

Estate Planning Documents Overview

When you're thinking about future planning for yourself (and potentially an adult son or daughter with a disability) there are three types of legal documents that need to be considered. While all might not be relevant for your circumstances, their benefits should be assessed.

The following is a very brief overview of factors to be considered.

1) Will

- A document which outlines how you wish your estate to be divided upon your death.
- Permits you to appoint a guardian(s) for your minor children, and establish "trusts."
- Without a will, your estate is divided as directed by the *Wills, Estates, and Succession Act*. It's a pre-set formula where your spouse gets between \$150,000 and \$300,000, depending on whether your spouse is the parent of your children, and one half of the remaining estate, and your children get equal shares in the remainder. (It has a set formula for other situations as well.)
- If one of your children is on BC Disability Benefits (for people with disabilities), the process under the *Wills, Estates, and Succession Act* can do more harm than good. A bequest of \$100,000 can cause the benefits to be temporarily cut off. This can be a traumatic, stressful experience for someone depending on BC Disability Benefits. **A discretionary trust, established in the will, is a way to get around this problem.**
- As well, without a will, the Superintendent of Family and Child Services takes custody of your minor child, and the Public Guardian and Trustee becomes the Guardian of his or her estate. This means that all decisions respecting your child will be made by a bureaucrat. While not an ideal situation for any child, this can be particularly problematic for a child with special needs.

2) Discretionary Trust

- When a person on BC Benefits gets a bequest of \$100,000 or more, the benefits are cut off until the balance drops below \$100,000.
- A way to get around this problem is by establishing a "discretionary trust."
- A discretionary trust gives the funds to a third person, a group of people, or an institution such as a trust company, to hold for the benefit of your child. As a result, because it is not held by your child, it is not legally "theirs", and his/her benefits won't be cut off. In making it discretionary, the trustee(s) (the folks holding the cash) decide when to release funds to help

the beneficiary (subject to the guidelines established in the trust agreement – for example, to cover medical aids, education, home renovations, etc.)

- When selecting the trustees, it is wise to think about the following:
 - If the trust will be existing for a while, consider whether it is more appropriately managed by a trust company (which has the administrative expertise), and individual or individuals (who can provide the personal contact with your son or daughter), or a combination of the two.
 - Consider your child's age. Are the trustees young enough that they'll be around for a good portion of your child's life? Who would make a good replacement? How are they to be selected?
 - It's wise to try to select people that will not be acting in a "conflict of interest." For example, parents might think of naming other relatives as the trustees. Unfortunately, if the relatives get the remainder of the trust (what's left over when the child on BC Benefits passes away), they may have a conflict between preserving the funds within the trust (so they'll get more in the end), and ensuring that the beneficiary has his/her needs met. Some conflicts may be avoided through a properly worded explanation of the limits on the trustee's discretion.

3) Representation Agreement/Enduring Power of Attorney

Two documents that can do similar things – they permit someone else to make decisions for you in the case of becoming mentally incapacitated.

Enduring Power of Attorney

- Must have "full mental capacity" before you enter into it.
- Permits you to delegate financial and legal decision-making.
- Simple, straight-forward process.

Representation Agreement

- Came into effect on February 28, 2000 with the implementation of the Representation Agreement Act, (RSBC 1996) Ch. 405.
- Permits a lot of flexibility, in that you can give your representative as much or as little authority as you wish, and you can set the specific terms as to when it comes into effect.
- There are two types of representation agreements. The "Standard" agreement, outlined in Section 7, permits the delegation of routine financial management; decisions respecting personal care; major and minor health care; and most legal issues. The "Enhanced" agreement, outlined in Section 9, permits the delegation of authority to make decisions respecting health and medical care.

- For entering into a “standard” representation agreement, delegating basic legal, financial, personal, and health care decision-making, you don’t need the requisite mental capacity – just an appreciation that you trust the person you are appointing as your representative. This makes it a possible alternative for the appointment of a committee (pronounced – KOM-mi-ttee) for an adult with an intellectual disability. This may permit parents and other family members to continue advocating on his/her behalf.
- To enter into an “enhanced” representation agreement, you need to have the same mental capacity as is needed for any other contract. As an enhanced agreement permits for the authorization to make arrangements for temporary care and support of persons cared for by the adult, it is better suited for parents.

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