

DISABILITY & ESTATE PLANNING

In Association with

Family Support Institute of BC

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ABOUT ME:

- ▶ Over 20 years experience practicing exclusively in the area of estates & trusts law, including estate planning, administration, litigation, elder law and mediation
- ▶ Strong relationship with the disability community and other related stakeholders
- ▶ Current Chair of the Emergency Medical Assistants Licensing Board (Province of BC Cabinet Appointment) and the BC Centre for Elder Advocacy And Support
- ▶ Past Chair of the National Board of Directors of Muscular Dystrophy Canada

OUTLINE FOR TONIGHT'S DISCUSSION:

- ❖ Disability Landscape For Persons with Disabilities (PWD)
- ❖ Key Provincial Legislative and Policy Changes For Disability and Trusts
- ❖ Trust Planning For Persons with Disabilities
- ❖ Alternate Decision-Making

TRENDS IN BC'S DISABILITY LANDSCAPE

- The Province of BC (SDSI) provided approximately \$976 million in disability assistance in 2015-16, an increase of 162% since 2001-02.
- Funding of more than \$5 billion a year is being allocated towards programs and services for people with disabilities.
- The Province has set a goal of making B.C. the most progressive place in Canada for people with disabilities with the Accessibility 2024 Plan.

RECENT DEVELOPMENTS WITH PROVINCIAL DISABILITY BENEFITS

- December 1, 2015 - Key regulatory and policy changes introduced by the BC Government in relation to income support for people with disabilities under the *EAPDA*:
 - British Columbians receiving disability assistance are now able to hold significantly more assets and receive financial gifts and inheritances with no impact on their monthly assistance.

DISABILITY AND ESTATE PLANNING

- Awareness of the many practical, tax and disability benefit considerations is necessary when designing an estate plan that includes a person with a disability.
- SSI provides disability assistance to Persons with Disabilities (PWD) who require financial or health support and are unable to fully participate in the workforce.
- Proper planning will ensure PWD's remain eligible to receive disability assistance.

ELIGIBILITY FOR DISABILITY ASSISTANCE: PWD

- To be eligible, under section 2(2) of the *Employment and Assistance for Persons with Disabilities Act (EAPDA)*, you must:
 - Be 18 years old;
 - Have a severe physical or mental impairment that is expected to continue for more than two years;
 - Be significantly restricted in your ability to perform daily-living activities;
 - Require assistance with daily living activities.

POLICY CHANGES AFFECTING DISABILITY BENEFITS

- **I. Prescribed classes for automatic PWD designation**
(Sept. 2016) - Shorter PWD application form confirming an applicant's eligibility into one of the following classes:
 1. People receiving support and services from Community Living BC (CLBC)
 2. People enrolled in the Ministry of Children and Family Development At Home Program
 3. People enrolled in BC PharmaCare Plan P – Palliative Care
 4. People determined as disabled by the Government of Canada and eligible for the Canada Pension Plan Disability Benefit

ASSET AND INCOME EXEMPTIONS

- **Asset Limit Increases for PWD** (December 1, 2015)
 - \$100,000 for a single, couple, or family where one person has the PWD designation (from \$5,000)
 - \$200,000 for a couple where both adults have the PWD designation (from \$10,000)

- **Gifts, inheritances and trust payments exemptions**
 - A first in B.C., PWD's will be able to receive cash gifts, inheritances and trust payments with no effect on their eligibility for assistance.

ASSET AND INCOME EXEMPTIONS CONT.

- **Earnings exemption** (December 1st, 2015) - Annualized Earnings Exemption of \$9,600 per year (formally \$800 per month)
- **Child support payments exemption** (September 1st, 2015) – Child support payments, CPP orphan's benefit & WorkSafe BC benefit for a surviving child of a deceased worker now also exempt from income calculation.

TRUSTS AND DISABILITY

- To achieve estate planning certainty, a properly designed plan will often involve the use of Trusts.
- Notwithstanding recent legislative and policy changes, Trusts continue to be a very effective vehicle in planning for individuals with disabilities.
- Offer great value where the PWD is unable to manage money for themselves due to capacity issues and/or has a higher level of susceptibility.
- Preservation of provincial disability benefits.

WILLS

- ❖ Why everyone needs a Will?
- What happens to your estate when you don't have a Will:
 1. First, it goes to your spouse. If more than one spouse, either as the spouses agree, or as the court decides.
 2. If you have kids, part to your spouse, part to your kids, but the amounts depend on whether the kids are from the same spouse.
 3. If no spouse, to your kids.
 4. If no kids, to your parents.

DYING WITHOUT A WILL

- If no parents, to your brothers and sisters
- If no siblings, to your grandparents, etc.

