



Heritage Law*

Heritage Law Disabled Beneficiary Estate Planning Package

Fees:

Single: \$2,500.00

Couple: \$2,750.00

Documents:

Power of Attorney, Representation Agreement, Will with Discretionary Trust, and Heritage Law Estate Organization Guide

Basic Estate Planning:

There are three documents everyone should have:

1. A Power of Attorney
2. A Representation Agreement
3. A Will

A **Power of Attorney** is a legal document where you can appoint someone (the attorney) to manage your financial and legal affairs in the event you were unable to do so yourself, for example due to illness, injury or travel. An **Enduring Power of Attorney** remains valid even if the person giving it loses mental capacity. It must be signed before the person loses capacity.

A **Representation Agreement** (which is a combined advance health care directive, personal directive and living will) allows you to designate someone you trust to make health and personal care decisions for you should you not be able to make such decisions yourself. If you have any particular health care wishes, you can include them in a Representation Agreement.

A **Will** sets out who you would like to administer your estate, to receive your assets and to be the guardians of your minor children in the event you died. This allows the maker of the will to make these decisions themselves rather than default to the legislative provisions that apply when a person dies without a will. A Will with a discretionary trust provides that all or a portion of your estate assets may be placed into a trust when you die. This trust allows your estate assets to be managed by someone for the benefit of a disabled beneficiary and may also prevent the disabled person from losing their entitlement to government benefits.

Additional Documents:

The **Heritage Law Estate Organization Guide** is a central document to organize key personal information and property information. The guide will be of great assistance to your personal representatives and family members in managing your financial affairs, if that becomes necessary, and administering your estate.

Specialized Estate Planning for a Disabled Beneficiary: A Discretionary Trust Will

A testamentary trust is a trust that is provided for in a will and takes effect after the death of the person who makes the will. A discretionary trust is a trust where the beneficiary doesn't have control over the money in the trust. A trustee or trustees are appointed to look after the money and the trustees make all of the spending decisions. The trustees can be family members, friends, professional advisors or corporate trustees.

Not only will a discretionary trust for a disabled beneficiary in a will allow for the assets to be managed on the beneficiary's behalf by a trustee of your choosing, it will also reduce the likelihood that the disabled beneficiary will lose access to government services or benefits. Because the beneficiary of a discretionary trust has no right to demand any of the income or capital of the trust, the person is not considered to own any of the trust property or to be entitled to any of the trust income.

Only the amounts actually distributed out of such a trust to a disabled person will be included in the disabled person's assets and income in determining whether the disabled person is entitled to government services and benefits. There is no limit to the amount of money that can be held inside a discretionary trust.

Qualified Disability Trusts

After amendments were made to the *Income Tax Act* in 2016, testamentary trusts became subject to tax at the highest marginal rate on income generated within the trust, resulting in the loss of graduated rates. One exception was made for trusts that satisfy the criteria of a Qualified Disability Trust, which is defined under section 122(3)(b) of the Act.

To qualify, at least one beneficiary of a Will *must be receiving the federal disability tax credit* and must jointly elect with the trustees on the trust's income tax return in order for the trust to be treated as a Qualified Disability Trust.

If more than one family member wishes to benefit a beneficiary who is receiving the disability tax credit, only one Qualified Disability Trust is allowable under the Act. It would be important to review which trust should be designated as a Qualified Disability Trust in order to maximize the benefits to the disabled beneficiary.

Allowable Assets for People Receiving Disability Benefits

Asset Limit:

If a beneficiary is designated as a Person With a Disability (PWD) pursuant to the *Employment and Assistance for Persons With Disabilities Act* and is receiving disability benefits, the person is allowed to have a certain amount of assets in his or her name before becoming ineligible for benefits according to the EAPWD Regulation. Benefits can be discontinued or clawed back if the asset limit is exceeded.

Asset Limit Exemptions:

The following list (which is not exhaustive) includes types of assets which a Person With a Disability (“PDW”) can own and not exceed their asset limit:

- Up to \$100,000 for a family unit with one PWD designation
- Up to \$200,000 for a family unit with two PWD designations
- A \$12,000 earning exemption per year for a single person with the PWD designation and \$14,400 per year for two adults, one having the PWD designation;
- Clothing and necessary household equipment;
- One motor vehicle (no limit on value);
- A family unit’s place of residence;
- Money received or to be received from a mortgage on, or on agreement for sale of, the family unit’s previous place of residence as long as the money is used to buy a new residence or used to pay rent on a current place of residence;
- Income tax credits and tax refunds;
- Government settlements for example, compensation for thalidomide victims, Hepatitis C victims, etc.;
- Registered Education Savings Plans
- Registered Disability Savings Plan (both the assets held within the RDSP and payments made from the RDSP)
- Assets in a Non-Discretionary Trust of up to \$200,000 (A non-discretionary trust which exceeds the \$200,000 limit is considered to be an asset); and
- Assets in a Discretionary Trust of an unlimited value (assets held within a discretionary trust are exempt because the PWD has no ownership or control of the assets)

All of the current asset exemptions are listed under Section 10 of the *Employment and Assistance Regulations*, which accompanies the *Employment and Assistance for Persons With Disabilities Act* (British Columbia). An electronic copy of the regulations is available under “Statutes and Regulations” at: www.bclaws.ca.

Items a Trust Can Pay For:

Money can be spent on the following items without a deduction to the PWD beneficiary's monthly disability benefits:

- Purchasing a home for the beneficiary;
- Purchasing a car for the beneficiary;
- Medical aids or supplies;
- Education or training;
- Home renovations required to make the residence more accessible for the beneficiary;
- Home maintenance and repairs; and
- Home support and caregiver services.

There is no limit to the amount of money that can be spent on the above items.

Historically, there was an annual limit on the amount that could be spent on any goods or services that helped the beneficiary live more independently. This limit was eliminated as of December 1, 2015. Practically speaking, this means that a trustee can disburse as much money as considered necessary for the purpose of paying the beneficiary's costs of "independent living".

Other Benefits of a Discretionary Trust Created in a Will: Creditors and Family Law Claims

The creation of a discretionary trust may also provide some insulation from claims, including from potential creditors or claims that might arise in a marital property settlement.