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promoting the rights  
of people with  
intellectual disability

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# ***Making a Will***

What you should know

A guide for parents and families of people with intellectual disability



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# Introduction

Nearly all parents who have a son or daughter with intellectual disability worry over the question of 'what will happen after we're gone?' Apart from the worry of appropriate care and continuity of care for adult children, there are many practical dilemmas about money - wills, inheritance taxes, trust funds, state allowances and guardianship. Due to the increasing demand for information and advice on these topics, namhi has produced this information leaflet for parents and families. namhi hopes the leaflet will be helpful for families and service providers alike and will offer parents the reassurance they need about the future quality of life for their surviving family members with a disability.

While namhi cannot advise parents regarding the provisions they should make in their Will for their child with intellectual disability, as the circumstances vary with every individual case, it strongly recommends to all parents that they make a Will and obtain the necessary professional advice.

Readers are advised that while every effort has been made to ensure the accuracy of this information as of January 2003, the law is subject to change.

Readers are advised to consult their solicitors before taking any legal step on foot of information provided. This leaflet is intended as a general guide and should not be regarded as a substitute for legal advice.

## **Q. Why should I make a Will?**

- A.** Making a Will is a realistic protection for every family. If a person discusses with a solicitor his/her wishes for the sharing of property, a Will can give those wishes the protection of law. A Will makes it clear who is to manage the Testator's (person making the Will) property as Executor (The person/s appointed by the Testator to carry out the provisions of the Will); who will share the property; and who will see to the support of incapacitated children/relatives. The two main reasons for making a Will are to provide Guardians/Trustees for young children and to save expenses on inheritance taxes.

## **Q. Who should I appoint as Executor/s ?**

- A.** You should choose a trustworthy person(s) best suited to carrying into effect the provisions of your Will. You may select them from friends or near relatives e.g. sons or daughters. You should select Executors who are younger than yourself. It is advisable to have at least two Executors. In addition, the family solicitor could be considered as one of the Executors or where there are significant assets involved, the Bank is sometimes appointed an Executor. Some of the major commercial banks provide this service.

## **Q. What happens if I die without making a Will?**

- A.** If you die without making a Will you are said to have died in testate. The Succession Act (1965) provides that your spouse is entitled to your entire estate if there are no children and otherwise two thirds (one third goes to your children). If you do not have a spouse, your entire estate goes to your children (children of a deceased child taking their parent's share) and if you have no children to your parents; and if both parents are deceased then to your brothers and sisters.

Where no Will or provision is made intestacy laws may mean that a child with an intellectual disability may inherit a sum which results in an application being necessary to make him/her a Ward of Court. This can usually be avoided by the appointment of Trustees in a Will (See Wards of Court).

## **Q. What inheritance rights has my spouse and children if I have made a Will?**

**A.** The Succession Act imposes certain restrictions.

### **Spouses**

Your spouse has a legal right to a minimum share of half your estate where there are no children, and otherwise one third. Your spouse also has a right to require that the family home and household contents be included in his/her share (and the share of minor children). You can leave the whole of the estate (or more than one third) to your spouse should this be desired.

Separation itself does not extinguish succession rights, however such rights may be extinguished or renounced under a separation agreement or judicial separation, or can be precluded by court order on divorce. In the case of divorce a former spouse for whom proper provision has not been made during his/her lifetime may apply for relief within 6 months from the date of grant of probate. Such relief is not available if the spouse has remarried.

If not married to you, your partner will have no succession rights and will therefore be limited to whatever rights may be established in contract or where he/she is entitled under your Will.

### **Children**

Children do not have any minimum entitlement under the Act if a Will has been made. There is little difference between the succession rights of children with intellectual disabilities and those without such disabilities. The Court does recognise that parents have moral duties to their children, including their children with disabilities. If it is shown that you have not made proper provision for your children in accordance with your means, taking into account the child's position in life, an application can be made to the Court. The child does not have to be under the age of 18 or be a dependant to make this application. Children born of parents

who were not married have a right to apply. The Court may order that such provision should be made out of the estate, as the Court thinks just. The illness or disability of the child will be a factor that the Court will take into account when considering whether proper provision was made. If inadequate provision is made for a child with a disability he/she may be made a Ward of Court if a Court awards assets to that child.

### ***Q. What if I am married with young children?***

- A.** Reciprocal Wills are common where each spouse leaves his/her estate to the other. You should consider provision for the children in the event of neither spouse surviving. For children under 18 years you may wish to appoint a Guardian. A Guardian is the person you select to take over your role as parents in rearing your children under the age of 18. In Irish Law at present, Guardians may only be appointed for children up to the age of 18, regardless of their mental age or capacity. This poses problems in relation to adult children with an intellectual disability. If a dispute should arise concerning how an adult over 18 years should be cared for, there may be no alternative but to have them made a Ward of Court.