➤ **EASIER TO MAKE A WILL!!!!**

OTHER CONSIDERATIONS

- As most estates are worth more than \$100,000, dying without a Will can have serious results for a beneficiary who is receiving disability assistance.
- If a guardian for minor children is not appointed, custody of that child may be given to the Ministry of Children & Families and custody of their estate may be given to the Public Trustee.

TAKING CONTROL OVER YOUR ESTATE

❖ A Will permits you to:

1. Appoint an Executor/Trustee (someone you trust to manage your affairs).
2. Appoint a guardian for any minor children.
3. Distribute your estate in the amounts and to the persons you wish.
4. Set up Trust(s) to protect vulnerable beneficiaries.

WILLS VARIATION AWARENESS

- ▶ The dangers of leaving your estate to a trusted friend or other family member with a request to look after the disabled person:
 - Invites a wills variation application on behalf of the disabled person
 - Exposes the assets to the vagaries of the life of the friend or family member.

- ▶ Who may pursue a Wills Variation?
 - A PWD or an acting litigation guardian on his/her behalf if he or she is incapable of instructing counsel (a private committee or the Public Guardian and Trustee)

- ▶ Why pursue a Wills Variation?
 - In order to achieve greater provision out of the estate

- ▶ Accordingly, it is not a viable option for a parent of a PWD to leave nothing or a reduced amount to that child under the parent's will in order to preserve the child's disability benefits in British Columbia

WHY SET UP A DISABILITY TRUST?

- Funds held in a trust are not treated as an asset of a person receiving disability assistance.
- The PWD continues to qualify for assistance.
- Trusts provide a way for PWD client's and their families to transfer and safeguard their assets for meeting disability-related costs now and in the future while remaining eligible for disability assistance.

WHAT IS A TRUST?

- A Trust is a relationship whereby one person (the "Settlor") gives assets to a second person (the "Trustee") to hold and use for the benefit of someone else (the "Beneficiary").

TRUST VEHICLES

1. Inter Vivos Trusts – “Living Trusts”
 - created by a person for his or her own benefit or by someone else during someone’s lifetime
2. Testamentary Trusts – “Death Trusts”
 - created in a will or trust when someone dies

.....Emphasis is on “how” the Trust was created and “how” the income in the trust is taxed: Both are treated as a separate tax payer.

ELEMENTS OF DISABILITY TRUSTS

SDSI POLICY UNDER THE EAPDA

- ▶ SDSI publishes an information booklet entitled Disability Assistance and Trusts (“Trust Policy”).
- ▶ The terms of the Trust Policy are neither legislation nor regulatory, and can be changed at the discretion of the Minister.
- ▶ As with the *EAPDA* and its *Regulation*, the terms of the Trust Policy should always be confirmed at the time planning is contemplated as any plan must also recognize that the policy of the Ministry may change in the future.

TYPES OF TRUSTS

- ▶ The Trust Policy identifies two types of trusts:

Non-Discretionary

v.

Discretionary

- ▶ These two terms describe what kind of power/control the Trustee(s) have in managing the assets in the Trust.

NON-DISCRETIONARY TRUSTS

- The Trustee does not have total authority over how the assets are managed.
- The beneficiary may have *some input* in the decision making of a trust either as a Trustee or because they originally contributed assets to the Trust.
- Considered an exempt asset as long as the value of the capital contributed to the Trust does not exceed \$200,000.
- Capital contributions in excess of \$200,000 require special approval by the Minister to be an exempt asset.

DISCRETIONARY TRUSTS

- The Trustee(s) has *absolute control and discretion* on how the assets are managed.
- The disabled beneficiary has no control over the money held in the Trust or how it is spent.
- Not considered an asset under the *EAPDA* and there is no limit to the amount of money that can be held in such a Trust.
- The disabled beneficiary does not have a “beneficial interest in assets held in the trust” or a right to income from the trust, nor can the beneficiary be said to have a right to any of the estate capital.

DESIGNING A DISCRETIONARY TRUST

1. Must be a class of beneficiaries in addition to the disabled person during that person's lifetime to bolster the argument that the beneficiaries' interest in the trust has no value ("ultimate beneficiary" clause).
2. Trust can state the settlor's non-binding preference that funds be used for the disabled beneficiary without consideration of other "alternate beneficiaries" which may excuse the trustee from the even-handed principle so that distributions can be made unequally among the beneficiaries from time to time.
3. Be aware of a collapsible discretionary trust which may cause eligibility concerns if the beneficiary has control over the funds before they were placed in the discretionary trust or if the amount contributed to the trust is more than \$200,000. If the beneficiary has a legal right to collapse the trust and gain control of the assets, SDSI considers the Trust to be an asset.

