

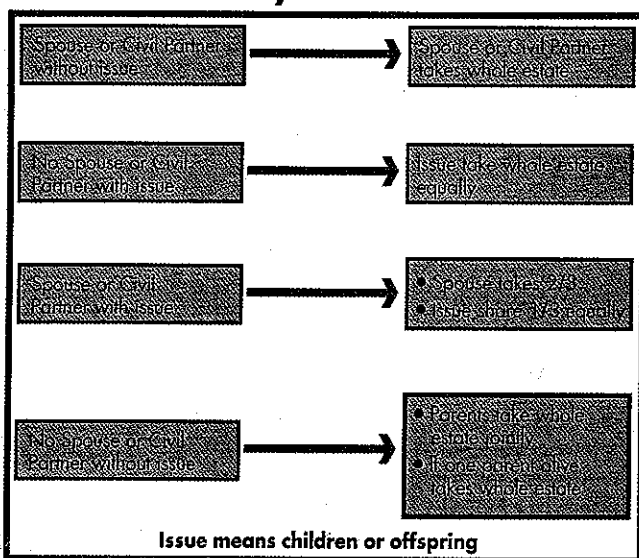
# MAKING A WILL: WHAT YOU SHOULD KNOW

*Sarah Lennon, Inclusion Ireland, writes that making a will is always important—even more so for the parents of those with an Intellectual Disability*

**PLANNING FOR THE** future can be a very difficult and worrying thing to do. Planning for a future after you have gone can be one of the most difficult and upsetting tasks of all. It is no surprise that many people delay thinking about making a will, but delaying and ultimately failing to make a will can have serious consequences for your family, especially if you have a family member with an intellectual disability.

Dying without a will means that you have died intestate and you will have no say over where your assets go. Dying intestate means that the strict rules of the Succession Act apply and certain people who are closely related to you inherit automatically.

## What is Intestacy?



Source: Inclusion Ireland Information Pack: A Guide to Disability Law and Policy in Ireland

This article aims to address some of the more frequent issues that arise with inheritance and people with intellectual disabilities and when drafting a will you should discuss the options in this document with your solicitor in light of your own personal circumstances.

A valid will must be in writing, signed by you and witnessed. The witnesses cannot inherit from you, nor can their spouse or civil partner. A will may also be invalid if you are acting under duress (pressure) or are being unduly influenced, or if you lack capacity (or as the legal profession call it 'of sound mind'). You choose an executor to carry out your wishes and the executor can apply to the Probate Office for a grant in order to administer your estate. It is worth remembering that your estate can be made up of all the assets that you own, as well as less valuable items that may have a great sentimental worth.

