

How to Create a Trust

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Introduction

Ensuring financial security for people with disabilities is becoming more important than ever. Increasingly, people with disabilities are living independently and outliving their parents and other relatives. The cost of living continues to rise and there is a growing trend in the government towards cutting services.

Families want to contribute to the financial well being of their children, but most cannot afford to comfortably support them for life. Medical coverage is extremely important for people who require costly aids and equipment, medication and medical treatment. Parents may worry that helping their children financially may adversely affect their disability benefits and extended medical coverage.

Creating a trust is one way that families can provide greater financial security for their relatives without affecting their disability benefits.

People with disabilities may also receive money from a will or a settlement from an accident. Wherever the money comes from, if they directly receive a lump sum payment they will lose their benefits. Having a trust is a way to protect against this loss and ensure that people with disabilities can receive both disability benefits and additional money.

There is a growing demand for information about trusts. It is a complicated issue and it is extremely important that a trust be created and administered properly. There are many rules governing trusts. If a trust is set up incorrectly or the government rules are not followed the person with the disability risks:

- Losing their disability benefits and extended medical coverage
- Paying unnecessary income tax
- Being unable to purchase a residence
- Being unable to change trustees

The laws concerning disability benefits and trusts have changed and much of the material previously published by advocacy organizations is out of date.

It is because of all of these issues that The Voice of the Cerebral Palsied of Greater Vancouver applied for a grant to the Law Foundation to write a resource guide on how to create trusts for people with disabilities.

We wanted to write a guide that would be useful for both people with disabilities and their families. We have tried to provide the information as clearly as possible. It is our hope that it will help families clarify their goals and prepare them to see a lawyer. Please use this book as a starting point and then seek professional advice.

We have endeavoured to provide accurate information at the time of publication. However, rules change and it is always a good idea to double check that all of the information is up to date.

To receive a copy of this resource guide from the VCP, you can:

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Part 1: Information about this Resource Guide

1.1 Who Should Use This Resource Guide?

This resource guide provides information primarily for:

- people who are receiving **Persons with Disabilities (PWD)** benefits and will be receiving a lump sum payment.
- people who want to bequeath some **money or assets** to a person receiving such benefits, **but do not have enough money to totally financially support** the person with the disability.

Important Note: Having a trust will disqualify people from **receiving Persons with Persistent Multiple Barriers to Employment (PPMB)** benefits until the trust money is exhausted, at which point the person would have to reapply for benefits.

This resource guide provides information about trusts. Anyone who wishes to create a trust **MUST** consult a lawyer who understands both trusts and the Employment and Assistance Act for Persons with Disabilities.

1.2 How is The Information in This Resource Guide Organized?

Part 2:

- Answers basic questions about trusts including:
 - Terminology
 - Differences between living trusts and trusts that are created in a will
 - Discretionary and non-discretionary trusts
 - Trust taxation and how to avoid being over taxed

Part 3:

- Explains:
 - The maximum amount of money and property a person receiving disability benefits is allowed to have
 - What not to do if the assets exceed the allowable limit
 - How a trust can enhance the financial security of a person receiving disability benefits

Part 4:

- Describes the rules regarding trust payments and the fact that the beneficiary can appeal decisions made by the Ministry of Human Resources

Part 5:

- Outlines options for a trust including:
 - Who can be chosen as trustee
 - What qualities a good trustee should have
 - Pro's and Con's of choosing a non-profit organization or trust company as trustee
 - Trustee investment powers and limitations
 - How much a trustee can be paid
 - Important clauses to include in the trust

Part 6:

- Provides a check list of:
 - What to bring with you when you visit a lawyer
 - Steps to complete after your lawyer has drawn up the trust
 - Documentation trustees have to keep
 - Taxation deadlines
- How to report the financial activity of the trust to the government

Part 7:

- Contains a questionnaire that you should bring with you to your lawyer, which will summarise what you want included in the trust agreement

Part 8:

- Contains an example of a trust agreement with explanatory comments written in plain English

Appendixes:

- At the back of the resource guide there are appendixes that will help you in the creation of and administration of your trust, which include:
 - Non-profit advocacy groups that provide information about trusts. Some are willing to act as co-trustee
 - Trusts lawyers
 - Trust accountants
 - Recommended supplementary reading list on investments and estate planning
 - Relevant web sites
 - Relevant Legislation
 - Definitions

We have also included blank pages at the back of this resource guide for note taking.

In this resource guide, for the purposes of clarity, words in one gender include all genders and words in the singular include the plural and vice versa, as context requires.

Part 2: Basic Trust Information

2.1 What is a Trust?

A **trust** is a legally binding agreement in which a **settlor** transfers legal control to a **trustee** to manage and administer assets for the benefit of a **beneficiary**. It is a way to set **assets** aside through a special agreement that has specific rules governing it and cannot be revoked.

Assets include money, property and other possessions.

The Settlor is the person who establishes a trust. The settlor can be the beneficiary, or someone else. In cases where the beneficiary is a minor or has a committee (legal guardian) appointed by the court then the beneficiary cannot be the settlor.

The Trustee is the person or company that manages the trust according to the instructions in the trust agreement.

The Beneficiary is the person who the assets in the trust are for. The trust is named after the beneficiary, for example “the Joe Smith Trust”.

2.2 When Does a Trust Come into Effect?

A trust can come into effect either during the lifetime of the settlor or after the settlor dies.

An **Inter Vivos Trust** is a trust that comes into effect during the lifetime of the person who established the trust. It is also known as a **Living Trust**. An example of an inter vivos trust is when the beneficiary is also the settlor.

A Testamentary Trust is a trust that is set up in a will and takes effect after the death of the settlor. Unless the will contains **an express direction to the contrary**, all the debts, funeral expenses, duties and taxes etc. can be taken from the trust.

There are two types of trusts this resource guide will discuss:

2.3 Discretionary Trust:

A **Discretionary Trust** is a trust where **the beneficiary does NOT have control** over the money in the trust. The trustees make all of the spending decisions. Therefore, it is extremely important to have trustees who know the beneficiary well and who understand and support her needs and lifestyle. There is **no limit** to the amount of money that you can place in a discretionary trust.

2.4 Non-Discretionary Trust:

A **Non-Discretionary Trust** is a trust where **the beneficiary HAS control** over the trust spending decisions. There is **a limit of \$100,000**, which can be put into a non-discretionary trust without affecting disability benefits. The Ministry of Human Resources (MHR) may permit more by special approval only. The trustees must ensure that the beneficiary spends the income generated by the trust so that the lifetime capital amount of \$100,000 is never exceeded.

A non-discretionary trust may be set up in two ways:

1. By the person with a disability
2. By people other than the person with the disability

Providing that he is mentally competent, the beneficiary can be the sole trustee of a non-discretionary trust. However, the Ministry of Human Resources may argue that the beneficiary no longer qualifies for disability benefits because he is the only trustee. The beneficiary can challenge this decision because the law states that he can be a sole trustee.

A beneficiary can have both a discretionary and a non-discretionary trust and continue to qualify for benefits. However, these two trusts must be kept completely separate to avoid them being treated as one non-discretionary trust with a limit of \$100,000.

2.5 How is a Trust taxed?

An **Inter Vivos Trust** is taxed at the current top marginal rate of 44% in B.C. (This tax rate changes from time to time.) If the beneficiary qualifies for the Federal Disability Tax Credit (T2201), it is possible to transfer any income made by the trust directly to the beneficiary's personal income tax. The beneficiary will pay income tax at a lower rate because his income is low. This is called the **Preferred Beneficiary Election**. It is important to ensure that the trust agreement gives the trustees the power to use the preferred beneficiary election.

The trustees can decide on a yearly basis whether or not to use the preferred beneficiary election. When making this decision, the trustees need to consider the amount of tax paid versus the amount of disability benefit that will be deducted if the income exceeds the income exemption. (See section 3.2 "Asset Limit Exemptions" Pg. 14). It is recommended that the beneficiary apply for the Federal Disability Tax Credit every year, so that it can be used as needed.

A **Testamentary Trust** is taxed on a graduated income tax rate.

How much income the trust makes will determine if it is more beneficial for the trust or the beneficiary to pay the income tax.

