



2020 INSPIRING POSSIBILITIES ESTATE PLANNING **GUIDE**

A TAX, BENEFITS, TRUSTS,
AND WILLS TOOLKIT
FOR ONTARIANS WITH
DISABILITIES

FOREWARD

It is hard to believe that four years have gone by since Community Living Ontario first released the Inspiring Possibilities Estate Planning Guide. While there have not been many significant changes affecting estate planning, the 2020 version does include updates to various chapters.

Both the Province of Ontario and the federal government have introduced budgets in 2019 that propose slight changes to social and tax policy. Ontario's 2019 Budget encompasses a series of reforms to social assistance, which include some changes to the Ontario Disability Support Program (ODSP). In particular, reforms to ODSP include reviewing financial eligibility on an annual, rather than monthly, basis and a flat \$6,000 annual exemption for employment earnings. See Chapter 5 for more on these changes to ODSP.

Ontario has also proposed reducing and simplifying the Estate Administration Tax (EAT) in its 2019 Budget, eliminating EAT for the first \$50,000 of estate value. The province also intends on extending deadlines for filing estate information returns. For more on estate administration, see Chapter 2.

At a national level, the federal government introduced much-needed changes to the Registered Disability Savings Plan (RDSP) in conjunction with the Disability Tax Credit (DTC). Starting in 2021, Budget 2019 proposes to eliminate the requirement to close an RDSP when the beneficiary no longer qualifies for the DTC. Any grants and bonds remaining in the RDSP will not need to be repaid to the government. In addition, RDSPs will be exempt from being seized in bankruptcy. See Chapter 7 for a description of changes to the RDSP.

Finally, 2019 also ushered in a landmark Supreme Court of Canada decision related to beneficiaries of Henson Trusts who are eligible for housing assistance. In *S.A. v Metro Vancouver Housing Corp* (2019 SCC 4), the Supreme Court ruled that a Henson Trust was not considered an asset when determining eligibility for rental assistance. While this decision may not apply to all means-tested social assistance programs, it is a significant decision for the disability community and provides a basis for the treatment of Henson Trusts in determining the value of assets of a household. To read more about the Supreme Court decision, see Chapter 3.

We hope that you enjoy this year's version of the publication and as always, we very much welcome your feedback.

BRENDON POORAN

Principal Lawyer

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A TAX, BENEFITS, TRUSTS, AND WILLS TOOLKIT FOR ONTARIANS WITH DISABILITIES

While financially supported by The Law Foundation of Ontario, Community Living Ontario is solely responsible for all content.



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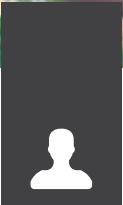
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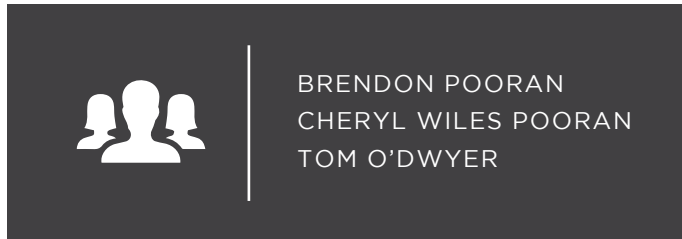
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Brendon D. Pooran is the founder of and a principal lawyer at PooranLaw. He is involved in most areas of the firm's practice and regularly provides advice to individuals, families, organizations, and

government in the areas of: wills and estates planning, disability law and corporate law for not-for-profit and charitable organizations.

Brendon has been involved with various disability organizations as a member, volunteer, employee, or director for most

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CHERYL WILES POORAN

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Cheryl Wiles Pooran is a partner at PooranLaw and head of the firm's labour and employment team. Her practice is dedicated to serving individuals who have a disability, their families, and the support organizations that

assist them in a wide variety of areas, including labour and employment law, human rights and accommodation, disability supports, and benefits.

Cheryl has worked with hundreds of individuals, families, and support organizations to provide advice and assist clients in navigating the complex legislative and regulatory regime that governs social services and supports for individuals who have a disability. Cheryl routinely provides guidance to clients with respect to the Social Inclusion Act, the Accessibility for Ontarians with Disabilities Act, the Ontario Disability Support Program Act, the Employment Standards Act, and the Human Rights Code.

A large part of Cheryl's practice is also dedicated to providing advice and representation to clients with respect to engaging and managing personal support workers and other employees in a variety of settings, from family homes to large unionized workplaces.

Cheryl routinely represents clients in proceedings before the courts, the Ontario Labour Relations Board, and the Human Rights Tribunal, but she is also a skilled negotiator and advisor with a solid reputation for resolving disputes early and in a manner that preserves relationships.

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TOM O'DWYER

Ability Tax and Trust



Tom O'Dwyer is a tax principal with Ability Tax and Trust Advisors. In affiliation with PooranLaw, Ability provides integrated tax, trust, and estate planning for individuals who have a disability and

their families. Previously the chief developer and leader of the disability tax group at a regional chartered accounting firm, Tom has represented a number of individuals with a disability and their families with respect to various tax applications, filings, and disputes with the Canada Revenue Agency. Together with Partners for Planning in Toronto, Tom presents a webinar series on disability and taxes. As well, in partnership with PLAN and Vancity Credit Union, Tom has developed the Equal Futures program to help eligible people learn, qualify, and set up a registered disability savings plan (RDSP).







OVERVIEW

If you are one of the more than 6.2 million Canadians living with a disability . . .¹

If you are one of the more than 2.3 million families in Canada who provide day-to-day support for a family member with a disability . . .²

If you have a disability and are uncertain about your future financial security . . .

If you are concerned with how a loved one who has a disability will be supported, personally or financially, after you are gone . . .

If you want to make the most out of community supports, government funding, and tax savings opportunities that exist for individuals who have a disability and their families . . .

. . . this book is for you.



The 21st century has seen unprecedented advances and improvements in the respect and recognition accorded to people with disabilities. The ratification of the United Nations Convention on the Rights of Persons with Disabilities, the appointment of a Federal Minister for Disability for Canada, the implementation of the Registered Disability Savings Plan, and a commitment made to introduce a Canadians with Disabilities Act demonstrate that there has never been a greater time when the issues facing people with disabilities have received so much attention. That being said, Canadians with disabilities (and cognitive or psychological disabilities in particular) are still significantly more likely to live in poverty and to suffer from social isolation compared to other Canadians and, correspondingly, are less likely to be meaningfully engaged in the community.

Many of you may, at present, be the only thing preventing your loved one who has a disability from becoming just one of those statistics. If that is the case, putting in place a plan to prevent that from happening after you are gone is likely high on your list of priorities—as it should be.

Community Living Ontario, with special grant funding from the Law Foundation of Ontario, has commissioned this book as a resource and tool for individuals and families in your situation. Written by legal, tax, and accounting professionals who specialize in and are dedicated to serving individuals and families with disabilities, the objective of this book is to provide a plain language but comprehensive guide to the complex web of resources, funding, tax, trusts, and estate planning options you can use to improve your life and the life of your family today to secure that quality of life for tomorrow.

1 - Statistics Canada, "Canadian Survey on Disability , 2017," The Daily, Catalogue no. 11-001-X, Ottawa, November 28, 2018.
2 - Council of Canadians with Disabilities, "Building an Inclusive and Accessible Canada: Supporting People with Disabilities."
<http://www.statcan.gc.ca/pub/89-654-x/89-654-x2015001-eng.htm#a1>.



We have divided this book by subject matter. Each chapter provides you with information about a particular resource or opportunity, eligibility criteria for that resource, and how to take advantage of the opportunity, followed by a reference to resources you can use to get started. Briefly, the topics that are covered are as follows:

CHAPTER 1 - INTRODUCTION

This chapter provides an overview of the contents of this book.

CHAPTER 2 - WILL PLANNING

This chapter provides a plain language guide to the Estate Planning process, the importance of having a Will if you have a family member with a disability, the steps required to prepare your Will, and important considerations to take into account in the Estate Planning process.

CHAPTER 3 - TRUSTS

This chapter provides a summary of the various types of Trusts you may want to consider establishing, either now or after your death, to ensure the long-term financial security of your family members.

CHAPTER 4 - CONSENT, CAPACITY, AND LEGAL DECISION-MAKING

This chapter provides an introduction to this complex area of the law, an explanation of the important issues facing families and individuals who have a disability, and the options and opportunities that may be pursued in overcoming the challenges that capacity issues can pose. Included in this chapter are a review of substitute decision-making, legal guardianship, custody for minors, and powers of attorney for property and personal care decisions.

CHAPTER 5 - THE ONTARIO DISABILITY SUPPORT PROGRAM (ODSP)

This chapter provides an introduction to ODSP, a very important source of government income for a person with a disability, as well as information about how to apply for ODSP, the eligibility requirements, and important things to be aware of in maintaining ODSP eligibility.

CHAPTER 6 - THE DISABILITY TAX CREDIT (DTC)

This chapter provides a plain language explanation of what the DTC is, the benefits it offers, who is eligible for the DTC, and how to qualify.

CHAPTER 7 - THE REGISTERED DISABILITY SAVINGS PLAN (RDSP)

This chapter provides an introduction to this valuable financial planning tool, how to qualify for an RDSP, how to set up an RDSP, and the financial benefits of doing so.

CHAPTER 8 - ADDITIONAL CONSIDERATIONS

This chapter provides an overview of additional options you have in providing and planning for the future security of your loved one who has a disability, including life insurance, residential options, self-directed support organizations, and accessing services and supports in your community.

CHAPTER 9 - CONCLUSION

This chapter provides information about the next steps for your future plan.



When you have finished reading this book, the hope is that you will know what your options are, how to go about pursuing them, and where and when to get professional help.

Every family's situation is different, and you are strongly advised to speak to qualified legal, tax, financial, and accounting professionals with experience serving individuals who have a disability and their families. This book does not contain legal advice. Rather, it is an overview of the legal landscape that is intended to introduce you to the issues so that you know what your objectives are and what questions to ask when seeking professional assistance.





WILL PLANNING

AS a parent, sibling, or support person for someone with a disability, you have probably spent an enormous amount of time thinking about your loved one's needs, interests, finances, and supports. You likely play a significant role in ensuring that their needs are met, their interests are explored, their finances are managed, and their supports are provided in a respectful and dignified manner. This begs the question, how will this role be filled after you are gone? Consider estate planning your opportunity to communicate a set of binding directions and clear wishes as to how your affairs will be managed and the responsibilities you filled during your lifetime will be met in your absence.

A. WHAT IS A WILL?

A Will is a legal document signed by you that appoints a legal representative, known as your Executor and Trustee (or "Estate Trustee"), to manage your affairs upon your death. Your Will provides binding instructions that your Estate Trustee must follow in managing your affairs, including who should receive your assets and how. It takes effect only upon the date of your death and can be changed by you any time before then, so long as you have testamentary capacity (i.e., the mental capacity required to make a valid Will or codicil).

A Will can take one of two forms: it can be (i) handwritten (a Holograph Will) or (ii) a formal typed document, most often prepared by a lawyer. There are certain minimum requirements of form that need to be met in order for either document to be a valid Will.

HOLOGRAPH WILLS

A Holograph Will is considered legally valid if it meets the following requirements:



1. It must be written entirely in your own hand writing;



2. It must be signed by you; and



3. It must be "the full and final expression of intention as to the disposal of property upon death."



Typically, Holograph Wills are used only in cases of emergency (i.e., where you are alone, do not have time to prepare a formal document, and/or do not have witnesses available). Holograph Wills are open to challenge on a number of fronts and frequently result in disputes and litigation. It is also well beyond the abilities of a lay person to address all of the powers and responsibilities you typically want your Estate Trustees to have, the directions you want them to follow, and the Trusts you will likely wish to establish in handwriting without the benefit of experienced legal counsel.

FORMAL WILLS

A Formal Will is a typed document, usually prepared by a lawyer, which must be signed and dated by you. Your signature must be witnessed by a minimum of two witnesses who are present at the time that you sign. The witnesses should not be minors and should not include Beneficiaries of your Will or your spouse.

B. WHY MAKE A WILL?

Generally speaking, everyone who can make a Will should have one, regardless of assets and family situation. The most important reason to have a Will is that it is the best way to ensure that after your death, your affairs are handled in the manner you wish, including who should be responsible for your affairs, who should receive your assets, and on what conditions. Providing clear and binding instructions is also the best way to avoid disputes amongst your family members and the added expense associated with administering your affairs without a Will.

For parents and caregivers of persons who have a disability, a Will is even more important. Your Will is your opportunity to ensure that the present arrangements you have made and your future plans for your loved one who has a disability are respected. Your Will is your best means of making certain that the finances you have set aside for your loved one are protected and that his or her eligibility for government benefits, such as Ontario Disability Support Plan (ODSP) benefits, are maintained. This is also your chance to determine who has control over those finances and to put in place checks and balances to ensure that they manage those finances in your loved one's best interest.

It may also be important for an individual with a disability to make a Will if it is in his or her ability to do so. This is particularly the case where an individual has a Registered Disability Savings Plan (RDSP) or any real estate or other property in his or her own name. In the absence of a Will, any assets a person has in his or her own name at death will be divided on the basis of intestacy (in other words, in accordance with the Succession Law Reform Act) rather than his or her own wishes.

C. IN THE ABSENCE OF A WILL - INTESTATE SUCCESSION

In the absence of a Will, your wishes as to who has control over your affairs, how your affairs are managed, and how the needs of a loved

one who has a disability will be met have little, if any, bearing on what happens after your death. Who manages your affairs will be determined by the Courts, and who receives your assets will be determined in accordance with the rules of "intestacy," a term that is further explained below.



CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITHOUT A WILL

If you do not have a Will, then upon your death your affairs will be in limbo pending the appointment of an Estate Trustee by the Court. An application to the Superior Court of Justice will be required for someone to obtain a Certificate of Appointment of Estate Trustee Without a Will. This is a legal document giving someone you have not appointed the authority to deal with your assets and manage your affairs. You will have no say in whom that person should be.

In some cases, multiple people may apply, leading to costly disputes amongst your family members. In other cases, no one may be willing to apply. Indeed, there are a number of disincentives associated with the application process; it can be expensive and time-consuming, and the Court generally requires that the person applying to be Estate Trustee post a bond as security to ensure that the person administers your estate properly.

The Estate Trustee who is eventually issued the Certificate of Appointment is then responsible for distributing your estate according to the rules of "intestacy" set out in the Succession Law Reform Act (after paying all your debts, funeral expenses, and expenses of administering your estate and meeting the other responsibilities applicable to an Estate Trustee, as further described later in this Chapter). A brief summary of these rules is provided on the following page.

1. SURVIVING SPOUSE

- The person to whom you are legally married is entitled to the first \$200,000 of your solely owned assets. This is known as the “preferential share.” This is in addition to any assets you own jointly with that person and any proceeds of plans or policies (such as RRSPs, RRIFs, TFSAs, or life insurance policies) of which you have designated your married spouse.
- If you do not have any children or grandchildren, your spouse will also receive the remainder of your assets outright.
- If you do have surviving children (or if not, then surviving grandchildren), then the division of the remainder of your estate will depend on how many children survive you (or have children who survive you).



2. NO SURVIVING SPOUSE

- If you have no surviving spouse, then your estate will be divided amongst your children in equal shares, providing that if you have a deceased child who has surviving children, the share that would have been paid to your deceased child will be divided equally among his or her children.

A more detailed discussion of the rules of intestacy is beyond the scope of this book. It is important to note, however, that your wishes and the realities of your familial relationships will have no bearing on how the estate is divided. The distribution will also be blind to the circumstances of any Beneficiary. For instance, a share for a minor will not be held in Trust or otherwise managed by another family member. Rather, it will have to be paid into court pending the person attaining the age of 18. Similarly, a share for a person with a disability will be paid to them directly, regardless of the impact the gift will have on the person's eligibility for ODSP and/or his or her ability to manage property. Where capacity to manage property is an issue, the Public Guardian and Trustee may have to become involved, further complicating the situation.

D. WHEN TO MAKE A WILL

Now that you know what happens if you do not have a Will, it should be clear that you always want to have a Will in place. This means that if you do not have a Will, the time to make one is now!

Whether or not you already have a Will, here are some situations in which it is strongly recommended that you consider writing or updating your Will:



WHEN YOUR RESPONSIBILITIES CHANGE

Practically speaking, many people do not think about making a Will until they have someone in their lives whose future well-being is dependent on them – usually a spouse, a child, or a sibling. If you have someone in your life that you have not considered in an existing Will, or if you do not have a Will, his or her needs are a good reason to prepare or revise a Will.



ON MARRIAGE

If you already have a Will, you should be aware that if you get married after the date of your Will, that Will is effectively revoked by law unless the Will specifically contemplates your marriage. This means that if you have a Will, you get married, and the next day you pass away, that Will is going to be treated as if it does not exist, and your affairs will be managed on the basis of “intestacy,” as described previously.



ON MARRIAGE BREAKDOWN

If your marriage breaks down after you have made a Will, you should know that just because you are legally separated from your spouse, your Will and any appointments of or gifts for your spouse under that Will remain in effect. This is the case even if you have been separated and estranged from your spouse for decades. In the event of separation, in order to ensure your wishes on your death are respected, it is important to enter into a separation agreement that contemplates what happens on your death and then to make a new Will.

If you divorce, your Will remains in force; however, it will be treated as if your former spouse had predeceased you. That being said, it is still a good idea to review your Will and determine if the appointments of Estate Trustees and Beneficiaries are still appropriate – very often changes are required after a divorce. It is also important to note that this is the law in Ontario. The laws in other jurisdictions (such as Alberta, for instance) do not follow this rule.



WHEN YOUR ASSETS OR JURISDICTION CHANGES

Changes in your place of residence may also be a good reason to review and, if necessary, revise your Will. Your existing Will may be limited in its application to assets you hold in Canada. If you subsequently acquire assets outside of Canada, you should consider drafting a new Will specific to those assets (potentially with the assistance of a lawyer practicing in that jurisdiction) or at the very least, updating your existing Will to take into account assets outside of Canada.



REGULAR REVIEW AND UPDATES

Even if there have not been changes in your own marital or financial situation, it is wise to review and, if necessary, update your Will every few years. Your relationships with the people you appoint under your Will as Estate Trustees and Beneficiaries, their life circumstances, and the needs of your loved ones are not static, and very often what seemed appropriate three or four years ago will not be appropriate today. More importantly, the law can change. The options available for future planning for people with disabilities are considerably different than they were a decade ago. Therefore, it is a good idea to review your Will regularly with a lawyer who is well versed in issues related to future planning for persons who have a disability. Recent legal developments related to Qualifying Disability Trusts, Lifetime Benefit Trusts, and RDSPs, among other things, demonstrate the importance of keeping your Will current.



E. WHO CAN MAKE A WILL?

GENERAL REQUIREMENTS

In Ontario, anyone over the age of majority (age 18) can make a Will, so long as they are of “sound mind” (i.e., have “testamentary capacity”).

TESTAMENTARY CAPACITY

Testamentary capacity is the legal term for possessing the requisite mental abilities to meet the following requirements:

- 1.** You must understand the extent of your property being disposed of (meaning the value of all real estate, cash, investments, personal items, etc.). This does not mean that you need to be able to recall every last item you own, but it does mean that you need to be able to identify your major assets, their value, and your ownership interest in them (for example, whether your home is jointly owned).
- 2.** You must understand the nature of the act of making a Will, the directions included in that Will, and the effects those directions will have. In other words, you must be able to understand that in making the Will, you are giving instructions for the division of your assets upon your death.
- 3.** You must appreciate the claims that others (such as family and others who depend on you) might have or supports they expect you to provide and that you ought to give effect to.
- 4.** Finally, that you have no insane delusions influencing your Will in disposing of the property and causing you to dispose of your property in a way that you would not have done if you had been of sound mind.³



In some cases, a person may not have the capacity to enter into a contract but they may, nevertheless, have the capacity to make a Will.

³ - Banks v Goodfellow (1869-70 L.R. 5 Q.B. 549).



Capacity is also not a fixed and unchanging state. A person who has capacity today may not have capacity tomorrow. For instance, many persons with dementia or mental health issues may be able to make a Will during periods of lucidity. The potential for shifting capacity is one reason why it is important to prepare a Will now, even if you are relatively young and healthy. If you lose capacity due to sudden illness or accident, it may then be too late.

PROVING TESTAMENTARY CAPACITY

In some cases, extra precautions may be warranted to reduce the risk of challenges to your Will. While the burden of proof in any action seeking to invalidate your Will is on the person bringing the challenge, it is prudent for your lawyer to take note of his or her assessment of your capacity. In some cases, your lawyer may determine that extra precautions are necessary; for instance, if you are older, have cognitive or mental health concerns, or have an addiction to drugs or alcohol, your lawyer may do a formal assessment of your capacity and either video record or record, in writing, your responses in detail. A report from a doctor provided in or around the same time that the Will is signed may also be prudent.



In any event, it is important to be open and honest with your lawyer about any concerns you may have about the risk of your Will being challenged; for instance, if you have estranged children, where your Beneficiaries are hostile toward one another, or where you are excluding a person you believe has an expectation of receiving a share of your estate.

UNDUE INFLUENCE

Even if there is no question as to your capacity, your Will may still be open to challenge where you are operating under the undue influence of another person. The law is very clear that the gifts you make in your Will must be voluntary – an expression of your wishes, not the wishes of any other person. If you are vulnerable – due to isolation, infirmity, ill health, or dependency on others – then you may be open to others exerting their influence on you by threats, continual pressure, or other forms of coercion. Where such influence causes you to include instructions in your Will that you would not have otherwise (such as gifts you did not actually want to make, or excluding family members that you actually wanted to benefit), then the Will will be open to challenge.



This issue is a particular concern if you have a mental health or intellectual disability. You will want to ensure

that your lawyer performs the appropriate assessment and keeps detailed records to ensure that your wishes are respected.

F. CHOOSING ESTATE TRUSTEES

One of the most important and challenging decisions in making a Will is choosing who to appoint as the executor of your Will and the Trustee of your estate ("Estate Trustee"). An Estate Trustee is the person you appoint in your Will to take charge of your affairs after you pass away. You can appoint one or more people to act jointly, independently, or in substitution for one another.

I. RESPONSIBILITIES

The reason this appointment is so important is that your Estate Trustees have total control of your affairs after you pass away, subject to the instructions in your Will. Their responsibilities include:

1. Reading your Will – Your Estate Trustees' direction as to what will happen to all property must be taken from your Will.
2. Determining that the Will is your last Will and that you have not prepared any more recent Wills (this may require advertising for any Wills another lawyer or person may have in their possession or otherwise be aware of).
3. Preparing documents necessary to apply for a Certificate of Appointment of Estate Trustee with a Will or "Letters Probate."
4. Locating the Beneficiaries – Determining names, addresses, and ages of the Beneficiaries and giving notice to Beneficiaries.
5. Sending a Notice of Application to all Beneficiaries.
6. Determining the nature and value of the assets and debts of the deceased and compiling a detailed inventory.
7. Setting up and administering any Trusts established by the Will, such as a Henson Trust or a Staged Trust (for minors).
8. Determining how to provide for any dependent Beneficiaries and how to pay any estate expenses while your estate is being administered.
9. Managing and, where appropriate, investing the funds in the estate (or any Trusts for which they are responsible) prudently.
10. Opening an estate bank account (where necessary). Estate money should not be mixed with any other money. A separate account should be maintained for all estate funds.
11. Advertising for creditors.
12. Dealing with liabilities and arranging for the payment of debts.
13. Preparing and filing the necessary tax returns on time and paying any tax owing.
14. Dealing with claims against the estate.
15. Distributing specific bequests.
16. Issuing interim distributions to residual Beneficiaries according to the terms of the Will and obtaining releases from all residual

Beneficiaries. When an interim distribution is made to a registered charity, a receipt for income tax purposes will be issued and can be used when submitting the final income tax return. A sufficient amount of holdback should be set aside to ensure funds are available for final taxes.

17. Obtaining a Clearance Certificate from the Canada Revenue Agency (“CRA”) following payment of all taxes.

18. Issuing final distributions to the Beneficiaries, along with final accounting, once the Clearance Certificate is received from the CRA.

19. Maintaining accurate accounting records in relation to all estate assets. The Estate Trustee will need to have these accounts approved by the Beneficiaries periodically and at the conclusion of the administration of the estate. The accounting must include a full report and disclosure of capital and revenue receipts received, disbursements, and investments made.

20. Ensuring that receipts, cancelled cheques, bills, etc., are maintained in order to prove the accounts, if that should be necessary.

21. Submitting the amount of compensation being requested for work done in the administration of an estate to the Beneficiaries for their approval during the final stages of the administration of an estate. If the amount of compensation is pre-determined by a compensation agreement, send a copy of the agreement to each Beneficiary. If the amount of compensation is outlined in the Will, then there is no requirement to have the compensation amount approved by all the Beneficiaries.

Long as this list may be, what is notably absent from this list is any mention of care, decision-making, or financial management for a Beneficiary with a disability. From a legal perspective, these are not within the realm of an Estate Trustee’s responsibilities, and it is only by virtue of acting as Trustee of a Trust established in your Will that your Estate

Trustee has any authority in this regard. For further information on appointing a Trustee of a Trust for a person with a disability, refer to Chapter 3.

II. CHARACTERISTICS OF THE RIGHT ESTATE TRUSTEE

Given the complexity of an Estate Trustee’s responsibilities and how time consuming they can be, it is very important that you appoint the right person. Who that person is will depend on your specific circumstances, the people in your life, the assets you hold, and the Beneficiaries you intend to provide for.

In the vast majority of cases, people name their spouse (if any) as primary Estate Trustee. The spouse is also typically the person to whom most, if not all, assets are left. Where a person does not have a spouse but has children, then most often one or more of those children will be named (again, because they are usually the Beneficiaries of the estate). There are, however, many circumstances where a spouse or children are not available or are not appropriate Estate Trustees for one reason or another.

