frenkel topping

Independent Financial Advisers

Personal Injury Trusts FAQs

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What is a personal injury trust?

A personal injury trust is a legal arrangement whereby 'trustees' hold and manage a personal injury award for a 'beneficiary', to ensure that the beneficiary:

- retains their entitlement to means-tested benefits, and/or
- minimises their contribution towards the costs of 'community care support' provided by their local
- authority social services department.

This is because regulations state that personal injury awards held in this way are to be disregarded when assessing entitlement to means-tested benefits and contributions towards community care costs.

Which benefits are means-tested?

For people aged under state pension age, means-tested benefits are:

- Income Support
- Income-based Jobseeker's Allowance (JSA)
- Income-related Employment and Support Allowance (ESA)
- Housing Benefit
- Council Tax Support (also known as 'Council Tax Reduction')
- Universal Credit

From April 2013, there also began a phased introduction of 'Universal Credit', which is to replace Income Support, Income-based JSA, Income-related ESA, Housing Benefit, Child Tax Credit and Working Tax Credit for people aged under state pension age.

The means-tested benefits for people aged over state pension age are:

- Pension Credit (Guarantee Credit)
- Housing Benefit
- Council Tax Support

NB. The regulations in respect of how personal injury payments are treated when assessing entitlement to means-tested benefits are different for pensioners – see page 6.

Tax credits are means-tested in a different way to other benefits – see page 5.

What is community care support?

Community care means providing the right level of intervention and support to enable people with health problems and disabilities to achieve maximum independence and control over their own lives.

Following a 'needs assessment' by your local authority social services department, this can be the provision of a carer, 'direct payments' to enable you to employ a private carer or the provision of supported accommodation

Do I need to set up a personal injury trust?

If you are:

- below state pension age and in receipt of means-tested benefits, or
- any age and in receipt of community care support, or
- likely to fall into either of these groups imminently, or
- wish to protect your entitlement to means-tested benefits and/or community care funding in the future,

it may be advisable for you to set up a personal injury trust.

Entitlement to means-tested benefits is assessed with entitlement to the claimant's income and capital, and that of their partner (if they have one). It is not affected by any capital their children have.

In contrast, the level of a community care recipient's contributions towards the cost of the community care support provided by the local authority is only assessed with reference to the recipient's own income and capital, i.e. their partner's 'means' are not taken into account.

Your interim payment or final settlement in respect of your personal injury case is a type of capital, and it may therefore lead to your means-tested benefits reducing or stopping. It may also lead to your contributions towards the cost of your community care support increasing.

This depends upon the amount of the payment you are about to receive in respect of your personal injury, what other 'capital' you have, and whether this is the first payment the defendant in your personal injury claim has made to you, or on your behalf, for example expenses paid to meet medical costs etc.

People aged above state pension age and tax credit claimants do not necessarily need to set up a personal injury trust to prevent their personal injury payment affecting their entitlement to benefits/tax credits, although they may still want to for peace of mind.

How does capital generally affect entitlement to means-tested benefits?

A claimant's capital is usually simply the amount of funds held in their bank account(s), but it can also include any property they own other than their main residential home, certain other assets and investments. Our Trusts team would be happy to provide advice about what else counts as capital.

The general capital rules for means-tested benefit claimants aged below state pension age:

1. The first £6,000 that the claimant has (and their partner, if they have one) is disregarded, whatever its source.
2. For pre-Universal Credit claims, any capital they have between £6,000 and £16,000 is treated as generating 'tariff income' of £1 per week on every £250 (or part thereof) above the £6,000 level, and
3. their 'income' means-tested benefit (i.e. Income Support, income-based JSA or income-related ESA) is reduced by a corresponding amount.
4. If they retain any entitlement to their 'income' means-tested benefit after tariff income has been applied,
5. they continue to be 'passported' to full Housing and Council Tax Support. However, if tariff income
6. negates their means-tested income benefit, tariff income is then applied to their Housing and Council
7. Tax Support assessment, thus reducing these benefits as well.
8. Once such claims are transferred onto Universal Credit, the claimant will receive one monthly payment that they need to meet their overheads out of, including rent. That monthly payment will be reduced by
9. tariff income if they have capital between £6,000 and £16,000 at an equivalent rate to that outlined above (£4.35 per month).
10. If they retain any entitlement to Universal Credit after tariff income has been applied, they will continue to be 'passported' to full Council Tax Support. However, if tariff income negates their Universal Credit, tariff income will then be applied to their Council Tax Support assessment, thus reducing that as well.
11. If they have capital in excess of £16,000, the claimant is not entitled to means-tested benefits.

