

Fact Sheet

Family trusts – some guidance

Why create a Family Trust and not make an outright gift?

A Trust is a relationship which is recognised and importable in the Courts, and the details of the Trust are contained in a formal Trust Deed which acts rather like a rule book.

Creating the Trust has the advantages of being able to satisfy most of the reasons why you might wish to dispose of your property, namely:

- Formally recognising financial contributions of other family members that they may have made directly or indirectly to the property.
- Avoiding problems following your death by recognising during your lifetime any potential issues that might arise.
- Once the Trust is created the Trust Deed will specify where the property is to go on your death.
- Once in the Family Trust, the property can be sold quicker following your death as no Grant of Probate will be required.
- The burden of owning property will be passed to the Trustees as they can meet both the financial and psychological burdens of owning property should you wish them to do so.
- By creating the Trust you can rest assured that you can remain in the property as long as you wish.
- Even if the property is sold, you can remain entitled to the income from the sale proceeds and use it to supplement your income should you need to live elsewhere.

What are the possible disadvantages of a Family Trust?

Once created, the property has to be transferred into the names of the Trustees. Whilst your right to remain in the property will be protected, you will no longer have legal ownership of the property and the Trustees will have certain discretionary powers which they can exercise in respect of the property.



Should you need to use the capital in the property to support a loan such as an equity release scheme, then once the property is in the Trust, it will not be able to be used for this purpose.

Your Trustees will need to keep records of all receipts and payments relating to the Trust which is important for tax and other purposes.

Once the property is placed into the Trust, then the buildings insurance of the property must also be transferred to the Trustees. Contents cover, however should remain in your own name.

The Trustees

Choice of Trustees

You will need to give careful thought to your choice of Trustees. A minimum of two and maximum of four people should be chosen. Whilst the Trustees must act in accordance with the Trust Deed, they also have certain discretions.

Whilst you can be Trustee, this is not generally recommended as it defeats the object of passing on the responsibility of the property to others. You may wish to use some of the beneficiaries of the Trust as Trustees, but you should be aware that sometimes this can create a conflict of interest. For example, if they are to receive the property upon you vacating the house, perhaps to move into residential accommodation, then they may actively seek to encourage you to take this course of action earlier than you may actually require.

It is our advice that you choose completely independent Trustees who have no interest in the Trust property. In such cases, the partners of Blakemores are willing to act as Professional Trustees and if you would like more advice in this regard, then please do not hesitate to ask.

The Trustees' Responsibilities

The Trustees do not have any power to go beyond the terms of the Trust Deed. However, most things which a person would want to do with his own money or property can be done by the Trustees provided it is for the benefit of the beneficiaries.



The Trustees must:

- Disclose any circumstances where they might have a conflict of interest with one or more of the beneficiaries. For instance, if a beneficiary owes a Trustee money, then this should be disclosed.
- Not act in conflict with the interest of any of the beneficiaries or profit from their role as a Trustee.
- Ensure that they know exactly what the terms of the Trust are, and that the terms of the Trust are fulfilled.
- Ensure that they do not exceed the terms of the Trust or their powers granted in the Trust Deed.
- Ensure that good Trust records and accounts are kept and account to the Inland Revenue for any tax due.
- Take independent financial advice at appropriate times and ensure that the advice taken is in accordance with the Trustee Act 2000.
- Act impartially and fairly between all the beneficiaries.
- Take reasonable care in exercising their powers. It is worthwhile noting that Professional Trustees have a higher standard of care to meet than individual lay Trustees.
- Act jointly. As Trustees are jointly liable for any mistakes, it follows that they should therefore act together and not delegate tasks to each other.
- Not charge fees. Only Professional Trustees can claim the payment for acting on behalf of the Trust. Lay Trustees may only claim out of pocket expenses.
- Ensure that the beneficiaries of the Trust are kept fully informed. This helps avoid disputes.

The terms of the Trust deed

With Family Trusts, it is usually the home of the person creating the Trust which forms the asset of the Trust.

The beneficiaries are usually the person creating the Trust and their children.

The property generally remains in the Trust for the duration of the life or lives of the persons that have created the Trust (or until the Trustees, for some good reason consider otherwise).

During your lifetime, you can remain living in your home as you do now. However, the home can be sold if you need to move with the sale proceeds being reinvested into another property for you. Alternatively, the sale proceeds can be invested to generate an income for you if necessary.



