

Coffin Mew Solicitors – Wills, Trusts & Probate

Please read the following notes very carefully

Implications of making the gift

It is important that you make a proper assessment of the implications of making a gift of the home or other property, both for yourself and for your relatives. Although the list is not exhaustive, the possible benefits and risks may include the following:

Possible benefits

- a saving of inheritance tax, probate fees and costs on your death. Although in most cases the existence of a potential liability for inheritance tax will mean that a gift of the home by itself will not avoid vulnerability to means-testing, the high value of homes particularly in London may create this situation;
- avoiding the need to sell the home to pay for charges such as residential care or nursing home fees, thus securing the family's inheritance;
- avoiding the value of the home being taken into account in means-testing for other benefits or services.

Possible risks

- the value of the home may still be taken into account under the anti-avoidance measures in relation to means-testing (see below);
- the capital gains tax owner-occupier exemption will apply to the gift, but may be lost thereafter and there will be no automatic uplift to the market value of the home on your death;
- you may never need residential or nursing home care (it has been estimated that less than 6% of people aged 75-85 need residential care), so the risks of giving away the home may outweigh any potential benefits to be achieved;
- if you eventually need residential or nursing home care but no longer have the resources to pay the fees yourself because of the gift, the local authority may only pay for a basic level of care (eg a shared room in a home of its choice), so you may be dependent on relatives to top up the fees if a better standard of care is desired;
- the relatives to whom the gift has been made may fail to keep their side of the understanding, whether deliberately or through no fault of their own. For example, they may:
 - fail to support you (eg by not topping up residential care fees)
 - seek to move you prematurely into residential care in order to occupy the home themselves or to sell it
 - die suddenly without making suitable provision for you
 - run into financial difficulties because of unemployment or divorce or become bankrupt and in consequence be unable to support you
- the home may be lost on the bankruptcy, divorce or death of the relative to whom it has been given, resulting in you being made homeless if you are still living there;
- there may be no inheritance tax saving whilst you continues to live in the home, yet there could be a liability for inheritance tax if the relative dies before you
- the relative to whom the home has been gifted may lose entitlement to benefits and/or services (eg social security benefits, legal aid) due to personal means-testing if not living in the home ;
- the local authority may decide, having regard to your ownership of the notional capital value of the home, rather than the property itself (see below), that you are not entitled to certain community care services, or even to be funded at all for residential care should this be needed.

Anti-avoidance measures

There are no guarantees that there is a fool-proof way of avoiding the value of the home being taken into account in means-testing, since the anti-avoidance measures in the law enable some gifts to be ignored by the authorities and even set aside by the court.

Not only are these measures subject to change from time to time, but it is also unclear how far the authorities will go in order to pursue contributions they believe to be owing to them.

In most cases, the intention behind making the gift is the most important factor.

Where the intention is clearly to create or increase entitlement to financial support from the local authority, measures can be taken to impose a charge on the asset given away in the hands of the recipients or even to recover the asset itself. However, it is necessary that the authority concerned believe that this was a "significant" part of the client's intention in making the gift. Using one of the publicly marketed schemes, which have been advertised, specifically to help people to avoid local authority means-testing may make clear your intention.

Charges for residential and nursing home care

Implications of the 'notional capital' rule

Where the local authority believe that property has been given away with the intention of creating or increasing entitlement to help with residential care fees, or nursing home fees where these are payable, then it may decide that you have 'notional capital' equivalent in value to that of the property given away. If that notional capital value exceeds the capital cut off (currently £16,000) the authority may decide that you are not entitled to any assistance (or any continuing assistance) with the home care fees.

In such cases it would be you who then had to take action if you wished to challenge the decision. This may involve the use of the local authority's complaints procedures, as well as the Ombudsman or a judicial review. These may all entail significant legal expense and anxiety for you as the outcome could not be guaranteed. If a judicial review is necessary it would be the client who had to establish that the authority's decision was unreasonable (ie the burden of proof would be on you).

Enforcing payment of fees for residential and nursing home care

Having assessed someone as being in need of residential or nursing home care and having then provided that care, the local authority cannot withdraw that provision simply because the resident does not pay assessed contributions. However, where charges may legally be made, the authority can take steps to recover contributions, and in assessing ability to pay, may take into account property that has been given away for the purpose of avoiding means-testing.

The enforcement provisions available to local authorities are as follows:

- i. taking proceedings in the Magistrates' Court to recover sums due as a civil debt
- ii. imposing a charge on any property belonging to the resident, with interest chargeable from the day after death
- iii. imposing a charge on property transferred by the resident within 6 months of going to residential care, or whilst in care, with the intention of avoiding contributions

Once the debt for unpaid contributions reaches £750, insolvency proceedings could be taken to declare the resident bankrupt, whereupon transactions at an undervalue may be set aside within 2 years, or within 5 years if the person made bankrupt was insolvent at the time of the transaction, which is unlikely

Under other provisions, a gift may be set aside without time limit and without bankruptcy, if the court is satisfied that the transfer was made for the purpose of putting assets beyond the reach of a potential

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creditor or otherwise prejudicing the creditor's interests This provision is exceptionally wide, and the court has extensive powers to restore the position to that which it would have been had the gift not been made.