Some of the most important factors in determining who to appoint as an Estate Trustee are set out here:



SENSITIVITY

Executors should be sensitive to your wishes and the needs of your family. They will be responsible for ensuring that your family has the resources they need while your estate is administered and ensure the fair and appropriate distribution of your assets, subject to any specific wishes you may leave in that regard. Where you have a family member with a disability, sensitivity is all the more important, as there are numerous issues that will arise related to how that person is provided for while your estate is being administered, how his or her ODSP benefits will be affected by any dispositions made to him or her, and any tax-deferred rollovers that may be made requiring elections to be made with the Canada Revenue Agency (CRA), among other things.





TIME

They should have the time to devote to these responsibilities. This may mean that an individual with a very demanding job of their own, and/or numerous personal demands on their time, may not be the best person to appoint. Many people are under the impression that estates can be administered very quickly. In many cases, however, estates can take years to administer, particularly if they are neglected by an Estate Trustee who fails to take the appropriate steps as and when required.



KNOWLEDGE

The person appointed should have the knowledge and sophistication to deal with the decisions that need to be made in administering your estate. This may include knowledge of a technical nature (such as about your business, investments, finances, property, etc.) and knowledge about you, your relationships, and family members (including the needs of a family member with a disability).



LONGEVITY

Depending on your age and the nature of the Trusts you include in your Will, your Estate Trustee's appointment may be in place for a long period of time. Certainly where your Estate Trustee is also Trustee of a Henson Trust, the appointment will last for the length of the Beneficiary's life (or as long as the funds in the Trust last). This means that it is important to appoint someone who is likely to be available for as long as the Trust will exist; in most cases, this means someone who is close to the same age as the Beneficiary. While that may not be possible when the Beneficiary is a minor, you may want to consider appointing a younger person as an alternate Trustee to take over the administration of your estate if and when an older Trustee is unable to continue to act.



TRUST AND CONFLICTS OF INTEREST

Your ideal Estate Trustee is trustworthy and capable of putting aside any personal interest they may have in your estate. Consider your intended appointee's relationship to your Beneficiaries and whether there is any risk that the person may take advantage of their position to the detriment of other Beneficiaries. Even if you trust the person you are appointing, it is also important that your Beneficiaries be able to trust him or her. Perceptions of bias and unfairness can result in costly disputes amongst Beneficiaries that may delay the administration and diminish the value of your estate for your Beneficiaries.

Fairness and the perception of fairness may be a challenge where the person you are appointing has a self-interest in conflict with the other Beneficiaries. Take the following situation as an example:

- You appoint your daughter, Jill, as Estate Trustee.
- In that role, Jill will be Trustee of a Henson Trust for your son, Sam.
- You have designated that in the event of Sam's death, Jill will get the remainder of his Trust.
- Jill will then have a self-interest in paying out as little of Sam's Trust as possible to Sam, thereby preserving as much of the Trust as possible for her own benefit.



Many families are not troubled by such a conflict of interest because they trust and believe in their children and their children's love for one another. That being said, other families are concerned about the influence that a spouse (or future spouse) could have on a child appointed as Estate Trustee and what that child may be persuaded to do for his or her own spouse or children to the detriment of the Beneficiary whose interests they ought to be representing.

**PROFESSIONAL HELP**

One common cause of delay, unnecessary expense, and/or disputes is an Estate Trustee's failure to obtain professional help (such as legal, financial, and accounting support). An Estate Trustee may, in an effort to save money for your estate, try to do it all. Unfortunately, this can result in costly mistakes. For instance, where a step is missed or a form improperly filled out in the probate process, the entire application may be rejected, which means the forms will need to be revised and re-submitted. The paperwork itself might not take very long, but the waiting times for approval or rejection can be very lengthy. Where an application is repeatedly rejected, the waiting times accumulate and can result in significant delays. Your Estate Trustee should get professional advice from the outset in order to ensure they understand their obligations, the timelines, and what types of professional services are available.

**PROXIMITY**

In an ideal situation, your Estate Trustee will reside in close proximity to you, or at the very least, in Ontario. From a practical perspective, close proximity makes the Estate Trustee's responsibilities easier to perform and more likely to be accomplished in a timely and inexpensive manner. There are also disincentives to Estate Trustees who do not reside in Ontario. Specifically, the Courts generally impose a bond requirement on non-resident Estate Trustees, which can be burdensome for your Estate Trustee.

In addition, there can be tax implications for you and your Estate Trustees associated with their residence in another jurisdiction. Generally, the CRA will determine the residence of an estate based on the residence of the Trustee(s) who exercise the management and control of the estate. If the Trustee is a non-resident, the estate will likely be considered a non-resident estate for tax purposes and will be subject to the tax laws of

the country of residence of the Trustee. If, for example, a sole Trustee of an estate is a U.S. citizen, the estate may be subject to both filing requirements and tax liability in the United States. In addition, the Beneficiaries of the estate may also have dual country reporting obligations.



At the end of the day, it is rare that any one person will possess all of the characteristics that form a good Estate Trustee, and it will be a matter of balancing necessity and risk in determining which factors ought to outweigh the others in making your selection.

Some people choose to appoint joint Estate Trustees – two or more persons to act together and with the supervision and agreement of one another. This has the effect of not only adding a degree of oversight, but also bringing to the table a wider range of skills and qualifications. For instance, in some cases, you may have a daughter who lives abroad but meets all of the other criteria you consider important in an Estate Trustee. You may then choose to appoint a friend or other relative who is local to act jointly with your daughter. This may help to avoid tax issues for your daughter and your estate, and it may also ensure that there is someone on hand to deal with the pressing administration issues as and when they arise, simultaneously ensuring that your estate benefits from the qualifications your daughter brings to the table.

III. SUBSTITUTE, ALTERNATE, OR SUCCESSOR TRUSTEES

In addition to appointing a primary Estate Trustee (or Estate Trustees), it is a good idea to appoint an alternate Estate Trustee to act in place of your original Estate Trustee (or Estate Trustees) in the event that he, she, or they are unable to act by reason of death, mental incapacity, removal by the Court, or resignation.

If you fail to appoint an alternate and your Estate Trustee passes away, then by law your Estate Trustee's Estate Trustee may take over. This means that whomever your Estate Trustee has appointed to manage their affairs could take possession of and responsibility for the management of your estate and any Trusts that your Estate Trustee was managing for you.

Relying on someone else's Estate Trustee can be problematic for a number of reasons:

- (I)** Your Estate Trustee may not have made a Will, in which case who becomes Trustee of your estate and Trusts will be determined by others, perhaps wholly unrelated or unknown to you;
- (II)** Even if your Estate Trustee has appointed someone, you may have no relationship with or knowledge of that person;
- (III)** There may be a significant delay between the day that your Estate Trustee passes away and the day that their Estate Trustee assumes the management and administration of your Estate and any Trusts;
- (IV)** The person your Estate Trustee has appointed will be faced with the immediate demands of managing your Estate Trustee's estate and the fallout from your Estate Trustee's death – their attention and focus will likely not be on your Estate and the needs of your Beneficiaries; and
- (V)** Your estate may be without proper management in the event that your Estate Trustee is alive but loses capacity or is otherwise unable to continue to act as Estate Trustee.

Another reason to appoint an alternate is that depending on the Trusts you have created in your Will, your Estate Trustees may be required to act for a very long period of time. As discussed above, if you have a Trust for a person with a disability in your Will and you have not appointed a separate Trustee for that Trust, your Estate Trustee will have the management of that Trust for as long as the person with a disability lives. This means that unless your Estate Trustee is very close in age to the Beneficiary, there is a strong possibility of the Beneficiary outliving the Estate Trustee. Appointing an alternate Estate Trustee is one way of making sure that there is always someone available to act, regardless of how long after your death they may be called upon to do so.



Where you do not have anyone that you are comfortable appointing as an alternate, you may also consider including

language in your Will that allows (or even requires) your last remaining Estate Trustee to sign an instrument appointing an alternate Estate Trustee to act in his or her place upon his or her death, incapacity, removal by the Court, or resignation.





IV. CORPORATE TRUSTEES

For one reason or another, you may not have anyone that you consider to be an appropriate Estate Trustee or alternate Estate Trustee. In that situation, you might consider naming a corporation to act as Estate Trustee, specifically a trust company. Trust companies are highly regulated entities whose business it is to manage and administer estates and trusts of many different kinds. Most of the big banks have trust arms, which offer Estate Trustee services, and there are also a number of private trust companies offering these types of services.

The advantages of naming a corporate Trustee include: specialized knowledge and significant experience in managing the administration of estates; a corporation is not susceptible to death or incapacity, which means that the longevity qualification is met; the absence of a conflict of interest with the Beneficiary and corporate accountability mean that you can trust the Corporate Trustee; unlike an individual Estate Trustee, estate administration is the full-time work of the Corporate Trustee and is therefore less susceptible to delays occasioned by indifference, procrastination, or innocent mistakes; and finally, Corporate Trustees

usually have accounting and investment services in-house, which simplifies the management of the estate.

The disadvantage of appointing a Corporate Trustee is that it can be quite expensive. Unlike a family member or friend, a Corporate Trustee will neither waive nor forgo its right to compensation for its services. To the contrary, a Corporate Trustee will typically enter into a lengthy and very detailed compensation agreement that clearly outlines each service they offer and the related charges. These charges are usually based not on the amount of work involved, but rather on a percentage of the value of the assets of your estate, subject to certain minimums. Many Corporate Trustees also have a minimum estate or Trust value that they will accept, usually not less than \$500,000, not because they do not want to assist people with smaller estates, but because their fees would be so exorbitant as to erode the value of the Trust or estate.

A further disadvantage is that while a Corporate Trustee may be highly knowledgeable in estates administration generally, they may also be seriously deficient in sensitivity and knowledge about your family, your unique circumstances, and the needs of a person with a disability in particular.





V. INDIVIDUAL PROFESSIONALS

Another alternative where you do not have any friends or family you are comfortable appointing is to work with a disinterested professional as your Estate Trustee, such as a lawyer or an accountant. Unlike a corporation, a professional cannot live forever; however, where they offer Estate Trustee services, they are likely to have procedures in place to ensure continuity of service in the event that they are unable to continue to act. They are also governed by a very onerous reporting and professional responsibility regime, which ensures that they act in a timely and professional manner while adding a degree of oversight that does not exist for a layperson.

Similar to a Corporate Trustee, professionals do not come cheap. They will usually require that you enter into a retainer or compensation agreement that is based on an hourly rate or other measure for compensation. Unlike a Corporate Trustee, however, they may be willing to take on estates of a smaller value because their fees are usually not based on a percentage of the value of your assets, but rather on the actual work they perform and the hourly rate associated with that work. The advantage of such a system is that unlike with a Corporate Trustee, you are only paying for services provided based on how long they actually take to perform. This means that if your estate is relatively straightforward the cost of administering it could be relatively low, even if the value of the estate is very high.

VI. THE PUBLIC GUARDIAN AND TRUSTEE (PGT)

The PGT has the authority to act as an Estate Trustee. This is viewed by many as being the worst-case scenario, and many families will go to great lengths to avoid the involvement of the PGT in their affairs and in the lives of their children. Rightly or wrongly, the common perception is that the PGT may not act in the best interests of the Estate or the Beneficiaries when it comes to taxation, timeliness, or the long-term financial security of a person with a disability. With regard to the latter, some would suggest that the PGT has a conflict of interest because it is a government agency, and the government has an interest in using Trust funds for Beneficiaries to reduce the need for government-funded benefits and income supports such as ODSP.

Where no other options exist, however, at the very least, the PGT is familiar with the estates administration process while being knowledgeable about the rights, needs, and interests of people with disabilities.



VII. NON-TRUSTEE ADVISORS

Many families have built strong relationships with not-for-profit agencies, support networks, and service providers in the community and seek to appoint these organizations as Estate Trustees. Unfortunately, this type of appointment is not legally permissible. Only a Trust company or a natural person (whether a professional or private individual) can be named as an Estate Trustee. These agencies, networks, and providers can, however, be identified in your Will or estate plan as advisors that you wish your Estate Trustees to consult with when making significant decisions related to your family's affairs. Indeed, you can name any number of individuals, entities, and organizations as advisors to your Estate Trustees, either informally by way of verbal instructions, in a wish stated in your Will, or in a side letter you

can leave with your Will describing your family situation, the needs of your Beneficiaries, your interests, and objectives in the distribution of your estate, and so forth.

[i] The role of non-Trustee advisors is particularly important where the persons you have appointed are not well acquainted with the intimate details of your family situation or the needs of a Beneficiary with a disability in particular. Many families are now working to develop formal networks around their loved ones with disabilities in order to ensure continuity of care and supports after their passing. For more information on Support Networks, see Chapter 8.



VIII. ESTATE TRUSTEE COMPENSATION

Unless you expressly prescribe the manner in which your Estate Trustees may take compensation, it will be awarded by the Court in accordance with the Trustee Act. That Act allows Estate Trustees to take "reasonable compensation" for their efforts and time, as approved by the Courts.

The Courts have developed a "Tariff" or guideline for how "reasonable" compensation should be calculated based on the following:

1. Fees charged against capital of estate:

- (I) 2.5 percent on capital receipts;
- (II) 2.5 percent on capital disbursements.

2. Fees charged against revenue (income) of estate:

- (III) 2.5 percent on revenue receipts (revenue received);
- (IV) 2.5 percent on revenue disbursements (revenue payouts).

3. Management fee:

- (V) 2/5 of 1 percent per year on the gross value of the estate.



The problem with the Tariff is that it does not necessarily reflect the time and effort involved in administering your Estate. For instance, an estate valued at \$1,000,000 and an estate valued at \$100,000 may take the same amount of time and effort to administer; however, the Trustees of the larger estate could receive 10 times the compensation. Similarly, if your estate is small but more complex (due to issues with ODSP, Henson Trusts, etc.), then the Tariff might not fairly compensate your Estate Trustee.

In recognition of this potential unfairness, the Courts have indicated that they will review whether the Tariff is appropriate in each case by considering the following factors:



SIZE – There is usually more work involved where your assets are of greater value and/or more numerous.



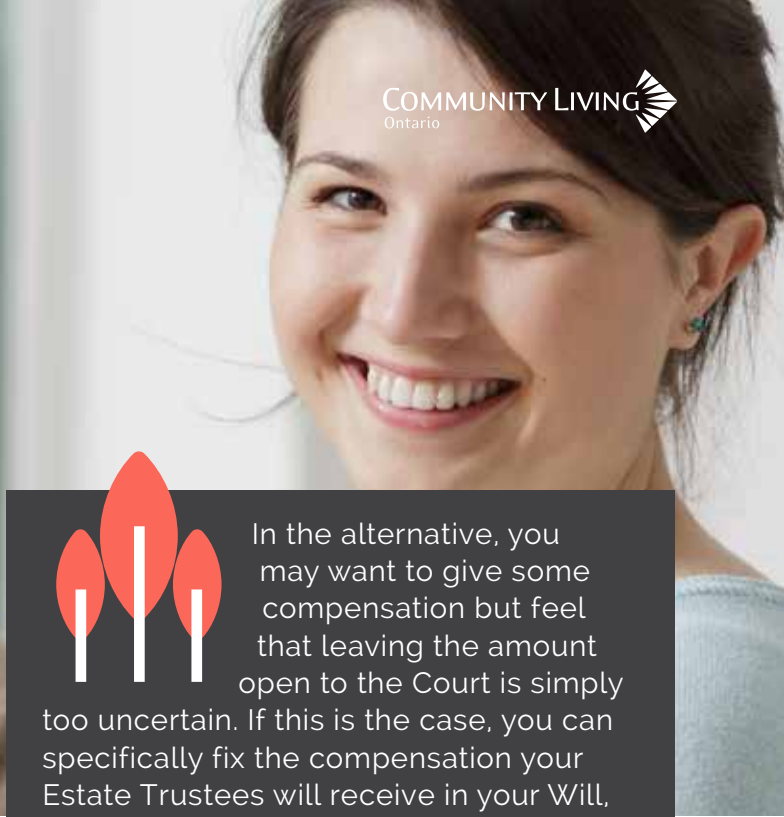
CARE AND RESPONSIBILITY – There is usually a greater degree of care and responsibility involved in administering an estate where there is a Henson Trust, ODSP concerns, and/or decision-making as to continuing care and support for a Beneficiary with a disability.



TIME – The amount of time involved in administering your estate will almost certainly be increased where you have a Beneficiary with a disability who is or who may be eligible for ODSP.

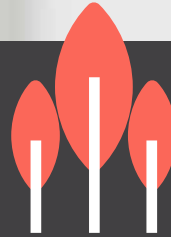


SKILL AND ABILITY – Where your Estate Trustees have shown a high degree of skill and ability in administering your estate, the Court may be inclined to grant a higher rate of compensation. On the other hand, where your Estate Trustee has not demonstrated these qualities, the Courts may be inclined to decrease their entitlement to compensation.



SUCCESS – Finally, where your Estate Trustee has administered your estate in such a way that your wishes have been carried out with diligence and care in a straightforward and prompt manner without unnecessary delays or mistakes, the Courts will be inclined to award a higher amount of compensation (reflective of the benefit to your estate occasioned by your Estate Trustee’s success). The reverse is also true; mistakes, delays, and other disadvantages associated with poor management of the administration process may result in the Court awarding a smaller amount of compensation.

Depending on your relationship to your Estate Trustees, you may decide that no compensation is appropriate and only expense reimbursement should be granted. You can certainly provide for that restriction in your Will and indeed many people do, particularly where the Estate Trustee is also a Beneficiary of a significant portion of the estate, or where the person is a very close family member whose love, care, and concern is expected to come free of charge, so to speak.



In the alternative, you may want to give some compensation but feel that leaving the amount open to the Court is simply too uncertain. If this is the case, you can specifically fix the compensation your Estate Trustees will receive in your Will, either as a lump sum payment, or as a percentage of your assets, or any other arrangement you believe will be fair or appropriate. If you choose to go this route, it is important to keep in mind that Estate Trustee compensation is taxed as income to the Estate Trustee, whereas a bequest in your Will is not. Keep this in mind when deciding what, if any, compensation to allow your Estate Trustees.

Finally, it is important to note that unless you provide otherwise, your Estate Trustees will not be permitted to receive any compensation until your estate has been fully administered. The reality is that an estate administration can take a significant amount of time to administer – in some cases 10 years or more. An Estate Trustee may have to commit a huge amount of time to the administration over that period, potentially to the detriment of his or her own earning potential, and receive nothing in return. Allowing for intermittent compensation under your Will is one way of ensuring that your Estate Trustees are compensated on a timely basis for their efforts.

G. DIVIDING YOUR ESTATE

I. HOW MUCH TO WHOM?

How your estate will be divided (i.e., who will get what) can be a difficult decision. You may enter the Estate Planning process thinking that after you and your spouse (if any) are both deceased, everything should be divided evenly between your children. In truth, this is the case for the vast majority of families. However, where one of your children has a disability, you may want to reconsider equal distribution and carefully analyze your family's situation before providing any instructions for the division of your estate. The following factors may be useful in determining how to divide your estate:



1. The size of your estate;
2. The needs of all of your children/ Beneficiaries and their expectations and dependence on you;
3. The age, health, and support needs of your son or daughter with a disability;
4. Other sources of support or income for which your son or daughter is eligible, and any potential changes to that income or support;
5. Eligibility for the Disability Tax Credit;
6. Your son or daughter's RDSP savings, if any;
7. Your son or daughter's total expenses (current and projected);
8. Your son or daughter's customary standard of living with your support; and
9. Your son or daughter's place of residence and long-term residential needs.



Based on these considerations, you may feel that, on one hand, in light of the other sources of income and support available, an equal share of your estate may be too much. On the other hand, however, an equal share may be too little indeed, you may feel that your entire estate is not sufficient. Be assured this is not uncommon – in fact, given the uncertainties around your son or daughter's changing needs, how long he or she will need financial support, and the availability of government benefits, many people are very concerned that even if they leave everything they have to their son or daughter with a disability, it simply may not be enough. It is vital that the funds you leave for your son or daughter (usually in a Henson Trust or other ODSP exempt form) are managed appropriately, tax planning is undertaken, and their eligibility for government benefits and income supports are maximized, as will be discussed later in this chapter.

Even if you believe your son or daughter with a disability needs a disproportionately greater share of your estate, you might feel (as many do) that it is unfair to give a greater share of (or even your entire) estate to one child and a small portion (or none at all) to your other children. This is something you should speak with your children about openly and honestly. It is also important to keep in mind that if you do leave everything (or a disproportionately greater share) to your son or daughter with a disability, you will likely place these funds in some sort of Trust (usually a Henson Trust), of which your other children can be the remaining Beneficiaries, thereby ensuring that if the funds are more than sufficient to meet your son or daughter's needs, whatever is left at the end of his or her life will go to your other children.



II. WHAT TO GIVE AND HOW TO GIVE IT

GIFTS TO A PERSON WITH A DISABILITY

After you determine what your son or daughter's needs are and how large a share of your estate you will leave to him or her, the next step is to plan what form that share will take. This will depend largely on your son or daughter's capacity to manage property, eligibility for the Disability Tax Credit, and dependence on ODSP.

As discussed in detail in Chapter 5, ODSP provides income support benefits to individuals who have a disability who are over the age of eighteen (18). There are a number of eligibility requirements for ODSP-related benefits to the extent of a person's disability and his or her financial situation. The most important factor when it comes to deciding how to provide an inheritance to a person with a disability is the asset restriction. The current asset limit for an individual is \$40,000 (and for a couple, it is \$50,000). This means that if you give your son or daughter an inheritance that exceeds these limits in his or her own name, he or she will not be eligible for ODSP, at least not until the inheritance is managed or redistributed in such a way that your child is once again in compliance with the asset restrictions.

Some families learn about this restriction and mistakenly believe that their only option is to leave their son or daughter with a disability nothing at all (or a small gift under the asset limit) and trust in the good faith and honesty of their other children to provide for their son or daughter with a disability. This option is fraught with risks.

Most pressing is the fact that no matter how much you trust your children now, their circumstances may change after your death. The children to whom you leave your estate could: marry someone who is disinterested in your Beneficiary with a disability; become bankrupt; become ill and unable to attend to their affairs, let alone their siblings' affairs;



have a falling out with your son or daughter with a disability and cut off contact and support; or pass away, in which case all of his or her assets could pass to someone else who has no moral or familial responsibility or concern for your son or daughter with a disability.

Cutting your son or daughter with a disability out of your estate could also leave your estate open to a dependent's relief application, which can be a time consuming and costly process that may result in your son or daughter receiving a lump sum gift that results in his or her ODSP eligibility being affected.

Finally, even if you believe that your son or daughter's ODSP earnings are sufficient to

meet his or her needs now, there is always the risk that these needs and/or eligibility for ODSP benefits may change in the future. If this occurs after your death and you have not provided for them in your Will, it will be too late to address their needs or provide for their future security.

Of course, if you are reading this book, then you already have some idea that leaving your son or daughter out of your Will or estate is not the only option. Indeed, there are a number of alternatives that provide greater flexibility to meet your son or daughter's changing needs. Depending on your son or daughter's situation, the alternatives may include:

(A) OUTRIGHT GIFT

In some cases, it may be acceptable to leave an inheritance to your son or daughter directly. For instance, where the share is small, your son or daughter is capable of managing property, and/or is not eligible for ODSP, an outright gift allowing the person to determine how to manage their inheritance may be possible. Indeed, due to the ongoing costs and reporting requirements associated with operating a Trust, in some cases, this alternative may make sense. Careful consideration should be given and professional advice obtained before taking this step.

Where an outright gift is made and your son or daughter has the capacity to manage property but is in jeopardy of losing his or her ODSP as the result of an outright gift from you or another person, there are some options for ensuring continuing ODSP eligibility, including transferring the inheritance into an Inheritance Trust, an RDSP, a Segregated Fund, or other exempt asset. These options have a number of restrictions and, unfortunately, there is usually some temporary loss of ODSP benefits involved.

(B) GIFT TO HENSON TRUST

Leaving an inheritance for a son or daughter with a disability to a Henson Trust is perhaps the most common practice for parents who are informed and engaged in appropriate estate planning. Briefly, an Absolute Discretionary Trust (more commonly known as a Henson Trust) is a special type of Trust in which the Trustees (i.e., the people who hold the inheritance for the benefit of your son or daughter with a disability) have absolute discretion as to what, if any, share of capital or income of the Trust they will pay out to the Beneficiary. Absolute discretion on the part of the Trustee is the key feature, which prevents the inheritance paid into the Trust from putting your son or daughter with a disability offside with the ODSP asset restrictions. Henson Trusts are discussed at length in the next chapter.





(C) RDSP

As is discussed at length in Chapter 6, an RDSP is a long-term savings vehicle established by the federal government as a way for individuals who have a disability and their families to promote long-term financial security for persons who have a disability. If your son or daughter is eligible for the Disability Tax Credit (DTC), you may, on your death, rollover all or a portion of your RRSPs, RRIFs, or LRIFs to your son or daughter's RDSP on a tax-deferred basis the same way you would roll over registered plans to your surviving spouse's plan. The tax savings that this rollover offers can be very significant; in fact, depending on your son or daughter's tax bracket when he or she eventually begins withdrawing money from the RDSP, there may be no taxation on the funds at all. There are some restrictions that apply to this rollover, but on the whole this is a very valuable option that you should discuss with your Estate Planning professionals.

(D) LIFETIME BENEFIT TRUST

A Lifetime Benefit Trust (LBT) is a little-known tax savings vehicle that has benefits similar to an RDSP. Simply put, the Income Tax Act allows you to rollover your RRSP, RRIF, and LRIF assets on a tax-deferred basis to an LBT. The LBT must use the entire rolled over amount to purchase a qualifying annuity, the proceeds of which may be paid directly to your son or daughter or held in the LBT for the benefit of him or her. There are a number of restrictions and requirements for a Trust to qualify as an LBT, and you should speak with your Estate Planning professionals to learn more about this option.





