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## Trusts for Persons Receiving Disability Assistance

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This document answers briefly the following frequently-asked questions about trusts, with a particular focus on persons receiving disability assistance in British Columbia:

What is a trust?

Why have a trust?

In a nutshell, what does a trust do?

What is the trustee's role?

What kinds of trust are there?

What are the trustee's rights and obligations?

How is a trustee selected?

What does a trust agreement look like?

Practically speaking, how is a trust set up (procedure, time, cost)?

Practically speaking, how does a trust operate?

What must be reported to the government about a trust?

How does a trust made during lifetime fit with a Will?

In the answers below, "your child" refers to a person who receives income assistance from the BC government under the *Employment and Assistance for Persons with Disabilities Act*, and "the ministry" refers to the BC Ministry of Housing and Social Development.

### **Q: What is a trust?**

A trust is a legal relationship, created by an agreement or a Will, that requires someone (the "trustee") to hold money or other assets for someone else (the "beneficiary").

In most cases, a trust is set up by a written document in one of three ways:

1. in a trust agreement signed by a person such as you while you are alive; or
2. in your Will, if that Will is still in effect when you die; or
3. by your child with her own money. So far, at least, the ministry policy would allow your child to set up a trust for her own benefit using money she has just inherited.

### **Q: Why have a trust?**

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Your child's desired level of spending may be higher than her disability assistance, or if your child is okay now her future expenses may increase. Also there is no guarantee that the disability assistance program will continue or that your child will continue to qualify for it. The current rules allow your child to own a home, a car, and other personal items, but if she owns more than \$3000 in cash or investments (outside a Registered Disability Savings Plan) then her disability assistance cheques will be reduced. Having a trust allows you or your child to save money for her future needs and, within certain limits set by the ministry, to spend more now and in the future than disability assistance pays or is likely to pay.

**Q: In a nutshell, what does a trust do?**

If it is set up and operated properly, a trust is a way to set aside money for your child's current and future needs, without reducing her disability assistance. It can do this because the trust fund is held in the name of the trustee, not in your child's name, and because the trustee is allowed to spend money for your child if the trustee follows the ministry's rules.

The trust also controls the distribution of any money that is left in the trust fund after your child dies, such as giving the balance to your other children or other family or to a charity.

**Q: What is the trustee's role?**

The trustee is the person who holds the money or other assets, "in trust". It is possible, though not necessarily advisable, for your child to be a trustee. Other possible trustees are a family member (including you), a friend, or a professional trustee (a lawyer or trust company). More than one person can be trustees together, provided they can co-operate.

The trustee invests the trust fund, keeps the trust's financial records, files its tax returns, and probably (depending on the terms of the trust) decides when and how the trust fund is spent while your child is alive.

**Q: What kinds of trust are there?**

There are two basic types of trust: (1) discretionary and (2) non-discretionary, and the ministry treats them each differently.

In a discretionary trust, the trustee has complete control, including deciding whether any of the trust fund is used for your child, and if so, when and how it is used. As a beneficiary, your child can ask the trustee to consider paying out some of the trust fund, but she cannot force the trustee to pay out anything. By contrast, the beneficiary of a non-discretionary trust has more control over how and when the trust fund is spent; in that case your child can demand payment by the trustee of some or even all of the trust fund, at any time.

The main advantages of a discretionary trust are that:

1. by the general law of trusts, it cannot be referred to by the ministry to reduce your child's disability assistance. It also protects the trust fund from other creditors that your child may have. By contrast, if the ministry's policy changes then a non-discretionary trust could be referred to by the ministry to reduce your child's disability assistance, and it does not protect the trust fund from other creditors of your child.

2. there is no limit to the amount of money that can be held in a discretionary trust, whereas current ministry policy only allows a non-discretionary trust to hold \$100,000 unless special permission is granted to hold a larger amount.

