

Applications to Appoint a Trustee of a Trust for a Child Under the *Family Law Act* Public Guardian and Trustee Guidelines

Introduction

When an application to appoint a trustee of a trust for child is made under s. 179 or s. 180 of the *Family Law Act*, written comments from the Public Guardian and Trustee (PGT) are required. This document has been prepared to assist counsel for the applicant when preparing the application and supporting materials. It has three parts: the factors the court will consider; guidelines for preparing supporting affidavit materials; and the PGT's review process. Please be advised that the PGT charges a fee to examine and respond to an application to appoint a trustee. A detailed description of fees can be found at www.trustee.bc.ca/fees.

For purposes of the *Family Law Act*, a child is defined as person who is under 19 years of age.

Part 1: Factors considered by the court

Sections 179 & 180 of the *Family Law Act* provide for the appointment of a trustee by the Supreme Court if the court is satisfied that the appointment is in the child's best interests having regard to the factors set out in s.179(2). The factors are:

- a) the apparent ability of the proposed trustee to administer the property;
- b) the merits of the proposed trustee's plan for administering the property;
- c) the views of the child, unless it would be inappropriate to consider them;
- d) the personal relationship between the proposed trustee and the child;
- e) the wishes of the child's guardians;
- f) the written comments of the PGT;
- g) the potential benefits and risks of appointing the proposed trustee to administer the property compared to other available options for administering the property; and
- h) if the Supreme Court is considering making an order under subsection (1)(b)*, that the interests of the child are likely better served by an order made under that subsection than by an order made under subsection (1)(a)*.

* An order under s. 179(1)(a) is an order appointing a trustee over all property to which the child is entitled at the time the order is made. An order under s. 179(1)(b) is an order appointing a trustee over all property to which the child is entitled at the time the order is made, as well as property to which the child may become entitled in the future unless the property is excluded in the order, or the trustee already has authority over the property.

Part 2: Guidelines for preparing supporting affidavit materials

As the PGT must provide written comments to the Court pursuant to s. 179(2)(f) of the *Family Law Act*, the PGT will review and comment upon the applicant's materials. The information set out below should be provided to assist the PGT.

Note: These are guidelines. Additional information may be required depending on the circumstances

- a) the child's full name, including any aliases;
- b) the child's date of birth;
- c) the child's usual residential address;
- d) the name and residential address of the child's guardian(s) responsible for the child's legal and financial matters (as per s. 41(k) of the *Family Law Act*);
- e) the name and residential address of any other guardians;
- f) full name and residential address of each proposed trustee and his or her relationship to the child. If the proposed trustee is a corporate trustee, the full legal name of the trust company and local business address where trust will be administered;
- g) the source of the funds or assets to be settled on the trust. For example: personal injury settlement, judgment awarded at trial, inheritance (name of deceased and date of death), distribution from a trust, gift or transfer from another person, insurance proceeds, proceeds from a RRSP or RRIF;
- h) with respect to the assets to be transferred to the trust:
 - i) the amount of cash to be transferred to the trust;
 - ii) a listing of any assets to be transferred to the trust with current market values and, if known, the estimated annual income;
 - iii) for real property to be transferred to the trust:
 - (1) the address and legal description of the property;
 - (2) the nature of the property (e.g. house, apartment, condominium, rental residential, commercial);
 - (3) the most recent BC Assessment; and
 - (4) a current property appraisal and/or recent realtor valuation.
- i) a description of the investment education and experience of the proposed trustee(s);
- j) a description of the proposed plan for administering the trust property. The plan should address the following, along with any other relevant information:
 - i) investment management plans:
 - (1) name of investment manager, if any, and management fees if applicable;
 - (2) anticipated investment objective and asset classes that will be purchased (e.g. GICs, government or corporate bonds, equities, mutual funds, other); and
 - (3) whether the proposed trustee plans to reinvest the income earned, or use the income for the child's benefit.
 - ii) real estate:
 - (1) if the child will live in the home, indicate who else will live with the child and the arrangements for covering ongoing expenses, repairs and maintenance;
 - (2) if the property is a rental or commercial property:

- (i) name of the property manager, if any, and management fees, if applicable; and
 - (ii) whether the property will be sold or retained.
- (3) Details of any mortgage including:
 - (i) balance outstanding, remaining term, interest rate;
 - (ii) the amount of the monthly payments the source of the funds to make the monthly payments;
 - (iii) whether or not the mortgage will be renewed; and
 - (iv) how the mortgage will be dealt with if it is still in place when the trust ends.
- iii) trust expenditures and distributions:
 - (1) description of anticipated capital expenses from the trust, including frequency and timing (e.g. insurance, property repairs, etc.);
 - (2) anticipated annual expenditures or payments from capital or income, including timing and frequency, to or on behalf of the child; and
 - (3) if the anticipated annual income does not cover annual expenses and/or payments to the child, plans for covering the shortfall.
- k) if a professional will be hired to prepare trust accounts and/or trust tax returns, provide professional's name, qualifications and fee schedule;
- l) if appropriate, confirmation that the trust has been discussed with the child, and the child's wishes with respect to the trust;
- m) the views of the child's guardian(s) if the proposed trustee is not the child's guardian;
- n) the proposed trustee fees, including annual expenses not already mentioned;
- o) if the applicant is an individual (private trustee), the applicant's affidavit should include:
 - i) a statement that the proposed trustee has been advised of the duties and responsibilities of acting as a trustee, including the need to manage the property, maintain accounts, file annual tax returns and authorize disbursements from the trust;
 - ii) confirmation that the proposed trustee is not an un-discharged bankrupt and the date(s) of any prior discharge(s) from bankruptcy along with any other relevant details; and
 - iii) confirmation that the proposed trustee has not been convicted of an offence involving fraud or property.
- p) any other relevant information that may assist the PGT and the court when considering the application; and
- q) a copy of the trust or proposed trust.

Part 3: Public Guardian and Trustee Review Process

To expedite the PGT's review process, it is preferable that you send your draft court materials to the PGT, and supporting information addressing the issues listed in the guidelines above.

Please ensure that you attach a cheque payable to the Public Guardian and Trustee for the private trustee application review fee when submitting your materials. No other form of payment is accepted for this purpose.

Draft court application materials and supporting information should be sent to:

Public Guardian and Trustee
Child and Youth Services
700-808 West Hastings Street
Vancouver, BC V6C 3L3
Attention: Legal Intake Liaison
Ph: 604.660.3040
Fax: 604.775.2429

The Legal Intake Liaison will assign the application to a lawyer in Child and Youth Services.

The lawyer will advise counsel for the applicant if additional material is required. Subject to any questions or clarifications that may be required, the PGT's formal written comments will be delivered to counsel.

Counsel with questions about the information required in the application materials or the PGT's review process may call the Legal Intake Liaison at the number above.