

Discretionary Trusts

This information is for people who want to give money to a relative or friend who will be unable to manage a direct gift by themselves, or whose receipt of an outright gift may affect their entitlement to Disability Benefits.

The information provided in this kit is very general. You should always consult with professional advisors such as your lawyer and accountant regarding the full range of options that may be available to you when planning to provide for a vulnerable friend or relative. A Discretionary Trust may not always be the best option available to you.

Trusts

A trust is a relationship established where one person, the settlor, gives property to another person, the trustee, for the use or benefit of another or others, the beneficiary (s). A beneficiary can be a beneficiary of the income of the trust property, the capital or both.

Trusts can also be non-discretionary, where the terms of the trust specifically direct the trustee as to what each beneficiary is to receive, and when. Our readers are, however, generally more interested in discretionary trusts, since such trusts can often provide long-term financial security for a vulnerable family member.

A discretionary trust provides the trustee with complete discretion as to what monies, if any, will be spent by the trust, when and for what. Typically, the trustee is given absolute discretion as to what will be spent from the income and/or capital of the trust for the benefit of a vulnerable family member, and is directed to transfer what is left in the trust, if anything, upon the death of the vulnerable family member, to the ultimate beneficiary (e.g. one or more other family members or a charity of the settlor's choosing).

One can set up a Living Trust (Inter Vivos) to start during your lifetime, or a Testamentary Trust (usually in a will), which starts upon your death. Trusts can also be revocable, where the settlor retains the right to terminate the trust, or irrevocable.

Why set up a Trust?

- Trusts allow families to plan for the future.
- They can provide a person with a disability some long-term financial security and provide some protection against their creditors or those who may have claims against them.
- A trust allows the trustee to take steps to preserve disability benefits, if such is advisable, by purchasing assets or services that do not affect a person's entitlement to benefits, or limiting such expenditures such that a person will only be disentitled for a relatively short time.
- A trust can be of assistance to a person who requires assistance with money management.

About Disability Benefits

The Disability Benefits Program is a B.C. government plan that provides income and medical or health benefits to people with disabilities who qualify for assistance. Formerly called GAIN for the Handicapped, the program is administered by the Ministry of Human Resources (MHR).

In order to qualify for Disability Benefits, one must:

- live in B.C.
- be 18 years or older
- have a severe mental or physical disability (like Schizophrenia) as defined by the program
- own no more than \$3,000 worth of certain assets such as money, property and investments. A person may, however be able to own a car or home that they live in and still be entitled to receive some benefits.
- receive no unearned income whatsoever (this would include income paid to you from a trust), and
- receive earned income of not more than \$400 per month.

If you need to learn more about how to receive Disability Benefits, call the Legal Services Society at (604) 601-6000 and request their Booklet entitled "*Have a Disability? Need Money?*"

Gifts and Disability Benefits

Gifts are required to be reported by recipients of disability benefits and are deducted dollar for dollar from a person's Disability Benefits.

Inheritances and Disability Benefits

Nicole has Schizophrenia and lives on Disability Benefits. Her family cannot afford to support her, but would like to help her out.

An inheritance is a gift. If Nicole inherited \$10,000, her Disability Benefits could be cut off and she would not be eligible for benefits again until her non-exempt assets totaled \$3,000 or less.

Setting up a Trust

It is possible to set up certain types of trusts without affecting a person's entitlement to benefits. Such a trust could be testamentary, created according to the terms of a will, or, if someone wanted to provide some assistance to Nicole right now, the trust could be a living trust, which would start right away, and could be added to as time goes by. Typically, a trust would run during Nicole's lifetime and anything remaining in the trust would pass upon Nicole's death to one or more other beneficiaries selected by the settlor. Such beneficiaries may be Nicole's children or a charity. For some people whose lives have been touched by schizophrenia, charities of choice would be the *Mind Foundation*, a Foundation of the British Columbia Schizophrenia Society (BCSS).

