Estate Planning for Your Relative with a Disability

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Estate planning, when you have a son or daughter with a significant disability, can be a daunting task. While there are the usual considerations that you would likely make for any child, the disability creates other, additional factors that need to be addressed.

Your Estate – Creating a Trust

When planning, it is key to ensure that when you pass on, your estate will not adversely affect your child's eligibility to receive Disability Assistance – the provincial government's pension for people with disabilities. The failure to properly prepare your will may cause your child to lose their government assistance.

For people with significant disabilities (which render them unable to hold employment), who depend on Disability Assistance to survive, receiving even a modest bequest can mean the loss of the pension. This often leads to anguish, and ironically, even greater poverty. Disability Assistance in British Columbia is means-tested, making qualifying for it conditional on the recipient having few liquid assets.

In British Columbia, if a person receiving Disability Assistance has more than $5000 in assets (with a few exceptions, such as a car and a principle residence, and in the case of a recipient with dependents - $10,000 in assets), they become ineligible for Disability Assistance. However, both Canadian law and BC's *Employment and Assistance Act for People with Disabilities* provide exceptions to these rules if the funds are held in trust.

A trust is an arrangement where a person (the "trustee") holds the money for the exclusive use or benefit of another (the "beneficiary"). Courts in Canada have determined that money held in a discretionary trust for a person with a disability (also called a "Henson Trust" or a "Special Needs Trust"), does not affect the person's ability to receive their Assistance.

In British Columbia, if the trust funds are used to cover "disability-related expenses", they have no impact on the beneficiary's continued receipt of Disability Assistance. However, it is important to keep in mind that your child cannot receive cash from the trust. Many people, including lawyers, make the mistake of assuming that because the person receiving Disability Assistance can receive $800 in earned income per month, then the trust can also pay them $800 cash per month. The reality is that ANY cash received from a trust is treated as "unearned income", and comes off of the beneficiary's monthly disability assistance cheque dollar-for-dollar. This means that paying cash from a trust to a person on provincial disability assistance provides no net benefit what-so-ever.

As a result, when giving a bequest to a person receiving Disability Assistance, it is crucial to plan your will so that their share flows into a discretionary trust. While there may be ways to

resolve the problem if a person making a will forgets to place their disabled beneficiary's share in a trust, these can be both expensive and stressful on the disabled beneficiary.

Trusts and Taxation

The way a trust is created can have long term income tax consequences. The terms "testamentary" and *inter vivos* (or "living") describe how a trust is created. As a trust is a separate taxpayer for income tax purposes, the way it is created affects how it is taxed, and ultimately, how much income tax it will pay each year.

Of the 51-odd trusts described in the *Income Tax Act*, the majority are *inter vivos* or "living". That means that the trust has been created during the lifetime of the settlor (the person who contributed the assets to the trust). Trusts must file a tax return each year, and with *inter vivos* trusts, they pay tax at the highest personal tax rate – currently about 43% - on the trust's income.

On the other hand, a testamentary trust gets significantly better tax treatment. A testamentary trust is created as a result of the settlor's death. This usually means that it is created within the settlor's will. However, there are also ways to create separate testamentary trusts. The benefit of a testamentary trust is that it is taxed at a graduated rate – just like human beings. The first $30,000 of income is taxed at around 21%, and this rate gradually increases until all trust income over $120,000 is taxed at about 43%.

From an income tax perspective, testamentary trusts are a much better deal. The downside is, you must die first. Hence, if you need the trust NOW, you are stuck doing an *inter vivos* trust.

The one other thing to keep in mind is that the Canadian Revenue Agency is very protective of the preferred tax status given to testamentary trusts. Hence, even if you manage to create a proper testamentary trust, if it becomes "tainted" by a contribution of money from any source other than the deceased, it will immediately be redefined as an *inter vivos* trust and pay a much higher tax rate.

Selecting Your Trustee

Your selection of a trustee can be crucial in whether the trust works the way you want. There are several important things to keep in mind when picking a trustee. First, a named trustee cannot be forced to act just because you have named them in your will. As a result, it is wise to confirm that they are willing to act as a trustee. Second, it is important to appoint someone with integrity. When there are several current or future beneficiaries, including the trustee, the person appointed cannot place their own interests before the other beneficiaries. Third, it is important to pick a trustee who understands, or is willing to get to know, your child. If the trustee doesn't know or understand your child's needs, it will be difficult for them to make decisions that will have positive results. Without putting proper thought into who you want as the trustee, the trust might not get distributed in the way that you intend.

Decision Making

Aside from your own estate planning, another important consideration is what to do about helping your child make decisions once they legally become an adult. When your child is under 19, as his or her legal guardian, you have the right, and the obligation, to make decisions on their behalf. The challenge arises when your child turns 19, because you no longer legally have the right to make decisions for them.

In British Columbia, for someone with diminished mental capacity, there are a couple of options open to you:

a) You may be able to assist your child in doing a "standard" representation agreement, appointing you as their representative; or

b) You can apply to court to be appointed as your child's legal guardian or "Committee" (pronounced "kom-E-tee").

The simplest route is the standard representation agreement. For the cost of legal fees, or less if you do it yourself, an Adult can enter into an agreement that permits the representative of their choice to assist them in making routine decisions with respect to: personal care; giving or refusing consent for health care; and management of their routine financial and legal affairs. While the authority is not all encompassing, it covers most day-to-day issues. An Adult does not have to have full mental capacity to enter into a representation agreement. Rather, they must either appreciate the nature of the agreement, be able to communicate their wishes, and/or be in a relationship of trust with the representative.

