

* Personal injury trusts

Guidance for beneficiaries and trustees

1 Trusts and trustees

1.1 What is a trust?

1.1.1 A personal injury trust (sometimes known as a "compensation protection trust" or "special needs trust") is a form of trust.

1.1.2 A "trust" is a relationship that is recognised and enforceable in the courts. Where there is an award of compensation for a personal injury, a trust arises for the injured person when that award is put under the control of other persons (the "trustees").

1.2 What must the trustees do?

1.2.1 The trustees must look after the award (which becomes the "trust fund") for the benefit of other persons (the "beneficiaries"). In some cases there may be just one trustee and one beneficiary, but the sole trustee cannot be the sole beneficiary or else there is no trust relationship.

1.3 How must the trustees act?

1.3.1 When the trustees are appointed they agree to act in the interests of the beneficiaries and not themselves. This is why it is called a "trust". They are entrusted to look after the trust fund for the beneficiaries.

1.3.2 In the case of a personal injury trust, the beneficiaries can benefit in the ways set out in a legally binding document (the "trust deed"). Some trusts are imposed by law and do not need a trust deed, but personal injury trusts should always have a trust deed to make sure all the terms are clear.

1.3.3 The compensated person is expected to be the main concern of the trustees of a personal injury trust, even if there are other potential beneficiaries of the trust.

1.4 Who should not be a trustee?

1.4.1 The following should not be trustees:

- (a) any person under the age of 18 (although trusteeship may also prove too great a responsibility for young people over the age of 18).
- (b) un-discharged bankrupts and those with voluntary arrangements with creditors.
- (c) people with current money troubles or with a history of money troubles.

- (d) people in prison or who have or may soon be convicted of offences involving dishonesty.
- (e) people who have a conflict of interest with the compensated person or others involved with the trust.
- (f) people with serious health problems who may be unable to fulfil their duties at any time.
- (g) people who live outside the UK or who may do so in the future.
- (h) people who are in any way concerned they might be unable or unwilling to fulfil their duties as a trustee.
- (i) ideally, the compensated person and their partner should not be trustees.

1.4.2 It is usually considered wise to have a combination of family and experienced professionals as trustees.

1.5 What are the powers of the trustees?

1.5.1 The trustees have certain powers over the handling of the trust fund. These are set out in the trust deed. Trustees do not have any power to go beyond the terms of the trust deed unless such powers are included within the general law.

1.5.2 Most things a person would want to do with their own money can be done by the trustees for the benefit of the beneficiaries. For example, they can, upon taking appropriate advice, open and operate a bank account, invest money, buy and insure property, and purchase help and assistance for the beneficiaries.

1.5.3 Trustees may sometimes need to take legal advice. That advice is funded by the trust fund and not from their own pockets unless the trustees do something wrong. That is called committing a "breach of trust". Trustees are liable for losses due to "breach of trust" out of their own pockets, so taking legal advice is important. Trustees can also obtain help from other professionals as required (e.g. when completing trust related tax returns). Again, that is at the expense of the trust fund so far as it is necessary to the smooth running of the trust.

1.6 What are the duties of the trustees?

1.6.1 A trustee must:

- (a) disclose any circumstances where they might have a conflict of interest with a beneficiary. For example, if a beneficiary owes a trustee money this should be disclosed.
- (b) not act in conflict with the interests of the beneficiaries or profit from their role as trustee.
- (c) ensure they know what the terms of the trust are and that they are carried out.

- (d) ensure they do not act beyond the terms of the trust and its powers.
- (e) ensure that good trust records and accounts are kept and pay any tax due on time.
- (f) take independent financial advice. This does not preclude the use of common sense. The trustees must also ensure that the advice taken is in accord with the Trustee Act 2000. The ultimate decision over what to invest in is the trustees' decision. It cannot be delegated.
- (g) act impartially and fairly as between multiple beneficiaries and as between those who are beneficiaries now and those who will be beneficiaries in the future. This is the general rule, but in the case of a personal injury trust the compensated beneficiary will be expected to be the main beneficiary for life. That is allowed for under the powers of the trustees.
- (h) take reasonable care. Professional trustees must take more care than others.
- (i) act jointly. Trustees should not normally delegate functions to each other. Trustees are jointly liable for mistakes and should therefore act together.
- (j) not charge. Only professional trustees can claim for more than out of pocket expenses.
- (k) ensure the beneficiaries are kept fully informed. This can help avoid disputes.

2 The personal injury trust and benefits issues

2.1 Personal injury trusts and means-tested benefits

2.1.1 The aim of this section is to make you aware of the generality of the rules. Complex questions will need to be referred to us for legal advice, but the administration of the trust can usually be operated without that.

2.2 Compensation and means-tested benefits

2.2.1 If a person receives damages for a personal injury then that compensation may reduce or even stop their entitlement to "means-tested" benefits such as income support, housing benefit, working tax credit, council tax benefit, pension credit, income based jobseekers' allowance and income related employment and support allowance. Universal credit is a new benefit which will replace these benefits and which is being introduced gradually across the country. The intention is that this new system should be fully in place by the end of 2017.