### ***Q. What is a Ward of Court?***

- A.** There are two categories of 'Wards'. The first and larger category comprises adults who have been brought into Wardship because of mental incapacity. The second and much smaller category comprises persons under the age of 18 who are taken into Wardship for particular reasons - the most common being where a Minor has been awarded substantial damages by a Court and has special housing/care needs.

The principle purpose of Wardship is to protect the property of the Ward and to manage it for his/her benefit. When a person has been taken into Wardship it means that the President of the High Court is satisfied, on the basis of medical evidence available to him/her, that the person should be deemed of unsound mind and is incapable of managing his/her affairs.

In a small number of instances a person can be taken into Wardship primarily for the protection of the person. This would normally only arise in the case of a person with an intellectual disability rather than a psychiatric illness.

If a person is certified as incapable of managing his/her affairs, an application is made to the Wards of Court Office and a 'Committee' (the technical term used by the Court for the Ward's Guardian - usually a close relative) is appointed to be responsible for the physical welfare of the Ward and for the Ward's property.

The disadvantage of this situation is that the appointment is normally made only after the death of the parents. They have no input into the choice of person appointed or how the money or property should be applied for the benefit of their son or daughter. Wardship of Court procedures may involve expense and delay.

***Q. Are there special considerations parents of children with an intellectual disability should take into account when making a Will?***

- A.** When drafting a Will parents should take into account the needs of all their children including the needs of their child with a disability. However, they should give consideration to the following factors:
1. The age of their child (i.e. under or over 18 years), the degree of disability and the changing need for care or services required in the future.
  2. The state benefits to which their child is currently entitled to and the extent to which these may be curtailed in the event of their child receiving an income. The most common benefits are the Disability Allowance and Medical Card.
  3. The amount and type of assets available and how to distribute those assets in a cost effective and tax efficient manner.

**Q. *What provisions should I make in my Will for my child with an intellectual disability?***

**A.** The three major concerns for parents are:

- (a) How to make proper provision for their child
- (b) How to protect their inheritance from exploitation
- (c) The effect of inheritance on state benefits

In order to provide for a child with an intellectual disability without risking exploitation or loss of state benefits, the child him/herself should not be named as a direct beneficiary of the Will. (A beneficiary is a person who receives benefit from the Will). Many people who make a Will give their property (in whatever form) outright to a beneficiary or a number of beneficiaries. This is a normal procedure where the beneficiaries are able to manage their own affairs. However, not all people with an intellectual disability will be capable of doing so, although some may be able to do so with appropriate support. If the property/inheritance is given outright, there is a danger that the person could be exploited and deprived of their inheritance or that the income from the property/inheritance would curtail their right to means tested State benefits such as the Disability Allowance.

If there is a referral to the Court it is likely that the person would be made a Ward of Court. It is recommended that you appoint a Guardian for an adult child with an intellectual disability, as he/she would have some authority to represent the person even though it is not formally recognised by law.

Some families have adopted the possibility of leaving property to another caring member of the family in the hope that they will support the person with the disability. However, this may place an undue burden of responsibility on that person and carries certain risks, not least the risks of that person's bankruptcy, inheritance tax problems, inheritance claims by that child's children, the risks of property division on marital separation and the death of that person. An option adopted by many families is the creation of a Discretionary Trust in favour of the person with a disability.



## **Q. What is a Discretionary Trust?**

- A.** A Discretionary Trust is a mechanism through which the welfare of a family member with an intellectual disability can be provided for indirectly and not as a direct beneficiary of the Will. Funds within a Discretionary Trust are administered at the absolute discretion of the Trustees (hence the importance of who you choose to be a Trustee) and are not under the control of the person with the disability. Trustees may also be Executors (See Executors). A Discretionary Trust may be created by deed during a parent's lifetime when perhaps a lump sum or a windfall is to be invested, or it can be established in a Will along with the naming of Trustees. Before establishing a Discretionary Trust, parents should discuss all the issues involved with their other children and potential Trustees.

## **Q. What does a Trustee do?**

- A.** A Discretionary Trust should give the Trustees the power to invest the Trust capital and the power to apply the income from the investment for the benefit of the beneficiary as they think fit. Consideration should be given to whether or not to confer powers on the Trustees to appoint capital to the beneficiary as this may interfere with means tested State benefits (See State benefits). A Discretionary Trust can be framed in such a way that funds may be spent on items or services for the person or given to the organisation caring for the person, if they are in residential care.

