
DISCRETIONARY TRUSTS

A GUIDE FOR FAMILIES

HOUSING
OPTIONS





Housing Options Advisory Service

This is a national independent advisory service on housing, accommodation and support options for people with learning disabilities, their carers and families, advocates and other professionals working with disabled people.

- ☐ The aim is to help people choosing where and how they live
- ☐ Giving ideas about the range of possibilities
- ☐ Making decisions better informed
- ☐ Giving examples from other people's experience

Contact Details:

Housing Options, Stanelaw House, Sutton Lane, Sutton, Witney, OX29 5RY

Tel 0845 4561497

Email: enquiries@housingoptions.org.uk

Website: www.housingoptions.org.uk

Table of Contents

Acknowledgements.....	4
Glossary.....	4
Introduction	5
Key Points.....	6
Trusts - what sort and when?	6
Created in Your Will or in Your Lifetime	6
A Discretionary Trust	6
Entitlement to Income Support and other benefits	7
What's the use?	7
A Disabled Trust or Discretionary Trust - which is better?	8
Conclusion.....	8
What is a Discretionary Trust?.....	9
Why should families consider a Discretionary Trust?.....	9
Why not leave money or property in your Will directly to a relative?	10
Creating a Discretionary Trust	11
Characteristics of a Discretionary Trust	11
Is doing nothing an option?	12
How do you run a Trust?.....	12
Can brothers and sisters inherit?	13
Trustees.....	14
What do Trustees have to do?.....	14
Who should the Trustees be?	14
How do I find Trustees?	15
Why doesn't everyone set up a Discretionary Trust?.....	15
Safeguards.....	15
Property and Trusts	16
Why hold property in Trust?	16
Rents and benefits	16
Sharing a Trust property with other people	17
Tax.....	21
Pros and cons of putting property in Trust.....	23
Publications, useful contacts and information sources	24

Acknowledgements

This guide has been written and updated by Nigel King and Maurice Harker for Housing Options. It was originally commissioned in 2003 as part of the work of the Older Family Carers Initiative at the Foundation for People with Learning Disabilities

The Foundation for People with Learning Disabilities would like to thank the family carers involved in the Older Family Carers Network who reviewed a draft of this guide. Their thoughts and questions helped to make the contents clearer and ensure it covered the questions families are most likely to want answered.

Clare Jeffries of ASB Law was kind enough to check the original document for accuracy in relation to the law of Trusts. We are most grateful to her.

Peter Hellawell of the accountancy firm Petersons kindly provided expert advice on tax issues relating to Discretionary Trusts.

Finally, we must thank the Department of Health for the opportunity to produce an updated edition for publication.

Glossary

Beneficiaries	People expected and able to receive money from the Trust
Donor	Person who puts money or property into a Trust. (See also 'settlor')
Object of the Trust	The person who is intended to benefit from the Trust
Settlor	Legal term for the person who puts money or property into a Trust. (See also 'donor')

Introduction

This guide to Discretionary Trusts has been written for families who have a relative with a learning disability.

Discretionary Trusts are a way of putting in place financial arrangements to help support a relative. These Trusts are particularly suitable for disabled people. A Discretionary Trust can also provide a way of owning property.

Sometimes families decide that in the long-term they would like to be able to set up arrangements that allow their relative to continue to live at home with the necessary support. This guide covers:

- ❑ The traditional use of Trusts as a way of paying for the things the statutory services may not be able to give, for example a holiday, a new coat or even additional care
- ❑ Trusts as a means of owning, managing and maintaining a property.

This guide includes case studies. One or two are abbreviated versions of examples which first appeared in “Buying, Renting and Passing on Property: A guide to Families in Arranging Housing for Disabled Relatives” (King and West, 2002).

Other examples are available from Housing Options and is also on their web-site www.housingoptions.org.uk and www.valuingpeople.gov.uk

Trusts are a complex and a specialist area of law. **You are strongly advised to get legal advice from a lawyer who has experience and expertise in Trust law.** Ideally, choose someone who has knowledge of Trusts for disabled people, dependent on benefits not only as part of tax planning. From the outset, individuals and families should obtain welfare rights advice so that they clearly understand the financials of any arrangements could have when an individual moves into paid employment.

Key Points

Trusts - what sort and when?

Trusts are often set up by family carers for a disabled relative. They are a way of putting money aside for their future. The main reasons for having a Discretionary Trust are:

- ☐ As a way of arranging an inheritance
- ☐ So there is a way of managing money or other assets
- ☐ To avoid benefits and care funding being stopped.

A Trust may be used to provide for a disabled son or daughter either in your lifetime or on your death. They may need some extra money now or it could be a way of providing a home to live in.

Created in Your Will or in Your Lifetime

When you die you want to pass on your wealth to family members for their future security but for a disabled family member you may want to provide for their future now. A Trust can be set up at any time so that other friends and relatives can also leave money to a disabled person without affecting the person's benefits or care by making a payment to the Trust.

