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Society of Will Writers Guidance for Members

Asset Protection Trusts (APTs) are a valid and effective tool for estate planners when used in the right circumstances. However, due to their complexity, these trusts often come with higher fees, making them an attractive option for some practitioners to pursue higher profits without fully appreciating the risks and considerations involved in advising clients. A lack of understanding can lead to false or misleading claims regarding the benefits of Asset Protection Trusts. As a result, the Society of Will Writers, with the support of its Professional Standards Board, has decided it is time to issue clear guidelines to Members on what can and cannot be said about lifetime trusts of this nature when promoting or advertising them.

This guidance specifically addresses trusts set up during the settlor's lifetime and does not relate to testamentary trusts. APTs are often used to settle a client's primary residence, and as such, have been referred to by various names, including Home Protection Trusts, Lifetime Trusts, Family Trusts, and Bloodline Trusts. For the purposes of this document, they will collectively be referred to as Asset Protection Trusts (APTs).

This document outlines commonly observed claims in advertising, followed by factual clarifications and the Society's guidance on acceptable use of such statements. Please note that merely altering a few words without changing the core sentiment will not be sufficient to circumvent these rules.

1) **"This type of trust will protect your home from paying care fees."**

The rules that cover care costs and deliberate deprivation of assets are complex, and specific to the circumstances of the individual. When considering the transfer to trust a Local Authority will take into account a number of factors –

- why and when the settlor disposed of the assets.
- whether they could have known that they would need care and support at the time of the transfer.
- whether they expected that they would have to pay towards their care costs.
- whether avoiding care costs was a significant motivation for disposing of the assets.

The Society's view is that by simply making this claim you are potentially providing the local authority with proof that avoiding care costs was a significant motivation.

The consequences of this can be severe – the Local Authority can apply to the courts to ‘set aside’ the transfer to trust and treat the asset as though the settlor still owned it for the purposes of calculating care fees. This means that the settlor will be deemed to own the full value of the property and therefore be responsible for the payment of their own fees.

However, as the property is in the trust and is no longer legally owned by the settlor, this cannot be undone without incurring costs and potential difficulties. Depending on how the trust has been set up, the settlor may no longer have direct access to the asset that the LA has used in the assessment. The settlor might be entirely reliant on the trustees’ actions.

Members must not make this claim in advertisements and promotions.

2) “This type of trust will save probate fees.”

The rationale behind the statement is that where professionals have been engaged to deal with probate, and their fee is based on a percentage of the estate, the percentage is reduced by the trust falling outside the estate.

It is impossible to know whether the executors would choose to engage a firm with that fee structure in the future. Furthermore, by passing assets into trust, you are creating a ‘Gift with Reservation of Benefit’ and in most cases making the settlor a beneficiary of trust assets of over £250,000. This will prevent the estate from being an excepted estate under the HMRC rules and will necessitate the completion of a full IHT 400 return at the time of death. This may increase probate costs, not reduce them, if the executors require professional assistance.

Members must not make this claim in advertisements and promotions.

3) “This type of trust will save time at probate.”

Applications for the grant of probate on excepted estates are processed quicker than when an IHT400 is needed. In addition, the IHT400 requires significantly more time and knowledge to complete than for excepted estates.

Members must not make this claim in advertisements and promotions.

4) “Trustees can dispose of trust assets without the need for probate.”

Assets held in trust do not form part of the deceased’s estate for the purpose of obtaining probate. This should not be confused with the fact that they will be

considered part of the estate for the purpose of calculating inheritance tax if the settlor continued to enjoy the benefit of the settled property.

This claim is reasonable to make.

5) “This type of trust will protect your estate against claims by disappointed beneficiaries.”

The Inheritance (Provision for Family and Dependents) Act 1975 contains specific provisions to allow settlements to be varied by the courts if they were made within 6 years of the death.

This type of claim should only be given where it is made clear in any advertising or promotion that it is only effective 6 years after the initial settlement.