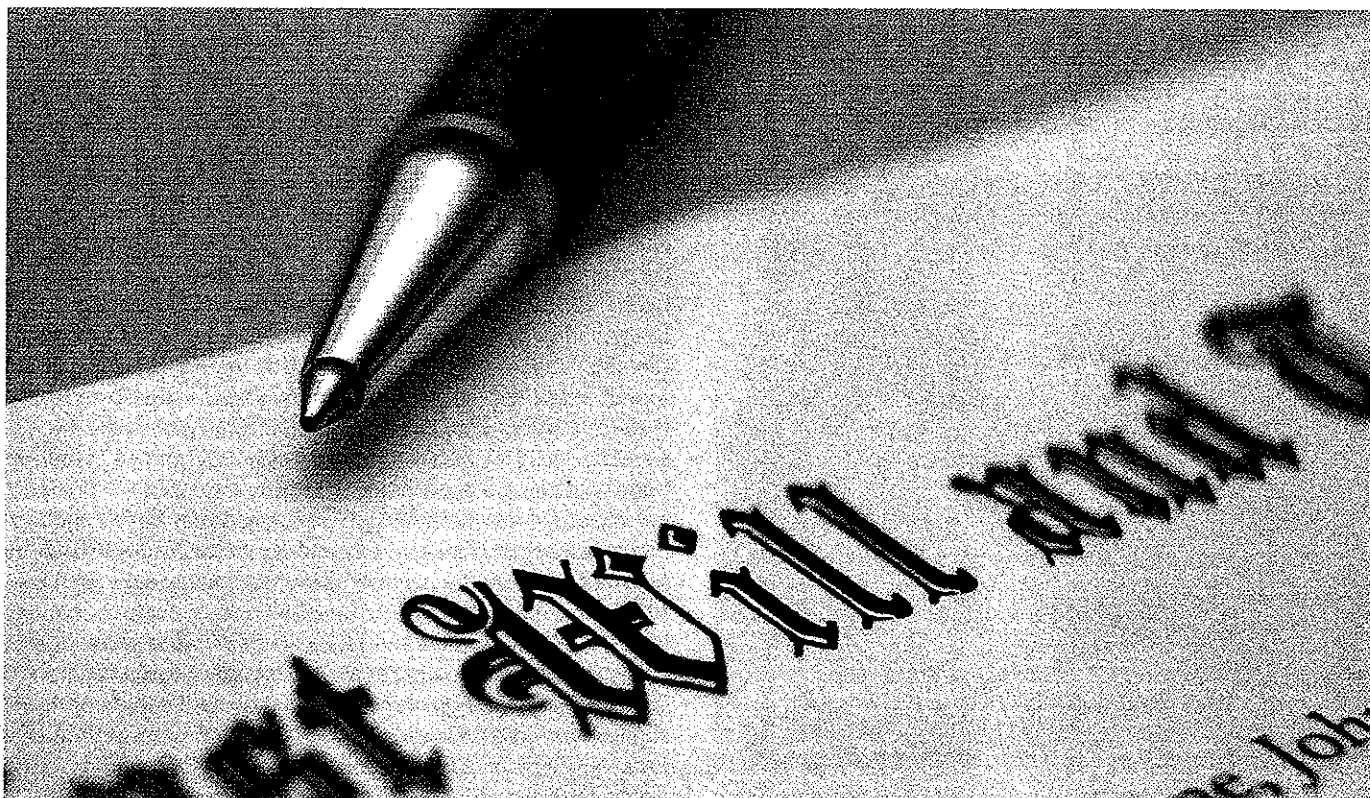
Generally speaking you have a lot of freedom in choosing those to whom you decide to leave a gift. However, your

spouse or civil partner is entitled to a share of your assets. If there are no children, the spouse/civil partner is entitled to one-half of the estate; if there are children, the spouse/civil partner is entitled to one-third of the estate. The children are not necessarily entitled to the remainder. You do not have to treat your children equally in your will, but any child who does not feel that he or she was treated fairly can challenge the will in court.

In planning for the future, many parents of people with intellectual disability want to achieve some certainty that their son or daughter will be looked after. Some people will leave a guardian named in their will. Although it may be prudent to have discussions about where your son or daughter will live after you have gone, it is not legally possible to 'leave' guardianship of a person who is aged 18 or over; no adult, whether they have an intellectual disability or not, can have a guardian, with the exception of the present Ward of Court system. While having a discussion with where your son or daughter will live is a good idea, it is necessary to involve them in this discussion as ultimately they will have the right to make that decision.

One of the biggest concerns a parent may have is that their son or daughter's income will not be affected. Where somebody is in receipt of a disability allowance it is important to note that the means test for this payment begins at €50,000. This means that the person receiving the payment may have capital (for example savings, investments, any property (other than own home) up to €50,000) before a reduction is made to their weekly payment. This does not mean that they may inherit €50,000, however, as the amount of capital that they already have is also taken into consideration.

