

Private Client Scotland

Welcome

Welcome to the first edition of 'Private Client Scotland' a quarterly publication produced by Legal Knowledge Scotland. Private Client Scotland will be published each November, February, May and August.

Private Client Scotland will review the latest cases, provide updates on the latest consultations, legislation and official publications and also includes articles, editorials and news items.

So why Private Client Scotland and why now?

Private Client Scotland is something that I have been meaning to get round to over the last few years and now finally have the time to do so. It is also a publication that I believe is needed. A publication that aims to bring together all aspects of private client work from a Scottish perspective. If you would like to subscribe to Private Client Scotland or simply would like to know more about it please contact me.

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As for myself, I have over 20 years' experience as a private client solicitor in three different legal jurisdictions; Scotland, England & Wales and somewhat unusually Illinois. I returned to Scotland over 10 years ago and in addition to my private client work I have been heavily

Preview edition,
November 2014

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involved in the debate surrounding the transfer of 'fiscal powers' to the Scottish Parliament. I split my time between Edinburgh and the Scottish Borders.

In this edition of Private Client Scotland I put forward the case for devolving control of inheritance tax to the Scottish Parliament. I then look at the continuing fall-out from Sheriff Baird's decision on the validity or otherwise of certain Powers of Attorney. Included in 'Case reviews' is the Judgement by Sheriff Valerie Johnston in the long-running dispute as to where Private Mark Connoly is buried.

'Professional updates' include a link to the Scottish Law Commission's report proposing major reform to our law of trusts. Lastly the 'News items' section includes stories that range from a dispute over a new crematoria in the Scottish Borders to how Delaware proposes to deal with digital assets on death.

Finally a few words on Legal Knowledge Scotland. It is now over 3 years since my co-editor Andy Duncan and I set up Legal Knowledge Scotland. Although it has taken a huge amount of work to get Legal Knowledge Scotland up and running it has also been great fun.

For more information on the increasing number of services provided by Legal Knowledge Scotland, please take a look at our website.

Editorial

As outlined above, Private Client Scotland will also include opinion editorials.

My first 'op/ed' relates to inheritance tax (IHT) and why control of this tax should be devolved to the Scottish Parliament. The background to this editorial is the submission I have made to the 'Smith Commission'.

The main argument is a simple one. Succession law is already controlled by the Scottish Parliament and if we are to develop policy in this area in a more cohesive manner inheritance tax and the law of succession, including trust law, needs to be developed together. For

example, we could look again at the rates and bands on which IHT is charged, or which exemptions we allow or how IHT and trusts interact.

At present the debate surrounding inheritance tax rates is dominated by house prices in the south of England and how much IHT these assets might attract on death. The reading of any Sunday newspaper shows how this issue is again coming to the fore in that particular part of the UK.

As for political support, the SNP, the Scottish Liberal Democrats and the Scottish Green party already support the devolving of control of IHT to the Scottish Parliament.

If control of IHT were devolved, we would also be in a better position to ensure that a Scottish inheritance tax based on Scottish legal principles would better reflect Scots law and in particular our succession law. IHT is primarily governed by English & Welsh legal principles.

Another advantage relates to tax simplification. A phrase often used but rarely put fully into practice. What is often ignored by commentators in this debate, is that devolving control of taxes such as inheritance tax would not just simplify matters for us here in Scotland but also for the rest of the UK. There would, for example, be no need to explain the peculiarities of each system in each other's relevant guidance and forms.

The devolving of control of SDLT to the Scottish Parliament and the positive reaction to the changes made, and in particular the innovative collection system and progressive system of rates and bands, provides a good example of how positive a change this could be.

My full submission to the Smith Commission can be found [here](#).

Article

The debate surrounding the decision of Sheriff Baird in W 2014 SLT (Sh Ct) 83 continues. This case is referred to as 'NW'. The NW case report can be found [here](#).

Sheriff Baird held that the wording contained in a document which followed a style provided by the Office of Public Guardian (Scotland) was not sufficient to constitute a valid continuing Power of Attorney and therefore such a Power of Attorney was invalid.

The reason given for this decision was that the wording appointing the granter's continuing attorney did not clearly express the granter's intention that the power be a 'continuing power', as required by section 15(3)(b), and the deed was completely silent on the section 15(3)(ba) requirement regarding determination of incapability. Both references are to the Adults with Incapacity (Scotland) Act 2000.

Since this decision the Law Society of Scotland and the OPG (Scotland) have issued guidance and a number of updates. These can easily be accessed on their respective websites. We also now know that the appeal has been withdrawn in NW and that no further proceedings are expected in this matter.

Whilst that door appears to have closed another appears to have opened. The latest instalment comes from Forfar and in the case of B and G Partners, pursuers & NBSP; against H, defender [2014] ScotSC 94.

The Sheriff in this matter, Gregor Murray, refused to follow the ruling in NW. Sheriff Murray "respectfully declined to agree" with Sheriff Baird that every power of attorney must explicitly state the donor's intentions concerning the onset of incapacity. The full case report can be found [here](#).

So where does this leave us. The two decisions reflect the different approach to this question. On the one hand, if the document does not contain specific wording from the 2000 Act as to the grantor's intentions concerning the onset of capacity it is not valid. On the other hand, evidence in addition to the wording used should also be considered when looking to see if there is a valid Power of Attorney. Whilst I have simplified the two positions somewhat, we do now have opposing decisions that broadly reflect these stances.

Although, personally, I may have been surprised as to Sheriff Baird's decision, it cannot be ignored. That is why, over time, I suspect we will see OPG (Scotland) (and many practitioners) change the relevant wording used in any style it publishes. That said, the decision by Sheriff Murray should give those who have used wording that follows the style produced by OPG (Scotland) some comfort.