However, you should be aware that having property in a Trust is not the same as having it in your own name. The Trustees can disregard your interest in the property (and any sale proceeds) if they have a good reason to do so and this reason can be justified in law. This is one of the main reasons why we would recommend that at least one Professional Trustee is appointed.

Other options are possible depending upon your circumstances and we will discuss this with you in detail as appropriate.

Tax matters

Whilst you remain in the property, tax should not have a great impact.

All Trusts must be registered with the Tax Office and we will do that for you.

Usually whilst there is no income being generated by the Trust, a yearly tax return will not be issued by the Tax Office.

Inheritance tax

Provided that the value of your home is below the current nil rate band threshold (for 2008/2009 - £312,000), inheritance tax is neither saved nor increased by transferring your home into a Family Trust.

If, however, your home is valued close to or other the nil rate band threshold, then you will need to tell us and we will explain to you the inheritance tax consequences of creating the Trust.

Capital gains tax

Because the principle private residence exemption to capital gains tax applies, when you transfer the property into the Trust, then there will be no capital gains tax charges. However, if you cease to live in the property for a length of time and then it is sold, there may be a capital gains tax charge. This is exactly the same as if you owned the property outright in your own name.

If there are other assets also held in the Trust (other than cash), then the current capital gains tax rate will apply to any gains made on those assets. However, your own capitals gains tax annual exemption can be used to offset any Trust gain.



Income tax

Whilst you live in the property, you will not pay a rent for the right to reside in the property and therefore there is no income tax charge.

If however, it is rented out at a later date or the sale proceeds generate an income, then income tax will be payable at the lower or basic rate of tax depending on the asset type.

Stamp duty land tax

Generally there is no tax to pay on founding the Family Trust.

Stamp duty land tax may arise if the property is sold and an alternative property is purchased by the Trust for you to live in. However, this is the same as if the property was in your own name.

Pre-owned asset tax

This does not apply where you have an interest under a Family Trust, it only applies in special circumstances, usually involving more complex inheritance tax planning schemes.

Reducing the cost of long term care fees

One of the possible benefits of transferring the family home into a Family Trust may be avoiding the need to sell the property for residential care or nursing home care charges, thus securing the family's inheritance. However, we cannot give you any guarantee that this will be successful, as there is no fool-proof way of avoiding the value of the property being taken into account in means testing.

There are anti-avoidance measures contained in the law to enable some gifts or disposals of property to be ignored by the authorities and even possibly set aside by the Court. Not only are these measures subject to change from time to time, but it is also unclear how far the authorities will go to pursue contributions which they believe to be owed to them.

Present statistics show that only 6% of people aged 75 to 85 actually require long term care and so the chances are that this may never even be relevant to you. There are also some circumstances in which the NHS has a responsibility to pay all of a person's care fees, where the primary requirement is nursing care, rather than residential care.



Local Authority Means Tested Assessments for long term care fees can also be wrong and may be challenged through their complaint's procedures, the Local Government Ombudsman and even the Courts.

What action could the Local Authority take?

Where the Local Authority considers a transaction has been made in order to reduce liability to pay for the cost of long term care there are a number of options available to the Local Authority.

- The Local Authorities can sometimes place a charge on a property if care fees remain unpaid, but this does not apply to gifted property.
- In some circumstances, the bill for care fees can be sent to the recipient of the gift or to the Trustees of the Trust. However, that is only if Local Authority assistance is required within six months of entering permanent residential care.
- They can sometimes treat you as owning the value of something which has been given away or placed into Trust which would limit your entitlement to assistance. This can only be done if they can show that at the time of the transaction it was likely that you would be making a subsequent claim for care. Hence, if you are in reasonable health now, then over the course of time the risk of them applying "notional capital" will fade.
- Sometimes bankruptcy and insolvency rules can be evoked to set transactions aside. However, few Local Authorities are willing to go down this route as it is potentially complex and generates bad feeling.

In short, there are no cast iron guarantees that by making a gift or Trust of the property, that the value of the home will be disregarded for means testing.

Gifts can limit your future choices and you therefore need to be fully informed of the possible implications of taking such actions.

If you wish to receive further advice about making a gift or creating a Family Trust, then please do not hesitate to contact **Emma Harrison** in our private client team at:

Blakemores Solicitors
40 Great Charles Street
Birmingham
B3 2AT

Tel: 0844 873 5249

Email: emma.harrison@blakemores.co.uk