A Trust is a formal transfer of assets (property, shares or just cash) to a number of persons (at least two and not more than four) or to a Trust Company with instructions that they hold the assets for the benefit of others. If a Trust is made in your lifetime, so that it takes immediate effect, it can be created by a Trust Deed. If it is to be created after your death, then the Trust rules can be set out in your Will.

There is no minimum or maximum amount of money that you can place in Trust, but obviously the amount of the Trust fund will need to be enough to make sure that running the Trust is financially viable.

A Discretionary Trust

A Discretionary Trust is the most flexible form of Trust. Under a Discretionary Trust, the benefits, the Trust assets or the income from them, are allocated entirely at the Trustees' **discretion** to any one or more of several beneficiaries or **class of beneficiaries** e.g. disabled people. The primary intended beneficiary must have no absolute right to either the capital or the income.

It is recommended that a "Letter of Wishes" is written for the Trustees to outline your wishes as to how the Trust fund should be spent, but this is a moral rather than a legal obligation on their part. You are usually advised to name more than one person and/or organisation as a beneficiary so as to avoid the Trust being classed as a "sham".

Once assets are put into the Trust they belong to the Trust not the person intended to benefit. He or she may get gifts or even payments from the Trust but they cannot be said to have any assets themselves.

The key points about a Discretionary Trust are:

- ❑ Trustees have **discretion** as to how the assets are used – the Trustees are free to make all the decisions.
- ❑ The person to benefit from the Trust **must not have a right to the income or capital**.
- ❑ The intended beneficiary must not be the only person named in the Trust i.e. **must not be the 'sole' beneficiary**.

Without these features the Discretionary Trust is not properly constituted and the person may be treated as though they own the house or have the money.

Entitlement to Income Support and other benefits

Income Support – and possibly other benefits like Housing Benefit – is reduced if a person has more than £6,000 and withdrawn over £16,000. If Social Services fund a residential care place or care package they may also begin to charge for the care service or stop funding it.

If a person with a learning disability is named as a potential beneficiary of a Discretionary Trust and might therefore receive a payment of income or capital from the Trust, this will not in itself affect his/her entitlement to income support or local authority funding for care. In addition, if income or capital is paid out for specifics not paid for by statutory funding, the payments made will also not be taken into account. So if a disabled family member depends on benefits don't just pass on money or property directly or in your will – use a Discretionary Trust.

However the Independent Living Fund (ILF) policy, as viewable on their website, states that if someone is a potential beneficiary of a Discretionary Trust which has capital or assets to the value of £23,000 or more, then ILF will not usually be payable. If the Trust assets are tied up in property being used by the disabled beneficiary, they said this would be decided on a case by case basis.

What's the use?

A Trust can be used to manage a pot of money put aside to buy extra things the normal benefits or Social Services may not be able to provide: a holiday, new clothes when needed, Christmas and birthday presents and similar things or services that can improve a disabled person's life.

Trusts can hold and invest assets. This can include a house or flat to let to a disabled person. It may provide a means of managing and maintaining a property. This is particularly useful when the person lacks legal capacity i.e. sufficient understanding to enter into a contract.

Trusts are operated by Trustees. These can be other family members, friends or professionals like solicitors.

A Disabled Trust or Discretionary Trust - which is better?

A Disabled Trust (or "Trust for the vulnerable") is a special form of Discretionary Trust in compliance with s.89 Inheritance Tax Act 1984.

A number of beneficiaries are named but the disabled person would be named as the principal beneficiary of the Trust. A condition is that at least half of the money paid out must go to them.

Special tax treatment of Trusts for "vulnerable beneficiaries" allows for the Trustees and vulnerable person to make an election for the special tax treatment to apply in relation to both income and capital gains tax - as if the vulnerable beneficiary owned the Trust assets themselves.

But, after the principal beneficiary's death, the principal beneficiary will be treated as having an interest in possession in the Trust for inheritance tax purposes, even though the Trust is discretionary in form - this means that on their death, their estate will include the value of the Trust fund on their death.

The Disabled Trust is often recommended as a tax efficient way of passing income to someone e.g. from an accident claims settlement or where there is only one child to be provided for but it is more restricted in operation and is liable to Inheritance Tax on the death of the prime beneficiary.

The broader Discretionary Trust does not have some of the tax advantages of the Disabled Trust but is free of Inheritance Tax on the death of the main beneficiary and can more easily provide for other family members. The most useful form of Trust (there are many types) for someone with a learning disability is usually what is called a Discretionary Trust.

Conclusion

If you want to make some financial provision for a close relative who is dependent on welfare benefits and/or supported by Social Services do **not** say in your Will, "I hereby leave my worldly goods to x". This will not provide a long-term nest egg. Consider instead setting up a Discretionary Trust.

Do go to a solicitor who is an expert in Trust law – it is a complex and specialist area. Local Mencap or other carer support groups may be able to suggest local contacts and national Mencap have a special helpline. Details are given at the end of the guide.

What is a Discretionary Trust?

A Trust is a legal arrangement whereby assets, money, investments, property, are managed by Trustees for the benefit of others such as people with learning disabilities.

