens when a person dies without leaving a will. The person's property (the estate) must be shared out according to these rules.

A person who dies without leaving a will is called 'intestate'. Only married people or civil partners (and some other relatives such as children) can inherit under the rules of intestacy, so if a person is divorced or their civil partnership has legally ended at the time of death, the surviving spouse or civil partner cannot inherit. Spouses and civil partners who have separated informally can still inherit under these rules, but they must still be married or in a legal partnership.

The surviving spouse or civil partner of a person who had died intestate used to receive a statutory legacy of £250,000 plus interest from the estate, the intestate's personal belongings and half of the remaining estate.

However, in February this year, the statutory legacy increased to £270,000 for people who have died intestate. Though this may seem like a lot of money, if the estate is worth more than that upon death and the children are entitled to half of anything over that amount, it could force the sale of the property.

Dying intestate is not uncommon; many people do not realise that significant events (such as getting married) invalidate any existing will. Others simply feel they don't have time to make a will or don't want to face the inevitability of death.

Importantly, unmarried couples, even if they are living together, are particularly vulnerable without a will. The surviving partner will have no automatic rights to the intestate's estate and the law will determine what happens to their assets. One example is if the couple has children; the assets would bypass the surviving partner and go straight to the children. If there are no children, the assets would pass to the nearest relatives (still bypassing the partner). If there are no relatives, the assets would pass to the Crown.

Therefore, although there is now a higher statutory legacy, it is important to be aware of the consequences of dying intestate, and the protection having a will can provide. ■

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Siân Ford
Paralegal

Wills, trusts & probate

Siân is a paralegal in our Legal 500-rated wills, trusts & probate team. She provides practical support to the lawyers in the drafting of wills and the administration of trusts and estates.

Court of Protection applications: a daunting process explained

Susie Jones
Private client executive
Wills, trusts & probate

Susie has nine years' experience of working in this area of law and advises on matters including wills, powers of attorney, trusts, estates, inheritance tax planning, and Court of Protection applications.

It's something none of us wants to have to do: making an application to the Court of Protection to act as an individual's deputy, when they no longer have capacity to deal with their own financial affairs.

This can be a daunting process, and the confusing nature of the applications for the uninitiated can make things even harder. To help make the process a little clearer, we have outlined some of the typical stages of a straightforward application below.

1. Initial meeting and signing of documents

We have an initial meeting with you to discuss P's circumstances and gather the relevant information we need to draft the application forms.

A client engagement letter and terms of business will then be sent to you to confirm your instructions and provide a cost estimate.

2. Preparing a draft application

Upon receipt of the signed documents we will prepare a draft of the deputyship application and will send this to you to review. If we require any further information this will also be highlighted at this stage.

Once any missing information has been obtained and the application has been approved by you we will finalise the forms and send these to you for signing.

3. We send the application to the CoP

Upon receiving your signed application forms we will lodge these with the CoP for them to review. They may raise further queries here but this will depend on a case by case basis.

4. Initial deputyship order issued

In straightforward cases where the court do not raise any queries, they will proceed to issue the initial deputyship order to us.

5. Notification

Upon receipt of the initial order, the respondents, and P need to be notified within 14 days. Within 7 days of notification, forms CoP20A and CoP20B need to be lodged with the court.

The Respondents, and P, then have 14 days themselves to respond to the CoP with any concerns, if they have them.

6. Security bond and final order

After a final review, the Court will write to us confirming that they have issued the final order. However, you must first give security to the CoP by way of a security bond; this must be in place within 28 days of the letter from the CoP. Once the security bond is in place, the CoP are automatically notified and will then write to us. They will send their final letter and court-sealed copies of the final order for your use.

7. Completion of application

We will then need to check the final order carefully and any spelling mistakes or errors will need to be rectified with the court. If the final order is correct as received, you must notify P of the court's decision within 14 days of the final order, and provide them with a copy of the same.

A typical application can take as long as 6-7 months, dependent on the court's timescales.

Although the deputyship application will then be completed, you will be required to keep accurate records of any financial decisions or payments you make on P's behalf. You will also have to prepare a report to account to the CoP each year you act as deputy.