The general capital rules for means-tested benefit claimants aged over state pension age.

The first £10,000 that the claimant has (and their partner, if they have one) is disregarded, whatever its source.

Any capital they have over £10,000 is treated as generating 'deemed income' of £1 per week on every£500 (or part thereof) above the £10,000 level, and their 'income' means-tested benefit (i.e. Guarantee Pension Credit) is reduced by a corresponding amount.

Again, if they retain any entitlement to Guarantee Pension Credit after deemed income has been applied, they continue to be 'passported' to full Housing Benefit and Council Tax Support. However, if tariff income negates their Guarantee Pension Credit, deemed income is then applied to their Housing Benefit and Council Tax Support assessment, thus reducing these benefits as well.

How does capital generally affect entitlement to tax credits?

Working Tax Credit and Child Tax Credit are not affected by capital per se. However, they are affected by actual taxable income generated by capital.

Tax credits are assessed with reference to annual income. The first £300 of taxable income generated by capital is disregarded each year. Any remainder is then included in the claimant's overall income when assessing entitlement, leading to a tapered reduction in the tax credit award.

It should also be noted that Universal Credit has started to replace Tax Credits, with a phased introduction for new claimants from April 2013. Existing tax credit claimants will have their claims transferred onto Universal Credit from April 2014.

The relevant capital rules for Universal Credit are the same as those for means-tested benefits, i.e. capital itself will be taken into account when assessing entitlement, subject to the lower capital limit of £6,000, the upper capital limit of £16,000, and the application of tariff income in respect of capital between these levels.

This means that existing tax credit claimants will need to consider whether they will need a personal injury trust to protect their future entitlement to Universal Credit, even if they don't need one at present to protect their tax credit entitlement. Our Trusts team would be happy to discuss this with you in more detail, if necessary.

How does capital generally affect entitlement to community care support?

The local authority social services department has a duty to provide any services and/or accommodation above a certain threshold anyone who lives within its boundaries is assessed to require. However, it will then undertake a 'means assessment', to ascertain whether they will be expected to contribute towards the costs.

The capital rules are as follow:

- The first £14,250 that the person has is disregarded, whatever its source.
- Any capital they have between £14,250 and £23,250 is treated as generating 'tariff income' of £1 per week on every £250 (or part thereof) above the £14,250 level, and their income is then increased by this amount (and thus their expected contribution increases).
- If they have capital in excess of £23,250, they will be expected to meet the full costs of any services required.

Will my personal injury payment definitely affect my entitlement to means-tested enefits and/or community care support?

Means-tested benefit claimants aged under state pension age.

If your interim payment or final settlement is the first payment made by the defendant in your personal injury case (including payments made to other people or organisations as part of your claim, for example in respect of medical expenses), then regulations state it will be disregarded for up to 52 weeks (no matter what amount it is and where it is held) when assessing your entitlement to means-tested benefits. This is known as the '52 week disregard' rule. Please note that only the first payment received in respect of your personal injury claim is disregarded for up to 52 weeks. Any subsequent payment received (whether a further interim payment or final settlement award) will not have the luxury of this '52-week disregard' rule – therefore a trust will need to be set up (to avoid impacting your means-tested benefits) if a subsequent payment means you will breach the £6,000 lower capital limit.

If you are likely to have spent this first payment within 52 weeks, or at least brought it below the aforementioned £6,000 level, you do not therefore necessarily need to set up a personal injury trust to hold this payment. However, you will need to ensure that you only spend it on things that the authorities that administer your benefit claims will deem reasonable, to avoid the application of the 'deprivation of capital' and 'notional capital' rules.

If your interim payment or final settlement will not take your total capital to above £6,000, then it will not affect your entitlement to means-tested benefits, and you do not need a personal injury trust at this stage.

In circumstances where this payment is not the first payment and will take your total capital to above £6,000, it will lead to a reduction in entitlement.

If it takes this total to above £16,000, it will lead to benefits stopping.

If this is the case, then we recommend that you set up a personal injury trust now. This will prevent your personal injury payment causing your benefits to reduce or stop, as regulations state that payments derived from a personal injury are disregarded as capital when assessing entitlement to means-tested benefits for people aged under state pension age, if they are held on trust.