Discretionary Trusts

Because the trustee has complete discretion as to what a vulnerable family member such as Nicole will receive from the trust, the property in a Discretionary Trust is NOT considered an asset under BC Benefits regulations and will not therefore affect Nicole's entitlement to Disability Benefits. Payments made from the trust to or for Nicole may, however, affect her benefits (see 'What can the Trust pay for?'). The Trustee appointed by the settlor to administer the trust has complete discretion to decide how much money will be spent, when and for what. The trustee can spend all of the trust, some of it, or none of it. The only right that the beneficiary has is to call upon the trustee to exercise the trustee's discretion to spend or not to spend. Because of the discretion given to the trustee, the settlor must be very careful in their choice of Trustee(s). The Ministry will not permit the person who benefits from the trust to be a trustee of a Discretionary Trust.

Non-Discretionary Trusts

Because a beneficiary has a fixed interest in a Non-Discretionary Trust, specified in the document itself, the beneficiary's interest will be considered to be an asset or income under the BC Disability Benefits program, and this may work to reduce or even eliminate a person's entitlement to benefits.

In certain circumstances however, the government now allows a person receiving disability benefits to have a lifetime exemption of \$100,000 (and more, with special approval in special circumstances) without it affecting their benefits if the sole expenditures from the trust are on account of certain disability-related costs, discussed below. The recipient can even be the trustee of such a trust, though many recipients may not be capable of administering their own trust.

What can the Trust pay for?

In order to ensure that Nicole can still receive her Disability Benefits, money from a Discretionary Trust or a trust established by Nicole under the \$100,000 exemption can ONLY be spent on:

- medical aids and/or supplies that improve the health or well-being of the beneficiary;
- renovations or changes to a home to accommodate a beneficiary's needs that relate to their disability;
- repairs and/or maintenance to the beneficiary's home, including appliances;
- education and/or training;
- caregivers and home support services.

There is no limit to the amount of money that can be spent on these items.

In addition, the Trust can spend up to \$5,484/year on “*any other item or service necessary to promote the independence of the person with the disability*”, without it affecting the beneficiary's disability benefits.

According to the rules, all of these items must be purchased by the trust. Money cannot be given directly to the person with the disability.

The Trustee(s) can decide to spend money on other things, but such expenditures may affect the beneficiary's Disability Benefits. Other options that can be considered by a trustee to preserve disability benefits include:

- the purchase of assets for a beneficiary that are exempted from consideration (such as a home or car, presently),
- limiting payments to one or two particular months, so that a beneficiary will only be cut off their benefits for a limited time.

Please note that there is no certainty that government rules relating to Disability Benefits will not change in the future and that it is therefore important that you consult with your professional advisors before making any decisions or plans that may relate to Disability Benefits.

Setting up a Discretionary Trust

The things that you will need to decide when setting up a Discretionary Trust are as follows:

1. Who to name as Trustee(s).
2. What instructions or information you want to provide to the Trustees regarding your wishes.
3. Who you wish to have as the ultimate beneficiary(ies) of anything left in the trust if your vulnerable friend or family member dies. If you decide that you wish to include BCSS the legal names are as follows:
 - For use by the BCSS – ‘The British Columbia Schizophrenia Society’
 - With the payment made to the Mind FoundationIf you wish, you can also specify how you would like the funds to be used, (e.g. advocacy, research, housing, education, etc.)

Trustees

If you are setting up a trust to begin now, you could potentially appoint yourself as a trustee, though there will likely be good tax reasons not to. You need to think very carefully about who to appoint as a trustee. Don't forget, your trustee(s) will:

- look after all the assets of the trust (money & property);
- decide what to spend money on;
- decide what not to spend money on.

In the absence of a clear direction as to who is to take priority, the trustee(s) must do what they think is best for both the *beneficiary* and the *ultimate beneficiary*.

