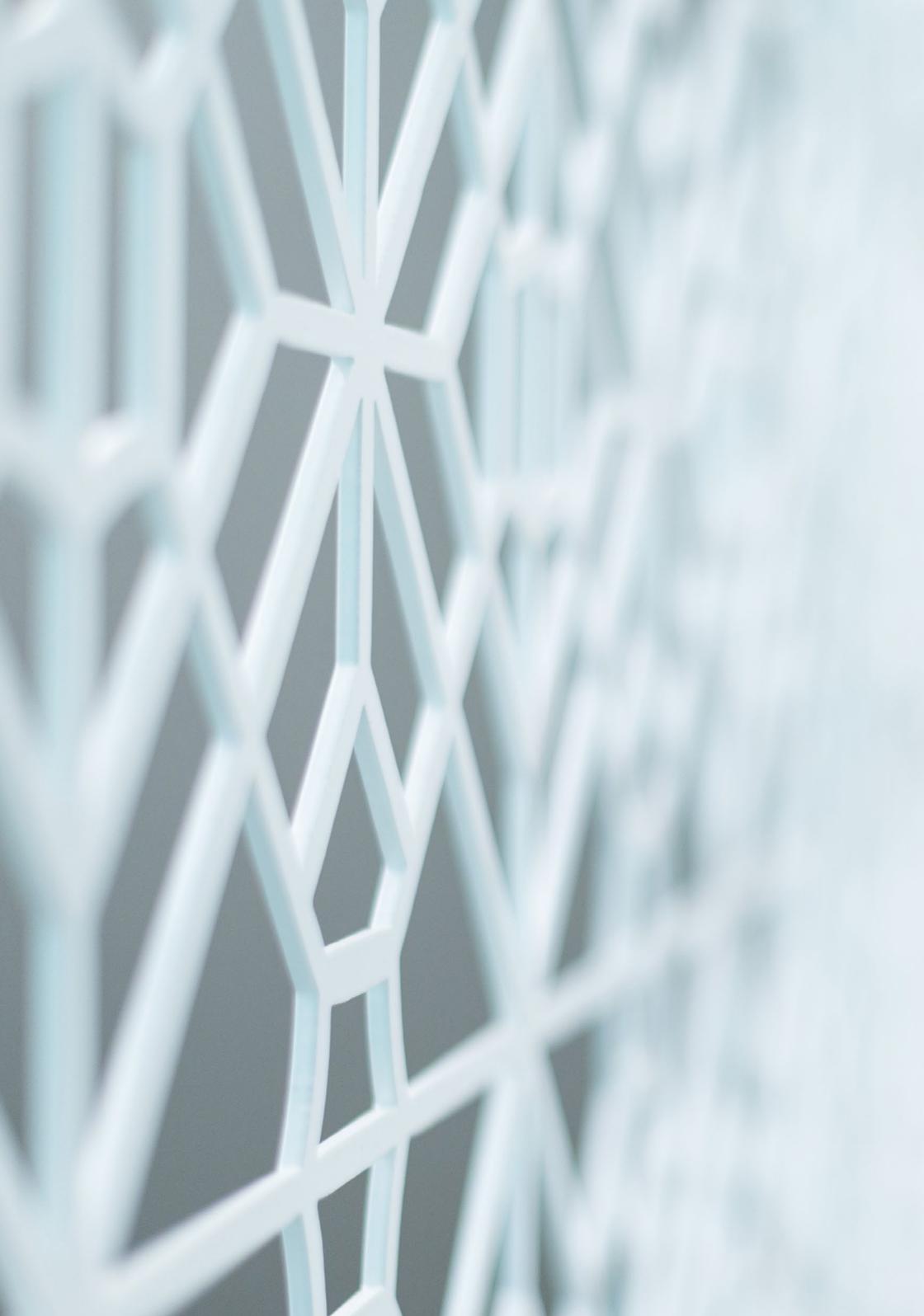


A Guide to How To Provide for Your Spouse or Civil Partner After Your Death

Mishcon de Reya

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Many people leave part or all of their estate to their spouse or civil partner outright. This is the simplest approach and in some cases quite appropriate. But for many of our clients we recommend they leave their estate on trust for their surviving spouse or civil partner rather than leaving it to them outright. Although there is usually no tax on the first death whichever route is chosen, using a trust can offer significant tax advantages to later beneficiaries as well as other important benefits.