The assets can include a house. This introduces the possibility of putting a home into a Trust as part of long-term planning. A Discretionary Trust is only one of many types of Trust but it is often the most useful for people with a learning disability.

A Trust Deed or part of a Will setting up a Trust need only be a few pages which explain for example:

- ☐ Who the Trust is being set up for – the beneficiaries
- ☐ The purpose of the Trust – why it is being set up
- ☐ Who the initial Trustees are and the rules the Trustees must follow

Why should families consider a Discretionary Trust?

Discretionary Trusts are set up by parents or other relatives as a way of making long-term financial provision for people with learning disabilities. The reason a Trust is useful is that assets once put in Trust do not belong to either the donor, 'settlor' in legal jargon (usually parents) or the 'object' of the Trust (usually son or daughter) who is intended to benefit. This means that the capital held in the Trust is not taken into account when assessing entitlement to state benefits - Income Support or local authority obligations to fund care.

Historically Discretionary Trusts were set up as a fund to pay for a few extras or luxuries that welfare benefits or Social Services might not provide or might not provide enough of. More recently they have been seen as a useful vehicle to own property, including the parental home, where the long-term plan is for the disabled relative to continue to live at home after the death of their family carers or a move elsewhere.

Case Study 1

Siblings as executors

Mrs Nolan had three sons. James has a learning disability. He lives in a small care home run by Social Services. Mrs Nolan had a Will drawn up which divided her estate of £36,000 at the time of her death equally between her sons. James therefore had a share worth £12,000. James does not understand money and knowing that even this modest amount of savings could affect benefits the Will created a Discretionary Trust for James into which the executors placed the £12,000.

The Trustees are the other two sons who can get advice from the solicitor who prepared the Will. Mrs Nolan also left a letter asking that her sons see James as regularly as they could, take him out to do things he enjoys and they try and use the Trust fund in the way they considered Mrs Nolan would have done if she were still alive. She asked that the money in particular be used to help James pursue his hobbies.

Why not leave money or property in your Will directly to a relative?

If parents leave a Will which says words like “our son hereby inherits our worldly goods” and the goods amount to more than £6,000 (in 2010) the result will be immediately to take their relative out of some Social Security means tested benefits. Over £16,000 no means tested benefit is payable. This includes Income Support and income-based Employment and Support Allowance administered by the Department of Work and Pensions and Housing Benefit administered by the local housing authority.

Social Services financial support to fund a placement or other services may also cease until the value of the inheritance falls below a threshold level.

Finally, if the son or daughter is unable to manage money then the Court of Protection can get involved. The Court will appoint a person called a ‘Deputy’ to look after the money and other assets. The Deputy may not act as either the family or their relative would wish.

Other reasons for creating a Trust to help provide some financial protection for the future include:

- ☐ Fears that the local authority may not continue to provide suitable or sufficient care
- ☐ To provide a source of money to ‘top up’ what a local authority is prepared to pay for care
- ☐ To enable a son or daughter to remain where they are rather than be forced to move out of their home
- ☐ To permit more choice and options both now and in the future.

Creating a Discretionary Trust

A Trust Deed consists of a few pages invariably drawn up by a solicitor that covers such matters as:

- ☐ The purpose of the Trust
- ☐ Who the beneficiaries are - the 'object' of the Trust
- ☐ Who the Trustees are - the administrators of the Trust
- ☐ How new Trustees, if needed in the future because a Trustee dies or no longer wants to do the job, are to be appointed
- ☐ How Trustees' fees and expenses are to be met
- ☐ What powers, duties and discretion Trustees have including investing, making of payments and buying or selling property
- ☐ What happens to funds held in the Trust after the prime beneficiary dies.

It is important that Trustees have **discretion** both to satisfy the legal requirements of a Discretionary Trust and to allow them to adjust to changing circumstances and future legislation. It may be for example that at some point the property will become unsuitable for the relative who might be better off in sheltered housing or a different environment. Trustees need the discretion to sell the property and allow a move if this is in the beneficiary's best interests.

Families are usually told to give Trustees a letter setting out their wishes as to how Trustees should act in the future and to seek Trustees' agreement to follow the settlors' suggestions. This kind of letter is however for guidance only and is not legally binding.

Trusts can be created in two ways:

- i. As an integral part of a **Will** which comes into effect on the death of a parent or other relative.
- ii. By drawing up a **Trust Deed** during the life of the person who puts money into a Trust.

The advantage of setting up a Trust straightaway with perhaps only a nominal sum is that if there are other relatives who wish to leave money they can do this by putting money into the Trust rather than giving it directly to their relative with all the consequences this may have for means tested benefits.

Characteristics of a Discretionary Trust

A Discretionary Trust is only one of many different types of Trust. It is particularly appropriate for people with learning disabilities who will continue to need care and support. It is termed discretionary because the Trustees appointed to administer the Trust have **discretion**, as to how, when and to whom the capital and income of the Trust are paid.

