PROTECTING CAPITAL ASSETS

We're getting an increasing number of queries from clients looking to protect their assets and maximise their family's inheritance.

There are many products or schemes on the market that claim to protect the value of the family home or other assets against the cost of care – often these arrangements fail to do anything of the sort. Success is very much dependent on a client's circumstances.

Might it be better to retain capital assets?

Well, perhaps. Having access to capital gives you choice and independence in terms of care provision. If you are able to pay for your own care, you can choose a care home anywhere that meets your care needs. If you become unhappy in future, you have the freedom to look at alternative placements without the financial restrictions placed on council-funded residents.

If you deprive yourself of capital to the extent that you have no (or very limited) savings left, then your disposable income may be restricted to the personal Expenses Allowance (PEA) of £22.60/wk. If you have retained your capital, you may have more disposable income / capital to spend as you wish.

Disadvantages of giving away capital

Most older people don't require long-term care in a care home. Quite apart from the issues surrounding care home funding, transferring assets to another person will have significant consequences if you do not subsequently need to enter a care home.

Once an asset has been transferred out of your name, you no longer have control over it. Unfortunately, it's not always possible to rely on the new owner acting in accordance with your wishes. You should consider how you might be affected if disagreements arise in the future.

Deprivation of capital

The guidance around deprivation of capital states that 'intention' is a key factor. Where a local authority believes that someone has given money away; transferred capital or ownership of property to someone else; or made extravagant purchases in order to avoid paying care home fees, the local authority may decide that this amounts to deprivation of capital. Other actions such as selling an asset for less than its true value may also be seen as a deprivation.

Obviously a person may have many motivations for disposing of a capital asset. Avoiding care costs need not be the main motive but it must be a 'significant' one. Both the timing and the intention behind the disposal will be considered.

There's no time limit as to how far back a local authority can look when considering intentional deprivation.

The nature of the rules on deliberate deprivation of assets means that it's not possible to predict with any certainty whether the local authority will raise the issue during any future financial assessment. Local Authorities will generally not advise you beforehand how they might treat a particular transfer at a later date.

Consequences of falling foul of the deprivation of capital rules

If the council decides that you have deliberately deprived yourself of capital, and you did this…

(1) More than 6 months before the resident entered residential accommodation

The local authority can treat you as still owning the asset and include the value of this 'notional capital' in your financial assessment. This means that, other than free personal and nursing care payments, they may not help to pay care home fees.

(2) Within 6 months of entering residential care

The local authority may look to recover the charges from the person to whom the house (or other property) was transferred.

Schemes designed to avoid liability for care home fees

Any arrangement designed to circumvent the rules may not be successful and the rules on care funding may change.

If you set up something when you're in good health, living independently and have no immediate prospect of entering long term care then you have a greater chance of success. Note I say a greater chance of success as opposed to guaranteed success.

It may be harder for the local authority to prove 'deliberate deprivation' if you can show that there were other important considerations. I'm thinking particularly if you have a dependent with additional support needs – you might want to ensure they can continue to live in the family home after your death.

Options:

Scheme 1: Gifting House to Relatives

Advantages

1. A transfer such as this will make it more difficult for a local authority to take account of the value of your home in any financial assessment.

2. A lifetime transfer such as this may result in a saving of inheritance tax - in some circumstances. Bear in mind though, that most people aren't liable to pay inheritance anyway.

3. There might be a small saving in costs by making this transfer to a relative during life as opposed to on your death.

4. The longer the time that elapses between the transfer taking place and the assessed person entering into long term care, the less likely it is for a local authority to argue that the transfer took place to deliberately avoid care fees.

5. If successful, the home may be secured as part of the family inheritance.

Disadvantages

1. A local authority may still take account of the value of the home as 'notional capital' and seek contributions from the assessed person based on this.

2. If the relative to whom the house has been transferred divorces then the home may be taken into account in any settlement. At worst, this could mean the property has to be sold while you still live there! The same risk applies if the relative is made bankrupt or dies.

3. If the person never ends up in long term care then the risks of giving away their home may outweigh any potential benefits.

4. There may be no inheritance tax saving if the person continues to live in the home after they have given it away.

5. If the relative receiving the property already owns their own home, they may be charged capital gains tax on the home if they have to sell it at a later date, be it to fund the care or upon the person's death.

Conclusions

Whilst this scheme is perhaps the simplest to put into practice, we tend not to recommend it. In my mind, the risks outweigh the benefits. Also, the ability of a local authority to regard a transferred home as 'notional capital' means that, ultimately, the scheme may well fail in its objective.