Choosing a Trustee

Here are some things to consider when choosing a Trustee:

- Appointing more than one trustee. If one trustee dies or is unable to act, the other trustee will still be there. Also, two trustees can make decisions together and share the responsibility.
- Appointing one or more alternate trustees, to take over if anything happens to one of the original trustees.
- Being a trustee is not a simple job. Be sure the person has the right skills and understands how much time and effort the job may take. (Trusts must keep detailed records of how money is spent and must file an annual tax return, as they are considered a separate legal entity). They should also know something about disability benefits, if you wish them to try and preserve them, or be prepared to find out.
- It is usually best if the trustees and beneficiary know and respect each other. Your trustee will be required to consider the needs and best interests of your vulnerable family member or friend and communicate with them.
- Trustees should get along with each other.
- At least one trustee should be easy for the beneficiary to get in touch with.
- Be aware of possible 'conflict of interest' issues. For instance, if the *ultimate beneficiary* is a trustee, they may be more concerned about keeping money in the trust than meeting the beneficiary's needs. One way to avoid this potential conflict is to consider appointing at least one trustee who is not seen as having a conflict of interest. This other trustee could be an individual or a trust company. A paid caregiver should not be a trustee.

Professional Trustees

Advantages

- They are experts at managing money and keeping financial records and know what they are doing.
- A well-established trust company is likely to be around for as long as the trust continues.
- The company doesn't get involved in family arguments.

Disadvantages

- Trust companies charge fees. (Note: any trustee is entitled to charge trustee fees). Most trust companies are reluctant to handle trusts under \$200,000 on the basis that the administration costs exceed the benefits available to the beneficiaries.
- Trust officers may change over time, necessitating the establishment of new relationships.
- Trust companies are, quite properly, cautious regarding expenditures and may need to be convinced that an expenditure is necessary.

One option to consider is to appoint a trusted friend or family member, who knows the needs of your family member and how you would want expenditures to be made, together with a professional trustee, who will be able to handle the day to day record- keeping and administration.

Some settlers provide letters of wishes to the trustee outlining their priorities and values, or incorporate such wishes in their will. You should be aware however that such a letter is not binding upon the trustee, since the trust itself has provided the trustee with absolute discretion as to expenditures from the trust. For most settlers, it is important that the trustee consider the needs of the vulnerable family member paramount to that of any other beneficiary. You may therefore wish to consider including a specific reference to this in your trust deed or will, thereby relieving the trustee of the duty to maintain an even hand between beneficiaries.

When Trustees Quit or are Removed

If the trustee does not appear to doing a good job, a friend or family member can ask the court to investigate and the trustee might be removed. This is usually a long and expensive process.

A trustee can also resign if s/he doesn't want to do the job anymore. It is possible to set up a trust so that the beneficiary has the right to change trustees. This can sometimes be a good idea, because it makes it easier to replace a trustee who dies or quits when there is no alternate trustee.

Giving Your Trustees Special Powers

Trustees are regulated by the B. C. Trustee Act. This Act limits the investment powers of trustees to a narrow range of safe investments, mostly government guaranteed. If you want to give your trustees broader investment power, so that the trust may hold real estate, mutual funds or stocks, your trust deed or will must include a provision to this effect. You may also wish to include a provision allowing your trustee the power to buy and sell property such as a residence for the person with a disability. Your trustees will have no such authority unless you specifically provide so.

Where to Look for Professional Help

Be sure to shop around and ask questions. If you are thinking of appointing a professional as a trustee, ask them about their services, their philosophy, and what their fees will be.

You should also obtain appropriate legal and financial advice. Before you do anything in terms of a trust, make sure you are advised as to the likely tax consequences of any transfer of property into a trust, both to you and to the trust itself.

Trusts are complicated. Get the appropriate professional help to set one up. Make sure that the professionals with whom you are dealing are familiar with trusts and, in particular, with discretionary trusts and other options that may be available to you. Remember, also, that preservation of disability benefits is not the only consideration.

In order to assist you, the last pages of this document contain a list of lawyers in the various geographic areas of B.C. who practice in the area of wills and estates and have indicated that they are prepared to assist people in this area. Be sure to ask a lot of questions, including how much they charge.



In response to your request for this information, the following is a list of lawyers with knowledge of wills and estates, and in particular, discretionary trusts and/or charitable giving.

