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» Ken M. Kramer, Q.C., TEP

Disability and Estate Planning

Pathways To Independence

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Ken M. Kramer, Q.C., TEP

- Founder and principal of KMK Law, a boutique law firm in downtown Vancouver, BC, providing specialized legal services in the areas of Estates, Trusts, Administration, Elder Law, Estate Litigation and Mediation for the past 25 years.
- Unique understanding of the disability community combined with expertise in the area of estates and trusts law to serve families with disabilities.
- Led community negotiations and collaborations with the Province of British Columbia for over 15 years. These discussions have led to significant improvements in the Choices for Support In Independent Living program ("CSIL") program including, two significant rate increases, culminating in over $25 million being allocated to the home care community in British Columbia.
- Recognized for his service to the community with the distinguished honour of receiving the Queen's Diamond Jubilee Medal in 2012 & Queen's Counsel designation in 2014.

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Outline For Today's Discussion

1. Disability Benefits in British Columbia
2. Estate and Trust Planning for Persons with Disabilities
3. Choosing Trustees
4. Other Planning Tools
5. Resources

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Why do we need to discuss estate planning?

- At age 18, a child with a disability may qualify for provincial disability assistance from the Ministry of Social Development and Poverty Reduction ("MSDPR").
- In order to qualify, a person must meet specific financial criteria.
- This criteria includes:
  - Less than $100,000 in liquid assets.
  - They may own a motor vehicle.
  - They may own their own principal residence.

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Will

Why Everyone Needs a Will

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Consequences of Dying without a Will

- If you die without a will in BC, there is no way to prove what your wishes were.
- When a person dies in BC without a will, that person is said to have died **intestate**.
- B.C. laws under the Wills, Estates and Succession Act will now **dictate** how your estate will be **distributed**.

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Other Ramifications

- 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 their person is given to the Ministry of Children & Families and custody of their estate is given to the Public Trustee.

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Trusts and Disability

To achieve estate planning certainty, estate planning 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 person with a disability is unable to manage money for themselves due to capacity issues and/or has a higher level of susceptibility.

Preservation of provincial disability benefits.

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A Will gives you control over your estate.

With a Will:

a) You can appoint an **executor** of your choice to manage your affairs

b) You can appoint a **guardian** for any young children you have

c) Distribute your **estate** in the amounts and to the persons you wish

d) Set up Trust(s) to protect **certain beneficiaries**

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Wills Variation Awareness

- There is a legal and moral obligation to provide for your spouse and/or children.

- If your Will does not **adequately** provide for your spouse and/or children, these individuals can challenge your Will in court through a **Wills Variation Claim**.

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Wills Variation Awareness

- Ensure that you have considered what is an appropriate share of your estate for a disabled child!
- If you have a disabled child, and **leave nothing or a reduced amount** to that child in your Will, a court may **vary** your will and order that the PWD receive a larger share of your estate.
- This claim may be brought by the PWD or by the Public Guardian and Trustee of BC (PGT)

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Why a Disability Trust?

- Funds in a trust are not treated as an asset of a person receiving disability assistance. The disabled beneficiary continues to qualify for assistance.
- Trusts provide a way for PWD clients and their families to transfer and safeguard their assets for meeting disability-related costs now and in the future while protecting against vulnerabilities and undue influence from others.

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What is a Trust?

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

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Distinguishing the Various Trust Vehicles

Inter Vivos Trusts – "Living Trusts"

- Settled by a person while they are alive for their own benefit or for someone else

Testamentary Trusts – "Death Trusts"

- Created in a will and settled after death of will maker

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.

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Types of Trusts

The Trust Policy identifies two types of trusts:

(1) Non-Discretionary Trust

(2) Discretionary Trust

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

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Non-Discretionary Trusts

The trustee does not have total authority over how the assets are managed as the beneficiary may have some input in the decision making of a trust either as a trustee or because they originally contributed the assets.

Non-discretionary trusts are considered an exempt asset pursuant to the *Employment and Assistance for Persons with Disabilities Act* ("EAPDA") so long as the value of all the capital contributed to the trust does not exceed $200,000.

Capital contributions in excess of $200,000 are not exempt as an asset unless special approval is given by the Minister.

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Discretionary "Henson Trusts"

A Henson Trust is **absolutely discretionary** in nature and leaves the distribution of the income and capital of the trust to the complete discretion of the **trustee**.

This type of trust can be of benefit to PWDs as it "allows the beneficiary to retain entitlement to government benefits, while simultaneously deriving funds from trust funds, at the trustee's discretion"

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.

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Issues to be aware of in designing a Discretionary Trust

- Should be a **class of beneficiaries** in addition to the disabled beneficiary - "**ultimate beneficiary**" clause.
- Trust can state the settlor's preference that funds be used exclusively for the disabled beneficiary regardless of any **ultimate beneficiary** to excuse the trustee from the "**even-handed**" principle.
- 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, SDPR may consider the trust to be an **asset** which may impact eligibility for provincial benefits.

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Permitted Expenditures From A Trust: *Disability Related Costs*

Trust funds for a disabled beneficiary can generally be used for the following:

- Caregiver services or other services related to that person's disability.
- Education or training.
- Home renovations necessary because of your 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 no limit on the amount of dollars that can be expended from the trust for this purpose.**

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Understanding How Trusts Work In Relation to the Ministry

- Earned vs. Unearned Income
- Utilizing Trust Funds without impacting PWD Benefits
- What do we submit to the SDPR?
- Assets Held by a Trust (e.g., a house)
- Life insurance policies, RRSPs, RRIFS, etc., and Designations

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Issues to Consider in Developing a Trust

- Initially, is the trust the **best option** available? Cost/benefit analysis and whether other **exempt assets** should be considered/utilized instead?
- **Personal circumstances** of the beneficiary (capacity issues, 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)

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Issues to Consider in Choosing a Trustee

1. The age of the beneficiary and how long is the trust expected to last (21 year deemed disposition rule).
2. The 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?

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Issues to Consider in Choosing a Trustee

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 Regulation?
7. Where does the intended trustee live?
8. The size and complexity of the trust.
9. Avoiding Conflict - Family / Friend versus Corporate Trustee.

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Other Planning Tools

- A trust is not the only way to preserve disability benefits for a person with a disability:
  - Availability of $100,000 exemption
  - Ability to purchase a principal residence or vehicle
  - Gifting
  - Registered Disability Savings Plan ("RDSP")
  - 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.

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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 in the future.

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Final Words of Advice

a) Gather the necessary information

b) Consider future events

c) Confirm your trustee(s) willingness to act as trustee

d) Retain a lawyer experienced in setting up these trusts and knowledgeable of BC Disability Benefits legislation

e) ASK QUESTIONS

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RESOURCES

- BC MINISTRY OF SOCIAL DEVELOPMENT & POVERTY REDUCTION (INFORMATION BOOKLET – *"DISABILITY ASSISTANCE AND TRUSTS"* – www.gov.bc.ca/sdpr
- Family Support Institute (FSI) – www.familysupportbc.com
- PLANNED LIFETIME ADVOCACY NETWORK (PLAN) – www.plan.ca
- KMK Law - info@kmklaw.net or 604-990-0995

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