

DISCRETIONARY TRUSTS AS PART OF ESTATE PLANNING

by Gabriella S. Bonn **

G. K. Chesterton said of religious faith - "It is not that it was tried and found wanting, but that it was tried and found difficult." Estate Planning is like that - it is difficult - if you put it off, however, it just gets more difficult. If you have a loved one with a developmental disability who is incapable of managing his or her financial affairs and this loved one is in receipt of government income benefits, some special planning must be done by you in order to assure the continuance of those government benefits for your loved one after your death. Government assistance programs, such as the *Ontario Disability Support Plan* ("ODSP"), regulate the amount of liquid assets and the amount of income that any recipient may receive before benefits are either reduced or terminated.

A successful way of providing resources for the use of your disabled loved one, without affecting entitlement to benefits under the ODSP, is to set up a discretionary trust within your Will. The cornerstone of the estate plan is the Will - which is a final statement made concerning distribution of assets to whom you wish in the proportions you wish.

A trust established by your Will upon your death is called a testamentary trust. A trust is a relationship established when one party (the settlor or testator) transfers property to a second party (trustee), who must use those assets solely for the benefit of a third party (beneficiary). Or, simply put, a trust is created when you instruct your estate trustee (formerly known as executor or executrix) to set aside assets for a specific purpose, as opposed to making an immediate distribution.

Trusts may have different provisions. A discretionary trust is used to provide resources for a family member with a disability without affecting entitlement to government benefit, such as benefits under the *Ontario Disability Support Plan*. A discretionary trust is a widely used estate planning tool. It is a trust arrangement whereby the Trustee has no obligation to distribute the trust property and the beneficiaries have no vested or contingent interest in the property. In a discretionary trust, the Will directs the Trustee to hold the estate, or a portion thereof, during the disabled person's lifetime. During that period the Trustee is authorized at his or her discretion (thus, the name discretionary trust) to pay the income and capital from the estate to a specific beneficiary or a number of beneficiaries which could include the testator's children or grandchildren, or, if there are no other potential beneficiaries, to hold the assets of the estate in trust and accumulate the income thereof or pay any amount or amounts to or for the benefit of the disabled person. In this way, if there is more than one potential beneficiary of the trust, the Trustee could invest the assets and give more or less income and capital to one beneficiary as the beneficiaries require. Because the disabled person would not have an absolute right to any of the property comprising the estate, but would only be entitled to income or capital if the Trustee chose to give it to him or her, the disabled person's ODSP allowance would

not be cut down except to the extent that the Trustee chose to pay income or capital to the person in excess of the amount of allowable earnings prescribed by legislation.

So, if a beneficiary lacks capacity to manage his or her financial affairs, it may be appropriate to leave inherited property to that person by way of a trust rather than by outright distribution. Not only will a trust help preserve the property, but it may avoid the need for the appointment of a guardian to manage such property. In a typical discretionary trust, the Trustee is given absolute authority or discretion to decide how much of the income and how much of the capital, if any, will be paid to the beneficiary and at which time. This trust is often used where a parent wants to see that a child continues to receive government assistance. It allows the Trustee to make discretionary gifts to the beneficiary, such as a audio equipment or a trip, without affecting government benefits

Sometimes, unfortunately, a person dies without leaving a Will, or a Will directs an outright distribution to disabled beneficiary or a disabled person is designated as a beneficiary of life insurance proceeds. Since no discretionary trust has been set up in these scenarios, there may be a direct impact on the disabled recipient of ODSP. There is however a solution available under the ODSP regulations and that is, it is possible to set up a Disability Expenses Trust - which has been capped by regulation at a specific amount of money. **THIS IS NOT ONE AND THE SAME AS A DISCRETIONARY TRUST WITHIN YOUR WILL.** A Disability Expenses Trust can be established if there hasn't been proper planning (i.e. a parent dies intestate, or a family member leaves an outright bequest to the disabled beneficiary or designates the disabled person as a beneficiary of life insurance). There are very specific rules which must be adhered to under the ODSP regulations regarding a Disability Expenses Trust, but it does provide some degree of assistance to the disabled person. Obviously, it is preferable to plan properly by including a discretionary trust in your Will, instead of using the less flexible Disability Expenses Trust.

As setting up a discretionary trust in your Will requires special drafting and is certainly not a "boiler plate" type of trust, should you have a need for this special kind of estate planning, be certain to use the services of a lawyer with knowledge of and expertise in this area of the law.

** Gabriella S. Bonn is a partner with the firm Kirwin Partners LLP Lawyers, of Windsor, Ontario, and concentrates her practice in Wills, Trusts and Estate Planning. She teaches student lawyers at the Bar Admission Course in the area of Estate Planning and Administration.*