Trust income can be generated from capital gains, dividend payments and/or interest.

Trust assets which attract capital gains, such as real estate and company shares, are subject to a **deemed disposition date**, 21 years after the trust was created, and every 21 years after that. This means, on that date, all of the trust assets are deemed to be sold at fair market value and the trust has to pay income tax on any accrued capital gains. This date is for tax purposes only and the trust itself is not dissolved.

The trustees should seek advice from a professional tax accountant who understands the tax implications of trusts.

The jurisdiction where the trust is taxed is based on where the majority of the trustees live, and where the property and records of the trust are kept. For example, if a trustee resides in Alberta and keeps the records there, then Alberta law governs the trust.

2.6 Can People Other than the Settlor Contribute to the Trust?

The terms of a trust can specify that people other than the settlor, such as family members can contribute to the trust. However in the case of a non-discretionary trust, people must be aware of the \$100,000 limit. The terms of the trust can also specify that the beneficiary cannot accept gifts that make the trust exceed this limit. One way to get around the \$100,000 limit is to also create a separate discretionary trust.

2.7 Can I Set up a Trust for a Relative in Another Province?

You can set up or contribute to a trust for a relative in another province. However, the laws regarding trusts and disability benefits vary from province to province. You must find out what the laws are before creating or contributing to this trust.

Part 3: Allowable Assets for People Receiving Disability Benefits

3.1 Asset Limit:

If you are receiving PWD benefits, you are allowed to have a certain amount of assets before you become ineligible for benefits. For example, if you are a single person with no dependants, you can have no more than \$3000. This is called an **asset limit**. You will have to go off monthly benefits if you exceed this asset limit. The government changes asset limits from time to time so you should double check what you are entitled to have.

3.2 Asset Limit Exemptions:

The following list includes items which you can own and not exceed your asset limit. (All the current asset exemptions are listed under Section 6 of the Employment and Assistance Regulations, which accompanies the Employment and Assistance for Persons With Disabilities Act. An electronic copy of the regulations is available at: www.qp.gov.ca/statreg/list_statreg.html)

- \$3000 for a single person with no dependants
- A person who has a dependant is allowed a maximum of \$5000
- A \$400 earning exemption per family per month
- Clothing and necessary household equipment
- One motor vehicle
- Your primary residence
- Money received from a mortgage or the sale of the residence as long as the money is used to buy a new home or to pay rent on a place of residence

- Tax credits and income tax refunds
- Government settlements for example: compensation for thalidomide victims and Hepatitis C victims etc.
- Non-discretionary trusts up to \$100,000. A non-discretionary trust, which exceeds the \$100,000 limit, is considered to be an asset.
- A discretionary trust is not considered to be an asset because the beneficiary has no ownership over the assets.

3.3 Things NOT to do:

If your money or other assets are greater than your asset limit, you **CANNOT**:

- give them away or spend them on non-exempt assets in order to make yourself eligible for benefits
- sell assets for less than they are worth.

You **CANNOT** refuse:

- to earn income
- to accept other means of support
- money from settlements
- financial gifts

In any of the above cases, the Ministry of Human Resources can declare you ineligible for disability benefits or can reduce your benefits.

3.4 How can a trust help?

- Trusts help families plan for the future.
- Trusts buy items that improve a person's quality of life without decreasing their Disability Benefits.
- Trusts give a person with a disability long term financial security.
- Trusts can help people who need assistance managing their finances.

It is extremely important to set up a trust BEFORE the beneficiary receives a lump sum payment to avoid becoming ineligible for benefits.

3.5 Wills Variation Act:

According to the **Wills Variation Act**, if a will does not leave a disabled child a fair share of the estate, the **Public Trustee** can intervene on his behalf and try to change the will. By intervening, the Public Trustee may affect his eligibility for benefits.

Ideally, a trust should be established while the will is being drafted in order to ensure that a disabled child receives a fair share of the estate **without** affecting his disability benefits. If there is no provision in the will for a trust, competent beneficiaries can establish non-discretionary trusts to protect their benefits. However, beneficiaries who are unable to establish trusts will lose their benefits until the money is spent.

Part 4: What Can a trust Pay For?

4.1 Items a Trust Can Pay For:

Money can be spent on the following items without a deduction to the beneficiary's monthly disability benefits. Money spent on items not listed below can be counted as income and deducted from the beneficiary's benefits.

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

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

- Independent living

There is an annual limit of **\$5,484**, which can be spent on any goods or services that will help the beneficiary live more independently. If the trustees are unsure if an intended expenditure falls within the independent living category, they can check with the Ministry of Human Resources before spending the trust money on it. However, the trustees have the final say as to how the money in the trust is disbursed even if it means that the beneficiary's disability benefits may be deducted.

It is always preferable to try and fit a beneficiary's request into one of the categories where there is no spending limit. Any money spent over the \$5,484 limit will be deducted dollar per dollar from the beneficiary's benefits.

4.2 Payments From the Trust:

Any money taken out of the trust is called a **disbursement**. All disbursements for the items listed above must be made **directly from the trust**. The beneficiary should avoid using his own money and then asking the trustee to reimburse him from the trust. Otherwise, the money will be counted as income for the beneficiary and deducted from his benefits.

4.3 PWD Eligibility for Programs and Benefits:

The Ministry of Human Resources cannot require the beneficiary to pay for items from his trust that are normally covered by disability benefits. A person receiving PWD benefits can qualify for such items as:

- Dental coverage up to \$500 a year
- Glasses every 4 years
- Medical equipment and devices
- Prescription drugs
- Annual Bus Pass (\$45 per year)
- BC Ferry pass
- Leisure Access Card

(For a complete list see the PWD web site:
www.mhr.gov.bc.ca/pwd)

The trust is meant to pay for things that are not covered by the Ministry.

4.4 Can Decisions Made by the Ministry of Human Resources be Appealed?

A copy of the trust agreement and all trust transactions must be sent to the Ministry of Human Resources (MHR) for evaluation. It is up to the ministry to decide whether or not:

- the trust is legal
- disbursements are given directly to the beneficiary
- the money is being spent on income exempt items
- all the ministry guidelines are being followed
- the beneficiary still qualifies for benefits

Any decision made by MHR, which adversely affects the beneficiary's eligibility for benefits, can be appealed.

A well maintained Trust Record containing all trust receipts will provide important evidence in the appeal process. The BC Coalition of People with Disabilities has an Advocacy Access Program that assists people going through the appeal process. (See Appendix B1 Pg. 62)

Part 5: Issues to Consider Before Setting up a Trust

5.1 The Trustee Act:

The Trustee Act covers all the responsibilities, liabilities and investment powers of the trustees **not directly specified in the trust agreement**. Once a trust is created it cannot be changed. It is extremely important that the settlor clearly sets out how she wants the trust to be administered. Otherwise, the trustees will be limited in their activities based on the trustee act.

A trust should be set up to be flexible so that trustees can make changes in how money is spent whenever laws and regulations change. For example, the rules about who can receive disability benefits and how much they receive are set by the province and can be changed at any time.

5.2 Duties of a Trustee:

The duties of a trustee include:

- Exercising discretion in the release of funds when necessary
- Providing investment management of assets
- Coordinating any maintenance/repairs of real estate
- Preparing trust tax returns
- Maintaining records of the trust (See section 6.2 “Trust Record” Pg. 32)
- Ensuring the beneficiary receives benefits as specified by the settlor’s wishes

5.3 Trustee Fees:

Trustees are paid a fee from the trust. The beneficiary or the court must approve the fee. The Trustee Act currently states that the maximum fees are:

- A flat, one-time fee of 0-5% of the value of the trust
- Income fee between 0-5% of the income collected per annum
- Trust management fee of 0.4% of the capital of the trust per annum

The fees that the trustees charge are determined by the amount of time, effort and skill that has been required of them while acting as trustees. (See Part 8 “Sample Basic Trust Agreement” clause 5 Pg. 51)

5.4 Choosing a Person to be a Trustee:

- It is extremely important that the trustees are very well acquainted with the needs and the lifestyle of the beneficiary. It is beneficial if the trustees have financial knowledge. However, under the Trustee Act, a trustee can also appoint agents to help in the financial administration of the trust.
- It would be helpful if the trustee knows something about the Employment and Assistance For Persons with Disabilities Act.
- If possible, the beneficiary should have some say as to who is chosen as trustees.
- Choose people as trustees who are committed to fulfilling that role for a long period of time. They must understand that being a trustee will require a lot of time and effort.