The intended beneficiary has **no right** to either capital or income and has no right to make claims for payments. If a claim was made then Social Services and the Department of Works and Pensions might challenge the Trust arguing the client/claimant effectively possessed the assets.

A further defining characteristic of a Discretionary Trust is that the intended primary beneficiary e.g. son or daughter belongs to what is termed a 'class' of people and is **not the sole beneficiary** of the Trust. Thus the deed might say "the Trust is for all people with autism living in Wales" and the son or daughter counts as a beneficiary because they have autism and live in Cardiff. Some solicitors prefer not to refer to such a wide class of potential beneficiaries. Instead, if there are other family members, the 'class' or wider group of possible beneficiaries might be based on family members.

In summary, under a Discretionary Trust, unlike some other forms of Trust

- ☐ The son or daughter has no absolute right to either the capital or investment income of the Trust
- ☐ Trustees have discretion about what payments are made.
- ☐ The principal beneficiary will not be the only possible beneficiary.

Parents may have reservations about accepting these defining features of a Discretionary Trust but they are essential if the Trust is to be effective in providing long-term protection and there are not many alternatives to the use of a Trust other than direct ownership of property.

Is doing nothing an option?

Not to make any provision at all for a son or daughter on the grounds that another member of the family will look after them or that the State will provide may not be wise. There are many fairly obvious reasons; other family members may find the task too much or their own circumstances may change; what the local authority is able or willing to provide may be insufficient or less than in the past and so on.

There is a risk too under the Inheritance (Provision for Family and Dependants) Act 1975 that if it appears that insufficient provision is made, or the division of a person's estate is obviously unfair, it is possible for Adult Social Care and the Department of Works and Pensions (or other relatives) to challenge the will. This could turn into an unpleasant, unhelpful and costly legal dispute.

How do you run a Trust?

Trusts are usually administered by between one (i.e. Corporate Trustee) and four Trustees who are initially selected by the person creating the Trust. Trustees can be other relatives, friends or professionals like a solicitor and can include the settlor while he or she is alive. Ideally Trustees should be contemporaries of the disabled person but finding suitable Trustees is often a real difficulty. You are looking for a

mix of personal interest in the welfare of your relative and financial skills. If one Trustee should die or not wish to carry on then the remaining Trustees can appoint a new Trustee.

Professional Trustees can be paid for their time and the Trust can meet Trustees' expenses. One issue if using professionals is the level of charges they may expect.

Payments are most commonly made by the Trustees to provide things the State does not. It is better for payments to be made as required and not regularly and as such they are treated as capital rather than income for benefit purposes.

On the eventual death of the primary, intended beneficiary of the Trust any remaining assets can be distributed to other named beneficiaries or perhaps donated to a charitable organisation involved in supporting people with learning disabilities according to the terms of the will or Trust deed.

Can brothers and sisters inherit?

Yes they can. It is quite common for the ultimate beneficiaries of this kind of Trust to be siblings or indeed grandchildren or more distant relatives. Trust deeds should provide for the eventual winding up of the Trust.

Case Study 2

Trust used to purchase a flat

Paul had been looked after at home by his family without any contact with Social Services. His parents died and an aunt continued to support Paul in the same house. Only on the aunt's own entry to residential care did Paul's position become apparent.

In clearing the house and making arrangements to re-house and support Paul papers were discovered indicating that Paul's father had made some financial provision for him through a Trust.

The Trustees were tracked down. Initially placement in a residential care home with his aunt had been proposed for Paul although he was relatively young and able. The Trust created different possibilities. Trustees were eventually persuaded to buy a small flat for Paul which is where he now lives with a visiting support service provided by Adult Social Care.

Trustees

What do Trustees have to do?

The basic tasks of a Trustee are:

- ☐ To manage assets: invest money or ensure a property is managed and maintained.
- ☐ To make payments to the beneficiary from time to time.
- ☐ To prepare accounts for the assets managed and paying any tax due.

Trustees may of course do more than this and be closely involved in the day-to-day welfare of a prime beneficiary advancing money as required.

Trustees may well ask others to carry out tasks for them so for example an accountant can be asked to prepare accounts and deal with tax matters. If there is a property to manage or maintain a local housing association, care provider or property management company could be asked to do this on behalf of the Trustees for a fee.

Who should the Trustees be?

Trustees might be anyone (other than a minor or someone of 'unsound mind') but it may be useful to have a mixture:

- ☐ One or two people who know the relative well and who will be most concerned with his/her welfare
- ☐ One or two people who are able to manage money and deal with the administration of financial matters
- ☐ Specialist skills relevant to the circumstances e.g. someone who knows about managing and maintaining property if this is relevant

Between two and up to four Trustees is common. Where Trustees include relatives (or others) who may ultimately directly or indirectly benefit from assets held in Trust, when it is wound up, they may be disinclined to spend money. Housing Options receives requests for help where Trustees appear to be looking after their own interests as "remainder men" rather than the interests of the relative with learning disabilities.

How do I find Trustees?

