

Welcome to the **September 2007 Cumberland Ellis News Bulletin**. This issue focuses on recent legal developments in the family and private client field which may be of interest to you in your personal life.

I trust you will find the legal news and press set out below both useful and informative. If you would like any further information on any of the issues raised below or concerning a specific situation, then please do not hesitate to contact the writer of the article or your usual contact at Cumberland Ellis.

[Neil Turner](#) – Senior Partner, Cumberland Ellis LLP

Index of Articles:

Taking the Spleen Out of Splitting Up	-	Hazel Wright & Graeme Fraser, Family
Divorce and Bankruptcy	-	Hazel Wright, Family
Enduring Power of Attorney	-	Cordelia Brand, Private Client
Lasting Power of Attorney	-	Susan Pape, Private Client

Taking the Spleen Out of Splitting Up

Family

Plans to give unmarried couples improved rights on the breakdown of their relationship highlight how worried the Government is about changes in society that leave many women and their children in deep financial trouble once a partnership breaks down. But for many who plan to co-own property, any change to the law (which is not expected to happen quickly) will not necessarily help them.

Many centuries ago, marriage was not formal. The Church or State was not involved. But after the Marriage Act of 1753, common-law spouses no longer had the same rights as those legally married. One effect is that when a home is bought, a couple must always be clear about their intentions as to who owns how much of the property.

When an unmarried couple own property in joint names, the presumption is that the home is equally owned. The House of Lords' decision in May in *Stack v Dowden* gave guidance about the exceptional circumstances in which a different intention could result in an unequal division at the end of the relationship. The background to the purchase, the nature of the relationship and the contributions made, before and during ownership, are of particular importance.

However, there is no scope for "fairness" nor are the discretionary remedies of the divorce court available. So in 1983, Valerie Burns (who took her partner's name, kept the family home and raised their children) received nothing after living with her partner for 19 years. Contrast this with divorce since the House of Lords' landmark decision in *White v White* in 2000, when a number of cases have made it clear that there is to be no discrimination between the breadwinner and the home-maker and child-carer.

Change has been long overdue. The 2001 Census for England and Wales recorded just over two million cohabiting couples with nearly 1.28 million dependent children between them.

For these couples, whose relationships are marked by intimacy and exclusivity, distinct from divorcing couples, the Law Commission's proposals could enable separated partners to claim a share of property, capital payments and a share of the other's pension with the aim of reaching a clean-break settlement, and if there are children, payments for childcare costs. Eligibility will be determined by the length of the relationship or if there are children. Applicants must make a "qualifying contribution" to the relationship giving rise to "certain enduring consequences at the point of separation".

The reforming legislation is not timetabled and leading politicians are undecided about how far marriage and unmarried relationships are to be supported and protected.

What is clear is that any new law will not protect other co-owning or cohabiting relationships, which include blood relatives (elderly siblings perhaps) or "caring" relationships.

The sharp increase in house prices in recent years has intensified the need to co-own, and also made it financially worthwhile to go to law to decide ownership at the end of the relationship, as the fight is over relatively large sums of money. Few people can afford to buy a first property easily by themselves, since earnings have not kept pace with house price increases. Many parents pay the deposit or guarantee a mortgage and will co-own the home to protect themselves.

At the other end of the economic cycle, in an attempt to avoid the impact of inheritance tax, assets pass on death to adult children, who then club together to house the surviving spouse out of the estate.

In times of lower house prices, higher mortgage capacity or even negative equity, settlement of any dispute was relatively straightforward. When legal costs might be £30,000 to take a case to a fully contested final hearing, without significant equity it was far better to settle the case. But today, people are far more inclined to argue about each percentage point in the property, which might mean several thousand pounds.

One way to regulate the outcome yourself is a cohabitation agreement – essentially a prenuptial agreement for those who are unmarried (including parents buying with an adult child or siblings housing an elderly parent). You can provide for different contributions, payment of mortgages or outgoings or other specific factors. They are almost always binding if everyone involved understands the agreement and has independent legal advice on it.