- If there is more than one trustee, the trustees should get along with each other.
- It is advisable to have trustees who are likely to live longer than the beneficiary or the length of time the trust is needed.
- Appoint one or more alternate trustees. It is beneficial to have more than one trustee especially if one of them lives far away from the beneficiary or becomes unable to continue carrying out the duties of a trustee. If a trustee dies, the remaining trustee is empowered to continue the duties she performs as trustee for the time being. (See 5.9 "Appointing New Trustees" Pg. 26 and Part 8 "Sample Basic Trust Agreement" Clauses 18 and 19 Pg. 56)
- At least one of the trustees should live near the beneficiary so that he has easy access to the trustees.
- Do not choose a person to be a trustee who has a conflict of interest with the beneficiary. For example, be cautious about choosing a sibling of the beneficiary who will inherit the trust after the beneficiary dies.
- Do not choose a paid caregiver or home support worker as a trustee.
- In the case of a non-discretionary trust, the beneficiary can decide if he wants to be both the beneficiary and a trustee.

5.5 Choosing a Non-Profit Society to be a Trustee:

Some non-profit groups, such as the Coast Foundation Society (See Appendix B1 Pg. 62), offer services as trustee or co-trustee. There are advantages and disadvantages to this arrangement:

a) Advantages:

- They are specialists in Disability Benefit law.
- They are experts in advocating for the rights of the disabled.
- They are knowledgeable about alternate sources of funding.
- They provide a support network for people who do not have immediate family close by.
- They can pool the trusts into a common trust fund with people in similar situations and similar financial needs.

b) Disadvantages:

- Employees change. This situation may create problems due to lack of continuity and consistency in the relationship between the beneficiary and the trustee.
- They are more likely to limit payments that affect disability benefits.

A **common trust fund** is the pooling together of a number of smaller trusts to increase the rates of return and decrease the fees charged. A trustee, including a non-profit organization, may invest in a common trust fund managed by a trust company whether or not the trust company is a co-trustee. The settlor can specify in the trust agreement whether or not he wants the trust to be pooled.

5.6 Choosing a Trust Company to be a Trustee:

The settlor may decide to have a trust company either as a co-trustee or as a sole trustee. The settlor should talk to several trust companies and find out information about their services, philosophy and fees and whether they would be willing to handle the trust. There are advantages and disadvantages to choosing a trust company as trustee.

a) Advantages:

- They are experts at managing money and keeping financial records. They can make financial decisions more quickly than someone who is not highly trained in financial investments.
- Trust companies are impartial and will not get involved in family arguments.

b) Disadvantages:

- Trust companies charge a variety of fees for the administration of a trust.
- Most trust companies will not handle small trusts (under \$200,000) because they will not make enough money on them. However, some will pool small trusts together into a common trust.
- Company employees change. This situation may create problems due to lack of continuity and consistency in the relationship between the beneficiary and the trustee.
- The Trust company may have little contact with the beneficiary and therefore be less attuned to his or her specific needs.

- Trust companies are very careful about paying out money. Therefore, the beneficiary may have greater trouble having his needs looked after.
- It can be very difficult to remove a trust company as a trustee

If you choose to have a trust company as a trustee, it is a good idea to have another person who knows the beneficiary as co-trustee. The trust company has expertise in investment whereas the other trustee can offer more personal attention to the beneficiary because the trustee knows his needs and lifestyle.

According to the law, a trust company that is co-trustee cannot use the money in the trust to invest in its own securities due to conflict of interest.

Many trust companies now prefer that a trust hire them as fund managers instead of as co-trustees.

5.7 Professional Fund Manager:

The Trustee Act allows the trustee to delegate financial management decisions to an agent such as a professional fund manager. The advantage of hiring a fund manager is that the trustees can access professional financial advice without having a trust company act as a co-trustee. The trustee is not held personally liable for decisions made by the agent so long as the trustee acted prudently in:

- Selecting the agent
- Establishing the terms and limits of the authority delegated
- Acquainting the agent with the investment objectives, and
- Monitoring the performance of the agent to ensure compliance with the terms of the delegation

5.8 Letter to Trustee in a Discretionary Trust

It is recommended that the settlor of a **discretionary trust write a letter** to the trustees accompanying the trust agreement about her values and priorities in administering the trust and how the money should be spent. (See Appendix A Pg. 61)

- This letter explains the settlor's wishes when she is no longer able to do it in person.
- The trustees can look at the letter for guidance if there is any argument over a difficult decision.
- This letter can be used as evidence if there is any question about whether or not the trustees acted according to the trust's purposes.

This letter is just a guideline for the trustees. It is not legally binding. If there is a dispute or a discrepancy between the directions in the letter and the trust agreement, the trustees must follow the trust agreement.

5.9 Appointing New Trustees:

The settlor must ensure that there is a clause within the trust agreement giving the settlor or the beneficiary (if he is competent) the power to remove or replace trustees. Otherwise, it is a complex and time consuming court procedure to get a trustee removed or to appoint a new trustee if one quits.

5.10 What Types of Investments Can Trustees Make?

It is extremely important that the settlor decide what types of investments she wants for the trust, what investment powers the trustee will have, and to ensure that the trustee has a prudent investment strategy.

When creating a trust, the settlor must consider:

- The age, health and life expectancy of the beneficiary

- The types of investments that will best meet the beneficiary's short term and long term needs.

There are many ways to invest money. It is important to assess the risk, expected return, and the ease that the investments can be turned into cash.

- Some investments are better suited for long term growth but also have a greater level of risk, such as a combination of mutual funds and stocks
- Others are more easily cashable such as government bonds.
- Some are more secure, but have a fixed length of time, like a GIC, and there are penalties for cashing them in before they mature.

Usually a combination of all of the above is best and the settlor has to decide what combination is best suited for the needs of the beneficiary. (See Part 8 "Sample Basic Trust Agreement" clauses 24 and 25 Pg. 57)

A clause must be written into the trust agreement that allows the trustees to purchase "**real property**". Without this clause, the trustees are able to sell property, but are unable to purchase a new principal residence for the beneficiary.

5.11 Immediate Beneficiary:

The **Immediate Beneficiary** is the person the trust was created for. The settlor should include a clause in the trust agreement stating that the priorities of the trustees are to look after the needs of the immediate beneficiary. Otherwise, the current trust law states that trustees must protect the money in the trust for the **Ultimate Beneficiary** who is the person who will inherit the trust once the immediate beneficiary dies. It is the settlor's choice who the ultimate beneficiary will be. (See Part 8 "Sample Basic Trust Agreement" clause 11 Pg. 53)

5.12 Liability of a Trustee:

A Breach of trust is a breach by a trustee of the terms of the trust agreement or the law of trusts. An example of a breach of trust is when a trustee redirects trust property for his own personal use.

The Trustee Act requires that the trustee act prudently while making investment decisions. The trustee's performance is judged on an overall portfolio strategy and not on an asset-to-asset basis. For example, if one stock significantly decreases in value, the trustee is not held personally liable as long as they have a prudent investment strategy in place. The court can decide, based on the evidence, whether or not the trustee acted in good faith by comprising a reasonable assessment of risk and return that a prudent business investor would adopt in comparable circumstances.

If the settlor or the beneficiary has strong moral or ethical beliefs about how and where to make financial investments, a clause must be included in the trust agreement stating that trustees are permitted to make moral or ethical investments decisions. Otherwise, without this clause, they will be in breach of trust if they obtain a lower level of return than if they only used economic considerations.

