Estate planning for children with disabilities

A trust and will can be used together to pass on assets and ensure that the child is cared for, financially and physically, after the parents' demise.

by **Riju Mehta**

Succession planning is an important exercise for passing on assets to the rightful heirs, but it acquires greater significance and urgency if one has children with special needs. While regular estate planning can work for kids with physical disabilities as they can manage their inheritance and finances, for those with cognitive, developmental or mental disorders, a more robust, structured and comprehensive plan needs to be in place.

"For such families, estate planning is not just about passing on wealth, but about ensuring that the child's care and financial security continue without disruption. Trusts, wills and guardianship form a dependable framework that protects the child for life," says Raj Lakhotia, Managing Partner, LABH & Associates.

Will, trust or both?

"Even in the absence of a will or a trust deed, succession Acts ensure that assets travel the path of legacy and that the disabled are not deprived of their right to ancestral property," says Rajat Dutta, Founder & Initiator, Inheritance Needs Services. The problem arises when the disabled child lacks the ability to manage his inheritance.

Wills: In case of a limited or moderate disability, where the child can take care of himself, a will may be enough. "A will also serves the purpose if there are reliable family members whom the parents can trust to take care of the disabled child," says Dutta.

However, a will may not be enough to safeguard the long-term interests of a severely disabled person or one with cognitive impairment because he will be unfit to manage the assets and deal with disputes if the will is contested by other legal heirs. It also fails to ensure the day-to-day supervision of the child's needs. "Leaving assets through a will does not guarantee proper care or a legal enforcement mechanism to ensure that the caregivers actually follow the parents' wishes," says Sneha Makhija, Head of Wealth Planning, Products & Solutions, Sanctum Wealth. In such a case, it is important to supplement the will with a trust.

Trusts: Parents can consider two types of trusts—an irrevocable private family trust or a testamentary trust through a will. While the former can be set up during the parents' lifetime, the latter comes into force only after they pass away. Vidhi Sharma (name changed) has chosen the first option for her 24-year-old son, who suffers from Autism Spectrum Disorder (ASD) and struggles with social conduct. "We have established a trust to ensure his care continues long after we are gone," says Sharma, who has earmarked a separate house to suit his specific needs in the trust.

A private family trust can be set up under the Indian Trust Act, 1882, and parents (settlors) can transfer assets and wealth into it to support the child (beneficiary) for his entire life. Not having adequate assets or running out of finances midway can defeat the purpose of a trust. Parents can also decide whether they want to set up the trust at one go or add assets over an extended period of time.

To set up the trust, a trust deed needs to be drafted and trustees appointed by the parents. "The trust deed provides guidelines for disbursement and care priorities, provisions for successor trustees to ensure continuity in management, and instructions about what happens to the trust after the child. Investment advisers can also be appointed to manage the finances effectively," says Neha Pathak, Managing Partner, Trust & Estate Planning, Motilal Oswal Wealth.

The second option is the testamentary trust, wherein the parents set up a trust through the will, and it is activated only after their demise. The executor of the will is the trustee, who administers the trust for the child. "This ensures a smooth transfer of assets into a controlled structure, prevents disputes, and allows the trustees to follow the parents' instructions on how money should be used and at what pace," says Lakhotia.

To avoid ambiguity and confusion, parents should ensure that the information in the will and trust deed are aligned. To provide holistic care for the child, they should also leave a 'caregiving checklist' or a 'care memorandum' along with the trust, detailing every aspect of the child's behaviour, dietary preferences and routine, his medical history and emergency protocols, etc.

Guardians & trustees

To ensure comprehensive care for the child, parents must appoint a legal guardian through their will, and trustees to manage the trust. However, one of the biggest mistakes they make is not appointing a legal guardian, assuming that family members will take responsibility for the child. "Unless a guardian is legally appointed under the appropriate disability laws, no one has the authority to take medical, residential or personal decisions," says Lakhotia.

Once the child turns 18, parents can apply for legal guardianship, as well as act as trustees, but they must list successors who can take over after their demise. They can also list guardians and trustees while they are alive so that the latter can familiarise themselves with the child's needs. "The parents may also appoint an impartial institutional trustee to ensure the child is looked after by the guardian after their lifetimes," says Bijal Ajinkya, Partner at Khaitan & Co.

Another mistake is selecting wrong people for these roles. The trustee controls the purse; the guardian controls the caregiving. "So a guardian should be someone who understands the child's temperament, medical needs and day-to-day routines, besides having the maturity to take the responsibility for the long term. A trustee, on the other hand, must be chosen for judgement, discipline and integrity, not sentiment," says Lakhotia.

Are trusts foolproof?

While a trust can be one of the safest structures, it can be undermined by weak drafting and poor governance. A trust gives trustees considerable power, and without the right checks, it can be misused. "Parents can mitigate this risk by choosing a mix of family members and professional trustees and by mandating annual audits and periodic reviews," says Lakhotia. "It may also help to have a 'protector', who oversees the trustees and can approach the court in case of mischief with the trust property," adds Ajinkya.

Problems also arise due to vague, incomplete or generic drafting. If the trust deed does not spell out the child's needs, trustees can use their own discretion, potentially diverting funds or ignoring the child.

riju.mehta@timesofindia.com

How to form a trust

STEP 1

Trust's purpose, child's needs
In consultation with a financial planner and an estate planning lawyer, define the trust's objectives, as well as the child's financial and physical needs in minute detail. Calculate the trust corpus you will need for the child's lifespan.

STEP 2

List assets for the trust
Identify assets, investments and inflows for the trust, and whether these are to be added immediately or over an extended period. Take into account inflation and administrative costs for trust management and expert fees.

STEP 3

Appoint trustees
Ideally, pick two people, one who is emotionally invested in the child's welfare and the other a professional who can manage the trust. Also consider people who are likely to outlive you, and alternatives in case they pass away or bow out.

STEP 4

Draft the trust deed
Pick a name/title for the trust and draft the trust deed on a stamp paper with a lawyer's help. Include details about assets, trustees and the beneficiary (child); child's healthcare needs; management of trust and assets; powers of trustees; and how the assets are to be managed or the trust dissolved in case of the child's demise.

STEP 5

Register trust deed
It's mandatory to register a private trust if it includes transfer of immovable property. Submit the application to the sub-registrar's office for a nominal fee. Attach the trust deed, attested identity proofs of settlor (parent), trustees and two witnesses, passport-sized photos, and other specified documents. Registrar provides registration certificate within a week.

STEP 6

Open bank account
Open a bank account with trust's PAN & TAN numbers.

Parents, don't make these mistakes

Underestimating trust corpus

Parents can miscalculate the financial needs of the child and the duration for which the corpus will be required. They need to provision for the child's lifetime, which may be 40-50 years after they pass away. They must also take inflation into account, especially because medical, therapy and caregiving costs will increase with time and age.

Relying only on a will

A will can help pass on assets, but doesn't consider how these will be managed and used for the child, or how he will deal with disputes if the will is contested. A trust ensures comprehensive protection for the child.

Forgetting caregiving checklist

A common mistake is not giving detailed instructions about the child's needs to guardians. These include child's behaviour, routine, physical and medical needs, day-to-day assistance and living arrangements.

Not listing guardian/trustees

Many parents believe that relatives will automatically take care of the child. So they fail to name legal guardians in wills and trustees, or alternatives, in case the appointees pass away.

Not updating documents

It's important to update the will and trust deed with information about assets, guardians, medical instructions, living arrangements, and other details.