Although some local authorities have threatened to use insolvency proceedings, few have actually done so, perhaps because of lack of expertise or the prospect of bad publicity. However, with increasing pressures on local authority resources to provide community care services, there is no guarantee they will not do so in the future.

The burden of proof remains on the local authority to establish that the purpose behind the gift of the property was to avoid means-testing. But it may be difficult for you or your relatives to give evidence as to your intentions, and if another purpose of the gift cannot be established or indicated the judge may conclude that it must have been to avoid means-testing.

In a 1999 Scottish Case it was held that a local authority was entitled to take account of the value of an elderly woman's home transferred to her daughter over 18 months before the woman entered residential care. The Court held that there was no time limit on local authorities when deciding whether a person had deprived themselves of assets for the purposes of avoiding residential care fees.

Paying for residential and nursing home care Charges

Individuals who can afford to pay for a place in a residential care or nursing home may arrange this independently, though it is advisable to seek a 'needs' assessment prior to entering residential or nursing care in order to achieve continuity if local authority funding may be needed in future:

- if met with a refusal to assess in advance, point out that the assessment of need for care provision does not depend upon the need for funding;
- it may also be wise to ensure that the particular home is willing to accommodate residents on local authority funding;

Local authority

Those who enter such a home through an arrangement made by the local authority must pay or contribute to the cost, whether the authority provides or buys in the accommodation:

- each authority must fix a standard weekly charge for its own homes which should represent the true economic cost of providing the accommodation – many have a standard scale of fees geared to their eligibility criteria;
- where the authority purchases a place from an independent home the weekly charge to the resident should represent the cost of the place to the authority;
- residents must generally contribute in accordance with their resources up to the appropriate charge, but no one will be required to pay more;
- the authority either:
 - pays the full fee to the home and collects the resident's contribution; or
 - pays its share whilst the resident and any third party pay the balance
- a contract with the authority or the home should state what is included in the charge and what are extras.

Health authority

Where a health authority arranges a place in a nursing home under a contractual arrangement the individual remains an NHS patient and no charge is made but social security benefits may be withdrawn or reduced.

It is important to ascertain whether a move from hospital to a private nursing home also involves a transfer of responsibility from the health authority to social services.

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Means-testing

When the resident cannot afford the full charge an assessment is made of ability to pay and this is reviewed annually but a resident should ask for re-assessment at any time if this would be beneficial:

- the assessment relates to both income and capital:
 - since April 1993 assessment has been brought largely into line with that for income support, though local authorities retain some discretion
 - the capital cut-off point is £16,000 but capital above £10,000 will result in a tariff income
 - notional capital and notional income rules apply as for income support
- assessment relates only to the means of the resident (unlike for income support where spouses and partners are generally assessed together):
 - there is no power to oblige a spouse/partner to take part but spouses are liable to maintain each other (National Assistance Act 1948, s 42) and court action may be taken against a liable relative (s 43)
 - jointly owned property may be deemed to be owned in equal shares (but query whether it has a value if a home is occupied by the joint owner)
 - since 1996 one-half of occupational and private pensions of the resident are re-routed back to the non-resident spouse
- the value of the resident's home is disregarded during a temporary stay or:
 - if occupied by a spouse/partner, or a relative who is aged 60 or over or incapacitated
 - if occupied by someone else and the local authority exercises its discretion
- there is a minimum charge payable by all residents and the assessment determines what should be paid above this, but all residents retain a personal expenses allowance (revised annually):
 - to be used by the resident for expenditure of personal choice such as stationery, personal toiletries, treats (e.g. sweets, drinks, cigarettes) and presents
 - the authority has a discretion to increase the amount, but it should not be used for top-up to provide more expensive accommodation
- authorities should carry out a benefits check because they have an incentive to ensure that people in homes are receiving maximum state benefits:
 - this should only be with the informed consent of the resident
 - income support will include a residential allowance (not for local authority homes)

Power to Charge

In only a very few cases there is no power to charge

Legal privilege

You should also be aware that whilst, in principle, professional privilege attaches to the advice given to you by this firm, and to our file, this can be waived by the court. Production of the firm's file could give evidence of the intention of the gift.

Note: The above is abridged from "Gifts of Property: Implications for future liability to pay for long term care" published by the Professional and Policy Directorate of the Law Society

For further advice and guidance on the complex rules that govern these arrangements, please contact one of the specialist advisers in our Wills, Trusts and Probate and Wealth Management teams at Coffin Mew LLP on **023 9236 6005** or email: wills@coffinmew.co.uk.