Part 6: Steps to Creating and Administering a Trust

6.1 List of steps:

1. Complete the Pre-Trust Questionnaire (See Part 7 “Pre-Trust Questionnaire” Pg. 37)
2. The settlor should create a list of things she wishes to discuss with her lawyer, and in the case of a discretionary trust, bring a copy of the letter she wrote for the trustees about the purposes of the trust. (See Appendix A Pg 61). The settlor must be clear about the intended purposes of the trust so that her lawyer can ensure that the trust will serve those purposes. Once the trust is created it cannot be changed.
3. The settlor should then arrange to have the trust document prepared by her lawyer. The trust must be in writing so that you can prove to the Ministry a trust exists, and that the money or other assets are in the trust.
4. Be sure that the people named as trustees want to be trustees.
5. The settlor should meet with the trustees and at least one other person who will be the witness. In a non-discretionary trust, where the settlor is the beneficiary, she can settle the trust with \$5.00 as set out in this step. Make sure that the definition of **settled property** in the Trust Agreement says \$5.00. In a discretionary trust, the settlor simply settles the trust with her assets for the beneficiary. The definition of settled property in this case would be the total amount the settlor is initially depositing into the trust.

(In a non-discretionary trust where the settlor is the beneficiary, a nominal fee, such as \$5.00, is required to initially create the trust. Once the trust is created, all future assets can be transferred directly into the trust. It is extremely important that the beneficiary never directly receives the

**assets. See Part 8 “Sample Basic Trust Agreement” clause A
Pg 59)**

At the meeting the settlor must follow these steps:

- a) The settlor gives the \$5.00 bill to the trustees (to “settle” the trust)
 - b) Everybody signs two original trust documents:
 - i. The settlor must sign both documents as “Settlor”
 - ii. The trustees each sign both documents.
 - iii. The witness signs each document three times as witnesses to the settlor’s signature and the signatures of the two trustees.
 - iv. Everybody initials all of the pages of both documents (except the last page that the settlor has already signed)
 - c) The trustees staple the \$5.00 bill to one of the original trust documents which the trustees keep
 - d) The settlor keeps the other copy of the trust document (the one without the \$5.00 bill)
6. Make 4 photocopies of the trust document:
- a) Copy to open bank account
 - b) Copy for accountant doing income tax returns
 - c) Copy for the Employment and Assistance Worker
 - d) Extra copy-just in case
7. The trustees open a bank account at any bank, trust company, or credit union. The bank account should be opened with the trust’s name (e.g. “The Joe Smith Trust”). The signing authorities for the trust should be the trustees and not the beneficiary (unless the beneficiary is also a trustee)
8. If the settlor is putting money into the trust, she gives a cheque to the trustees for the money that she wants added

to the trust. If the money for the trust is coming from somewhere else like an estate, ICBC, or another person, the settlor must tell that person to give the cheque directly to the trustee. The cheque should be payable to the name of the trust (i.e. “the Joe Smith Trust”) and not to the beneficiary.

9. The trustees deposit that cheque into the account and then decide whether any of the money should be invested somewhere else: for example, in a term deposit or GIC. All securities must be registered under the trustees’ names and not under the beneficiary or the settlor’s name.
10. The trustees should have a ring binder or file so they can keep a diary and record of all activities of the trust. The trustees should write down:
 - a) All the decisions the trustees make
 - b) Any instructions
 - c) Any money that comes in to the trust or is paid or of the trust.

It is very important to keep a copy of each resolution that is made by the trustees. The trustees must write down each decision they make and file them in the ring binder. (See Section 6.2 “Trust Record” Pg. 32)

11. Make a reminder note about the need to file income tax returns for the trust each year. (See “Checklist of Deadlines” Pg. 33)
12. The trustee must decide each year if income earned by the trust will be attributed to the beneficiary and included in his personal income tax return or the trust’s income tax return. (See Section 2.5 “How is a Trust Taxed?” Pg. 12)
13. The trustees must regularly review the regulations under the Employment and Assistance for Persons with Disabilities Act before making any payments to the beneficiary.
14. The beneficiary must advise his Employment and Assistance Worker (EAW) of the creation of the trust. The

worker must send a copy to the Legislative and Interagency Branch in Victoria to make sure the trust is legal.

6.2 Trust Record:

The trustees must keep a record of all activity related to the trust. Not only will it keep the trustees organized, it will also provide evidence that the trust is well managed in case the administration of the trust is called into question.

The trustees should keep a ring binder or file to hold:

- A copy of this checklist
- Original signed trust document (the one with the \$5.00 stapled to it)
- Copies of any cheques or descriptions of any property given to the trust
- Copies of receipts for expenditures, deposit receipts and proof of all disbursements
- List of trustees' names and addresses
- Minutes of trustees' meetings and copies of resolutions including:
 - a) Any resolutions regarding paying income or capital to the beneficiary
 - b) Any resolutions regarding any unused income in any year; for example, if it is going to be reinvested and added to capital or paid to the beneficiary or preferred beneficiary election
 - c) Any resolutions regarding the payment of bills relating to the trust such as legal fees or accounting fees

- Copies of T3 trust asset forms and income tax returns
- Copy of the regulations for the Employment and Assistance for Persons with Disabilities Act
- **Checklist of Deadlines:**
 - a) **Fiscal Year End:** For an inter vivos trust; it is December 31. For a testamentary trust, the trustees can decide on any fiscal year end.
 - b) **Annual Report to the Ministry of Human Resources:** At least once a year, the trustees must submit a report to MHR about all financial activities of the trust. MHR will review the report to ensure that all regulations are being followed regarding exempt income. The fiscal year end is a good time for this. MHR may request more frequent reports. (See section 6.3 “How to Report Disbursements from the Trust to the Ministry of Human Resources” Pg.34)
 - c) **Preferred Beneficiary Income Tax Filing:** For an inter vivos trust, it is March 31 (March 30 in a leap year). For a testamentary trust, it is 90 days after the fiscal year end.
 - d) **Trust Income Tax Filing:** For an inter vivos trust, it is March 31 (March 30 in a leap year). For a testamentary trust, it is 90 days after the fiscal year end.
 - e) **Information Slip Filings:** such as NR4, T4 etc. are due February 28 (February 29 in a leap year)
 - f) **The 18th Anniversary** of the trust is a good time to review the ongoing administration of the trust with respect to the upcoming 21 year deemed disposition. If there are investments making a high rate of return, it is a good idea to start possibly cashing in shares to

reduce the accrued capital gains, which will be taxed on the 21st year of the trust.

- g) **21 year Deemed Disposition Date:** For most trusts, trust assets are subject to deemed disposition 21 years after the trust was created, and every 21 years after that. (See Section 2.5 “How is a Trust Taxed?” Pg.12)

6.3 How to Report the Financial Activity of the Trust to the Ministry of Human Resources

The ministry must be informed about how the trust money is spent so they can decide if the disbursements should be considered exempt income. (See section 4.1 “What can a Trust Pay For?” Pg.17)

Each year the ministry needs the following information about the trust:

- How much money was disbursed from the trust
- What this money was used for
- Any new capital contributions

A good way to report the financial activity within the trust is to use the following table. This table shows when disbursements were made, what they were spent on, and what deposits were made.

Column A	Column B	Column C	Column D	Column E	Column F
Date	Capital	Disbursement	Expenditure	Explanation Of Expenditure or Deposit	Trust Balance
Capital of the Trust on the date it was created (settled property)					\$35,000
Aug 17, 2004		(\$1000)	\$500	Attendant services	\$34,000
Aug 22, 2004			\$500	Education/ Tuition Fees	\$34,000
Oct 15, 2004		(\$300)	\$300	Home Repair	\$33,700
Dec 1, 2004	\$500			Inheritance from Aunt Rose Smith	\$34,200
Total Disbursements		(1,300)			
Total Expenditures			\$1,300		
Total Deposits	\$500				

Column A: the date of the disbursement or deposit

Column B: the dollar value of the capital deposited to the trust

Column C: the amount of the disbursement

Column D: the amount that was spent on a disability related cost

Column E: a description of how money was spent or where money for the deposit came from

Column F: the amount of money left in the trust after each deposit or disbursement

When the trustees give this table to the ministry they must include proof for all disbursements, receipts for expenditures, deposit receipts and proof of the balance in the trust account from the bank. Any money that is spent on items other than the MHR list of allowable trust expenses will be deducted dollar for dollar from the beneficiary's disability benefits cheque.

Please Note: the amount of "Disbursements" (Column C) and "Expenditures" (Column D) must be the same for the disbursements to be exempt. All money taken out of the trust (Column C) must be spent on disability related costs (Column D). Any amount not spent of these costs will be deducted from the beneficiary's disability cheque.

