

Legal Issues for Parents of Children with Special Needs,

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Thurs 28th May 2009, Cathedral Parish Centre

Good evening! My wife asked me to be interesting, but I'm a lawyer so I'm going to do my best ! Today I hope to talk to you about some of the legal issues that surround having a dependent child or relative, in particular the issues which are concerned with Succession and how parents can make provision for dependent children or relatives.

The first point is that anybody who has responsibility for a disabled child or relative should make a will. I will go on to discuss the issue of trusts and briefly some issues arising out of wardship.

One of the big problems which arise when making provision for a disabled child or relative is how this provision may affect other children's expectations and responsibilities. None of us likes to think of our own mortality, but nothing is more sure than that we will die, and consequently it makes a big difference if some of the issues which arise have been thought about.

It is difficult to imagine all of the difficulties which might arise and so I would strongly recommend that a parent should talk to their family solicitor before making a will. One way of approaching this is to make a check list before visiting the solicitor. This way you will remember to ask the questions that are of particular concern to you. It might be worth considering speaking to the family doctor in relation to the future needs and likely progression of the disabled child's life. Is he or she likely to have a full life span or will his or her needs grow as they get older – which of course will have implications for the provisions to be made for them. Remember that having made a Will you should review it every 18 months and definitely after 5 years. Circumstances change.

It is important that any siblings of the disabled child or relative are aware of what you propose to do, in order to make provision for the child and to have his or her siblings agreement, particularly in situations where a disproportionate amount of family assets may have to be used. One of the mechanisms by which this can be done is to create a Trust giving property to the Trustees for the benefit of the child. You will need advise from your accountant and solicitor in respect of Taxation. You will also have to decide before creating the Trust what exactly you wish to achieve and when the Trust should come into operation. I would strongly recommend that there be an uneven number of trustees

If there are other children it will be necessary to bring them on board, to talk about their expectations and needs in the light of the disabled child or relative's situation. Will one of the siblings act as a trustee? or perhaps your doctor / solicitor . There are different implications in relation to tax when transfer of assets occur and this needs to be discussed with accountant and solicitor. It is likely that there will be property tax reform in the next budget and there is and has been a difference in the rate of tax to be paid on transfer after death and transfer during life. That being the case the establishment of a trust is perhaps the most sensible mechanism to provide for the disabled child or relative.

Education and the future development of the disabled child is of course of paramount importance and the constitution provides education until 18years. The case that Cathy Sinnott took in the early 1990's established that a disabled child is entitled to primary school education up until the age of 18, but it has not provided for subsequent educational development.

In the present economic situation it is difficult to know what ongoing provision the HSE will be able to provide for the health care of the child. In these circumstances it is important that every parent or carer keep a good record of all correspondence or other communication with the HSE and note their replies.

Another aspect and jurisdiction of the courts is the question of wardship. This is a very 19th century concept and has its foundation in the Lunacy Regulation Act of 1871.

Although the title of the legislation is somewhat off putting one should remember that it is a Victorian piece of legislation and that the practice of wardship now is very different from its origins. Essentially the aim of the wardship proceedings is to protect and safeguard the interests of the disabled person. It often arises where a person has been injured in a car accident and due to the medical expertise he/she survives but does not have the capacity to look after him/herself and large sums of money have been awarded to the victim/ward.

This area of the law is essentially administered by the president of the High Court. While the mechanism is formal the office of the wards of court are extremely helpful and the mechanism is not expensive or very burdensome. Essentially the Court has guardianship of the ward's assets and directs how they should be used in the ward's interest. Usually a relative of the ward is made his/her committee who are answerable to the High Court for the day to day care of the ward. Any sale or change in the assets of the ward will have to be approved by the court.

Questions on the night

1 How do you set up Trusts?

A Trust is a legal mechanism by which property is held for the benefit of a beneficiary. The Trustees hold the property in accordance with the provisions the the Trust Deed which is a written statement of the intention and aims of the person or persons who set up the Trust and it establishes what the Trust is to do and who it is to benefit.

Trustees are usually relatives, solicitors, doctors of the person setting up the Trust. It is possible to appoint the person who sets up the Trust as a trustee for their child

2 Do the Trustees have to agree on what they should do?

No, but a good trust deed will provide for a majority or casting vote to determine what the Trustees should do. For this reason it is always sensible to provide for an uneven number of Trustees and to establish a mechanism in the Trust Deed for Trustees to retire and appoint new Trustees as the need arises. You definitely need a solicitor or barrister to advise when setting up a Trust. One of the issues is that the assets of the Trust have to vest in someone within certain time limits. Given the complexity of this area its important that you think about what you want to achieve for a while before going to the solicitor.

