

TRUST ADMINISTRATION

FREQUENTLY ASK QUESTIONS

Guidance Notes



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Introduction

This leaflet is a brief guide to some of the aspects of administering Will Trusts and Lifetime Trusts as well as guidance as to being an executor and trustee of such arrangements.

Trusts are viewed as 'protection boxes' in which assets are protected and then passed to those people you wish to benefit in the best and most efficient way.

For many people that means passing your estate to a spouse and then down the line to children and/or grandchildren. It is designed to protect against third party attack on the assets received by the beneficiary; from 2nd marriage claims, changes to Wills, divorce, insolvency and could also as a by-product ring-fence assets from Inheritance Tax and/or care fees claims.

Administering Trusts is an important task and responsibility. It is often a matter delegated to an experienced, trusted advisor who can provide stable, independent, expert attention to the best way to ensure the wishes are fully protected.

Some usual questions regarding administering a Trust on death are covered below but if there are other questions, please contact us on 0207 113 5760.

Some usual questions

1. What do we mean by using a Trust?

By 'Trust' we do not mean automatic trusts that are created in simple Wills when assets are (for example) held back in trust for children who are under the age of 18 years. That type of trust creates no specific protection for the beneficiaries as their entitlement is gifted outright to them upon reaching a certain age. In the context of Trust Wills, we have two specific types of 'Trust' in mind. These are:

- a Discretionary Trust and/or
- a Flexible Life-Interest Trust.

2. How do the Trusts work?

Trusts accompany your Wills and enable you to pass all or some of your assets via the trusts to your Beneficiaries in whatever method is the best suited to meet your aims.

Options within the Trust:

- Gifts: capital or property gifts can be made to beneficiaries;
- Life Interests: Alternatively, trusts can provide a use of 'income' or a right to live in a property, with the underlying asset protected for ultimate beneficiaries, such as children.
- Loans: Often, the best use of Trusts is the ability to 'loan' the assets to the Beneficiaries, rather than gifting it outright such that the value is protected for subsequent Beneficiaries, or against third party attack*.

3. How are "loans" made and dealt with?

By way of example:

A husband wishes to pass his estate to his wife and then on her death for it to be pass on again to his children. His Will passes his estate into the accompanying Trusts. The Trusts then loan the whole estate to his wife; she has full use of those assets for her lifetime. She does not have to repay any of it during her lifetime as it is a loan for the whole of her life. On that basis, she has the right to give away, spend or use the assets as she wishes: to her it is just the same as a gift.

On her death, the loan value is repayable from her estate assets (so long as there are sufficient assets** in her estate to do so. If there are insufficient assets, the part of the debt that cannot be repaid is written off by the Trustees) and then any fund/value repaid to the Trust is advanced on next to the husband's children in a similar way, by loan again or by gift.

The wife's net estate is not increased due to the fact that she owes back what she receives.

4. Why use a Discretionary Trust format?

The Discretionary Trust format is used not only in Discretionary Trusts but in the Flexible Life-Interest Trusts. The structure includes the fact that any beneficiary is just one of a list of named beneficiaries, none of whom are individually automatically entitled to receive the estate.

The reason for that structure is that if a loan is made from the Trust to a beneficiary (who is automatically entitled to receive the asset as a gift), that loan might be deemed a sham transaction as the beneficiary could have no legal liability to repay the loan as he/she has the right to claim it as an outright entitlement.

Therefore, if the beneficiary is one of a class of beneficiaries and therefore not automatically entitled, it is not a sham for the beneficiary to receive a loan of the capital and therefore it should protect against the third party claims on that basis.

5. If the spouse or Beneficiary cannot afford to pay back the loan, what happens?

The loan from the Trust is only repayable out of the net estate assets on death of the beneficiary. If there are insufficient assets to repay the loan, the loan is simply unable to be repaid in full and any amount that cannot be paid from the assets of the beneficiary is written off.

6. Are there any significant disadvantages of the Trust Will set up?

There are limitations in terms of the value that can pass through a Trust; there are taxes that apply for assets in Discretionary Trusts or similar arrangements (6% over 10 years over £325,000 in value).

The cost of establishing a Trust within a Will or (separately) incurs a set up cost which is usually a further £500 to £1000 + VAT per person to cover the time advising, drafting and completion. There is also some administrative work that is required on death of a beneficiary, or if advice is required. That advice will involve some time work and therefore cost. Our view is that both the set up cost and operation cost of the Trust is extremely cost-effective when compared to the amount of protection potentially provided. There is generally no annual management charge and charges are simply according to time spent in advising or dealing with any requests.

7. Is an annual review or regular administration required?

Yes.

When a Trust is established the Trustees have a duty to review the trust at reasonable periods. However, often the case is that Trusts do not require much if any review of the whole value has all been advanced by gift or lifelong loan to the spouse (or children on spouse's death) and that the value of the trust does not exceed the IHT threshold*. In that case, the assets are all held by that beneficiary and not within the Trust itself and therefore review is often quick and basic. The parameters for reviewing should be agreed between the Trustees and the primary beneficiary when the Trust is actioned (usually following death of the 1st spouse or Testator).