Reduction or loss of the Disability Allowance can have an impact beyond the loss of income, as other supplementary benefits can be affected (e.g. medical card, free travel or household benefits). Another potential difficulty that can arise when a person with intellectual disability inherits can be the necessity of becoming a Ward of Court. Anyone who comes under the auspices of Ward of Court is governed by the Lunacy Regulation Act 1871. Originally designed for people with mental illness or for financial transactions involving older people, at the present time we are seeing an increasing number of people with intellectual disability are being taken into wardship; in 2012, over 100 people with intellectual disability were made a Ward of Court. A person is typically made a Ward of Court as a result of coming into possession of finances and where another person becomes concerned about their capacity or ability to manage the finances. While the protection of finances is a major function of Wardship of Court, it can have a significant impact on the other areas of a person's life. A person who is made a Ward of Court will see travel restrictions put in place, will need to seek permission for medical treatment, cannot marry and cannot make a will



without the permission of the court. It is extremely difficult to stop being a Ward of Court once the designation is made. For people with intellectual disability it is more difficult, because in order to be discharged an element of recovery is required and as intellectual disability is not an illness it is not something from which a person 'recovers'.

It is worth mentioning that the Lunacy Act is in the process of being reformed, with the Assisted Decision Making Bill 2013 having been published in July 2013. This legislation, when enacted, will overhaul the Ward of Court structure and it will mean that where there are concerns relating to an individual's capacity to manage his or her own financial affairs they can be supported in relation to their financial matters. The wide ranging restrictions of Ward of Court will no longer be in effect. However, we remain under the Lunacy Act regime until such a time as the new Bill is enacted.

Having posed some of the difficulties involved for people with intellectual disabilities and inheritance, it is worth mention that a lot of people will look to use a discretionary trust fund as a useful mechanism to avoid a lot of difficulties. A discretionary trust fund is a way of indirectly providing for another person (the beneficiary). In a discretionary trust, two or more people are appointed to oversee an asset to benefit another person.

One benefit of a discretionary trust fund is the assurance that the trustees will have an involvement in the beneficiary's life and that in being responsible for the financial decisions associated with the fund there may be a more general involvement in areas of the individual's life. Another significant benefit is that the concerns raised above, relating both the wardship of court and the Disability Allowance means test, are addressed. The individual does not inherit directly and is therefore not in possession of the asset or funds themselves. A beneficiary to a discretionary trust will not see their Disability Allowance means tested nor be subjected to a Ward of Court proceeding by virtue of the money being

within the trust fund.

There are taxation issues to consider as there is a Discretionary Trust Tax, but at the present time a discretionary trust fund for the benefit of a person who is incapable of managing their own affairs by reason of physical, mental or legal incapacity is exempt from tax.

For people with intellectual disability who want to make wills in their own right, it is worth bearing in mind that while there is no category of person who is not permitted to make a will, the Law Society of Ireland has stated that solicitors have a 'special duty of care towards vulnerable clients'. The characteristics of a vulnerable client are inexperience or youth, want of education or lack of knowledge /business acumen, mental illness and lack of ability to make an informed and independent decision regarding their affairs. While intellectual disability is not mentioned specifically, it may be captured under the final characteristic mentioned. Solicitors will be very mindful of a vulnerable client being put under duress or being influenced to make or change a will. Solicitors are also concerned that a client has capacity and will not take instruction from a client who lacks capacity. If the solicitor is concerned, they may ask them to get a letter from a doctor to confirm their capacity.

It is important to regularly review one's will and to remember that it can be changed/adapted at any time, if circumstances, the law or policy change—in order to reflect these changes in the will. Inclusion Ireland provides information on making a will and regularly holds training workshops for people with intellectual disabilities, their families and the people who work with them on this important decision.

**More information can be found online:**  
**Disability Allowance Means test:** [www.welfare.ie](http://www.welfare.ie)  
**Making a Will:** [www.inclusionireland.ie/content/page/making-will](http://www.inclusionireland.ie/content/page/making-will)  
**Discretionary Trust Tax:** [www.revenue.ie](http://www.revenue.ie)