Part 7: Pre-Trust Questionnaire

This questionnaire is intended for a settlor who wants to create a trust. The settlor can be creating a trust for himself or someone else. It will help you and your lawyer to be clear about what you want included in the trust agreement.

When a settlor meets with a lawyer there are many things that must be discussed, such as who will be trustees, the type of trust that he wishes to create, what powers the trustees will have, etc. When the beneficiary is also the settlor, the lawyer must be aware of all of the beneficiary's financial information in order to protect his money and disability benefits. These discussions can be time consuming and lawyers charge fees for consultations. It will save you time and money if you fill out this questionnaire before you see a lawyer.

Please make note of any additional information concerning you, your family, and/or assets and liabilities that might be helpful for your lawyer to know about.

Questionnaire

Date: _____

1. Full name

2. Home Address

3. Birth Date

4. I have a will: Yes____ No____

5. I need a will: Yes____ No____

6. I want to create a discretionary trust for my_____

Or

I want to create a non-discretionary trust for:

a. my _____

b. myself_____

If you are creating a trust for someone else please skip ahead to “Terms of My Trust” on page 45

7. I am working: Full time _____

Part time _____

As a volunteer _____

8. My job is: _____

9. I get paid \$ _____

10. I am receiving money from the government:

Yes _____ No _____

11. I started getting money from the government at age: _____

12. Every month I get \$ _____ in benefits

13. My government money comes from:

a. B.C Disability benefits (PWD) _____

b. CPP Disability pension _____

c. ICBC settlement payments _____

d. Other: _____

14. My disability is: _____

15. My doctor is:

(Name)

(Phone #)

(Address)

16. I have a completed list of assets: Yes _____ No _____

17. My total assets are worth \$ _____

18. My closest relatives are:

Family Member No.1:

(Name) (Address)

Relationship: _____

Age: _____

Family Member No.2:

(Name) (Address)

Relationship: _____

Age: _____

Reasons for the Trust:

19. I want to set up a trust now because I am receiving money from:

a) \$_____ my own money

b) \$_____ from an inheritance from my_____

and he is still alive

or

he died on _____ date

and the executor is:

(Name)

(Address)

c) \$ _____ from an accident settlement from:

i. ICBC _____

ii. Another insurance company _____

iii. Someone else _____

iv. I think the money will be paid to me on:

(Date)

d) \$ _____ from a court settlement for

(Reason)

The money is:

i. Still in court _____

ii. Somewhere else _____

iii. Already in my account _____

iv. Other _____

20. I expect my trust fund will have a total of \$ _____

21. I want to set up a trust now because:

a) I want to keep my government benefits: _____

b) I want to get government benefits again: _____

c) I want to start getting government benefits: _____

My Assets:

Bank Accounts:

22. I have \$ _____ in a bank account(s) at:

(Name of first bank, trust company or credit union)

I have \$ _____ in a bank account(s) at:

(Name of second bank, trust company or credit union)

Investments:

23. I have \$ _____ other money or investments at:

(Name of financial institution)

24. I have an RRSP worth \$ _____ at:

(Name of financial institution)

Real Estate:

25. I own my own home: Yes _____ No _____

If yes:

I bought or inherited my home on _____ date

My home is worth: _____

My mortgage balance is: _____

I live in my home with:

(Name)

(Relationship)

(Name)

(Relationship)

26. My name is on other real estate, e.g: parents home.

Yes_____ No_____

Details: _____

Life Insurance:

27. I have life insurance with:

(Name of insurance company)

(Amount)

Personal Effects and Other Assets:

28. Besides the “usual” furniture, clothes and household items I also own:

(List all the things of value to you that you own ie car, computer, expensive tools etc.)

(Item) (Value)

(Item) (Value)

(Item) (Value)

Outside British Columbia:

29. I own property and/or assets outside of British Columbia:
Yes_____ No_____

Total:

30. My total assets are worth \$_____

Debts:

31. I owe \$_____ amount to _____
(Name of creditor)

I owe \$_____ amount to _____
(Name of creditor)

Terms of My Trust:

32. I would like to have these people as the trustees of my trust:

Trustee #1:

(Name)

(Address)

(Occupation)

(Relationship)

Trustee #2:

(Name)

(Address)

(Occupation)

(Relationship)

Trustee #3:

(Name)

(Address)

(Occupation)

(Relationship)

33. I would like the above trustees to act together as co-trustees:

Trustees to act together: _____
(Names)

34. I would like some of the trustees named above to be alternates if one or more can not do it:

Trustee to be alternates: _____
(Names)

Beneficiaries:

35. I would like the immediate beneficiary to be the only person who can get the money from the trust during his lifetime:

Yes_____ No_____

36. When the beneficiary dies, the remaining trust assets will to go to my closest relatives: Yes_____ No_____

If yes:

a) Wife/husband and children_____

b) Grandchildren _____

c) Mother/Father_____

d) Brothers and Sisters_____

e) Other relatives_____

Or:

37. When the beneficiary dies, the remaining trust assets will go to someone else _____
(Names)

Other Terms of the Trust:

38. When my trustees invest in my trust, I want them to be restricted to investments like bank accounts, term deposits, G.I.C's and Canada Savings Bonds:
Yes____ No_____

Or:

39. I want my trustees to have unrestricted powers so they can invest in whatever they think is a good investment:
Yes____ No_____

40. I want my trustees to be able to buy real estate:
Yes____ No_____

41. I want to be able to use the trust as collateral to buy a house:
Yes____ No_____

42. I want my trustee to be able to make complicated business deals like investing in private companies or carrying on a business: Yes____ No_____

43. I want my trustees to make investments using particular ethical criteria: Yes____ No_____

If yes:

They are:

44. I want my trustees to be able to pool trust assets into a common trust fund: Yes_____ No_____
45. In the future, I want to be able to change the trustees of my trust: Yes_____ No_____
46. I want to give my trustees the power to use the Preferred Beneficiary Election: Yes_____ No_____

Part 8: Sample Trust Agreement

The following trust agreement is meant simply to familiarize the reader with the type of language commonly used when making trust agreements. There are differences between discretionary and non-discretionary trust clauses. Included in this agreement are the most common clauses for each type. Trust agreements are customized to best meet the needs of the beneficiary. Therefore, trust agreements will vary.

This Trust Agreement dated this (date) day of (month) of (year)
BETWEEN:

(the “Settlor”)

OF THE FIRST PART

AND:

(the “Beneficiary”)

**OF THE SECOND
PART**

AND:

***** and *****

OF THE THIRD PART

(the “Trustees”)

Interpretation and Definitions:

In the Trust Agreement:

- a) **“Agreement”** means the Trust agreement
- b) **“Discretion”** means as much sole and uncontrolled discretion as the law allows
- c) **“Settled Property”** means amount first paid by the Settlor to create the trust
- d) **“Trust”** means the trust created by this Trust Agreement

e) **“Trustee” or “Trustees”** means the trustee or trustee from time to time acting under this Trust Agreement and includes the Original Trustees and any trustee or trustees who replace the Original trustees

f) **“Trust Fund”** means:

- i. the Settled Property and any property that may be substituted for it any time
- ii. all property which may be paid or given or appointed to the Trustees, together with all income the Trust Fund earns and additions to the capital but does not include any amounts which have been paid or distributed under this Trust Agreement

Words in one gender include all genders and words in the singular include the plural and vice versa, as context requires.

WHEREAS:

A. The Settlor wishes to establish a Trust for the Benefit of the Beneficiary, composed of \$***** settled property and such other assets as may be assigned in the Trust in the future,

(See Section 6.1 “List of Steps” on Pg. 29 regarding settled property)

B. The Trustees are willing to act as the Trustee of that Trust for the benefit of the Beneficiary,

C. The Beneficiary is disabled and the disability will continue for the rest of his life,

D. British Columbia Provincial legislation provides for special consideration of some certain persons who are disabled where money is held in trust for them and the Beneficiary is a person so entitled.

This agreement is governed by and interpreted according to British Columbia law and applicable Canadian law and will be treated in all respects as a B.C trust agreement.

