

Estate Planning for Families of SEND Children

Edward James, Senior Solicitor

Steven Treviss, Solicitor

Who we are and our approach

Edward James - Senior Solicitor

edward.james@theburnsidepartnership.com

T: 01865 987781; M: 07961 020480

Steven Treviss - Solicitor

steven.treviss@theburnsidepartnership.com

T: 01628 301221; M: 07970 853986

- We are private client lawyers - advise families on planning for the future, mental capacity, Wills and probate.
- We take a holistic approach to our clients and focus on getting to know you, your family and your aims.
- We provide tailored advice on this basis.
- We aim to be your resource for all legal issues.
- We agree fixed fees in advance so there is no ticking taxi meter when we are advising you.

Seminars

- Meeting with families of SEND children in parent and carer forums and at schools to provide talks, clinics and materials to help educate and inform on issues you should be thinking about, problems you might face and how to avoid problems in the short, medium and long term.
- We have extensive experience in advising SEND families and making sure they are prepared and protected.

Housekeeping

- We will be speaking for around 20 minutes
- There are several questions we have for you which will be polled for simple answers during the talk.
- You are welcome to submit questions and we will answer those which are most likely to be common concerns
- If you have specific queries you are welcome to contact either of us for a private chat either by 'phone or Zoom.

Avoiding chaos in your own affairs

- Proper legal planning and preparation by families in relation to their own affairs reduces the risk of problems arising or unintended consequences. This is especially important when dealing with issues surrounding SEN children.
- You need to consider:
 - Careful estate planning, ensuring you have appropriate Wills in place.
 - A plan for how your children might be cared for, both physically and financially, if both parents died.
 - Appropriately drafted Lasting Powers of Attorney which provide for ongoing care and financial provision for children.

Avoiding chaos in your child's affairs

- Similar legal planning and awareness for your children ensures that the most appropriate people are able to make decisions for the child and manage their lives as much as is necessary.
- You need to consider when the child is 18:
 - Lasting Powers of Attorney if the child has capacity to appoint attorneys.
 - Deputyships if the child does not have capacity.
 - How the child will be looked after.
 - What money will be available for their care and how will they be funded.

Making sure your Will is up to date

A well drafted Will should:

- Take into account family dynamics and circumstances:
 - Providing for vulnerable beneficiaries - young or SEND.
 - Providing for complex family situations.
 - Anticipating problems for beneficiaries such as divorce or financial difficulty.
 - Avoiding conflict.
- Protect assets
 - Make sure that assets are protected from being assessed for benefit entitlement.
- Ensure tax efficiency
 - Balance your needs with inheritance tax efficiency.

Getting the best Will for you and your family

To achieve a well drafted Will you should review your circumstances carefully and look at your existing Will.

- Are the executors up to date and appropriate?
- Are you happy that the right people are going to benefit?
- Are assets properly protected?
- Are there any personal gifts to consider?
- Is the Will too rigid or do you feel a flexible structure better suits your wishes?
- Is there any inheritance tax liability?
- Who is the back stop beneficiary?

Estate planning case study - Lily 1

- Lily is 17 and is physically and mentally disabled. She has three siblings who are not disabled aged between 19 and 25. Lily is unable to manage any money on her own behalf. She is in receipt of Personal Independence Payment and will receive Universal Credit. PIP is not means tested. UC is.
- Her parents want to provide for her lifetime care on their deaths.
- Review:
 - a. Family assets, pensions, life insurance to establish what will be available for Lily.
 - b. Lily's future prognosis - how will she be living in the medium and long term. Her life expectancy is normal and she anticipates living semi-independently.
 - c. What state benefits will Lily receive in the future and are they means tested.
 - d. Lily's relationship within the wider family - who might care for Lily or take responsibility for her.
 - e. The parents' needs and likely expenditure.
 - f. The wider family's estate planning arrangements.

Estate planning case study - Lily 2

- Advise on traditional simple Will vs. flexible Will:
 - Traditional Will sets out a strict order of battle. i.e. everything to each other and then to children in equal shares.
 - Flexible Will leaves everything to a discretionary trust where the trustees decide who gets what and when. This allows for the trustees to review the situation on the ground at the date of death and then choose the best options for the family at the time.

Here we advised a flexible Will as this will allow the family to review Lily's needs at that time and ring fence some of the estate for her benefit. This balances her needs against that of her siblings who may want their share outright. Lily's share would be held in trust for her. As there is a discretionary trust the money held for Lily would not affect her entitlement to means tested state benefits which might be an important part of her financial provision in the future.

- Advise on best executors/trustees
 - The strength of flexible Wills is their flexibility. However, the trustees have enormous power and it is crucial to choose the right trustees. Here the siblings could act as trustees but we also advised that a party who would not benefit from the Will should be appointed to look out for Lily's interests.

