

Planning for the Future Series 3

WILLS and TRUSTS

Protection of a child who is vulnerable and/or living with a disability

How to protect their child is one of the greatest worries of parents of children who are either vulnerable or living with a disability which affects their capacity to live independently or limits their mental capacity to manage their financial affairs. Often the parent and child relationship is very close and parents are understandably very protective of their offspring. Parents worry about what will happen when they are no longer able to look after their child.

In these circumstances it is very important that a correctly worded Will Trust is created appointing suitable trustees to protect and manage the funds after the death of the parents.

EXAMPLE

Ian and Babs have two children: Peter who is able bodied and Simon who is living with a number of disabilities arising from his brain being starved of oxygen at birth. Simon is unable to communicate effectively, he cannot walk or feed himself. Ian and Babs are concerned to ensure that Simon is looked after they have died and that Peter receives his share of their estate.

SOLUTION

In their mirror Wills and after both deaths, Ian and Babs are able to leave half of their estate to Peter as an outright legacy and to leave the remaining half in trust for the benefit of Simon.

Will Trust for Simon

This trust is called a Will Trust because it comes into effect after the death of the testator (person making the Will). It is possible to make a trust during lifetime and this is extremely useful in certain circumstances which are the subject of a later fact sheet.

The Will Trust means that the fund is managed by at least two trustees. Trustees are subject to high legal and fiduciary duties and are subject to the auspices of the High Court. Trustees are responsible for managing and distributing the funds and dealing with any tax issues and preparing annual accounts.

The choice of trustees is critical and these are the main options:-

- Ian and Babs could appoint their able bodied son Peter and another family member. The advantages are that they know Simon and should have a very good awareness of his needs. The disadvantages are that to carry out the duties of trustee is very time consuming and there are legal requirements which are complex and easy to misunderstand.
- Ian and Babs could appoint Peter and the solicitor who would act in their professional capacity and the cost would be paid for from the trust fund. A professional trustee is under a higher duty of care than a lay person and Peter would be able to rely on the advice of the solicitor. The advantages are that Simon will benefit from the personal knowledge of his brother and the technical knowledge of the solicitor. The disadvantages are the professional costs of the service but these need to be weighed in the context of the size of the fund, benefit to Simon and fairness to Peter.
- Ian and Babs could make a simple appointment of two solicitors and not include Peter as a trustee. This may be appropriate within the dynamics of the family for example Peter may not wish or feel able to act as a trustee for a number of reasons.

Note that trustees act by agreement and disputes are settled in the High Court. The purpose of the trust is to protect Simon and to be able to provide the financial means to promote the best care and lifestyle for him.

After the choice of trustees has been made the next stage is for Ian and Babs to decide on the terms of the trust. It is important that the trust is tax efficient and that Simon's entitlement to means tested benefits is protected including entitlement to payment for care under the Care Act 2014.

It is essential that Simon's position is protected and that the money is used for his benefit. This is the concern of all parents in the situation of Ian and Babs. In the trust, Simon will be the primary or sole beneficiary during his lifetime and the trust will also direct who will be the ultimate beneficiary after Simon has died. This could be Peter and his family, or a charity or a mix. It is also possible to leave the money within a family discretionary trust and the wisdom of this arrangement will depend on the circumstances and size of the fund.

These are such important matters and careful discussion and thought needs to be applied before making the final decision. After the decision is made and the Wills executed, Ian and Babs will have peace of mind and no more worries about Simon's financial security after they have died.

EXAMPLE

John and Dee have a daughter Carol who has learning difficulties. Carol lives in supported accommodation with other people with learning difficulties and she is happy. Carol has capacity to manage smaller amounts of money and under the Mental Capacity Act 2005 she will have capacity to make a lot of decisions for herself with help and support.

John and Dee are very worried because Carol is highly suggestible and is anxious to please people. They are worried that Carol will be taken advantage of and will be unable to manage the money in a way that benefits her. This is what I call the “goldigger situation.”

Capacity under the Mental Capacity Act can be difficult to assess for a number of reasons, including that there is an assumption that a person has capacity to make the particular decision in question at the time the decision needs to be made. The test of capacity is both decision and time specific. A person must be given all the support and help possible to make their own decision before it can be found that they do not have capacity. A person has a legal right to make an unwise decision. The Mental Capacity Act is an empowering piece of legislation which promotes an individual to act for themselves wherever possible.

This situation causes great worry to John and Dee because they know Carol will always seek to please others and is easily led.

SOLUTION

The solution is to create a Will Trust coming into effect after John and Dee have both died and in which they appoint trustees (in this case the solicitor because they have no-one else) and to write the terms of the trust to benefit Carol during her lifetime and state what happens after she has died. John and Dee wish the ultimate beneficiary to be any child or children Carol has, failing which they wish to benefit a particular charity from whom the family has received a lot of help over many years.

Trusts can be flexible to meet different circumstances which may arise in the future. A full discussion is needed to look at the different options to take into account the family and size of the estate.

NEXT STEPS

This is a basic guide, so contact us to talk about your wishes to enable us to advise you about your options and how we can help you.



Naomi Pinder, Head of Private Client

Naomi Pinder qualified as a solicitor in 1988 and for over 20 years she has specialised in helping clients in planning for the future through Wills, Trusts and Lasting Powers of Attorney; Probate and the administration of estates and trusts; capacity and Court of Protection; later life care planning and related elder client issues.

Catherine Higgins Law Ltd Solicitors
45 Allerton Road
Woolton
Liverpool
L25 7RE
Tel: 0151 428 2472

www.chigginslaw.co.uk

naomi@chigginslaw.co.uk