Asset Protection & Family Trusts

Client Guide

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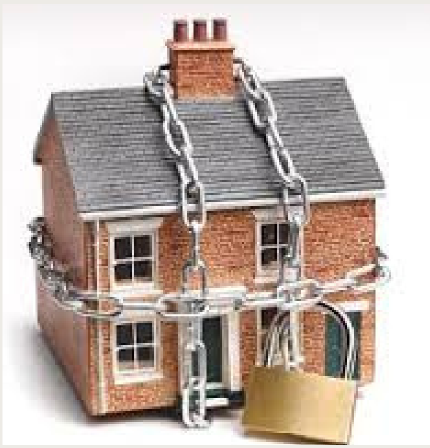

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It's hardly surprising that a growing number of people are looking ahead to their old age to see how they can protect their home so that they have something left to leave their children or loved ones when they pass away

Over recent years, there has been increasing interest in what is often known as **'Family Asset Protection Trusts'.** This type of trust is referred to by many different names such as a Family Trust, Living Trust, Asset Protection Trust, Family Protection Trust but all these different names refer to the same thing.

This guide is designed to help you understand how such a trust can work and the potential benefits of using a trust to protect assets for future generations.

What is a trust?

- A trust is a legal arrangement created by a person known as 'the Settlor' who appoints trustees to look after property or other assets on behalf of the people who will benefit, known as 'the beneficiaries'.

- Trusts crop up in a surprisingly wide variety of circumstances. They commonly appear in wills and are frequently wrapped around life insurance policies.

- Trusts can be set up during a person's lifetime to be used for tax planning, to pay school fees and to protect assets from divorce or bankruptcy.

- Trusts are widely used as a tool for protecting assets for many different reasons.

- Trusts provide people with a means of controlling how their assets are used after they have been given away.

What are the advantages of a trust?

Avoids the cost, delay and uncertainty of litigation on death

- Unlike a Will, beneficiaries cannot challenge the trust after death and cannot force the trustees to exercise their powers in favour of any one individual - this is particularly helpful in the event of any family disagreement or where difficult relationships exist between particular family members.
- In the event of a claim against the estate by disgruntled beneficiaries, the assets in the trust will be protected from the claim.

- Assets held in the trust may be disregarded from means testing for funding long-term residential care when claiming all the means tested benefits.

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Preserves assets for beneficiaries

- Assets held in the trust may be disregarded from means testing for funding long-term residential care or when claiming means tested benefits.

- Holding assets in a trust can avoid the trust assets passing otherwise than where you direct them under the terms of the trust i.e. to a beneficiary's new spouse or partner or to beneficiaries that you did not choose.

- It can also help avoid difficulties caused by family circumstances such as beneficiary's financial difficulties or divorce. Instead of giving assets to a beneficiary on death under a Will, trust assets can be kept within the trust until any financial difficulties or divorce of a beneficiary have been finalised, protecting the assets for the beneficiary only.

- ·Holding assets in the trust can provide the family with the ability to plan for any inheritance tax issues and pass assets on to benefit future generations.

Avoids delay in obtaining a grant of probate

- As the legal title of trust property is transferred to the trustees, the trustees will not require a grant of probate on death. The probate registry is currently working on timescales of around 16 weeks or more to issue a grant of probate. The wait for probate can stop a property from being sold or transferred for many months following a death. Conversely, trustees of trust property will have the power under the trust to deal with the property straight away, saving time and costs in administering a person's estate and selling or transferring property.

Should I give my property to my children instead?

Often clients will ask us if they should transfer their property into the names of their children and simply give it away.

There are a number of problems attached to simply making a gift of your home, including:

- With the best intentions in the world, the relatives or other people who are in receipt of the gift may not fulfil their side of the bargain, for example they place undue pressure on the person to leave the property or may not help pay for any additional care in excess of the amount that the local authority will fund.

- What if you decided that you wanted to sell the property to move house and the relatives who owned your property did not agree? Family disagreements are all too common and cannot often be foreseen. Whilst you may all get on well now, circumstances can and do change and family all outs, particularly over money, are all too common.