A *Committee* is a court-appointed decision-maker. While a Committee has much broader legal authority than a representative under a standard representation agreement, it comes at a cost. First, a committeeship application is fairly expensive. Court applications can be costly, especially if there is any kind of disagreement amongst family members as to who is the best person to be appointed as the committee. Second, a committeeship has the distinct disadvantage that, because the process requires the judge to declare the adult mentally incompetent, the Adult can no longer assist with the decision-making process. Third, the appointment of a Committee requires the Public Guardian and Trustee's involvement. The PGT has an obligation to annually review the Adult's financial records, and by default, if the person appointed by the court as the Committee cannot act, the PGT automatically takes over. This is not a great deal if you are trying to minimize government involvement.

The upshot is, where an Adult has some ability to make their own decisions, a representation agreement can be an economical tool for ensuring their current level of autonomy. For an Adult with minimal mental capacity, a court-appointed Committee may be the only option. However, it is an option that must be pursued after careful consideration.

Getting Help

Given the need for the above mentioned documents, as a way of cutting costs, people often ask: "Can I prepare my own will/representation agreement?" Or, "If I can get a Wills Kit from that company on the internet for $29.95, why would I want to pay twenty times that amount for someone else to write my will?"

A will can seem very simple, but mistakes can be very costly to your estate later on. The more complex your wishes and/or affairs are, the greater the chance that a mistake will be made when drafting your will. Having the assistance of someone with specialized knowledge on estate planning can reduce the chances of mistakes being made. When dealing with a specialized situation, such as a beneficiary with a disability, the potential for mistakes is magnified.

The rules for executing a legally binding will are fairly simple:

a) It must be in writing (i.e. you can not express your wishes on video tape, on a CD, or an audio tape);

b) It must be dated; and

c) It must be signed by you and witnessed by two adults who are of sound mind and who are not beneficiaries or spouses of beneficiaries. They must then sign the will in front of you and each other.

Assuming you get past these, there are other rules which, if not considered, can make things really difficult (and expensive) for the people you leave behind. Some of the more typical mistakes in will drafting include:

a) **Forgetting to revoke a previous will**. If you write a new will which gives everything to Aunt Suzie, and the will you wrote last year (and didn't revoke) gives everything to Brother Michael, who gets all of your stuff? This simple mistake may end up needing to be sorted out in court.

b) **Not considering what will happen if a person named in the will dies before you.** What happens if the person named as your executor dies before you? Have you named an alternate executor? How about your bequests? If you leave everything to your only son, and he dies before you, what do you want to happen to your property? Does it go to his spouse? To his kids? To a favorite charity? If you forget to specify, your wishes may not be followed.

c) **Using improper or insufficient names for a beneficiary.** It's important to correctly describe where you want your bequest to go. For example, making a gift to "Karen" may be confusing if you have two friends and a sister-in-law who are all named Karen. Similarly, a recent gift in a will to the "Boy Scouts of Canada" led to a court battle between the district council, the provincial office, and the national office, all of

whom are legitimately called the "Boy Scouts of Canada", but act as separate entities. A bit more clarification ensures that your gift will quickly reach its target.

d) **Being specific on the purpose of the gift.** If the gift is being given to a charity, and there's a specific type of work that you want to support, it is important to be clear in your intentions. For example, if you are giving a gift to BC Children's Hospital Foundation, but you fail to mention that you really want the money to be used to upgrade the emergency ward, there's no guarantee that the funds will be used for that purpose.

e) **Not considering what will happen if the property does not exist at the time of your death.** People often make specific bequests to individuals, such as "my 1954 Buick to my child, Leslie". What happens if, at the time of your death, you have already sold the Buick and purchased a 1934 Ford? What happens if the Buick has been sold, and the funds from the sale are sitting in a term deposit? What if the Buick has been demolished, and you haven't yet bought a new car. It is important to be clear on your intentions.

f) **Using imprecise language.** A vague description of property can lead to confusion and additional legal costs. For example, giving your "favorite gold watch" to your grandson, works well if you only have one watch. But if you have five gold watches, there may be confusion. Similarly, a will which left "all my real property to X", was deemed by the court to be invalid when the person who made the will did not have at her death, and never had owned, real estate.

g) **Not giving your executor or trustee enough power**. For example, not being able to make final determinations as to the value of property, not being able to make beneficial elections under the *Income Tax Act*, or not being able to sell assets for cash, can all make the job of administering your estate much more difficult.

As well, in writing your own will, you might not be aware of tools, such as trusts or life interests, which can help you to better accomplish your goals. You may also not be fully aware of income tax rules which can affect your bequests.

Do you really need a lawyer or notary to help you write your will? It depends. If the person you hire is simply a scribe who writes down your instructions, the end result often won't be much better than if you use a store-bought will kit. On the other hand, a lawyer who understands estate law, particularly with respect to disability issues, and who appreciates your situation can help you avoid mistakes which, after your death, can be expensive to your beneficiaries. He or she may also be able to come up with creative approaches that you may not think of yourself, helping you to save probate fees, taxes, and avoid other problems.

The key with writing a will is to be clear to yourself in what you're trying to accomplish, and then ensuring that those wishes are communicated properly to the folks you leave behind.

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