How can you decide whether to choose between an outright gift or trust?

We have set out in this brochure the reasons you might choose either option, using the example of a married man thinking about a Will leaving his estate to his wife. Hopefully this will help you with your decision.

What does a trust involve?

If, for example, you are a married man and you leave part or all of your estate on trust for your wife, the trust would provide income for her (and potentially also capital if the trustees choose to pay it to her) for the rest of her life.

The trust would be very flexible and other people could potentially benefit including your children and grandchildren and their spouses and civil partners.

However, in the first instance your wife would be entitled to receive all of the income from the trust unless and until the trustees decide otherwise.

You would create the trust for your wife, and appoint the trustees, in your Will. You could give the trustees guidance in a letter of wishes covering how you would like your estate to be dealt with after your death. Although a letter of wishes is a non-legally binding document, the trustees would be expected to follow your wishes unless there were good reasons not to.

The letter of wishes could, for example, ask your trustees to make gifts from the trust to people other than your wife provided she is otherwise well provided for. We can draft the letter of wishes on your behalf. The letter of wishes can be changed whenever you wish without needing to prepare a new Will.

Reasons for using a trust

1. Protecting your children

Leaving your estate on trust for your wife would ensure that the assets left over in the trust on your wife's death would pass to your children (or grandchildren or other chosen heirs), rather than to any of your wife's family or to any future partner she may have. This is particularly important where second marriages and step-children are involved.

2. Tax efficiency and onward gifts

Gifts from the trust during your wife's lifetime

The letter of wishes to the trustees would usually make it clear that your wife's financial wellbeing after your death is of the utmost importance. However, you could also ask the trustees to pass some of the trust capital down to your children (or grandchildren) during your wife's lifetime if they feel that your wife's financial needs have been sufficiently catered for, whether from the remaining trust assets or from her own resources.

As the rules currently stand, the capital passing to your children (or other chosen recipients) would be received by them free of inheritance tax provided your wife survived the transfer by seven years or more. Since your estate will have passed into the trust for your wife free of inheritance tax in the first place, this is a very tax-efficient means of passing assets down the generations, potentially saving significant amounts of tax. It also gives you a degree of control over this process after your death, rather than relying on your wife to make these transfers herself.

Making of gifts by the trustees rather than by your wife

a. Lack of mental capacity.

If your wife received your estate outright but she was unable to make decisions for herself, she would not be able to make tax-efficient onward gifts to your children or grandchildren even if she wanted to. By leaving your estate to your wife on trust rather than outright, the making of tax-efficient onward gifts would be by your trustees rather than by your wife. Therefore even if your wife were to lose mental capacity, those gifts could still be made.

b. Preserving your transferable nil rate band

If you do not use up your own inheritance tax free allowance (known as the "nil rate band") on your death, it will pass to your wife to be used on her death. However, if you leave your estate to her outright then there are some circumstances in which onward gifts made by your wife of assets from your estate would inadvertently use up some or all of your own nil rate band. This not only means that inheritance tax could then apply on your death, but also that more inheritance tax would be payable on your wife's death. The problem can be avoided if you leave your estate to your wife on trust and onward gifts are then made by the trustees. This will ensure that your own unused nil rate band passes to your wife in full, meaning that she will have a double nil rate band available on her death.

3. Protecting your assets

If your estate goes into a trust for your wife, she would not actually own the underlying capital for the purposes of means-tested benefits. This may also offer protection against having to pay care home fees.

A trust would also provide protection against other family members (for example, your children) putting pressure on your wife to give them assets from your estate after your death. This is because the collective trustees may find it easier than your wife to refuse any unsuitable requests.