- The property may be considered as part of the matrimonial pot if the relative who has received the gift of the property ends up getting divorced or could be included in their estate for the purpose of meeting their own debts if they get into financial difficulties.

- There are potential capital gains tax (CGT) implications for the recipient of the property if the property is not their main residence. This is avoided if the property is left in a Will rather than given away during your lifetime.

- Any transfer may still be treated as "deliberate deprivation" by Local Authority Social Services (LASS) or the Department for Work & Pensions (DWP) and result in no financial assistance being forthcoming when needed in relation to the provision of care because the value of the property will be deemed to still be in your estate. In these circumstances you would be dependent upon relatives to fund your care and if there is disagreement those relatives may not agree to help.

The risks above often outweigh any possible benefits of making an outright gift of the property. To protect against these potential problems, a trust can be an alternative way of making a gift whilst still enjoying the use of the property.

What about care fees?

Is it possible to gift assets into a trust which will protect property or other assets from assessment to means tested residential care home fees?

Theory and practice

The theory is that by putting your house into trust and naming someone as the Trustees (this can be your children or someone independent) , you no longer own your home as it is owned by the trust. Should you have to go into residential care, any trust property or other trust assets should not be take into account in a local authority means tested care funding assessment.

It might seem the perfect plan to protect your children's inheritance – and this can certainly be true if the assets are transferred to a trust early enough – but there can be a number of pitfalls and specialist advice and consideration of all your circumstances must be considered before proceeding.

How does the local authority decide if I have to pay for residential care?

Paying for residential care in a care home is expensive. On average, care home fees are currently around £800-£1,000 a week. If you have assets, including property, valued at more than £23,250 you will pay full residential care home fees (known as self-funding).

For a permanent admission (not a temporary one) any property that the person owns will be considered as part of the capital unless it is occupied by a partner/spouse, older relative, incapacitate relative or a child who is the responsibility of the applicant. The Local Authority Social Services have the discretion to ignore the value of the property if someone else lives there who does not fit into any of those categories.

If you own the property jointly with someone else such as your spouse/partner, you will each be assessed as owning equal proportions of the property regardless of how much was contributed to the purchase unless there is written evidence that states otherwise.

Deliberate deprivation of assets

Most people will in their lifetime gift either money or assets to family members and relatives. Because of this, **intention, amount and timing** are central to deciding whether a transfer of assets to a trust can be considered deliberate deprivation of assets.

During the financial assessment, the local authority will ask about property ownership and bank statements. If they show that you have quickly reduced your wealth before the assessment by purchasing expensive possessions, such as jewellery, the local authority may allege deliberate deprivation of assets.

Examples of what could count as deliberate deprivation of assets

- Gifting a lump sum of money to a family member or friend
- Transferring property into someone else's name
- Selling a property to someone for less than it is worth
- Buying or gifting expensive items
- Suddenly spending unusually large amounts of money
- Gambling
- Putting money into a trust

There could be other legitimate reasons for the above, so the council must consider the **timing and the intention** of the actions. For a purchase or transfer to count as deliberate deprivation of assets, the local authority must prove that you were aware that you might need care in the **near future**.

Local authorities can investigate asset protection trusts to check that they haven't been set up to get out of paying for care, particularly where a substantial application for assistance with care is made. There is a risk that the local authority can ignore the trust and treat the assets as if you owned them, if they can prove that you put them into the trust as an act of "deliberate deprivation" to avoid having to pay for your care fees.

The 7 year myth

There is a common misconception that this only applies for the first seven years after setting up the trust, but in fact there is no such time limit. It is therefore important to be able to show that at the time the trust was set up, you were in good health and had no reason to expect that you would need to go into a care home. Therefore, using a trust to protect assets can and does work if the timing is right.

Timing

The key issue is timing – when the person made the gift to the trust, could they have reasonably known that they might need care? For example, if the individual was already ill when they signed the property over to a relative, it might look suspiciously like 'deliberate deprivation'.