(E) EXEMPT ASSETS

You may also choose to leave your son or daughter an exempt asset directly as part of his or her share of your estate. A more detailed discussion of ODSP exempt assets is provided in this book in Chapter 4. If you are considering this option, you should take into account, amongst other things, the following issues:

- I.** Your son or daughter's capacity to manage property (i.e., will your son or daughter have the capacity to make decisions about the exempt asset and to manage it appropriately?);
- II.** The cost of maintaining the asset (i.e., property tax, insurance, hydro, gas, up-keep, and repairs, etc.);
- III.** The availability of liquid assets to support your son or daughter outside of the exempt asset (i.e., if a residential property forms the majority of his or her share of your estate, will there be sufficient liquid assets remaining in his or her share to maintain both your son or daughter and the property?);
- IV.** The possibility that the asset will need to be sold and what will happen to any proceeds (i.e., if your son or daughter finds that he or she cannot manage a property and chooses to rent a home, then the proceeds of the sale will be liquid assets in your son or daughter's own name); and/or
- V.** The impact of any such proceeds on your son or daughter's eligibility for ODSP (if he or she is unable to transfer the entire amount of the proceeds of sale into an RDSP or other exempt asset, then the proceeds will likely affect his or her continuing eligibility for ODSP).



GIFTS FOR OTHERS - MINORS

As predominant as the needs of your son or daughter with a disability may be in your Estate Planning considerations, there are likely other Beneficiaries that may need some additional planning. In particular, if you have children or grandchildren who are minors or very young adults, you may have some concerns about leaving them a substantial share of your estate, and rightly so; they say 30 is the new 20, and for good reason. Young adults are staying in school, living at home, and depending on their parents for ever-increasing periods of time and as a result, many do not have the maturity, experience, or financial awareness to manage large sums of money. Unfortunately, unless you expressly provide otherwise in your Will, a gift to a minor will be paid directly to him or her in full when he or she turns eighteen (18), and then it is up to him or her to decide how to spend it, whether it be on post-secondary education, or less tangible and potentially more harmful pursuits.

The other concern with leaving a share of your estate to a minor directly is that, unless you provide otherwise, the share for that person will have to be paid into court, and consultation with the child's lawyer (a government office) may be required for the minor to receive any share of the inheritance prior to his or her attaining the age of eighteen (18).

Happily, there is a tried and tested solution for this problem: specifically, the use of a Staged Trust. Staged Trusts are discussed in detail in Chapter 2. Briefly, a Staged Trust is a Trust established in your Will that allows payments from a young person's inheritance to be paid out for them at intervals until they reach the age at which you feel he or she will have the maturity to handle the inheritance appropriately. This might be age 21, 25, 30, or even older depending on your desires and impressions of the person's maturity.

GIFTS FOR OTHERS - SPOUSES

Depending on your marital situation, providing a Trust for a spouse may be appropriate. Some situations where you may want to consider doing so include: if this is a second marriage and you have responsibilities to children from a previous marriage; if your spouse is or may be eligible for ODSP; and/or if your spouse has lost the capacity to manage property. Further information regarding Trusts in these circumstances is provided in Chapter 2.





H. CUSTODY AND GUARDIANSHIP

CUSTODY FOR MINOR CHILDREN

If you have minor children, one of the most important decisions you will make in preparing your Will is who should have custody of your children while they are growing up. The Children's Law Reform Act⁴ allows you to appoint another person to have custody of your minor children upon your death if there is no other person entitled to custody. This appointment is effective for 90 days only after the date of your death. After that 90-day period is up, the person you have appointed must apply to the Court to be appointed on a permanent basis as guardian and custodian of your children (until they attain the age of majority). Commencing that application within the 90-day period will extend the temporary appointment until the matter has been finally decided by the court. It is important to note that parents who share custody of their children should, if possible, agree on and make the same appointments in their Wills. If, for instance, both parents should pass away in a common accident without agreement on the issue of custodians, neither appointment will be effective. If one custodial parent dies first, it will be the appointment made by the surviving custodial parent that is effective.⁵

Parents are often surprised to learn that regardless of the appointments you make in your Will, anyone can apply to have custody and guardianship of your children upon your death. For instance, if you appoint your child's maternal grandparents, his or her paternal

grandparents have an equal right to seek custody and guardianship. It will be up to the Court to determine who should be appointed, based on a wide array of factors, including:

- The love, affection, and emotional ties between the child and the person seeking appointment, other members of the child's family, and the people involved in the child's upbringing;
- The child's views and preferences;
- The ability and willingness of each person applying to provide the child with guidance, education, the necessities of life and any special needs of the child;
- The plan proposed by each person to provide for the above;
- The permanence and stability of the home and family unit of the person applying to have custody;
- The ability of the person applying to act as a parent to the child;
- The relationship, by blood or adoption, between the person applying and the child.⁶



This list is not exhaustive, and some other facts the Courts will consider include, for example, the religious upbringing of the children and the persons applying for custody. The Court will certainly take into account your wishes, and as a best practice, it is a good idea to provide documentation clearly explaining the reasons behind any appointments you have made, addressing the factors listed above and any others that are important to you and your child.

4 - Children's Law Reform Act, R.S.O. 1990, c. C. 12, section 61.

5 - Ibid., section 61.

6 - Ibid., section 24.

GUARDIANSHIP OF AN ADULT

Many parents of an adult with a disability are surprised to learn that they do not have any custodial or guardianship rights with respect to their adult child, even if he or she has always lived with and been cared for by them. In fact, the law provides that every person who has reached the age of 18 is considered to have capacity to manage his or her own property, and upon the age of 16 to have the capacity to make personal care decisions.⁷ In any event, no person can have custody over an adult. A further discussion of the ins and outs of consent and capacity law and legal decision-making is provided in Chapter 3.

That being said, it may be necessary, in some circumstances, for a person with a disability to have a legal guardian appointed for his or her personal care or property. This may be the case where he or she does not have the capacity to manage his or her own affairs but has inherited a large sum of money directly (i.e., with no Trust). Absent of a valid Continuing Power of Attorney for property, someone may have to be appointed as guardian because no other person would have the legal authority to make decisions on the person's behalf about how to manage the funds so that his or her entitlement to ODSP is affected as little as possible.

While you, as a parent, do not have authority to appoint anyone to be guardian for your child (while a minor or an adult), you can specify a non-binding wish as to whom you would like to support to be appointed. For instance, if you believe that a guardian may, at some point, become necessary, you can state that you authorize your Estate Trustees (or the Trustees of any Henson Trust you establish in your Will for your son or daughter) to use funds from your estate (or the Henson Trust) to support a specific person to be appointed as guardian. A statement and authorization of this nature may be persuasive to the Court and also provide the means to ensure that the application for guardianship (a costly undertaking) can move ahead without delay.

⁷ - Health Care Consent Act, s. 4 and 15; Substitute Decisions Act, 1992, S.O. 1992, c. 30, s. 2.

I. INHERITANCES FROM OTHER FAMILY MEMBERS

A frustrating realization for many parents and family members of individuals who have a disability is that even if you take all the estate planning steps necessary to ensure the future financial security of a loved one who has a disability, your plans may be upset by an inheritance from a well-meaning but uninformed family member. This frequently happens when a parent, grandparent, or aunt or uncle dies intestate or, unaware of the asset and income limits imposed by ODSP, leaves a gift for the person without consulting his or her family about the implications. The direct gift to a person with a disability, as discussed previously, may put him or her offside the ODSP asset and income limits. The only way to fix the situation will be to move the assets into an exempt asset, an RDSP, a segregated fund, or an inheritance Trust. These options are discussed at length throughout this book.

The trouble is that these options all require the person to have the capacity to make decisions about their property or have a valid Continuing Power of Attorney for property in place (both of which require a higher degree of cognitive functioning than is sometimes present). In the absence of these, an appointment of a guardian for property may be required.



Fortunately, the direct gift is easily avoided through open and honest communication with your family members about your own estate planning activities, the implications of inheritances for your loved one who has a disability, and the options for avoiding a direct inheritance while still benefiting your loved one.

In some cases, you may find that your family members want to benefit your son or daughter with a disability but at the same time, are reluctant to engage in what they view as complex estate planning processes and the perceived expense of incorporating a Henson Trust into their Wills. Unfortunately, naming the Trust established for the benefit of a person in someone else's Will is not a good option; doing so will result in the Henson Trust being tainted, thereby losing the preferential tax treatment it receives (if properly drafted; see Chapter 2 regarding taxation of Trusts for more information). Depending on who dies first, the Trust may not have been established in time for the inheritance. The alternative that many families pursue is to establish what is called an "Inter Vivos" Henson Trust, in which any person can settle an inheritance or gift for the benefit of your son or daughter without putting him or her offside the ODSP eligibility requirements. Inter Vivos Henson Trusts are discussed in greater detail in Chapter 2.

J. TAX CONSIDERATIONS

Unlike in some other countries, most notably the United States, Canada does not impose an estate tax on a deceased person or an inheritance tax on an individual who receives a share of a deceased person's estate. There are, however, a couple of different taxes that arise on death, specifically, income tax on capital gains and estate administration tax (also known as probate fees).

INCOME TAX ON CAPITAL GAINS

In general, under the *Canadian Income Tax Act* (the "Act"), a deceased taxpayer is deemed to dispose of their worldwide assets at fair market value ("FMV") immediately before death. As a result, any accrued gains on their property may be subject to income tax. (For example, shares of privately held Canadian corporations are considered property of a deceased taxpayer, and any gains and the value of these shares will be subject to tax upon the shareholder's death.) In some cases, property may be transferred (i.e., a rollover) on

a tax-deferred basis to a spouse, common law partner, qualifying spousal Trust, Registered Disability Savings Plan (RDSP) or a Lifetime Benefit Trust.

Specific to holding farm property, there are rollover options (subject to strict rules) for transfers from parents to children either prior to or after death.

Provided below is a summary of the tax consequences of assets held by an individual at the time of their passing (the "deceased taxpayer"):

A. PRINCIPAL RESIDENCE

The gain on the sale of a principal residence for tax purposes is not taxable (i.e., the principal residence exemption ("PRE")), and as such, the proceeds from the subsequent sale of a principal residence of a deceased taxpayer may be distributed tax-free to the Beneficiaries. (However, as of 2016, dispositions of principal residences must now be reported on the T1 personal tax return regardless if the PRE applies.)

B. REGISTERED INVESTMENTS

The deceased taxpayer will be deemed to have disposed of the assets held in a registered plan at the date of passing and will be liable for income taxes on the fair market value of the assets. To mitigate the tax liability, the deceased taxpayer may name a spouse as Beneficiary of the registered plan or may rollover the proceeds from the registered plan to either a Lifetime Benefit Trust or an RDSP on behalf of eligible Beneficiaries.

C. NON-REGISTERED INVESTMENT

The deceased taxpayer will be deemed to dispose of these investments at their fair market value ("FMV"). The tax liability on the deemed disposition of these assets will be based on the difference between the FMV and adjusted cost base ("ACB") of the investments. For example, if an investment purchased for \$100 (i.e., the ACB) has an FMV of \$1,000 at the time of an individual's death, the difference (i.e., \$1,000 - \$100 = \$900) is the deemed disposition gain that

the marginal tax rate of the deceased taxpayer. If the gain is deemed to be a capital gain (in which most investments are considered on account of capital), only one-half of the deemed disposition gain will be subject to tax. To mitigate the tax liability, the deceased taxpayer may rollover certain capital property to a spouse.

D. PRIVATE COMPANY SHARES

The deceased taxpayer may be subject to tax on two transactions on account of holding shares of a private company at the time of passing. The first tax transaction ("deemed disposition tax") occurs on death, deems the shares to have been sold, and is calculated on the gain of the fair market value ("FMV") of the private shares. The second tax transaction ("deemed dividend tax") occurs when the estate redeems the private shares, deems a dividend to have been paid to the estate, and is calculated on the excess of fair market value of the private shares over the paid-up capital (usually nominal in value) of the private shares.

There are various strategies that can be used to minimize the double taxation effect, which may include the use of an incorporated holding company to acquire the shares of the private company from the estate at a cost equal to the FMV of the shares.

E. FARM PROPERTY

The deceased taxpayer will be deemed to dispose of the farm property (the "property") at its fair market value ("FMV") at the time of passing. The tax liability on the deemed disposition of the property will be based on the difference between the FMV and adjusted cost base ("ACB") of the property. The capital gains tax rules apply and one-half of the capital gain of the deemed disposition of the farm property will be taxed at the deceased taxpayer's marginal rate of income tax.

For dispositions of qualified farm property ("QFP") after April 20, 2015, a lifetime capital gains exemption of \$1,000,000 (the "LCGE") is available. The rules are complex for the definition of 'qualified farm property,' and a special rule applies for property acquired prior to June 18, 1987. In addition, there are provisions both prior to, and after the passing of, the taxpayer with respect to a tax-free rollover of QFP to children of the deceased taxpayer.

F. PERSONAL USE PROPERTY

The deceased taxpayer will be subject to capital gains tax on certain personal use property items greater than a \$1,000 in value (i.e., paintings, rare coins) at the time of passing (although these items are usually purchased by a third party at an agreed upon price).

ESTATE ADMINISTRATION TAX

When working through your estate plan, particular attention should be placed on whether your estate would be subject to estate administration tax (EAT). EAT will be payable on the value of your estate if a Certificate of Appointment of Estate Trustee with a Will (or without a Will) is required. This requirement is typically based on the type and/or value of assets held in your estate.

IF EAT IS PAYABLE, THE CURRENT RATES IN ONTARIO ARE:

UNTIL DECEMBER 31, 2019:

- >> **\$5** for each **\$1,000** or part thereof, of the first **\$50,000** of the value of the estate; and
- >> **\$15** for each **\$1,000**, or part thereof, of the value of the estate exceeding **\$50,000**⁸
- >> There is no EAT applied to estates valued under **\$1,000**.

EFFECTIVE JANUARY 1, 2020;

- >> **\$15** for each **\$1,000**, or part thereof, of the value of the estate exceeding **\$50,000**
- >> There is no EAT applied to estates valued under **\$50,000**.

Note: Changes to EAT were proposed in the 2019 Ontario Budget and are expected to become effective as of January 1, 2020. The Budget also proposes extending the deadlines for filing an Estate Administration Tax Information Return with the Ministry of Finance from 90 to 180 days, and filing amendments from 30 to 60 days.

8 - More information can be found at the Ministry of Finance.

There are ways in which you can reduce the amount of EAT owing, including naming Beneficiaries of your life insurance policies and retirement savings plans, as well as considering the use of multiple Wills if you own shares of a private corporation. This kind of complex planning is beyond the scope of

this book, and we recommend that you further discuss EAT planning with your professional advisors.



PLANNING CONSIDERATIONS

Proper estate planning will usually involve two stages: pre-death and post-mortem planning. From a tax perspective, an individual should consider the following:

PRE-DEATH

The Will should be clear as to the allocation of assets to the beneficiaries. Tax planning considerations should include a review of all of the tax-deferred asset transfer options (i.e., rollovers) available, including maximizing eligible contributions to RDSP and Lifetime Benefit Trusts for beneficiaries with a disability. Further information with respect to Lifetime Benefit Trusts is provided in Chapter 2, and further information related to RDSP rollovers is provided in Chapter 7 of this book.

Changes to the taxation of trusts starting in 2016 include a new testamentary Trust category, the Qualified Disability Trusts (QDTs). If a Trust qualifies as a QDT, the trust will be taxed at the more favorable graduated tax rates. It is imperative that the Will clearly states the intention of the testator to utilize this option, as the QDT designation must be made by joint election of the estate and the beneficiary. For further information with respect to QDTs, please see Chapter 3.

In addition, if the testator owns controlling voting shares in a private corporation ("corporation"), consideration should be given to do an estate freeze that (i) allow the testator to remain in control of the corporation, and, the tax on any capital gain on the value of the shares of the corporation (from the date of the estate freeze) will be paid by the beneficiaries.

POST-MORTEM

The estate (i.e., your Estate Trustees on behalf of your estate) may choose to file up to three tax returns: the final T1 return, a rights or things T1 return, and an estate T3 trust return. A rights or things return includes amounts earned but not yet paid, such as old age security payments, and declared but unpaid dividends. The advantage of electing to file a rights or things return is that the tax is at the graduated rates, and certain personal credits are allowed to be claimed on the return. A trust return will be filed if the estate has earned income since the time of passing of the testator.

In addition to filing options, it is important to consider all available tax credits and capital losses that may be claimed in order to minimize the overall tax liability of the estate. For example, advanced tax planning options are available to minimize the double tax consequence of holding private company shares at the time of passing.

We strongly recommend that you a) speak with your Estate Trustees during your lifetime to make your wishes as to the manner of administering your estate known and b) refer or connect your Estate Trustees to estate planning and tax professionals who are knowledgeable about the options that exist in your unique circumstances.

K. ADDITIONAL CONSIDERATIONS

Some additional issues you may wish to consider in your estate planning include the following:



I. INSURANCE DESIGNATION

In determining what share of your estate each Beneficiary will receive, it is important to take into account any insurance policies you have on your life and whether you intend that any insurance proceeds be divided along the same lines or differently than your estate assets. It is also important that you update your insurance designations at the time you make your Will to ensure that your estate plan, Will, and designations are consistent. If it is your intention that a loved one who has a disability benefit from your insurance proceeds, be sure that your designation properly identifies the Trust you establish for your loved one in your Will as the Beneficiary of the proceeds.



II. PENSION PLANS

If you have a pension plan, it is important to determine what survivor benefits are available to your family members upon your passing. Many pension plans have benefits for a surviving spouse, while others also offer benefits to surviving dependent adult children with a disability. While these types of plans are less common, the benefits they offer are significant: often a lifetime monthly survivor pension that equates with 60% of the value of your original pension, together with certain health and drug plan benefits to boot. If you are the lucky member of such a plan, it is important to confer with your pension provider to determine eligibility requirements for your son or daughter, steps that need to be taken now to ensure eligibility in the future and determine what the value is likely to be in order to take that into account in determining the equitable distribution of your estate.

Where a survivor benefit is available for your son or daughter, you will need to consider whether it provides a benefit that is superior to that offered by ODSP. In many cases, it occurs when ODSP has to be foregone. The reason is that a survivor benefit usually cannot be paid into a Trust, which means it is direct income and results in asset accumulation for your son or daughter that exceeds the ODSP income and asset limitations. This also raises issues related to legal decision-making. If there are concerns related to the management of property, the pension fund may require the appointment of a legal representative for the Beneficiary (perhaps involving an application for guardianship).

Finally, even if your son or daughter is eligible for a survivor pension, that does not mean you should automatically dispense with any other inheritance for him or her. The reality is that many pension plans are struggling under the brunt of unprecedented waves of retirement among pensioners, and the value of the pension in the future may be less than certain. Furthermore, your son or daughter's eligibility may change over time and is usually only determined at the date of your death. If he or she is considered ineligible at your death, or at any time thereafter, it will be too late to consider making other provisions in your Will for him or her.





III. REGISTERED PLANS

As discussed above, there are tax savings opportunities that can be obtained from rolling over your RRIFs, LRIFs, and RRSPs to the RDSP or RRSP of a spouse, a son or daughter with a disability (eligible for the DTC), and/or a dependent minor child or grandchild. A rollover of this nature allows taxation to be deferred until the funds are withdrawn from the Beneficiary's RRSP, RRIF, or RDSP.

If a rollover of this nature is absent, it is still important to ensure that your designations for your RRSPs and RRIFs are updated appropriately to reflect your estate planning intentions. In doing so, you will be saving your estate unwarranted probate fees.

It is also important to consider the tax implications of gifts of RRSPs and RRIFs. Unless a tax-deferred rollover occurs, RRSP and RRIF proceeds are taxed as income in the year of your death. The tax burden is borne by your residuary estate, even if the proceeds of your RRIF and RRSP are paid in full to Beneficiaries who are not residuary Beneficiaries. In certain circumstances, this may significantly decrease the value of the residue of your estate (or even render your estate insolvent). If you do choose to name a Beneficiary of your RRSPs or RRIFs, you may wish to make the gift conditional on the tax liability associated with the RRSPs and RRIFs being paid by the Beneficiaries of those plans.



IV. REWARD PLANS

If you, like many of us, have accumulated reward plan points such as Aeroplan Points or Air Miles, you may wish to specifically designate who should receive these in your Will. If you fail to do so, there can be extra costs associated with valuing and transferring the points. Each plan has its own rules for how and when points can be transferred or used, and giving this some thought now can help to avoid disputes about who should receive them and how.



V. PETS

Many families would not be complete without their loyal pets. Whether your pet is a trained support animal providing a real and necessary service to a family member with a disability or simply a member of the family giving and receiving love and comfort, it is a good idea to provide for their ownership and care upon your death. You may wish to specify who should take in your pet, and you may choose to settle a small bequest on the person adopting your pet to contribute to its care.



VI. SOCIAL MEDIA AND ONLINE ACCOUNTS

Whether you are a tech savvy Web developer or a casual social media participant, your online assets may have real value or be of importance to you and your family. Domain names, websites, blogs, profiles on social networking sites, and other online content should be addressed in your Will to ensure that these assets and/or control over them goes to the person(s) you believe to be appropriate.



It is also a good idea to keep a list of your passwords for relevant online accounts in a safe place so that upon your death, your Estate Trustee has the information needed to manage your accounts.



VII. RESPS

If you are a subscriber of RESPs for the benefit of a child or grandchild, it is important to give some consideration to how you want the RESPs to be dealt with upon your death. If you fail to specify the manner in which they should be managed, they will revert to your estate and will not necessarily benefit the child or grandchild for whom they were intended.

If you wish the RESPs to be continued for the benefit of the child or grandchild, it is necessary to determine who should be the successor subscriber. The selection of the appropriate person is very important because as a subscriber, he or she will have a right to withdraw contributions and receive income payments. This creates an inherent conflict of interest between the subscriber and the intended recipient. The subscriber should therefore be someone who has the intended recipients' best interests at heart and who you believe to be moral and Trustworthy.

On the other hand, if you wish your RESPs to be wound up rather than continued, it is a good idea to provide clear direction to your Estate Trustees as to who should be the recipient of the RESPs and on what conditions. For instance, what if the recipient is still a minor at the time of your death?

There are also tax implications from the wind-up of the RESP. Specifically, accumulated investment income is taxed as income of you, the subscriber. This tax can be avoided through a tax-deferred rollover to the RRSP of a spouse or, in certain limited circumstances, to the RDSP of a Beneficiary with a disability.

RESPs and the rules around who can become a successor subscriber and how RESPs may be rolled over to a Beneficiary with a disability are complex and beyond the scope of this book. We recommend speaking to a lawyer to discuss the options best suited to your needs.



VIII. CHARITABLE BEQUESTS

Providing a bequest to a charity has a number of benefits, both philanthropic and tax related. While you may wish, at the outset, to preserve all of your estate assets for your children, particularly a son or daughter with a disability, you have additional options for charitable giving when your estate plan includes Trusts. For instance, a Henson Trust or Staged Trust must provide for remainder Beneficiaries (i.e., who will receive what's left of the Trust if the Beneficiary of the Trust passes away before everything is paid to or for the benefit of him or her). At this juncture, many families choose to provide a share of the remainder of a Trust to charities of choice or community support organizations that have been important in the life of the Beneficiary.

If and when you choose to provide a gift to a charitable organization, it is imperative that you properly identify the charity in order to avoid costly disputes and confusion for your Estate Trustees. For example, many individuals wish to benefit a Community Living association. There are literally hundreds of organizations that have the words "Community Living" in their legal name. Not specifying which one you wish to benefit can cause very real problems and may lead to the gift failing altogether. You can search registered Canadian charities on the CRA's website, which provides a detailed listing of all Canadian registered charities along with their full legal names, registration numbers, and addresses. This information should be included in your Will to avoid confusion.

We also recommend including language that specifies what should happen to any charitable gift in the event that the charity you have named no longer exists at the time the gift is to be paid (keep in mind this might be only after the death of your son or daughter). Your Estate Planning professional should clearly provide for this in your Will.



IX. SECOND MARRIAGES

Today, second and third marriages are the foundation for a large portion of Canadian families. There are a number of additional considerations that need to be addressed if you have a blended family, including, among other things:

- Any agreements you have entered with any former spouse regarding entitlements to support or shares of your assets (a separation agreement);
- Any prenuptial agreements you have entered affecting the division of your estate with a current spouse upon your death;
- How you will provide for children from a previous marriage and the spouse from a current marriage;
- Who will be Estate Trustee (i.e., your children or your spouse);
- How a child with a disability will be provided for and cared for if your current spouse is not this child's parent;
- Whether your pension, if any, should go to your child with a disability or your current spouse; and
- Who should receive the remainder of your estate after the death of your current spouse, yourself, and your children.

The typical approach for a married couple is to prepare "Mirror Wills," meaning a Will for each spouse that provides identical appointments of Estate Trustees and Beneficiaries on the same terms and conditions. Such Wills typically leave everything to the surviving spouse, but if there is no surviving spouse, then everything is divided equally amongst the surviving children, subject to a preferential share for a child with a disability. This usually works because the spouses have the same degree of interest in the children and share the same goals and support obligations.

If, however, you are in a second marriage situation involving children from a previous marriage, Mirror Wills may not work. The reason is that a spouse who is not the parent of your children may have competing priorities and therefore may not be inclined to continue to provide the amount of financial support you have provided during your lifetime and/or may change his or her Will after your death in such a way that your children are negatively affected. This can lead to inadequate support for your loved one who has a disability, costly disputes, and potentially the need for a dependent's relief application.

There are a number of options for avoiding this situation, including domestic agreements or Mutual Wills. These instruments are beyond the scope of this book. If you are in this situation, we recommend speaking with a legal professional to discuss your options in greater depth.