A trust will also protect against the possibility of your wife's own profligacy after your death.

4. Making life easier for your wife

By leaving your estate to your wife on trust rather than outright, it will relieve her of the burden of having to manage the investment of the assets. Instead this will be the responsibility of the trustees. It may also avoid the need for her to sign a Lasting Power of Attorney authorising someone else to manage her financial affairs in the event that she loses capacity to look after her own affairs. Having your estate held in a trust might also avoid the need for the family to make an expensive and time-consuming application to the Court of Protection for the appointment of a Deputy to manage her affairs should she lose capacity.

5. Avoiding tax on a sale of your home after your death

If you leave your house to your wife outright but it has not always been used as your main residence then if and when the house is eventually sold by your wife sometime in the future, there could be a capital gains tax charge in respect of the period when it was not your main residence. This tax charge could be avoided if instead you leave the house to your wife on trust.

6. Practical financial help on your wife's death

On your wife's death, your trust would continue to exist and money could immediately be paid out to your children or grandchildren from the trust.

If no trust had been created on your death, assets would not be available for distribution from your wife's estate until probate is granted. This could be many months after your wife's death.

However, if you had created a trust on your death, money from this trust could be used to pay expenses and/or inheritance tax on your wife's death. These would otherwise have to be funded by, for example, your children or an expensive bank loan.

Reasons for no using a trust

1. Potential claim by your wife under the Inheritance (Provision for Family and Dependants) Act 1975

By leaving your estate to your wife on trust rather than outright, she might have a potential claim against your estate under the Inheritance (Provision for Family and Dependants) Act 1975 on the grounds that she is only entitled to the income from your estate and not the capital.

Equally, although the partial or full termination by the trustees of your wife's entitlement under the trust in favour of your children (or other chosen individuals) during your wife's lifetime would potentially be very tax efficient, there is a possibility that your wife could then claim that she had not received adequate provision from your estate in the light of the termination of her entitlement under the trust.

You will need to weigh up whether you think it is likely that your wife would bring such a claim, bearing in mind that this structure is often set up to create a possible tax saving for her own children.

If your wife is one of the trustees (which we generally recommend), it would be especially difficult for her subsequently to argue that the termination of part or all of her entitlement under the trust in favour of the children meant she had not been adequately provided for, as she would have been instrumental in the decision to terminate her own entitlement. In these circumstances a successful claim by your wife would be unlikely.

2. Complexity

An outright gift of your estate to your wife in your Will would be simpler than creating a trust, as it would remove the time and expense involved with an ongoing trust after your death.

Your wife may also resent not having sole control of your estate after your death. However, as set out above, there could be good reasons why an outright gift to your wife is inappropriate in your particular circumstances. In that case the benefits of a trust will far outweigh the inconvenience and modest cost involved.

Who should the trustees be?

If you decide to include a trust in your Will, you should give careful thought to whom you would like to appoint as trustees. There should be at least two trustees. We generally recommend appointing a professional as one of the trustees, such as a solicitor or accountant, and we are usually happy to offer this service at Mishcon de Reya. You might wish to avoid appointing certain family members in circumstances where there is likely to be any dispute over your estate on your death. As mentioned above, we usually recommend appointing your spouse or civil partner as one of your trustees although sometimes this may not be appropriate.

Trustee decisions usually have to be unanimous. The choice of appropriate trustees is extremely important and will always depend on your individual family circumstances.

We would be happy to advise you on how to choose appropriate trustees.



For further information, or to make an appointment, please contact:

Andrew Goldstone
Partner; Head of Tax
T +44 20 3321 7205
E andrew.goldstone@mishcon.com
Twitter [@GoldstoneTweets](https://twitter.com/GoldstoneTweets)

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Africa House
70 Kingsway
London
WC2B 6AH

T +44 20 3321 7000
F +44 20 7404 5982
E contactus@mishcon.com

www.mishcon.com

Mishcon de Reya