

Acting as Trustee for an Adult with a Disability

The information contained in this brochure is provided as a public service by the Public Guardian and Trustee (PGT) and is a general guide for persons who are trustees of money or other property left in trust for an adult with a cognitive disability. It has been prepared to assist trustees but is not a substitute for legal advice from a lawyer. The PGT recommends that a trustee seek legal advice from a lawyer before making decisions on behalf of the trust and beneficiary. This brochure is for trustees administering trusts located in BC. Each province of Canada has its own laws about trusteeship.

What is a trust?

A *trust* is a legal relationship between three parties: the *settlor* sets up the trust either by will or trust document, contributes assets to it, sets out instructions on who will benefit from the assets and how the assets are to be used or managed; the *trustee* is appointed to control and manage the assets in the trust; and the *beneficiaries* will benefit in different ways from the assets owned by the trust. A trust can be part of someone's will (a "testamentary trust") or a trust document made by a person that takes effect during their lifetime (an "*inter-vivos*" trust).

What is a trustee?

A *trustee* is the person appointed to carry out the terms of the trust. A trustee does not have the same duties as an executor but, in many cases, the same person may occupy both positions. The trustee is required to manage the trust assets according to the instructions in the trust document and must use those assets solely for the benefit of the beneficiaries. A third party is not entitled to benefit from the trust unless specifically provided for in the trust document.

What are a trustee's duties?

A trustee is guided by the instructions in the trust document, the British Columbia *Trustee Act* and decisions of the Court. The primary duty of a trustee is to follow the terms of the trust document in holding and administering the trust assets for the benefit of the beneficiaries. A trustee is required to use the utmost care in managing the assets, and must always act in the best interests of the beneficiaries.

In a private trust established for the benefit of family or friends of the settlor, the trustee has no obligation to disclose the existence of the trust or any information relating to the trust to any person other than the settlor, the beneficiaries and their legal representatives, other than in compliance with the requirements of taxation authorities, the Court or the PGT.

A trustee has the duty to account for the property held on behalf of the beneficiary. For this reason, a trustee must keep a record of all transactions he or she makes. The trustee should keep all financial statements detailing income earned by the trust, as well as a record of all expenditures from the income or capital of the trust. (The original assets of the trust as well as any gains received from these assets are called the capital; income is money that the capital has earned.)

The records that a Trustee keeps are called the accounts. A trustee is obligated by the *Trustee Act* to seek the approval of his or her accounts by the Supreme Court of British Columbia within two years of his or her appointment unless waived by the beneficiaries. This procedure is known as a “passing of accounts”. The beneficiaries of the trust, or their legal guardians or committees, are entitled to request and receive a copy of the trustee’s accounts at any time. The PGT has the authority to request an accounting when investigating concerns regarding the management of a trust.

A trustee is required to file tax returns on behalf of the trust each year. The PGT recommends that you seek advice of a lawyer or accountant when preparing a trust’s tax return.

When a trustee has discretion, he must consider the following when deciding whether to provide a benefit to the beneficiary:

- terms of the trust
- beneficiary’s current situation
- whether the beneficiary is receiving other benefits that may be affected
- financial ability of the trust to support the benefit
- possible income tax consequences to the trust and the beneficiary
- any potential impact on other beneficiaries

One of the most important guiding principles of trust administration is the “Even Hand Rule” which requires the Trustee to weigh the rights and interests of all the beneficiaries of the trust impartially, unless the trust document provides otherwise.

Whose property is it?

Money or other property held by the trustee belongs to the trust to be used for the benefit of all the beneficiaries and not for the benefit of the trustee. The trustee cannot personally profit from the trust assets, except for reasonable compensation as allowed by the Court. The trustee cannot borrow from the assets.

Where and how should the trustee hold the trust assets?

The trustee must keep the assets separate from the trustee’s own property. For this reason, the trustee must establish a separate account for any money to be held in trust. Cash assets cannot be held in the trustee’s personal account, or in an account which is held jointly with a beneficiary. The trustee should never mingle personal funds with trust funds. No person other than the trustee should have signing authority for the trust account. There should be a separate account established for each trust created under the document unless the will states otherwise. Any major bank, credit union or trust company can assist a trustee in setting up a trust account. Please contact your financial institution to find out what they may require to set up a trust account.

What investments can the trustee make?

The trustee must invest the money held in trust as directed by the trust document. If the trust document does not specify how the money is to be invested, the trustee must follow the rules for investing outlined in Sections 15.1 to 15.5 of the *Trustee Act*. A trustee is required to exercise the care, skill, diligence and judgment of a “prudent investor” when making investment decisions. A trustee is required to develop an investment plan or strategy which should be put in writing. A trustee who makes imprudent investment decisions can be held personally liable for any losses to the trust property that results and may be required to reimburse the trust for any shortfall.

A trustee should obtain advice when investing trust property. Some criteria that may be considered when determining if an investment is prudent include:

- adopting a balanced investment strategy
- protecting capital and providing income
- choosing suitable risk and return objectives
- having a reasonable diversity of investments
- using caution in delegation of authority to agents, and
- incurring only reasonable and appropriate costs.

Can the trustee access the capital of the trust?

The trustee must be guided by the trust document when determining whether or not to use capital held in trust for a beneficiary. If the trust document does not specifically allow it, funds may not be used. The trust document may state that the trustee, at his discretion, may use so much of the trust income or trust capital as he judges necessary for the benefit of the beneficiary. The trust document may list specific purposes for which a trustee may pay income and capital. If a trustee is unsure how to exercise his or her discretion or whether the capital may be used, advice should be obtained from a lawyer.

To whom can the trustee release funds?

Money can be released to third parties only in the following instances:

- to persons providing goods or services for the beneficiary;
- where required by law
- to a person with legal authority to represent the beneficiary for whom the trust is set up (Power of Attorney, Legal Guardian, Committee, Representative).
- for proper and reasonable expenses of the trust.

A trustee will be personally liable for any losses to the trust arising from improper or unauthorized release of the assets to an inappropriate person. If the trustee is in doubt about releasing funds to someone other than those listed, advice from a lawyer should be obtained.

Are disability benefits affected if someone is the beneficiary of a trust?

For Employment and Assistance for Persons with Disabilities (EAPD) benefits administered by the Ministry of Employment and Income Assistance (MEIA), it depends on MEIA policy and whether the trustee has discretion on how to expend the funds. If the trust is discretionary, benefits under BC's *Employment and Assistance for Persons with Disabilities Act* usually will not be affected, provided the MEIA guidelines are followed.

For other types of disability benefits (CPP, WCB, private long-term disability benefits, etc.), there may be restrictions placed on what the beneficiary can receive from the trust.

How long does a trust last?

The trust lasts for the period of time designated in the trust document or until the funds are exhausted.

More Information

To obtain a copy of the *Trustee Act* visit the Queen's Printer website at: www.qp.gov.bc.ca/statreg/default.htm.

For assistance in obtaining legal advice call the Canadian Bar Association's Lawyer Referral Service at 604-687-3221 or 1-800-663-1919 (toll free outside the Lower Mainland).

For more information about the Public Guardian and Trustee, please visit our website at www.trustee.bc.ca or contact us at:

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