Do out a check list.

- * What assets do I have?
- * Which do I want to put in the Trust and which do I want to keep
- * Do I want to direct the Trustees how to spend the assets of the Trust for the benefit of the disable person.
- * How much discretion do I want the Trustees to have
- * Who will act as Trustee, mention same to the proposed Trustees before creating the Trust.
- * Uneven number of trustees
- * Mechanism to replace Trustees
- * Negotiate with solicitor for the preparation and execution of the Trust. Remember the price will reflect the complexity of your requirements.

3 Executors – how to appoint and what to do if they don’t do as you wish?

Executors job is to carry out your wishes within the law. They are given 1 year after your death to fulfil your wishes. Make your family members aware who you propose to appoint as executor and give them a general idea of what you want. Keep a copy of the will. Let the solicitor keep the original and give a copy to a family member. Remember that wills can be changed very easily, but it is extremely important that someone knows that you have changed it, ideally your solicitor. If the Executor does not carry out your wishes the Trustees, your solicitor or a family member can take out representation instead of the original Executor (to carry out your wishes) Although this is a troublesome procedure it is fairly straightforward. Hopefully it won’t happen! (Choose your Executor carefully!)

4 Can an Executor be a beneficiary?

Yes. But no beneficiary (somebody who takes a benefit from a will) can Witness the will successfully. Ideally an Executor should not be a family member - a close friend or someone you can talk to, such as solicitor. Check with them first to see if they're happy to act. Usually there's one executor, but more than one can be appointed.

5 Trusts

Trusts in general were often used to transfer land from one generation to another. Usually upon marriage. Sometimes the father of a farming son would hold the lands in trust for his grandchildren, or the wife would hold the land in trust for her children. When Marriage Settlements were set up they often included the creation of a Trust where the son of the landowner would not hold the lands, but would be the beneficiary of the Trust set up on his marriage. This illustrates a characteristic of Trusts that the person who sets up the Trust can often be a Trustee with the power of appointment to someone in the next generation. The very fact that Trusts were used to transfer the main asset of a family, ie. land, illustrates yet again how important the issue of taxation is and it is important to recognise that it would be unsafe not to get professional advice in respect of taxation if one were to consider setting up a trust.

6 Can family members challenge a Trust?

One of the advantages of setting up a trust prior to your death is that it exists outside your estate and therefore cannot be challenged after your death. Section 117 of the Succession Act 1965 would not apply. If the Trust Deed is sufficiently well planned you can act as a Trustee during your lifetime and appoint new trustees upon your death by Will and give directions as to your wishes. The taxation issue is perhaps the most difficult in present circumstances and requires the most advice, so it might be worthwhile to give your Trustees discretion as to spending some of the Trust funds to get professional advice in respect of tax. There is a balance to be struck between

protecting the assets of the Trust and the beneficiary's interest and allowing the Trustees enough flexibility to change with the times.

7 Is there existing wording for Trusts available?

There are precedents which are formats, but only give rough outline as to what should be considered. Every Trusts requirements are different, which is why an experienced solicitor / barrister should be consulted.

8 Can the disabled child inherit without effecting State's benefits?

It is impossible to give a precise answer as to an individuals situation. There are thresholds and these change regularly. Your solicitor / accountant should be able to advise. An example is the present 15% levy on nursing home care – this may go up and that of course would affect what resources were available for the disabled child after your death.

Another aspect is that it may be possible to look for the assistance of various charitable associations and organisations. I would recommend that parents should scan newspapers to see what charities are active and which might be appropriate for your child. One might make a gift to the charity rather than the child if the charity were going to look after the child or relative. Percentage of the assets of a Trust could be paid to the charity for as long as the child lives with the charity or association. These options can be looked at.

A disabled child can inherit in his or own name, but if one is to use the mechanism of a trust it makes better sense that the child be named as a beneficiary of the trust rather than as a beneficiary of a Will simply. Remember that if a Trust is created you have to have a mechanism to replace trustees and you should always appoint an uneven number of trustees with directions as to how disputes are to be resolved. Solicitors usually charge on the basis of the complexity and value of the estate when setting up the Trust. You need to trust your solicitor, but do not be afraid to discuss the question of fees. The Law Society has a clause which is inserted in Trusts to ensure that the

fees are not unreasonable, but essentially it's a matter of trust, if you know your solicitor he/she will endeavour to carry out your requirements at a fair cost.
Remember no solicitor wants to lose a family's business!