THIS AGREEMENT WITNESSES that in consideration of the agreements set out below, the parties agree as follows:

1. The Settlor assigns and conveys to the Trustees for the exclusive benefit of the Beneficiary, a disabled person, the sum of \$*****
2. ***** and ***** each agrees to act as one of the Trustees.
3. The Trustees each agree to help administer the Trust and all investments and reinvestments of the Trust assets and agree to help maintain the Trust for the benefit of the Beneficiary.
4. Any person, corporation or trust may add any real or personal property to the Trust by delivery, conveyance, bequest or by causing the proceeds to be payable to the Trustees.

(In a non-discretionary trust agreement, the settlor may not want the trust fund to accept additional gifts because they may cause the trust to exceed the \$100,000 limit and thus disqualify the beneficiary from disability benefits.)

5. The Trustees (or any successor) shall be entitled to reasonable compensation in accordance with fee schedules from time to time agreed between the Trustees (or successor) and the Beneficiary, which is to include all out of pocket expenses plus reasonable compensation for Trustees' services as Trustees.
6. The Trustees agree to exercise their powers in the best interests of the Beneficiary.

(Clauses 1 and 6 together mean that the trustees are to only focus on the needs and interests of the beneficiary during his lifetime.)

MANDATORY PAYMENT

7. The Trustee shall pay to or expend for the benefit of the Beneficiary such part of the income and principal of this Trust as may be required or desirable to meet the following needs, being the cost of providing the Beneficiary with the following:
 - a. Devices, or medical aids, related to the Beneficiary's health or well being;
 - b. Caregiver services or other services related to the Beneficiary's disability;
 - c. Education or training;
 - d. Necessary maintenance for the Beneficiary's principal residence;
 - e. Renovations to the Beneficiary's principal residence to accommodate the person's disability;
 - f. Expenses up to the current year's legislative limit of \$5,484 or other amount established by the regulations, that promote the Beneficiary's independence;
 - g. Any other item for which the expenditure is not considered "income" under the Employment and Assistance for Persons with Disabilities Act, or any other applicable statute or regulation under which the Beneficiary is receiving benefits.

(Clause 7f states that expenses for independent living have a maximum limit per year of whatever the law allows for this category. The current limit is \$5,484. It is important that the agreement be flexible because this limit can change from time to time.)

8. No payments may be made from the Trust until the Beneficiary has first utilized, until exhausted, all other income and resources available to the beneficiary from all sources other than this Trust known to the Trustee, except exempt assets, but including, without limitation, benefits, payments, programs, services and funds provided, administered, sponsored, or paid for by or on behalf of any governmental (federal, provincial or municipal) agency.

(Clause 8 ensures that the Ministry of Human Resources cannot force a trustee to pay for something that would otherwise be covered by PWD benefits. This clause is especially important if the trust fund is small. However, it limits the trustees ability to make payments. It is up to the settlor to weigh the pros and cons of this clause. See section 4.3 “PWD Eligibility for Programs and Benefits” on Pg.18)

9. A payment may be delayed or not made at all if making that payment would result in the loss of government benefits.

(Clauses 7g and 9 limit payments for disability related costs only so that the beneficiary can continue to qualify for disability benefits. However, there may be circumstances when the beneficiary requests payments for items that are not disability related. Therefore, in a non-discretionary trust, you may choose to replace these clauses with one that states “anything else the beneficiary directs”, even if this means the beneficiary loses disability benefits for a month.)

OPTIONAL PAYMENTS (Discretionary Trust Only)

10. In addition to the payments made as described above, the Trustee shall pay to or expend for the benefit of the Beneficiary such part, all or none of the net income and principal of this Trust as the Trustee, in its absolute discretion, determines to be in the Beneficiary’s best interests.
11. The power to make the Optional payments shall be exercised for the Beneficiary without regard to more remote interests.

(The term “remote interests” refers to anyone who will eventually have a claim over the trust assets after the immediate beneficiary dies. Clause 11 means that the trustees must look after the needs of the immediate beneficiary and not worry about protecting the money for the ultimate beneficiary. See section 5.11 “Immediate Beneficiary” Pg. 27)

12. The power to make Optional payments of income or principal shall be exercised by the Trustee after considering the following suggested guidelines, so that the trust money may be used to provide for the Beneficiary's:
- a. Health (including without limitation, medical, dental, nursing, rehabilitation, psychiatric and psychological care),
 - b. Support,
 - c. Education (including special, vocational, or habilitating education),
 - d. Welfare and comfort,
 - e. To attend a wedding or funeral or other similar event or vacation,
 - f. To strengthen, enrich and gladden the Beneficiary's life, including trips away from the Beneficiary's residence including persons to accompany the Beneficiary on such trips, clothing, recreation, entertainment, hobbies and "treats",
 - g. And generally to promote the Beneficiary's independence, but only after first utilizing, until exhausted, all income and other resources available to the beneficiary for such purposes from all sources other than this trust.

EXERCISE OF TRUSTEES POWERS-PUBLIC RESOURCES

13. As it is intended to assure initial and continued availability to the Beneficiary of all governmental payments, funds, programs, services, and facilities ("public resources") available to the Beneficiary, the Trustee is directed to exercise its powers to distribute the Trust money to supplement, exceed and extend, but not supplant, "public resources" by providing only such health, support, education, welfare and comfort as is unavailable from "public resources".

14. It is the overriding intent of this agreement to give the Trustee the discretion and obligation to make such payment of income and principal as will be in excess of, or in addition to, those provided by “public resources” but in no respect shall such expenditures replace or duplicate “public resources”.

(Clauses 12g, 13, and 14 encourage the trustee to maximize the benefits from other sources available to the beneficiary even though doing this means limiting payments from the trust to the beneficiary.)

15. The Trustee shall have no power to pay or apply Trust assets to pay or reimburse any governmental agency, or provider of “public resources”.

16. In the event, and to the extent:

- a. Any governmental agency, payor, sponsor, or provider determines administratively, or a court shall determine, that provisions of this trust are ineffective or are to be disregarded for purposes of determining the Beneficiary’s eligibility for statutorily provided “public resources” or
- b. A court or administrative tribunal shall determine, notwithstanding provisions of set out above, that this Trust is or may be subject to garnishment, attachment, levy, execution, or bankruptcy proceedings instituted by any creditor against the Beneficiary, then,
- c. The Trustee may appeal that administrative or judicial determination.

(Clause 16 states that the trustee can appeal any ruling that either overrides the provisions of the trust protecting the beneficiary’s eligibility for public resources or overrides the provisions protecting the trust from payment of any debts.)

GENERAL AND ADMINISTRATION

17. Payments of Trust money may be made in person to the beneficiary or deposited in any bank account in the Beneficiary's name or be paid directly to a third party for the benefit of the Beneficiary.

(It is not recommended that the beneficiary receive payments directly from the trust because it will adversely affect his benefits. However, clause 17 is in the agreement to allow for greater flexibility in exceptional cases where the beneficiary may require money.)

18. Should **** become unable to act as Trustee **** shall be the sole Trustee of this Trust.

19. Should ***** wish to resign, refuse or become unable to act, ***** may, with the approval and consent of the Beneficiary, appoint a successor Trustee to act in its place, and failing agreement a successor Trustee shall be appointed by the Supreme Court of British Columbia.

(In a non-discretionary trust, the settlor may want to give the beneficiary the power to call on any trustee to resign. See Section 5.9 "Appointing New Trustees" Pg. 26)

20. Should the Beneficiary die, after paying the Beneficiary's funeral and testamentary expenses, the remaining assets of the Trust shall form a part of the Beneficiary's estate.

21. No interest of the Beneficiary shall be subject to assignment, alienation, pledge, encumbrance, sale, gift, transfer or other disposition in anticipation of payment prior to actual distribution, either by the voluntary or involuntary act of the Beneficiary or by operation of law, nor shall any such interest be liable for or subject to any debt, contract, obligation, claim or liability, in contract or tort, legal or equitable, of the Beneficiary by reason of bankruptcy, insolvency, or otherwise subject to the Beneficiary's debts or in any way be subject to attachment,

garnishment, levy, execution, seizure under claim of creditor or other legal process.

