

Description	This guide looks at protecting the Family Home
Other relevant guides	<ul style="list-style-type: none">- <i>How to set up a Discretionary Trust</i>- <i>How to negative gear with a trust</i>
Documents required	<ul style="list-style-type: none">- <i>Option Deed</i>- Loan Agreement- Mortgage- Discretionary Trust
Notes	<p>A number of strategies exist for protecting the family home.</p> <p>In considering strategies to protect a family home, the following alternatives are available:</p> <p>All of the following strategies are subject to the provisions contained in the Bankruptcy Act 1966 (Cth).</p>

Step 1 – Acquiring a Family Home

Where a party is contemplating acquiring a family home, then the following strategies should be considered:

a) Acquiring a house in their spouse's name

By acquiring a family home in the name of their spouse who is less at risk of litigation, a person protects that residence from any litigation against them as the high-risk individual. For example, if a husband is a director of a company or engaged in a risky profession, their family home may be acquired in his wife's name. The relevant capital gains tax and land tax exemptions will still be available in respect of such a property.

NOTE: A husband and wife can only own one main residence at a time. That is, if a home is owned in a wife's name, her husband cannot claim any other property as his main residence.

b) Acquiring a house in their name as to 1% and their spouse's name as to 99%

Assuming the same facts as in A-1 above, another option is for the husband and wife to acquire a property as tenants-in-common, with the high-risk individual owning it as to 1%. This has the result of only exposing 1% of the market value of the house to litigation against the high-risk individual, as the low-risk individual holds a 99% interest in the property. This strategy also offers protection to the high-risk individual (i.e. the 1% owner) from the low-risk individual selling or mortgaging the property without their permission.

c) Acquiring a house in a trust

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If possible, acquiring a family home in a trust should be avoided, due to the potential loss of both State and federal tax concessions and exemptions. In particular, the capital gains tax main residence exemption is lost and, potentially, so too will any land tax exemptions and concessions. This strategy should only be considered by single people who are at high-risk (e.g. professionals), or where both a husband and wife are at risk of litigation.

d) Acquiring a house in the name of an individual with a trust holding the mortgage

This strategy involves a trust borrowing money from a third-party financier, and the financier then potentially becoming first mortgagee of the property. The trust then lends the same amount to an individual to acquire a property in their own name, and the trust then becoming first or second mortgagee of the property. Over time, the loan undertaken by the trust from the financier is repaid and the mortgage (if any) is discharged, while the loan from the trust to the individual (and the second mortgage) remains on foot. This strategy, however, only protects the property up to its original purchase price.

NOTE: Under this strategy, the loan to the trust from the financier is repaid from gifts made to the trust from the earnings of the husband and wife.

Step 2 – Where a Family Home is already owned

Where a party already owns their family home, then the following strategies should be considered:

a) Granting a lease over the property to a trust

This strategy involves granting a favourable lease over the property to a related trust. The lease is granted on terms that have the effect of reducing the value of the remaining property (e.g. on a 301 year term with no rent payable by the lessee).

NOTE: The stamp duty consequences of this strategy should be considered before executing any relevant documents.

b) Granting an option over the property to a trust

This strategy involves granting an option over the property to a related trust. This has the effect of protecting the owner from any increases in value in the property, but the market value of the property calculated at the time when the option was granted is still exposed. This strategy should be considered together with 1d above.

c) Transferring the home to a trust

As with 1c above, this strategy should be considered as a last resort. In order for this strategy to be effective, the transfer to the trust must be made as an absolute gift. Documentation must exist showing that the property has been transferred to the trust and that either it was a gift, or the resulting debt was forgiven.

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NOTE: Stamp duty may also be payable on the transfer, as well as the disadvantages discussed at 1c.

WARNING: The above strategies are likely to have stamp duty and land tax consequences as well as the loss of the CGT principal residence exemption. Great care needs to be taken and professional advice sought before entering any of the above strategies.

The Bankruptcy Provisions (section 120 and 121)

The most important provisions of the Bankruptcy Act 1966 are sections 120 and 121. These govern Undervalued Transaction (s.120) and Transfers to Defeat Creditors (s.121). These should both be read in their entirety before any asset protection strategies are put into place. The main points are listed hereunder:

Undervalued Transactions (section 120)

- Transfers made less than 5 years before bankruptcy for no consideration or less than market are void
- Despite above transfer not void if made to related party more than 4 years before bankruptcy and transferor can prove he or she was solvent at time of transfer,
- Despite above transfer not void if made to non-related party more than 2 years before bankruptcy and transferor can prove solvency at time of transfer, If no books or records exist at the date of the transfer the transferor is presumed to have been insolvent,
- If the transaction is void any consideration paid to the transferor has to be refunded.

Transfers to Defeat Creditors (section 121)

- Transfers are void if the main purpose of the transfer is to put the property outside the reach of creditors and that was the main reason for the transfer,
- In determining the transferor's main purpose for the above, it is taken to be the main purpose if at the time of the transfer the transferor was, or was about to become, insolvent,
- If no books or records exist at the date of the transfer the transferor is presumed to have been insolvent,
- If the transaction is void any consideration paid to the transferor has to be refunded.

It is important that sufficient records are maintained at the time of any transfer, especially where it is done for little or no consideration, to prove that the transferor was solvent at that time.

NOTE: The above information is meant as a general guide only, and the information applies to superannuation funds provided by Macquarie Group Services.

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