factsheet

HOUSING OPTIONS

Discretionary Trusts for the Benefit of Relatives with a Learning Disability (*ref 14*)

What is a Discretionary Trust and Why Are They Used?

A trust is a legal arrangement whereby assets (money, investments, property and similar things) are managed by trustees for the benefit of others such as people with learning disabilities. The assets can include a house.

Discretionary trusts are set up by parents or other relatives as a way of making long term financial provision for a disabled child. The reason a trust is useful is that assets once put in trust do not belong to either the donor, 'settlor' in legal jargon (parents) or the 'object' of the trust (disabled son or daughter who is intended to benefit). This means that the capital held in the trust is not taken into account when assessing entitlement to state benefits like Income Support or local authority obligations to fund care.

If parents leave a will which says words like 'our son hereby inherits our worldly goods' and the goods amount to more than about £3,000 the effect will be to immediately take their son or daughter out of some Social Security means tested benefits. Local Authority (Social Services) support may also cease until the value of the inheritance falls below a threshold level. In addition if the disabled son or daughter is unable to manage money then the Court of Protection can get involved. They will appoint a person called a 'receiver' to look after the money and other assets. The receiver may not be the person the disabled person or parents would choose.

Trusts are used to pay for extra things which Social Security benefits may not fund, a holiday, new clothes, electrical goods, special equipment. Importantly a trust can also hold, manage and maintain the parental home if put into the trust.

Other reasons parents give for creating a trust to help provide some financial protection into the future include:

- fears that the local authority will not always continue to provide care or will provide insufficient care
- to provide a source of money to 'top up' what a local authority is prepared to pay for care or to obtain better quality or a different care package
- to enable a son or daughter to remain where they are rather that be forced to move
- to permit more choice and options now and in the future

Creating a Discretionary Trust

A trust consists of a few pages usually drawn up by a solicitor that cover such matters as:

- the purpose of the trust
- who the beneficiaries are - the object of the trust
- who the trustees are
- how new trustees, if needed in the future because a trustee dies for example or no longer wants to do the job, are to be appointed
- how trustees' fees and expenses are to be met

- what powers, duties and discretion trustees have including investing, making of payments and buying or selling property
- what happens to funds held in the trust after the prime beneficiary dies

It is important that trustees have reasonable discretion both to satisfy the legal requirements of a discretionary trust and to allow them to adjust to changing circumstances and legislation in the future. It may be for example that at some point the property will become unsuitable for the son or daughter who might be better off in sheltered housing or a different environment. Trustees need the discretion to sell the property and allow a move if this is in the beneficiary's best interests.

Parents are usually told to give trustees a letter setting out their wishes as to how trustees should act in the future and to seek trustees' agreement to follow the parents' preferences. This kind of letter is however for guidance only and is not legally binding.

A trust is usually brought into effect on the death of a parent (or other relative) as an integral part of the person's **will** but a trust can be created at any time. Other relatives or friends can contribute to the trust. Alternatively but less commonly a trust can be created by drawing up a trust **deed** during the lifetime of the person (settlor) who wants to put money into the trust.

Characteristics of a Discretionary Trust

A discretionary trust is only one of many different types of trust but it is particularly appropriate for people with learning disabilities who will continue to need care and support. It is termed discretionary because the trustees appointed to administer the trust have **discretion** subject to the terms of the trust as to how, when and by whom the capital and interest of the trust are used.

The intended beneficiary has **no right** to either capital or interest and has no right to make claims for payments. If they did then Social Services and DSS might challenge the trust arguing the client/claimant effectively possessed the assets.

A further defining characteristic of a properly drawn up discretionary trust deed is that the intended beneficiary e.g. son or daughter belongs to what is termed a 'class' of people and is **not the sole beneficiary of the trust**. Thus the deed might say 'the trust is for all people with autism living in Wales' and the son or daughter counts as a beneficiary because they have autism and live in Cardiff.

In sum, under a discretionary trust - unlike some other forms of trust - the son or daughter has no absolute right to either the capital or investment income of the trust. Trustees have discretion about what payments are made, subject to the terms of the trust. The intended beneficiary is not the only possible beneficiary.

Parents are often reluctant to accept these defining features of a discretionary trust but they are essential if the trust is to be effective in providing long-term protection and there are not many alternatives.

It is also worth bearing in mind that **not** to make any provision at all for a disabled son or daughter on the grounds that another member of the family will look after them or that the state will provide may not be a wise course. This is because under the *Inheritance Act (1975)* if insufficient provision is made it is possible for Social Services and the Department of Social Security to challenge the will. In turn this can result in an unpleasant, unhelpful and costly legal dispute.

How are Trusts Operated?

Trusts are administered by between one and four trustees who are initially selected by the person creating the trust. Trustees can be other relatives, friends or professionals like a solicitor. Ideally trustees should be contemporaries of the son or daughter but finding suitable trustees is often a real difficulty. You are looking for a mix of personal interest in the welfare of your son or daughter and financial expertise. Professional trustees can be paid for their time but parents are often wary about how much these fees will deplete the trust fund. The trust can meet other trustees' expenses.

Payments are most commonly made by the trustees to provide things the state does not. It is usual for payments to be made as required and not regularly and as such are treated as capital rather than income for benefit purposes.

On the eventual death of the primary intended beneficiary of the trust any remaining assets can be distributed to other named beneficiaries or perhaps donated to a charitable organisation involved in supporting people with learning disabilities according to the terms of the will or trust deed.

Property Held in Trust

There are several advantages of holding property in a trust:

- trustees can deal with all the management and maintenance of the property thus if the disabled person is unable to organise this or do it themselves or lacks legal capacity the problem of how to arrange maintenance can be solved
- if in addition money is put into trust over and above the property this can provide a fund to pay for repairs or upgrading the property

The trustees do not necessarily have to do all the maintenance themselves, they could contract with a local Housing Association or private agency for this service. Note that the trust is not a legal entity so contracts are between the trustees collectively and the other organisation.

A beneficiary living in the house or flat may be able to claim Housing Benefit. The Housing Benefit Regulations amended by Statutory Instrument 3257 apply which discourage this except when:

- the letting is on a commercial basis as any other private sector tenancy
- and the HB administrators must be satisfied that the arrangement is not made just to take advantage of the housing benefit scheme.

See *factsheet* - Renting Accomodation to Relatives: Can They Claim Housing Benefit? (*ref 17*)

Further Information

Trusts are a complex area of law which like any area of law may change. Specialist legal advice is required in drawing up a trust deed from a solicitor experienced in wills and discretionary trusts in the context of state benefits not simply tax planning.

You may get help in identifying the right practice locally from -

Mencap
123 Golden Lane
London EC1Y 0RT
Tel: 020 7454 0454
Email: information@mencap.org.uk
Website: www.mencap.org.uk

Lawyers for People with a Learning Disability
Tel: 0207 242 3332

Disability Law Service
39-45 Cavell Street
London E1 2BP
Tel: 020 7791 9800
Minicom: 020 7791 9801
Email: advice@dls.org.uk
Website: www.dls.org.uk

We hold supplies of a more detailed booklet called *A Guide to Families Wishing to make Legal Provision for a Learning Disabled Member* written by a solicitor, Anthony Quinn.

Mencap, MIND and the National Autistic Society also produce helpful booklets.

If you require further information or have other queries contact Housing Options.

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