Please note that the above relates to a typical, straightforward, deputyship application where you have appointed Willans to act on your behalf.

If you would like any further information or assistance with a deputyship application, please don't hesitate to contact us. ■

Susie Jones
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Glossary

P: The individual who does not have capacity and for whom you will be applying to act as deputy.

CoP: The Court of Protection (the division of the court that deals with deputyship).

Respondents: These are the individuals who must be notified as part of the deputyship application (certain family members, close friends, care home managers, social services, and so on).

Security bond: This is a type of insurance or financial guarantee that protects P in the unlikely event that you were to misuse their funds. The amount is set by the CoP.

Nick Southwell
Associate, solicitor
Litigation & dispute resolution

Nick works with a wide range of private and commercial clients. He has particular expertise in contentious probate and landlord and tenant disputes.

Landlords: get up-to-speed with Tenant Fees Act

Since June last year, landlords have not been allowed to charge any fees (except those specified as 'permitted') when they enter into a tenancy agreement, student let or licence to occupy housing in the private rented sector.

Where a tenancy agreement was entered into before 1 June 2019, landlords are still entitled to charge fees until 31 May 2020, but only where these are required under an existing tenancy agreement (for example, fees to renew a fixed-term agreement which a tenant has already agreed to pay).

From 1 June 2020 the ban on fees will apply to *all* applicable tenancies and licences to occupy housing in the private rented sector. You won't be able to charge any fees after this date (except the 'permitted' fees, which include things like the rent, payments to change the tenancy up to £50, and payment for the replacement of a lost key).

> "...breaches may lead to you being added to the database of 'rogue' landlords .."

Breaking these rules will usually be a civil offence, carrying fines of up to £5,000. If another breach occurs within 5 years of a fine or conviction for a previous breach, this will be a criminal offence, which may lead to prosecution and an unlimited fine. Breaches may also lead to you being added to the database of 'rogue' landlords and property agents, or even becoming subject to a banning order under the Housing and Planning Act 2016.

As well as this, your tenant will be entitled to be repaid any unlawfully-charged fees, an unlawfully-retained holding deposit or amounts paid under a prohibited contract, as well as any interest awarded by the enforcement authority.

You would also be unable to use the section 21 procedure to recover possession of your property, until any unlawfully charged fees or holding deposit have been given back to your tenant.

Landlords and agents should be aware that certain charges (for example, charges to view a property, set up a new tenancy or for references or credit checks) are now prohibited and should not be passed to tenants:

If you're in any doubt about these regulations, please do get in touch for advice. ■

Nick Southwell
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Exiting shareholder? Think about inheritance tax

Thanks to 'Business Relief', whilst a shareholder holds shares in a trading business, the value of those shares is free from inheritance tax (subject to certain criteria). In addition, any property held personally but used in the running of that trading business will also qualify for 50% inheritance tax (IHT) relief.

But what happens if those shares are sold before the death of the shareholder?

The act of selling qualifying shares effectively swaps tax-free shares for taxable cash. In addition, the 50% relief applied to properties used in the running of the business but held personally will also be lost. IHT is currently charged at a flat rate of 40% so for large business interests, it can be a big difference.

So what can an exiting shareholder do to manage their IHT position?

The simplest option is to give away the taxable cash during their lifetime. If the retired shareholder survives 7 years from the date of the gift, the value falls outside of their estate and does not suffer IHT upon their death.

However, this isn't fool-proof; the shareholder may die within 7 years of the gift (in which case the cash is still taxed even though it is no longer held by the shareholder) or they may be relying on the cash as part of their retirement planning in which case, gifting will not be affordable.

Alternatively, the exiting shareholder may invest the proceeds of the sale into other assets qualifying for Business Relief, such as unquoted shares. Unlike gifting, this allows the shareholder to retain control of the funds (perhaps earn an income and/or benefit from any capital growth) whilst also securing IHT relief on the investments.

Certain Business Relief qualifying investments can also offer additional capital gains tax and/or income tax benefits. For exiting shareholders who have built up their businesses from scratch, this can be a real bonus. HMRC impose strict deadlines for reinvestment in order for these reliefs to apply, so investment plans would ideally be in place before a business sale completes.

