

# Testamentary Trusts for Children

The information contained in this brochure is provided as a public service by the Public Guardian and Trustee of British Columbia and is a general guide for persons who are Trustees of money or other property left to a child (a person under age 19) under a Will. It has been prepared to assist Trustees but **is not a substitute for legal advice from a lawyer**. The PGT recommends that a Trustee of a child's property seek legal advice from a lawyer before making decisions on behalf of the child. This brochure is for Trustees in BC; each province of Canada has its own laws about trusteeship and children's property.

## What Is A Trustee?

A Trustee is a person who holds money or other property on behalf of another person. Often a Trustee is appointed in a Will to hold any money or other property left to a child. The Trustee holds the money until the child reaches age 19, or to another age specified in the Will.

## What Are A Trustee's Duties?

A Trustee is guided by the terms of the Will, the British Columbia *Trustee Act* and decisions of the Court. The primary duty of a Trustee is to follow the terms of the Will in holding and administering a child's property. A Trustee is required to use the utmost care in managing the child's property, and must always act in the best interests of the child.

A Trustee has the duty to account for the property held on behalf of the child. For this reason, a Trustee must keep a record of all transactions made by the Trustee relating to the trust property. The Trustee should keep all financial statements detailing income earned by the trust, as well as a record of all expenditures from the income or capital of the trust (the original amount of money a child inherits is called the capital, while income is money that the capital has earned while invested).

The records that a Trustee keeps are called the accounts. A Trustee is obligated by the *Trustee Act* to seek the approval of his or her accounts by the Supreme Court of British Columbia within two years of his or her appointment. This procedure is known as a “passing of accounts”. The child who is a beneficiary of the trust, or the child’s legal guardian, is entitled to request and receive a copy of the Trustee’s accounts at any time. The Public Guardian and Trustee may also ask to review the Trustee’s accounts at any time.

### **Whose Property Is It?**

Money or other property held by the Trustee belong to the child who is the beneficiary of the trust and not to the Trustee. The Trustee holds and protects the trust property and must use the property exclusively for the benefit of the child. The Trustee cannot personally benefit from the trust. The Trustee cannot borrow the trust property, or lend it to anyone else.

### **Where and How Should the Trustee Hold the Child’s Property?**

The Trustee must keep the child’s property separate from the Trustee’s own property. For this reason, the Trustee must establish a separate account for the money to be held in trust for the child. The child’s money cannot be held in the Trustee’s personal account, or in an account which is held jointly with the child. The Trustee should never mingle personal funds with trust funds. No person other than the Trustee should have signing authority for the trust account. There should be a separate account established for each child who receives funds to be held in trust, unless the Will states otherwise. The trust account should be registered in the name of the Trustee “in trust for the child”. Any major bank, credit union or trust company can assist a Trustee in setting up a trust account.

### **What Investments Can The Trustee Make?**

The Trustee must invest the money held in trust as directed by the Will. If the Will does not specify how the money is to be invested, the Trustee is restricted to investments outlined in

Sections 15.1 to 15.5 of the *Trustee Act*. Under the *Trustee Act*, a Trustee is required to exercise the care, skill, diligence and judgment of a “prudent investor” when making investment decisions. A Trustee is required to develop an investment plan or strategy which should be put in writing. A Trustee who makes imprudent investment decisions can be held personally responsible for any losses to the trust property that results.

A Trustee should obtain advice from a lawyer or financial advisor when investing trust property.

Some criteria that may be considered when determining if an investment is prudent include:

- Adopting a balanced investment strategy
- Protecting capital and providing income
- Choosing suitable risk and return objectives
- Having a reasonable diversity of investments
- Using caution in delegation of authority to agents
- Incurring only reasonable and appropriate costs

### **Can The Trustee Use Some Of The Property For The Child?**

The Trustee must be guided by the Will when determining whether or not to provide money or other property held in trust for the child for the child’s use. If the Will does not specifically allow it, property may not be used. The Will may state that the Trustee, at his discretion, may use or “encroach on” trust income and/or trust capital. The Will may list specific purposes to which a Trustee may apply trust money or other property, or may contain general language outlining how the Trustee may use the trust property for the benefit of the child.

The Trustee must keep careful records of how any money is used. If a Trustee is unsure how to exercise discretion, advice should be obtained from a lawyer.

## **Can Money Be Released to the Child's Parent or Guardian?**

Money can only be released to a child's parent or guardian if the Will allows it. A Trustee will be personally responsible for any losses to the trust property arising from improper or unauthorized release of the trust property to a child's parent or guardian. If the Trustee is in doubt about releasing funds to a parent or guardian, advice from a lawyer should be obtained.

## **How Long Does A Trust Last?**

The Trustee must continue to hold the child's funds in accordance with the terms set out in the Will. The Trustee may not end the trust early by paying the money to a child or his or her guardian unless the Will specifically authorizes this. The Trustee cannot appoint someone else to act as Trustee in his or her stead, unless the Will specifically authorizes this or the Supreme Court of British Columbia so orders.

To obtain a copy of the *Trustee Act* visit: [http://www.qp.gov.bc.ca/statreg/list\\_statreg.htm](http://www.qp.gov.bc.ca/statreg/list_statreg.htm)

For assistance in obtaining legal advice call the Lawyer Referral Service at (604) 687-3221 or 1 800 663-1919 (toll free outside the Lower Mainland).