Guide to gifting assets

Reasons for gifting assets during your lifetime

1. General affection. You may want to demonstrate your love and affection for the proposed recipient in a significant way.

2. Family harmony. Even in the closest of families there can be the potential for disputes, especially over property and money. It may prevent damaging and potentially very expensive arguments after death to transfer assets during your lifetime.

3. Avoidance of delays on death. You may wish to reduce delays in selling or transferring your assets after you die. Obtaining the grant of probate and distributing assets after death usually takes 3-12 months and can take very much longer. Assets transferred during your lifetime have already been distributed or put in trust and do not need to be dealt with again as they are outside your estate.

4. Reducing the stress and cost of probate. As above, assets gifted during your lifetime do not need probate. If your Personal Representatives (usually the executors of your Will) ask a professional to deal with your estate after you die it can reduce the stress of dealing with the process, but can incur significant fees. Assets given away or already placed in trust are not included in the probate process, which can reduce the costs to nothing or a few hundred, instead of several thousand pounds.

5. Avoiding inheritance tax (IHT). Making an outright gift of assets to one or more individuals can be a Potentially Exempt Transfer (PET), which means that after seven years the asset does not form part of your taxable estate.

6. Paying inheritance tax (IHT). If your estate is liable to IHT on your death, your executors have to pay the tax before they can sell enough assets to raise the money to pay the tax! However, assets (including life assurance) placed in trust during your lifetime are available quickly so your executors should not need to arrange bridging finance to pay the tax, which is very expensive.

7. Sideways disinheritance. If a couple just make "mirror" Wills, leaving everything to each other on the understanding it will then be passed to jointly agreed beneficiaries, this can be overtaken by events. Sometimes the survivor remarries and forgets to make a new Will, which can mean everything goes to a new spouse, or to their children. Sometimes elderly widows or widowers are coerced or influenced to change their Will in favour of someone else. A Trust, either in a Will or set up during your life, can make sure that at least your "half" of such assets can only ever go to the people you have chosen.

8. Future claims on your estate. Under the law of England and Wales you can include or exclude whoever you like in your Will, but certain classes of people still have the legal right to make a claim against your estate. Assets given away or put in trust more than six years before death cannot be claimed and assets put in trust for less than that time are difficult to claim.

Guide to gifting assets

Reasons not to just make an outright gift

9. Future difficulties. You need to bear in mind that just giving away assets outright, especially the family home, means there is a risk of the asset being lost to future generations, or you being made homeless if the recipient wants to sell the property (perhaps because they have lost their job, been forced to take a pay cut or just because they are under irresistible pressure from partners or immediate family to do so). The asset could also be lost if they were to divorce or go bankrupt. You would be placing enormous trust on someone else in respect of what may well be the most important asset you own, in the hope their own circumstances do not change.

10. Tax implications. If you continue to live in or use a property or benefit from an investment it will still be treated as yours for inheritance tax purposes. To avoid this you would have to pay the recipient full open market rent for living there, and they would have to pay income tax on it. If they are not living in the property they may have to pay capital gains tax when they eventually sell it.

11. Loss of means-tested benefits. If the recipient of your gift is in receipt of such benefits then these could be lost.

12. Greed. We know money can have a power all of its own. When an asset is received the desire to sell it and spend the proceeds can prove overwhelming to some people, who may have mortgages of their own to pay or pressing credit card or other debts. The desire for impressive holidays or cars and the cost of bringing up a child, or education and university fees can turn a heart to stone and lead to assets being sold to raise capital by whatever means necessary. Sadly it does happen.

13. Laziness. It may be that the recipient of an outright gift simply gives up working as hard as they have before or cease to apply themselves to their education, work or life in general.

14. Vulnerable beneficiaries. It is wise to bear in mind the possibility that, even if a child or other potential recipient has your best interests at heart, a third-party (such as a spouse or other person you may not even know about) may not and could exert tremendous influence against you. Gambling, drink and drugs have also led to the loss of many fortunes and ruined lives.

15. Premature death of a recipient of your gift. If someone dies before you, then a gift given to them outright passes under their Will, or if they have not made a Will then directly to a spouse or civil partner, who may then subsequently remarry, or to their children who might not have your best interests at heart. This is a risk few clients would take once they have understood the potential consequences.

