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Family Protection Wills

Private client solutions for the St. James's Place Partnership

What are Family Protection Wills and who are they for?

Family Protection Wills are Wills designed for each of a married couple, or couple in a registered civil partnership, who have children. The Wills incorporate asset protection on the first death by ring-fencing assets against care fees, remarriage or bankruptcy, whilst similar protection is also included on the second death for the couple's children by ensuring that their inheritance cannot be squandered or used to meet third party claims.

How do Family Protection Wills work?

On the death of the first of the couple, the entire estate of the first to die is left to an immediate post-death interest trust (IPDI) for the benefit of the surviving spouse/partner. Under the IPDI the survivor is entitled to receive income or to occupy a property rent free but has no right to capital. This is inheritance tax (IHT) efficient as there will be no IHT on the first death as the surviving spouse is deemed for IHT purposes to own the capital in the trust and thus the surviving spouse exemption applies. Assuming no lifetime gifts have been made by the first partner to die within seven years of his or her death, his or her unused IHT nil rate band can be transferred to the surviving partner and claimed on their death.

The use of an IPDI trust on the first death has several advantages:

- **Care fees**: The survivor's only entitlement under an IPDI is to the income arising from the trust's investments. This would normally be coupled with a right to live in the family home. The trustees would usually have power to advance capital to the surviving partner at their discretion. This means that if the survivor has to move into a care home the capital in the trust will not be taken into account in calculating the financial help the survivor is entitled to claim towards payment of care fees. This effectively protects the proceeds of sale of the share of the family home belonging to the first partner from being spent on payment of the survivor's care fees.
- **Remarriage**: As the survivor is only entitled to income, if he or she remarries the capital in the IPDI trust is ring-fenced and is guaranteed to pass to the couple's children; it cannot be left by the survivor to their new partner.
- **Bankruptcy**: Again as there is no capital entitlement the assets in the IPDI trust do not form part of the survivor's assets and thus if he or she were to run into financial difficulties the trust assets will not be available to his or her creditors.

On the death of the second of the couple both estates are then left in trust(s) for the benefit of the couple's children. The trusts for the children are either:

- **Discretionary trusts**: these provide that the trustees can, at their absolute discretion, choose to benefit any of a class of beneficiaries (typically the couple's children and grandchildren or future bloodline descendants). No beneficiary has any entitlement to income and/or capital from the trust and the discretionary nature of the trust means that it is very flexible. The trustees in making their decision can be guided by a Letter of Wishes left by you stating the factors that you would like them to bear in mind when exercising their discretion.
- **IPDI trusts**: as with the IPDI trust on the first death, these trusts provide that your children are entitled to the income produced by the trust investments during their respective lifetimes; the capital passes after their death to their children. Full powers to advance capital to your children at the trustees' discretion can be included and again the trustees can be guided by a Letter of Wishes in making their decision.

What is the IHT position?

As mentioned above, leaving the entire estate of the first to die to an IPDI trust for the survivor is usually an IHT efficient option. If you decide to opt for discretionary trusts on the second death then to ensure that the IHT payable at death is the same as if you leave your estate to your children outright part or the whole of your house (or assets equivalent in value if you have disposed of your home prior to your death) may need to be distributed from the trust to your "lineal descendants" (broadly your children, grandchildren and their spouses and civil partners) outright within two years of the first death in order that your estate can take advantage of the residence nil rate band. However, there would be no IHT payable on your children's deaths on the assets in the discretionary trust, as these are outside of their estates, but there would be a charge to IHT on every ten year anniversary of the trust and on capital being distributed. This charge to IHT would be at a current maximum rate of 6% (and can be less than this).

If you choose IPDI trusts for your children then again the IHT on the second death will be the same as if you had included outright gifts to them provided action is taken similar to that mentioned above to preserve entitlement to the RNRB. However, on the death of your children the value of the assets in the trust would be added to the assets in your child's free estate, IHT calculated and apportioned between the trust and your child's own assets. No more IHT will be payable on your child's death than if an outright gift to your child had been made.

Our Information Sheet, "Will trusts for children", sets out in detail the relative taxation positions of both types of trust and covers IHT, income tax and capital gains tax.

How do Family Protection Wills protect assets?

As mentioned above an IPDI trust on the first death has a number of advantages and effectively ring-fences the assets of the first to die and protects them from several potential threats. Whether you choose a discretionary trust or an IPDI trust on the second death, the capital in the trust is protected. This is because your children can only receive capital at the trustees' discretion enabling the trustees to control the situation and to avoid capital passing to children which might not be used in the way that you would want.

In addition, the capital (and income in the case of discretionary trusts) is protected from claims by third parties, in so far as is possible, such as creditors and estranged spouses. Moreover, if your child dies his or her spouse is not entitled to receive the assets in the trust so they cannot be left outside of the family to a new partner, ensuring that your assets pass ultimately to your grandchildren.

Discretionary trusts have long term IHT mitigation benefits.

Case study

Andrew and Gillian are married with two teenage daughters, Laura and Megan. The couple decide to enter into Family Protection Wills leaving their estates to an IPDI trust on the first death and to a discretionary trust for the benefit of their daughters and their families on the second death.

Andrew dies prematurely and Gillian remarries five years later. Andrew's share of the family assets are protected and guaranteed to pass to Laura and Megan. They cannot be left by Gillian to her new husband. In addition, when Gillian moves into nursing care towards the end of her life again Andrew's assets cannot be used to fund her care unless the trustees decide to do so.

All does not go well for the couple's daughters. Sadly, Laura is killed in a car accident five years after Gillian's death. The assets in the discretionary trust do not form part of her estate and escape a charge to IHT on her death. Laura's children continue to benefit from the discretionary trust set up under their grand-parents' Wills and the assets do not pass to Laura's widower who remarries a few years later.

Megan is a self-employed businesswoman and, due to a downturn in business, runs into financial difficulties and is forced into bankruptcy. The assets in the trust are not her assets and thus unavailable to Megan's creditors. When Megan's bankruptcy is discharged the trustees are able to exercise their discretion to provide finance to her to enable her to re-build her business.

What will we provide you with?

- Wills for each of a couple incorporating an IPDI trust on the first death and your chosen trusts on the second death.
- Letters of Wishes.
- Severance of the joint tenancy on the family home (if required).

The cost

£2500-£3000 plus VAT.

This product can be combined with either (or both) of our Exempt Asset trust or Property Discount bolt ons. Please see our Information Sheets on Exempt assets; Discretionary trusts in Wills and Property fragmentation (Wills) for more information.

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