WILLS – INCLUDING A LIFE INTEREST TRUST

Many of us are concerned that later in life we may need to protect assets in the event of second marriages, stepchildren and care costs. It is understandable that we might look for ways to provide for our spouse or partner during their lifetime and to shelter the capital so that it reaches our ultimate beneficiaries, perhaps our children.

HOW DOES THIS WORK?

It is possible to structure your Will and property so that you can give your loved one (perhaps your spouse, civil partner, or cohabitee) the right to remain in your property for their lifetime but ensuring on their eventual death your share of the property or asset passes back to your chosen beneficiaries in your Will. It gives you an element of control over your asset from beyond the grave.

WHAT IS A LIFE INTEREST TRUST

A life interest trust can be incorporated into your Will to protect certain assets. The Will sets out who you want to receive the benefit of the life interest trust, this is often your spouse, cohabitee, civil partner or other loved one. That person is known as the "life tenant" and they are entitled to the income (after expenses) from any assets in the trust and the right to live in the property, if there is one in the trust. Typically, the life tenant is not entitled to the underlying capital of the trust assets. On the life tenant's death, the capital passes to your ultimate beneficiaries (often children/ grandchildren) as set out in your Will.

By structuring your Will in this way, it means your loved one can continuing living in your property (or your share of it) for the rest of their life. Then on their eventual death (or any other triggering event you have specified in your Will) your share of the capital passes to your ultimate beneficiaries. You are protecting your loved one during their lifetime but ensuring ultimately your assets are passed to the people you want to inherit under your Will. This type of arrangement can have the added advantage of sheltering your assets against care home fees or ensuring children from a previous relationship will benefit. It protects the capital for the next generation.

The trust can cover most assets, but typically you might include just your property, cash and/ or investments.

STEP 1 (IF NECESSARY)

If you own your property with another person then it must be held as what is known as "tenants in common".

If instead it is held as "joint tenants" then your property will pass automatically to the surviving owner outside the terms of your Will. Therefore, any trust you create in the Will cannot apply to the property as it does not form part of the trust. It is therefore important to adjust your property ownership so that you hold it as tenants in common.

Your solicitor will obtain Office Copy Entries in order to ascertain how you hold your property. If you hold the property as joint tenants your solicitor will make an application to the Land Registry to change this to tenants in common. This is known as severing the joint tenancy to tenants in common. *Please note there is an additional charge for this work.*

Holding a property as tenants in common means the property is still owned jointly by you, but you are each treated as owning a 50% share. This enables you to then each leave your respective halves of the property under your own Will.

STEP 2

Prepare new Wills. Rather than leaving your whole estate to your loved one outright, we draw up Wills that include "life interest trusts".

Your Will might contain exactly the same provisions as your loved one (being your spouse, cohabitee, civil partner or other loved one) except in relation to your share of the property.

Your Will essentially sets out that on death, your share of the property is left to into a life interest trust for the benefit of your loved one. For example, if you own you home with your spouse then instead of the property passing outright to your spouse on death, it would pass into the trust.

Under the terms of the Will your loved one will be able to continue to live in the property as they had been, except they cannot sell or re-mortgage without the Trustees involvement.

We recommend your loved one remains responsible for all outgoings (insurance, council tax, utilities etc) for your share of the property. You can also stipulate any event that triggers the end of the trust (this is usually death or remarriage).

It may be necessary to downsize in the future so your solicitor should discuss with you what happens to any surplus monies in that scenario.

Legally your loved one only owns their half share of the property with your half share "ring-fenced" for your ultimate beneficiaries, perhaps your children. This means your property ultimately passes to who you want to inherit under your Will, and ensures it is not eroded by care fees.

TAX IMPLICATIONS OF A LIFE INTEREST TRUST

The trustees are responsible for dealing with any tax position of the trust including any capital gains tax of the sale of assets held in the trust. If the life tenant has declared the trust property as their principal private residence then no capital gains tax is due on sale.

The life tenant is responsible for declaring any income they receive from the trust at their personal income tax rate. There are different Inheritance tax rules where you are granting a life interest to different people.

Where it is for your spouse or civil partner then generally the inheritance tax position is neutral. However, if you are granting a life interest to your unmarried partner/ cohabitee then there can be significant tax implications as a result of this arrangement.

It is important that you discuss the tax position fully with your solicitor.