8. Are Trustees needed?

Yes. Trustees need to be appointed.

Executors are the trustees of the Will and it is their responsibility to administer the terms of the Will.

The trustees of a Discretionary Trust are often the executors but they can be other people too.

In nearly all cases of a Trust, there will be two Trustees needing to be acting as that is the requirement where there are property assets. When advising couples, it will often be the case that the 1st trustee and executor shall be the surviving spouse. Then a 2nd trustee with knowledge of the law and procedure should be considered – to guide the spouse or other trustees. For Wills, new executors and trustees can be appointed at any stage by you.

9. Who to appoint as the 2nd Trustee?

Robert Cartmell continues to act as co-executor and trustee on many Wills and Trusts. Robert says:

“First, a Trustee ideally ought to have good Trust knowledge and expertise.

Secondly, the advisor should know and be trusted and respected by the people making the Wills and have experience in administering trusts, assets and estates.

What are the skills required of the advisor-trustee?

- Independence: provision independent and objective trust and administration advice;
- Communications: excellent clear communications, both written and oral;
- Authority: the ability to guide lay trustees or beneficiaries with authority and professionalism;
- Integrity: undertaking to carry out the wishes set out in the Trust;
- Balance: to be fair and able to make informed decisions in consultation with beneficiaries;
- Knowledge of other relevant matters: to know when to approach professional contacts for advice on investment of assets and taxation advice and to be able to link up with and communicate with reliable professionals on behalf of the trust or estate.
- Value: to add value to the project of protecting the assets for the chosen beneficiaries in the best way and with full flexibility”;

10. If Robert Cartmell is appointed as Trustee, what is the administration cost?

Our policy is that Robert does not charge an additional fee for his appointment as 'trustee' or 'executor'. Instead, his work in advising and carrying out the administration of the trust will be part of the overall estate or trust work and will be charged according to the time he spends on that work and advice at the prevailing rates.

11. What are the standard Trustee Duties and Responsibilities?

Trustees are generally responsible to act under the terms provided in the Will or Trust documentation as well as under the terms of the Trustee Act 2000* or other relevant legislation. Trustees can be held personal responsible for some breaches of Trust and therefore the duties and responsibilities are serious.

The primary duties of care are twofold:

- (a) to act in accordance with the purpose of the Trust as set out by the creator of the Trust (the Will-maker or the Settlor) and to respect any wishes and act in accordance with them; and
- (b) to act with all care for the benefit of the Beneficiaries of the Trust. To act responsibly in the management of the functions.

The overall duties are:

- To take care over the management of the Trust.
- To assist in the best management of the assets of the Trust in terms of maximising capital and income for the benefit of the beneficiaries. In this regard, with assets held in the control or management of Trustees, to take independent financial advice on the management of those assets as part of the compliance under the Trustee Act 2000.
- To consult with beneficiaries on an objective and fair basis.
- To act in accordance with the guidance of the Will-maker or Settlor as set out in the guidance documents (Memorandum of Wishes)
- To understand the options available for the transfer of assets to beneficiaries (ie gift options, loan options, life interest options)
- To understand the need to be aware of taxation issues or personal issues that might affect or

alter the decision making and to adjust to fluctuations in circumstance in an appropriate way and to seek counsel or advice.

- To keep updated with legislative requirements;
- To meet with key beneficiaries at suitable or regular intervals.
- To meet with co-Trustees at suitable or regular intervals.
- To act with independence and in the best interests of the Trust objectives.

12. Life-Interest Trusts – how do they work in the event of a sale of the property?

The spouses have the right to a full life-interest in the property and that means that they can voluntarily sell the property and use the proceeds to purchase another property to live in. If there are surplus proceeds of sale, they can be used to provide further income.

13. Is a Trust future-legislation proof?

No legal instrument or document is fully legislation proof. The benefits can alter according to legislation or by interpretation. However, both a Discretionary Trust and a Flexible Life-Interest Trust are by their natures “flexible” and the benefits and options can be adopted or not depending on the tax legislation and other factors as they adapt in future.

Footnotes

- * **Third party attack** - This is generally considered to be attacks on someone's assets by any person or entity apart from the person himself/herself spending or giving away assets. In reality we are talking of claims such as on divorce, insolvency, care fees attack and variation of Will.
- * **Sufficient Assets** - On death, debts will be paid first. So, before a Beneficiary receives their entitlement debts have priority. However, debts can only be settled from available assets in the estate of the Deceased. Any surplus debt not satisfied by the assets is written off.
- * **IHT threshold** - IHT thresholds and rates 2019-20. Everyone in the 2019-20 tax year has a tax-free inheritance tax allowance of £325,000 – known as the nil-rate band. The standard inheritance tax rate is 40% of anything in your estate over the £325,000 threshold.
- * **Trustee Act 2000** - This imposes a duty on trustees to act in the best interests of the beneficiaries of the trust. Trustees should not profit from their office (although beneficiaries can be trustees). Trustees should act impartially between different classes of beneficiaries.

For more information and for an initial discussion for advice please contact Robert

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