16. Long-term care provision. Just giving your assets outright to family in the hope of avoiding the costs of long-term care is very unlikely to be effective. Please take careful note of the advice given later on this topic.

17. Lack of control. Just giving an asset away means you have completely lost control of it and cannot redirect it if circumstances change.

Guide to gifting assets

Reasons to consider using trusts

'A trust' is a relationship between the person who sets it up (the Settlor or Testator), the people who administer it (the Trustees) and the people who benefit from it (the Beneficiaries). The details of the trust and the rules about how it is to be run are contained in the 'trust deed'; this may be a document set up in your lifetime, or expressed in a Will.

The assets contained in a lifetime trust fund are put into the name of, and are legally controlled by, the trustees. These assets do not then form part of your estate, and therefore do not need a Grant of Probate to be distributed to your beneficiaries; and may also be outside the scope of means-testing. By comparison a Will trust only take effect following a death, the assets are then subject to probate and would still be subject to means-testing if that was required prior to death.

The Trustees must obviously be persons (including professional trustees) whom you trust. Trustees have a certain amount of discretion, although they must act in accordance with the trust deed and can be held accountable by the courts if they do not act properly. You need to choose your trustees carefully, a minimum of two and a maximum of four should be appointed, although a trust corporation can act on its own.

If you set up a trust through your Will it is usual to appoint your executors as trustees. If you set up a 'lifetime trust' you could be a trustee, but that is not recommended as it defeats the objective of passing on responsibility to someone else. Beneficiaries can be trustees, but sometimes this can create a 'conflict of interest' when they have to consider the competing claims of other beneficiaries against their own or their children's. The general rule is that a trustee should not personally benefit from the trust.

Trustees are personally responsible for keeping good trust records and trust accounts, and for preparing tax returns and paying any tax due. They must take investment advice from properly qualified and insured financial advisors at appropriate times, and at all times act in accord with the various Trustee Acts, as they are amended from time to time. These are onerous responsibilities, which is why we recommend that a professional trustee, such as the Family Trust Corporation, is appointed.

Professional trustees can charge for their time according to their published terms of business or letters of engagement, but all fees must be agreed in advance. Professional trustees are held to a much higher duty of care by the courts than amateur trustees and must carry professional indemnity insurance in case anything does go wrong.

Guide to gifting assets

Will trusts for solely owned property

If you want to ensure particular assets go to particular people after your death you must make a Will. If you want someone to benefit from an asset (perhaps by living in your home after your death or getting the income from an asset) but don't want them to own it outright or be able to sell it, then your Will can contain a 'term interest', 'life interest' or 'discretionary trust'. You can give directions about who the asset eventually passes to and when.

If one or more of your potential beneficiaries is disabled a vulnerable beneficiary's interest trust' can be established which has certain tax advantages and can protect any means-tested benefits they are in receipt of.

Will trusts and joint ownership of property

Any asset that is jointly owned, such as a house or a bank account, passes automatically to the survivor on the death of a joint owner on a 'last man standing' basis. For some clients this will be what they want to happen, but consideration must be given to the threat of 'sideways disinheritance' outlined at paragraph 7 above. It is always possible the joint owner will remarry and want to share assets with their new family, or inadvertently leave them to a new spouse because they have not made a new Will (Wills are automatically revoked on marriage). If there are children from previous marriages the survivor may decide to prefer their own offspring over their former partner's, or they may just be persuaded to alter their Will in someone else's favour.

By 'severing the tenancy' of a jointly owned property, and preferably registering this with HM Land Registry, so that each party owns a defined share (usually 50:50), that share can be left only to the beneficiaries they have chosen in their Will. The survivor can be granted the 'right to reside' in the property for a fixed term or for their life, or until they go into care and they can usually downsize if they want to, but it must eventually pass to the specified beneficiaries you have chosen in your Will.

A very useful effect of severing the property and establishing a trust over the property and/or other assets is that the share in trust cannot be taken into account by a local authority if the survivor goes in to care at a later date.

While this will protect half of the assets if the survivor enters care, the whole property could be taken into account if both enter residential accommodation.