

Will Trusts

There are different types of trust depending on the individual requirements of each client. The following are outlined in this information:

- **Protective Property Trusts**
- **Residence Trusts**
- **Nil Rate Band Discretionary Trusts**

What is a Trust?

A trust is an obligation binding on a person called a 'trustee' to deal with property or assets in a particular way for the benefit of one or more 'beneficiaries'.

Trustees

Trustees are the legal owners of the trust property and as such are legally bound to deal with it in accordance with the terms set out in the Will Trust. They also administer or manage the trust and may make decisions about the trust property. Usually trustees are the same people as the executors and they can include your spouse/partner or beneficiaries. There should always be a minimum of two trustees.

Beneficiaries

A beneficiary is anyone who stands to benefit from the property held in trust. There can be one or more beneficiaries and each may benefit from the trust in different ways. For example one beneficiary may be entitled to trust income only, whilst another beneficiary may be entitled to the trust capital.

How is a Will Trust created?

A Will Trust is created when the testator leaves instructions in his Will for part of his estate to be placed in trust. The Will sets out the detailed terms of the trust, which only commences after the testator has died.

Protective Property Trusts

Many clients are concerned about protecting their estate to ensure that their assets will ultimately pass to their children (or other chosen beneficiaries) and will not be eroded after their death.

A Protective Property Trust can offer protection for the family home from a number of events including remarriage, divorce, bankruptcy or long-term care home fees. It is also a good way of ensuring that your home will eventually pass to your children (or others) whilst at the same time making sure that your surviving spouse/partner has continued security to live there for the remainder of his/her life.

Why might you need to protect your home?

Most couples wish to leave their home to the survivor on the first death, with the intention that it will then pass to their children on the second death. However if after the first death the survivor owns the property outright this could potentially create problems in a number of different ways - all of which could result in the children ending up with nothing at all.

For example, where a couple have children from previous relationships it is natural for them to want to protect their own children's inheritance in case the survivor subsequently changes their own Will for whatever reason.

Furthermore following the first death the surviving spouse could remarry, divorce, face bankruptcy or need long-term care – all of which could jeopardise the children's inheritance.

The use of the trust structure can help to solve some of these concerns.

How the Protective Property Trust works

Both Wills provide that on the first death, instead of the family home passing outright to the survivor in the usual way, the deceased's share of property will pass to trustees to hold on behalf of the remainder beneficiaries (e.g. the children) but subject to the proviso that the survivor can continue living there.

In this way the share of the property of the first to die does not become part of the survivor's estate and so will be protected for the remainder beneficiaries. Do note that not the whole property can be protected – only the share of the first to die that is held in trust.

The terms upon which the survivor is allowed to remain at the property and for how long are set out in the Will. There are two approaches: one is to create a 'life interest' in the property, whilst the other is to grant a 'right of occupation'.

Life Interest

With couples, particularly those in longstanding relationships, it is usual to grant a life interest as this does more than just give rights to occupy and it provides flexibility to meet changing circumstances. In legal terms the survivor has what is known as 'an Interest in Possession' for the rest of his life. This entitles him to live in the property so long as he wishes; or if he wants to move, then to sell and buy another property in its place (the replacement property being subject to the trust in the same way); or if he no longer wishes to live in the property at all then for it to be sold and to receive the income produced from the investment of the sale proceeds.

In this way the trust capital (being the deceased's share in the property itself or its sale proceeds) is preserved for the remainder beneficiaries who inherit upon the survivor's death. The survivor does not usually have any right to receive trust capital – although if required, the trustees can be given additional powers to pay capital to the survivor at their discretion, for example in case of need.

Rights of Occupation

Where the survivor has rights of occupation only, then this means what it says. The Will specifies when those rights will cease – for example it could be upon the survivor's remarriage, or a set number of years or simply when the survivor himself chooses to move away. If required this right can be extended to allow if the survivor wished to move elsewhere.

Ancillary Provisions

Whichever approach is used it is usual for the survivor, during his residence at the property, to be liable for the outgoings. If trustees are to be held liable for any expenses then they will need to be provided in the Will with a separate trust fund in order to do so.