Finding reliable Trustees can be a real difficulty. Typically, they are:

- ☐ Other sons, daughters or more distant relatives often become Trustees.
- ☐ Close family friends or teachers, past care workers are all possibilities.
- ☐ Members of a local Mencap Society, or Carers Group may lead to groups forming or one family becoming Trustees for another.
- ☐ Solicitors, accountants and similar professionals can of course also be appointed Trustees. (They may expect payment!)

Why doesn't everyone set up a Discretionary Trust?

The main reasons given by families for **not** setting up a Trust are:

- ☐ Unable to find reliable, suitable Trustees
- ☐ Concern that the relative does not have an absolute right to what is held in Trust
- ☐ Fear that Trustees will use their (legitimate) discretion to benefit people other than their relative
- ☐ Assets are insufficient and/or there are other relatives who must inherit immediately

In addition where relatives are the long-term beneficiaries and also Trustees there is a risk no payments will be made. Nevertheless, establishing a Trust is one of the few means of making long-term financial provision in a way that will not affect entitlement to care or welfare benefits. A Trust is also, for the reasons explained, a good vehicle for holding property.

Safeguards

The following are ways of safeguarding the primary, intended beneficiary and are recommended as good practice:

- ☐ Give a letter to Trustees setting out the settlor's (relative's) wishes and intentions in establishing the Trust. Note however this is not legally binding.
- ☐ Only appoint Trustees who agree to follow the guidance given in the letter.
- ☐ Have several Trustees.
- ☐ Have at least one Trustee who is not a family member.
- ☐ Give a copy of the Trust deed and letter to the care manager so this can be put on file and Social Services are aware of the terms and value of the Trust.
- ☐ Give a copy to an independent organisation or advocate.
- ☐ Explain the terms of the Trust to the person concerned if possible.
- ☐ Involve the relative in the selection of Trustees if possible and make sure they know who they are.

Property and Trusts

Why hold property in Trust?

When it is agreed that it makes sense to plan around a relative continuing to live in the family home, with the appropriate support if necessary, then a family property can be inherited in the normal way. However, it may be better to put the property into Trust.

There are several advantages for putting the property into Trust:

- ❑ Trustees can deal with **the management and maintenance of the property**. Thus if the person with learning disabilities is unable to organise this or do it themselves or lacks legal capacity the problem of how to arrange maintenance can be solved.
- ❑ If money is put into Trust over and above the property this can provide a **fund to pay for repairs** or upgrading the property. The Trustees do not necessarily have to do all the maintenance themselves; they can contract with a local housing association or private agency for this service. Note that contracts are between the Trustees and the other organisation.
- ❑ If property is held in Trust it does not belong to the occupying person with learning disabilities and should **not result in loss of benefits**. In addition it will prevent the local authority putting a legal charge on the property to recover the cost of care, thus depriving the disabled person of future choice of housing if circumstances change. However the Independent Living Fund say they will not fund anyone with Discretionary Trust assets of more than £23,000.
- ❑ It is possible in some circumstances to charge rent on the property to those who live in it provided they are eligible to claim Housing Benefit. This may provide an income to fund management and maintenance.
- ❑ It can provide a vehicle for managing a home for a relative living on a fair and equal basis with others.

Rents and benefits

It may be possible for Trustees to rent the property held by the Trust to the beneficiary (and indeed others who might share the property) and for the beneficiary to claim Housing Benefit. This provides a mechanism to generate an income for the Trust and thus an ongoing source of funds to pay for management and maintenance. This possibility is covered in Statutory Instrument No 3257 (The Housing Benefit (General) Amendment (No 2) Regulations 1998).

These regulations first explain that where a Trust rents a property to a beneficiary the rent will not be eligible for Housing Benefit. (3(1) e).

However this is qualified by saying this restriction *‘shall not apply in a case where the person satisfies the appropriate authority that the liability was not intended to be a means of taking advantage of the housing benefit scheme’*.

In practice it appears Housing Benefit is being paid where it is demonstrably the case that the Trust arrangements were established for sound reasons regardless of Housing Benefit considerations but receipt of Housing Benefit cannot of course be guaranteed.

Housing Benefit and Trusts

It is not always appreciated that a beneficiary **may** be able to claim Housing Benefit in respect of rent on a property owned by a Trust. The Housing Benefit Regulations (as amended by Statutory Instrument 1998 No. 3257) do not encourage this but in practice it is possible. However:

- ☐ The letting must be on a "commercial basis" i.e. arranged as any other private sector letting with a proper tenancy agreement
- ☐ The Housing Benefit administrators must be satisfied ‘that the liability (i.e. payment) was not intended to be a means of taking advantage of the housing benefit scheme’.

Sharing a Trust property with other people

A Discretionary Trust will often identify the main beneficiary and then make provision for a “class” to which the son or daughter belongs. It may in addition provide for payments to a charitable organisation likely to be interested in the welfare of people with learning disabilities. On this basis it is acceptable for the property held in Trust to be used to provide accommodation for other people with learning disabilities or even to be given to a relevant charity.