There should be an arrangement for the distribution of the remainder of the Fund after the beneficiary's lifetime. Parents are advised to provide in their Wills for the disposal of the Trust to residuary beneficiaries on the death of the child e.g. to brothers/sisters or to their children. Parents should also include a 'letter of wishes' with the Discretionary Trust - giving direction to the Trustees on how payments might be made. Parents should seek the advice of a solicitor known to have expertise in drafting Discretionary Trusts.

## **Q. Are there any Tax liabilities with a Discretionary Trust?**

- A.** Normally there is a discretionary tax of 6% on the value of the fund in the first year and a 1% tax in each subsequent year. However, this tax is not payable where the beneficiary is a person with an intellectual disability. In order to qualify for this tax exemption, the Trust deed must state clearly that the trust is exclusively for the maintenance and upkeep of the named beneficiary and no other individual, although, a body with charitable status may be named as an alternative beneficiary without incurring a tax liability.

Explanatory leaflets on gift, inheritance and probate taxes can be received from the Revenue Commissioners at Capital Taxes Division, Dublin Castle, Dublin 2 (Tel: 01 679 2777)

## **Q. Will my son or daughter lose his/her state benefits if a Discretionary Trust Fund is established?**

- A.** Care is required in the administration of a Discretionary Trust in relation to state benefits. The main allowance paid to adult persons with an intellectual disability is the Disability Allowance paid by the Department of Social and Family Affairs, Social Welfare Services Office, Longford. This is a weekly allowance paid to people with a disability whose income falls below certain limits and who are aged 16 or over and under the age of 66. The allowance is subject to both medical suitability and a means test. However, €120 a week can be earned from rehabilitative work without it affecting a Disability Allowance claim (correct as of January 2003). The allowance is paid to people living either in their own home or in a community residence. However, if the recipient has to go into hospital or residential care, payment of the Disability Allowance will continue.

If a Trustee dispenses a substantial sum to the person with a disability he/she may lose eligibility for the Disability Allowance, as well as the Free Travel Pass, other Free Schemes, Medical Card or be liable to income tax on the amount received. However, contributions for occasional medical expenses, holidays etc, should not incur loss of other entitlements.

**Q. How are income and capital assessed for means testing purposes?**

- A.** For the purpose of assessing means for means tested social assistance schemes such as Disability Allowance the following rules apply: If the Disability Allowance recipient only has a life interest in the capital in the Trust Fund, then any periodic payment received from the Trust is assessed as cash income. Where the amount of income from the Trust exceeds the weekly amount of Disability Allowance they may lose their entitlement to the allowance. Where the amount of income from the Trust is less than the amount of Disability Allowance, entitlement to that benefit will be stopped in proportion to the extent that the person has income from other sources.

If the Disability Allowance recipient has ownership of the capital i.e. at date of death, the funds revert to his estate, then the capital is assessed as part of his/her means. The method of assessing capital for means tested purposes is as follows: the first €12,697.38 savings will be disregarded and savings over that amount will be assessed on a sliding scale as follows:

**Formula** (correct as of January 2003)

Capital	Weekly Means Assessed
Up to €12,697.38	- nil
€12,697.38 - €25,394.76	- €1.27 per €1,269.74
€25,394.76 - €38,092.14	- €2.54 per €1,269.74
Over €38,092.14	- €5.08 per €1,269.74

A recipient should notify the Department of Social and Family Affairs of changes in any circumstances that may affect their Allowance. It is inevitable that there will be alterations from time to time in the conditions of eligibility for state services and benefits, including increases in certain benefits. For these reasons it is important that parents keep their Wills under periodic review.

**An information booklet on the Disability Allowance is published by the Department of Social & Family Affairs, which you can contact at 043 45211 or 01 7043948.**

*namhi is a national voluntary organisation working to promote the rights of people with intellectual disability in Ireland to ensure their full and equal participation in society. namhi was founded in 1961 and has become the co-ordinating body for over 160 organisations providing services and supports to almost 28,000 people with intellectual disability in Ireland.*

## **Useful Contacts**

### **Information on Disability Allowance:**

Disability Allowance Section, Social Welfare Services Office,  
Government Buildings, Ballinalee Road, Longford.

Tel: 043 45211 or 01 7043948

### **Information on Inheritance, Probate Taxes:**

Capital Taxes Division, Revenue Commissioners, Dublin Castle, Dublin 2.

Tel: 01 679 2777

### **Information on Wards of Court:**

Office of Wards of Court, Áras Uí Dhálaigh, Dublin 7.

Tel: 01 8725555

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