



WILLS & TRUSTS FOR VULNERABLE PERSONS

A Will is a document where you record your wishes in relation to what happens to your estate (i.e. your assets and liabilities) when you die. In our experience of dealing with vulnerable persons (e.g. disabled children and adults) a parent is often concerned with **protecting** assets for the vulnerable person. As such, matters we feel a parent needs to consider include:

- If my child is under 18 when I die, who shall I appoint as guardian(s)?
- My family situation is complicated as I am divorced/separated, what impact does this have?
- How do I protect assets for my disabled child (i.e. for their future care needs)?
- What benefits (if any) does my disabled child receive and will receiving funds affect them?
- Is the division of my estate between **all** my children fair?
- I have various insurance/pension policies, what happens to these when I die?
- Have my parents (i.e. the grandparents) considered the above issues themselves?

Under a Will you can leave immediate gifts to friends, families and even charities. However, it is sometimes not suitable to make an immediate gift if the chosen beneficiary is either physically or financially vulnerable.

As such, a popular way of protecting assets for the future needs of a vulnerable person is to leave assets in 'trust'. A trust arises whenever you give your assets (such as property, cash and investments) to another person(s) (the trustees) to hold for the benefit of someone else (the beneficiary or several beneficiaries). It depends on your specific circumstances as to which trust may be appropriate and we have outlined below some types that may be of interest.

DISCRETIONARY TRUST

This type of trust is extremely flexible as it gives the trustees wide powers, which enables the trustees to use the trust assets to meet the individual needs of a beneficiary more easily. In a discretionary trust, trustees can distribute income and capital separately to beneficiaries as the trustees think fit.

- There are usually multiple beneficiaries (specified in your Will) who may potentially benefit from the assets in the trust, but no beneficiary is absolutely entitled to either income or capital. This means that trustees can take note of the individual circumstances of each beneficiary.

- Discretionary trusts must have more than one beneficiary, so it could be a mixture of family members including the vulnerable person.
- As a beneficiary is not absolutely entitled to the assets of a discretionary trust, this means that these assets should not be considered when a vulnerable person is assessed for means-tested benefits or local authority care funding.
- Although used to protect assets, the taxation of trusts is rife with complications so we would always recommend taking appropriate advice when setting up or administering a discretionary trust.

TRUSTS FOR DISABLED PERSONS

There are currently various different types of trust that can be created for the benefit of a disabled person (either by someone on their behalf or by the disabled person personally). In the context of these notes, we will focus on a **discretionary trust set up by a parent for a disabled child**.

In general, this type of trust is similar to a discretionary trust in that the trustees still have wide powers but only small payments (from capital, income or a combination of the two) within a **specified amount** may be paid to non-vulnerable beneficiaries in any tax year (i.e. the lower of £3,000 or 3% of the maximum value of the trust). This enables trustees to make payments of indirect benefit to a vulnerable person (e.g. carer's travel expenses to enable them to accompany the vulnerable person on holiday).

The main difference is that in general more advantageous tax rules apply to this trust type, but again we recommend that professional advice should be sought to consider these in detail.

In order to qualify as a trust for a disabled person the 'primary beneficiary' must be disabled, which is defined as a person who:

- By reason of 'mental disorder', within the meaning of the Mental Health Act 1983, is incapable of administering their own property or managing their own affairs;
- Is in receipt of (or qualifies for) Attendance Allowance (or constant Attendance Allowance);
- Is in receipt of (or qualifies for) Disability Living Allowance by virtue of entitlement to the care component at the higher or middle rate; or
- Is in receipt of (or qualifies for) Personal Independence Payment rate at the standard or enhanced rate for either of the daily living activities or mobility components.

Please note that the **key date for qualification** is the date that funds were placed into a trust (i.e. during the lifetime of a disabled person or when a trust comes into existence through a person's will).

During the disabled person's lifetime they will not have an absolute right to the capital or income of the trust, meaning it is the trustees' responsibility to pay any income or capital to the disabled person

for their benefit only. This discretionary element means that they again cannot be considered the owner of the trust assets, meaning that the assets that remain in the trust should not be considered for means tested reasons.

The trustees may also be able to make a 'vulnerable person's election' during the lifetime of the disabled person, which means that lower rates of Income Tax and Capital Gains Tax may apply. However, great care must be taken with this election as if it is made then **the total value of the assets would be brought into account for means testing purposes**. As such, professional advice should be sought at the necessary time as to whether the election should be made.

There are many disparate taxation considerations that may apply so it is important to take professional advice when considering the suitability of this type of trust.

Which trust is best?

This is entirely context specific, but in general a discretionary trust is often more suitable where the tax implications are not likely to be a major consideration and when maximum flexibility is required to provide for several people in the family. A disabled person's trust is useful when tax is likely to be a major issue and there are no other family members who have financial needs that need to be met by the funds held in trust.

We hope that this general guidance assists you in identifying your individual needs. Rutters Solicitors have been established for longer than any other firm in North Dorset, with offices in Shaftesbury, Gillingham and Sturminster Newton. The longevity of the firm is evidence of its successful relationship and reputation within the local community and wider afield.

Please contact Matthew Billingsley on 01258 444483 or m.billingsley@rutterslaw.co.uk (Head of Trusts and Sturminster Newton – 2nd Floor Market Square House Sturminster Newton Dorset DT10 1FG) who would be happy to meet to discuss your requirements, either at his office or if more convenient at your home.

The general information contained within these notes is intended to stimulate discussion for you as a family. Legal and taxation principles can change over time and as such Rutters Solicitors can accept no responsibility or liability for any action or omission taken by you based on the information contained in these notes, both now and if relied upon in the future, as these notes do not constitute legal advice. We recommend that if you have specific needs or require legal help you seek expert legal assistance.

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