



Caring Financially for the Disabled Adult

When it comes to caring financially for a disabled adult, a commonly used and valuable vehicle is a trust.

What is a Trust?

Essentially, a trust is a relationship between people involving property to be used for the care or benefit of a 3rd person called a “beneficiary”. For example, a father (called the “settlor” in trust terminology) who desires to set up a trust may transfer property to another person, the “trustee”, to hold, manage and invest for the benefit of his disabled child - the beneficiary. (There can be more than one settlor, trustee or beneficiary, and there can be present and future beneficiaries.)

Trusts can be simple or complex, discretionary or non-discretionary. They can be created in Wills (testamentary trusts) or in Deeds prepared during the settlor’s lifetime. Trustees can be given limited or broad powers.

Discretionary Trust

When a trust is discretionary, only the trustees can make decisions about if, when or how much money to use for the beneficiary. The trustees may use some, all or none of the money. Discretionary trusts are sometimes used for spendthrift children, the main purpose to keep the money out of the child’s control. They are often used to care for beneficiaries receiving provincial disability benefits: one reason is because the beneficiary does not have the right to demand money from the trustees (who can say ‘no’) and, therefore, the money cannot be considered his or her asset. Disability benefit recipients are subject to asset limits.

Non-Discretionary Trust

A non-discretionary limits the trustees’ ability to exercise discretion. An example would be an express requirement to pay income to a beneficiary: the trustee cannot say ‘no’ but must pay. This is common in spousal trusts, where money is transferred to a trustee to with a requirement that all income earned be paid to (or for) a wife or husband. Clearly, this is a way to care for a disabled spouse. Limits on trustees’ discretion may be as wide or narrow as the settlor decides.

Inter vivos Trust

An inter vivos trust is set up by Deed during the settlor's lifetime. "Inter vivos" is a Latin term that means "among living persons." Because of adverse income tax treatment, inter vivos trusts must be carefully considered and are not appropriate in all situations.

Alter Ego/Spousal Trusts

Alter Ego and Spousal Trusts are inter vivos trusts recently created under the *Income Tax Act* of Canada. An adult 65 years or older can transfer assets into trust and name as trustees themselves and one or more of their children, or another trusted party.

From a caregiving perspective, these trusts can be helpful because they involve children or other caregivers in the management of finances during a time when the adult's ability may be compromised. (They are also popular to avoid probate fees.)

Testamentary Trust

A testamentary trust (meaning a "Will trust") is set up under a person's Will and takes effect after death. The trustees named in the Will hold property for a beneficiary (or beneficiaries) also identified in the Will. A testamentary trust receives more favourable tax treatment than an inter vivos trust. The most common way to provide financially for a disabled person is through a testamentary trust. If the beneficiary is receiving disability benefits, the testator will set up a fully discretionary testamentary trust (for the reasons given above).

What about bypassing a trust?

In their Wills, testators sometimes leave a large chunk of money outright to a friend or relative and ask that person privately to use the money for the care of a child or disabled person. No one else might be aware of the arrangement. The obvious risk is that the friend or relative is not trustworthy and will appropriate the money for personal use. Sadly, this happens. Another risk is that to give the money to someone else is an effective disinheritance of the disabled person: if he or she is a spouse or child, such action invites an application under the *Wills Variation Act* of B.C. Under that Act, the spouse or child has a right to ask the court to vary the Will: alternatively, the Public Guardian and Trustee of B.C. may commence litigation on behalf of the spouse or child. Such litigation is costly, unpleasant, and unnecessary.

Trustee protection vs. beneficiary protection

Modern Wills and trust Deeds often give trustees broad protection which limits their exposure not only for errors but, also, for questionable exercise of discretion. Some clauses in common use limit the ability of the court to intervene to protect beneficiaries, such as those that give the trustees "absolute and unfettered discretion." This may be interpreted to mean that the court cannot intervene. Then, for example, if a trustee is unreasonably refusing to pay money for a needy beneficiary, the court cannot order payments to be made. Why not state that the trustees' exercise of discretion is subject to requirements of good faith and reasonableness? This is what most people really want, anyway. One should give careful consideration to balancing the protection of trustees with the protection of beneficiaries who may be vulnerable to the careless deeds or misdemeanours of trustees for many years in the future.

Trusts are flexible instruments, and with careful drafting, can be used to address many concerns and family-planning needs. However it is important to seek proper legal and accounting advice.

By Ruth Magnusson, Lawyer