

All parents are concerned to provide adequately for all their children. Parents of people with intellectual disability are even more concerned about this - how can I best provide for my son or daughter who has an intellectual disability?

Many people believe a person's future is best guaranteed if the person's entitlement to the Disability Support Pension is maintained and for this reason parents sometimes limit their son's or daughter's ready access to cash. This can and does cause problems because it is rarely possible to predict what the needs of the person will be in the future. Facilities and services may close or fees increase until someday they exceed the pension. New ways may become available to improve the person's lifestyle which cannot be obtained if the pension is the person's only source of income.

### 1. What if a person does not have the capacity to manage money?

Before preparing a will, parents need to consider the capacity of any beneficiary with an intellectual disability to manage any money or other property left to them. It should not be assumed that a person with intellectual disability is incapable of managing a gift.

In each case parents must consider the size and complexity of any gift and their own son or daughter's capacity to manage the gift alone or with informal assistance from friends and family members.

Even if it has been decided that a person lacks the capacity to manage money, money (or other property) can still be left to the person in a will as there are many ways to structure a will to protect the interests of such a per-

son. For example, parents can leave a share of the estate in a trust fund. 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.

### 2. What factors should parents consider when setting up a trust fund?

If a trust is created, parents need to consider how much freedom or "discretion" the trustees will have in deciding whether and when to spend money on the person with an intellectual disability. If too little discretion is given, the trustees may not be able to respond appropriately to changing circumstances.

The choice of trustees is vitally important. The trustees should have some understanding of intellectual disability and some knowledge of the individual's needs and likes.

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.

Parents should also carefully consider the possibility of any potential conflict of interest in selecting a trustee. 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 diffi-

cult if not impossible to act solely in the best interests of the person with a disability. If parents do not know anyone they would like to act as a trustee, they can consider appointing the Public Trustee or a private trustee company. Some parents may consider appointing two trustees to act together, one with knowledge of the person and the other providing a more “objective” view; each to act as a balance for the other. For example, if the estate is large, a professional such as an accountant may be an appropriate trustee along with someone who has direct contact with the person with intellectual disability.

tion that such organisation or department would then provide services to their son or daughter for life. This can lead to many problems and should be avoided. For example, the organisation may encounter financial problems and be unable to continue to provide services or the needs or wishes of the person with the disability may change so that the department is no longer able to meet those needs or wishes.

Rather than leave property to the organisation or department, parents can create a trust and instruct the trustees to investigate allow-

Parents should refer to the references listed below for a further discussion of the options available and the issues which need to be considered when appointing a trustee. Legal advice should be sought when drafting a will which creates a trust.



### 3. Are there other options?

Trusts are not the only option. For example, parents could leave a share of the estate directly to the person with the disability with the request that the executors of the will make an application to the Guardianship Tribunal for the appointment of a financial manager if at the time of the parent’s death the person with the disability does not have the capacity to manage the share of the estate left to him/her.

### 4. What if parents leave the family home to an organisation or government department?

Some parents have considered leaving their home (or other property) to an organisation or a government department in the expecta-

ing an organisation or department to use the house for so long as services are provided to their son/daughter.

If the organisation or department fails to keep its side of the bargain or if the needs or wishes of the person with the disability change, the trustees would then have the power to sell the house and use the proceeds in a more appropriate way for the benefit of the person with the disability.

### 5. What if no, or inadequate, provision is made in a will for a person with a disability?

The Family Provision Act 1982 gives a court the power to alter a will where the willmaker has not made adequate provision for the “proper maintenance, education and advancement in life” of a spouse, son, daughter or certain other dependents.

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

## 6. Can parents appoint a guardian in their will?

Parents can indicate in their wills who they wish to act as the guardian of their children. The guardian's powers only apply until the child turns 18 years old.

Many parents assist their adult sons and daughters with an intellectual disability to make decisions about their lives (for example, where they live) and manage their finances.

Parents are sometimes concerned about who will provide this assistance after they have died. The least restrictive alternative should always be considered first - for example another family member may be able to provide this assistance.

A parent may wish to include a phrase such as "I request X assist my son/daughter in his/her life." Such "requests" have no legal force but are an indication of the parent's wishes.

If these informal mechanisms are not available or are unworkable, an application can be made to the Guardianship Tribunal for the appointment of a guardian and financial manager.

A guardian or financial manager will only be appointed if the Tribunal is satisfied that the person with the disability cannot make his or her own decisions, that no less restrictive/informal assistance is available and that it is in his or her best interests that a guardian or financial manager be appointed.

Even if a parent has been formally appointed by the Guardianship Tribunal to be the Guardian of his/her adult son or daughter, the parent can not pass this authority on to another person. Only the Guardianship Tribunal (or the Supreme Court) can appoint guardians of adults.

## 7. 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.

- **When I'm gone - A guide to wills for parents of people with intellectual disability.** This book aims to provide parents with the full range of options available to them in estate planning so they are better placed to fully and properly instruct a solicitor in drafting their wills.

- Booth, S. "**Wills for Parents of People with Intellectual Disability**", Lawyers Practice Manual, vol 2. Most Lawyers have this manual and would be well advised to consult this chapter.

- Booth, S. "**Providing for a child with intellectual disability**", Law Society Journal, February 1996.

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

- Law Access PH 1300 888 529

- **Intellectual Disability Rights Service**  
2c 199 Regent Street Redfern NSW 2016  
PH 02 9318 0144 (Sydney)

1800 66 66 11 (Freecall)

Legal Advice available between 2.00 - 5.00 weekdays.

[www.idrs.org.au](http://www.idrs.org.au)

