

Disability Law Service

Offering free, confidential legal advice and
representation for disabled people

Guidelines for Trusts

Where there is a disabled
family member

Frequently Asked Questions

Q. What is a Trust?

A. A Trust is an arrangement whereby persons (the trustees) hold and administer property or money for the benefit of others (the beneficiaries). The Trustees become the legal 'owners' of the Trust property. There are many different types of trusts.

Q. What is a discretionary trust?

A. Where the beneficiaries do not have the legal right to demand payment of Trust income or capital (unlike beneficiaries of other types of trusts). Payment is wholly within the discretion of the Trustees, as are the amounts and frequency of the payments. The Trustees' powers are defined by the creator of the Trust in the Trust Instrument.

Q. Why is a discretionary trust appropriate for a disabled person?

A. Many social security benefits are means-tested. Many services and facilities offered by social services are also subject to means-testing. The capital (or the legal right to

capital) of a disabled beneficiary from a simple trust will be taken into account as if they held the money themselves, leading to a reduction in or a complete loss of the benefit or service. The capital in a discretionary trust will be disregarded.

Q. How is a Trust created?

A.

- i) By Deed – for a Trust intended to take effect immediately, during the lifetime of the creator/settlor, or

- ii) By will – for a Trust intended to take effect only on the death of the creator/testator. This is the most common method as most parents of a disabled child cannot afford to lose control over their own assets in their lifetime.

A typical format for a family Will is for a husband and wife to leave everything to each other in the first instance or if they both die then to the children. Some assets can be placed in a 'ring-fenced' discretionary trust (of which the disabled person and others will be beneficiaries), and the rest of the assets then passed to the able-bodied children

and other beneficiaries as may be desired.

Guidelines

1. Each arrangement needs to be tailor-made to suit the needs of the people involved. This makes it difficult to give generalised advice so this is only an outline. Before you set up a Trust, either by Will or by Deed, you must see a solicitor. Either method has tax implications.
2. Your solicitor needs to know the extent of the disability, the family situation relating to the disabled member and all the financial circumstances, for example: insurances etc.
3. You will need to address the following issues in your Will:
 - Appoint executors for the will and trustees for the trust in the will. They can be the same people if you so wish.
 - Appoint a guardian for your infant children having special regard to the particular needs of your disabled child under 18.
 - State how much of your estate you wish to go to your spouse and non-disabled children in such manner as you wish, e.g. by outright gift.

- State how much of your estate you wish to pass into the discretionary trust.
 - Make sure that the trustees have sufficiently wide powers to be flexible, e.g. to give gifts or interest-free loans to a charity that has already accepted responsibility for the care of the disabled person; to appoint and pay professional trustees.
 - Include a direction that so long as the trustees act honestly they will not be personally responsible for any mistakes they may make in the administration of the Trust, particularly where friends/relatives are to be trustees.
 - Review your will every two years at least because the law changes and so can your personal and financial circumstances.
4. You can leave a letter of wishes with your discretionary trust, whether it is made by Deed or Will, saying how you would like the trustees to exercise their discretion. A letter of wishes is not binding in law but trustees will ordinarily respect your wishes.
5. Some provision should be made for the disabled child, be they minor or adult. Where no provision is made at all in the parents' Will, the disabled person may apply to

the Court to alter the distribution of the estate on the grounds that the Will did not make reasonable financial provision for him/her. Where the disabled person has no mental capacity, a 'litigation friend' may apply on their behalf. Where the estate is large, the local authority may seek to be the 'litigation friend'. There is case law that provision for a disabled beneficiary by means of a discretionary trust can constitute reasonable financial provision for these purposes.

6. Since March 2006 there has been an extension of tax benefits for 'trusts for disabled persons'. They will not be suitable in most cases. Discretionary trusts will remain more suitable.

However, they could be useful in two circumstances:

- 6.1 First, where particularly wealthy parents wish to make lifetime provision for their disabled child.
- 6.2 Alternatively, where an individual who has a debilitating illness and deteriorating health which is expected to lead to a disability wishes to make a settlement for him or herself.

It must be emphasised that these guidelines are an **outline only** of a very complicated subject and no action should be taken without your first taking detailed advice from a solicitor.

Legal Disclaimer

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