(Clause 21 states that the beneficiary cannot use the trust as collateral or give it away as a gift. The trust is also not liable for any debts or financial obligations incurred by the beneficiary)

22. The Trustee may combine the separate trust accounts administered under this and other similar trust agreements with each other for the purposes of commingled investment and administration of the combined trust accounts, and the Trustee shall allocate all trust receipts and disbursements among the combined trust accounts proportionately.

(Clause 22 is an example of a Common Trust Fund clause. See Section 5.5 "Choosing a Non-Profit Society to be a Trustee" Pg 23)

23. The Trustee shall allocate receipts and expenses of the trust first to income and then to principal. If the net income from the trust is not spent in any year, the amount not spent is to be added to the principal.

(In the case of a non-discretionary trust it is strongly recommended to spend ALL of the income so as not to exceed the \$100,000 lifetime capital amount)

24. The Trustees are expected to invest trust property as would a prudent investor in a manner best suited to the requirements of the trust for income and capital growth at no more than a reasonable level of risk. The Trustees' performance should be assessed on a portfolio wide basis, with the test being whether the overall investment strategy was prudent.

25. The Trustees are permitted to access professional fund management as other prudent investors do.

26. The Trustees are permitted to delegate authority to the professional fund managers where this reflects only common business sense and ordinary prudence. The Trustees who delegate authority must exercise prudence in selecting the

agent, define clearly the scope of the authority to be delegated, and supervise the agent in a reasonable manner. The Trustee will have final responsibility for properly supervising the agent's exercise of limited discretionary power.

(Clause 25 and 26 give the trustee the power to seek professional investment advice and to delegate decision making to an agent. However, the trustees are still responsible for ensuring that the funds are properly invested. See Section 5.7 "Professional Fund Manager" Pg. 25)

27. The Trustees have the power to use modern technology to enhance their investment capabilities, including e-mail, facsimile transmissions and investing online.

(Clause 27 allows the trustees to invest electronically rather than manually.)

28. A statement showing all receipts and disbursements and the property comprising each trust shall be given at least annually to the Beneficiary.

29. Unless otherwise provided in the instrument:

- a. The legal title to all property of this Trust shall remain vested in the Trustee from time to time without any act of conveyance or transfer to, by or from any succeeding or retiring Trustee;
- b. All of the rights, powers and authorities, discretionary or otherwise, granted to the original Trustee shall descend to any successor Trustee;
- c. No Trustee shall be required to give any bond or security or to render any periodic court accounting;
- d. All words denoting number and gender shall be construed to denote the proper number and gender applicable to the Trustee with respect to the power or duty involved;
- e. No person dealing with the Trustee shall be obliged to inquire into the Trustee's powers or to see to application of any money or property delivered to the Trustees; and

- f. A successor Trustee may accept the account rendered and the trust property delivered by the predecessor Trustee without review or liability.
- g. This Agreement shall be construed, regulated and determined by the laws of British Columbia

SIGNED, SEALED & DELIVERED

By ***** as settlor on <date> in the presence of:

(Signature of Witness)

(Print name of Witness)

(Settlor's signature)

(Address of Witness)

(Occupation of Witness)

SIGNED AND DELIVERED by
(Trustee #1 name) as an
Original Trustee on <date>
In the presence of:

(Signature of Witness)

(Print name of Witness)

(Trustee #1 signature)

(Address of Witness)

(Occupation of Witness)

SIGNED AND DELIVERED by
(Trustee #2 name) as an
Original Trustee on <date>
In the presence of:

(Signature of Witness)

(Print name of Witness)

(Trustee #2 signature)

(Address of Witness)

(Occupation of Witness)

TO EVIDENCE THEIR TRUST AGREEMENT the Settlor and the Original Trustees have signed this Trust Agreement on the date appearing above.

(The original trustees, by signing this trust agreement, acknowledge receiving the settled property from the settlor, and accept their appointments as original trustees. The settlor cannot revoke the trust.)

Please note: If the settlor is also a trustee, he must sign both in the section marked "Settlor" AND the section marked "Trustee".

Appendix A: Sample Letter to Trustees in a Discretionary Trust

Date

To The Trustees:

I am setting up this trust for these reasons:

1. To protect my daughter's assets.
2. To ensure she continues to receive government benefits.
3. To maintain the quality of life she now enjoys.

The trust is for her benefit during her lifetime. You are not to concern yourself with the benefit to any ultimate beneficiaries (those who will inherit the trust after her death) but consider the needs of my daughter as paramount.

I want you to consult my daughter and try to meet her requests. If she makes a request that may cause her to lose her benefits, you should consider whether it contributes to her quality of life. If so, do it. However, try to avoid major losses, if possible.

Always ask yourself what I would have done. Do not ONLY consider finances.

I cannot foresee the future, but I do know that things will change. My daughter may want to move. Her residence may have to be sold and another home found. She may marry and want to have children. I trust you to do your best to see she is protected and she enjoys a good quality life.

Settlor's Name.

Appendix B: Resources

B.1 Non-Profit Societies:

The Voice of the Cerebral Palsied of Greater Vancouver

Laurette Yelle, Assistant Executive Director
#103-577 East 8th Avenue,
Vancouver B.C, V5T 1S9
Tel: (604) 874-1741,
Email: vcpgv@vcn.bc.ca

The VCP is a non-profit, self help, advocacy society, which is run by and for adults with Cerebral Palsy.

Planned Lifetime Advocacy Network

Boundary Plaza
Suite 260-3665 Kingsway,
Vancouver B.C, V5R 5W2
Tel: 604-439-9566 Fax: 604-439-7001
www.plan.ca

PLAN is a non-profit advocacy group, which specializes in working with people who are mentally handicapped and their families. PLAN has extensive knowledge about creating trusts and support networks.

B.C. Coalition for People with Disabilities

#204-456 West Broadway,
Vancouver B.C. V5Y 1R3
Main Tel: 604-875-0188 Fax: 604-875-9227
Advocacy Access Tel: 604-872-1278
E-mail: advocacy@bccpd.bc.ca

The B.C Coalition is a provincial non-profit group, which advocates on behalf of people with all types of disabilities. The advocates at Advocacy Access assist people appealing decisions made by the Ministry of Human Resources.

The Coast Foundation Society

Blandyna Skowronska, Trust Co-ordinator
293 East 11th Avenue,
Vancouver B.C. V5T 2C4
Tel: 604-872-3502 Ext. 290 Fax:604-879-2363
Email: blandynas@coastfoundation.com
www.coastfoundation.com

The Coast Foundation Society is a non-profit advocacy group that specializes in helping people who have mental illnesses. Blandyna is an expert in creating discretionary trusts. The Coast Foundation also acts as co-trustees.

B.2 Trust Lawyers:

Access Law Group

Barristers & Solicitors
Halldor K. Bjarnason, B.A. (Hons.) LL.B.
Suite 1700, 1185 West Georgia Street,
Vancouver B.C, V6E 4E6
Tel: 604-689-8000 Fax: 604-689-8835
E-mail: halldor@trustlawyers.ca
www.Trustlawyers.ca, www.Accesslaw.ca

Tim Louis and Company

Barristers & Solicitors
208-175 East Broadway
Vancouver B.C, V5T 1W2
Tel: 604-732-7678 Fax: 604-732-7579

B.3 Trust Accountants:

Cinnamon Jang Willoughby

Chartered Accountants
Valerie Denike, BA, BSc, BEd, CA
900-4720 Kingsway, Burnaby B.C V5H 4N2
Tel:604-435-4317 Fax:604-435-4319
E-mail: vdenike@cjw.com

B.4 Books on Estate Planning:

You Can't Take it With You: A Common Sense Guide to Estate Planning for Canadians by Sandra E. Foster

Published by John Wiley and Sons 2002

ISBN:0470783156

This is a book about estate planning, protecting your money, minimizing estate taxes and maximizing the money left for beneficiaries. Although not specifically a disability related book, it is still very helpful and includes a chapter on trusts.

Safe and Secure: Six Steps to Creating a Good Life for People with Disabilities by Al Etmanski with Jack Collins and Vicky Cammack, Published by (PLAN) in 2002

This book is about ensuring the well being of mentally disabled family members. It includes steps to creating a will, creating a trust and developing a life long support network for people with mental disabilities. It can be purchased from PLAN.