L. SUMMARY AND ADDITIONAL RESOURCES

The purpose of this chapter is to provide you with an understanding of the importance of making a Will and the various decisions you will be faced with in doing so. By now, you should have a good understanding of the following:

- (I)** The considerations involved in selecting an appropriate Estate Trustee (and alternate Estate Trustees) and what their roles and responsibilities will be;
- (II)** The variables to consider when determining how to divide your estate – taking into account both fairness and the long-term financial security of your family member with a disability;
- (III)** The options for structuring gifts to a person with a disability in such a way that minimizes tax and maximizes eligibility for government supports;
- (IV)** The options for structuring gifts for minors or young adults in a way that promotes their interests and provides for their needs;
- (V)** The considerations involved in appointing a custodian and the circumstances in which you may wish your estate to support an application for guardianship for an adult child with a disability; and
- (VI)** A variety of the other more minor issues you may want to consider in preparing your estate plan.



While a more detailed discussion of these issues is beyond the scope of this book, we trust that this resource has, at the very least, made you aware of the issues so that you are now at the stage where you can consult with a legal professional in an efficient manner knowing precisely what questions to ask, what your priorities are, and the options you would like to discuss.

Finally, there are a wide variety of resources available to families engaging in estate planning. Those that are of particular relevance to individuals who have a disability and their families include the following:

- [The Office of the Public Guardian and Trustee Ontario Disability Support Program](#)
- [Canada Helps – A Resource for Identifying Charitable Organizations in Canada](#)
- [Canada Revenue Agency – Registered Disability Savings Plan](#)
- [Canada Revenue Agency – Tax Credits and Deductions for Persons Who Have a Disability](#)







TRUST PLANNING

A parent, sibling, or support person for someone with a disability, the importance of a “Trust” is particularly important to you – trust in the support organizations and support workers you rely on to provide services to your loved one who has a disability, trust in the family members or friends who may need to make decisions for your loved one after you are gone, and trust in the persons you appoint to carry out your plans and wishes after your death. It is also likely that you have heard that it is important for you to “set up a Trust” for your loved one who has a disability. Like many in your situation, however, you may have little understanding of what a “Trust” is and how you go about setting one up.

A. WHAT IS A TRUST?

A Trust is a legal arrangement that exists whenever you (as the “Settlor” or “Testator”) give property (whether real estate, cash, investments or other assets) to one person (called the “Trustee”) to hold “in Trust,” invest, and manage for the benefit of another person (called the “Beneficiary”). For instance, consider Sam’s Trust:

- You (Settlor) give a condominium property (the Trust Property) to your daughter, Jill (Trustee), for the use and benefit of your son, Sam (Beneficiary).
- In this arrangement, Jill’s name would be on title to the property as the legal owner.
- However, Jill’s ownership of the property is subject to Sam’s right to use and benefit from the property.

The terms and conditions of a Trust, including any restrictions you impose on the use, investment, management or distribution of the assets, including who the assets can be used for, to whom the assets should be distributed and when, are typically laid out in the legal document establishing the Trust, whether that be a Will or a separate Trust Agreement. In the example of Sam’s Trust above, the Trust document would typically include details about how the expenses of the property are to be met, on what conditions the property can be sold, how any proceeds of the sale are to be distributed, who should act as Trustee if Jill can no longer act, and what should happen to the property if Sam passes away.

A Trust can be as simple as a statement that you are giving assets to one person for the benefit of another (though such a Trust will likely be ineffective in achieving your goals) or so complex that only your lawyer can understand the 10-page document establishing it. The degree of complexity will depend on the purposes of the Trust you are establishing and the needs of the Beneficiary you intend to benefit through the Trust.

B. WHY USE A TRUST?

A Trust allows you to give a gift while at the same time retaining a degree of control over the manner in which the gift is transferred, how and when it is used by the Beneficiary, and who will receive the gift if the Beneficiary passes away before using the entire gift. This enduring control makes a Trust a valuable

tool for ensuring the future financial security of your loved ones, including minors, persons who have a disability, and in some cases, spouses with competing responsibilities and interests.

Some examples of the circumstances in which you might want to establish a Trust and the types of Trusts that are appropriate in those circumstances are as follows:

1. You have a loved one who has a disability who is or who may be eligible for ODSP, and you wish to leave an inheritance for him or her. See the sections on Henson Trusts and Qualified Disability Trusts below.
2. You are a person with a disability who is or who may be eligible for ODSP, and someone has left you an inheritance in your own name. See the discussion on Inheritance Trusts below.
3. You have a loved one who has a disability to whom you wish to give a residential property. See the sections on Housing Trusts and Inter Vivos Trusts below.
4. You have considerable RRSP, RRIF, or LRIF assets and you wish to benefit your son or daughter with a disability while minimizing tax liability. See the section on Lifetime Benefit Trusts below.
5. You have life insurance that you would like to designate for the benefit of a minor or a person with a disability who is eligible for ODSP. See the section on Insurance Trusts below.
6. You have minor (or young adult) children or grandchildren that you wish to benefit. See the section on Staged Trusts below.
7. You are in a second marriage and you have children from a previous marriage. See the section on Spousal Trusts below.



[i] In each case, it is important to consider the implications of the proposed Trust on the Beneficiary, their needs and eligibility for government benefits, if any, as well as the tax implications and planning options that apply. Each of the Trusts referenced above is discussed in detail below.

C. COMMON TYPES OF TRUSTS

I. ABSOLUTE DISCRETIONARY OR “HENSON” TRUSTS

The most well-known and commonly used Trust among families of people with disabilities is the Absolute Discretionary Trust, more commonly known as the “Henson” Trust. It is a special type of Trust arrangement in which the Beneficiary is considered not to have any legal claim to the property held in Trust, and therefore, the property is not considered an asset of the Beneficiary when determining eligibility for ODSP. In short, a Henson Trust renders the property invisible to ODSP for as long as the property remains in the Trust.

It should be noted that a Henson Trust can take a number of forms and can be used in respect of a wide variety of assets. For instance, a Henson Trust may be testamentary in nature (meaning that it is included in a Will or Trust deed that takes effect only on the death of the person establishing the Trust), or it may be inter vivos, meaning that it takes effect during the life of the settlor. A Henson Trust may be used to hold a residential property (as a type of housing Trust), or it may hold cash or investments. Some of the more common forms of Henson Trusts are explored further in this chapter. The genesis of these Trusts, their defining features, and the considerations that should be taken into account when establishing these Trusts are also discussed below.

HISTORY

This type of Trust actually derives its name from a legal decision involving a Trust that was established for the benefit of a Beneficiary by the name of Audrey Henson. In that case, Audrey's father established an Absolute Discretionary Trust in his Will for her benefit. The language set out in this Trust, which has now become the standard for what is now known as a "Henson Trust," clearly indicated that Audrey did not have a right to any part or portion of the Trust's assets or income therefrom, except as determined by the Trustees of the Trust in their absolute discretion. In other words, the Trustees could decide, without any input from Audrey, what, if anything, she would receive from the Trust, and could in fact determine not to give her anything.

Prior to her father's death, Audrey had been in receipt of an allowance under what was then the Family Benefits Act (the predecessor to the current Ontario Disability Support Plan Act). When her father died, the Ministry of Children, Community and Social Services, which was responsible for administering Audrey's allowance, took the position that the Trust assets were Audrey's assets and discontinued her allowance. Understandably, this decision was challenged in the courts and the ultimate decision clearly held that the Trust property did not form part of Audrey's assets; therefore, her eligibility for the allowance (what would today be ODSP) ought not to have been affected.⁹ Unfortunately, Audrey did not live to benefit from this decision. It has, however, been a significant gift to people with disabilities ever since, allowing families to plan for and contribute to their loved one's comfort, care, and well being after they are gone.

RECENT SUPREME COURT DECISION - HENSON TRUSTS ARE NOT "ASSETS" FOR HOUSING ASSISTANCE

In 2019, the Supreme Court of Canada (SCC) confirmed that Henson trusts are not considered "assets" for the receipt of housing assistance. In *S.A. v Metro Vancouver Housing Corp* (2019 SCC 4), the SCC ruled that a Henson Trust did not disentitle an individual with a disability from receiving a rental housing subsidy through a social assistance program. This is a significant decision for current social assistance recipients who are also Henson Trust beneficiaries, as well as family members of people who have created, or are considering the creation of a Henson Trust in their will.

In *S.A. v Metro Vancouver Housing Corp*, a person with disabilities, referred to as S.A., was the beneficiary of an absolute discretionary Henson Trust. S.A. had also qualified for rental assistance through the *Metro Vancouver Housing Corp* (MVHC), which provided her with a subsidy to cover approximately two-thirds of her monthly rent. In 2015, her rental assistance was discontinued by MVHC on the basis that her Henson trust was an asset whose value required disclosure to MVHC.

Upon reviewing the trust language, the SCC determined that S.A.'s trust constituted a valid Henson Trust, as she did not have any "enforceable right to receive any of the Trust's income or capital." The SCC therefore ruled that S.A.'s Henson trust was not an asset to be considered when determining her eligibility for rental assistance under the MVHC guidelines.

This is a significant and important decision for the disability community in Canada. While this does not mean that Henson Trusts are always exempt from all means tested social assistance programs, it provides a basis for the treatment of Henson Trusts in determining the value of assets of a household.

⁹ - Ontario (Ministry of Community & Social Services) v. Henson 1989 O.J. No. 2093 affirming Ontario (Director of Income Maintenance) v. Henson [1987] O.J. No. 1121.

DEFINING FEATURES

What you may have picked up on from the discussion above, and perhaps have some concerns about, is what is meant by the words "Absolute Discretion." Absolute Discretion means that the Trustees of this type of Trust have total decision-making authority over whether or not to provide any part of the Trust (or income from the Trust) to the Beneficiary, when any such payments should be made, and how. Many families are put off by this requirement and would prefer an arrangement that would allow them to require payments from the Trust to the Beneficiary at certain times, for certain supports or services, or in specific installments. Unfortunately, it is just those types of restrictions and obligations that would give the Beneficiary a claim to the assets and thereby make them assets that are included for the purposes of determining eligibility for ODSP. In short, there is no legal mechanism for imposing requirements on an Absolute Discretionary Trust without rendering it no longer discretionary in nature.

Another defining feature of an Absolute Discretionary or Henson Trust is that the Trust must account for how any remaining income will be paid after the accumulation period has expired. The "accumulation period" is the period of time that a Trust may legally accumulate income in the Trust. In Ontario, the accumulation period is currently 21 years. After 21 years, any income must be paid out in the year it is earned. The issue in this case is that if the Beneficiary is in receipt of ODSP and all of the income from the Trust cannot be paid to or for the benefit of him or her without putting the Beneficiary offside the ODSP asset or income limits, then the income will need to be paid to someone else. A well-drafted Henson Trust will account for this eventuality.

Finally, a Henson Trust must prescribe how any remaining portion of the Trust will be distributed on the death of the Beneficiary. Failure to account for the final distribution of the Trust will result in the Trust being considered an asset of the Beneficiary for the purposes of ODSP.

TRUSTEE RESPONSIBILITIES

In the majority of cases, a Henson Trust is included in a Will to be established upon the death of the person making the Will; this makes the Trust a "Testamentary Trust." Very often, the Estate Trustees appointed in the Will are instructed to establish and act as Trustees of the Henson Trust. In some cases, however, it is appropriate to appoint different persons or additional persons to act as Trustees of a Henson Trust. This is because the responsibilities to which the Trustee of a Henson Trust is subject are very different from those of an Estate Trustee, as is the degree of discretion (or decision-making authority) the Trustee has.



The Trustee of a Henson Trust is responsible for the following:

- Overseeing the Trust assets for the benefit of the Beneficiary while they are held in Trust. This includes managing the assets and investing them prudently;
- Distributing funds from the Trust if and when the Trustee determines it is appropriate to do so. The Trustee has the discretion not to distribute any funds at all, or to distribute all of them to or for the benefit of the Beneficiary and wind up the Trust if the Trustee believes it is appropriate to do so;
- Keeping records and accounting for all the assets of the Trust, payments made out of the Trust, and income received by the Trust;
- Preparing annual reports for ODSP identifying income and disbursements from the Trust;
- Preparing annual tax returns for the Trust; and
- Distributing any remaining assets as you have instructed in the Trust when the Trust is wound up upon the death of the Beneficiary.



These are the minimum legal responsibilities of the Trustee. You will note that they do not include legal decision-making for your loved one who has a disability, seeing to his or her personal care, coordinating support with agencies, acting as plan holder of an RDSP, or otherwise seeing to his or her well-being. These roles are in fact beyond the true mandate of a Trustee who is in fact only really responsible for the Trust assets. Practically speaking, however, families expect considerably more from the Trustee of a Henson Trust. The Trustee is, in most situations, expected to take over where a parent has left off, making a wide variety of decisions for the Beneficiary, affecting every aspect of his or her life. Some of the responsibilities a Trustee is usually expected to undertake include:

- Where the Beneficiary will live (whether independently with supports, in a group home, or with the Trustee or a family member);
- Coordinating and managing supports and funding with local agencies and/or the Developmental Services Office (DSO);
- Managing the investments held in an RDSP;
- Determining how assets will be used to support the Beneficiary and what assets can or should be provided to the Beneficiary to improve his or her quality of life; and
- Overall responsibility for the Beneficiary's needs and well-being.

These expectations and responsibilities are well beyond what an Estate Trustee is typically accountable for, and therefore many families choose to appoint someone other than their Estate Trustee to act as Trustee of a Henson Trust, or to act together with the person appointed as Estate Trustee, to bring to the table a wider variety of skills and qualifications.





I. QUALIFICATIONS OF A HENSON TRUST TRUSTEE

The qualifications you may want to consider in determining who to appoint as Trustee of a Henson Trust include the following:



KNOWLEDGE

To begin, the Trustee of a Henson Trust needs to be knowledgeable about the rules, regulations, and supports available to the Beneficiary. Specifically, the Trustee should understand the reason the Trust has been established and the asset and income restrictions under ODSP. The Trustee should also understand the other resources and supports that are available to the Beneficiary, such as RDSPs, tax credits, and various forms of individualized funding

and/or base-funded supports. It is up to the Trustee to ensure that payments made from the Trust are balanced with other earnings and income, that tax savings are realized wherever possible, and that the Trust assets are not unduly depleted.

Where the person you are appointing does not have this breadth of knowledge, it is important that they seek out (and/or are directed to obtain) professional help to explain the system and direct them in the administration of the Trust.



UNDERSTANDING OF THE BENEFICIARY

Perhaps more important than knowledge is an understanding of the Beneficiary in question. Familiarity with and sensitivity to the individual's needs and wants should underlie the decisions made by the Trustee. Ideally, the Trustee is someone who is an active participant in the Beneficiary's life and who knows about his or her residential arrangements, health, and personal care needs, as well as those aspects of life that add to his or her happiness and general well-being. Unfortunately, in many cases, this is not possible either due to competing demands on the time of those persons who are involved, or due to relative isolation of the Beneficiary or his or her family.

Whatever the case may be, it is a good idea to provide the Trustee with what we refer to as a "Life Plan," which identifies where

and how the Beneficiary will live, who the important people in the Beneficiary's life are, contact information for support organizations, medical practitioners, and other community members who play a role in the care and support of the Beneficiary. The degree of detail required in this plan will of course depend on how independent the Beneficiary is. For instance, where the Beneficiary lives independently and manages his or her own ODSP, or resides in a group home and is wholly supported by an agency, the Life Plan may be very brief and the Trustee's role may be limited to the discretionary dispensation of funds upon the request of the Beneficiary or the Agency. However, where the individual is less independent and/or does not have the support of any agency, the Life Plan will need to be significantly more detailed in order for the Trustee to make informed decisions regarding the payment of Trust funds.



TRUSTWORTHINESS

Given the degree of discretion the Trustee of a Henson Trust possesses, trustworthiness as a qualification takes on a significantly higher value. Unlike in the estate administration process where the courts and other Beneficiaries usually have an ability to approve or disapprove the actions of the Estate Trustee, there are far fewer opportunities for oversight in the administration of a Henson Trust. Many families choose to appoint multiple Trustees to act jointly, thereby adding a degree of oversight that would otherwise be lacking.

As discussed in the previous chapter, the potential for a conflict of interest is a particular concern where the Trustee you appoint is also a remainder Beneficiary of the Trust. In layman's terms, if the Trustee (frequently a sibling of the Beneficiary) is designated to receive what's left of the Trust when the Beneficiary dies, then the Trustee has a personal interest in not exercising his or her discretion to give anything to the Beneficiary. Rather, the Trustee has a motive to simply accumulate and reinvest the assets preserving them for him or herself to be claimed when the Beneficiary dies.



The ability to make unbiased decisions free from self-interest is a primary consideration in selecting a Trustee. Where

the possibility of a conflict of interest exists, it may be prudent to appoint multiple Trustees to act jointly to reduce the risk of that conflict being acted upon.



LONGEVITY

As discussed in the previous chapter, the longevity of the Trustee is an important feature when it comes to Henson Trusts, which, depending on the size of the capital, could last for the entire lifetime of the Beneficiary. Once again, it is prudent to name at least one Trustee (or alternate Trustee) who is somewhat close in age to the Beneficiary. This may mean appointing someone who is currently a minor contingent upon that person attaining the age of majority, or such other age at which you believe they will be competent to act as a Trustee or Co-Trustee.





PROXIMITY

The Trustee's place of residence is also a highly relevant factor.

The ability of the Trustee to make informed choices about the administration of Trust funds may be reduced when the Trustee lives at a considerable distance from the Beneficiary. It is also much easier for the Trustee to manage any assets that form part of the Trust, such as a residential property, if he or she is nearby.



It should also be noted that from a tax perspective, there may be concerns regarding how the Trust is taxed

if the Trustee(s) reside outside of Canada. In general, the Canada Revenue Agency ("CRA") will determine the residence of a Trust based on the residence of the Trustee(s) who exercise its management and control. If the Trustee is a non-resident, the estate will likely be considered a non-resident estate for tax purposes and be subject to the tax laws of the country of residence of the Trustee. If, for example, a sole Trustee of an estate is a United States citizen, the estate may be subject to both filing requirements and tax liability in the United States. In addition, the Beneficiaries of the Trust may have dual country reporting obligations as well.



**DEDICATION
AND COMMITMENT**

As described above, many of the responsibilities we attributed to the Trustee of a Henson Trust go well beyond the technical or legal responsibilities of a typical Trustee. As a result it is important that the Trustee you select be a responsible person willing to commit the time and energy required to properly and promptly administer the Trust and attend to the needs of the Beneficiary over a very long period of time, potentially the entire life of the Beneficiary. When considering this qualification, it is important to keep in mind any competing demands a potential Trustee has, such as their own family, business or personal commitments the person is under and how, and if it is reasonably possible to balance those interests with the responsibilities associated with becoming a Trustee.

**PROFESSIONAL ASSISTANCE**

As is the case for Estate Trustees, it is important that the Trustees of a Henson Trust know who to go to for help. The rules, regulations, and duties that a Trustee must operate under are very complex, and your average lawyer or tax advisor is not well versed on the ins and outs of ODSP, RDSPs, Henson Trusts, and the myriad of other options and obligations that arise when it comes to managing a Trust for a person with a disability. If you do not already have advisors, we recommend that you speak to others in your community, including any support organizations that you deal with, to identify appropriate assistance, and then make sure that your Trustees are directed to your advisor.





TRUSTEE OPTIONS, ALTERNATIVES, AND ADVISORS



As is the case for Estate Trustees, it is rare to find all of these qualities united in a single individual. Therefore, many families choose to appoint multiple Trustees to act jointly, sharing the responsibilities, acting as a check and balance on the exercise of discretion, and bringing to the table a broader spectrum of skills and qualifications.

Given the duration of a typical Henson Trust, it is also a good idea to appoint alternate or successor Trustees to act in the event that one or more of your original Trustees is unable to continue to act, either due to their death, incapacity, removal by the Court, or resignation for personal reasons.

[i] Corporate Trustees (such as a Trust Company appointed as Trustee), professional Trustee supports (such as lawyers or accountants retained by your Trustees to assist with the Trust administration), and personal support networks or groups (comprised of family and friends of the family or the Beneficiary) can offer valuable alternatives or additions to the plan of care for your loved one who has a disability. These are discussed at greater length in the previous chapter.



TRUSTEE COMPENSATION



Unless you expressly prescribe the manner in which your Trustees may take compensation, compensation will be awarded by the Court in accordance with the Trustee Act. That Act allows Trustees to take "reasonable compensation" for their efforts and time, as approved by the Court.

The Courts have developed a "Tariff" or guideline for how "reasonable" compensation should be calculated based on 2/5 of 1 percent per year on the gross value of the estate.

The problem with the Tariff when it comes to a Henson Trust is that it does not necessarily reflect the time and effort involved in administering the Trust. The time and effort involved in administering a Henson Trust can be quite substantial and, in many cases, disproportionate to the mere monetary value of the Trust; as such, compensation based on a small fraction of a percent of the Trust value is often not fair or appropriate.

In recognition of this potential unfairness, the Courts have indicated that they will review whether the Tariff is appropriate in each case by considering the value of the Trust, the care and responsibility involved in the administration, the time expended, the skill and ability used in the administration, and the degree of success in the administration.

The alternatives and options for compensation are discussed further in the previous chapter with regard to compensation for Estate Trustees.





II. QUALIFIED DISABILITY TRUSTS

In 2016, rules under the Canadian Income Tax Act came into effect with respect to the taxation of Trusts. All trusts (with exceptions) are now taxed at the highest marginal tax rate rather than at graduated tax rates, as was previously the case. One of the few exceptions to this arguably punitive tax treatment is a Qualified Disability Trust (QDT). Thankfully, many Henson Trusts will also qualify as a QDT.

The criteria a Trust must meet in order to qualify as a QDT are as follows:

- The Trust must be testamentary (i.e., coming into effect on death of the person making the Trust).
- The Trust must be a resident in Canada for the Trust year. Therefore, if the Trust was deemed to be a non-resident Trust (i.e., the sole Trustee is a non-resident), the Trust would lose the preferred graduated tax rates.
- At least one Beneficiary of the Trust must be eligible for the Disability Tax Credit.
- The Trustee and the Beneficiary must make an annual election in the tax return for the Trust.

No capital distribution may be made to a Beneficiary other than the Beneficiary with the DTC.



If any of these qualifications is not met, the status may be lost, thus resulting in the Trust being subject to income tax at the highest marginal tax rate. It is also important to note that a DTC-eligible beneficiary may only elect one trust to be a QDT. Notwithstanding, this same individual may be a beneficiary of multiple trusts.

As previously mentioned, a properly drafted Henson Trust is, in many cases, capable of meeting the qualifications set out above. It is important, however, that the Trust be managed in such a way that this preferential status is not lost either due to the tainting of the Trust, a failure to make the requisite elections, or the distribution of capital to someone other than the Beneficiary with a disability.

The QDT can, however, pose significant obstacles to certain individuals; for instance, if the Beneficiary is not eligible for the DTC, or if his or her eligibility for the DTC varies due to the nature of his or her disability. There are numerous people who will qualify for ODSP but may not qualify for the DTC. The strict rules of the QDT mean that a Henson Trust for these individuals will be taxed at the highest marginal tax rate. This can be very punitive. For instance, if the income of the Trust is only \$10,000 per year, that income will be taxed at the highest marginal tax rate (53.53% in Ontario for the 2017 tax year), resulting in the Trust (and the Beneficiary) keeping just over \$5,000 of that income.



III. INHERITANCE TRUSTS

Another common type of Trust that may benefit an individual with a disability is an Inheritance Trust. This is a Trust that is created by the ODSP regulations to allow individuals who have a disability in receipt of ODSP to receive an inheritance without voiding their ODSP eligibility. Now, you may ask yourself: If an Inheritance Trust is permitted, why do I need a Henson Trust? The answer is that Inheritance Trusts have a number of restrictions, including the following:

1. Only testamentary gifts can be used to create an Inheritance Trust, such as a gift from a Will, a share of an intestate estate, proceeds from a life insurance policy, death benefits from a pension plan, and proceeds from a locked-in RRSP or RRIF. Before establishing an Inheritance Trust, it is always a good idea to discuss with ODSP whether the testamentary gift in question is eligible for inclusion in an Inheritance Trust.

2. Unless the Estate Trustee of the estate from which the inheritance is derived has the power to unilaterally establish an Inheritance Trust (a power not always granted in a Will), the Beneficiary will usually need to establish the Inheritance Trust him or herself.

3. If the Beneficiary does not have the capacity to manage property, he or she will be unable to establish such a Trust unless he or she has signed a Continuing Power of Attorney for Property, someone has been appointed as guardian for him or her, or a court order has been granted creating such a Trust.

4. The Trust must be established within six months of the date the Beneficiary inherits the asset, which may not be feasible where the Beneficiary lacks capacity to manage property and does not have a signed Continuing Power of Attorney for Property.

5. The maximum value of an Inheritance Trust is \$100,000. By contrast, a Henson Trust has no upper limit. This limit applies to all inheritances received during the lifetime of the Beneficiary. If the inheritance is greater

than \$100,000, the Beneficiary's ODSP benefits will be suspended until such time as the portion of the inheritance exceeding \$100,000 has been depleted or transferred into an exempt asset such as a principle residence.

6. Any income of the Trust that puts the value of the Trust over \$100,000 will result in a dollar-for-dollar deduction from the Beneficiary's ODSP in the following year. This means that the Trust cannot accumulate income over \$100,000.

7. An Inheritance Trust is considered an Inter Vivos Trust and therefore cannot qualify as a Qualified Disability Trust. As such, it is taxed at the highest marginal tax rate. The only exception to this rule would be where the Will pursuant to which the inheritance is granted gives the Estate Trustee the authority to establish such a Trust, in which case, arguably, the Trust could qualify for QDT status.