I also strongly suspect that I will be coming back to this issue in future editions of Private Client Scotland.

Case reviews

Oates v Revenue and Customs [2014] UKUT 409 (LC)

The UK Lands Tribunal (England & Wales) agreed with the taxpayers that a greater proportion of the sale value should be allocated to the farmhouse rather than the adjoining land. This was important as it determined the amount on which main residence CGT relief was available. The full case report can be found [here](#).

Smyth v Rafferty & Others [2014] CSOH 150

The Court of Session upheld a Will made shortly before the testatrix's death in which she left £3m to re-finance her failing newspaper business. The full case report can be found [here](#).

Judgement of Sheriff Valerie Johnston A29/13

This long running matter is set to continue as an appeal has been lodged. This is a family dispute as to where to the body of Private Mark Connolly is buried. My blog on this matter can be found [here](#). This is likely to be the subject of an article in a future edition of Private Client Scotland.

Peat and Kerr v Assembly Theatre Limited [2014] CSOH 144

An executor, the daughter of a woman whose late mother was injured in a fall, can proceed with a claim for damages despite the fact the action was raised more than three years after the incident. The full case report can be found [here](#).

Routier & Anor v Revenue And Customs [2014] EWHC 3010 (Ch)

A legacy left to a charitable trust by a Jersey resident testatrix was denied UK inheritance tax relief. The England & Wales High Court held that the Inheritance Tax Act 1984 contains an implied requirement that a qualifying charitable trust must be governed by the law of some part of the UK. The full case report can be found [here](#).

Drown & Anor (as Executors of Leadley Deceased) v Revenue & Customs [2014] UKFTT 892 (TC)

The executors of a deceased individual who had incurred capital losses during his lifetime are able to claim relief for those losses against income and capital gains that had arisen before his death. The full case report can be found [here](#).

Kerr v Mangan [2014] ScotCS CSIH 69

A deceased Scots resident's land outside Scotland cannot be taken into account when evaluating a surviving partner's claim on the estate under s29 of the Family Law (Scotland) Act 2006. The full case report can be found [here](#).

Professional updates

Finance Secretary, John Swinney, has announced the rates and bands for the new Land and Buildings Transaction Tax. These proposed tax rates and bands are subject to Parliamentary approval. More on this can be found [here](#).

The UK Government has published draft legislation that would put two tax exemptions that are currently granted as extra-statutory concessions on a statutory basis one of which is 'ESC F15 inheritance tax: woodlands subject to deferred estate duty charge'. More on this can be found [here](#).

HMRC has published an update on the improvements it has made since 2012 to its 'bereavement service'. More on this can be found [here](#).

In a written House of Commons answer the UK Government has confirmed that the total value of cultural items accepted by HMRC under the inheritance tax 'acceptance-in-lieu' scheme for the five years from 2009 to 2013 was just under £125m. More on this can be found [here](#).

OPG (Scotland) has introduced new guidance to its procedures for reviewing accounts. More on this can be found [here](#).

HMRC's August 2014 edition of the 'Trusts & Estates newsletter' for trusts and estates practitioners can be found [here](#).

The Scottish Law Commission has published a major report recommending substantial reform of the law of trusts in Scotland. More on this can be found [here](#).

OPG (Scotland) has provided regular updates on Powers of Attorney processing waiting times. More on this can be found [here](#).

The Scottish Government has published a consultation that seeks views on jurisdiction and choice of law; wills and survivorship; rights of succession in limited circumstances; bonds of caution and the timescale for a surviving cohabitant to make a claim on a deceased cohabitant's intestate estate. More on this can be found [here](#).

The UK Government has published a new consultation on extending the inheritance tax exemption for armed forces personnel to all emergency service personnel who die in the line of duty. More on this can be found [here](#).

The Scottish Law Commission has published its long-awaited report on the reform of the law in Scotland to cater for the lawful deprivation of liberty of adults with incapacity. The 'Report on Adults with Incapacity' includes a draft Bill. More on this can be found [here](#).

News items Scotland, UK and further afield

Thirty-eight paintings by Sir Winston Churchill are being offered to the UK, following the death

of the politician's youngest daughter in May. More on this can be found [here](#).

A man who was detained in a mental health unit for killing his partner and their child has had his claim to £80,000 from her estate dismissed. More on this can be found [here](#).

Delaware has become the first US state to grant deceased residents' executors the right to take over their digital assets such as email and social media accounts. More on this can be found [here](#).

Chartered Accountants in England & Wales will soon have powers to licence accountancy firms to practice non-contentious executry work. More on this can be found [here](#).

Plans to open a £2m crematorium in the Scottish Borders have been put on hold after a nearby objector threatened to invoke a 112-year-old law. More on this can be [here](#).

Controversial proposals to create a fully online process for creating lasting powers of attorney in England & Wales have been put on hold. More on this can be found [here](#).

Families in England & Wales will now be able to apply, for the first time, for a 'Presumption of Death Certificate' for a loved one who has gone missing and is presumed dead. More on this can be found [here](#).

German legislation that denies tax relief to legacies left to foreign charities is being challenged by the European Commission. More on this can be fund [here](#).

A major painting by John Constable, titled 'Willy Lott's House from the Stour', was donated as part of the 'Acceptance in Lieu' scheme to settle a £1,012,200 inheritance tax bill. More on this can be found [here](#).

145,000 people from across Europe have asked that 'search' results about them are deleted, with 18,304 coming from the UK. More on this can be found [here](#).

A charitable trust is challenging the compensation scheme for people who say they were abused by Jimmy Savile. More on this can be found [here](#).

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