Remember, any form of investment comes with its own risks; careful planning and good advice is vital. Whilst we cannot offer financial advice, we regularly work alongside reliable advisors who would be happy to help exiting shareholders with their future tax planning. Please ask us for a recommendation. ■

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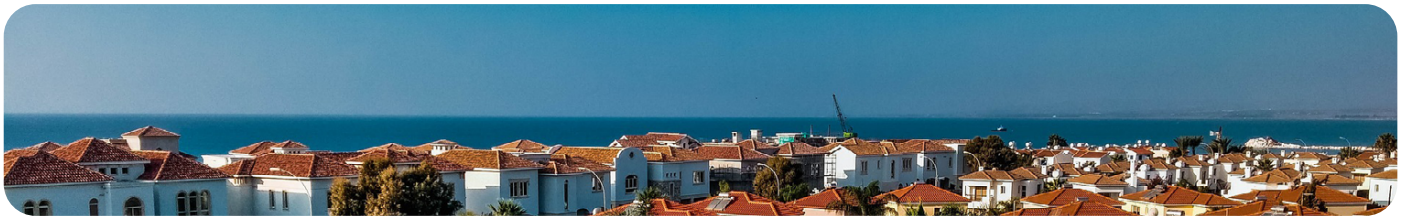
Rachel Sugden
Associate, solicitor
Wills, trusts & probate

Rachel is a member of the Society of Trust & Estate Practitioners (STEP) and helps clients, including business owners, with complex estate and tax planning, lifetime trusts and the administration of estates.



Non-resident capital gains tax: what you need to know

Hannah Wall
Associate, solicitor
Wills, trusts & probate

Hannah advises UK and non-UK resident clients on matters including tax and succession planning, wills, trusts and lasting powers of attorney, and the administration of estates with cross-border elements.

If you own property in the UK but do not live in the UK, you should make sure that you comply with non-resident capital gains tax (NRCGT) rules, including the changes from 6 April 2020.

Since 6 April 2015, non-UK residents selling UK residential property have had to pay NRCGT on the proportion of the gain that relates to the period after 5 April 2015. On 6 April 2019, the scope of NRCGT increased to cover gains on direct and indirect disposals of all UK land and property (a direct disposal is selling the actual property, whereas an indirect disposal is, for example, selling shares in a company that owns UK property).

An NRCGT return must be submitted to HMRC within 30 days of the date of the disposal, and this applies regardless of whether you think there is any NRCGT payable or not.

The gain can be calculated by either establishing the value of the property as of 5 April 2015 or 2019 ('rebasing') and then working out the amount of gain over that value or by carrying out a 'straight-line time apportionment' of the gain over the period of ownership.

Once the gain has been calculated with the annual exemption and available reliefs deducted, the tax is calculated at a rate of 18% or 28% (as appropriate) on the excess (these rates are for residential property only). Any NRCGT due is payable within 30 days of the disposal.

If the residential property being disposed of was previously your main residence, then you may be entitled to principal private residence relief (PPR) on part of the gain.

However, a tax year while you are non-resident will only be eligible for PPR if you have spent at least 90 nights in that property for that year. Practically, this means there are few cases where a non-resident will be eligible for PPR.

In addition, new rules for landlords who once lived in their rental property are due to come into force this April. Currently, homeowners who previously lived in a property but went on to let it out can claim PPR relief on property sales for up to 18 months after they move out. From 6 April 2020, the period will reduce to nine months. This will hit people who leave home for unplanned reasons before sale, such as lengthy hospital stays. If the owner or their spouse moves into a residential care-home or is disabled, the final deemed period of occupation remains at 36 months.

Lettings relief is currently very valuable; it can be worth up to £40,000 per owner when a landlord sells their former home after renting it out. However, from 6 April 2020, lettings relief will only be claimable where the owner is in shared occupation with a tenant. If we can help you with any of this, please get in touch. ■

Hannah Wall
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Contact

For advice on any of the issues covered in *Your Life & the Law* or any other area of law, these are the people to contact in the first instance.

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