

Supportive & Estate Planning for People with Disabilities

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Ken M. Kramer, Q.C.

- ▶ Founder and Principal of KMK Law Corporation, a long-standing boutique law firm in downtown Vancouver providing Estates, Trusts, Elder Law, Litigation and Mediation services.
- ▶ A unique understanding of the disability community combined with expertise in the area of estates and trusts law to serve families with disabilities.
- ▶ Passionate and a strong advocate for both the disability and seniors communities.
- ▶ Served on numerous boards and committees over the past 25 years with a focus on disability and seniors issues. Current Publicly Appointed Vice-Chair of the Board Of Directors of the College of Chiropractors and Chair of Seniors First BC.
- ▶ Past Chair of the Emergency Medical Assistants Licensing Board and the National Board of Directors of Muscular Dystrophy Canada.



Outline for today's discussion:

- ❖ Understanding & Defining Disability
- ❖ Trends in Canada and BC's Disability Landscape
- ❖ Estate and Trust Planning for Persons with Disabilities
- ❖ Supported/Alternate Decision-Making
- ❖ Resources & Language Dictionary

Understanding & Defining Disability

- ▶ Current understanding of the concept of “disability” has been articulated in the Preamble to the United Nations *Convention on the Rights of Persons with Disabilities* as follows:
 - ▶ Disability is an *evolving* concept and results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.
- ▶ The Supreme Court of Canada has stated that:
 - ▶ Disability should not be confined within a narrow definition... rather, it is more appropriate to leave room for **flexibility** and proposes a series of guidelines that will facilitate **interpretation**.

Understanding & Defining Disability

- ▶ Defining disability necessitates a broad multi-dimensional understanding:
 - ▶ May be Visible or Hidden
 - ▶ Not merely a health problem or a physical or mental limitation
 - ▶ Movement from the “Medical” to “Social” model of Disability
 - “The medical model tries to adapt the individual to society whereas the social model tries to adapt society to the diversity of individuals that comprise it.”

Trends in Canada's Disability Landscape

- ▶ Statistics Canada confirms that approximately 14% of Canadians report having some level of disability.
- ▶ Disability rate rapidly increases as age increases.



BC's Disability Landscape

- ▶ As of August 2015, there were approximately 96,000 people receiving disability assistance in BC.
- ▶ The Ministry (SDSI) will provide about \$976 million in disability assistance in 2015-16, an increase of 162% since 2001-02.
- ▶ Funding of more than \$5 billion a year is being allocated towards programs and services for people with disabilities.
- ▶ Government has set a goal of making B.C. the most progressive place in Canada for people with disabilities with the Accessibility 2024 plan.



What This Means for the Legal/Health-Care Professions

- ▶ Most legal & health-care professionals, regardless of specialization, will serve at least some clients/patients who have disabilities or otherwise encounter issues of significance to people with disabilities.
- ▶ Incumbent on each professional to be aware of legislation, jurisprudence, services and programs of significance to people with disabilities.
- ▶ Duty to accommodate disability:
 - ▶ Principles underlying the duty to accommodate include respect for dignity, individualized accommodation and integration and full participation.

Why do we need to discuss Estate Planning?

- ▶ At age 18, a child with a disability may qualify for provincial disability assistance from the Ministry of Social Development and Poverty Reduction (“SDPR”).
- ▶ In order to qualify, a person must meet specific financial criteria.
- ▶ This criteria includes:
 - ✓ Less than \$100,000 in liquid assets.
 - ✓ They may own a motor vehicle.
 - ✓ They may own their own principal residence.

Recent Developments with Provincial Disability Benefits

- On December 1, 2015, the BC Government introduced several key regulatory and policy changes in relation to income support for people with disabilities under the *EAPDA*:
 - **British Columbians receiving disability assistance are now able to hold significantly more assets and receive financial gifts and inheritances with no impact on their monthly assistance**



Disability and Estate Planning



- ▶ Many practical, tax and disability benefit considerations must be contemplated when designing an estate plan that includes disability.
- ▶ SDSI provides disability assistance to Persons with Disabilities (PWD) who require financial or health support and are unable to fully participate in the workforce.
- ▶ Proper planning will ensure that persons with disabilities remain eligible to receive disability assistance.