An Asset Protection Trust can be a useful tool for protecting your assets for your and your family's sake, but it is essential to set it up when you are in reasonable health and financially solvent, and to take proper professional advice before doing so.

Is it wrong to put a property into a trust?

Trusts are a centuries-old concept which allow assets to be held by trustees on behalf of beneficiaries. They have been used in Britain since the Middle Ages, when knights departing for the crusades used them to protect their interests and look after their wives and children.
Trusts are appropriate in many cases for estate planning and asset management purposes. However, they should not be entered into without detailed, very specific advice from suitably qualified and experienced professionals.

Asset protection schemes have caught the attention of the media because they are targeting older people who can be more vulnerable and have sometimes been sold to people for whom the scheme isn't suitable. Lawyers are often criticised because the media believes lawyers are thought to be behind the promotion of some of these schemes. Is this true and are asset protection trusts really a bad thing anyway?

What's wrong with Asset Protection Trusts?

The short answer is - **nothing in principle**. The problem is if they are being used specifically and deliberately to deprive a person of a valuable asset who is likely to need residential care in the not too distant future. If this is the intention behind setting up an Asset Protection Trust, then the arrangement runs a very real danger of being regarded by the local authority as a deliberate deprivation of assets.

Organisations that openly advertise the use of Asset Protection Trusts to protect against the cost of care fees are actually creating suspicion about the products they are marketing. The suspicion will be that anyone purchasing those products has bought them deliberately to try to put their assets out of the reach of care costs. What some organisations appear to do is take a long-established legal concept, the trust, and use it to create a 'product' which is then packaged and sold as being a means to avoid care fees. It isn't the idea of using a trust to protect assets that's questionable, it's the way in which the trust arrangement is being marketed that creates a potential problem. The negative attention given to these types of trusts in the media in recent years is a result of the trusts being offered by unregulated companies as a "one size fits all" product, charging huge fees often pitching stands in places such as garden centres to advertise their services.

One popular sales tactic is the free seminar approach that these companies take where discounts are offered if attendees to the seminar "sign up" on the day. Many of these companies are not solicitors and are unregulated. They claim to be expert advisers, whilst making various assurances about the advantages of trusts that may not always be correct. What these companies do not always make clear is that transferring your assets into a trust may not necessarily protect them from being sold to pay care fees. You could also incur a tax liability and be giving up all your rights to your assets and your home if the planning is not done correctly.

Looking ahead - is a trust right for me?

The Government's 2021 Vision for Adult Social Care proposes the introduction of a new £86,000 cap on the amount anyone in England will need to spend on their personal care. This means that even where someone has significant assets, and is self-funding their care plan, they will not need to spend more than £86,000 on their personal care over their lifetime. The cap also applies to domiciliary care.

It should be noted that personal care means the residential care, nursing care and support needed, whether it's with washing, dressing, mealtime assistance or managing health problems. There are many aspects of the care home service that are not classed as personal care – this includes accommodation, food, energy bills, lifestyle and wellbeing and consumables. These costs will not be covered by the care cap and will need to be met by the resident in full. Many people will still continue to pay the full cost of their care even when the cap is introduced.

Originally due to come into effect in October 2023, the Government have now delayed the reforms by two years and it is now expected to be introduced in October 2025.

There is no fool proof way of avoiding the value of the assets being taken into account for means testing whilst alive; indeed, as we know only too well, public values change, and the law can be altered so that it can apply retroactively even if not retrospectively. It is always a good idea to plan for the future, even if you eventually decide a trust is not right for you. Using a specialist solicitor to look at your Will and review if it needs updating, considering a Lasting Power of Attorney and a review of your affairs generally is always sensible.

We provide individual, confidential, no-obligation advice about what is appropriate for you, your circumstances and your family. There is no such thing as one-size fits all approach to an 'asset protection trust' and the value of obtaining specialist advice cannot be underestimated.

Everyone's circumstances are different - a trust is not for everyone but could be right for you. For advice tailored to your specific circumstances, contact us to arrange a free confidential discussion.

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