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FAMILY TRUSTS FOR CHILDREN AND DEPENDANTS LIVING WITH DISABILITY IN KENYA

INTRODUCTION

For a parent of a child living with disability, planning for the future often begins with a deeply personal question: **"who will provide the care my child needs when I can no longer do so?"**

Estate planning helps you decide how your property will be managed and your loved ones cared for after your death. It also helps you prepare for a time when illness or injury may prevent you from making decisions for yourself. Where support may continue into adulthood, continuity of care deserves particular attention.

Section 20 of Kenya's Children Act, 2022 recognises the rights of children living with disabilities to dignity and to receive appropriate medical treatment, special care, education and training free of charge. An effective estate plan helps translate those protections into practical arrangements for a child's future. The same planning concerns may arise for adult children, grandchildren and other dependants living with disability.

WHY CARE CANNOT WAIT FOR AN INHERITANCE

A will remains a valuable estate planning tool, but your loved ones may still have to wait for the court to approve distribution of your estate according to your will before they receive their inheritance.

Delays in accessing support can also arise when someone dies without a will. This was the situation in ***Re Estate of Samuel Karime Kimani [2025] KEHC 681 (KLR)***. In this case, a daughter living with disability asked the court to release money from her late father's estate to support herself and her two children, who also had disabilities. She explained that her parents had previously provided KShs 35,000 a month for their upkeep. The court treated the requested payment as a partial distribution of the

estate. It declined her request because distribution had not yet been approved and the other beneficiaries had not agreed to the payment.

The case highlights a practical concern: your loved one's daily needs continue even when access to your estate's funds is delayed. An effective estate plan should therefore address both who inherits your property and how your loved one's care will continue.

HOW A FAMILY TRUST SUPPORTS CONTINUITY OF CARE

For a loved one who needs ongoing care, a family trust set up and funded during your lifetime can offer more reliable support than a will alone. A family trust is an arrangement in which you set aside money or property to support people you choose, such as your child. As the person creating the trust and transferring assets into it, you are the **settlor**. The people you want it to support are the **beneficiaries**. You appoint **trustees** to manage the trust's money and property according to the **trust deed**, a document setting out the trust's rules. You may also appoint an **enforcer**: an independent person or organisation who checks that the trustees carry out their duties properly.

An incorporated family trust can own property in its own name. Once you complete the legal transfers and register the titles in the trust's name, the ownership records are already in place. Those titles do not need to be changed through the court process for distributing your estate when you die. Together with carefully chosen trustees, clear rules on spending and independent oversight, these arrangements can help protect your child from relatives or others who might seek control of the assets under the pretence of providing care, then use them for their own benefit.

With money available and trustees authorised to make payments, the trust can continue funding your child's care without waiting for your estate to be distributed or seeking permission from other people inheriting from you. These benefits depend on completing the transfers and putting money into the trust during your lifetime. Signing the trust deed alone is not enough.

KEY CONSIDERATIONS WHEN BUILDING A TRUST AROUND YOUR LOVED ONE'S NEEDS:

1. Choosing the right trustees

The trust's success depends heavily on whom you appoint as trustee. You may choose trusted family members, professionals, a suitable organisation experienced in supporting persons with disabilities, or a combination. An organisation must be willing and legally able to accept trusteeship.

When selecting a suitable trustee, look for integrity, availability, an understanding of your child's needs and sound financial judgement. Provide for replacement trustees and clear procedures for making decisions and resolving disputes.

If you want the trust's assets to earn income and grow over time, consider appointing a **corporate trustee**, a company that provides professional trustee services. Choose one with experience in overseeing investments and working with qualified investment managers. The aim is to invest the trust's funds to help support your loved one throughout their lifetime, while keeping enough money available for everyday care.

2. Choosing caregivers and respecting independence

Care arrangements should be tailored to your loved one's needs and preferences, taking into account their disability, the skills and experience required of their caregivers, and the funds available.

You may appoint the same person as trustee and caregiver, keep the roles separate, or authorise trustees to appoint and replace suitable caregivers. The trust deed should explain how the trustees, caregiver and any legal guardian will work together on care plans, payments and reviews, with your loved one's involvement. Appointment as a trustee or caregiver does not automatically authorise someone to make medical or other personal

decisions; any necessary legal authority must be established separately.

Remember that your loved one's wishes and independence should remain central to these arrangements. Section 7 of the Persons with Disabilities Act, 2025 recognises that **having a disability does not, by itself, take away a person's right to make their own decisions**.

3. Choosing the type of trust that will support your loved one

You can decide how much flexibility the trustees will have by choosing a trust structure that suits your family. A **fixed trust** sets out what each beneficiary is entitled to receive. A **discretionary trust** allows trustees to decide who receives support, how much and when, within the rules of the trust deed.

A **hybrid trust** combines both approaches. For example, you can require the trustees to pay for regular essentials, such as housing, treatment and caregiver costs, while giving them flexibility to meet unexpected expenses or changing care needs.

Some flexibility can be particularly helpful because your loved one's care needs may change over time. It allows the trustees to respond to new treatment needs, unexpected expenses and other circumstances that you cannot fully predict when setting up the trust.

4. Protecting your loved one from financial exploitation

Your child's need for care should never become an excuse for someone else to misuse the money set aside for them. A relative, friend or caregiver may claim to be meeting your child's needs while using those funds for their own benefit.

In ***Re Estate of MG [2020] eKLR***, a daughter living with disability had initially been left out of the proposed inheritance arrangements. Her brother later claimed he had sold land allocated to her to pay for her care, but provided no evidence of the sale or the amount received. The court rejected the unfair distribution and ordered that her share be held in trust.

To reduce this risk, your trust deed should require clear financial records and receipts, specify who approves caregiver payments, and provide for regular independent checks that the care being paid for is actually being provided. Appointing an enforcer, discussed below, can provide an additional safeguard.

5. Independent oversight through an enforcer

An enforcer provides additional oversight under section 3J of the Trustees (Perpetual Succession) Act. This may be an independent lawyer, suitable disability-support organisation or professional corporate provider.

The enforcer cannot also be a trustee of the same trust.

The deed can require annual reviews, or more frequent checks. An enforcer can inspect accounts, require action on breaches and pursue legal remedies.

6. Dignity and privacy

A trust can support discreet administration and reduce the need to expose sensitive family circumstances in routine succession proceedings. Protect medical and personal information through careful recordkeeping and controlled access. Privacy remains subject to lawful disclosure, and disputes may still require court intervention.

CONCLUSION

Your loved one's future deserves the same care and attention you give them today. With the right people, clear safeguards and adequate funding, a family trust can help provide continued care while protecting their dignity and independence.

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PLANNING FOR THE COSTS

Budget for a one-off legal fee to set up the trust, together with the costs of transferring assets into the trust. Fees for professional trustees and caregivers should be agreed separately with the service providers in service level agreements setting out their services, responsibilities and charge.

HOW THE WELL PRACTICE CAN HELP

At the Wealth, Estate, Legacy & Lifestyle Advisory (WELL) Practice at CM Advocates LLP, we help you put arrangements in place for your loved one's continuing care, dignity and financial security. From establishing a family trust to preparing a will and coordinating appropriate guardianship arrangements, we work with you to develop an estate plan that reflects your family's circumstances and your wishes for the future.

To discuss your family's needs and explore your options, contact us at law@cmadvocates.com and wellpractice@cmadvocates.com.

For More Information

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