2.2.2 The amount of money or "capital" a person can have before losing Income Support is currently £16,000. Some means-tested benefits allow you to have more savings, but Income Support can help determine your eligibility to other benefits which means its thresholds are very important. The rules mean that a personal injury award can be ignored by the Department of Welfare and Pensions (DWP) for up to one year. It is extremely important, however, that a compensated person takes advice if it is thought

this may apply as, unfortunately, the rules are more complicated than they might at first appear. For example, if a compensated person received any payment in relation to their personal injury more than a year ago, compensation being received later will not be ignored for any period at all.

- 2.2.3 Capital is made up of cash/investments and so on - subject to certain 'disregards' - such as for the value of the family home whilst you live there and the surrender value of life policies. Disregarded items are not treated as part of your capital.
- 2.2.4 It is important to note that the rules mean that the amount of capital in the name of your marriage partner or a person you are living with as man and wife also needs to be taken into account. Please bear this in mind when reading this guide. It is very important.
- 2.2.5 A child's capital does not count towards an adult's claim for benefits even if they are in the same household. A "child" is one of any age, including adult children still living at home. However, it is vital that the ownership of capital assets is transparent and not manipulated. To do so could lead to the claimant being treated as if they still had the capital. That is the result of the anti-avoidance 'notional capital' rules.
- 2.2.6 Special rules apply to certain, generally older, people in residential care. Broadly, if they have over £23,250 they will have no entitlement to means-tested benefits, which includes local authority assistance with residential care funding. Below £23,250 down to £14,250 they will receive benefits on a sliding scale. Below £14,250 they will have full entitlement to means-tested funding. A claim for a fall or other injury affecting an older person can be protected from liability to care fees as below. This guide is therefore relevant for people of all ages. It may help you to retain means-tested benefits and protect your assets long into the future.

2.3 How can you avoid losing means-tested benefits when receiving an award for a personal injury?

- 2.3.1 The law says that where money "derived from a payment made in consequence of any personal injury" is placed in a trust, then "the value of the trust fund and the value of the right to receive any payment under that trust" shall be disregarded as capital in calculating a claimant's entitlement. This means that, by putting your compensation for your personal injury into a trust you should be able to retain your entitlement to state benefits.
- 2.3.2 It is important you are aware that the disregard of compensation placed in trust is not a "loophole". The government recognises the special situation. It is happy for you to keep on claiming benefits, but you must do it in the way the government has specified. That means putting the personal injury compensation into a trust.
- 2.3.3 If you are in receipt of working tax credit or child tax credit it is important that you make us aware of this as this may affect the type of trust to which we recommend that your personal injury payment is transferred.

- 2.3.4 If you are a carer and are supported by means-tested benefits but part of the award of compensation is for past care of the child or other person you have looked after, depending upon the terms of the settlement and the historic position regarding payment, that may be your money. It may reduce your own entitlement to benefits depending upon how much is received. You may choose to allow that amount to remain with the injured person or to be placed upon any trust set up for them for this reason. That may protect your entitlement to benefits but that is not certain, and you may need to take independent advice if you wish to discuss that option further. Many people just want to take that money and make use of it, perhaps claiming benefits again later when it runs out. The choice is yours.
- 2.3.5 Your adviser and the DWP should be aware that these important rules are included in Regulation 46(2) of the Income Support (General) Regulations 1987. Paragraph 12 of Schedule 10 applies. They were also amended by Statutory Instrument 1990/1776. That amendment got rid of some old limitations upon the original disregard of money in personal injury trusts. Further changes to your advantage have taken place since.
- 2.3.6 These rules are mirrored in the case of other benefits such as Housing Benefit and Council Tax Benefit. For local authorities dealing with care for elderly people issues, the relevant disregards are contained within the Care and Support (Charging and Assessment of Resources) Regulations 2014. The disregard of capital held in a personal injury trust is contained in clause 22(1)(a) of the regulations. The regulations are supplemented by the Care and Support (Deferred Payment) Regulations 2014 and by the Care Act 2014 statutory guidance. The Care Act 2014 determines the procedure that should be followed by Local Authority with regard to the provision of non-residential and residential care. In both cases the applicable capital limit is £23,250 as set out in paragraph 2.2.6. The Local Authority will carry out a needs assessment to determine eligibility for care in accordance with the national eligibility threshold. This will result in a care and support plan following which a financial assessment will be carried out which sets out a personal budget figure which is the amount that it costs to meet the older person's needs.
- 2.3.7 The Local Authority is not permitted to charge more than the cost of providing the services; certain services - intermediate care of less than six weeks and costs of equipment and minor property adaptations not exceeding £1000 - should be provided free of charge.
- 2.3.8 The Local Authority will have a limit on the amount that it will be prepared to pay for a place in a residential care home. Again the amount in a personal injury trust will be disregarded in the financial assessment.