Recipients of community care services/accommodation

If your personal injury payment will not take your total capital above £14,250, it will not affect your contributions towards your community care costs.

However, you should note that if this payment will take your total capital above £14,250, it will lead to an increase in your expected contributions towards these care costs.

Further, that if it takes your total capital to above £23,250, it will mean you are expected to meet the full costs of care yourself.

If this is the case, then we recommend you set up a personal injury trust now, as this will prevent your personal injury payment increasing your expected contributions. This is because regulations state that payments derived from a personal injury are fully disregarded as capital when assessing the level of contributions someone is required to make towards their community care costs.

Means-tested benefit claimants aged over state pension age.

Regulations simply state that personal injury payments are disregarded as capital when assessing entitlement to means-tested benefits for people aged over state pension age.

This means pensioners do not necessarily need to set up a personal injury trust to prevent their payment from leading to their benefits reducing or stopping.

However, the personal injury payment will need to be kept separate to the pensioner's other finances, so that it is clear to the authorities that administer their benefit claims which sums are to be disregarded. Setting up a trust and associated bank account is one way of doing this.

If you decide not to set up a trust, we would advise you to keep your personal injury payment separate to your existing finances by other methods, for example by opening a brand new bank account in your own name only that just holds those funds and nothing else.

You will also need to notify the authorities that administer your means-tested benefits about the money, as receipt of it is a significant change of circumstances that you have a duty to disclose. You should clearly state that these monies are derived from a personal injury claim to you in order for the authorities to apply the appropriate disregard rule.

It is notable that some pensioners may prefer to set up a trust to hold their personal injury payment for other reasons, for example because they want the protection of two (or more) trustees vetting the decisions they make as to how to spend the funds thereafter, or dealing with tax or investment issues.

What if I decide not to set up a trust and just spend all of my personal injury payment?

If a means-tested benefit claimant receives a capital sum that means their total capital exceeds the lower capital limit of £6,000, but then spends it on things that the authorities that administer their benefit claims consider 'unreasonable', they can be treated as still possessing it. This is the 'notional capital' rule.

These authorities can therefore still reassess the claimant's benefits and reduce or stop them, if it is believed the claimant deliberately deprived themselves of capital in order for it not to affect entitlement to means-tested benefits. This is the 'deprivation of capital' rule.

One example of what is likely to be considered unreasonable disposal of capital is giving it away to family members, even if you argue it is to repay money you owe them. This is because the authorities would be likely to deem it more reasonable for you to live off the money than give it to someone else, and establishing that you owe it to them is likely to be very difficult in the absence of a 'audit trail' (i.e. paperwork proving you owe the money that you would have if you owed it to a bank – a loan agreement, statements verifying previous repayments etc).

This is in contrast to repaying formal debts, such as bank loans, credit card balances, outstanding mortgage, rent, council tax, utility arrears, etc. There should not be any difficulty establishing that you owe these sums, and this should be accepted as a reasonable use of a capital sum and therefore not activate the notional capital and deprivation of capital rules.
It should also be accepted as reasonable for you to buy a new car if you need one, although you should choose one from within your usual price range to ensure that the authorities do not deem it as unreasonable. Repaying some or all of your existing mortgage should be accepted as reasonable, whereas doing so for somebody else who does not live with you is unlikely to be, as you will be expected to use your resources to meet your own housing (and other) costs rather than those of somebody else for whom you are not reasonably responsible.

Buying a property other than the one you live in will simply lead to the capital value of the second property being included in your total capital, and will not therefore stop it affecting your means-tested benefit entitlement.

What is a trustee?

A trustee is a person, chosen by you, who looks after your personal injury funds. They vet what you spend the money on and each time you raise money from the trust, they need to consent to the withdrawal and its proposed use. Trustees must always act in the best interests of the Beneficiary (the person whom the trust fund was set up for).

How many trustees should I have?

A minimum of two trustees are required to form the personal injury trust. You can be one of the trustees yourself. If you nominate yourself to be a trustee, you will then need to have at least one other trustee for there to be a trust relationship. We recommend a maximum number of no more than four trustees.

Who can be a trustee?

Anyone over eighteen years of age can be a trustee, including family and friends (provided no decision has been taken that they lack the mental capacity to fulfil the financial responsibilities of the role, for example by the Court of Protection). Your proposed trustees must also reside in the UK. However, you should note that if they have a negative credit rating or a criminal record, this may cause problems with setting up the associated trust bank account.

