

Introduction to Wills and Trusts: Providing financially for a person with a learning disability by Simon Franklin of Martin Tolhurst Partnership

An overall guide to making a Will – common questions and answers

1. Why make a Will

The purpose of making a Will is for you to decide:

- How you would like your estate to be dealt with
- Who is to receive your estate
- If any conditions are to be attached

2. What happens if I don't make a Will ?

If you die without having made a Will, you are known as having died Intestate and the Rules of Intestacy apply and would dictate how your estate is to be divided, you have no control over this.

- These rules often mean that your estate would pass in a way that most people would not want it to, by not making a Will you lose the opportunity to specify who you would like to benefit from your estate.
- This means that your family member or friend with a learning disability may not get the things you want to them to have – or they may get too much.
- In particular if you die whilst unmarried, your partner will not automatically receive anything.

3. Examples of what might happen if you die without having made a Will

- Mr and Mrs Jones are married, they live in a property that is jointly owned and is worth £200,000.00, subject to a mortgage, they have two children aged say 3 and 7. Mr Jones dies totally unexpectedly aged 38 years; fortunately he has made provision by way of insurance policies for his family, and with the benefit of a policy that was taken out by his employers his estate is worth £400,000.00. On the face of it he has made suitable provision for his family but he has made the mistake of not having made a Will. On Mr Jones death his wife would receive his personal effects, together with the sum of £250,000.00. The other £150,000.00 would be held in trust for the children to share equally between them upon their attaining the age of 18 years, Mrs Jones only other entitlement would be to income on £75,000.00 i.e. half of the sum that would have been invested for the children.
- Mr and Mrs Jones have a property that is worth approximately £200,000.00, they do not have any children. Mr Jones dies unexpectedly; he has savings in his own name, various insurance policies, the benefit of which totals £500,000.00. Both of Mr Jones parents are dead, he has a brother however, a couple of years older than him, they had a big argument many years ago and have not spoken for 10 years. In the event of Mr Jones death Mrs Jones would receive £450,000.00, with the other £50,000.00 passing to Mr Jones brother to whom he had not spoken for 10 years!

4. **Do I have to use a solicitor to make a Will?**

- No you don't need to use a solicitor, you can buy a home-made Will pack from W H Smith's but beware!

5. **Why should I use a solicitor to make a Will ?**

- If a Will is made or signed incorrectly it would not be valid
- We can advise you in structuring your Will in a way to reduce or in some cases even avoid liability to Inheritance Tax
- If you make a mistake preparing a home-made Will, it could prove expensive to sort out after your death

6. **I only want to make a small change to an existing Will**

- If you have an existing Will and only want to make a small change to it this is known as making a Codicil
- Sometimes though it maybe necessary to prepare a new Will if more than few changes are required. If so, we can advise you about this.

7. **I own a property abroad**

- Your Will made in this country will probably not be effective to pass the property located outside England and Wales. It is likely that you would need to instruct a lawyer in the country where the property is located.

8. **What are Executors and Trustees of a Will ?**

- These are the people who are responsible for ensuring that the instructions laid down in your Will are carried out and any trust that is set up in your Will is administered properly.
- Most people appoint members of their family or close friends to act as executors and trustees. You would need to consider in advance of making a Will who you would wish to appoint as executors and trustees.

9. **What duties and responsibilities does a Trustee have?**

- As a trustee the basic tasks the assets of the trust (by investing the money or maintaining a property), to make payments to beneficiaries and to prepare accounts for the assets managed (and pay any tax due).
- Trustees sometimes do much more than this and maybe closely involved in the day to day welfare of a beneficiary. Trustees also have the power to ask others to carry out tasks for them.

10. **Who can I appoint as Trustees?**

- You should take great care over your choice of trustees. Always appoint people who are capable of coping with the responsibility and work involved. It is always best to ask the person whom you would like to appoint whether they are willing to act in this role.
- You may wish to appoint family members, friends, professionals (e.g. a solicitor or an accountant), institutions (such as a bank's trustee services) or specialist trustee companies. Only professional trustees can charge for their services.
- You can appoint someone as a trustee who is also a potential beneficiary of the trust.

11. **How many Trustees can I appoint?**

- Any number between one and four. We normally suggest that you appoint at least two trustees and would recommend that at least one trustee is not a family member or a beneficiary of the trust.

12. **How can I guide my Trustees about how I would like them to administer the trust?**

- If you decide to set up a discretionary trust (which we will deal with later on), it is a good idea to leave the trustees a letter signed by you. The letter should explain the reasons for setting up the trust; it should also give them guidance as to how the trust fund should be used to assist or protect your child with a

learning disability and how the trust fund should be distributed after your child's death. Although such a letter cannot be legally binding on your trustees, it gives the trustees guidance and it is only in exceptional or unforeseen circumstances in our experience that trustees do not comply with such a letter of wishes.

13. What can I put in a trust and how much?

- You can put money, shares and property into a trust.
- It is entirely up to you how much you put into the trust fund, but you may wish to think about how much would be required to look after the person with a learning disability based on their needs, their life expectancy and inflation. As a general guide however it is not normally financially worthwhile to set up a trust for under £10,000.00.

14. Do I need to appoint guardians of my children?

- If you died having young children or a child with a learning disability then you would need to consider who you would want to look after your children under they were grown up. These people would then be appointed as guardians of your children in the Will.
- It is important that guardians are people that the children know and get on well with. This may or may not be relatives. It maybe worthwhile asking your children for their views on who they would be happiest living with if anything happened to you.
- Speak to your intended guardians before you make a decision, they may not wish to take on the responsibility.
- It is possible/advisable to put a provision in the Will that any guardian(s) are entitled to have money advanced from your estate to assist with the expenditure that would be involved in looking after your children until they are grown up.