Based on the foregoing restrictions, an Inheritance Trust is usually only used as a last resort where the Beneficiary has received an inheritance directly from a family member who was not aware of or otherwise failed to undertake appropriate estate planning.



IV. INTER VIVOS TRUSTS

Many families seek legal advice about establishing a Henson Trust under the mistaken impression that a Trust will be set up immediately. In fact, in most cases, a testamentary Henson Trust is the best option, in which case this Trust only comes into effect after the death of the person setting up the Trust. For example, for a married couple with a child who has a disability, a Testamentary Henson Trust will only come into being when both parents are deceased and then, only if the child with a disability survives both parents.

An Inter Vivos Henson Trust, by contrast, comes into effect while you are still alive, on a date chosen by you. Some circumstances in which you might want to consider an Inter Vivos Trust include:

- 1.** Where you are concerned about your Trustee's ability to coordinate the set-up of the Trust. An Inter Vivos Trust will allow you the opportunity to establish the accounts and set up the systems and relationships with professionals around the Trust in the way that you would prefer before you pass so that things can be transferred seamlessly to a successor upon your death;
- 2.** Where you are concerned about your Trustee's ability to administer the Trust or want the chance to evaluate their fit. An Inter Vivos Trust allows you to work with a co-Trustee during your lifetime who will continue on after your death, thereby allowing you to assess their fitness for the role and to learn about their responsibilities and the needs of the Beneficiary to facilitate a smoother transition with fewer unknowns upon your death;
- 3.** Where you are concerned about your own continuing capacity to manage property, an Inter Vivos Trust allows you to secure funds for your loved one in a Trust while you are alive to address the risk of you becoming

incapacitated (due to dementia or Alzheimer's for instance) and unable to continue to support him or her; and

- 4.** Where you have concerns about claims that may be made on your estate upon your death. An Inter Vivos Trust effectively removes the Trust assets from your estate at the time the assets are transferred to the Trust.
- 5.** Where you have family members who wish to leave an inheritance to your loved one who has a disability but who are unwilling to undertake the extra planning and costs associated with including a Henson Trust in their own Wills. If you establish an Inter Vivos Henson Trust, these family members can simply name the Trust to receive the share for your loved one.
- 6.** Finally, where you wish to purchase a home for your loved one who has a disability but are concerned about the tax implications of owning more than one residential property in your own name and you have concerns about placing the property into the name of your loved one directly. This situation is discussed at greater length below.



If you are considering creating an Inter Vivos Henson Trust, be aware that there are certain disadvantages to doing so, including the following: they are subject to the highest marginal tax rate, Trust accounts must begin to be kept immediately, and tax filings will need to be made every year commencing in the year the Trust comes into effect. Like any other Henson Trust, it is imperative that the Trust be properly drafted so as to ensure the assets therein will not interfere with your loved one's ODSP eligibility. Professional legal and accounting advice is also highly recommended.



V. HOUSING TRUSTS

As discussed further in Chapter 5, a principle residence is an exempt asset for the purposes of ODSP eligibility. Therefore, many families assume that a home can and should be left to a loved one who has a disability directly, without a Trust. While in some limited circumstances that might be a viable option, in most circumstances where ODSP eligibility is a priority, transferring a home to a Trust is the better route. Transferring the property to a Trust has the following advantages:

1. A Trust addresses any concerns that may exist regarding the ability of the Beneficiary to manage the property;
2. A Trust accounts for the possibility of the property needing to be sold and the effect that the proceeds from the sale would have on the Beneficiary's ODSP in the absence of a Trust;
3. A Trust allows you to dictate who will receive the property (or the proceeds of the property) after the passing of the Beneficiary. In the absence of a Trust, the property will be transferred to the Beneficiary's heirs, even if those heirs are persons totally unknown to you;
4. A Trust allows for greater flexibility in the housing options for the Beneficiary. For instance, if the Beneficiary cannot reside in the home or cannot afford to reside in the home, the Trustees can rent out the home and use the proceeds to support the Beneficiary in another residential setting;
5. Arguably, if a property is held in the Trust, some of the costs of maintaining the property may be considered an expense of the Trust and therefore may not necessarily constitute payments made from the Trust for the benefit of the Beneficiary. While this will be a question of the particular structure of the payments and the benefit the Beneficiary receives from the payments, it could provide added flexibility for Trustees in dispersing Trust funds and supporting the Beneficiary.



Practically speaking, a Housing Trust (or Trust that holds a house) does not need to be any different from the typical Henson Trust. Indeed, it is recommended that the Trust be structured as a Henson Trust in order to take advantage of the benefits listed above. Just like your typical Henson Trust, the Trust that holds a house can be testamentary in nature (i.e., arising upon your death as a result of a gift in your Will) or Inter Vivos (i.e., a Trust established while you are alive to hold a property purchased for the benefit of your loved one who has a disability). Inter Vivos Henson Trusts for the purpose of holding a house are, in fact, becoming increasingly common as the direct funding and de-bundling of Ministry dollars becomes more widespread.

New Tax Considerations Affecting Housing Trusts

Finance Canada announced on October 3, 2016 that only certain kinds of trusts (an "eligible trust") that hold housing units will be able to claim the principal residence exemption ("PRE") on dispositions after 2016. For dispositions in 2016 and prior years, many personal trusts were able to claim the PRE in order to reduce or eliminate any capital gains that resulted from the disposition.

Under these new trust PRE rules, an eligible trust is one of whose beneficiaries (the "eligible beneficiary") is a resident in Canada in the applicable year and a specified beneficiary of the trust for that year. In addition, the terms of the trust must provide the eligible beneficiary with a right to use and enjoy the housing unit as a residence throughout the period in the year that the trust owns the property.

Note, however, on September 3, 2019, the Department of Finance (Finance) made

recommendations to the Minister of Finance (Minister) to amend the Income Tax Act in order to allow certain inter vivos trusts for a beneficiary eligible for the DTC to claim the PRE. If all conditions are met, Finance recommends these amendments will apply retroactively to tax years that begin after 2016. Although there is no guarantee that the Minister or Parliament will agree to these recommendations, it would be prudent and fair that an inter vivos trust for a DTC eligible beneficiary receive the same PRE benefit as a testamentary trust for a DTC eligible beneficiary currently receive.

Eligible trusts include (i) an alter ego trust, (ii) a spousal trust, (iii) a joint spousal trust, (iv) a qualified disability trust, and (v) a trust (testamentary or inter vivos) for minor children of deceased parents (as the settlor).

From a planning perspective, the new rules do include a provision to allow non-eligible trusts to continue to hold the housing unit, roll the residence to the beneficiary on a tax deferred basis, and for the beneficiary to claim the PRE upon the subsequent disposition of the residence (as long as the property qualifies as a principal residence of the beneficiary). As the circumstance may not be ideal to transfer the residence for the beneficiary to hold personally, professional assistance is highly recommended prior to contemplating the ownership/disposition of housing units held by a trust.



VI. LIFETIME BENEFIT TRUST

A Lifetime Benefit Trust (LBT) is a little-known tax savings vehicle that has benefits similar to an RDSP. Simply put, the Income Tax Act allows you to rollover the proceeds of your RRSP or RRIF into a Trust for the benefit of an "infirm" spouse, dependent child, or dependent grandchild. The rollover is treated as tax deferred, which means that the RRSPs and RRIFs are not taxed as income to your estate, as they otherwise would be.

This tax deferral opportunity can significantly increase the value of your estate by minimizing your final tax obligations. In order to take advantage of the opportunity, the following requirements must be met:

1. The Beneficiary must be mentally "infirm";
2. The Beneficiary must be financially dependent on you by reason of that infirmity;
3. The proceeds of the RRSP or RRIF must be used to purchase a qualifying Trust annuity, and the Trust must be named as annuitant of that annuity;
4. An election needs to be made by the Beneficiary or by the Beneficiary's legal representative if he or she does not have the capacity to make such an election. The capacity to make this election has the potential to heavily restrict the viability of this option in the vast majority of cases;
5. No person other than the Beneficiary may, during the lifetime of the Beneficiary, receive or otherwise obtain the use of the income or



While the LBT may be a very tempting option, it should be noted that an LBT might not qualify as a Henson Trust. As discussed above, a Henson Trust must account for the payment of income after the accumulation period expires (in Ontario, 21 years after the Trust comes into effect). Specifically, any remaining income may need to be directed to someone other than the Beneficiary in order to preserve eligibility for ODSP. As noted above, no capital or income from an LBT may be paid to a person other than the Beneficiary during his or her lifetime. Given the competing requirements of the Henson Trust, and ODSP on one hand and the LBT and the CRA on the other, professional, legal, and accounting advice should be sought before including an LBT in your Will.

capital of the LBT. The LBT may and should specify who should receive the remainder of the LBT upon the death of the Beneficiary;

6. The Trustees of the LBT must have the authority to distribute amounts to the Beneficiary but are not required to do so; and

7. The Trustees are required to consider the needs of the Beneficiary, including his or her comfort, care and maintenance, in exercising their discretion whether or not, or how and when, to make distributions out of the LBT.



VII. INSURANCE TRUSTS

If you have substantial life insurance policies, you have a few options for the manner in which the proceeds will be distributed.

If you do not take any steps to control or otherwise direct how your life insurance proceeds will be paid, the proceeds will automatically form part of your estate. You can also sign a designation confirming that this is your wish; in other words, you can name your estate as the Beneficiary of the policy. Where your life insurance proceeds form part of your estate, they will be available to your Estate Trustee to use in paying your taxes and other liabilities. Only after these obligations have been met will the remainder of the proceeds be divided by your Estate Trustees amongst the people you have named as Beneficiaries of your estate in your Will.

As a part of your estate, your life insurance proceeds are also subject to probate fees or Estates Administration Tax (see the discussion related to taxation in Chapter 1).

The alternative is to specifically designate Beneficiaries to receive the proceeds of your life insurance policy. You can do so either on the policy form documents, in a separate life insurance designation, or in your Will. Whichever method you choose, it is important that you clearly identify the person you wish to designate and clearly communicate your designations to your insurance provider. This arrangement has the advantage of avoiding probate fees and claims from creditors, but it is restricted in the sense that it requires a direct gift, potentially to a person eligible for ODSP or to a minor, both of which can have undesirable consequences.

In order to prevent your life insurance

proceeds from forming part of your estate while at the same time retaining some control over how and when your life insurance proceeds will be distributed, you may want to consider establishing an Insurance Trust.

An Insurance Trust, generally speaking, is simply a Trust to which the proceeds of a life insurance policy have been directed. This type of Trust allows you to name a Trustee to receive the life insurance proceeds for the benefit of another person. In the Trust document, you can dictate how the Trustee must manage and distribute the insurance proceeds amongst your Beneficiaries.

You can establish an Insurance Trust in a couple of ways: (i) as a separate Trust created in your Will; and (ii) as a standalone document. In either event, it is imperative that you clearly designate that the insurance proceeds are to be paid to the Trustee of the Trust, that you identify the Trust document, that the Trust document includes the Trustee authorities and powers your Trustee requires to properly administer the Trust, and that the Trust document clearly identifies the Beneficiary, as well as a remainder Beneficiary, to avoid potential intestacies with regard to the insurance proceeds.

If drafted appropriately, an Insurance Trust may also be a Henson Trust and QDT, but recall that there can only be one QDT for any one person. Therefore, it may be prudent to draft a single Henson Trust, which is also a QDT, as a separate testamentary Trust established in your Will. This has the following benefits, including:

- Allowing payments from multiple testamentary sources to be paid into the Trust, including life insurance, RRSPs, and your estate;
- Maintaining creditor protection and avoiding probate fees on the non-estate proceeds (life insurance and RRSPs);
- Minimizing the number of Trusts that need to be established; and
- Allowing the entire Trust (and all the proceeds from various sources) to benefit from a QDT designation (i.e., graduated tax rates).



Careful drafting is required to ensure that the Trust is properly constituted as a separate Trust that meets the Henson Trust and QDT requirements. We recommend that you retain a legal professional with experience in this complex area of the law in order to make sure that the Trust that is prepared meets your needs.





VIII. STAGED TRUSTS

Another type of Trust that is not particular to families of people with disabilities is the Staged Trust. Staged Trusts, or Trusts for minors, are Trusts that are used to administer an inheritance to someone who is a minor, or who otherwise lacks the maturity required to manage property. You may establish a Staged Trust in a number of different scenarios, either as an Inter Vivos Trust (coming into effect while you are still alive) or a Testamentary Trust (on your death).

Typically, the terms of the Trust allow the Trustee to make discretionary payments to the Beneficiary while the Beneficiary is young for his or her care, education, or other purposes identified in the Trust. The Trust then mandates the payments of a fixed sum or portion of the Trust to be paid to the Beneficiary on specific milestones, such as attaining certain ages (for instance, a quarter being paid at age 21, 25, 30, and 35) or

achieving some other fixed criteria (such as upon graduating from university, etc.). In order for the Trust to be effective in preventing premature distribution of the funds, the Trust must clearly delineate what should happen to the Trust funds in the event that the Beneficiary passes away before the Trust funds have been fully distributed.



There are a wide range of options for how a Trust like this can be arranged based on your impression of the needs and abilities

of the Beneficiary and the objectives you wish to encourage through the inheritance. Whatever your wishes may be, it is important to retain a lawyer that is experienced in preparing these types of Trusts and that you clearly communicate your wishes to them.





IX. SPOUSAL TRUSTS

There are a wide variety of Trust options that can be used to deal with the sometimes-complex marital and support arrangements that exist in this area of the blended family. A full review of the options is beyond the scope of this book. Our focus here is on Trusts that may be appropriate in estate planning involving a loved one who has a disability. In this context, you may want to consider a Spousal Trust if you are in a second or third marriage and you have a child with special needs from a previous marriage.

Consider the following scenario:

- Sue and Tom are married.
- Sue came into the marriage with sizeable property and savings, while Tom has little in the way of savings and no property.
- Sue and Tom each have children from a previous marriage.
- Sue's son Sam has special needs, is in receipt of ODSP, and is dependent on Sue for ongoing support.
- Sue and Tom do not have a domestic agreement in place.
- Sue is not on good terms with Tom's children.
- Tom is supportive of Sam but is also dedicated to his own children.



In this scenario, Sue wants to provide financial security for both Tom and Sam. Sue also wants to ensure that upon Tom's death, her assets go to her own children and not to Tom's children.

If Sue and Tom prepare Wills in which they leave their entire estates to one another, and then if both are deceased to their respective children, the result will be that only the wishes of the surviving spouse will be followed. For instance, if Sue dies first, then all of her assets will go to Tom. On Tom's death, all of Sue's assets will be part of his estate and will go to his heirs based only on his Will, which he is able to change at any time prior to his own death. In this situation, Sue's children and Sam, in particular, are at risk of being excluded from Tom's (and therefore their mother's) estate.

As a starting point, a domestic agreement is almost always a good idea for couples in second marriages with children from previous relationships. These agreements address the various ways in which the relationship could end (i.e., one spouse or the other passing first, divorce, death in a common accident) and what entitlements each spouse (and their children) will have in each case.

If no domestic agreement is in place, or even where a domestic agreement is in place, a Spousal Trust can help to address these concerns. In Sue and Tom's situation, Sue can provide for Tom by placing a sizeable sum or asset in Trust for Tom (subject to any claims he may have under the Family Law Act¹⁰), allowing Tom to receive all of the

10 - Dd Family Law Act, R.S.O. 1990, c.F.3



income from the Trust, with or without a right to receive or otherwise deal with the capital of the Trust. This means that Tom will have an income and be provided for out of Sue's assets, but that upon Tom's death, the capital and any remaining interest are distributed in accordance with Sue's wishes rather than as part of Tom's estate. This type of Trust can be used in conjunction with or as a precursor to a Henson Trust for Sue's son Sam, depending on Sue's estimation of Tom's commitment to providing for Sam after Sue's passing.



There are a wide variety of options for how to structure a Spousal Trust to provide for your spouse and children in a way that meets their needs and at the same time gives you peace of mind. An experienced Trusts and Estate practitioner should be retained to guide you through the options and to prepare your Wills if you are considering this option.



D. TAX CONSIDERATIONS

As discussed earlier in this chapter, personal trusts are either (i) Inter Vivos, meaning the settlor created the trust during their lifetime, or (ii) Testamentary, meaning the trust was created by a Will that will take effect upon the passing of the settlor. For tax purposes, Canadian resident trusts are considered as a separate individual taxpayer. Historically, testamentary trusts benefited from graduated tax rates while Inter Vivos trusts are taxed at a flat rate equal to the highest marginal tax rate (for example, an Inter Vivos trust that is resident of Ontario will pay tax on income at a combined federal and provincial tax rate of 53.53% in 2019). As of 2016, testamentary trusts are taxed at the same flat rate at the highest marginal tax rate as an Inter Vivos trust, subject to the exceptions for a Graduated Rate Estate (GRE) and a Qualified Disability Trust (QDT). (Transitional rules were in place for estates created prior to January 1, 2016).

In general, the estate of an individual is considered a GRE if it is a testamentary trust for tax purposes in which no more than 36 months has passed since the date of passing of the individual. In addition, the estate of the individual must designate itself as a GRE in taxation years ending after 2015 and no other estate may be designated a GRE for the individual in taxation years ending after 2015. If an estate qualifies as a GRE, the income of the estate will be taxed at the graduated tax rates for up to 36 months after the date of passing of the individual. From a tax planning perspective, as only estates are eligible for GRE designation, it may be advisable to delay distributions to beneficiaries for up to 36 months. In addition, the estate must be a GRE at the time, so careful attention to maintaining GRE status is required.

A fulsome discussion about the QDT was provided earlier in this chapter.

E. SUMMARY AND ADDITIONAL RESOURCES

As discussed in this chapter, Trusts can be used for a variety of purposes. If you are planning for a relative with a disability, there are a number of different types of Trusts that should be considered when developing your estate plan. Many people may be familiar with the concepts of the Inheritance Trust and the Henson Trust, as they have been available for a number of years. Particular attention, however, should be made to the LBT and QDT, both of which are specific to planning for your relative with a disability.

CANADA REVENUE AGENCY TRUST ADMINISTRATION







CONSENT, CAPACITY, AND LEGAL DECISION-MAKING

A. OVERVIEW

When is consent required?

What degree of mental capacity is required to provide valid consent?

How are decisions made in the absence of that capacity?

These questions are very important when it comes to planning for future security for yourself and a loved one that has a disability. In this chapter, we answer these questions and provide a discussion of the various planning tools and processes that may be used to ensure that your wishes are followed for your own care and that the best interests of a loved one who has a disability are considered and form the basis for any decisions made on their behalf.



B. LEGAL DECISION-MAKING

The law recognizes the right of every person to self-determination and generally requires that an individual provide consent in respect of any decision that will affect his or her rights. The validity of consent is in part dependent on whether the person providing consent had the required mental capacity to do so.

In general, there are two broad areas of decision-making that need to be considered when working through the planning process. The first deals with a person's property. Decisions involving property may include signing tax and annual returns for the purposes of meeting obligations to the CRA, opening bank accounts or RDSPs, and otherwise dealing with financial institutions.

The second area of decision-making relates to personal care matters, which includes health care, nutrition, shelter, clothing, hygiene, and safety.

In Ontario, there is a clear legal regime that dictates who is capable of making decisions and who can make decisions for a person who is not capable of making decisions for themselves. With respect to determining whether someone is capable of managing property or consenting to personal care decisions, two criteria must be met:

- 1.** The person must have the ability to understand the information relevant to making the decision.¹¹ In other words, can he or she grasp and retain the factual information that is required in the decision-making process? Furthermore, is the cognitive ability to process and synthesize information about various options apparent?¹²

11 - SDA, sections 6 and 45.

12 - Guidelines for Conducting Assessments of Capacity, Capacity Assessment Office, Ministry of the Attorney General, May 2005.



2. The person must have the ability to appreciate the reasonably foreseeable consequences of a decision.¹³ This involves the person's ability to apply the applicable facts to him or herself. For example, an individual may understand the nature of a certain type of medical condition but may be unable to appreciate that he or she personally demonstrating its signs or symptoms. It is important to note that one's ability to appreciate is not necessarily based on whether the decision is a good or a bad one; rather, an assessment is being made as to whether the decision appears to be "reasoned" as opposed to "reasonable."¹⁴

If a decision has to be made and it appears that the person may lack the capacity to do so, the question then becomes, who is legally authorized to manage one's property or to consent to their personal care decisions? The options will vary depending on the type of decision that has to be made. A discussion about powers of attorney, guardianship, and the extent of the legal authority of family members is the basis for this chapter.

C. CONTINUING POWER OF ATTORNEY FOR PROPERTY

I. WHAT IS A CPAP?

A Continuing Power of Attorney for Property (CPAP) is a document that allows you to authorize one or more person(s) to make decisions on your behalf about matters related to your property. This may include real property, financial investments, bank accounts, etc. Many people do not realize the importance of this document.

If you find yourself in a situation where you cannot manage your own property (for instance, if you have a stroke, are in a coma, or have dementia) and you have not signed a Power of Attorney for Property, then no other person would have the authority to do deal with your property on your behalf. Many

people are surprised to learn that, unlike decisions around personal care, the law does not recognize a spouse, child, or other next of kin as having authority to make decisions related to property. Unfortunately, in the absence of a Power of Attorney, a costly and time-consuming guardianship application is frequently required to deal with the property of a person who does not have or has lost the capacity to manage his or her property. Whether or not it is necessary to do so usually depends on the value of the assets held independently in the person's own name. Where the assets are minor and of a personal nature, guardianship usually need not be pursued. Where, however, real property or other substantial assets are at stake, guardianship is more likely to be necessary.

A CPAP can authorize your attorney to act immediately, or only upon a certain event taking place, such as if and when you lose capacity to act for yourself. For example John could give his wife, Jane, the authority to manage his property upon the signing of his Power of Attorney for Property even though he would be capable of managing his property himself. Jane would have the authority to continue acting if John were to be deemed incapable of managing the property on his own. Alternatively, John could include a clause in his Power of Attorney that provides that Jane can only act for him if he has been deemed incapable (usually by a qualified capacity accessor or medical professional) of acting for himself.



It is also important to note that you can authorize your attorney(s) to manage all of your property or restrict this authority to a specific transaction involving a specific asset (i.e., a family cottage).

¹³ - SDA, sections 6 and 45.

¹⁴ - Guidelines for Conducting Assessments of Capacity, Capacity Assessment Office, Ministry of the Attorney General, May 2005.

II. WHO CAN MAKE A CONTINUING POWER OF ATTORNEY FOR PROPERTY?

In order to make a valid Continuing Power of Attorney for Property, you must be at least 18 years of age and possess the requisite degree of capacity to appoint an attorney. When it comes to a CPAP, the elements of the required capacity are set out in the Substitute Decisions Act, as follows:

A person is capable of giving a Continuing Power of Attorney if he or she:

- A)** Knows what kind of property he or she has, and its approximate value;
- B)** Is aware of obligations owed to his or her dependents;
- C)** Knows that the attorney(s) will be able to do, on the person's behalf, anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the Power of Attorney;
- D)** Knows that the attorney(s) must account for their dealings with the person's property;
- E)** Knows that he or she may, if capable, revoke the Continuing Power of Attorney;
- F)** Appreciates that, unless the attorney(s) manages the property prudently, its value may decline; and
- G)** Appreciates the possibility that the attorney(s) could misuse the authority given to her/him/them.

The burden of proving capacity (or lack of capacity) falls on the person or entity that is challenging the validity of the CPAP in question.



III. KEY CONSIDERATIONS MORE ON CAPACITY REQUIREMENTS

The capacity requirements set out above are also applicable if you wish to revoke a CPAP that you had previously put in place. In other words, if you meet the legislative requirements allowing you to sign a Continuing Power of Attorney for Property, you would also be in a position to revoke one as well. With this in mind, it is important that you keep this document up to date while you have the capacity to do so. If, for instance, you appoint your spouse as your attorney for property and 10 years later you and your spouse separate, your spouse will nevertheless retain Power of Attorney over your property until it is revoked. If you have forgotten about this Power of Attorney document or fail to revoke it and subsequently lose capacity due to dementia or a stroke, for instance, your spouse will permanently retain decision-making authority over your property.

DATE OF EFFECTIVENESS, LIMITS, AND RESTRICTIONS

You have the ability to trigger the onset of the attorney's authority in one of two ways. The authority can become effective upon the signing of the document. For example, John could give his wife, Jane, the authority to manage his property upon the signing of his Continuing Power of Attorney for Property, even though he would be capable of managing his property himself. Jane would have the authority to continue acting if John were to be deemed incapable of managing the property on his own. Alternatively, John could include a clause in the document that requires him to be found incapable of managing his property before Jane could step in and do so on his behalf.

It is also important to note that you can authorize your attorney(s) to manage all of your property or restrict this authority to a specific transaction involving a specific asset (i.e., a family cottage).

A Power of Attorney is revoked automatically on the death of the person who gave it.

IV. WHO CAN YOU APPOINT AS YOUR ATTORNEY FOR PROPERTY?

The person you appoint must be 18 years of age or older and possess the capacity to make the decisions with regard to your property. There are no residency requirements imposed on an attorney; however, non-resident attorneys may be precluded from directing a Canadian investment advisor.

You can also appoint multiple attorneys to manage your property jointly (meaning that they are required to act together) or jointly and severally (meaning that they can act separately). Some reasons to appoint multiple attorneys would be to deal with potential conflicts of interest that an attorney who is a Beneficiary of your estate may have in orchestrating your affairs to his or her advantage over those of other Beneficiaries or even your own interests. Another reason may be that one of your attorneys resides elsewhere and you wish that person to be involved in the management of your affairs but also wish to have an attorney who is local to handle your day-to-day property management needs.

