

Provision For Disabled Beneficiaries In Your Will

Wills and Inheritance
Factsheet



SMITH PARTNERSHIP
Solicitors

By way of introduction

Firstly the reference to “Disabled” includes any form of physical disability and/or learning / mental disability, emotional difficulties and people who may for any other reason require substantial help with managing their own affairs.

Secondly, the various suggestions as to what might be incorporated in a Will providing for a disabled beneficiary can equally apply to any other beneficiary and for different reasons.

Thirdly, the illustrations given in this note are based on husband and wife making Wills and having three children of whom one is disabled. The specific provisions relating to disabled beneficiaries could equally apply to one surviving parent with one child who is disabled.

Some thoughts

In making provision for a disabled child there will probably be the initial desire to treat all of the children fairly and as equally as possible. Sometimes there are good reasons for allocating a greater or lesser share of your inheritance to one or other of the children, but simply because one of them cannot manage their own affairs should not be a prime reason for inequality.

Consideration needs to be given to how self reliant a disabled beneficiary will be, how dependent a disabled beneficiary will be on practical help from other members of the family, practical help from third parties (e.g. Social Services), whether or not the person will be willing or able to reside in the house, what financial provision is being made for them now e.g. State Benefits including Means Tested State Benefits. It is important to look at things as they are now and to consider any medical or other prognosis reports which may indicate possible changes in the future. It is also important to review any care-plan that may be in existence and incorporate any long term arrangements you would like to see in put place for your disabled child (beneficiary) after your death

The options...

Once you have established balancing the fairness to the children and the practical and financial needs of the disabled child, your wishes can be incorporated into any number of provisions in a Will. There now follow six examples of schemes which can benefit the disabled beneficiary.

1. The absolute Gift

After giving everything to each other on the death of the first of you, the second of you can make provision for all three children equally and without any further directions or restrictions in the Will. This means that the one-third share allocated to the disabled child belongs to that child absolutely. Firstly, for this to work the child needs to be able to have the capacity to make decisions as to the use of the money. Secondly, it would form part of that child's estate on his/her death so that it would be important for that child to be able to make a Will. Thirdly, the capital and income would be taken into account in assessing a person's entitlement to Means Tested Benefits. This simple scheme, as a result of these matters, might not benefit your child's circumstances.

2. Absolute Gift but operated by appointed Trustees

Everything that has been said about the first scheme would apply to this scheme except for the fact that the day to day use of the inheritance would be in the hands of Trustees whom you have appointed. This scheme might benefit the situation where the value of the inheritance is relatively small.

3. Putting the share of the estate into the hands of Trustees to provide a guaranteed income for the disabled beneficiary

This scheme requires that the share of the inheritance allocated to the disabled beneficiary is invested by the Trustees so that the income from the investments belongs to the disabled child. The capital is ultimately ear-marked in your Will for other individuals, for example, your other child or grandchildren. This scheme known as a Life Interest Trust runs for the lifetime of the disabled beneficiary and on the death of that person the capital is allocated in accordance with the terms of your Will. The income is taken into account when assessing the disabled beneficiary's entitlement to Means Tested Benefits but the capital is not. This scheme might be useful where the income generated from the invested capital is likely to exceed any projected Means Tested Income because the disabled person will actually be better off each month from an income point of view.

4. The life interest Trust but with power for the Trustees to use some of the invested capital for the benefit of the child

This operates in exactly the same way as 3 above but if a particular need of the beneficiary requires a "one-off" payment then the Trustees can use some of the capital which has been ear-marked for the other beneficiaries. For example a capital lump sum could be used to buy a piece of equipment or pay for a holiday. You can place restrictions on how much capital should be used in this way to ensure that there is some capital left for your other beneficiaries.

5. Discretionary Trust

Where a Will sets up a discretionary trust, the layout of the will appears to be quite complex and deliberately so. This scheme places the share of the inheritance which you wish to make available for your disabled child to be placed into the hands of the Trustees who then have an absolute discretion as to when and how they allocate the income and capital for the benefit of the disabled child. There will be more than one beneficiary who would be able to benefit from any of the income and capital and you would name these in the Will, for example, your other children and grandchildren, and perhaps Charities which are associated with the particular disability etc. During the lifetime of the disabled child the Trustees could actually decide not to allocate any of the income or capital at all for the benefit of the disabled child. Alternatively, they could ultimately use up everything. On the death of the disabled child any remaining capital and unused income is distributed either in accordance with instructions left with your Will or left to the discretion of your Trustees. In this particular scheme none of the capital and income is taken into account for assessing the entitlement to Means Tested Benefits. You will be placing total reliance upon your choice of Trustees to utilise the money in the Trust Fund in a way that you might do so for the benefit of your disabled child. There are likely to be income tax and capital gains tax consequences depending upon how the Trust money is invested and used from time to time but the flexibility of the scheme should outweigh any tax liability that may occur during the administration of the Trust. If this option were chosen you would be wise to do a side letter to your Trustees to help them decide how to use their discretion.