Eligibility for Disability Assistance: Person with a Disability(PWD)



- ▶ To be eligible, under section 2(2) of the *Employment and Assistance for Persons with Disabilities Act (EAPDA)*, you must:
 - ▶ Be 18 years old;
 - ▶ Have a severe physical or mental impairment that is expected to continue for more than two years;
 - ▶ Be significantly restricted in your ability to perform daily-living activities;
 - ▶ Require assistance with daily living activities

Policy Changes Affecting Disability Benefits

- ▶ Several key policy changes introduced by the BC Government affecting people receiving the PWD benefit under the *EAPDA*:
- ▶ **1. Prescribed classes for automatic PWD designation (Effective September 2016)**
 - ▶ Applicants will complete a shorter PWD application form that gives SDSI permission to confirm their eligibility into one of the following classes:
 - ▶ People receiving support and services from Community Living BC (CLBC)
 - ▶ People enrolled in the Ministry of Children and Family Development At Home Program
 - ▶ People enrolled in BC PharmaCare Plan P - Palliative Care
 - ▶ People determined as disabled by the Government of Canada and eligible for the Canada Pension Plan Disability Benefit

Asset and Income Exemptions

- 1. Asset Limit Increases (Effective December 1, 2015)**
 - ▶ The asset limit threshold is raised for a PWD as they will now be able to hold more assets:
 - ▶ **\$100,000 for a single, couple, or family where one person has the PWD designation (from \$5,000)**
 - ▶ **\$200,000 for a couple where both adults have the PWD designation (from \$10,000)**
- 2. Gifts, inheritances and trust payments exempt from general asset limit (Effective December 1st, 2015)**
 - ▶ For the first time in B.C., persons with disabilities will be able to receive cash gifts, inheritances and trust payments with no effect on their eligibility for assistance.
 - ▶ The \$8,000 annual (“independence”) cap on trust payments is being eliminated.
- 3. Earnings exemption**
 - ▶ Annualized Earnings Exemption of \$12,000 per year
- 4. Child support payments (Effective September 1, 2015)**
 - ▶ Child support payments, CPP orphan’s benefit & WorkSafe BC benefit for a surviving child of a deceased worker now exempt from income calculation.

Trusts and Disability

- ▶ To achieve estate planning certainty, estate planning will often involve the use of Trusts.
- ▶ Notwithstanding recent legislative and policy changes, Trusts continue to be a very effective vehicle in planning for individuals with disabilities.
- ▶ Offer great value where the person with a disability is unable to manage money for themselves due to capacity issues and/or has a higher level of susceptibility.
- ▶ Preservation of provincial disability benefits.

Wills



Why Everyone Needs a Will!

Without a Will, your estate is divided according to a fairly confusing set formula:

- ▶ First, it goes to your spouse. If more than one spouse, either as the spouses agree, or as the court decides.
- ▶ If you have kids, part to your spouse, part to your kids, but the amounts depend on whether the kids are from the same spouse.
- ▶ If no spouse, to your kids.
- ▶ If no kids, to your parents.

Dying Without a Will

- ▶ If no parents, to your brothers and sisters
- ▶ If no siblings, to your grandparents, etc.

- ▶ **EASIER TO MAKE A WILL!!!!**

Other Ramifications

- ▶ As most estates are worth more than \$100,000, dying without a Will can have serious results for a beneficiary who is receiving disability assistance.
- ▶ If a guardian for minor children is not appointed, custody of their person is given to the Ministry of Children & Families and custody of their estate is given to the Public Trustee.

A Will gives you more control over your estate.

It permits you to:

- ▶ Appoint an Executor/Trustee (someone you trust to manage your affairs).
- ▶ Appoint a guardian for any minor children.
- ▶ Distribute your estate in the amounts and to the persons you wish.
- ▶ Set up Trust(s) to protect vulnerable beneficiaries.

Wills Variation Awareness

- ▶ Danger of leaving your estate to a trusted friend or other family member with a request that that person look after the disabled person:
 - ▶ Invites a wills variation application on behalf of the disabled person,
 - ▶ Exposes the assets to the vagaries of the life of the friend or family member.

Wills Variation Awareness

- ▶ It is not a viable option for a parent of a person with disabilities to leave nothing or a reduced amount to that child under the parent's will in order to preserve the child's disability benefits, particularly in British Columbia, where [Part 4, Division 6](#) of the [Wills, Estates and Succession Act](#), S.B.C. 2009, c. 13 which can be used to vary a will for the benefit of a disabled child.
- ▶ The person with disabilities or someone acting as a litigation guardian on his or her behalf if he or she is incapable of instructing counsel (a private committee or the Public Guardian and Trustee) may pursue a wills variation claim in order to achieve greater provision out of the estate (see, for example, [Woods \(Guardian of\) v. Woods Estate](#), 2002 BCSC 569).

Why a Disability Trust?



- ▶ Funds in a trust are not treated as an asset of a person receiving disability assistance. The beneficiary continues to qualify for assistance.
- ▶ Trusts provide a way for PWD client's and their families to transfer and safeguard their assets for meeting disability-related costs now and in the future while remaining eligible for disability assistance.

