

# All present and correct?

*Joanna Mills* runs through the basic tick list for clients considering gifting assets to family

**W**ith more clients facing future care fees, as well as a potential inheritance tax liability for their estate, gifting assets to family is increasingly on the agenda. Clients will always see the potential benefits of making such a gift, but they must also be advised of the risks and the consequences so that they make an informed decision.

It is often the family home the client wishes to gift away, which means they may lose the security of living in their own home. If the donee is declared bankrupt or goes through a divorce, the property would be involved in these proceedings. This may lead to the home being sold or transferred and the donor having to move out. Relationships can always deteriorate and we have seen too many cases of children selling the property and parents becoming homeless. When the gift has been made, without any undue influence and if the donor was capable at the time, there is little objection the donor can make. It is always advisable to go through the trust options available in order to minimise the risk of such a sale or transfer.

## Every eventuality

Gifting assets away may also mean that the donor will not have sufficient assets left in order to fund any care fees for

themselves. This can restrict significantly the choice of care home they can move into, as the local authority will only pay up to a certain level. When making the gift it may have been agreed that if the donor has to move into a care home the family will top up the care fees so that the donor can move into a home of their choice.

What happens if the family renege on this promise or put pressure on the donor to move into a care home early? It is difficult for clients to believe that their family may not be able or would refuse to support them financially, but this issue needs to be explained as a potential and very real possibility.

Not everyone wants to move into a care home; however, the donor may be left with insufficient assets to finance the alterations necessary to enable them to continue living at home. The local authority will not provide financial assistance for all alterations, which may leave the donor with no other option but to move into a care home.

Gifting away assets does not necessarily mean that they will be ignored in the care fees financial assessment. Section 6.062–6.073 of the charging for residential accommodation guide (CRAG) 2010, which is updated each April, sets out the deprivation of capital rule. When carrying out the financial

assessment, local authorities will look for evidence of deliberate or intentional deprivation of assets. Where a gift has been made with the intention of reducing capital to receive local authority funding for care, the local authority has the discretion to treat the individual as still owning the asset.

Avoiding care fees does not have to be the only intention behind the gift, but it must be a significant one. The value of the asset is treated as notional capital and added to the value of the donor's actual capital. If this exceeds the capital limit, currently £23,250, then the donor is assessed as having to meet the full cost of their care. As a result, the local authority may refuse to fund the care or treat the financial assistance as an accruing debt owed to the local authority.

This means that the donor needs to find a way to fund their own care, even though the assets have been gifted away. As set out above, they may need to rely



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on their family to help them fund the cost of their care and this may not always prove possible.

**Unforeseen consequences**

Where an individual is unable to fund all or part of the care fees charge, the local authority can look at using their powers under section 21 of the Health and Social Services and Social Security Adjudications Act 1983. Section 21

provides that the donee of the gift shall be liable for the care charge the individual cannot pay where:

- it has been decided that a gift has been made with the intention of avoiding charges for accommodation;
- the gift was made no more than six months before admission into the care home; and
- no consideration, or less than market value consideration, has been received for the asset.

If the six-month rule does not apply, the local authority could try to pursue the debt against the donee by using the provisions of the Insolvency Act 1986. This has rarely been used to date, but may well change in the future.

Thought should also be given to the capital gains tax consequences of the gift, especially second properties where the main residence exemption will not apply.

The uplift in the value of the property on the donor's death for capital gains tax purposes will also be lost.

Where the donor remains living in the property or continues to receive a benefit from the asset which has been gifted away, the Gift with Reservation of Benefit Rules will apply so the value of the asset will still be included in the donor's estate for inheritance tax purposes. This could result in a surprise inheritance tax bill for the children where they were not previously aware of these consequences.

The client needs to be fully aware of these potential risks and consequences of making the gift before deciding how to proceed. The Law Society Practice Note 'Making Gifts of Assets' was revised in July 2009 and is a helpful checklist of how this issue should be approached. ■

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