The main disadvantage of a discretionary trust is, of course, that the trustee has the power to deny your child any benefit from the trust fund, if he decides to do so. Therefore, if you wish to use a discretionary trust it is critical that you choose a trustee (and a backup trustee) who you are confident will put your child's best interests first.

You may also have heard of a testamentary trust. This is simply a trust made by Will or life insurance. It is called "testamentary" because it only comes into effect as a result of someone's death rather than during lifetime. It can still be discretionary or non-discretionary.

### **Q: What are the trustee's rights and obligations?**

The document that sets up the trust also describes the rights and responsibilities of the trustee. The trustee is usually given broad powers to invest and manage the trust fund and, if the trust is a discretionary trust, to decide if, how, and when to spend the trust fund. The trust document can also set the trustee's fee for acting as trustee. If it does not, the general law of trusts allows the trustee to claim a reasonable fee, payable out of the trust fund.

The trustee has obligations towards your child as beneficiary, including: acting always in good faith and not with malice or for some improper purpose; investing the trust fund carefully as a reasonably prudent person would do; not benefiting personally from the trust fund (except for payment of his trustee fee); and reporting to the beneficiary at any time.

### **Q: How is a trustee selected?**

Very careful thought must be given to picking the right person or people to carry out the role of trustee, including appointing alternates. Consider the following factors in particular:

- Someone you really trust to look after the trust fund diligently for many years
- Someone whose life situation is stable, i.e. is in good health, is unlikely to move away, and is unlikely fall into an addiction or similar trouble
- Someone who knows your child and her needs and circumstances well
- Someone who is able to deal with bureaucratic or business matters
- Someone who lives relatively close to your child or can be in close contact
- Someone who is not also a beneficiary of the trust (this is not always possible as siblings or other family members can make very good trustees).

It is always advisable, before naming a person as a trustee, to talk to him about it. If you have any doubts about appointing him as trustee, it is better not to, or at least to appoint another person as co-trustee to compensate for the first trustee's possible shortcomings. For example, your child may be a good choice as trustee if she is named together with another person as co-trustees.

### **Q: How can a trustee be replaced or substituted?**

The trust agreement should include a clause that allows the trustee to resign, at which time the alternate trustee, assuming there is one named already, would take over.

The trust agreement can also include clauses that govern how the trustee can be replaced, including allowing your child or some other person to appoint an alternate trustee if there is no alternate trustee in place, or even allowing your child or some other person to remove the trustee and replace him with another trustee at any time.

If the trust agreement does not include the clauses just described, then a court application may be required in order to fill a vacancy, remove a trustee or appoint an alternate trustee.

### **Q: What does a trust agreement look like?**

A trust agreement is a document, usually 5 to 10 pages long, with the following sections:

1. Parties (i.e. names of trustees and beneficiaries)
2. Definitions
3. Initial trust fund and later additions to the trust fund
4. Life benefit terms (i.e., discretionary or non-discretionary) for your child
5. Final benefit terms of distribution after your child has died
6. Replacement of trustee
7. Powers of trustee
8. Signatures
9. Schedule describing or attaching the initial trust fund

A trust made by a Will is simply a section of the Will itself that deals specifically with the part of the estate that is set aside for your child. It is typically shorter and less detailed than a trust agreement, although there is no requirement that this be the case.

### **Q: Practically speaking, how is a trust set up (procedure, time, cost)?**

Because the law is constantly changing, you should hire a lawyer to prepare the Will or trust agreement that creates the trust. This is the typical procedure for setting up a trust during your lifetime with the help of a lawyer:

1. collect your child's personal information before meeting with the lawyer
2. select possible trustees and confirm they are willing to act
3. meet with the lawyer to discuss your ideas and give instructions for the trust document to be prepared by the lawyer after your meeting
4. receive and review a draft of the trust agreement, and instruct the lawyer on any changes to the draft before it is signed