What Is a Trust?

- ▶ A **Trust** is a relationship whereby one person (the "**Settlor**") gives assets to a second person (the "**Trustee**") to hold and use for the benefit of someone else (the "**Beneficiary**").



Trust Vehicles

- ▶ **Inter Vivos Trusts - “Living Trusts”**
 - ▶ created by a person for his or her own benefit or by someone else during someone’s lifetime

- ▶ **Testamentary Trusts - “Death Trusts”**
 - ▶ created in a will or trust when someone dies

The emphasis is on “how” the Trust was created and “how” the income in the trust is taxed: both are treated as a separate tax payer.

Types of Trusts

- ▶ The Trust Policy identifies two types of trusts: “discretionary trusts” and “non-discretionary trusts”.

Non-Discretionary

v.

Discretionary

- ▶ These two terms describe what kind of power/control the trustee(s) have in managing the assets in the trust.

Non-Discretionary Trusts

- ▶ The trustee does not have total authority over how the assets are managed as the beneficiary may have some input in the decision making of a trust either as a trustee or because they originally contributed the assets.
- ▶ Non-discretionary trusts are considered by SDSI an exempt asset so long as the value of all the capital contributed to the trust does not exceed \$200,000.
- ▶ Capital contributions in excess of \$200,000 are not exempt as an asset unless special approval is given by the Minister and he/she is satisfied that the lifetime disability-related costs of the beneficiary will exceed \$200,000.

Discretionary Trusts

- ▶ The trustee(s) has absolute control and discretion on how the assets are managed. The disabled beneficiary has no control over the money held in the trust or how it is spent.
- ▶ Not considered an asset under the *EAPDA* and there is no limit to the amount of money that can be held in such a trust. The disabled beneficiary does not have a “beneficial interest in assets held in the trust” or a right to income from the trust, nor can the beneficiary be said to have a right to any of the estate capital (see [Ontario \(Ministry of Community & Social Services\) v. Henson](#) (1987), 28 E.T.R. 121 (Ont. Div. Ct.), affirmed (1989), 36 E.T.R. 192 (Ont. C.A.)).

Permitted Expenditures From A Trust: *Disability Related Costs*



Trust funds for a disabled beneficiary can generally be utilized for the following:

- Caregiver services or other services related to that person's disability.
- Education or training.
- Home renovations necessary because of your disability.
- Home maintenance repairs.
- Medical aids.
- Any other item the trustee/beneficiary considers necessary to promote the person's independence.*

***Effective December 1, 2015, there is now no limit on the amount of dollars that can be expended from the trust for this purpose.**

Other Planning Tools

- ▶ A trust is not the only way to preserve disability benefits for a person with a disability:
 - ▶ Availability of \$100,000 exemption
 - ▶ Ability to purchase a principal residence or vehicle
 - ▶ Gifting
 - ▶ RDSPs
 - ▶ RRSP/RRIF Rollover
- ▶ Good planning will ensure that each of these tools are considered and will often involve some combination of the above referenced options.

Supportive/Alternate Decision-Making

- ▶ There is a presumption that when a person reaches age 19, they are capable of making their own decisions.
- ▶ Due to disability, aging, disease, or accident, personal decision-making is not always a reality. Some people never acquire the ability to make their own decisions. Others have the ability and lose it.

Private Committeeship

What is Private Committeeship?

- ▶ Substitute Decision Maker for Estate and/or Person
- ▶ Court appointed decision-maker
- ▶ Expensive and uncertain. By having a judge make the appointment, it doesn't always ensure you "get who you want" making decisions on your behalf
- ▶ Puts the Adult under the supervision of the Public Guardian & Trustee of BC "PGT"
- ▶ Last-Resort Option

Enduring Power of Attorney

An Enduring Power-of-Attorney is . . .

- ▶ A living document.
- ▶ Permits you to appoint someone that you trust to make legal and financial decisions on your behalf, even if you subsequently lose mental capacity.
- ▶ Has a high test for requisite mental capacity.

Representation Agreements



“SUPPORTIVE” AS OPPOSED TO A
“SUBSTITUTE” DECISION-MAKING TOOL



Representation Agreements

A Representation Agreement is the **key legal document** in British Columbia for personal planning/advance care planning.

It is a legally enforceable document and used in case of incapacity, for end-of-life, and other support needs.

You must be an adult (19 years or older) to make a Representation Agreement.

A representative has legal authority to help you manage your affairs and carry out your wishes if you need temporary or ongoing assistance – due to illness, injury or disability.