6) “This type of trust will protect the trust assets in the event of your beneficiaries’ divorce.”

S25 Matrimonial causes act states the court may take into account - *The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future (including any benefits under a pension scheme which a party to the marriage has or is likely to have), including in the case of earning capacity, any increase in that capacity which it would in the opinion of the Court be reasonable to expect a party to the marriage to take steps to acquire.*

This includes trust assets that have been ‘Matrimonialised’ or ‘Nuptialised’.

This claim is not to be made without making the distinction clear.

7) “This type of trust will save Inheritance Tax or is neutral for Inheritance Tax.”

Since the introduction of the residence nil rate band this statement is untrue and should not be made. It is theoretically possible to reclaim the residence Nil Rate Band by enacting a Deed of Variation within two years of the death of the life tenant. However this requires a level of sophistication that is beyond the majority of lay trustees. Additionally it should not be overlooked that appointing out assets and claiming back tax paid will incur additional costs. Nor should it be overlooked that tax will have to be paid in the first instance, before it can be reclaimed.

Members must not make this claim in advertisements and promotions.

8) “This type of trust can help your beneficiaries to save Inheritance Tax.”

This is a potentially valid reason for the creation of an APT, where the intention is to provide the option of ‘generation skipping’ for already wealthy beneficiaries.

This claim is reasonable to make.

9) “This type of trust will protect your assets from Bankruptcy.”

Similar to deliberate deprivation of assets for care costs, the Insolvency Act 1986 addresses the subject of putting assets beyond the reach of creditors, which this type of trust could potentially do. In this case, the trustee in bankruptcy can set aside the transfer and seek the permission of the court to recover the trust assets.

Members must not make this claim in advertisements and promotions.

10) “This type of trust will protect your assets from your beneficiary’s Bankruptcy.”

The rationale behind this statement is that the settlor’s chosen beneficiaries may be facing bankruptcy at the time of their inheritance. Assets in an APT are held by the trustees and can be distributed at their discretion, which can be exercised to hold the funds until the bankruptcy has been ended. This is all about timing but can be a valid benefit.

This claim is reasonable to make.

11) “This type of trust will protect your assets from your beneficiary’s vulnerabilities.”

As a discretionary trust, the trustees have the ability to assess the potential beneficiaries and their life circumstances at the time of the settlor’s passing. Beneficiaries with vulnerabilities such as alcohol or drug addiction, gambling problems or other adverse life situations can be financially assisted through the trust assets, or they can be held until such time as the potential beneficiaries are in a better position.

This claim is reasonable to make.

12) “This type of trust will protect your assets from scams and cons.”

Trust assets are significantly harder to take advantage of than assets held absolutely. Scams and cons that involve a person’s main residence are rare but can include

predatory marriage and confidence tricks that gain a victim's trust to deceive them for personal gain. Trustees can introduce a level of security that would assist settlors, particularly in later life when they might be more vulnerable.

This claim is reasonable to make.

Reserved Activity

The creation of a lifetime trust is a reserved activity. Members that are setting up lifetime trusts for their clients will be doing so through the agency of an appropriately qualified and licensed legal entity. However, the member should understand that they are responsible for the advice provided to their clients and for the advertising and promotion of the services.

Breaches of the Restrictions

Members found to be making false or misleading statements in their promotional and marketing materials shall be deemed to be in breach of point 7.3 of the Code of Practice and shall be subject to further enquiry and potential disciplinary measures.

Knowledge and Education

These guidelines and restrictions take immediate effect to mitigate the potentially harmful effects of false or misleading advertising. The Society of Will Writers and its Professional Standards Board want to emphasize that there is no substitute for a thorough understanding of the subject of trusts and encourage its members to pursue additional education so that clients can be effectively and accurately helped to put the right solutions in place for their families. Courses are available from the College of Will Writing and other training providers for practitioners that wish to gain a detailed understanding of the subject.