

Life Interest Trust Wills

Protecting the succession interests of the family is becoming increasingly important in the context of second marriages / step children and also care home fees.

A life interest gift to the surviving spouse perhaps with some additional powers for executors/trustees to advance some capital may be a convenient way of balancing the family interests. These notes summarise some of the key points relating to life interests in Wills.

What is a Life Interest Trust in favour of a surviving spouse?

This is a Trust which allows the assets within the Trust to be either invested or retained for the benefit of the surviving spouse. Any income generated by such investments is paid to the surviving spouse. This means that the spouse has an absolute right to the income only-or to the immediate use and enjoyment of trust property. Consequently, it is important to ensure that the combination of the surviving spouse's own assets and the income generated from the Trust will be sufficient for them to live on.

What assets usually form the Trust?

The standard format is usually a combination of all or any of the following:

- Home – the surviving spouse has the right to remain in the property until their death (please see below in relation to downsizing etc).
- Remaining cash assets – any assets in sole name of the first spouse to die at their date of death would be put into the Trust fund and the survivor would be entitled to the income that was generated (see below in relation to the investment powers of the Trustees).

Why is it recommended?

There are a variety of reasons why such Life Interest Trusts are recommended:

- *Ultimate destination of the funds* – You are ensuring that whilst the surviving spouse is looked after for the rest of their life, the capital value of the fund is ultimately preserved for your beneficiaries, such as your children. This would therefore protect your estate from the influences of another spouse for example were the survivor to re-marry.
- *Bankruptcy of the surviving spouse* – as the spouse has no right to the capital of the fund then the capital value of the fund could not be taken into account by a Trustee in Bankruptcy in the event of such an order being issued.
- *Care Home Fees* – on the basis of current legislation only, this arrangement would effectively 'ring fence' the assets within the Trust and would prevent them from being taken into account were the survivor to require either residential or nursing care in the future. The income from the fund which is payable to the survivor would assist them in discharging their own fees.
- *Transferable nil rate maintained* - a life interest gift to a spouse qualifies as if it were an absolute gift thus enabling the nil rate band to be transferred for Inheritance Tax purposes.

What are the disadvantages?

It is not an absolute gift to the surviving spouse. They are only entitled to the income from the Fund or the right to remain in the property. This may seem very rigid and some spouses resent having to be answerable to trustees. If the remaindermen are under 18 the trusts are very difficult to "un do".

Such Trusts can be extended to allow the Trustees to advance money to the survivor if required but there is no absolute right of the survivor to expect this. Surviving Spouses may feel vulnerable.

The Trusts are not as flexible as between beneficiaries as full discretionary trusts.

There are additional formalities required in setting up investments and when dealing with possible changes in property which must be adhered to.

However, it would be hoped that the advantages outlined above would outweigh these issues.

What steps will I have to take to ensure that the Wills achieve their ultimate objective?

If you decide to leave your entire estate into a Life Interest Trust, it is important that all assets are equalised as far as possible to ensure that (a) these Wills have the ultimate effect as outlined above and (b) that the surviving spouse has sufficient capital assets to live on.

This will involve ensuring that your property is held as Tenants-in-Common which is where each spouse owns a defined 50% share which then forms part of their estate passing under the Wills and therefore into the Trust. Your Solicitor will complete any Notice of Severance as required and ensure that this is completed for you.

You will need to ensure that all other assets (banks/building society accounts/shares/other investments) are equalised as far as possible between you.

Who should be my Trustee?

It is entirely your decision but they should be individuals who you trust to look after the ultimate objectives of the Trust; namely to provide an income for the survivor and to ensure that the capital is paid to the beneficiaries ultimately.

The majority of people prefer to appoint the surviving spouse to ensure that their views are respected and one or two further family members or friends. It is permissible to appoint those that will ultimately benefit such as your children.

However, you may also wish to ensure that there is some independence within the Trustees appointed to ensure that all decisions are taken in the best interests of the beneficiaries with no ulterior motives. It is for this reason that we often recommend the appointment of professional Trustees who can provide much needed knowledge, professionalism and independence; if professional Trustees are appointed they must charge for the services that they provide and this will be deducted from the funds held within the Trust.

How will it be set up on my death?

This will largely depend upon which assets are required to be placed within the Trust.

For example; all cash assets would be invested in assets in the names of the Trustees and the property would be transferred into the joint names of the surviving spouse (who still own their half-share) and the appointed Trustees.

What investments can be made by the Trustees?

The Trustees have a wide range of powers of investment which have been included within the enclosed draft Wills.

The majority derive from the provisions of the following (clause 8 of the enclosed draft Wills):

- Trustee Act 2000
- Trustee Act 1925

- Standard Provisions of the Society of Trust and Estate Practitioners (1st Edition)

All Trustees owe their beneficiaries a duty of care to ensure that all investments are made and the administration of the Trust is completed with reasonable care. In the event that they do not exercise such care as is reasonable in relation to an objective standard or any additional expertise that they hold themselves out as having, the beneficiaries may sue for breach of Trust.

Under the Trustee Act 2000, the Trustees have wide powers to invest in any investment as if they are the absolute owner subject to ensuring that they take reasonable care and take advice at the appropriate time.

In accordance with the Trustee Act 2000, all Trustees should diversify their investments to ensure that there is a balance between the often competing needs of the surviving spouse who is entitled to income only and the ultimate beneficiaries who will receive the capital. However, this can sometimes lead to inflexibility when there is a pressing need to obtain the most income for the surviving spouse and therefore in the Wills we draft this statutory requirement to diversify is often excluded.

Depending on the instructions of our clients our Wills will often have additional powers included to allow the Trustees to advance cash to the surviving spouse if required – please see further below.

Will my spouse be able to remain in our home?

Yes, under the terms of the Life Interest Trust, the surviving spouse may remain in their own home. This is because they will (in the majority of cases) own half of it and they have the express right to remain in their deceased spouse's share.

Will my spouse be able to downsize if required?

Yes, under the flexible provisions included within the Trustee Act 2000 and the terms of the Life Interest Trust, the survivor will be able to approach the Trustees and request to be moved to a smaller house if required.

The Trustees have the power to both sell and purchase land and this would, again, be in the joint names of themselves and the surviving spouse. Any surplus resulting from the sale of the property owed to the Trust would be re-invested as above and the income made available for the surviving spouse.

Will my spouse be able to have cash advanced to them if required?

Under a strict Life Interest Trust, the surviving spouse is only entitled to the income from the invested assets.

However, this can be extended to allow the Trustees to advance capital to the surviving spouse either by way of absolute gift or by way of loan repayable with or without interest.

In the event of a loan, this will act as a liability on the estate of the surviving spouse and will merely be repaid upon death or expiry of agreed terms. The capital value of the Trust Fund will be preserved.

In the event of an absolute gift, this will irrevocably pass such capital into the ownership of the surviving spouse and this will form part of their estate and pass either in accordance with the terms

of their Will or be open to any form of assessment were this required. This would affect the capital value of the Trust Fund.

With the inclusion of these additional powers to release capital, Life Interest Wills can represent a good compromise reflecting all the family needs.

*In this document, where reference is made to the term 'spouse', that term includes civil partner.