You can also appointment alternate or substitute attorneys to act in the place of your original attorneys. This is often advisable to ensure that there is no gap in the management of your property in the event that your originally appointed attorney becomes unable to act by reason of death, his or her own incapacity, removal by the Court, or resignation.

When you do appoint multiple attorneys, it is important to be clear about when each attorney is authorized to act, in respect of what property they are being appointed, and any restrictions you wish to impose on their authority. For instance, if you have appointed two attorneys to act simultaneously, you might want to designate that some decisions will require the signature of both attorneys, while other decisions may be made by one or the other independently.



COMPENSATION

Unless you specify otherwise in your CPAP, the compensation your attorney(s) is(are) entitled to is prescribed by law. The Regulations under the Substitute Decisions Act provides that your Power of Attorney for Property is entitled to three per cent (3%) on monies received and dispersed, as well 3/5 of one per cent (1%) of the assets under management. You may, however, choose to provide for greater or lesser compensation in writing in your CPAP.

D. POWER OF ATTORNEY FOR PERSONAL CARE

I. WHAT IS A POWER OF ATTORNEY FOR PERSONAL CARE?

A Power of Attorney for Personal Care (PAPC) is a document that allows you to authorize one or more persons to make decisions on your behalf about matters related to your health care, hygiene, nutrition, safety, shelter, and clothing. The authority granted to your attorney(s) comes into effect only upon you being deemed incapable of making a decision in one or more of these areas of personal care.

A PAPC is also your opportunity to express your wishes for what treatment you will receive and when; such instructions are sometimes termed a "Living Will."

II. WHO CAN GIVE A POWER OF ATTORNEY FOR PERSONAL CARE?

A person must be at least 16 years of age and capable to give a Power of Attorney. The standard for capacity to give a PAPC is very low. Simply put, if you can understand whether the attorney has a genuine concern for your welfare and you can appreciate that the attorney may need to make personal care decisions on your behalf, then you have the capacity needed to give a valid Power of Attorney for personal care. Even if a person cannot make his or her own personal care decisions, he or she may still be capable of executing a valid PAPC.

III. KEY CONSIDERATIONS

Who May Be an Attorney for Personal Care?

You can appoint anyone over the age of 16 years of age to be your attorney for personal care. The only exception to this rule is that you may not appoint anyone that you pay to provide health care, residential, social, training, advocacy, or support services to you, unless that person is your spouse, partner, or relative.



In most cases, people appoint their spouse as their primary attorney for personal care, usually followed

by one or more children or close friends as alternates.

As is the case with an appointment of an attorney for property, you may decide to appoint multiple attorneys for personal care to act jointly (together) or jointly and severally (independently of one another). You may also stipulate that your attorneys may make decisions independently about certain issues (such as hygiene, shelter, or clothing) but must act jointly when it comes to decisions about health care or the refusal of treatment. Finally, you may (and we recommend that you do) appoint substitute or alternate attorneys to act in the event that your originally appointed attorney(s) can no longer act due to death, incapacity, removal by the Court, or resignation. If you do not and your original attorney passes away, then the next person on the list of substitute decision-makers under the Substitute Decisions Act, as referenced above, will have decision-making authority, regardless of whether this person is close to you or has any idea about or inclination to follow your wishes as to your care.





INSTRUCTIONS, CONDITIONS, AND RESTRICTIONS

Many people choose to include instructions for their treatment and care in their Power of Attorney for personal care. This can be very helpful to your attorney(s) who, in the absence of such instructions, must try to find out if you expressed any wishes as to your care before you lost capacity, whether written or spoken. Technically, your attorney is bound to act on your wishes unless it is impossible to determine what they were, or your wishes are impossible to follow. Where your wishes are unknown or are impossible to fulfill, then the attorney must make a decision that is in your best interest based on any known wishes, values, and beliefs prior to becoming incapacitated.

The wishes you may choose to express in your PAPC may be as simple as a wish not to be placed in a long-term care facility, for instance, or as complex as detailing under what specific conditions you wish to be removed from life support. Whatever you choose to include in your PAPC, we recommend that you speak with your family and your attorneys about your wishes related to end-of-life decisions in order to avoid painful disputes and alleviate the heavy burden your attorneys will otherwise be under in making these types of decisions on your behalf.



E. MAKING DECISIONS ON BEHALF OF YOUR LOVED ONE WHO HAS A DISABILITY

As discussed earlier in Chapter 1 of this book, many parents are surprised to learn that they do not automatically have guardianship, custody, or any other legal rights over their own adult child. In fact, as a matter of law, every person is presumed to have capacity to make decisions for themselves. When it comes to personal care decisions, that presumption kicks in at age 16. For property decisions, the presumption arises at age 18. The same principle applies with respect to custody; no person can have custody of another adult, even if they have lived with, cared for, and provided for that person for their entire lives. This presumption of independence and capacity to make decisions is designed to protect people's right to live freely and govern their own affairs.

When it comes to the realities of everyday life, however, many family members are concerned about their loved ones who may require support to make various decisions in their lives. As discussed at the beginning of this chapter, in Ontario, we do not currently have a supported decision-making framework recognized by the law. This means that if your loved one is deemed incapable of making a decision, the law does not provide for a family member or friend to support him or her in making that decision. Rather, the decision is placed in limbo pending someone with legal decision-making authority for your loved one stepping in, whether it be an attorney for property or personal care, legal guardian, or substitute decision-maker for personal care matters.

(A) PERSONAL CARE DECISIONS

As discussed above, Ontario law does provide for a substitute decision-maker to make certain personal care decisions for an individual who is deemed incapable of making those decisions for themselves. These decisions are restricted to the provision of consent for health care treatment, admission to long-term care homes, and personal assistance services under the Health Care Consent Act.¹⁵ The persons who may act are ranked with the first available person on the list having the right to act before those that follow. Recall the ranking, as follows:

1. Legal guardian;
2. Attorney for personal care;
3. A representative appointed by the Consent and Capacity Board;
4. Spouse or partner (legally married or common law);
5. A child or parent (including adopted children and parents, or someone legally authorized to act in the place of a parent, such as the Children's Aid Society);
6. A parent who has only a right of access (as opposed to a custodial parent);
7. A brother or sister (including half siblings);
8. Any other relative (i.e., related by blood, marriage, or adoption)¹⁶.



It is important to note that all persons within each class in the ranking have an equal right. For instance, if there is not

an attorney for personal care, legal guardian, representative, spouse, or partner in place, then all of the parents or children of the person will have equal decision-making authority. If they cannot agree, then the authority to make the decision will revert to the Office of the Public Guardian and Trustee.

(B) DECISIONS RELATED TO PROPERTY

Families do not have the same kind of statutory decision-making authority when it comes to supporting individuals in making decisions with respect to their property. In fact, the only way you can obtain legal decision-making authority over your loved one's property (whether they are an adult or a child) is for them to sign a Power of Attorney for property in your favor if they have the capacity to do so and are at least 18 years of age, or to obtain legal guardianship for the person through an application to the Court or the Office of the Public Guardian and Trustee. This is why careful estate planning is so important. As discussed in Chapters 1 and 2, Trusts, such as the Henson Trust, can be used to ensure that property is not left directly to your loved one who doesn't have the capacity to manage it. In many cases, a Henson Trust can prevent capacity issues from interfering with the proper management of an inheritance or other property for the benefit of your loved one who has a disability.

While, technically speaking, establishing a Henson Trust cannot give someone else the authority to deal with your loved one's ODSP, practically speaking, ODSP will typically accept the Trustee of a Henson Trust as ODSP Trustee if he or she simply completes an Appointment of Trustee Form (1046) with ODSP staff. Formal paperwork beyond this form, such as a Continuing Power of Attorney or guardianship order, is not required for ODSP purposes.

Likewise, if your loved one is the Beneficiary of an RDSP, his or her parent(s), spouse or common-law partner, are legally authorized to be the plan holder for that RDSP without the need for any formal paperwork being in place. Unfortunately, this authority does not extend to siblings or other support persons. The provincial government, however, is currently reviewing recommendations to make it easier for other family members and trusted individuals to support a Beneficiary as their plan holders. We expect to see a change in the law soon.

15 - Health Care Consent Act, 1996, c. 2, Sched. A.

16 - Health Care Consent Act, 1996, c. 2, Sched. A, s. 20.

As discussed above, the legislative requirements for making a binding Power of Attorney for Property or personal care is sometimes beyond the cognitive capacity of a person who has an intellectual disability. In such cases, guardianship may unfortunately be necessary to ensure the best interests of your loved one who has a disability are achieved. Guardianship applications are looked to only as an avenue of last resort, which need and ought not be sought, nor ordered by a court, until all other avenues have been exhausted.

(C.) GUARDIANSHIP



THE GUARDIANSHIP PROCESS PROPERTY

When it comes to property decisions, the type of situation where guardianship may be necessary typically arises when your loved one does not have the capacity to manage property but inherits money, or is the Beneficiary of a pension, registered plan, or insurance policy in his or her own name. In other words, if your loved one receives a substantial sum of money or other property directly, rather than through a properly constituted absolute discretionary or Henson Trust. Where this occurs, not only will your loved one's ODSP benefits likely be interrupted, but in the absence of a Continuing Power of Attorney for Property, no person will have the authority to deal with the funds in order to transfer or convert them into an exempt asset for ODSP purposes, or to simply ensure that the funds are managed appropriately and used to meet your loved one's needs. These types of situations can be avoided with careful planning and communication amongst family members.

Sometimes, families may also experience push back from the CRA or a financial institution when they seek to complete financial reporting or open accounts on behalf of a loved one that does not have the capacity to act for themselves. Sometimes these families are told by these institutions that they

must get legal guardianship in order to move forward. In the vast majority of cases, these comments are made by persons who are uninformed and overzealous in their duties. In our experience, these issues can usually be managed with a simple phone call or letter to the institution; though sometimes, it is necessary for that phone call or letter to come from a lawyer who explains the law.

Where it appears that guardianship may be necessary, it can be pursued by applicants through a statutory process involving the Office of the Public Guardian and Trustee, or through the court-appointed process (which offers an option of summary disposition as well). Applications are quite involved, and therefore retaining an experienced lawyer to review your options and complete the necessary documentation is strongly recommended.

It is important to note that the law prohibits a finding of incapacity and the appointment of a guardian of property or of the person where there is some other alternative means of decision-making available.¹⁷ There may be family members and friends within the individual's personal network that could provide support in the decision-making process that would render a finding of incapacity and appointment of a guardian unnecessary.

Based on the above, it is our experience that very few families decide to pursue a guardianship application. In many cases, it is simply unnecessary. Further, the human rights implications on the person with a disability and the time and significant costs associated with the process simply act as a deterrent.

Our hope is that Ontario will follow other Canadian jurisdictions and shift toward a more progressive legal framework that recognizes Trusted family members and friends within the context of supported decision-making. Such a framework, based on a piece of legislation called the Representation Agreement Act, has been in place in British Columbia since 1996.

17 - Substitute Decisions Act, 1992, S.O. 1992, c. 30, sections 22(3) and 55(2).



THE GUARDIANSHIP PROCESS FOR THE PERSON

Guardianship of the person is a less commonly pursued process, partly because the degree of capacity required to give a Power of Attorney for Personal Care is much lower (recall that it merely requires that your loved one understand whether the person they are appointing has a genuine concern for his or her welfare and appreciates that the person being appointed may need to make personal care decisions for him or her. Guardianship of the person is also commonly rendered unnecessary due to the statutory substitute decision-making authorities granted to family members under the Health Care Consent Act (see above). That being said, in some cases, no person identified in the Health Care Consent Act is willing or able to act. In other cases, a person more highly ranked on the list of substitute decision-makers is not the appropriate person. For instance, an estranged or self-interested spouse, parent, or child may seek to exercise decision-making authority granted by the Health Care Consent Act in a manner that a lower-ranking person may believe is inappropriate. In such cases, an application for guardianship of the person might need to be made to effectively defeat the higher-ranking claims to decision-making authority.

Where it appears that guardianship may be necessary, it can be pursued by applicants through the court-appointed process only. As with guardianship of property, applications are quite involved, and therefore retaining an experienced lawyer to review your options and complete the necessary documentation is strongly recommended.

F. SUMMARY AND ADDITIONAL RESOURCES

As part the estate planning process, it is vitally important to ensure that, along with your Will, you complete a Continuing Power of Attorney for Property and a Power of Attorney for Personal Care. Failure to do so could result in no one being legally authorized to manage your affairs and/or an unwanted person having the authority to do so. Executing powers of attorney do not require a lawyer; however, legal advice is highly recommended. That being said, powers of attorney documents typically do not add much to the cost of your legal fees; they are completed as part of your overall estate planning process.

If you believe your loved one may lack the capacity to manage their own personal care or property decisions, this does not necessarily mean you need to undertake expensive guardianship proceedings. In fact, in many cases, families are able to support their loved one who has a disability without experiencing any serious push back from health care providers or financial institutions. It is important, however, that you understand your rights and the rights of your loved one who has a disability. Equally important is communication with and education of the persons who will, in effect, take over your supporting role upon your death. As discussed in Chapter 1, your Will and estate plan is your opportunity to ensure that arrangements are in place to reduce the likelihood that a guardianship application will be necessary, and if it is, to express your wishes as to who should be supported to apply.



For more information on Consent, Capacity, and Legal Decision-making, please see:

[**Office of the Public Guardian and Trustee**](#)

[**CLEO - Continuing Power of Attorney for Property**](#)

[**CLEO - Power of Attorney for Personal Care**](#)





ONTARIO DISABILITY SUPPORT PROGRAM

Ontario Disability Support Program (ODSP) benefits are, for many people with disabilities, their primary source of income; it pays the rent and puts food on the table. Aside from issues related to legal decision-making as described in the previous chapter, ODSP—and maintaining eligibility for ODSP—are also two of the most compelling reasons for you, as a support person for a loved one who has a disability, to ensure that you have a Will and estate plan in place that takes into account your loved one's continuing eligibility for ODSP. This chapter will provide an introduction to ODSP, the benefits it offers, the eligibility criteria for ODSP, and recommendations for how to ensure continuing eligibility.

A. WHAT IS ODSP?

ODSP is a provincial support program that provides social assistance benefits to Ontario residents who have a disability. Funded by the Ontario Ministry of Children, Community and Social Services (MCCSS or the "Ministry"), the program offers two broad areas of supports:

1. Income Supports
2. Employment Supports

The income support component of the program provides financial assistance to qualifying individuals to offset the basic needs and accommodation costs. The content provided in this guide focuses on the Income Support component of ODSP. A short summary of ODSP Employment Supports is also provided at the end of this chapter, though it is not necessarily relevant to this book. Further information about Employment Supports can also be found here.

B. WHO QUALIFIES FOR ODSP?

To qualify for the Income Supports component of ODSP, you must:

- Be at least 18 years of age;
- Be an Ontario resident;
- Be in financial need; and
- Meet the program's definition of a person with a disability or be a member of a Prescribed Class.

The determination of eligibility is a two-step process. First, you or your loved one who has a disability will be required to establish financial eligibility. Only if this criterion is met will MCCSS then move on to the stage of determining whether you (or your loved one) meet the program's definition of a person with a disability. For the purposes of this chapter, we will refer to "you" as the person with a disability applying for ODSP, though practically speaking, a caregiver or support person (most often a parent) may be the person making the application and providing information to ODSP on behalf of someone with a disability.

I. FINANCIAL ELIGIBILITY

When determining financial eligibility, an ODSP caseworker will ask you for information related to your household's basic living expenses, its income, and its assets. Note that your parents' and siblings' income and assets are not taken into account unless they are financially dependent on you. This means that if you are living with your parents or siblings, all of whom have substantial income, this income is not included and does not affect your eligibility for ODSP. However, if you are married or live with a partner, and/or have

children who live with you, their income, assets, and expenses will be taken into account for the purposes of ODSP eligibility.

There are various rules associated with what you may earn (i.e., income) and what you may own (i.e., assets) when considering whether you qualify for ODSP, as discussed below.

(A) INCOME

Generally speaking, your household expenses must exceed your income in order to qualify for ODSP. As an ODSP recipient, you are allowed to receive income from other sources; however, the impact on your income support benefits will be determined by the amount and source of this income.

Some examples of income that may affect your ODSP income support benefits include:

- Canada Pension Plan (CPP) or Québec Pension Plan (QPP) benefits;
- Workplace Safety and Insurance Board (WSIB) benefits;
- Earnings from a job or training program;
- Profit from a farm or business, including self-employment;
- Child, spousal, or sponsorship support;
- Guaranteed Annual Income Supplement (GAINS);
- Old Age Security (OAS) and Guaranteed Income Supplement (GIS);
- Employment Insurance (EI); and
- Some types of loans.


The above are commonly referred to as "non-exempt" income.

As a recipient of ODSP, however, there are certain types of income that ODSP allows or considers as "exempt" when determining eligibility for benefits. Some examples include:


- Voluntary gifts or payments of up to \$6,000 per 12-month period from any source (this includes payments from Trusts, such as a Henson Trust, and life insurance proceeds);
- Voluntary gifts or payments (from an individual or from a Trust, such as a

Henson Trust) used for disability-related items or services (no limit);

- Voluntary gifts or payments used for education and training incurred because of disability (no limit);
- Payments from a Registered Disability Savings Plan (RDSP);
- Payments from a Registered Education Savings Plan (RESP);
- Some refundable tax credits; and
- Court judgments or legal settlements, received as damages or compensation for pain and suffering due to injury or death of a member of the benefit unit.

 With regard to income from employment, ODSP allows you to keep the first \$200 of your net earnings per month. The remaining income, after childcare and disability-related work costs are deducted, is treated by ODSP on a 50/50 basis: half is the ODSP recipient's to keep; half is deducted from your income support benefits. You will also receive an additional \$100 per month in the form of a work-related benefit. Note that if you are attending high school or post-secondary school full-time, your employment earning will be fully exempt.

Note: In November 2018, the Ontario government announced reforms to social assistance, including changes to the ODSP Earnings Exemption. Under the proposed changes, individuals receiving ODSP benefits will receive a flat \$6,000 annual exemption, without reducing their assistance. Twenty-five per cent of any income earned above \$6,000 will be exempt for ODSP purposes. In addition, financial eligibility for ODSP benefits will be reviewed on an annual, rather than monthly, basis. The new rules are expected to become effective on January 1, 2020.

 [For more information related to the treatment of income, please click here.](#)

(B) ASSETS

ODSP requires that you disclose information with regard to your assets. Some assets may affect your eligibility for income support benefits, while others will be considered exempt.

Generally speaking, you may have up to \$40,000 in assets as a single recipient and \$50,000 as a couple. The prescribed limit would increase by \$500 for each dependent living with you other than a spouse. Note that the Director has the discretion to approve a greater amount, however, approval is given only for items that are necessary to the health of a member of your household or for disability-related items and services.

NOTE: Effective September 1, 2017, the asset limit for a single recipient increased from \$5,000 to \$40,000 and for a couple from \$7,500 to \$50,000. This provides people with greater flexibility in relation to keeping liquid assets on hand as well as potentially benefiting from investment options enjoyed by everyone else, such as tax-free savings accounts and registered retirement savings plans.

EXEMPT ASSETS

Similar to the way in which ODSP treats income, there are certain assets that are not considered when determining eligibility for income support benefits. Some examples include:

- A principle residence;
- Certain types of Trust funds;
- A Registered Disability Savings Plan (RDSP);
- The cash surrender value held in an insurance policy up to \$100,000;
- Court judgments or legal settlements, received as damages or compensation for pain and suffering due to injury or death of a member of the benefit unit;
- One motor vehicle;

- Student loans; and
- Pre-paid funeral expenses.
- Pre-paid funeral expenses.

II. DISABILITY DETERMINATION

Once your financial eligibility has been established, you must demonstrate that you meet the ODSP definition of a person with a disability. The ODSP regulations determine "disability" based on three criteria, all of which must be met in order to be eligible for ODSP:

1. You have a substantial mental or physical impairment that is continuous or recurrent, and it is expected to last one year or more; and
2. Your impairment directly results in a substantial restriction in your ability to work, care for yourself, or take part in community life; and
3. Your impairment, its duration, and restrictions have been verified by an approved health care professional.¹⁸



[For more information related to the treatment of income, please click here.](#)



The courts have held that the definition of a "person with a disability," compared with its predecessor and with similar federal legislation, differs. It would appear that the current definition of "person with a disability" in the ODSPA was intended to encompass a broader segment of society and to provide assistance to persons with significant but not severe long-term functional barriers.¹⁹ With regard to the requirement that the impairment be "substantial," the court advised "the word should be given a flexible meaning related to the varying circumstances of each individual case in a manner consistent with the purposes of the Act."²⁰

¹⁸ - Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sched. B, section 4.

¹⁹ - Gray v. Director, Ontario Disability Support Program (2002), 2002 CanLII 7805 (ON CA), 59 O.R. (3d) 364 (C.A.)

²⁰ - Gray v. Director, Ontario Disability Support Program (2002), 2002 CanLII 7805 (ON CA), 59 O.R. (3d) 364 (C.A.)

Note that if you are a member of a Prescribed Class, you are not required to go through the disability determination process. Rather, as long as financial eligibility has been established, you would qualify for income support benefits. A list of the prescribed classes provided by MCSS is as follows:

- A person whose eligibility has been confirmed for services and supports and funding under the Services and Supports to Promote the Social Inclusion of Persons with Disabilities Act, 2008. This includes:
 - » Persons living in the community as a renter, owner, a tenant or a border
 - » Persons living in an intensive support residence as defined under the SIPDDA
 - » Persons living in a supported group living residence under SIPDDA
- This process typically takes place through Development Services Ontario. INOTE: LINK TO DSO - https://www.dsontario.ca/?_ga=2.195758508.1207074811.1499287328-1029630341.1498481855
- A person who, on May 31, 1998, was a recipient, or the spouse of a recipient, of benefits under specific case classes under the Family Benefits Act, 1992.
- A person who is 65+ years old and not eligible for Old Age Security (OAS).
- People who receive either of these disability pension benefits:
 - » Canada Pension Plan Disability (CPP-D) benefits
 - » Quebec Pension Plan Disability (QPP-D) benefits
- A person in receipt of an Award under the English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act, 1986.
- A person who was a former resident of a Schedule 1 facility under the former Development Services Act (DSA) who ceased to be resident of that facility on or after June 1, 1998.
- The Schedule 1 facilities under the former DSA include Huronia Regional Centre (Orillia), Rideau Regional Centre (Smith Falls), and Southwestern Regional Centre (Blenheim).
- Persons residing in one of the following places (but only while residing there):
 - » A facility that was a former Provincial Psychiatric Hospital
 - » The Centre for Addiction and Mental Health (in Toronto)
 - » The Homewood Health Centre (in Guelph)
- A person who currently resides in a home under the Homes for Special Care Act or a person who resided in a home under the Act on or after January 1, 2018, but has since left that home (e.g. living in the community as a renter, owner, a tenant or a border).
- A resident or former resident of homes that are part of the program of the Ministry of Health and Long-Term Care known as Community Homes for Opportunity²¹

C. HOW DO I APPLY FOR ODSP?

An application for ODSP Income Support benefits is made either online, by phone, or in person. If you prefer to apply by phone or in person, you may call or visit your local ODSP office.

To allow for processing, applications should be made at least six months before the person's 18th birthday. The Ministry's website suggests that the following information is required to determine financial eligibility:

- The first name of all family members;
- Dates of birth of all family members;
- Immigration status for all family members;
- Income for all family members;
- Assets for all family members;
- Your address;
- Your housing costs;
- Cost of expenses (such as child care and disability related work expenses).

21 - This list is excerpted directly from the website of the Ministry of Community of Social Services.

The words “family members” as used in the above list refer to the spouse or common law partner and dependent children of the person applying, not to the person’s parents or siblings. Information from your birth certificate, immigration papers, and tax returns will be required as well. MCSS also recommends that you gather the following documents prior to completing an application.

INFORMATION	DOCUMENTARY EVIDENCE
<p>NAME AND DATE OF BIRTH FROM AN OFFICIAL GOVERNMENT DOCUMENT</p>	<ul style="list-style-type: none"> • Birth certificate, or • Baptismal certificate, or • Immigration papers, or • Landing document, or • Passport
<p>INFORMATION ON STATUS IN CANADA, INCLUDING THE DATE YOU CAME TO CANADA (IF YOU WERE NOT BORN IN CANADA)</p>	<ul style="list-style-type: none"> • Canadian Citizenship card, or • Permanent Resident card, or • Record of Landing, or • Passport
<p>EXACT TOTAL AMOUNT OF INCOME (MONEY THAT YOU AND THE MEMBERS OF YOUR FAMILY RECEIVE), INCLUDING START DATE AND AMOUNT FOR EACH ITEM</p>	<ul style="list-style-type: none"> • Tax return, or income tax Notice of Assessment for the last year (for family members who are 18 years or older) • Pay stubs (for family members who are 18 years or older) • Statements from Canada Pension Plan (CPP) or other pension programs • Employment Insurance (EI) • Workplace Safety and Insurance Board (WSIB) • Old Age Security (OAS), Guaranteed Income Security (GIS), or Guaranteed Annual Income Security (GAINS) • Student loans • Child or spousal support agreements • Sponsorship payments • Any other type of income



INFORMATION	DOCUMENTARY EVIDENCE
<p>EXACT TOTAL AMOUNT OF ASSETS, INCLUDING VALUE AND DATE PURCHASED FOR EACH ITEM</p>	<ul style="list-style-type: none"> • Cash • Bank books or statements (including name of bank, transit number, account number, and date account was opened) • Life insurance policies • Copies of savings bonds • Statements for Registered Retirement Savings Plan (RRSP), Registered Disability Savings Plan (RDSP), Guaranteed Income Certificates (GIC), bonds, or any other investments, etc.
<p>INFORMATION ON OTHER ASSETS, INCLUDING VALUE AND DATE PURCHASED FOR EACH ITEM</p>	<ul style="list-style-type: none"> • Property you own, other than where you live • Vehicle(s) you own • Other valuables, including jewelry • Trusts • Pre-paid funerals, etc.
<p>EXACT TOTAL AMOUNT YOU PAY FOR YOUR HOUSING (WHAT YOU PAY FOR WHERE YOU LIVE)</p>	<ul style="list-style-type: none"> • Rent • Board and lodging • Utility bills • Heating bills • Mortgage agreement • Property tax statement • Home insurance premium statement
<p>EMPLOYMENT INFORMATION FOR FAMILY MEMBERS WITH JOBS</p>	<ul style="list-style-type: none"> • Start date of employment • Employer name • Monthly income from work

INFORMATION	DOCUMENTARY EVIDENCE
<p>EXACT OR ESTIMATED CHILD CARE EXPENSES (IF APPLICABLE)</p>	<ul style="list-style-type: none"> • The amount you pay each month for unlicensed (e.g., babysitter) and/or licensed (day care center) child care • Extended day (school) program fees
<p>EXACT OR ESTIMATED DISABILITY-RELATED WORK EXPENSES (IF APPLICABLE)</p>	<ul style="list-style-type: none"> • The amount you pay each month for disability-related items or services so you can work or participate in a training program. For example, attendant care, sign language interpreter services, specialized equipment, etc
<p>EXACT OR ESTIMATED SPECIALIZED EXPENSES FOR A CHILD WITH A DISABILITY (IF APPLICABLE)</p>	<ul style="list-style-type: none"> • For items or services for a child with a disability. For example, transportation to medical appointments, special equipment or clothing, home repairs, etc.