6. Leaving it to the goodwill of other members of the family.

You could simply leave your inheritance equally between your two other children and work on the basis that you can trust them to give money to their disabled sibling from time to time, as they think appropriate. They would effectively be making Gifts of money from time to time provide for his or her needs. A clear danger of this is that the two other children might decide that their disabled sibling is already well provided for from State and Charitable Benefits and does not need any more money and they could keep it for themselves. (It could be argued that this scenario might result from the Discretionary Trust. It could well occur if the Trustees of the Discretionary Trust are also your two other children BUT their position as Trustees is governed by Trust Law and places certain obligations on them as to how they make their decisions.). However, it would not be wise to leave your disabled child out of your Will altogether in this way because potentially a claim could be made by or on behalf of the disabled child under the Inheritance (Provision for Family and Dependents) Act 1975 on the basis that reasonable and financial provision should have been made for the disabled child but none was made in the Will. Such a claim is to be avoided because of the uncertainty of the outcome and the costs of litigation. A claim could well be brought by the Local Authority.

For this reason, it is better to make some provision, albeit relatively modest, rather than none at all.

What next...

Once you have decided upon the scheme which you think would be most appropriate, taking into account the value of your inheritance, the practical and financial support being provided to your disabled child at the moment, and having discussed it with other members of your family, there will be other decisions to make.

1. Choice of Trustees.

There need to be at least two Trustees in place to operate any Trust Fund referred to above. As the Trustees are likely to have some very extensive powers given by the Will and also by the general Trust legislation, your choice of suitable Trustees is crucial. Can you trust them? Can they get on with each other? Will they be sympathetic to your disabled child's needs?

2. Guardians

Although the appointment of Guardians usually applies to children under the age of 18 years, it is possible to express a wish to appoint a Guardian/Carer in your Will (as far as the Law allows it) to look after someone over the age of 18 years and in particular your disabled child.

3. Occupation of a property

If the disabled child is living with you in your house at the moment and if your house is your main asset, you could add a provision to the Will to the effect that although two-thirds of the house would be allocated to your two other children they would be directed not to sell the house for as long as your disabled child wished to and was able to continue living there, with or without additional support. In other words, your two other children would have to wait for a while before they received the benefit of the proceeds of sale of the house.

4. Inheritance Tax consequences

If the total of your inheritance exceeds the inheritance tax threshold applicable at the time of your death (£275,000.00 for the tax year 2005/2006) then there will be a potential inheritance tax matter to deal with. There will be no inheritance tax payable on the death of one spouse in respect of everything that passes to the surviving spouse. However, on the death of the second of you that surviving spouse will be potentially worth more than the tax threshold and tax would be payable. Sometimes it is difficult to avoid such a tax bill simply using the Will although you can use the Will to good effect to minimise the tax bill. Because everybody's circumstances are different, this can be discussed at the time that the Will is prepared. The inheritance tax consequences would apply whether or not there was a disabled beneficiary in the Will.

5. Letter of Wishes to accompany your Will

To assist the Trustees in making their decisions, it is wise that you do a Letter of Wishes giving the Trustees guidance on how you would wish them to exercise their discretion in using any of the inheritance which you are allocating for the benefit of your disabled beneficiary. While you cannot order the Trustees to do something (because this would take away their discretion and consequently jeopardise the provision which you are trying to make for the disabled child) you can ask them to give consideration to certain things. The Letter of Wishes can be prepared with your Will.

6. List of Assets

To assist in ensuring that the Wills make sense in your particular circumstances you should prepare a list of your assets, including jointly owned assets, life insurance policies and lump sums payable from Pension Schemes.

7. Lump Sums from Pension Schemes and Insurance Policies

Sometimes there are benefits payable as a result of death which are governed not by a Will but by Rules of a Pension or Insurance Scheme. You will need to check this and if, for example, benefits are payable to "your children" then a share of that money will end up with your disabled child which will be deemed to belong to that child and not approached through any Trust provisions. Payments made to a disabled child will end up owned by that child absolutely. If necessary, change your nomination/beneficiary form which you can obtain from your Pension Administrator or Insurance Company.

If you are a grandparent with a disabled grandchild you can adapt your Will to benefit that grandchild using any of the options referred to above. The wording will be slightly different but the principles will be the same.

Something else you could do now....

You could in fact set up a Trust for your disabled child now. Open a Bank/Building Society Account with a small amount of money and set up a Discretionary trust Deed now. All of the provisions which you would otherwise put in the Will for the benefit of your disabled child would be in the Trust Document. The Will would then simply leave "a one-third share of my estate to the Trustees of the ABC Trust Fund". This scheme allows other people to make gifts or legacies for the benefit of your child by simply referring to the existing Trust Fund

And finally....

Everybody's circumstances both family and financially are different and a Will needs to be "tailor-made" as far as possible to benefit all of your beneficiaries including your disabled child.

The information in this briefing note is intended to provide an overview of current or upcoming legislation and is not intended as complete coverage. The application of the law in any specific case should always follow professional advice. If you wish to update the details which we hold on you or you do not wish to receive any further marketing materials from us, please contact us by email - marketing@smithpartnership.co.uk.



4th Floor,
Celtic House,
Heritage Gate,
Friary Street,
Derby DE1 1LS

Tel: 01332 225225
Fax: 01332 225444

Email: info@smithpartnership.co.uk
Web: www.smithpartnership.co.uk