

## COMMENTARY ON A FAMILY ASSET PROTECTION TRUST

The purpose of this document is to provide an explanation of the trust deed.

1. When you create a trust, you transfer the legal title of the asset, such as your family home, to the trustees. To perfect this transfer, a land registry document is prepared and registered at the land Registry, and this shows that the legal title is held by the trustees as trustees of the newly created trust. You may, of course, be one of the original trustees and your name will be shown at the land Registry with the other trustees.
2. The trust is said to be **discretionary** and falls within the **relevant property regime**. This means that if the value of the asset going into the trust exceeds your nil rate band (currently £325,000) then there would be an entry charge of 20% of the excess. Every 10 years there is a review of the assets in the trust and again there could be a charge to tax if the value of the assets exceeds the available nil rate band at that time.
3. The **Settlor(s)** is the person who has created the trust.
4. The trust also appoints **trustees** who are responsible for the management of the trust fund which in this case is the property/family home. You may also act as a trustee initially or during your lifetime. This means that during your lifetime you will be able to hold trustee meetings, participate in them and assist in making trustee decisions.
5. You are described as the **life tenant** in the trust, which basically means that you have the right of occupation of the property in the trust, or income, if the property is producing income.
6. The trust fund consists of the property [family home] initially, but also envisages that further assets could be added to the trust fund in due course. If you do intend to add further assets, then you need to take professional advice when so doing as there can be tax consequences when you add property to the trust fund.
7. Trusts have a life of 125 years and at the end of the 125 years trust property must be paid out to the ultimate beneficiaries.

8. In reality, the trust is likely to be wound up well before this date and the trust fund distributed to the chosen beneficiaries. In other words, after your life tenancy has ended, the trustees can continue the trust for the benefit of your chosen beneficiaries or wind it up and transfer the property to the beneficiaries, as per a letter of wishes which you may have given to the trustees.
9. The trust sets out whom you wish to be the **discretionary beneficiaries**. This can be a wide range of people, such as your surviving spouse, your children and grandchildren, nieces and nephews, friends and so on and so forth. However, despite the wide class of beneficiaries, a letter of wishes can narrow the class, so that you might say you wish only your spouse and your blood-line children to be considered as beneficiaries, for example.
10. The trustees have a **wide discretion** over which of the beneficiaries is entitled to income and capital. This can be very useful if you wish to exercise some control over beneficiaries and ensure they only have income and no access to capital. For example, a child may be irresponsible with money. By restricting access to income only, and not access to capital, you can control their spending.
11. As trustees have such a wide discretion, you should exercise caution in whom you choose as trustees and these should be people whom you can trust to carry out your wishes, particularly after you have died. You might also consider whom you would like as replacement trustees if a trustee dies, loses capacity or wishes to retire. Although you may wish to appoint a friend or a relative as a trustee, you should consider carefully whether they have the capability to be a trustee, prepare trust accounts and generally administer the trust. Elderly people may find the office of trustee to be onerous and you should exercise caution in such an appointment. Very often, it is desirable to appoint people who are younger than you and who are likely to still be around after your death.
12. You will see that the trust also contains an **ultimate default clause**: this really covers the situation at the end of 125 years and it is usual for charities to be appointed, because in reality it is unlikely as we have said that the trust will last for 125 years and will be wound up well before then. The ultimate default clause is sometimes called a disaster clause: in other words if all other gifts have failed, this clause covers such an eventuality. Often grandchildren are named in such a clause although they are unlikely to be living in 125 years time.

13. There must be a **minimum** of two trustees [if there is land or property in the Trust Fund] or a professional trustee; the **maximum** is four trustees. The land registry will not put more than four trustees on the land Registry title.
14. This can cause some confusion if the Settlers have for example 3 children and they wish all 3 to act with them as trustees. This is not possible because it would result in a total of five trustees which is not acceptable to the land registry. You could appoint two children to act with you and reserve the third child as a replacement trustee in due course. This would work quite well as you advance in age and perhaps wish to retire as a trustee.
15. You will see that the trust allows the Settlor to appoint new and additional trustees and to remove trustees and this power continues during the settlor's lifetime or whilst he or she has capacity. After the settlor's death or loss of capacity, the remaining trustees have these powers.
16. The schedule to the trust contains details of the initial assets to go into the trust. This will normally be the family home but in certain circumstances, for example, where there is a mortgage over the family home, a nominal asset may be put into the schedule, such as a one pound stamp or a ten pound note.
17. The rest of the trust contains **administrative powers**, which in the case of this trust is the incorporation of the powers prepared by the Society of Trust and Estate Practitioners. [STEP].
18. These provisions give the trustees **wide powers** such as management of the trust property, the power to repair and maintain it and develop and improve it and of course the power to allow you, as the life tenant, to reside in the property. If at any time you left the property, for example, you went into care, and the trustees let the property, then they could pay the income from the tenancy to you.
19. It is also the case that the trustees can lend money arising from the trust fund to a beneficiary, without security, and on such terms as they think fit.

20. It should be noted that the trustees are not under any duty to consult with beneficiaries to give effect to any wishes of any beneficiaries. This is important because the powers of trustees should not be fettered in any way.
21. The provisions also protect trustees in the exercise of their powers. This means that unless the trustee has committed fraud or been negligent then they will not be liable for their actions provided they have acted in good faith and have done their best to carry out their duties. Very often, trustees will have questions about what they can and cannot do as regards the trust fund. In such a case they can consult with the court for directions.
22. If you have any concerns as regards the ability of trustees to assist you **during your lifetime** as trustees, or more particularly, to carry on the trust properly after your death, then you could consider appointing a professional trustee.

#### **MINUTES**

23. At least once a year, you should hold a trustee meeting to confirm that the trust is operating satisfactorily, that property expenses and bills are being paid and that any returns to the revenue have been made or will be made in due time. This meeting can be quite informal, held over the telephone, but should be recorded in a formal minute signed by the trustees. It is also an opportunity to consider the state and condition of the property and decide whether any essential repairs should be carried out.