15. Where shall I keep my Will?

- After it has been signed we normally suggest that we retain the original Will at our offices. We do not make any charge for this facility. If we keep the Will at our offices we supply copies for you and your executors at no extra charge.
- You can keep your Will with your bank but beware as many banks make a charge, in some cases, an annual charge if your Will is left with them.
- You can keep your Will at home, but we do not recommend that. If it cannot be found after you die, it is likely that it would be assumed from a legal viewpoint that you had destroyed the Will. This would mean that you would die without leaving a Will and the intestacy rules would apply.

16. What if I make a Will and get divorced?

- The quick answer is to make a new Will !

- When the Decree Absolute is through the appointment of your former spouse as an executor is no longer effective and any gift to your former spouse would not be effective.

17. **What if I remarry after my divorce?**

- Any existing Will is revoked, i.e. no longer valid if you subsequently get married.
- The only exception to this is if a Will is specifically made and worded to state that it is in contemplation of marriage to the person you marry.

Particular ways to provide for a person with a learning disability in a Will

1. Discretionary Trust

- Under a Discretionary Trust, the trustees appointed in your Will can decide who, from a class of beneficiaries, such as your children, your grandchildren and one or more charities can benefit from the trust.
- None of the beneficiaries have the right to all the money in the trust, nor the income that comes from it, but the trustees may, at any time, grant them a sum of money from the trust if they think that it is appropriate.
- In each year, the trustees can choose whether or not to make payments to your children with a learning disability and how much to pay. Or they may choose to purchase things for his or her benefit. This way, the payments can reflect your child's needs at the time.
- Because your child with a learning disability is not entitled to payments from the trust, this means that the money (or any other assets) in the trust is not taken into account when assessing their entitlement to means tested state funding. The only thing taken into account would be the value of the payments actually made to them. Also because it is a discretionary trust, the assets are not treated as part of their estate for the purposes of Inheritance Tax.
- The ten year anniversary charge is the main Inheritance Tax (IHT) charge for discretionary trusts. The first ten year charge arises on the tenth anniversary of the date when the settlement began. This is when a discretionary trust is set up during one's lifetime, but where a discretionary trust is set up under a Will the date of death is the commencement of the settlement.
- Tax is charged every ten years on money in a discretionary trust to the extent that it is above the IHT tax free threshold which for this tax year is £312,000.00. The maximum rate is 6%.
- There is also an "exit charge" which applies where property leaves a discretionary trust, the calculation of this is quite complicated, but the majority of discretionary trusts are within the nil rate band and the charges to tax may be very small or nothing at all.
- This is the form of trust that DGSM yourChoice generally recommends that parents use to provide for children with a learning disability, or for individuals to provide for friends and relatives with a learning disability as this is the most flexible type of trust.

2. Life interest trust

- Under a life interest trust part of your estate would be invested and the income that comes from that would be paid to your child with a learning disability for the rest of their life. The trustees can also be given the power to pay all of the invested amount over to your child.
- Although it is possible to set up this type of trust in our view it is not recommended as this type of arrangement is likely to effect your child's

means tested state funding. If they are given more money than they require, then excess income will accumulate in their name.

3. **Disabled person's trust**

- This type of trust is defined in Section 89(4) of the Inheritance Tax Act 1984. It allows a special trust to be created for a person who is incapable of administering their affairs or is entitled to disability living allowance of the highest or middle rate.
- It is basically a special type of discretionary trust where your child with a learning disability would be named as the "principal beneficiary" of the trust.
- This type of trust has a similar advantage to a discretionary trust that if the income is applied appropriately throughout the lifetime of the child it should not jeopardise their entitlement to state benefits.
- The terms of this type of trust however must be that not less than half of the settled property and income must be applied for the benefit of the disabled person and he or she should also be entitled to not less than 50% of the income arising from the property.
- There is also a disadvantage in that when your child dies, their interest in the trust would be taken into account as an asset for Inheritance Tax purposes when dealing with their estate, which could give rise to a liability for IHT.

4. **Protective trust**

- This is a trust under which a person known as the principal beneficiary, is entitled to the immediate enjoyment of the trust unless he or she forfeits his interest e.g. by assigning his interest or by becoming bankrupt.
- Protective trusts are normally worded so that if a principal beneficiary forfeits his interest, the trust property is held on discretionary trusts, for the principal beneficiary and other members of the family.

5. **Charitable trust**

- This is a trust where the income and capital must be applied exclusively for "charitable purposes" and income and capital gains received by the trustees are normally exempt from tax.

Inheritance Tax

1. Inheritance Tax planning

- IHT is payable on an estate that is above the following amounts for the tax years set out below

6 April 2008 – 5 April 2009	£312,000.00
6 April 2009 – 5 April 2010	£325,000.00

- There is no IHT payable as between spouses.
- To the extent that the value of an estate exceeds £312,000.00 (in this tax year), tax would be charged at 40% on the excess.
- If an estate was valued at £350,000.00, there would be IHT payable of £15,200.00 (40% x £38,000.00).
- There is no IHT payable between spouses. On the death of the first of a married couple, if everything is left to the survivor, there would be no IHT. On the death of the survivor for the purposes of his/her Estate the unused Nil Rate Band of the first to die can be used, thus giving an exemption of £625,000.00.
- In the case of a married couple if an amount up to £312,000.00 is paid into a discretionary trust, that would serve to reduce the value of the estate of the surviving spouse.
- Charitable donations are also exempt when calculating IHT.

Adopting the example given earlier of an estate valued at £350,000.00, IHT of £15,200.00 was payable. If however an individual had left a legacy of £38,000.00 to DGSM yourChoice then there would be no IHT payable. Why give the money to the tax man when you can give it to charity!