Please note the provision of this list by the BC Schizophrenia Society in no way endorses practice of any professionals listed. It is provided solely as a service to persons who request it, providing them with access to professionals with knowledge in these fields. When considering the services of a professional, it is wise to shop around. Ask lots of questions. Find out how much they charge, how much experience they have with trust and tax laws, and if they understand disability assistance law.

If you should use the services of a lawyer on this list, please feel free to let us know your level of satisfaction with their service. If you have worked with other lawyers whom you would recommend to others, please let us know, so we might add them to our list.

Vancouver

Mary Hamilton Davis & Company,
2800 Park Place
666 Burrard Street,
Vancouver, BC V6C 2Z7
604-643-6490 Fax: 604-605-3764
Email: hamilton@davis.ca

Sadie Wetzel Davis & Company,
2800 Park Place
666 Burrard Street,
Vancouver, BC V6C 2Z7
604-643-6499 Fax: 604-605-3764
Email: wetzel@davis.ca

Hugh McLellan McLellan Herbert
310 – 800 West Pender Street
Vancouver, BC V6C 2V6
604-683-5254 Fax: 604-683-5212

Kay Vinall Brook Vinall Associates
1500 - 736 Granville Street,
Vancouver, BC V6Z 1G3
604-688-3272 Fax (604) 688-6540
Email: kvinall@telus.net

Ken Kramer KMK Law Corporation
807-1112 Pender Street West,
Vancouver, BC V6E 2S1
604-694-0999 info@kmklaw.net

North Vancouver

Manijeh Moieni
Echelon Law Corporation
107 – 1975 Lonsdale Ave,
North Vancouver, BC V7M 2K3
604-987-8660 mmoieni@echelonlaw.com

Surrey/Whiterock

Kim Karras
Brawn, Karras
301- 15117 101 Ave,
Surrey, BC V3R 8P7
604-542-5344 kakarras@bkslaw.com

Mary-Jane Wilson
Greg Wilson and Rasmussen
15127 100th Avenue Ste 300
Surrey, BC V3R 0N9
604-583-7917 mjwilson@gwrlawyers.com

Victoria

Fiona Hunter
Horne Coupar,
3rd floor,
612 View Street,
Victoria, BC V8W 1J5
250-388-6631 fhunter@hc-law.com

Jennifer Coulter
Jones, Emery
1212 – 1175 Douglas Street,
Victoria BC V8W 1J5
250-385-1383
Email: jcoulter@jonesemery.com

Nanaimo

D. Peter Ramsay
Ramsay Lampman
111 Wallace Street,
P. O. Box 667, Stn. A,
Nanaimo, BC V9R 5L9
250-754-3321 pramsay@rlr-law.com

Qualicum Beach

Douglas Marshall
Marshall & Lamperson
710 Memorial Ave,
Box 879, Stn Main
Qualicum Beach, BC V9K 1T1
250-752-5615 Fax: 250-752-2055
Email: lawfirm@bcsupernet.com

Prince Rupert

Robert D. Punnet
Punnett & Johnson,
7-222 3rd, Ave W.,
Prince Rupert, BC V8J 1L1
250-624-2106 250-627-8805
pj@citytel.net

Kelowna

Theresa M. Arsenault
Pushor, Mitchell
3rd. Floor,
1665 Ellis Street, Kelowna BC V1V 2B3
250-869-1110 Fax: 250-762-9115
arsenault@pushormitchell.com

Geoffrey W. White
Geoffrey W. Law Corporation
434 Glenwood Ave,
Kelowna, BC V1Y 5M1
250-712-2205 gwhite@bcestatelaw.com

Joel A. Wiseman
Salloum Langin
327 Bernard Ave,
Kelowna, BC V1Y 6n6
250-861-5678

Nelson

Susan Wallach
4- 577 Baker St,
Nelson, BC V1L 4J1
250-352-6124 Fax: 250-352-3145



British Columbia Schizophrenia Society – Provincial Office
#201-6011 Westminster Hwy. Richmond, BC V7C 4V4
Tel 604.270.7841 bcss.prov@telus.net www.bcss.org