Estate planning case study - Lily 3

- Advise on pensions and life insurance
 - These can be written into trust and we made sure that any payments from these sources would pass in line with the Will and would thus be treated in the same flexible manner.
 - If this is not done then there is a chance that the proceeds would simply be divided between the four children, leaving Lily with money that she would not be able to manage and which might compromise her access to benefit assistance.
- Advise on wider family
 - It is always important to make sure that the wider family has up to date Wills which take into account the circumstances of a SEND child.
 - Here one set of grandparents had left large bequests to each grandchild in their Wills (which pre-dated Lily's birth). They duly changed their Wills to protect the gift for Lily so that it was on trust.
- Advise on Inheritance tax planning
 - We always conduct a review of the family assets to see if it is possible to reduce exposure to Inheritance tax.

Demystifying Trusts

Trusts sound more complex than they really are.

- Money is held and managed in a trust by the trustees to benefit another person or people.
- The trust document sets out the rules of the trust.
- There are different types of trust and they are taxed differently.
- Trusts can last for as long as they are needed (up to 125 years) and as long as they have assets.
- Trusts are invaluable when you want to provide for people who may not be able to manage money for themselves and if you want to protect assets for them.

Mental Capacity

This can be hugely complicated and nuanced.

Two key Acts:

- **Mental Health Act 1983**
 - This deals with the assessment, treatment and rights of people with a mental health disorder.
- **Mental Capacity Act 2005**
 - This is designed to protect and empower people who may lack the mental capacity to make their own decisions in relation to their finances or welfare.
 - Central to this Act is the assumption that a person has capacity unless it's proved otherwise.
 - There is enormous scope for interpretation relating to mental capacity.

The power to make decisions for your child

This is an increasingly complex area.

Legally parental rights over children diminish after the age of 16.

- Until 16 decision making rests with parents.
- After 16 parents can make decisions for the child with their agreement and support.
- At 18 the child is legally adult and your legal authority over decisions in relation to their welfare and finances is over.

Why do you need ongoing parental authority?

- Parties must put their arguments to you, not you having to put arguments to them.
- You have the right to make decisions and the ultimate say so.
- You can act as advocate for your child and put forward their wishes.
- You can manage and help with your child's finances.

But beware:

- If the issue is truly contentious and there is no resolution then the matter can be referred to the Court of Protection for guidance or judgement.

Options for SEN children at 18

These depend on the child's capacity

If they have capacity then they can appoint attorneys under Lasting Powers of Attorney (LPAs) where they will choose who can make decisions for them if they cannot make the decisions themselves or have difficulty making some decisions.

- Capacity is decided with guidance from the Mental Capacity Act 2005 and case law.
- Broadly we examine whether the person's impairment prevents them from making the decision to appoint an attorney and then whether they:
 - Understand information about the decision to be made.
 - Retain that information in their mind.
 - Use the information as part of the decision making process.
 - Communicate their decision.

If they do not have capacity then you need to make an application to the Court of Protection for a deputyship.

Court of Protection and deputyship

- There are two types of deputyship and they give similar powers to those given by LPAs:
 - Property and Financial deputyship.
 - Welfare deputyship.
- The Court has historically been reluctant to grant welfare deputyships with only 375 welfare deputies appointed each year compared to around 15,000 property and financial deputies.
- Recently Judge Hayden asserted that welfare deputyships can inhibit personal development and fail to nurture individual development and that the extension of parental responsibility after 18 should be guarded against, despite the good intentions of parents. This displays an underlying Court attitude.
- In the absence of a welfare deputyship welfare decisions can fall to the state.

Applying for a deputyship

This is generally procedural:

- Property and finances deputyship is normally fairly straightforward.
- Welfare deputyship is more complex and requires the involvement of professionals such as social workers, medical advisers and schools.
 - On this basis it is best to be proactive and make an application when relations are good with these parties, not where you may disagree with decisions in the offing.
 - Most professionals are supportive.
- The aim of obtaining a deputyship is so that you retain decision making authority.

Deputyship Case Study - Leon 1

- Leon is 23 and severely autistic.
- He is unable to make any decisions for himself.
- He finds change very traumatic.
- His present placement will end when he turns 25 and the decisions need to be made about his next placement.
- The family felt that managing previous placements prior to the present one was poor.
- The family also felt that Leon's medication and treatment had been variable and they wanted more involvement in such decisions based on their absolute expertise on Leon's historical treatment. He had been given various medications that had been historically damaging. However, this information had not been apparent to new treating professionals.