Adult Social Care might raise an objection to people sharing a property owned by an individual or a Trust even though someone does not wish to live alone:

“...there is a fundamental incompatibility between private Trust vehicles and Social Services’ responsibilities to treat individuals equally. Trustees of a private Trust have a duty to prefer the interests of the Trust’s beneficiaries, whereas Social Services would not normally enter into an arrangement which gives unequal housing (or other) rights to a group of people. This is particularly complex with people whose learning difficulties may make it very difficult for them to understand the subtleties of such an arrangement and to choose such an option with a full awareness of the implications.

In practice, we would normally only support a shared arrangement in a house which is in Trust, where the Trustees agree to lease the house to a registered social landlord. This is partly to ensure that adequate housing management arrangements are in place and partly as a way of establishing equal housing rights for tenants."

A Service Manager - Learning Disabilities

Case Study 3

Discretionary Trust owning property rented to a beneficiary

This shows how property can be held in a Discretionary Trust and some of the advantages of this. It also covers:

- ☐ Housing Benefit in relation to a Discretionary Trust
- ☐ The role of Trustees in arranging support

Personal Circumstances

Sally is 39 and has Down's Syndrome. She can speak but others find it difficult to understand her. Her mother, who was a teacher, helped her develop a skill forming words. Sally also has impaired vision. Despite these limitations Sally is socially skilled and outgoing. She enjoys company. Both her parents are now dead. Sally is the primary beneficiary of a Discretionary Trust administered by Trustees. The Trust was established by her late mother's will.

Housing

Sally lived in a local authority owned residential care home with 14 other residents. The local authority had a policy of moving the residents out of the home into local flats or houses it was faltering. The Trustees thought it was for lack of funds or local housing options. Empty places were now used for respite care.

The home manager suggested the Trustees consider buying a house. One of the Trustees felt the care home was not able to help Sally realise her potential or become more independent and was happy to consider this suggestion.

Because they were not certain what Sally preferred the local authority commissioned an independent body to carry out a care assessment. This said Sally would benefit from a move. It suggested a move into a house shared with other people with a learning disability. This started Trustees trying to find a house for three people with a learning disability to share. A newly built four-bedroom home was identified on an estate under construction. The Trustees wanted to proceed with the acquisition but were unable to get the local authority to commit itself to funding the care package. The local authority had begun a review of the future of the care home and was unwilling to make any decisions until the review was complete.

In the absence of a clear decision on care funding and fearful of losing the property the Trustees took legal advice on whether it would be proper to invest the bulk of the Trust fund in a property. The legal view was that as there was no certainty the local authority would fund the necessary care it was not reasonable to put all the Trust funds into the new house but that using some of the fund, would be acceptable.

To secure the property two of the Trustees contributed from their own money on the understanding that they would be reimbursed by the Trust so it could be used as Sally's home. The local authority eventually agreed to fund a care package for Sally with a future plan for her sharing with another person.

Sally's Decision

The process of Sally reaching a decision involved:-

- ☐ Sally making a list of all the people she knew who she wanted to help her decide.
- ☐ Inviting them to a large meeting - friends of Sally's parents, relatives, the three Trustees, and two of Sally's friends with a learning disability with their parents. It was facilitated by an advocate the Trustees had contacted for help.
- ☐ Many were concerned that, as Sally was so convivial, living in the house with merely one support worker would be too quiet
- ☐ Many worried about safety and security of living independently. But one of Sally's friends said the Care Home was boring and that Sally should "go for it".

This was the decision. There was some opposition from neighbours and legal technicalities with the property deeds but these were eventually overcome.

Support

Support is provided by a care provider under a contract with the local authority. A new care plan identified what help Sally needs throughout the day and involved a variety of "day opportunities" which take place outside the house. This means that the support required is not 24 hours a day, seven days a week at her home.

There is a project leader for Sally's house and a team of four part-time support workers. There are two prime objectives for the care plan written into the local authority contract:

- ☐ To support Sally to be as independent as possible in her new home and
- ☐ Help Sally make contacts with friends and relatives to prevent loneliness.

The Trustees researched equipment aiding independence. As one example Sally enjoys food and company. With support she is able to make a meal and would like to invite her friends for meals. So the cooker is simple and safe to use and has an eye level grill. The Occupational Therapist advised temperature thermostatic controls for the shower. RNIB advised on how to avoid glare and achieve safety on the stairs.

Sally can read signs but not more complex text so they use pictures from a suitable software programme. The right support staff can make a huge difference and it staff selection allowed Sally to play a part in choosing who would support her. It involved:

- ☐ The Trustees helping to select questions and discussions suitable for the job applicants and being present at both days
- ☐ Sally and the applicants both presenting, in pictures and words, what they liked and disliked
- ☐ Sally and the Trustees and the applicants had lunch together on one of the days
- ☐ A group discussion by the applicants around for example how the applicants would make difficult, moral decisions
- ☐ Formal interview of each applicant

Funding

There are three main components:

- ☐ Housing and associated management, maintenance and repair costs
- ☐ Care and support funded by the local authority
- ☐ Allowances and benefits for living costs

For one person the care package is expensive but in the longer term there is a possibility of her sharing the house.