5. meet with the lawyer again to sign the final version of the trust agreement, and arrange for the trustees to sign it
6. store the original trust agreement in a ring binder (where all other documents relating to the trust will also be stored in the future), and make photocopies to give to the trust's bank, to the trust's accountant, and to your child's financial aid worker
7. the trustee opens a bank account for the trust, using the initial trust fund as a deposit
8. the trustee decides about investing the trust fund, and keeps a diary or record of all activities relating to the trust, including trustee decisions, instructions from the trustee to others (e.g. the bank), and receipts and disbursements from the trust fund
9. the trustee can consider purchasing life insurance on his life to cover any additional costs incurred by the trust as a result of his unexpected death, and/or on your child's life to cover the costs incurred by the trust as a result of your child's death
10. advise your child's financial aid worker of the trust's existence and trustee details

From start to finish, a trust is typically set up in 3 to 4 weeks, depending on how busy you and your lawyer both are. If you do your homework, your lawyer should be able to set up a simple trust for under \$4,000. That cost should be made up quickly by preserving the money that goes into the trust and protecting your child's disability assistance in the future. (The exception is a trust in a Will, which you pay for when the Will is made but does not start to make up the cost until after you have died).

#### **Q: Practically speaking, how does a trust operate?**

Generally the trust fund is simply invested and re-invested by the trustee unless a payment is made to your child or to another person for the benefit of your child. For a discretionary trust, payments may happen at the request of your child that the trustee agrees with, or on the trustee's own motion. For a non-discretionary trust, payments usually happen at your child's request. The trustee also files a tax return every year, and reports to the ministry.

#### **Q: What must be reported to the government about a trust?**

The ministry has the right to ask for information about the trust at any time. At the very least, the trustee or your child must report to the ministry every year:

- how much money was paid out from the trust
- what the money was used for, with supporting documentation if requested
- if any new money was deposited to the trust.

If all the money spent was in accordance with the ministry rules in effect at that time, then your child's disability assistance will not be reduced. Under the ministry's current policies, money spent on the following items:

- devices or medical aids that improve your child's health or well-being
- caregiver or other such disability-related services
- education or training

- necessary maintenance on your child's home
- renovations or changes to your child's home that make it easier for her to live there because of her disability

will not reduce her disability assistance, no matter how much is spent on them, provided that the payments are made directly from the trust (i.e., not to your child to reimburse her for money she has spent on those items).

In addition, under the ministry's current policies, your child can also receive up to \$5,484 from the trust each year, including payments directly to her, to help her live more independently. This general catch-all category does not have specific guidelines; if the trustee is not confident a payment will qualify, he should check with the ministry first.

### **Q: How does a trust made during lifetime fit with a Will?**

If you set up a trust for your child during your lifetime, the trust operates the same before and after your death (unless of course you are the trustee, in which case a new trustee must take your place). The trust fund also does not form part of your estate, so no probate fees are payable on the money in it, and the trust fund cannot be called on to pay your final debts or income taxes or to fund any gifts in your Will if the other assets in your estate are not enough to meet those requirements.

If the trust is the only provision you are making for your child – that is to say, if you are not also giving a significant share of your estate to your child in your Will – then your Will should mention the existence of the trust in order to explain that it is not unfair to your child that she not be included in your Will. For this reason, it is a good idea to have your Will and your trust agreement prepared by the same lawyer.

### **Q: Where to get more information?**

Developmental Disabilities Association of BC  
Phone: (604) 273-9778  
[www.develop.bc.ca](http://www.develop.bc.ca)

B.C. Coalition of People with Disabilities  
Phone: (604) 872-1278  
[www.bccpd.bc.ca](http://www.bccpd.bc.ca)

Coast Foundation Society  
Phone: (604) 675-2343  
[www.coastmentalhealth.com](http://www.coastmentalhealth.com)

Planned Lifetime Advocacy Network  
Phone: (604) 439-9566  
[www.plan.ca](http://www.plan.ca)

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