PERMITTED EXPENDITURES FROM A TRUST

Trust funds for a disabled beneficiary can be utilized for:

- Caregiver services or other services related to that person's disability
- Education or training
- Home renovations necessary because of disability
- Home maintenance repairs
- Medical aids
- Any other item the trustee/beneficiary considers necessary to promote the person's independence*

* Effective December 1, 2015, there is now no limit on the amount of dollars that can be expended from the trust for this purpose

UNDERSTANDING HOW TRUSTS WORK IN RELATION TO THE MINISTRY

- Earned vs. Unearned Income
- Utilizing Trust Funds without impacting PWD Benefits
- Trustee/PWD accountability to the Ministry
- Assets Held by a Trust (a House?)

ISSUES TO CONSIDER IN DEVELOPING A TRUST

- Initially, is the trust the best option available?
- Cost/benefit analysis and whether exempt assets should be utilized instead?
- Personal circumstances of the beneficiary (married or single, children or other dependents)
- Life expectancy of the disabled beneficiary
- The existing assets of the beneficiary, etc.
- Choice of trustee(s) and alternate trustee(s)

ISSUES TO CONSIDER IN DEVELOPING A TRUST

- Types of assets to put into the Trust; i.e., cash, equities, bonds, life insurance proceeds, the proceeds from an ICBC settlement.
- How much money to put into the Trust?
- Who will decide how much money you can have and when (perhaps you or the “Trustee”)?
- Who is going to get what is left in the Trust after you die?

ISSUES TO CONSIDER IN CHOOSING A TRUSTEE

1. Age of beneficiary and how long is the trust expected to last (21 year deemed disposition rule)
2. Age of trustee(s)/alternate trustee(s)
3. How many trustees should you have and should there be provision for alternate trustee(s)
4. Does the trustee know you and your circumstances and do you trust them

ISSUES TO CONSIDER IN CHOOSING A TRUSTEE CONT.

5. Do you want to have the ability to remove and/or replace trustee(s) or permit them the opportunity to resign?
6. Does the trustee have knowledge of EAPDA or its Regulation?
7. Where does the intended trustee live?
8. Size and complexity of the trust.
9. Avoiding Conflict - Family / Friend versus Corporate Trustee.

OTHER PLANNING TOOLS

A Trust is not the only way to preserve disability benefits for a PWD:

- Availability of \$100,000 exemption
- Ability to purchase a principal residence or vehicle
- Gifting
- RDSPs
- RRSP/RRIF Rollover

Good planning will ensure that each of these tools are considered and will often involve some combination of the above referenced options.

FINAL WORDS OF ADVICE

- Gather the necessary information.
- Consider future events.
- Confirm your trustee(s) willingness to act as trustee.
- Retain a lawyer experienced in setting up trusts and knowledgeable of BC Disability Benefits legislation.

✓ ASK QUESTIONS!

ALTERNATE DECISION- MAKING

- Presumption that when a person reaches age 19, they are capable of making their own decisions.
- Not necessarily true - due to disability, aging, disease, or accident.
- Some people never acquire the ability to make their own decisions. Others have the ability and lose it.

COMMITTEESHIP

- A court appointed decision-maker.
- Expensive.
- By having a judge make the appointment, it doesn't always ensure you "get who you want" in regards to those making decisions on your behalf.

ENDURING POWER OF ATTORNEY

- A living document.
- Permits you to appoint someone that you trust to make legal and financial decisions on your behalf, even if you subsequently lose mental capacity.
- Has a high test for requisite mental capacity.

REPRESENTATION AGREEMENT

- ❖ Two types of Representation Agreements:
 1. Standard Representation Agreement
(Section 7)
 2. Enhanced Representation Agreement
(Section 9)

STANDARD REPRESENTATION AGREEMENT (SECTION 7)

- Allows you to appoint someone you trust to help you make routine medical, personal care, financial, and legal decisions.
- You do not need to have full mental capacity to make a standard representation agreement.
- You can make one without the aid of a lawyer.

ENHANCED REPRESENTATION AGREEMENT (SECTION 9)

Permits you to:

- Appoint someone you trust to make almost all health care and personal care decisions.
- Give advanced care and end of life instructions.
- You do not need to consult with a lawyer to make an Enhanced Representation Agreement.

LAWYER RELATIONS

- ✓ Keep in mind that not all lawyers understand Wills and Trusts, and not all Wills and Trust lawyers will understand disability issues.
- ✓ It is crucial to find a lawyer who understands disability issues as they relate to your estate. A small mistake now can be very costly later on.

RESOURCES

- BC MINISTRY OF SOCIAL DEVELOPMENT (INFORMATION BOOKLET – “*DISABILITY ASSISTANCE AND TRUSTS*” – www.hsd.gov.bc.ca)
- PLANNED LIFETIME ADVOCACY NETWORK (PLAN) – www.plan.ca
- NIDUS Personal Planning Resource Centre and Registry - www.nidus.ca

THANK YOU !!!

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