Your trustees should be people you trust, with whom you are likely to maintain contact indefinitely. Because of the practicalities of them being available to counter-sign cheques and have regular input regarding any investment decisions, it makes sense for them to be people you see regularly. In the alternative, a solicitor can be a professional trustee, although it is likely they will charge you a fee for doing so.

You should choose carefully, as there is a further fee for changing trustees after the trust has been set up and complications can arise if proposed retiring trustees do not consent to their removal. Please see page 9 – 'Do the trustees have to act on my wishes?'

How can my trust fund be invested?

An associated trust bank account is initially opened to receive and hold your personal injury payment(s). However, as this is an instant access account primarily set up as a 'holding' account for your damages (therefore giving a minimal amount of interest), you may wish to 'invest' these funds in other financial products to gain a better rate of return.

The funds you pay into this main 'holding' account can go on to be invested in a wide range of assets (i.e. share portfolios, bonds, savings accounts, property etc.) as long as these investments/assets:

- allow investment from a trust, and
- can be registered in the name of the trust.

These investments will then be held in the name of the trust, rather than in your own name. However, these further investments will still belong to you because you are the sole 'beneficiary' of the personal injury trust. Any interest or income generated from these investments can then be paid back into the main trust bank account, thus they are still disregarded for means-tested benefits/community care funding purposes.

Please note that the rules regarding investments within personal injury trusts in respect of tax credits are different. Please contact us if you wish to discuss this further.

We recommend that your trustees appoint a professional financial adviser to help with investments, preferably one who specialises in the investment of personal injury and clinical negligence awards. Our financial advisers can fulfil this role, and details of their commission rates or fees are available on request. Any initial consultation with our advisers is totally no obligation and free of charge.

If your award is in excess of the £85,000 limit of protection for deposits under the Financial Services Compensation Scheme (FSCS) and you do not have plans to significantly reduce your holding to below £85,000 within six months, we recommend that you contact us for further advice regarding diversification of your monies held in trust so that you are fully covered in the unlikely event the bank (which holds your trust account) becomes insolvent.

Can I purchase a property with my trust fund?

Your personal injury trust can own property (provided the trust has been set up to allow this at outset). If you want to use your trust funds to purchase a property as your main residence, we recommend you speak to a solicitor to arrange this transaction to ensure there is no mix up of personal funds and money owned by the trust. A solicitor should advise on whether the property should be registered in the trusts name to ensure there is no impact on any means tested benefits should you sell the property in the future. Bear in mind if you use the proceeds of your personal injury trust to purchase a property it will be owned by the trust which can mean you need permission from the trustees to make alternations or sell the property in the future.

It is possible for a personal injury trust to own any type of property, including rental property. Rental income would need to be declared on your tax return and we would recommend you seek tax advice on income generated by investments held in your trust. Rental income can be paid into the trust bank account to avoid any impact on means tested benefits.

How can I access my trust fund once the account has been set up?

The main method is for your trustees to sign one of the cheques from your trust account chequebook made payable to you, and pay this into your own personal current account. You can then use the facilities attached to that account to spend the money. You can do this every so often to top up the funds readily available to you. However, you should ensure that these payments into your personal current account do not ever take the balance to above £6,000 at any one point in time, as the funds will not be disregarded once they are outside the trust.

Please note that a minimum of two trustees' signatures are required to authorise a withdrawal from the trust.

You should also vary the amounts and the length of time that elapses between each payment, so that they are irregularly spaced and for irregular amounts, to avoid the authorities that administer your benefit claims treating them as income. While income payments from a personal injury trust are disregarded as income for the period to which they relate (for example, a month if they are paid monthly), any amount left at the end of that period then becomes capital. If this residual capital accrues to a level in excess of £6,000, it will lead to a reduction in means-tested benefit/cause it to stop, because it is held outside the trust.

Many trustees are tempted to arrange for a monthly income to be paid to the beneficiary out of the personal injury trust as a low-maintenance way of managing the funds and ensuring they have sufficient accessible funds. However, in our experience, these payments are often set too high, leading to problematic capital accrual outside the trust. It is therefore our advice that the best way to make sufficient funds available is to issue irregular advances in response to needs as and when they arise.

Can I pay other money into the trust bank account?