Scheme 2: Transferring the Home into a Liferent Trust

Using this scheme, the occupier of a property transfers the property into what is called a 'liferent' trust (also known as a life interest or interest in possession trust). The property would then not be owned by the transferor, or by a relative, but by the trust itself. The occupier gives themselves a right to live in the property until they enter long term care. If and when they enter long term care, they are then still entitled to receive an income from the property in order to support their care fees. Alternatively the trust could be brought to an end upon entering care, at which point the property will pass onto the ultimate beneficiaries of the trust – usually the person's children.

Advantages

1. As with the last scheme, a transfer into a liferent trust will make it more difficult for a local authority to take account of the value of the home in any financial assessment. It's probably harder for a local authority to take the property into account as 'notional capital' when it's been transferred into a liferent trust as opposed to directly to a relative.

2. Again, the longer the time that elapses between the transfer into trust taking place and entering long term care, the less likely it is for a local authority to argue that the transfer took place to deliberately avoid care fees.

3. A lifetime transfer may result in an IHT saving (in a limited set of circumstances).

4. As the home isn't transferred into the name of a relative, the home would be protected against the risks of divorce, bankruptcy or death of the relative. So it protects the person's right to live in the property.

5. The adult is able to benefit from the income that the home may generate to help fund their care fees.

6. This scheme has shown to be somewhat more successful than the previous scheme, and is therefore more likely to secure a family's inheritance and achieve its overall objectives.

Disadvantages

1. It's still possible that a local authority may still take account of the value of the home as 'notional capital'.

2. There may be no IHT saving if the person continues to live in the home once it's been put in trust

3. Setting up the trust may be more costly than simply transferring the home to a relative.

Conclusions

This scheme is 'safer' than the first scheme. It's generally got a higher success rate in protecting the home from being considered 'notional capital' but it's still possible – and does happen.

Scheme 3: Giving a Spouse or Partner a Liferent in the Property upon Death

Before we go into detail about this scheme, we need to take a look at the way property can be owned.

In Scotland, if two people (a married couple for example) own a home together, the title could be taken in one of two ways:

1. The title can include a survivorship destination which means that on the death of the first owner, his or her share automatically passers to the remaining owner and doesn't form part of their estate. So, the surviving spouse will become the outright owner.

2. If there is no survivorship destination the deceased person's interest in the property will simply form part of their estate. They can then leave their share to whoever they like in their will (or it will be dealt with under the Laws of Intestacy)

Why is this relevant? Well, we already know that, if a person enters long term care whilst their spouse is still alive and living at home, then their property will be disregarded in any financial assessment. However, if that spouse dies or also moves in to long term care, then the property will no longer be disregarded.

If, after the first spouse has died, their share has automatically passed to the survivor – the entire house will be now be included in any financial assessment.

This scheme allows at least a proportion of the property (usually a 50% share) to be excluded from any financial assessment.

To use this scheme, we must make sure there is no survivorship destination. If there is, then it can be 'evacuated'. The next step is for the couple to amend their wills so that, on the first death, they give the surviving spouse a liferent in their share of the property. This means that the survivor can live in the property or receive an income from it to help fund their care.

The success of this scheme lies in the fact that if the surviving spouse does have to enter long term care, their deceased partner's share of the property is entirely protected from from local authority assessment. The surviving spouse will only be assessed on the basis of the share that they own. The Local Authority may also decide that the other 50% then has a 'low or nil value' because it's very difficult to place a value on half a property as it's unlikely they could actually realise this value by selling half a house.

Advantages

1. If enacted properly, this scheme will ensure the share of the property from which they are benefitting as life tenant will be entirely protected from local authority assessment. This share of the home will therefore be secured as family inheritance.

2. A local authority may attach a lower value than the ordinary market value to the half share of the property that's still in the name of the surviving spouse as the split ownership will reduce the property's market value.

3. The home is not held in the name of a relative and is therefore protected from the risks that attach to a relatives divorce, bankruptcy or death.

4. The surviving spouse can still benefit from the income from the whole of the property (whether rental or sale) if the property is rented/sold after the surviving spouse has entered care.

Disadvantages

1. It's only an option for those who are married, cohabiting or in civil partnerships.

2. It's only effective if a person is required to enter into care after their spouse has died. If both spouses are alive and both enter into care then their respective shares of the property will be taken into account in their respective assessments – thus negating the effectiveness of the scheme.

3. The scheme can only protect the beneficial share of the spouse who has died, this is usually 50%.

Conclusions

Whilst this scheme may only protect a beneficial share of a property, upon the scheme coming into effect it is guaranteed to be protected from a local authority assessment. The beauty of this scheme is that that it does not matter what your motives were and for that reason it's perhaps the 'safest' option.