An experienced welfare benefits advisor has carried out a benefit check to ensure that as far as possible sources of income maximised non-means tested benefits. The second objective was to ensure that Sally had claimed all the benefits she was entitled to, and at the appropriate levels. Sally receives the middle rate care component of the Disability Living Allowance and the lower rate mobility component of the Disability Living Allowance. Income Support is paid, including the Disability Premium and the Severe Disability Premium. The total income from benefits at March 2002 was £168.85 a week.

The housing capital funding came from Sally's deceased parents through the Trust and the Trust **may** be in a position to get an income:

- i. Sally is an assured short hold tenant of the Trust
- ii. The Trustees as landlords charge a rent
- iii. Sally should receive 100 per cent Housing Benefit on the eligible rent

This would be limited if she is the only tenant. It does not include any of the support costs.

Sally moved into the house and is happy. Those who were most concerned about the safety and security of Sally living independently were delighted with the new arrangements. Sally was accepted as eligible to receive Housing Benefit. Had she not, Trustees would have problems paying for future repairs and maintenance. It would have been essential to look for additional income.

The issue of the cost effectiveness to Adult Social Care of the support arrangements leading them to suggest sharing may or may not be correct. Much depends on the circumstances and the ways support is funded and arranged. The equality of security of tenure - housing rights - is the second issue that may impact on arrangements. As the quotation shows there are ways around this if it is raised as an issue. The solution usually involves an intermediary like a housing association leasing the property from the Trust and then sub-letting.

Tax

One of the matters families will need to consider is tax. Trusts as discussed here are **not** being suggested for tax planning purposes. This is where specialist knowledge is required but the box below provides a basic guide to some of the principles that currently apply. If tax planning is an important consideration take expert advice.

Tax and Discretionary Trusts

Under a Discretionary Trust the Trustees can exercise their discretion as to the distribution of income and capital amongst the potential beneficiaries. The Trust Deed will define who the potential beneficiaries are and the extent to which the Trustees can exercise their discretion. Up to £325,000 (2009/10) can be put into Trust tax free and thereafter inheritance tax is paid during the donor's lifetime on the excess at 20%.

Excess means the difference between the sum put into trust - say £400,000 and £325,000, i.e. £75,000 in this example. If there are assets worth more than £325,000 it is worth considering separate Trusts. Say, for example, if a husband and wife jointly own a property worth £400,000 as tenants in common, two Trusts of £200,000 each would avoid tax on a chargeable transfer. Please note that the property must be held as tenants in common and not as a joint tenancy.

It is generally not recommended a husband and wife put their property into a Discretionary Trust while they are still living in it. This is not necessarily effective for inheritance tax purposes. Similarly it is recommended that any other assets that may be needed at a later date by the donor, even if the way they are invested over the years changes, are not put into a Discretionary Trust during their lifetime. This is because such a gift could be caught by the pre-owned assets legislation giving rise to an income tax charge for the donor. A husband or wife could, however, put their property into a Discretionary Trust on death even though the widow or widower continues to enjoy the benefit.

Inheritance tax may be paid by either the donor or the Trust.

If the trust falls into certain categories then the trust will become a deemed Interest in Possession trust and the normal 10 yearly charge on discretionary trusts can be avoided. Advice before embarking on a gift into trust is essential.

In certain cases it may be possible to donate assets to a trust intending only to provide for the maintenance/future care of the beneficiary, but this must constitute “reasonable provision”, and claim this as an exempt transfer of value for inheritance tax. Utmost care is required and professional help is essential. It is considered that this can include part of the parents’ home in the right circumstances.

Income and capital gains arising in the Trust will be taxable at 40% (2009/2010), rising to 50% in 2010/11 tax year. This tax arises on income or capital gains from trading and investment but not on the mere appreciation in value of the property. Upon distribution to the beneficiaries the tax paid will form a tax credit. It may be possible for a beneficiary to recover some or all of the tax if they are dependent on benefits. An annual Tax Return is required for the Trust. If the Trust only holds freehold/leasehold property on which no rental income arises, then a nil Return can be filed, keeping running costs to a minimum.