Any money received as a result of a personal injury to you can be paid into your personal injury trust bank account.

If this payment is an interim payment, you can therefore pay subsequent interim payments and/or the final settlement sum into the trust bank account and invest it in the name of the trust.

If you receive a payment in respect of a separate personal injury claim, this can also be paid in. How[illegible] only money received as a result of a personal injury that can be paid in. You cannot therefore pay in capital sums you derive from any other source (e.g. an inheritance).

What are the tax requirements in respect of the trust fund?

If no investments are made after the setting up of the trust bank account, then HMRC do not have to be notified about the trust. However, if investments are made within the trust, the trustees should assist the beneficiary with the following:

The beneficiary's local tax office needs to be notified about these investments made under trust, and income and expenditure generated by these investments needs to be kept and disclosed in the beneficiary's annual tax returns.

Your trustees may need to appoint accountants to help with the trust tax requirements. We would be happy to provide you with details of a Chartered Accountant that can provide you with the necessary assistance.

Do the trustees have to act on my wishes?

Your trustees will be required to take your wishes into account. However, they will not be obliged to act upon them. Their main obligation is to act in your best interests. If you do not believe they are doing this, for example by refusing to consent to a withdrawal of funds you request, this may breach the terms of the trust. In those circumstances, you can consider replacing them.

NB. Your trustees will need to consent to being replaced. If they refuse consent, you may consider making an application to Court for a trustee to be removed on the grounds that they are not acting in the best interests of the beneficiary. Such court action can be expensive and time consuming, and it is always preferable to try to maintain good relationships between all parties to the trust. This should be borne in mind when selecting trustees in the first place.

What happens if I get divorced?

As you will be the beneficial owner of the trust, the assets within the trust will normally be treated in the same way as any other capital asset when the financial arrangements are negotiated. However, you should discuss this with a solicitor specialising in family law as it may be possible to present an argument that the funds held in trust derive from a personal injury to you and that the compensation had been awarded to you and not in association to your marriage.

What happens in the event of my death?

Your personal injury trust will 'dissolve' and the funds and assets within the trust will form part of your normal estate. Your estate will then be distributed in accordance with the terms of your will. Please bear in mind that any subsequent beneficiary of your will that is a means-tested benefit claimant will not have this capital disregarded, despite it originally being derived from a personal injury payment and previously having been held in a personal injury trust.

If you die without a valid will, your estate will be distributed according to the rules of intestacy. This is not in keeping with most people's wishes, and we therefore recommend that you have an up-to-date will. We suggest you seek specialist legal advice about this.

What is the process for setting up a personal injury trust?

We undertake a free initial assessment to ascertain whether it would be advisable for you to set up a personal injury trust. If we advise you that it is, and you decide to go ahead, we then charge a one-off fee to set up a personal injury trust. This includes:

- liaising directly with your personal injury solicitor,
- producing a suitable worded trust deed,
- opening an associated trust bank account,
- notifying the relevant authorities that administer your means-tested benefit claims and/or provide
- community care support about the trust funds, and why they should be disregarded, and
- providing on-going advice to assist you with the smooth running of the trust

If you decide to proceed with setting up a trust, you should complete, sign and return the 'Acceptance form' to us. The Acceptance form formally instructs us to assist with the setting up of your trust. We will then obtain information we need from your Solicitor to enable us to draft your trust deed. Once the trust deed has been drafted, it will then be sent to you for you and your trustees to sign, in the presence of a witness.

At the same time, we will also send you an application form to fill in to open the associated bank account. You will then need to return these completed documents to us, along with proof of identity for yourself and each of your trustees (if requested).

Once we also receive cheques from your solicitor in respect of our fee and the balance to be paid into the trust account, everything is forwarded to the bank to set up the trust.

When will I be able to access the trust funds?

It should be noted that after we send everything to the bank, it can take up to ten working days for the trust fund to be accessible. This is because it can take up to five working days for the account to be opened, and then up to another five working days for the cheque to clear.

This means it generally takes around four weeks for the process to be completed, from when you return the Acceptance form to us.

If you will need some of your funds to tide you over in the meantime whilst your trust is being set up, you can ask for an 'advance payment' on the Acceptance form. This advance is only available if the award is already received by your Solicitor and they have banked it into their client account. You should ensure that this advance will not take the total funds in your and your partner's (if you have one) accounts to more than £6,000, to avoid the advance affecting your entitlement to means-tested benefits.

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