Planned Succession
Personal Estate & Business Succession Planning

Property Ownership

For the majority of people the largest asset that they'll ever buy is their family home, yet most of us own that property in the least efficient manner. In broad terms, and regardless of whether you have a mortgage, there are four ways in which we can own property; being Sole Ownership, Joint Tenants, Tenants in Common or via an what is known as an 'artificial personality' such as Trust.

Sole Ownership

This is where the owner of record is one person. Upon death, the property will pass to those who you nominate as beneficiaries under your Will. If you don't have a Will, then your home along with all your other assets will be divided up as per the Intestacy Rules. If you are a sole owner, it is vital that you have a Lasting Power of Attorney wherein you have appointed someone (your Attorney) to speak and act on your behalf should you become physically or mentally unable to do so yourself.

Joint Tenants vs. Tenants in Common

Traditionally, most people own their property as Joint Tenants. Generally, this is for no other reason than that they ticked the first box on the questionnaire provided by whoever carried out their conveyance. However, in most cases, it is more beneficial for you to be as Tenants in Common, as explained below.

Joint Tenancy

Being Joint Tenants means that each joint owner (whether two or more) owns the same 100% of the property. The only advantage to this method of ownership is that, upon the death of any such owner, whether or not they have made a Will and regardless of the provisions of such Will, the property passes directly to the survivor(s). A major disadvantage is that if one Joint Tenant got into financial difficulty or had to use the property to fund their long-term care, the other Joint Tenant or, for that matter, their children have no protection as to how much of the property's value remains in family hands. Moreover, with unmarried couples or those not in a civil partnership, there could also be Inheritance Tax (IHT) implications.

Tenancy in Common

Tenancy in Common provides far greater protection and flexibility and is the modern way of owning property. Being Tenants in Common means that each party has their own Protected Share in a property, which is owned individually and can therefore be left directly to children, or other beneficiaries, as appropriate.

Where this basis of ownership is correctly reflected in accompanying Will planning, the surviving property owner(s) can enjoy complete security of tenure during life, whilst the capital value of the property value is safeguarded for their chosen beneficiaries. This can be especially helpful, for example, when protecting the interests of children of a former relationship, or those of a current relationship in the event of the later remarriage of a surviving parent.

Tenancy in Common also, in the right circumstances and as coincidental by-product, allows each owner to protect their share of the equity within their property from the charging procedures allowed under the NHS & Community Care Act (1990) in the event of the requirement for Long Term Care. Providing sufficient time had elapsed since becoming Tenants in Common, a Local Authority would simply rank as an Ordinary Creditor. Similarly, if a joint owner should find themselves in financial difficulties for any other reason, being Tenants in Common makes it difficult for their creditors to force the sale of the property.

If you are to become Tenants in Common, then it is essential that you write a Will and have Lasting Powers of Attorney. It is also the best way to ensure that your heirs can benefit from the additional inheritance tax allowance of up to £350,000 that was introduced in the 2015 post election budget.

Likewise, if you a Director of a close company (one with five directors or less) or a Partner (whether or not a limited liability one), you may in some circumstances face an unlimited personal liability regardless of whether you are a shareholder or equity partner with protection from trading losses. Thus, the provisions of the preceding paragraph would also apply.

You should be aware that a creditor could still place a charge on the debtor's share of the equity, to be realised upon the debtor's death or the earlier sale of the property, and also that there would be no protection from creditors where the parties had given Joint & Several Guarantees, which may sometimes be the case for business purposes.

Interest in Possession (Asset Protection)Trust

Asset Protection Trusts are used to 'ring fence' assets and provide peace of mind that the assets are protected for your chosen beneficiaries. These Trusts are lifetime settlements used to provide for a surviving spouse, civil partner, co-habitee and future generations and to protect hard earned assets against the possible claims of as yet unknown third parties by splitting the beneficial enjoyment of assets from their legal ownership. The beneficiaries are the beneficial owners of equitable interests in the Trust assets, but the legal title to those assets is held by the Trustees.

Placing assets within a Trust can, in some circumstances, protect them from 'sideways disinheritance', claims upon the divorce or bankruptcy of a beneficiary and can save Inheritance Tax (IHT) on a beneficiary's estate by retaining assets within the Trust and passing them directly to future generations. Moreover, probate fees can be mitigated or avoided as the assets within the Trust are not part of the estate for distribution or probate purposes. This also means that they are protected from any claim under the Inheritance Family Provisions legislation. A couple can transfer the family home into a Trust and continue to live there for the rest of their lives. The death of the first property owner to die will not affect the right of the surviving property owner to occupy the home. The equity of a property which is subject to a mortgage can be placed within a Trust and secured by a restriction on the land registry title without needing the consent of the lender.

It is not just the family home which can be put into the Trust. Other assets such as building society accounts, bank accounts and equities can be placed into the Trust for the use of the settlor and surviving property owner during their lifetimes and for other beneficiaries after the death of the survivor. Income and capital can be paid to the survivor for his or her welfare at the Trustees' discretion.

Taxation - The purpose of the Trust is not to mitigate or avoid IHT but to protect and preserve assets. It is IHT neutral in this respect and does not remove the value of the assets from the IHT calculation if the settlors continue to receive a benefit from the assets. The principal residence exemption for Capital Gains Tax will continue to apply to a property held in Trust as long as the settlors continue to occupy it as their principal residence.

Care fees - Clients often ask whether asset protection Trusts can protect against care home fees as the fear is that the family home will be taken from them and sold so that nothing is left for future generations. This is a complicated topic and involves consideration of the concept of 'deliberate deprivation'. Any act carried out whereby assets are transferred, sold or used up deliberately to diminish the settlor's assets to avoid paying care fees can be considered as deliberate deprivation.

If assets are transferred into an Asset Protection Trust whilst care fees are not even contemplated and when the clients are still healthy and not considering going into care, the assets may be excluded from a local authority assessment for care fees. A full assessment of the settlors' circumstances will be required to provide full and accurate advice in this respect. You should however be aware that regardless of the Trust's provisions, it is always open for a creditor or local authority to challenge its provisions.

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