Public reaction to the proposals for cohabitation will indicate whether the law is ahead of society in promoting change or behind it in catching up with what is already happening.

**By Hazel Wright, Partner and Graeme Fraser, Associate – Family Department
(Published: The Times on Tuesday 7 August, 2007)**

DIVORCE AND BANKRUPTCY

Family

If you are contemplating divorce or separation, and if you are about to obtain a financial settlement as part of a divorce, particular care must be taken where there is a prospect that one of the spouses may become bankrupt.

A series of high profile cases have highlighted the risk that such settlements are not safe from creditors. Even where a spouse has obtained the right to stay in the marital home until their children grow up or he or she remarries, this can be overridden to pay off the debts of a bankrupt partner's debts.

In the case of Vivienne Avis, the Court of Appeal ruled in July 2007 that the interests of the bankrupt's creditors outweigh all other circumstances unless the circumstances of the case are exceptional. This confirms an earlier High Court decision in May 2007 concerning Wendy Pearl Haines, where an order transferring a house from a husband to a wife was overturned when bankruptcy trustees successfully set aside the divorce order, forcing Mrs Haines to give back her husband's share of the house unless he discharged his debts.

These decisions have completely reversed the widely accepted position that divorce settlements made by the matrimonial courts after a fully contested hearing are beyond reach in bankruptcy courts and cannot be overturned by a bankruptcy court.

The impact of the Avis decision is far reaching. Trustees in bankruptcy will be free to see whether there are other instances where there are assets in a divorce case that they can now proceed against.

It has been estimated that these decisions could affect at least 20 per cent of the 120,000 people expected to file for divorce this year.

Careful planning and informed legal advice are crucial to an understanding of the implications of transactions which take place following a financial settlement as part of a divorce or separation agreement. This is particularly true today when many families face the financial pressures of maintaining businesses with increasing overheads and tightened profit margins, or keeping their homes safe from mortgage repossession in the face of rising mortgage monthly payments following recent interest rate increases. Equally popular is the retention of an interest in a family home, otherwise transferred to the other spouse, until the children grow up, as a way of then achieving a fair share of the assets (which may be 50%).

When you consult a lawyer at Cumberland Ellis LLP, you have immediate access to our Private Client Group who can guide you to manage and protect your wealth.

By Hazel Wright, Partner – Family Department

Enduring Power of Attorney

Private Client

Enduring Power of Attorney (an "EPA") is a power of attorney given by someone at a time when they are in control of their mental faculties, but which can continue in force even after the donor of the power has lost those faculties. The Attorney is able to act on behalf of the donor, e.g. signing cheques or otherwise managing his financial affairs, from the date the EPA is executed, provided there are no restrictions placed on its operation and that this is what the donor wishes.

- It enables the donor to choose the person or persons he would like to handle his affairs after the onset of mental illness, which would not otherwise be possible once that had happened. If there is no EPA in force, the loss of mental capacity often results in the need for the appointment of a Receiver by the Court of Protection, which can be an expensive procedure.
- The donor should choose as his Attorney someone he trusts completely, for example a member of his immediate family, a close friend or a professional adviser. One or more Attorneys can be appointed, though it is unusual to have more than two. If two are appointed, they can either act "jointly", which means both must always sign documents, or "jointly and severally" in which case either one or the other can sign.
- The donor should consider carefully what powers he wishes to give his Attorney, since if there are no restrictions he can sign cheques, deal in Stock Exchange securities and even sign a Transfer for the sale of the donor's house. It is possible in the EPA to place any limitations on these powers, such as signing cheques only, or specifying that the Attorney may only act after the donor has become mentally incapable, a condition that is frequently used.
- When the donor loses his mental capacity, the Attorney should make application to the Court of Protection for "registration" of the Power. The donor and his nearest relatives are given notice of this, and they are able to object to registration on various grounds. An EPA can be revoked at any time, but only prior to registration.
- The EPA has to be made in the statutory prescribed form. It must be signed by the donor first, and then by the Attorney(s), and all signatures have to be witnessed. The document should always be kept in a safe place.

