

Providing for Someone with a Disability in Your Will or by Lifetime Gift

Every adult should have an appropriate up to date Will in place. This is the only way to ensure that your family and loved ones will be provided for out of your Estate in the way you would want. This is likely to be even more important if someone close to you has some significant disability and it is important that you seek expert advice.

This “Q&A” aims to deal with some of the most common issues and to highlight the steps you should consider taking. Throughout, it is assumed that the intended beneficiary is a child of the person who wishes to make provision but similar principles will apply if you have a grandchild, friend or other family member with a disability and whom you wish to benefit.

My disabled child would not be able to manage a significant sum of money on a day to day basis but I would like to make provision for him in my Will.

If a beneficiary does not have the mental capacity to manage his or her financial affairs, an application to the Court of Protection could be necessary when the gift takes effect so that a “Deputy” can be appointed to deal with the sum due to the beneficiary. The Court may then be involved on an ongoing basis with the beneficiary’s financial affairs. This can be costly, drawn out and complicated. The need for Court of Protection involvement may be avoided altogether by leaving the intended gift to an appropriate Trust set up in the Will rather than to the beneficiary outright. You can choose who should be the Trustees (which could include family members and/or professionals) and how the Trust Fund should be used.

If I make provision for my disabled child in my Will, won’t it just cancel out his entitlement to Means Tested Benefits?

An outright gift whether made in your lifetime or under your Will may affect any entitlement of the recipient to means tested benefits particularly if a significant sum is gifted. Also, that person may not currently receive means tested benefits but might otherwise be eligible to do so at some time in the future.

Through careful trust planning it is possible for a beneficiary to enjoy the funds you wish to set aside (for example, holidays and other extras) over and above his or her entitlement to means tested benefits. Another option is to gift money to a Charity or via a charitable trust, the object of which will be to benefit your child and others in a

similar position (and a number of charities have arrangements specifically for this purpose).

I am planning to leave some money to a family member who I envisage will take responsibility for my disabled child if I am not around. Is this a good idea?

For smaller amounts this can be a practical solution. You need to bear in mind that legally the monies or assets you pass on will belong to the person to whom you have made the gift. As a result, the value could be vulnerable to changes in that recipient's own situation (such as insolvency, divorce or in the event of their death, passing under their own Will). In addition, there is no guarantee that the recipient will carry through your wishes. If you do not make any provision in your Will for your disabled child then the local authority could bring a claim on his or her behalf against your estate (on the basis that it was not reasonable for you to leave out provision altogether and with a view to the local authority mitigating the financial burden falling on them as a result).

I am not sure what my child's circumstances or needs might be in the future. How can I decide on suitable provision if I make a Will now?

With expert advice, a flexible trust can be set up in your Will and so that the precise extent of the sums to be set aside and/or how such sums would be applied for the benefit of the intended beneficiary can be decided when the Will comes into effect. Your chosen Trustees can take into account all the relevant circumstances at that time and with a view to giving effect to your underlying wishes.

This sort of flexible trust can be a spring board to set up more specific and detailed trust arrangements when the Will takes effect (for example, to take advantage of favourable tax treatment which, under current rules, apply to certain types of Trust for disabled beneficiaries).

Other family members and charitable organisations can also be included within the class of potential beneficiaries of the flexible Trust (and so that, for example, sums could be distributed as and when appropriate to those who you envisage will have a supporting role).

I am concerned that a large proportion of my estate will be taken up by Inheritance Tax and that this will seriously reduce the provision I can make for my disabled child after my death. Is there anything I can do about this?

It is important to ensure that you make full use of your annual exemptions and allowances and your nil rate tax band (currently £325,000) when looking to pass on or set aside sums for the next generation whilst reducing your Inheritance Tax exposure.

Lifetime gifts into trust of amounts up to the nil rate threshold of the person making the gift (or to a specific form of trust for disabled beneficiaries) can be made free of Inheritance Tax, such sums falling out of the giver's estate if he or she survives 7 years from the making of the gift.

I currently deal with the financial affairs of my disabled child, are there any steps I should be taking to formalise this?

If a person loses mental capacity but does not have a Lasting Power of Attorney in place a Court of Protection order would be needed to unfreeze that individual's finances and the Court will decide who should act as deputy to deal with them going forward.

By making a Lasting Power of Attorney it is possible for an individual to nominate a person or persons he or she would entrust to manage their financial affairs or particular aspects of them should they ever be unable to do so. Both adult individuals with a disability (but who have mental capacity) and those who support them should therefore consider putting a Lasting Power of Attorney in place.

This fact-sheet is intended only as an initial guide based on current laws and general principles and is no substitute for specific advice based on your individual needs and circumstances.

For further information and advice please contact Claire Johnson at Leo Abse & Cohen on 02920 272 149 or via email at clairej@leoabse.com