Once financial eligibility has been established, a Disability Determination Package will be sent to you. There will be sections for you to complete as well as for your health care provider.

Most decisions of the Director about eligibility or the amount of income support may be appealed. First, you may request an Internal Review of the decision. This involves a review by ODSP to ensure that the program's rules were applied in accordance with its rules and regulations. If you are unsuccessful, the matter can be appealed to the Social Benefits Tribunal. Further information about the appeal process can be found here.

22 - This chart is excerpted directly from the MCSS website at: http://www.mcass.gov.on.ca/en/mcass/programs/social/apply_online_documents.aspx



D. WHAT BENEFITS ARE AVAILABLE UNDER ODSP?

(A) INCOME SUPPORT

Once eligibility for ODSP has been established, you will be eligible for monthly income support. The amount of these payments will depend on the size of family, income, assets, and housing costs.

In addition, the amount of support will depend on whether you rent or own your own home, or if you are considered to be living in a "board and lodging arrangement." According to ODSP policy, this type of arrangement would apply "if you receive food and shelter from the same source." For example, if you live with your parents and they buy and prepare your meals, you would likely be considered to be in a boarding and lodging arrangement. If you fall within this category, you would be entitled to \$825 per month.

If you rent or own your own home, you will be eligible for a monthly payment comprised of a "basic needs" amount and a "shelter" allowance. Basic needs include food, clothing, and other necessary personal items, with the shelter portion intended to cover your rent

or mortgage payment, heat, utilities (hydro, water), property tax, home insurance, and condominium fees.

Additional allowances are paid to those who have dependents in their care. The recipient and all such dependents (if there are any) are referred to as the "benefit unit."

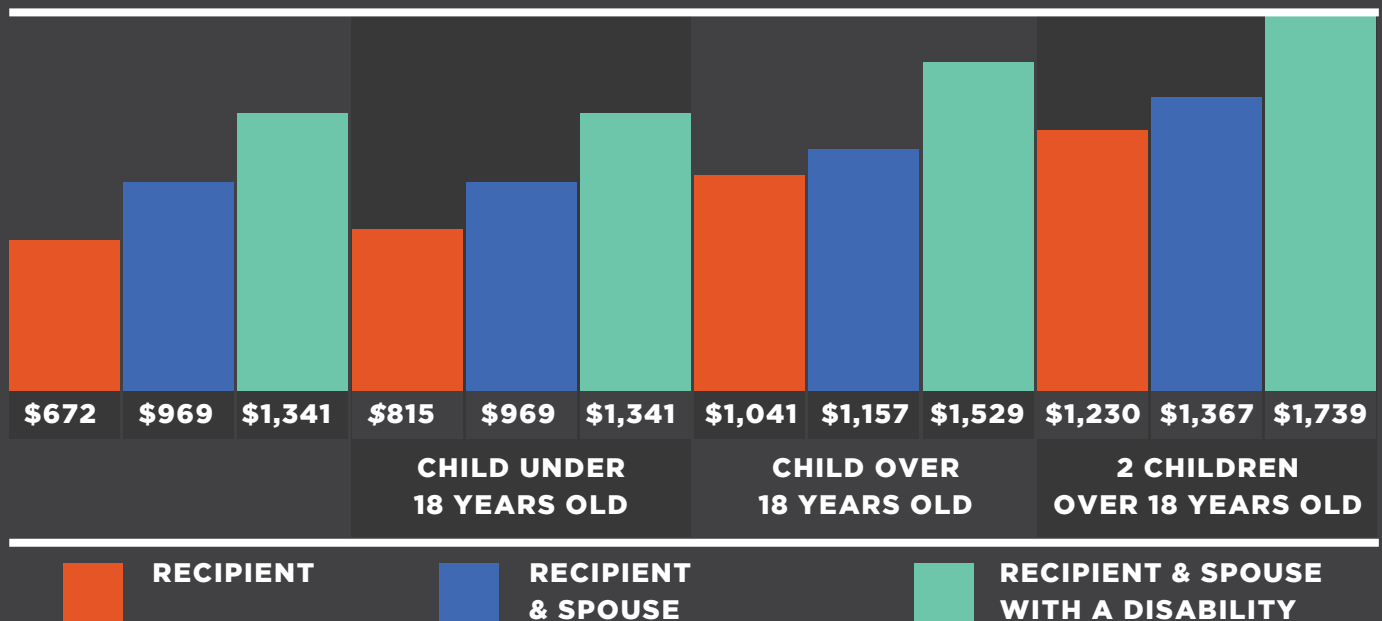
The monthly income support amounts are reflected in the chart below:

SHELTER ALLOWANCE (ONTARIO REGULATION 222/98)

BENEFIT UNIT SIZE	MAXIMUM MONTHLY SHELTER ALLOWANCE
1	\$497
2	\$781
3	\$846
4	\$918
5	\$991



BASIC NEEDS ALLOWANCE (ONTARIO REGULATION 222/98)



Based on the above, a single individual without any dependents would be eligible for a combined monthly shelter and basic needs allowance of \$1,169.

ODSP income support is paid by direct deposit toward the end of the month for which the payment applies.

(B) HEALTH-RELATED BENEFITS

If you are deemed eligible for ODSP, then in addition to monthly income support payments, you will also be eligible for various health-related benefits. These include:

- Prescription drug coverage – coverage extends to prescription drugs that are listed on the Ontario Drug Formulary and prescribed by an approved health care professional.
- Dental coverage – you will be eligible for basic dental services as well as additional benefits if your disability, prescribed medications, or prescribed treatments affect your oral health.
- Vision care benefit – ODSP provides coverage for routine eye examinations (not covered by OHIP) as well as prescription eyeglasses and the cost of eyeglass repairs.

You may also be eligible for a pregnancy/breast-feeding nutritional allowance, as well as extended and transitional health benefits.

(C) DISABILITY-RELATED BENEFITS

As an ODSP recipient, you will also be eligible for the provincial Assistive Devices Program (ADP). Through the ADP, you may be able to access:

- A.** Mobility devices, such as wheeled walkers and wheelchairs;
- B.** Visual aids, such as magnifiers;
- C.** Hearing aids;
- D.** Orthotic or prosthetic devices;
- E.** Speech devices, such as teletypewriters;
- F.** Certain medical supplies, such as; ostomy supplies;
- G.** Respiratory devices.



Depending on the item, the ADP will pay up to 75% of the cost of the device or a fixed amount.



E. EMPLOYMENT SUPPORTS

In addition to income supports, ODSP provides a wide variety of employment-related supports to individuals seeking employment. Some examples of the available supports include:

- Help preparing for work;
- Help finding a job that is right for you;
- Help keeping a job;
- Job coaching;
- On-the-job training;
- Help to move to the next level in your career;
- Software and mobility devices that can help you do your job;
- Interpreter or intervenor services;
- Transportation assistance;
- Assistive devices and training to use them;
- Tools and equipment you need for your job;
- Special clothing for your job;
- Specialized computer training²³.

You can also access employment supports if you are interested in starting your own business. Some of the supports available include:

- Help to develop and implement a business plan;
- Training in money management, record keeping, and budgeting;
- Help with marketing your business;
- Mentoring;
- Financial help towards the costs of business tools, equipment and supplies, licenses, and certification;
- Help getting work-related disability supports, such as assistive devices and technical equipment, interpreter, intervenor, reader, and notetaker services²⁴.



ODSP connects interested ODSP recipients with a local service provider that specializes in self-employment.

For more information, we recommend contacting your local ODSP supports office and/or visiting the Ministry's website.

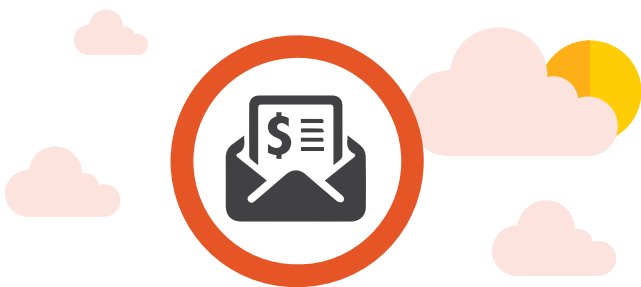
²³ - This list excerpted from the website of the Ministry of Children, Community and Social Services.

²⁴ - This list excerpted from the website of the Ministry of Children, Community and Social Services.



A. TAX CONSIDERATIONS

Benefits received under ODSP are not subject to federal or provincial income tax. From an income tax return filing perspective, the amount of the benefit is included into income and is then offset by a deduction equal to the amount of the benefit. This could affect the refundable tax credit. As well, it will also affect the status of those persons with a disability who wish to qualify as family dependents. However, if an individual only receives ODSP benefits, there is no income tax payable, and the full amount of the disability tax credit for ODSP recipients eligible for the DTC may be transferred to a supporting family member.



B. SUMMARY AND ADDITIONAL RESOURCES

ODSP provides a number of important benefits to individuals between the ages of 18 and 65 years of age who have a disability. It is prudent for the recipients and those providing support to be knowledgeable about the rules related to financial eligibility, not only at the time of application, but also on an ongoing basis. Earning too much income or acquiring too many assets could easily result in benefits being reduced, suspended, or even terminated. As part of the planning process, family members should ensure that the proper estate planning tools and techniques are incorporated into the plan to ensure that inheritances do not adversely affect one's eligibility for ODSP.



[Ontario Disability Support Program](#)

[CLEO - Social Assistance and Pensions](#)

[ODSP Action Coalition](#)

[Income Security Advocacy Centre](#)





THE DISABILITY TAX CREDIT

A. WHAT IS THE DISABILITY TAX CREDIT?

The reality is that living with a disability requires additional resources. If someone in your family has a disability, the chances are that you are providing support to him or her, either financially or by providing personal care and supports. In recognition of the additional time, energy, and expenses families commit to their loved ones with disabilities, federal and provincial governments have implemented a regime of tax deductions, credits, and benefits to assist people with disabilities and their family caregivers.

First introduced in 1987, the Disability Tax Credit (DTC) is a Federal Tax Credit (with a corresponding Ontario Provincial Tax Credit) for an individual with a mental or physical impairment that is severe, prolonged, and markedly restricts the basic activity of daily living.

Effective since 2005, eligibility for the DTC now includes an individual having significant restrictions of two or more basic activities of daily living where the cumulative effect of these significant restrictions is equivalent to a marked restriction in performing a single basic activity of daily living. The eligibility restrictions for the DTC are discussed in further detail in this chapter.

The DTC is a tax credit that is available to a person with a disability only. It is also non-refundable (meaning that the individual must pay personal income tax to benefit from the credit). You may be thinking, how does that help my family if my loved one who has a disability is unemployed and therefore pays no tax? The answer is that under certain

circumstances, the individual may transfer the credit to a supporting family member earning taxable income. In 2019, the combined federal and provincial Disability Tax Credit amount in Ontario will result in a maximum tax savings of \$1,694. (As well, an under 18 disability supplement for DTC eligible minor children may be claimed that could generate an additional \$988 in tax savings in 2019.)

Once an individual is DTC eligible, there are many additional benefits and tax credit enhancements available. For example, for payments beginning in July of 2019, qualified minor children are eligible for the Child Disability Benefit, a monthly benefit worth up to \$236, which is a supplement to the Canada Child Tax Benefit payment. In addition, a highly valuable benefit that is contingent on DTC eligibility is the qualification to open a Registered Disability Savings Plan (RDSP) and receive government disability saving grants and bonds.



B. WHO QUALIFIES FOR THE DISABILITY TAX CREDIT

On behalf of the Minister of National Revenue, the CRA administers all tax and benefit programs for the Government of Canada and in particular, the DTC program. The provisions of the Income Tax Act (the “Act”) set out the requirements that must be met in order for an individual to qualify for the DTC. In general, to be eligible to claim the DTC, the person you are supporting must meet the following three requirements:

- (I)** He or she must have a prolonged severe physical or mental impairment;
- (II)** The effects from the impairment must be such that his or her ability to perform a basic activity of daily living is “markedly restricted”; and
- (III)** A medical practitioner must certify, on behalf of him or her, that both of the above conditions exist.

[i] You will note that there is no age restriction on who may be eligible for the DTC, but re-qualification will be required in the future.



KEY TERMS AND CONCEPTS

The CRA has established what each of these three requirements means based on how it defines certain key terms, as set out below:

(I) WHAT DOES “PROLONGED” IMPAIRMENT MEAN?

If an individual’s impairment has lasted or can reasonably be expected to last for a continuous period of at least 12 months, the individual’s impairment is considered prolonged.

(II) WHAT DOES “MARKEDLY RESTRICTED” MEAN?

An individual’s ability to perform a basic activity of daily living is considered to be markedly restricted only if the individual is either blind or unable to perform a basic activity of daily living all or substantially all of the time, even with therapy, the use of appropriate medical devices, and medication.

(III) WHAT ARE “BASIC ACTIVITIES OF DAILY LIVING”?

For the purpose of qualifying for the DTC, basic activities of daily living include:

- Mental functions necessary for everyday life;
- Feeding oneself or dressing oneself;
- Speaking so as to be understood, in a quiet setting, by another person familiar with the individual;
- Hearing so as to understand, in a quiet setting, another person familiar with the individual;
- Eliminating (bowel or bladder functions); or
- Walking.

[i] Alternatively, if an individual can perform a basic activity of daily living but requires an inordinate amount of time to perform the activity, the individual is considered to be markedly restricted with respect to that activity.



**(IV) WHAT IS AN
“INORDINATE AMOUNT OF TIME”?**

An inordinate amount of time generally means that the individual takes a longer amount of time to perform the activity compared to a person of the same age and gender who does not have a restriction in the same activity.

**(V) WHAT IS
“SUBSTANTIALLY ALL THE TIME”?**

The phrase substantially all of the time is not defined in the Act. The CRA has taken the administrative position that substantially all of the time means “at least 90% of the time.” The Tax Court of Canada has emphasized the need for a qualitative approach to determine if a marked restriction of an impairment is present substantially all of the time and that there is no mathematical formula by which one can determine what “substantially all” means in any particular case.

EXCEPTIONAL CIRCUMSTANCES

The CRA recognises that the precise wording of the three eligibility requirements listed above may exclude certain people who should nevertheless benefit from the DTC. Therefore, the CRA has created a number of additional tests through which these individuals may gain access to the DTC, as follows:

(I) THE “CUMULATIVE EFFECTS” TEST

Oftentimes, individuals suffer from impairment in more than one activity of daily living that, when considered separately, do not meet the criteria under the marked restriction test (i.e., an individual suffers from fibromyalgia that restricts both memory and walking activities). If the effects on each of the activities of daily living is a significant restriction (which is a lower threshold than the “marked restriction” discussed above), the cumulative effect of these significant restrictions is often equivalent to a single marked restriction of an activity of daily living.



(II) THE “LIFE-SUSTAINING THERAPY” TEST

If the individual needs therapy to support a vital function at least three times per week for an average of 14 hours per week, the individual will be eligible to claim the DTC if the medical practitioner certifies to the above therapy requirements in the “Life-Sustaining Therapy” section of the prescribed form.

WHAT IS THE CERTIFICATION THAT IS REQUIRED?

Practically speaking, in order to qualify, you will need a medical practitioner to complete the CRA prescribed form (the T2201 form; the “prescribed form”). The prescribed form can be found on the CRA website (<http://www.cra-arc.gc.ca/E/pbg/tf/t2201/README.html>).

On this form, the medical practitioner must confirm the following:



The individual's impairment: (i) is prolonged where it has lasted or can reasonably be expected to last, for a continuous period of at least 12 months; and (ii) markedly restricts the individual in performing a basic activity of daily living (each basic activity of daily living has its own section in the prescribed form);



The individual's impairment significantly restricts more than one basic activity of daily living, and the cumulative effects of these multiple restrictions is equivalent to a marked restriction in performing a single basic activity of daily living (under its own section in the prescribed form).

C. WHAT BENEFITS ARE AVAILABLE FOR DISABILITY TAX CREDIT ELIGIBILITY?

A DTC-eligible individual will be entitled to enhancements to other tax deductions and credits as well as to specific benefits programs. These enhancements and benefit programs are as follows:

ENHANCED TAX CREDITS AND DEDUCTIONS

- CHILD CARE EXPENSES**
An extra \$11,000 (for dependent children with disabilities) in expenses for child care services such as nursery, baby-sitting, or boarding at a day camp may be claimed for a child that is DTC eligible.
- HOME BUYERS TAX CREDIT (FOR INDIVIDUALS WITH A DISABILITY)**
A net \$750 tax credit is available to a DTC-eligible individual or a supporting family member to purchase a home for the individual in order to accommodate the individual's personal needs or care.
- HOME ACCESSIBILITY CREDIT**
A DTC-eligible individual may claim a maximum \$10,000 tax credit for expenses incurred to renovate a dwelling in order to make it more accessible or reduce the risk of harm.
- WORKING INCOME TAX BENEFIT (WITB) CREDIT SUPPLEMENT**
A refundable annual supplement to the WITB is available to DTC-eligible individuals 19 years of age or older with income from employment or business of at least \$1,150.
- CHILD DISABILITY BENEFIT**
A non-taxable monthly supplement on behalf of children that are DTC eligible is available to a family that is eligible for Canada Child Benefit payments.
- DISABILITY TRANSFER CREDITS**
Supporting family members of DTC-eligible individuals with little or no income may claim the disability tax credit.
- HOME BUYERS PLAN**

There are no "first-time buyer" restrictions for DTC-eligible individuals (or supporting family members) to remove funds from an RRSP in order to acquire a dwelling to accommodate the individual's mobility issues or to meet their personal needs or care.

NOTE: that on June 22, 2017, Bill C-44 received royal assent that replaced the existing caregiver credit, infirm dependent credit, and family caregiver tax credit with the new Canada caregiver credit ("CCC") beginning in 2017. The CCC is available in respect of a person's spouse or common-law partner, minor child, or relative (the "infirm dependant") who is dependent on the individual because of a mental or physical infirmity at any time in the year. The infirm dependant does not need to live with the person, but must be dependent on the individual for support by reason of infirmity (the CRA may require documentation in order to show the type of support the individual has provided). The CCC maximum amount that may be claimed is based both on the income of the infirm dependant and the amount of other tax credits that have been claimed on behalf of the infirm dependent.



TRUST BENEFITS

- **QUALIFIED DISABILITY TRUST (QDT) DESIGNATION**

A Testamentary Trust for the benefit of a DTC-eligible individual will be taxed at the lower-graduated tax rates rather than the combined top tax rate for individuals. In Ontario in 2019, the top tax rate is 53.53%. A further discussion of QDTs is provided in Chapter 7.

- **PREFERRED BENEFICIARY ELECTION**

A Trust for the benefit of a DTC-eligible individual may elect to include the income from the Trust into the income of the DTC-eligible person in order to take advantage of the lower marginal tax rates of the individual.

ENHANCEMENT TO MEDICAL EXPENSES

- **ATTENDANT CARE EXPENSES** – Up to \$10,000 (\$20,000 in the year of death) in remuneration may be claimed for attendant care for a DTC eligible individual.

BENEFIT SAVINGS PLAN

- **REGISTERED DISABILITY SAVINGS PLAN (RDSP)** – DTC eligible individuals under the age of 60 are qualified to open an RDSP, and if they are under the age of 50, become eligible for Canada disability savings grants and bonds up to a lifetime maximum of \$90,000





D. SUMMARY AND ADDITIONAL RESOURCES

An individual with a severe prolonged physical or mental impairment ("impairment") is eligible to claim the DTC. A medical practitioner must certify, in a prescribed form, that the individual's impairment is prolonged and markedly restricted substantially all of the time. DTC-designated individuals will be required to re-qualify for the credit in the future. The DTC reduces taxes payable and may be claimed by supporting family members. In addition, it may be claimed retroactively under the fairness provisions, and it may be combined with other tax credits. The combination of credits can significantly reduce a DTC-eligible or supporting family member's tax liability. As a DTC-eligible individual, many other enhancements to tax credits and benefits are available, including the RDSP.



ADDITIONAL RESOURCES

[T2201 DTTTC Form](#)

[RC 4065 Medical Expenses](#)

[RC 4064 Disability Related Guide](#)

[Disability Tax Fairness Report](#)







THE REGISTERED DISABILITY SAVINGS PLAN (RDSP)

A. WHAT IS THE RDSP?

The Registered Disability Savings Plan (the “RDSP” or the “Plan”) is a long-term savings plan designed to benefit individuals who have a disability. It was introduced by the federal Government of Canada in 2008 and is the only savings vehicle of its kind anywhere in the world.

You can think of the RDSP as being similar to a Registered Education Savings Plan (RESP). In both instances, a registered account is opened at a financial institution. Both government and personal contributions can be made to the RDSP, and those monies can be invested with any income from the investment being earned on a tax-deferred basis. In other words, it can accrue income and no tax will be paid on that income until the income is actually taken out of the RDSP. This, however, is where the similarities between these savings vehicles end.

The objective of the RESP is to save for the costs associated with post-secondary education. RDSP savings are meant to provide financial support to the Beneficiary of the RDSP later in life.

Unlike an RESP, which is held by and remains the property of the person making the contributions to the RESP, not the intended Beneficiary, an RDSP may be held by a parent or legal guardian of the person with a disability who is the Beneficiary of the RDSP; however, the legal ownership of the RDSP lies with the Beneficiary.

While we strongly recommend that anyone who is eligible for government contributions to an RDSP open one, an RDSP is especially important for an individual who may not be

tied to the labour force and therefore, may not have access to income from retirement savings plans, private pension plans, or the Canada Pension Plan as they grow older.

Since 2008, thousands of Canadian families have opened up an RDSP for the benefit of a loved one who has a disability, and it is now an essential component of estate and financial planning for individuals who have a disability and their families.

B. WHO CAN BENEFIT FROM AN RDSP?

In order to be eligible as a Beneficiary of the RDSP, you (being the person with a disability) must meet the following four criteria:

- You must be a resident of Canada;
- You must open an RDSP on or before December 31 of the year in which you turn age 59;
- You must have a valid social insurance number. If you are working or receiving any form of government benefits, you will likely already have a social insurance number in place. If you do not, please visit the Service Canada website for information about how to apply for your social insurance number; and
- You must have an approved Disability Tax Credit Certificate in place.



Note that there is no minimum age requirement for a person to be an eligible Beneficiary of the RDSP.



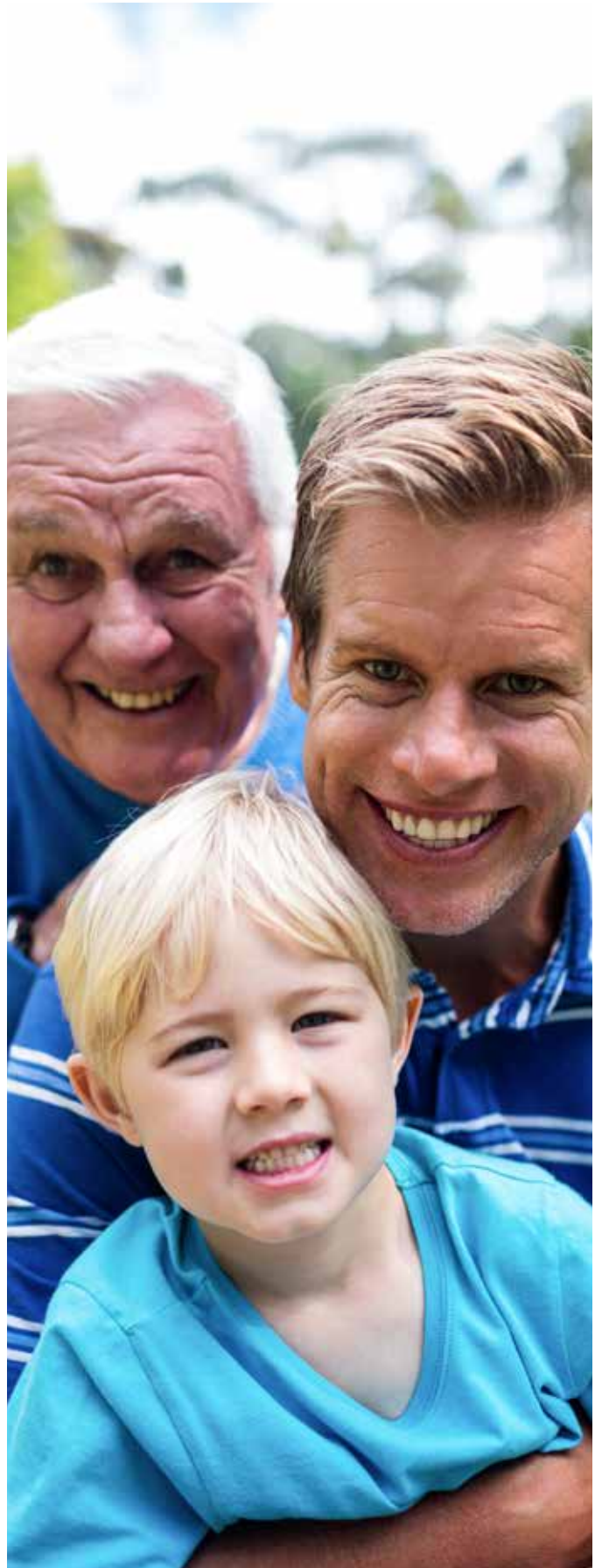
C. WHO CAN SET UP THE PLAN?

