

## **ASSET PROTECTION**

Couples tend to leave their estate to their partner in their Will, trusting that their children or other intended beneficiaries will ultimately benefit on the second death.

Unfortunately, leaving everything to your partner when you die does not in any way guarantee that your assets end up with your preferred beneficiaries. This can be for a number of reasons:

- Following the first death, it could be that the surviving partner eventually receives care which they must pay for. This could see the estate value diminish significantly over time, potentially leaving little or nothing left by the second death.
- The surviving partner might marry/re-marry, which will invalidate any existing Will they have in place benefitting your loved ones. If no new Will is made by them to ensure that the former provisions still take effect; it will be the case that their new spouse receives at least the first £250,000 of their estate and all of their personal chattels absolutely. In this scenario, it could be that another family ultimately benefits from your estate on the second death.
- The surviving partner may simply change their Will to benefit other people; thereby disinheriting your own children or other intended beneficiaries. There is nothing whatsoever to stop your partner making a new Will following your death.

## **LIFE INTEREST TRUST**

In order to guarantee at least some benefit for those you intend, the inclusion of a life interest trust in your Will could be the solution.

A life interest trust is usually included in a Will in relation to property. As above, it is typical when the first of a couple dies that their property or share of property passes automatically to or is left to the survivor, together with the remainder of their estate. The survivor then owns the entire property absolutely. When a life interest trust is utilised, this does not happen. The property or share of the property of the first partner to die instead passes into the trust and therefore the survivor does not own the entirety. The 'life interest' affords the surviving partner the right to live in and use the property only but they do have the benefit of this security for the rest of their life.

If the survivor later had to pay for care, the local authority would only be able to take their own share of the property in satisfaction of fees. This is because the other share does not belong to the survivor, but to the trust. It cannot be touched. The clause in your Will incorporating the life interest trust will specify where, on the second death, your share passes and as per the above, this is typically on to children but may be whoever you like.

The protection afforded by the life interest trust is equally applicable should the survivor go on to re-marry or change their Will. You are essentially ring-fencing the benefit of at least a portion of your estate for those you would ultimately wish to receive it.

It is usual for a couple to own their property as joint tenants but this will need to be altered in order to give effect to the life interest trust. When ownership is as joint tenants, it passes to the surviving owner automatically following the first death irrespective of what a Will says. Instead it is necessary to own your property as tenants in common whereby you each own a separate and distinct share (often 50/50) which can then be dealt with in your Will. If you own a property as joint tenants, a simple severance can be effected to create the tenancy in common which will be undertaken by us to coincide with the drafting of your Will.

## **Costs**

Our fee for life interest trust Wills is £600 plus VAT and the severance of tenancy (if required), £100 plus VAT. For a single Will including a life interest trust, our fee is £300 plus VAT. There will be a search fee of £3 (per property) to confirm your type of ownership at the Land Registry. If the property is not registered at the Land Registry, please note that it will be necessary for us to have sight of your deeds in order to confirm how it is owned before proceeding.

## **NIL RATE BAND DISCRETIONARY TRUST**

Since 2007, a person's nil rate band (the inheritance tax free portion of an estate, currently £325,000) has been transferable in its entirety to their spouse or civil partner if they die leaving all of their estate to them. This means that on the death of the second partner, a maximum nil rate band of £650,000 could be available to offset against the estate before inheritance tax may become due at a rate of 40% on any value in excess of this amount.

If you have a Will that was made in or before 2007, it may contain a nil rate band discretionary trust. Such Wills were arranged at the time to maximise tax efficiency by preserving the nil rate band of the first to die by leaving assets up to the value of the same in trust. This had the same effect on the second death so that essentially, two nil rate bands were then available to offset against the estate value.

Since the law changed, the transferable nil rate band is applicable whether or not your Will contains such a trust and therefore they are no longer strictly required for this purpose. That said, Wills containing a nil rate band discretionary trust remain entirely valid and can provide protection in the several other respects previously outlined; namely from the effect of care fees, re-marriage and alteration of the Will of a surviving partner.

Just as with a life interest trust, assets placed into a nil rate band discretionary trust do not pass outright to the surviving partner and therefore cannot be disposed of by them as a sole owner. This is useful in guaranteeing that the assets placed within the trust are able to be inherited by your children or other beneficiaries following the second death. One potential limitation concerning a nil rate band discretionary trust however is that it allows assets only up to the value of the nil rate band in force at the date of the first death to be placed within it; as opposed to the life interest trust which offers the same type of protection but places no cap on the value to be protected.

## **A NOTE ON LIFE POLICY PROCEEDS**

If you have a life policy or policies to pay out in the event of your death e.g. to repay a mortgage or to provide a lump sum to your spouse or children, it is important that any such policy is written in trust so that the proceeds will not form a part of your estate.

There are two advantages to this:

- The proceeds will not be subject to inheritance tax.
- The proceeds will be available immediately since no grant of probate or letters of administration is required to retrieve them.

## **Costs**

For each policy Trust and Notice of Trust to the life insurance company our fee is £125 plus VAT. To accompany each policy, a Letter of wishes is £50 plus VAT.

**To make a Will including the life interest trust or for any further information in relation to these matters, please contact Bryony Wilmshurst on 01376 567280 or [bryony.wilmshurst@cunningtons.co.uk](mailto:bryony.wilmshurst@cunningtons.co.uk).**