Deputyship Case Study - Leon 2

Advice

- As Leon has no capacity we needed to make an application to the Court of Protection for a welfare deputyship.
- We needed to set out:
 - How the appointment of deputies would benefit Leon.
 - What decisions the deputies would be making and how they would be collaborating with professionals.
 - Why the deputies were appropriate. We advised that one of his brothers was appointed along with the parents so that Leon was likely to have a deputy in the long term and there would not need to be a new appointment if the parents could no longer act.
 - The approval (or at least notification) of the various parties responsible for Leon - medical, social and pastoral.
 - The support of all of Leon's family and friends for the application.

Deputyship Case Study - Leon 3

- Ultimately a deputyship for Leon's welfare was granted to his parents and his brother ahead of the discussions on Leon's next placement.
- Any of them or all of them were then able to have full involvement and final say in his next long-term placement and this was achieved as they wanted.
- They were also able to make sure that any change in Leon's medication was run through them which avoided previous mismatches and setbacks.
- The case highlighted the importance of making sure that the right measures are in place as early as possible and the value of family being the legally entitled decision makers.

Questions?



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”

Legal 500, 2019

Guide

We have not covered Inheritance Tax or Lasting Powers of Attorney in depth but have set out some basic information in the slides below:

Inheritance tax and estate planning

Inheritance tax is set at 40% of all capital over your available nil rate bands

- Personal nil rate band is £325,000.
- Residence nil rate band is £175,000. This is only available if you are leaving real estate to lineal descendants - children, grandchildren.
- No inheritance tax due on inheritance passing between spouses on the first death.
- Both the spouses' nil rate bands are available on the second death.
- On present figures a married couple can therefore leave £1 million before tax is due.

Inheritance tax calculation

On an estate of £1.2M for a married couple leaving their estate to children:

Estate value	£1,200,000
Less 2x nil rate band	(£650,000)
Less 2 x residence nil rate band	(£300,000)
Taxable estate	<u>£250,000</u>
Inheritance tax at 40%	<u>£100,000</u>

Inheritance tax mitigation

The main way to lower a potential inheritance tax bill is to give assets away.

- Any individual can gift £3,000 a year without inheritance tax. You can also make usual birthday, wedding, festive gifts.
- Gifts valued over £3,000 become potentially exempt transfers and you must live 7 years after the date of the gift for it to be exempt from tax.

Beware also:

- Can you afford it?
- Will the recipient of the gift use it wisely?
- Do you need to control the use of the gift?

Gifting options

There are various ways of making gifts.

- Outright gifts are very simple and require nothing more than handing over the gift. However you have no say in how the gift is used.
- Gift into trust
 - This allows you to control when and how the beneficiary receives the asset - gift, loan or allowing the beneficiary to use an asset, such as living in a house.

Beware that a gift must involve the asset being given away by the owner

- The tax man is relentless in chasing gifts with reservation of benefit (GROB) and other attempted schemes.

Lasting Power of Attorney

These are set up so that you choose people to manage your affairs if you are unable to do so.

There are two types:

PERSONAL WELFARE

Personal decisions such as medical treatment, where you live, how you should be treated and end of life decisions.

PROPERTY AND FINANCIAL

Managing your money, paying bills, selling or buying property and investments and ongoing financial provision for dependants.

Choosing attorneys

Lasting Powers of Attorney are muscular legal documents giving huge powers over your life to the attorneys.

Key decisions should be:

- Do you trust the proposed attorney?
- Are they competent to carry out the job?
- If there is more than one attorney can they work together?
- Is the attorney appropriate?
 - Financial difficulties?
 - Emotionally/temperamentally appropriate?
 - Time commitments?

Attorney's duties

These are defined by principles of the Mental Capacity Act 2005

1. Your attorneys must assume that you can make your own decisions unless it is established that you cannot do so.
2. Your attorneys must help you make as many of your decisions as you can. They must take all practical steps to help you make a decision. They can only treat you as being unable to make the decision after they have completed these steps.
3. Your attorneys must not treat you as being unable to make a decision simply because you make an unwise decision.
4. Your attorneys must act in your best interests.
5. Before they make a decision your attorneys must consider whether they can make a decision or act in a way that is less restrictive of your rights and freedoms.

Instructing and guiding your attorneys

It is vital that your attorneys know your mind on key issues and that the LPA is drafted with special provisions to ensure that your child's needs are taken account of.

In the Lasting Power of Attorney document:

- Draft guidance. Guidance covers your general wishes and attorneys may or may not follow this. This should include provision that your child's wellbeing is linked to yours and that their needs are to be taken into account.
- Draft instructions. Attorneys must follow these. The drafting must be careful otherwise the Office of the Public Guardian will not accept these. Similarly provision needs to be made for your child's ongoing care and wellbeing.

In person you should also discuss your wishes and guidance with attorneys.

- Put the wishes down in the document if there is any confusion or it is likely to be contentious.