Representation Agreements

A Representation Agreement is the **only way** to authorize someone – called your representative – to assist you or to act on your behalf for **health care and personal care** matters.

Some might use a Representation Agreement to cover routine financial affairs and legal matters.

There are **two types** of Representation Agreements - a Representation Agreement section 7 (RA7) and a Representation Agreement section 9 (RA9). The term ‘section’ refers to a part of the Representation Agreement Act that lists the authorities a representative may have.

An RA7 and an RA9 are **different**. The one to make **depends on your mental capability** at the time of making it.

Standard Representation Agreement(Section 7)

- ▶ Allows you to appoint someone you trust to help you make routine medical, personal care, financial, and legal decisions.
- ▶ Diminished Capacity. You do not need to have full mental capacity to make a standard representation agreement.
- ▶ You can make one without the aid of a lawyer.

Enhanced Representation Agreement (Section 9)

Permits you to:

- ▶ appoint someone you trust to make almost all health care and personal care decisions
- ▶ give advanced care and end of life instructions

You do not need to consult with a lawyer to make an Enhanced Representation Agreement.



Lawyer Relations

- ✓ Not all lawyers understand Wills and Trusts, and not all Wills and Trust lawyers will understand disability issues.
- ✓ It is crucial to find a lawyer who understands disability issues as they relate to your estate. A small mistake now can be very costly later on.



Resources

- ▶ **BC Ministry of Social Development/Social Innovation Information Booklet:** www.hsd.gov.bc.ca
- ▶ **Planned Lifetime Advocacy Network (PLAN):** www.plan.ca
- ▶ **NIDUS Personal Planning Resource Centre and Registry:** www.nidus.ca
- ▶ **ARCH Disability Law Centre:** www.archdisabilitylaw.ca

ARCH is a community legal aid clinic dedicated to defending and advancing the equality rights of people with disabilities in Ontario. Its website provides a description of the services it offers as well as information on disability law and initiatives in litigation and law reform. Special acknowledgement to ARCH, “*Providing Legal Services to People with Disabilities*” (2010).

- ▶ **Council of Canadians with Disabilities:** www.ccdonline.ca

CCD is a consumer-controlled organization that advocates for the equality rights of people with disabilities. This site describes the philosophy and membership of the CCD and includes information on their advocacy work in a number of areas including technology, human rights, international development, social policy and transportation.

- ▶ **Disability-Related Policy in Canada:** www.disabilitypolicy.ca

This website presents policy discussions on the funding, supply and availability of a range of products and services for disability-related needs, including personal supports and technical aids and equipment.

Resources

- ▶ **Disability Research Information Page:** www.ccsd.ca/drip

This website provides centralized access to information about disability research on a wide range of topics including employment, education, health care, and supports and services available for people with disabilities.

- ▶ **EnableLink:** www.abilities.ca

Enablelink provides links to Canadian and international resources on a wide variety of disability-related topics including links to directories, articles, organizations, advocacy and support groups, services and products.

- ▶ **Persons with Disabilities Online:** www.pwd-online.ca

This site is sponsored by the Federal Government and provides links to both national and provincial information sources for a wide range of programs and services available to people with disabilities including housing, employment, assistive technology, tax benefits and transportation.

- ▶ **United Nations Convention on the Rights of Persons with Disabilities:** www.un.org/disabilities/

This site gives information on the history and development of the *Convention*, the background behind the provisions and the current work taking place on the *Convention*.

- ▶ **Special acknowledgement to Barbara Buchanan, Practise Advisor, “Acting for a client with dementia,” Law Society Benchers’ Bulletin: Practise Watch (2015).**

Language Dictionary

- **“Language that is, and is not, considered to enhance the dignity of people with disabilities:”**
 - ▶ putting the person first by saying, “people with disabilities” or “women with disabilities” is now generally considered more appropriate than saying “disabled persons” or (especially) “the disabled”;
 - ▶ people with disabilities are often referred to as “consumers” of disability-related services;
 - ▶ some people prefer to be known as “autistic” rather than as a “person with autism”;
 - ▶ “disability” is a more appropriate term than “handicap”;
 - ▶ “non-disabled” is considered more appropriate than “able-bodied”;
 - ▶ refer to a “wheelchair user” rather than to someone “confined” or “bound” to a wheelchair;
 - ▶ usage (in Canada, especially) strongly favours “intellectual disability” or “developmental disability” as opposed to “mental retardation”;
 - ▶ the terms “physically challenged” and “mentally challenged” are not in general use in Canada.
- For more helpful tips on proper use of language, see www.archdisabilitylaw.ca

THANK YOU!

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