B.5 Relevant Web Sites About:

- **PWD Benefits:**

The Persons with Disability Benefits Web Site:

www.mhr.gov.bc.ca/pwd

This site includes how to apply for benefits, a copy of the Employment and Assistance for Persons with Disabilities Act and Regulations and more detailed information about income exemptions than we included in this resource guide.

- **Federal Tax Forms and Disability Tax Credits**

Canada Customs and Revenue Web Site:

www.ccr-a-drc.gc.ca/tax/individuals/menu-e.html

This site has an alphabetical search for all federal tax related topics. A search under “D” will lead you to all the disability related tax information including how to apply for T2201 Disability Tax Credit and how to use it to apply for other tax credits, including a credit for attendant care.

- **Investing and Securities, Trust Companies and Professional Fund Managers**

The majority of the investment information that is available online is produced by banks, trust companies and credit unions. The following is a list of sites that are for independent regulatory agencies. These sites are designed to answer investment questions, assess claims of individual companies and provide non-partisan information and advice.

The British Columbia Securities Commission Web Site:

www.bcsc.bc.ca

The British Columbia Securities Commission is an independent government agency that regulates the trading in securities in B.C. This very informative site provides information about basic investing, creating an investment strategy, mutual funds, choosing financial advisors, and how to protect against fraud. This site is written in plain language and is easy to navigate.

Financial Consumer Agency of Canada Web Site:

www.fcac-acfc.gc.ca

The Financial Consumer Agency of Canada is a new, federal, independent body designed to educate and protect consumers of financial services. The site includes a resource centre with information about almost every financial topic including bank accounts, fees trust companies can charge, questions to ask before

investing, mutual funds and more. The information in this site applies to all federally incorporated banks, credit unions and trust companies.

Financial Institutions Commission Web Site:

www.fic.gov.bc.ca

The Financial Institutions Commission is a B.C government regulatory agency created to protect people who hire trust companies, credit unions and insurance companies. This Site includes an alphabetical list of authorized B.C trust companies, credit unions and insurance companies as well as investor information and consumer alerts.

Appendix C: Glossary of Relevant B.C. Legislation

A complete alphabetical listing and electronic copy of all British Columbia Statutes with associated Regulations can be found at: www.qp.gov.ca/statreg/list_statreg.html

Employment and Assistance for Persons with Disabilities Act - Establishes the rules for disability benefits.

Public Guardian and Trustee Act- protects the rights of minors and dependant adults.

Securities Act- establishes guidelines for all financial activities including stock exchange, mutual funds, insurance companies and trust companies.

Trustee Act- covers all the responsibilities, liabilities and investment powers of the trustees not directly specified in the trust agreement.

Trustee Investment Statues Amendment Act – Amends section 15 of the Trustee Act to allow the trustees more flexibility in making investments. Defines “Prudent Investor Rule”

Wills Variation Act- allows spouses and children who believe they have not been fairly treated to contest the will in question. **If the will does not leave a disabled child a fair share of the estate, the Public Trustee can intervene on their behalf and try to change the will.**

Other Acts that might be useful to our readers include: *The Adult Guardianship Act*, *The Power of Attorney Act*, and *The Probate Fee Act*.

Appendix D: Definitions

Assets: the financial resources a person has, including cash, bonds, securities, property and/or items of value (ie. a car). Pg. 10

Asset Limit: the maximum amount of assets a person receiving PWD benefits can have. Pg. 14

Beneficiary: the person who the assets in the trust are for. The trust is named after the beneficiary, for example “the Joe Smith Trust”. Pg. 10

Breach of Trust: a breach by a trustee of the terms of the trust agreement or the law of trusts. An example of a breach of trust is when a trustee redirects trust property for his own personal use. Pg. 28

Capital Gain: profit from the sale of assets, such as bonds, real estate, etc.

Common Trust Fund: a number of small trusts are pooled together to increase the rates of return and decrease the fees charged. Pg. 23

Deemed Disposition Date: on the 21st anniversary of the trust and every 21 years thereafter, all of the trust assets are deemed to be sold at fair market value and the trust has to pay income tax on any accrued capital gains. This date is for tax purposes only and the trust itself is not dissolved. Pg. 12,34

Disbursements: payments from the trust Pg. 18

Discretionary Trust: a trust where the beneficiary does not have control over the money in the trust. The trustees make all of the spending decisions. There is no limit to amount of money that you can place in a discretionary trust. Pg. 11

Diversify: to invest in different types of securities, investments etc. so that a failure or economic slump in one will not cause economic disaster.

Dividend: a sum of money paid out to shareholders out of corporate earnings.

Immediate Beneficiary: the person who the trust is created for. Pg. 27

Immediate Beneficiary Clause: a clause added to the trust agreement to ensure that the needs of the immediate beneficiary take priority over all future claims.

Inter Vivos Trust: a trust fund that comes into effect during the lifetime of the person who established the trust. It is also known as a **Living Trust**. Pg. 10

Non-Discretionary Trust: a trust where the beneficiary has control over trust spending decisions. There is a limit of \$100,000, which can be put in a non-discretionary trust without affecting disability benefits. Pg. 11

Preferred Beneficiary Election: a way of transferring taxable income from the trust to the beneficiary's personal income tax. Pg. 12, 33

Professional Fund Manager: a professional money manager a trustee can hire to either offer financial advice or to handle the financial administration of the trust. Can also be called a portfolio manager, mutual fund manager or a securities advisor. Pg. 25

Public Trustee: a provincially appointed person responsible for protecting the interests of children who are under 19 or dependent adults. The Public Trustee intervenes in cases where there is a question of abuse of power of attorney or when a will does not provide for children under 19 or adults with a disability. Pg. 16

Real Property: the legal term for real estate. A clause must be included in the trust agreement allowing trustees to purchase real property as a residence for the beneficiary. Pg. 27

Remote Interests: anyone who will eventually have a claim over the trust assets after the immediate beneficiary dies. Pg. 53

Settlor: the person who establishes a trust. The settlor can be the beneficiary, or someone else. In cases where the beneficiary is a minor or has a committee (legal guardian) appointed by the court then the beneficiary cannot be the settlor. Pg. 10

Settled Property: the initial amount of money that is used to create the trust. Pg. 29

Testamentary Trust: a trust that is set up in a will and takes effect after the death of the settlor. Pg. 11

Trust: a legally binding agreement in which a settlor transfers legal control to a trustee to manage and administer assets for the benefit of a beneficiary. It is a way to set assets aside through a special agreement that has specific rules governing it and cannot be revoked. Pg. 10

Trustee: the person or company that manages the trust, often according to written instructions contained in the trust agreement. Pg. 10

Ultimate Beneficiary: the person who will inherit the trust after the person it was created for dies. Pg. 27

Appendix E- Bibliography and References

In Trust: How to set up your own trust and still be eligible for B.C. disability benefits by Peter Bogardus and Mary Hamilton, Published by The Planned Lifetime Advocacy Network (PLAN) in 1999

Safe and Secure: Six Steps to Creating a Good Life for People with Disabilities by Al Etmanski with Jack Collins and Vicky Cammack, Published by (PLAN) in 2002

Planning a Trust: for a relative or friend who receives disability benefits from the B.C. government, Published by the Coast Foundation in 1997

B.C. Benefits: Disability Benefits and Trusts, by the BC Coalition of People with Disabilities, Published by the Ministry of Human Resources 1999

A Sample Discretionary Trust by the Coast Foundation

Trusts for Persons with Disabilities (PWD), Help sheet series #8 prepared by Advocacy Access a program of the BC Coalition of People with Disabilities, updated April 23, 2003

The Trustee Act (RSBC 1996) Chapter 464 (Current to B.C. Regulations Bulletin February 20, 2003)

Trustee Investment Statues Amendment Act S.B.C. 2002, c.33 (current to B.C regulations bulletin Feb.28, 2003)

The Employment and Assistance for Persons with Disabilities Act and Regulations

Consultation Paper on Trustee Investment Powers by the British Columbia Law Institute

Tax Planning using Alter-Ego/Joint Partner Trusts help sheet by AIM Trimark

Notes