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Legal Notes – Gifts



Solicitors are often asked for advice about making gifts. The reasons for such gifts can include trying to save Inheritance Tax or protecting assets from being assessed when seeking financial assistance from the Local Authority for care costs.

There are a number of important principles which apply even before one reaches the question as to whether the gift will work for the purpose of saving tax or care fees. These can very easily be overlooked by non-solicitor advice services keen to sell investment products designed to achieve such aims.

It must be established that the person making the gift (known as “the donor”) is making the gift of their own free will and that they have not been unduly influenced. This is especially important where instructions are given by someone other than the donor. There might well be a conflict of interest and this must be assessed at the outset.

The possibility of money-laundering or fraud should not be overlooked.

Careful notes must be made and kept in case the gift needs to be re-investigated in the future, for any number of reasons.

The solicitor’s role is much more than just drawing up the document to give effect to the gift. The solicitor has a professional duty to make sure that the client fully understands the nature, effect, benefits, risks and foreseeable consequences of making the gift, in order for them to form a view as to the wisdom of the proposed transaction. Assessing this understanding allows the solicitor to determine whether the donor has mental capacity to make the gift and whether they are subject to undue influence. The advice given to the donor will depend to a great extent on the motivation behind the gift.

The Mental Capacity Act 2005 and its Code of Practice states that the donor should be able to understand the relevant information, use it to make a decision and communicate that decision to their solicitor. The main case on gifts remains Re Beaney (1978) which sets out the test of capacity to make a gift and states that capacity will vary depending on the size, nature and consequences of the gift.

Advice can only ever be the best advice at the time it is given and the unexpected can and often does occur. It is always advisable to be cautious when giving assets away as once given you cannot be at all sure of getting them back.

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If you require advice on this matter please contact Miranda on 01328 710210. If you require advice on any other legal matter please telephone our Wells office on 01328 710210 or email law@hayes-storr.com.

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