2.4 How can a beneficiary of a personal injury trust benefit from the money in their trust?

- 2.4.1 You can receive the benefit of the money/investments in the trust. That is on top of you being able to keep means-tested benefits.
- 2.4.2 Broadly speaking, if the capital paid out to you from your trust means that the money you have in your own name (or in your partner's name or when your joint capital is

added together) is more than that allowed by the benefit rules then your means-tested benefits will be reduced or stopped altogether until your capital drops below the limit again. This means that only relatively small payments may be made directly to you from time to time out of capital..

- 2.4.3 Although you may not receive large amounts into your own account there is nothing to stop the trustees from buying things for you to use.
- 2.4.4 A useful rule of thumb to help with your budgeting is that if your benefits are supposed to pay for something, then that "something" should not be paid for by your trust. Benefits are supposed to pay for ordinary expenses of daily living such as food, clothing, footwear, gas, water, electricity bills, rent and mortgage interest. Obviously, if you receive an unexpectedly large bill your trustees could make good the shortfall.
- 2.4.5 "Care needs" are not ordinary living expenses nor are the costs of repairs and refurbishment of property, the price of cars and even your telephone bill. These should therefore normally be paid for directly by the trust without affecting your benefits-related budgeting. The trustees could also buy you a holiday, furniture or a computer and other educational equipment and any other personal possessions you want, even valuable ones. They would pay for those items directly. Your account balance and thus your means-tested benefits would therefore not be affected by this expenditure.
- 2.4.6 In short, there is nothing in the normal way of things the trust could not pay for. Payments can also be made to other beneficiaries if you want. Care needs to be taken not to increase your partner's capital above the threshold which will mean you are both over the capital threshold.

3 The personal injury trust and other issues

3.1 What are the other advantages to having a personal injury trust?

- 3.1.1 There are important ways in which a compensated person can benefit from the trust apart from financially:
 - (a) your trustees can look after your property in the trust even if you cannot. That may be particularly important in later life.
 - (b) your trustees can help share the burden of sorting out your paperwork which naturally arises when money is invested.
 - (c) the trust can provide a level of protection if you were to divorce or to become bankrupt making it harder for the assets in the trust to become available to meet third party claims.
- 3.1.2 In essence, these additional advantages of a trust are related to better peace of mind.

3.2 What about tax?

- 3.2.1 As most personal injury trusts are "bare trusts", any income derived from the trust fund will be yours and will be taxed at your normal tax rate.
- 3.2.2 The income from the trust will need to be declared on your own personal tax return. If you do not automatically receive an annual self-assessment tax return at the moment, you will need to request one from HM Revenue & Customs if the award is significant. We can also do that for you. We can assist with tax returns and tax refund applications each year.
- 3.2.3 Payments of capital from the trust fund to you are not subject to income tax.
- 3.2.4 Gains in value (between purchase of trust assets and sale) are subject to capital gains tax but, as you will have an interest in your own trust, your own personal capital gains tax allowance should be available to set against them.
- 3.2.5 There are special rules relating to the purchase/sale of residential property. It would be prudent to allow us to deal with that for you as we may be able to eliminate capital gains tax issues. Capital gains tax is a complex area and before any trust assets are sold advice should be taken. Note that some payments of assets out of the trust where there has been a gain in value (even if the assets are not sold) can trigger a charge to capital gains tax. Again, take advice before you do anything. The same can sometimes apply upon the possible break up of a trust following the death of the primary beneficiary.
- 3.2.6 When you die, inheritance tax is payable if your assets (including the value of the trust and certain gifts made within seven years of your death) exceed a certain amount called the "nil rate band". The nil rate band is currently £325,000 (2016/17). The rate of tax is 40% on any value above this threshold. We can help if this is an issue.

3.3 What about investment of the money while it is in the trust?

- 3.3.1 Your trustees will have power to invest the money as they see fit.
- 3.3.2 We can help you make sure the tax and administrative issues are dealt with properly.
- 3.3.3 If you need a financial adviser we can assist you to find a suitably qualified person.

3.4 Can the government change the rules?

- 3.4.1 The government can change the benefits rules, tax rules and trust laws at any time.
- 3.4.2 The arrangements we put in place are very flexible so most changes can be accommodated easily. You should keep in touch with us. Revised guides may be issued from time to time.

3.5 What happens to the money after I die?

- 3.5.1 The fund will usually form part of your estate unless it is held in a discretionary trust when different rules apply. You will need to draw up a Will to say who your estate is to go to following your death. This is very important. Please contact us to discuss.
- 3.5.2 Family members who might want you to benefit you on their death may need to alter their Wills so as to avoid you losing benefits upon receiving funds from them. They can still benefit you, but a Will incorporating a trust rather than an outright gift may be more appropriate. We can advise further on this.

4 Further information

For further information on this or on any other Private Capital matter you may have, please contact us via:

See key contacts

* Calls cost 2p per minute plus your phone company's access charge. We receive no monies from your call and an alternative geographic number is provided.

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