Placing a property in trust does not include the furnishings or other household contents, which are usually left to the survivor as an outright gift.

Property Ownership

A property trust is only effective where a couple own their property jointly as Tenants in Common. As such they each own a separate 'share' of the property which they are free to leave in their Will in trust. But where, as is often the case, a couple own their home as joint tenants then before drafting the Will it will be necessary to convert their ownership so that they own as tenants in common. This can be done quite easily through filing a Notice of Severance at the Land Registry.

Care Home Fees

It is illegal to deprive yourself of capital assets in order deliberately to avoid paying care home fees and there is a great deal of anti-avoidance legislation in place aimed at preventing people from removing assets from their estate. However it is not illegal to provide in your Will for your share of property to be held in trust for your children. Provided that you are not aware of having to go into care in the near future then there is nothing to prevent you from planning your estate to ensure that your property ultimately passes via a Will trust in accordance with your wishes.

It is important however to understand that there can be no guarantee that a property trust will provide a fool-proof way of avoiding the value of your property being taken into account in means-testing by a local authority. Legislation and regulations are subject to change at any time and it is unclear how far the authorities will go in future to pursue contributions they feel are due to them in respect of care home fees.

Inheritance Tax (IHT)

Equally, it is important to understand that Protective Property Trusts are not designed to save IHT but to serve a practical purpose of protecting property. Using a trust in this way will NOT save tax as the survivor with an interest in possession will be treated for tax purposes as owning the trust property. So a tax liability could arise on the survivor's death, payable by the trustees.

For a couple who are married or in a civil partnership though, there will be no tax liability on the first death when the property trust is set up, because of the IHT spouse exemption.

Residence Trusts

Where clients wish purely and simply to safeguard someone's residence at their property then a residence trust might be appropriate. This could apply for instance where a client who intends leaving her estate to her children, has her elderly mother living at home with her and she wants to ensure in the event of her death first, that her mother is not made homeless upon sale of the property by the children.

The beneficiary under these trusts has a simple right of occupation only and nothing more.

Nil Rate Band Discretionary Trusts

Prior to the Finance Bill 2008 these trusts were widely used to enable married couples/civil partners to double-up on their tax-free allowances in order to save Inheritance Tax. However the introduction by this legislation of the transferable nil rate band between such couples makes these trusts largely redundant for most people.

For certain clients though - including those whose estates exceed double the nil rate band (currently £650,000), those who own their own businesses, widowed clients, those whose family circumstances are very complicated or those who seek flexibility so that decisions can be made after death, -these trusts can still play a part in their estate planning. Individual advice should be sought from our Legal Department.

Disadvantages of Trusts

When planning their Wills, it is important for clients to understand fully the implications of leaving their property in trust and be aware of the inherent disadvantages and risks involved.

Loss of Control

You should realise that placing your property in trust will inevitably mean loss of control of the assets. So a couple should understand that the surviving partner will have to rely on the trustees (though as mentioned above the survivor can be one of those trustees). For those clients who wish to retain complete control over their property a trust will not be appropriate. Clients should therefore think carefully about this.

Administrative Requirements

Trust law and the taxation of trusts are complicated. Trustees are required by law to administer trusts in accordance with strict rules and they are personally responsible amongst other things for keeping full records and accounts, completing tax returns and paying any tax due and also taking independent financial advice.

These are onerous responsibilities and so specialist advice is usually required not only in setting up the trust but also for its ongoing administration. Very often trustees appoint a professional adviser (such as a solicitor or an accountant) which inevitably incurs expense. For this reason trusts are only worthwhile where the estate is substantial.

Conclusion

When considering the options it is important that clients take a step back and look at the overall picture. They should ask themselves to what extent they are happy to sacrifice their own or their partner's future security in the property and whether a trust is actually going to be practicable and financially viable. Trusts are not appropriate for most people - often the best scenario is the simplest one.

The information contained in this leaflet is intended as a guide only. It is not intended to be comprehensive or to provide specific legal advice and should not be relied upon as doing so.

Further detailed advice appropriate to your individual circumstances should be obtained from our Legal Department, telephone us on 01934 836159.