

The Intellectual Disability Rights Service often receives requests for advice from people with intellectual disabilities, their families, friends, service providers and advocates concerning the rights of people with intellectual disabilities who have been unfairly treated in a parent's (or other family member's) will; or have failed to receive property left to them in a will.

The following is a brief summary of some of the issues to be considered. This summary is based on the laws of New South Wales but the general principles are applicable in other states.

1. How can you find out whether a person has been left anything in a will?

If you suspect that a person has been treated unfairly in a will or has not received his or her entitlement under a will, you should first discuss the issue with the person to find out:

- does she or he know anything about the will?
- does she or he want to know more about his/her rights under the will?
- is it ok to discuss the matter with other family members who may know more about the will?

If the person wants to know more about the will and agrees to having the matter discussed with family members, ask the family for a copy of the will. If the family refuses or if the person with the disability does not want the family to know about his or her concerns, a copy of the will can be obtained from the Supreme Court (as most wills have to be approved by the Supreme Court before they can be carried out by the executors).

Your local community legal centre or the Registrar of the Probate Division of the Supreme Court may be able to assist.

Try to find out as much information as you can about the deceased including his or her full name, last address, date of death and the date on which probate was granted.

The more information you can get, the easier it is to locate a copy of the will. Another way of finding out who is handling the deceased's estate is to keep an eye on the legal notices section of the paper.

If a person does not have the capacity to make an informed decision about whether to pursue the matter, an application may be made to the Guardianship Tribunal for a guardian or financial manager to be appointed.

Before doing this, consideration should be given to discussing the matter with any family members who may have information about the will in an attempt to resolve the matter informally. It may also be appropriate to seek legal advice on the desirability of settling the matter or taking it further.

Once you obtain a copy of the will, you can contact a solicitor, your local community legal centre or NSW Legal Aid for assistance in interpreting the will.

2. What if no or unfair provision is made in a will?

Everyone, whether they have a disability or not, can ask the court to alter a will if they believe that inadequate provision is made for them in another's will. The Family Provision Act 1982 gives a court the power to 'rewrite'

a will where the willmaker has not adequately provided for family members.

Who can apply to have a court 'rewrite' a will?

Under the Act there are four categories of people who can challenge a will. These are: a spouse (including a defacto spouse) of the willmaker; a child of the willmaker; a former spouse of the willmaker; and certain other people who were dependent on the willmaker at some time.

What factors will the court consider?

In order for a court to alter a will the court must be satisfied that the willmaker made inadequate provision for the "proper maintenance, education and advancement in life" of the person making the application. Whether the provision made is "adequate" or "proper" will depend on all the circumstances of the case.

For this reason the court will consider a wide range of factors such as: the wealth of the willmaker; the number and needs of other dependents and beneficiaries; the age and

capacity of the applicant; and the relationship between the applicant and the willmaker.

If the court is satisfied that the provision made in the will for the applicant was not adequate and proper, the court will then have to decide what, if any, provision should be made for the applicant.

Again the court will consider a wide range of factors. If the applicant is a person with an intellectual disability the court may consider issues such as the availability of social security benefits and the extent to which the person's disability inhibits his or her ability to gain employment.

How is an application made?

An application under the Act is made to the Supreme Court. Legal Aid may be available for such applications depending on how much money the applicant has and the likelihood of success of the application. Legal costs are usually paid from the estate.

When can an application be made?

An application must be made within 18 months of the death of the willmaker. The court has the power to extend this time but will do so

Anne and Michael were the only children of Mr and Mrs Smith. Mrs Smith died many years ago. Mr Smith recently died and in his will he left everything to Michael.

Anne has an intellectual disability and receives the Disability Support Pension (DSP). Before their father's death, Anne and Michael lived at home with their father. Michael now wishes to marry and he and his new wife want a place of their own. He wants to sell the family home and buy a new home.

Michael proposes that Anne move into a hostel for people with disabilities, the rent for which she can afford on the DSP. Anne does not want to upset her relationship with Michael but she is very unhappy about this as she would like to live in a unit near where she has always lived so that she can remain close to her friends.