The plan “holder” is responsible for opening up the RDSP, managing the Plan, and making decisions about contributions, investments, and payments from the RDSP. Persons eligible to be the plan holder differ depending on whether the Beneficiary is under 18 years of age or is an adult.

For Beneficiaries under the age of 18, a parent or legal guardian of the child can be the holder of their RDSP. Upon the Beneficiary turning the age of 18, the parent can continue to be the holder of the Plan, transfer the role to the Beneficiary, or become joint plan holders with the Beneficiary (if the financial institution allows for joint holders).



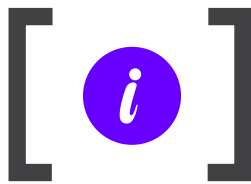
If you are an adult Beneficiary, you may also be the holder of your RDSP. Note, however, that if you are not able to be the plan holder due to capacity concerns, then only your parent, spouse, common-law partner, or someone otherwise legally authorized to act on your behalf can be plan holder of your Beneficiary. In Ontario, legal authority generally means that you have appointed someone to be your Continuing Power of Attorney for Property, or someone has been appointed as your guardian of property, typically by the courts.



D. CONTRIBUTIONS TO THE RDSP

I. PERSONAL CONTRIBUTIONS

You can only be the Beneficiary of one RDSP, and there can only be one Beneficiary per RDSP. As the Beneficiary of an RDSP, personal contributions of up to \$200,000 can be made to your RDSP up to December 31 of the calendar year in which you turn age 59. Personal contributions can come from a variety of sources. They can come from your own income or be made by family members, friends, or even corporations (on your behalf). These contributions require the written authorization of the plan holder.



Note that there is no annual contribution limit (keeping in mind the \$200,000 lifetime limit) and contributions are not tax-deductible.



II. FEDERAL CONTRIBUTIONS

What makes the RDSP such an effective savings tool is the annual contributions made to your Plan by the Federal Government. Depending on your age and level of income, the Government may contribute up to \$90,000 over the course of the Plan's lifetime.

Before getting into the numbers, it is important to understand that the amount of Government contributions will be based on what is referred to as the Beneficiary's Family Income (BFI). For Beneficiaries under the age of 19, the BFI is comprised of your parents' net income. In your nineteenth year, however, the BFI includes only your net income, unless you are married, in which case your spouse's income would be taken into account as well. It is also important to keep in mind that the BFI from two prior years is used to determine the amount of the federal contribution. For example, 2019 contributions are based on the BFI of 2017.

The Federal Government contributions are comprised of two components:

- The Canada Disability Savings Bond (the "Bond"); and
- The Canada Disability Savings Grant (the "Grant").



They are both cash contributions for which you may be eligible on an annual basis. The primary difference between the two is that the amount of the Grant is based on a personal contribution, whereas you may be eligible for the Bond by virtue of simply opening an RDSP.

III. BOND

The Bond is a cash contribution made by the Government of up to \$1,000 on an annual basis. You must be 49 years of age or younger to receive the Bond (the Government will contribute until December 31 of the year in which you turn 49), and the Government will contribute up to \$20,000 over the course of your lifetime. Application for the Bond is made at the time you open up your RDSP.

The amount of the Bond for which you are eligible is based on income thresholds that are adjusted upwards each year based on the rate of inflation. The following chart reflects the 2019 thresholds:



BENEFICIARY'S FAMILY INCOME

BENEFICIARY'S FAMILY INCOME (BASED ON 2017) "PHASE OUT INCOME"	ANNUAL AMOUNT OF BOND
"PHASE OUT INCOME": \$0-\$31,120	\$1,000
"FIRST THRESHOLD": MORE THAN \$31,120 AND LESS THAN \$47,630	\$1,000 REDUCED ON A PRO-RATED BASIS
\$47,630 OR MORE OR NO INCOME TAXES FILED	NONE

IV. GRANT

Unlike the Bond, the annual Grant of up to \$3,500 is based on personal contributions to your RDSP. You must be 49 years of age or younger to receive the Grant (the Government will contribute until December 31 of the year in which you turn 49), and the Government will contribute up to \$70,000 over the course of your lifetime. Application for the Grant is made at the time you open up your RDSP.

Like the Bond, the amount of Grant for which you are eligible is based on income thresholds that are adjusted upwards each year based on the rate of inflation. The following chart reflects the 2019 thresholds:



BASIC NEEDS ALLOWANCE (ONTARIO REGULATION 222/98)

BENEFICIARY FAMILY INCOME (BASED ON 2017 INCOME)	PERSONAL CONTRIBUTION	GRANT AMOUNT	MAXIMUM GRANT	TOTAL ANNUAL GRANT
\$0-\$95,259	ON THE FIRST \$500 CONTRIBUTED	\$3 FOR EVERY \$1 CONTRIBUTED	\$1,500	\$3,500
	ON THE NEXT \$1,000 CONTRIBUTED	\$2 FOR EVERY \$1 CONTRIBUTED	\$2,000	
MORE THAN \$95,259 OR NO INCOME TAXES FILED	ON THE FIRST \$1,000 CONTRIBUTED	\$1 FOR EVERY \$1 CONTRIBUTED	\$ 1,000	\$1,000



E. WITHDRAWALS FROM THE RDSP

As discussed earlier in the chapter, the intent of the RDSP is to encourage long-term savings so that you have built up a decent-sized nest egg to support yourself later in life. Therefore, the withdrawal rules associated with the plan are structured in such a way as to promote savings and to deter early withdrawals.

When thinking about the RDSP as part of your financial and estate plan, it is very important to take note of the rules relating to withdrawals, the most important of which is likely the following:

(A) THE 10-YEAR RULE

You must wait 10 years from the date of the government's last contribution in order to make a withdrawal from your RDSP without a penalty. In most cases, the government makes its last contribution before you turn 50. Therefore, in most cases, you must wait until you are 60 to withdraw funds from the RDSP without penalty.

(B) EARLY WITHDRAWAL PENALTY

Early withdrawals (i.e., withdrawals made before 10 years have elapsed since the government's last contribution) can be made, however, the Beneficiary would be required to repay three times the amount of the withdrawal up to the total amount of Government contributions made to the RDSP in the previous 10 years.



For example, let's say that the government contributed to John's RDSP until 2025 because it had paid the maximum Grant and Bond amounts of \$70,000 and \$20,000, respectively. John would have to wait until 2035 to make a withdrawal from the RDSP in order to avoid an early withdrawal penalty.

Likewise, let's say that the Government contributed to Jane's RDSP until 2019, at which time she had turned 49 years old. She would be eligible to withdraw funds from the RDSP in 2029.





(C) PAYMENTS FROM THE RDSP

There are three different payments that can, and in some cases, must be made from an RDSP:

I. RECURRING PAYMENTS (REFERRED TO AS LIFETIME DISABILITY ASSISTANCE PAYMENTS OR “LDAPS”)

LDAPs are regularly scheduled periodic withdrawals that can begin at any time (keeping in mind the 10-year rule) but must begin by the end of the calendar year in which you turn 60 years old. These withdrawals are determined by a formula (referred to as the “LDAP Formula”) that takes into account how much money is in your RDSP (referred to as the fair market value or “FMV”) and your age at the time of the withdrawal. The formula is as follows:

$FMV / (80 + 3 - \text{Beneficiary's Age})$



For example, let's say that John is 60 years old at the time of the withdrawal and has \$200,000 in his RDSP.

The total amount of his LDAP would be calculated as follows:

$\$200,000 / (80 + 3 - 60) = \$10,000$

II. LUMP SUM PAYMENT (REFERRED TO AS A DISABILITY ASSISTANCE PAYMENT OR “DAP”)

There may be times when you would like to make a withdrawal from your RDSP without triggering the recurring payments (LDAPs). Perhaps you would like to use the money for a down payment for a home or simply to take a vacation. You can do so by taking out a lump sum withdrawal.

The maximum annual amount of the withdrawal is based on the makeup of the plan. In particular:

- If there are more government contributions than personal contributions in the RDSP, the maximum amount is the greater of 10% of the FMV or the amount determined by the LDAP Formula.
- If there are more personal contributions than government contributions, there is no maximum limit on the amount of your lump sum withdrawal.

Keep in mind that these payments are subject to the 10-year rule.

III. SPECIFIED PAYMENTS

Specified payments of up to \$10,000 per year are available to Beneficiaries with a life expectancy of five years or less. In order to qualify, the Beneficiary must submit a request to the financial institution along with a letter from a medical practitioner attesting to the prognosis. Note that the 10-year rule and the LDAP Formula do not apply to these withdrawals.





F. THE RDSP AND OTHER GOVERNMENT PROGRAMS

Together, the federal government and the provincial government of Ontario have ensured that payments from RDSPs do not affect eligibility for and benefits from other government programs.

At the federal level, this applies to benefits such as the Canada Child Tax Benefit, the Goods and Services Tax Credit, Old Age Security, and Employment Insurance.



With regard to provincial benefits, payments from your RDSP (income) and the value of your RDSP (asset) will not affect benefits from Ontario Works or ODSP. Note that these rules vary among the provinces and territories, so if you move outside of Ontario, you will want to verify the rules about RDSP withdrawals with the provincial or territorial government to which you are relocating.

G. OPENING AN RDSP

RDSPs can be opened at a number of financial institutions (FIs) around the province. Employment and Social Development Canada ("ESDC") keeps a current list of FIs that offer RDSPs on their website.

When it comes to choosing your FI, you may want to consider the following:

1. Does the FI allow for multiple plan holders of an RDSP?

For some Beneficiaries, having multiple people as holders of the plan would be beneficial in terms of succession planning. With multiple plan holders, if one were unable or willing to continue in that role, having multiple people in place would ensure limited disruption with the administration of the RDSP. In Ontario, at present, the groups of people who can be a plan holder are restricted to parents, spouses, guardians, and authorized representatives (such as attorneys for property). That being said, it is hoped that Ontario will soon provide changes to its policies and regulations to allow for a wider range of persons to be considered an "authorized representative."

2. What investment options are available?

You want to ensure that the financial institution takes time to learn about you and your family. For example, what other sources of income are available, what is your age, your risk tolerance, and your anticipated needs? All of these factors will influence the type of investment that is right for your RDSP. Investment options do differ among the FIs.

H. CLOSING AN RDSP

The ultimate goal of the RDSP is to ensure that you are able to access all of the funds over the course of your lifetime. There may be situations, however, where the RDSP has to be closed due to the Beneficiary passing away or losing eligibility for the DTC.

I. WHAT HAPPENS IF THE BENEFICIARY PASSES AWAY?

If the Beneficiary passes away, the RDSP must be closed by December 31 of the following calendar year. Any Grant or Bond received within 10 years of the Beneficiary's death will be paid back to the Federal Government, and all remaining monies (including accrued growth) will be transferred to the Beneficiary's estate and taxed accordingly.

If the Beneficiary has a Last Will and Testament (the "Will") in place, the Will identifies who inherits the remaining proceeds. If there is no Will in place, provincial legislation takes over and states that next-of-kin will inherit the funds based on the rules of intestacy, as further described in Chapter 1.

II. WHAT HAPPENS IF THE BENEFICIARY LOSES ELIGIBILITY FOR THE DTC?

Prior to changes announced in the federal government's Budget 2019, if a beneficiary lost eligibility for the DTC, the RDSP would have been closed by December 31 of the second consecutive year following DTC ineligibility. Any Grant or Bond received within 10 years of the loss of eligibility would have been paid back to the federal government, and all remaining monies (including accrued growth) would have been transferred to the Beneficiary and taxed accordingly. The plan holder could, however, elect to keep the RDSP open for up to a period of five years if the Beneficiary would likely re-qualify for the DTC in the foreseeable future.

In Budget 2019, the federal government has **eliminated** the requirement to close an RDSP when the beneficiary no longer qualifies for

the DTC, starting in 2021 and for subsequent tax years. Any Grants and Bonds remaining in the RDSP will not need to be repaid back to the government. The change also eliminates the need for a medical certificate to certify that the beneficiary is likely to become DTC-eligible in the future. (A transitional rule will ensure that an RDSP will not be required to close after March 21, 2019 and before 2021 solely because the beneficiary becomes DTC-ineligible.)

For the period that the beneficiary is DTC-ineligible, the operation of the RDSP will be limited to the following rules:

- No contributions can be made to the plan, including the rollover of a Registered Education Savings Plan ("**RESP**") (Note: Rollover of a Registered Retirement Savings Plan ("**RRSP**") or Registered Retirement Income Fund ("**RRIF**") to the RDSP of a financially dependent infirm child or grandchild will be permitted);
- The beneficiary is not eligible to receive grant or bonds, nor will entitlements accrue; and
- Withdrawals will be permitted, but will trigger repayment of grants or bonds.

Plan holders will be allowed to close an RDSP where the beneficiary is DTC-ineligible. Any monies remaining in the RDSP will be paid to the beneficiary, after the repayment of any Grants or Bonds back to the federal government.

The federal government has also exempted RDSPs from being seized in bankruptcy, with the exception of contributions made in the 12 months before filing.



I. TAX CONSIDERATIONS

I. TAX-DEFERRED GROWTH

Contributions to an RDSP are not tax deductible, but any investment gains earned inside the RDSP are not taxable until such time the Beneficiary makes a withdrawal.

II. RRSP/RRIF/LRIF ROLLOVER

Section 60.02 and paragraph 60(m) of the Income Tax Act govern the rules with respect to a rollover of an amount to a RDSP from a registered retirement savings plan (RRSP) or a registered retirement income fund (RRIF) as a result of the death of the annuitant of the registered plan (the "annuitant"). In general, in order for the rollover to be available, the Beneficiary of the RDSP must be a child or grandchild of the annuitant and have been financially dependent on the annuitant by reason of a physical or mental infirmity (the "eligible individual"). In addition, the amount of the rollover is subject to (i) the \$200,000 maximum RDSP contribution limit, and (ii) must not be greater than the lump sum payment from the RRSP or RRIF as a consequence of the death of the annuitant.

ELIGIBLE INDIVIDUALS AND FINANCIAL DEPENDENCE TEST

Specifically, an eligible individual is a child or grandchild of an annuitant of an RRSP or RRIF who was financially dependent on the annuitant for support, at the time of the annuitant's death, by reason of mental or physical infirmity. For the purpose of the financial dependence test, unless the contrary can be established, an eligible individual was not financially dependent on an individual for support (the "supporting individual") if the income of the child or grandchild in the tax year preceding the tax year the supporting individual died exceeded the aggregate of the basic personal tax credit amount and the DTC amount (if eligible).

III. RESP ROLLOVER

Beneficiaries of both a registered education savings plan ("RESP") and an RDSP are permitted to transfer, tax deferred (i.e., rollover), the investment income from the RESP under one of the following conditions:

- 1) The Beneficiary is, or is reasonably expected to be, unable to pursue post-secondary education because he or she has a severe and prolonged mental impairment; or
- 2) The RESP has been in existence for more than 35 years; or
- 3) The RESP has been in existence for at least 10 years, and each Beneficiary under the RESP has attained 21 years of age and is not eligible to receive educational assistance payments.



The RESP rollover amount will be considered a private contribution, and as such, must not be greater than the Beneficiary RDSP contribution room. In addition, the RESP rollover amount will not attract Canada Disability Savings Grants.



J. SUMMARY AND ADDITIONAL RESOURCES

The RDSP is one of the most effective ways for individuals with a disability to save for their future. With an annual government contribution of up to \$4,500, it is hard to think of any better return on your investment. Further, monies held in an RDSP and withdrawals made from the plan do not impact eligibility for social assistance programs, including ODSP. That being said, careful consideration needs to be given to the rules associated with payments from the RDSP in order to ensure the maximum use of the funds.

Note: Beginning on April 30, 2020, the federal government is expanding deposit insurance to RDSPs, in addition to RRSPs, RESPs and TFSAs. This means that RDSPs will be insured for up to \$100,000 in savings, in the rare event that a financial institution fails.



[Canada Revenue Agency - RDSP](#)

[ESDC - RDSP](#)

www.rdsp.com







ADDITIONAL CONSIDERATIONS

THE intent behind the Inspiring Possibilities Planning Guide: Benefits, Tax, Trusts, and Wills Toolkit for Ontarians with Disabilities is to provide you with the key components of your blueprint for developing future financial security for your loved one who has a disability. As part of this process, we have discussed tax benefits, social assistance benefits (ODSP), long-term savings vehicles (the RDSP), Wills, Trusts, and Powers of Attorney. While these serve as the foundation elements of your plan, there are several others that should also be considered. A brief discussion about a few of these follows – we strongly encourage you to seek out further information from your professional advisors with regard to these topics.

A. LIFE INSURANCE

Life insurance is often a cost-effective way of adding to the proceeds of your estate. There are many different types of life insurance that may be considered to achieve various objectives. In the disability-planning context, some families may consider taking out a separate policy for the purposes of supplementing the proceeds flowing into a Henson Trust. For married couples, this is commonly a “joint last-to-die” policy that pays out only in the event that both spouses are deceased.

As mentioned in Chapter 1, if you do have insurance policies in place, it is very important that you seek advice with regard to your designations. Remember, proceeds from a life insurance policy are considered similarly to inheritances flowing from an estate. Without proper planning in place, such as using a Henson Trust as the repository for these proceeds, your relative’s eligibility for ODSP benefits may be adversely affected.

B. HOME OWNERSHIP OPTIONS

As different types of funding opportunities become available, many families are seeking advice with regard to home ownership options. Parents may consider providing support to purchase a home for their child during their lifetime. Alternatively, many are seeking advice about how to structure the ownership of the family home in their estate plan, especially in situations where their son or daughter wants to remain living in the home after their parents have passed on.

There are various options when it comes to structuring the home ownership. As mentioned in Chapter 4, individuals can own their own principal residence without affecting their eligibility for ODSP. That being said, there are several other factors that should be considered, including personal and financial supports, legal decision-making, tax implications, and succession planning. Many families are creating separate housing Trusts for their relatives during their lifetime as a means to provide secure and personalized living arrangements. We would recommend that you discuss your various options as part of the overall estate planning process.





C. SELF-DIRECTED SUPPORT CORPORATIONS

Although there is no formal definition associated with a self-directed support organization (SDSO), some of which may be a "microboard™" or an "aroha," these types of organizations are typically small not-for-profit corporations comprised of people who work together with an individual to provide various degrees and types of supports. Vela Canada, a British Columbia organization that assists with the development and ongoing support of "microboards™," suggests that such groups help the individual:

- Plan his or her life;
- Brainstorm ideas;
- Advocate for what they need;
- Monitor services and ensure they are safe;
- Connect to his or her wider community; and
- Do fun things together.

Individuals and their families also form SDSOs for the purposes of:

- Administering individualized funding arrangements;
- Employing or contracting with support workers;
- Receiving and managing income and disability supports;
- Supporting Trustees of Trusts for which the individual is the Beneficiary;
- Supporting the plan holder(s) of the RDSP for which the individual is the Beneficiary (which may include the individual); and
- Advocating for additional supports and resources.



While it is not essential that an SDSO be used, many families have been incorporating the concept into their overall estate

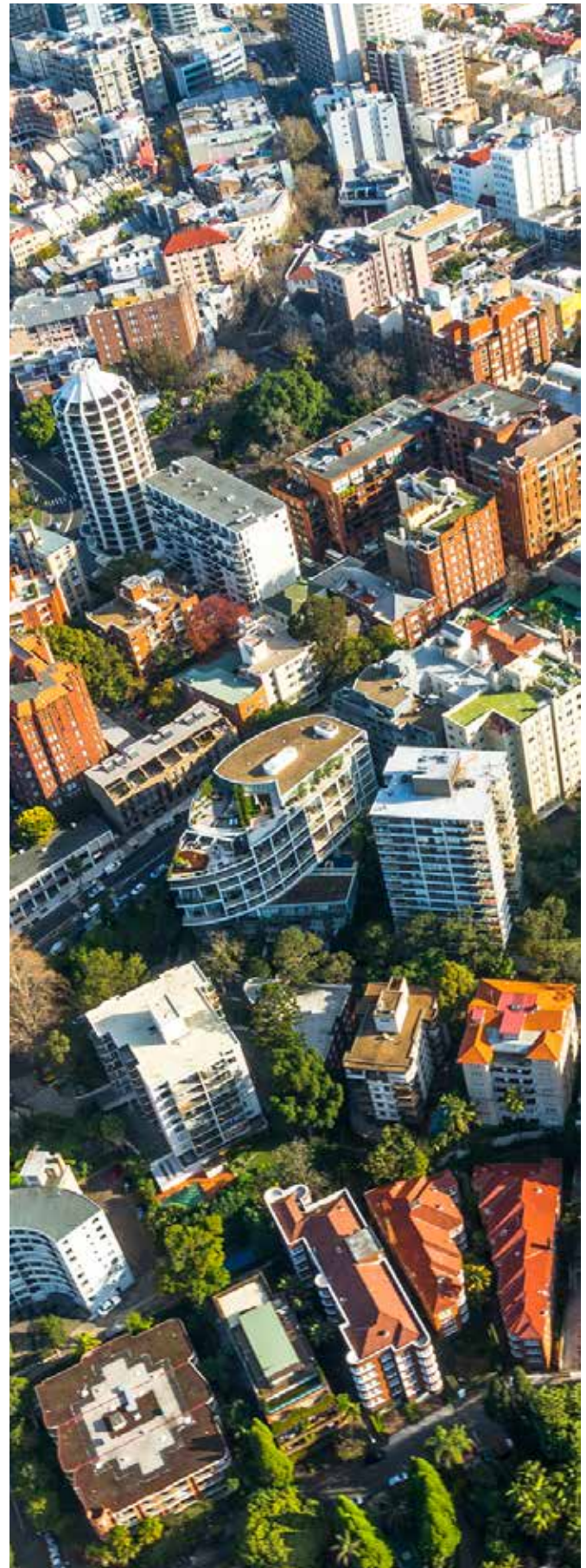
plan. The SDSO provides a complimentary role to any housing Trusts, Henson Trusts, individualized funding arrangements, and RDSPs that may be in place to support a person.

D. ACCESSING SERVICES AND SUPPORTS IN YOUR COMMUNITY

The Ministry of Community and Social Services (MCSS) offers a number of initiatives that provide funding for services and supports for individuals with developmental disabilities in the community. For children, the Special Services at Home Program provides funding to assist with skills development and family respite. Upon turning 18 years old, funding can be sought out through Developmental Services Ontario to access services and supports for adults who have an intellectual disability to facilitate community involvement and provide access to family respite and residential options.



It is important for you to share information about any services and supports that your family may have in place with your professional advisors, as such supports may influence the final version of your estate plan.







CONCLUSION & NEXT STEPS

WE hope that this publication has provided you with enough information about the key components of your future plan. While the process may seem overwhelming for families, developing your future plan is vital to ensuring future financial security for your family members. We therefore encourage you to get started, if you have not already done so. Here are a few final words of advice:

1. Prioritize Your Planning

While we stress the importance of putting a plan in place, we understand that there is quite a bit involved in doing so. Keep in mind that all components do not have to be completed overnight. Given that we never know what may happen tomorrow, we recommend prioritizing the Will and Trust planning process. Doing so will ensure that your affairs are handled in accordance with your wishes and that the proper Trusts are set up for your relative with a disability without any impact on social assistance benefits. The other components should be prioritized according to your family's needs.

2. Gather Your Information

It is important to gather all of the information required to start the planning process. This will save you time and money when it comes to working with professional advisors. Start by organizing information about your assets, including real property, investments, life insurance, registered plans, and pensions.

3. Identify Your People

You will need to identify people to fulfill the various roles in your future plan. Depending on your family's situation, such roles may include: Estate Trustees (executors); Trustees for Discretionary, Housing, and Staged Trusts; guardians for minor children; attorneys for Powers of Attorney; and directors for SDSOs.

Identifying people to fulfill these roles is often the most challenging aspect of the planning process. Please do not be discouraged. You would be surprised as to how many people out there may be willing to assist – especially

if the responsibilities are shared among a group of individuals.

4. Select Your Professionals

As you can tell by all of the information included, there are many different considerations specific to future planning for individuals who have a disability and their families. It is therefore exceptionally important that you select professional advisors that have a background in the area of disability planning. To complete your plan, consider engaging a lawyer, tax accountant, financial advisor, and person-directed planner with specialized knowledge of the components discussed in this guide. Ask a lawyer how many Henson Trusts they have drafted, or a financial planner how many RDSPs they have opened. There is nothing worse than thinking you have the right plan in place only to realize that the professionals involved may have neglected to advise you on a number of the key components. After reading this guide, you are now armed with enough information to ask the right questions when interviewing professionals!

5. Consider a Donation to Community Living Ontario

Help Community Living Ontario to continue to make gains in the lives of people who have an intellectual disability and their families such as through the Inspiring Possibilities Estate Planning Guide.

To make a one-time donation, monthly gift or a planned gift, we encourage you to visit the donations section of our website – www.communitylivingontario.ca/donate.



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