Pros and cons of putting property in Trust

<i>Social Services perspective</i>	
Advantages	Disadvantages
❑ A Trust is a resource - saves accommodation cost element. ❑ Provides accommodation element of a care package. Can possibly extend to property maintenance as well ❑ Trustees can administer property and even supervise care package. ❑ Trust could lease to charity or housing association to facilitate sharing	❑ Parents may want long-term guarantees from Social Services on care funding. ❑ Trustees may fail to act when they legitimately could help the beneficiary. ❑ If the beneficiary is happy to share (to achieve economies or reduce isolation) the terms for occupation must be even handed ❑ Social Services may not be consider the property suitable. ❑ Trustees' ability to fund, manage and maintain property
<i>Family perspective</i>	
Advantages	Disadvantages
❑ A way of making long-term financial provision and securing housing that does not spoil benefit or care funding entitlements. ❑ Sorts the housing out provided social care is available. ❑ Provides a means of managing some crucial financial affairs if legal capacity or ability to manage money is in doubt. ❑ Can provide a maintenance fund. ❑ Discretionary Trust flexibility to switch properties if circumstances change.	❑ Discretionary Trust does not give the beneficiary the right to capital or income. ❑ Requires Trustees acting in accordance with settlors' wishes and beneficiary interests. ❑ May be difficult to find suitable Trustees of the right age. ❑ Professional fees reduce value of fund. ❑ Sustainability conditional on support package being available. ❑ May be a problem with eligibility for ILF payments for care
<i>Individuals perspective</i>	
Advantages	Disadvantages
❑ Can remain in the family home. ❑ Stay in familiar area, environment, with own furniture and possessions. ❑ Stay near friends. ❑ Community/ neighbours may provide some assistance and know you. People to call on in an emergency or even support. ❑ The Trust property is an asset which can be sold to provide other options in future if circumstances change. ❑ Trustees can organise maintenance.	❑ If left alone may be lonely (but not everyone is and not everyone wants to share). ❑ If do want to share with others there may be difficulties with Social Services over legal status and security ❑ Difficult to maintain property – particularly unexpected major repairs - if insufficient in Trust for maintenance. ❑ May not be eligible for Housing Benefit.

Publications, useful contacts and information sources

Publication

www.hamiltontdowning.com

A Guide to Families Wishing To Make Legal Provision for a Learning Disabled

Member, Anthony Quinn, Hamilton Downing Quinn, 1997. Tel 0207 831 8939

Mencap

www.mencap.org.uk

Mencap's list of specialist legal professionals at who have experience in wills and Trusts and advising the parents of a person with a learning disability.

www.mencap.org.uk/willsandTrustspublications

Contact Mencap's wills and Trusts solicitor Aarti Gupta on 0207 696 5533 or email askaarti@mencap.org.uk to discuss any queries you may have. Aarti cannot write your will or set up your Trust for you but she can to give advice. There is a guide Wills and Trusts available as a download from www.mencap.org.uk/guides
General helpline 0808 808 1111

Lawyers for People with Learning Disabilities

www.lpld.org

LPLD is a special interest group recognised by the Law Society. It was established by Tony Quinn and Lynne Brooke in 1985 and its purpose is to act as a resource for solicitors who are approached by or on behalf of a person with learning disabilities involving the various areas of the law that might affect them. It also helps locate solicitors who have the necessary expertise in the various areas of the law such as community care, benefits, disability discrimination and the question of capacity (under the Mental Capacity Act 2006).

The Disability Law Service

www.dls.org.uk

(DLS) has provided high quality information and advice to disabled and Deaf people for over 30 years. Tel: 020 7791 9800

Disability Alliance

www.disabilityalliance.org

Website of Disability Alliance (DA), who are also publishers of the Disability Rights Handbook. Disability Alliance was set up in 1974 providing various services to disabled people, their families, carers and professional advisers about social security benefit entitlement and other entitlements. These services include the provision of advice, information, campaign work, research and training. Tel: 020 7247 8776

Citizens Advice Bureauwww.nacab.org.uk

The Citizens Advice Bureau Service offers free, confidential, impartial and independent advice on debt and consumer issues, benefits, housing, legal matters, employment, and immigration. Advisers can help fill out forms, write letters, negotiate with creditors and represent clients at court or tribunal. The national website provides a directory of local CAB offices and a guide on money, legal, housing and rights. Tel: 020 7833 2181

Department of Work and Pensionswww.dwp.gov.uk and www.disability.gov.uk

Information from the Department managing benefits including those for disabled people. The directorate is responsible for providing an efficient, reliable and considerate system of Disability Benefits, and for all disability issues: unemployment and sickness benefits, income support, disability, children with special needs, residential care etc. The Disability website provides information on disability rights and policy. Tel: 020 7712 2171. Benefit enquiry line: 0800 882200

Independent Living Fundwww.ilf.org.uk

The Independent Living Fund (ILF) is set up and financed by UK central government and may be available to support disabled people who want to live in their own homes. To qualify applicants have to be receiving the highest rate of Disability Living Allowance (DLA) care component and receiving services from their local authority of at least £320 per week. ILF say funds will not be paid if someone has Trust funds of more £23,000. Tel: 0115 9428191

Taxwww.hmrc.gov.uk/Trusts/types

Types of Trust and tax implications, interest in possession Trusts, discretionary or accumulation Trusts, trusts for vulnerable beneficiaries

Shelterwww.shelter.org.uk

Shelter is a national organisation working to improve the lives of homeless and badly housed people. It provides free, professional and independent advice on homelessness, finding a place to live, renting and leaseholds, legal rights and benefits. The aims are to prevent and alleviate homelessness by providing information, advice and advocacy for people with housing problems and campaign for changes to housing policy. Free housing advice helpline 0808 800 4444