Anne along with her friend Margaret visit the local community legal centre and the solicitor there explains that Anne has the right to challenge her father's will on the grounds that it is unfair. The solicitor suggests that Anne, with support from Margaret, explain to Michael her concerns and her right to challenge the will if an agreement can not be reached. Michael agrees to split the proceeds of the sale of the house with Anne so that she can purchase her own unit.

only if sufficient cause is shown. In considering whether to allow an application to be made out of time, the court will consider a number of factors such as the reason the claim was not made earlier; prejudice to other parties if the time is extended; whether any party acted in an unfair way; if time is extended, the likelihood of success of the application.

It is important that applications be pursued promptly. A person who has questions about this can contact their local community legal centre or NSW Legal Aid for advice.

3. What if the terms of the will are fair but are not being carried out or what if a trust has been created but the trustee is acting unfairly?

In some cases that have been referred to our Service, the willmaker attempted to make an adequate provision in the will for the person with the disability but the person has received none or only a small part of the money or other property left to him or her. This can happen for a number of reasons including:

- problems with trustees who may be overly cautious in maintaining the trust fund; may not be aware of the person's needs; or may be reluctant to agree to innovative uses of the money which could significantly enhance the person's life;
- lack of communication between service providers and the trustee (the trustee may not be aware of the potential benefits which the person could receive if more money was made available unless the service provider asks for the money but the service provider might not ask if they do not know that money is available); or
- fraud or financial exploitation.

What is a trust?

One way parents often try to provide for their son or daughter with a disability is to leave the person's share of the estate in a trust.



Legal advice

This means appointing people, called trustees, to manage and use the fund for the person with a disability in the way specified in the will. Parents can also say what happens to any unspent part of the fund when the person with a disability dies.

The Intellectual Disability Rights Service has dealt with cases where trustees have been unwilling to meet very reasonable requests for money. This has arisen from factors such as trustees mistakenly thinking that a person's disability will prevent the person from appreciating a holiday, ordinary furniture and even decent clothes and shoes.

In some cases, trustees are reluctant to spend money on the person with the disability because it conflicts with their own personal interests.

For example if a family member is appointed as a trustee and the will provides that the trustee will receive any unspent part of the fund when the person with a disability dies, the trustee may find it difficult if not impossible to act solely in the best interests of the person with a disability.

What can be done if you think trustees are acting unfairly or improperly?

Under the law, trustees must act in accordance with the terms of the trust; act only in the best interests of the beneficiaries of the trust; invest wisely; not make any unauthorised profit; keep accounts and give the beneficiaries complete and truthful accounts.

If a beneficiary has any concerns about the way the trustees are acting, the person should demand that the trustees provide an

John's parents died many years ago. In their will they said that everything they owned should go into a trust fund for John. They appointed John's uncle Pat as the trustee and instructed him to use the money for John's maintenance and support. They also said that when John died any money left in the trust would go to uncle Pat's children.

John has received very little money from the trust fund. The staff in the group home where John lives are very concerned about this as Pat has consistently refused to give John any money claiming that John would not appreciate anything they purchased. John has told them that he would like to take a holiday and get his own television.

John with the help of the staff writes to Pat asking for an explanation of how much money was left to John by his parents, where the money has been invested and how much has been spent on John. Pat supplies the information requested and a meeting with Pat is arranged. Pat agrees to provide money from the trust fund for John to go on the holiday and purchase the television. John and Pat agree that they will have a meeting every few months to discuss what John wants or needs.

“accounting.” An accounting is a statement prepared by the trustees showing how much property was originally put into the trust, how that money was invested or distributed, how much income the trust has earned and how that income has been used.

If trustees can not account for moneys they have held on trust or if they have used the money for improper purposes, then they may be legally required to repay any such money to the beneficiaries. It is possible to apply to the court for a new trustee to be appointed.

If a trustee fails to do these things, legal advice should be sought as it may be necessary to apply to the court to remedy the problem.

4. Where can further information be obtained?

- Questions of Rights: A guide to the law and rights of people with an intellectual disability, 2nd edition. Available from the Intellectual Disability Rights Service. This book covers many of the rights problems faced by people with an intellectual disability in NSW and includes sections on guardianship and on wills.
- When I'm gone - this book aims to provide parents with the range of options available to them on wills and estate planning so that they are better palced to fully and properly instruct a solicitor in drafting their wills. Published in early 1999 by the Intellectual Disability Rights Service.

- Community Legal Centres - for information about the legal centre closest to you phone the Combined Community Legal Centres Group 02 9318 2355

- Law Access 1300 888 529

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