CE has considerable experience in dealing with all aspects of the EPA, and if you wish we will be happy to prepare one for you or discuss them generally.

N.B. These will be replaced by ***Lasting Powers of Attorney in October 2007***. At that time, while existing EPAs will remain valid, it will not be possible to make new ones. If you are interested in having an EPA, ***we strongly recommend that you deal with this before October 2007***.

Cordelia Brand, Partner – Private Client Department

Lasting Power of Attorney

Private Client

We have always advised our clients to sign **Enduring Powers of Attorney (EPA's)** giving someone authority to manage their financial affairs should they become mentally incapable and unable to manage them themselves. The passing of the Mental Capacity Act 2005, whose main provisions come into force in October 2007, makes changes of which our clients should be aware.

Under the present rules, if you have a valid EPA, and become incapable of managing your affairs, an application to the Public Guardianship Office, registers the EPA, and allows your attorney to continue managing your affairs on your behalf.

If you do not give anyone an EPA and, through illness or incapacity you are unable to look after your affairs, then your next of kin, your solicitor, or the most appropriate person, will have to apply to the Court of Protection to become your Receiver, a longer more expensive procedure.

Under the current system, the donor completes a form giving name, address, date of birth and appointing the attorneys. The form is signed in the presence of a witness, and the attorneys then sign to indicate their acceptance.

Under the new Act, there will be a new Power of Attorney known as the **Lasting Power of Attorney, (LPA)** and this will be in two parts, covering personal welfare and property and financial affairs. Personal Welfare LPA's amongst other things will cover:-

- Where the donor should live,
- Consenting or refusing medical examination or treatment,
- Personal correspondence and matters generally in connection with their general health and wellbeing.

Property and Financial LPA's amongst other things will cover:-

- Buying or selling property
- Opening, closing or operating bank or building society accounts

Ensuring that the donor receives all benefits, allowances and rebates, dealing with their tax affairs, investing the donor's savings

One of the formalities to create a LPA, is production of a certificate which has to be signed by a person who is not a relative of the donor but has known the donor for at least two years, and there is a list of people who can sign the certificates including amongst others:

- A local business or shopkeeper
- A registered social worker
- A GP, police officer, solicitor
- Librarian
- Minister of religion

The certificate provider has to show that he is one of the prescribed people listed above, and that he is independent of the donor and has the appropriate experience and understanding of mental incapacity issues involved in making a LPA.

He also has to know enough about the donor's affairs to assert that they were not under any pressure and no fraud is involved. These requirements impose a substantial burden on the person

providing the certificate.

From the above you will see that anyone providing such a certificate will have to obtain details of the donor's personal and financial background.

Our opinion is that anybody who wishes to make an Enduring Power of Attorney should make one as soon as possible and before October; we can provide you with full information and the necessary forms for completion.

Susan Pape, Associate – Private Client Department

For previous editions of the News Bulletin or other Cumberland Ellis news items and press releases please visit our website at www.cumberlandellis.com

Disclaimer: The contents of the Cumberland Ellis News Bulletin are designed for guidance only and is not intended to be a substitute for detailed legal advice. Consequently, whilst every care is taken to ensure that the information is accurate, we cannot accept responsibility for any liability to any person as a result of any errors or information which is found to be misleading.

In accordance with the Privacy and Electronic Communication (EC Directive) Regulations 2003, if you would like to be removed from this mailing list, you are invited to [click here](#). Please note that if you are an individual receiving this news bulletin, it is because we believe that the Regulations' 'soft opt-in' exception applies to you (as fully explained in our December 2003 News Bulletin).

Cumberland Ellis LLP is a limited liability partnership registered in England. Registered number OC30937. Registered Office Atrium Court, 15 Jockey's Fields, London, WC1R 4QR. Regulated by the Law Society. Any reference to a partner denotes a member of Cumberland Ellis LLP.