



# Planning for a Child with Special Needs

A child who is financially dependent on you because of mental or physical disability presents significant issues for you in your estate planning. How will your disabled child be cared for and by whom when you are no longer here to do so? This article will discuss those issues and how they may be addressed in your estate planning.

## Financial Considerations

The question which is paramount for the parent of a disabled child is, “How can the financial needs of my child be met when I’m gone?”. There are several options to consider including trust structures, provincial disability benefits and the Registered Disability Savings Plan. It is important to understand these options thoroughly as part of your estate planning.

## Provincial Disability Benefits

All the provinces of Canada offer benefits for disabled persons. The benefits may not only be monetary assistance but also include group housing and attendant care support. If provincial benefits are a part of your child’s support structure, it is important to determine whether your child will need to continue to access those benefits after your death.

In most cases a disability certificate, (as required under the Income Tax Act of Canada to claim the disability tax credit) must be submitted in order to qualify for benefits. There is also a “means” test which places a limit on the value of the assets that can be owned by the disabled person and still qualify him or her for benefits. If your child receives an inheritance outright, the value of the inheritance may put your child “over the top” on the means test and cause him or her to no longer qualify for the provincial benefits. Providing a trust structure to hold your child’s inheritance may avoid this result in some provinces.

## Trust Structures

A Trust is often used in planning for a person with disabilities. A trust may either be established during your lifetime by a trust deed or agreement or on your death by your Will.

The Will or trust agreement will appoint a trustee and set out how the trustee is to manage the trust and pay or use the trust funds for the benefit of your child during his or her lifetime.

A trust for a disabled person that is designed to preserve the provincial disability benefits is often referred to as a “Henson trust”. Henson trusts for this purpose are effectively used in all provinces except Alberta, the Northwest Territories, Nunavut and Quebec. The critical component of a “Henson Trust” is that the trust funds may be paid out or used for the benefit of the disabled person at and only at the trustee’s discretion. If the disabled person has a right to demand funds be paid to him or her from the trust, the person will be considered to own the assets of the trust for purposes of the means test and may be disqualified from provincial benefits.

If you decide to set up a Henson trust, the choice of a trustee is very important. A trustee has many responsibilities with respect to the trust assets including investing the trust assets, keeping proper accounts and records, making distributions and filing income tax returns. You need to appoint as a trustee a person who is diligent and careful, who is well versed with investment management and has your child’s best interest at heart. A trust company and a family member or friend are a good choice as co-trustees for a Henson trust. The trust company could look after the investment of the trust funds, the keeping of records and filing income tax returns and the family member or friend could best assess the needs of your child.

## Registered Disability Savings Plans

In 2008, the Income Tax Act was amended to create a new type of registered plan, called a “Registered Disability Savings Plan” (“RDSP”). A RDSP can be established for a person with a disability by the parent, guardian, or other person legally authorized to act for the disabled person.

Once established, family and friends can contribute up to \$200,000 to the RDSP with the consent of the person who established it until the end of the year in which the disabled person reaches 59 years of age. Although contributions to the RDSP are made with after tax dollars, income can accrue tax free within the RDSP.

Another advantage to a RDSP is the availability of Canada disability savings grants and Canada disability savings bonds. A Canada disability savings grant is an amount that the Government of Canada contributes to a Registered Disability Savings Plan. The Government will pay matching grants of 300%, 200%, or 100% percent, depending on the disabled person's family income and the amount contributed. A RDSP can receive a maximum of \$3,500 in matching Canada disability savings grants in one year and up to \$70,000 over the disabled person's lifetime.

A Canada disability savings bond is an amount paid by the Government of Canada to a RDSP. No contributions to the plan have to be made to receive the bond. Depending on family income, up to \$1,000 per year may be paid to the RDSP. The lifetime bond limit is \$20,000.

The Canada disability savings grants and Canada disability savings bonds are excluded from the \$200,000 lifetime limit on contributions. In certain circumstances all government grants and bonds paid into a RDSP must be repaid.

All provinces except Quebec have agreed that a RDSP and payments from it will not affect the disabled person's entitlement to provincial disability benefits.

Unlike a Henson trust, payments from a RDSP can only be made to the disabled person or to his or her estate. Any funds remaining in the RDSP after the disabled person's death will be part of his or her estate to be dealt with by the person's will or distributed in accordance with the intestacy rules.

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## Personal Considerations

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Children who are disabled could be anywhere on the mental capacity spectrum. In many cases they are able to make decisions for themselves about their finances and personal care. But what if they can't do this alone or need help?

Thinking about who is going to help them with their day to day financial and personal care decisions is an important step in your planning process.

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## Guardian of Property and Personal Care

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If your adult child has significant mental capacity issues the consideration of a guardian of property and personal care is important. If you have been helping your child with financial and personal care decisions and he or she is dependant on you for guidance, consider who is going to fulfill this role when you are no longer there. If there are financial considerations where decisions are needed, who will have responsibility for this if your child is unable to manage? In particular, if you have set up a Henson trust there should be someone available to discuss income needs with the trustee if your child is not able to do so.

Fortunately, in some cases, where mental capacity issues are not too severe, the disabled person can make decisions with the help of family, friends and caseworkers.

In some instances, the disabled person may have the capacity to appoint an attorney for personal care or property even though she may not be able to make financial and personal care decisions herself.

The decision to apply for a guardian for property and personal care will vary from case to case and will depend to a large extent upon the severity of the mental disability.

The appointment of a guardian entails time, expense and medical reports as you may have to hire a lawyer and make a court application. It can be a taxing for the person applying as well as for the subject of the application. Fortunately, for most adults with mental disabilities, issues of financial and personal decision making may be dealt with, without recourse to a guardianship application.

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## Final Thoughts

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Estate planning for a disabled child presents significant issues. How sufficient funds can be provided to meet your child's needs and who decides how those funds are to be used for his or her benefit are challenging questions. Professional advice is essential to help you find the answers.

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### Bibliography

1) CCH Estate Planning Guide - Vol 1, para. 2910

2) Estate planning for Beneficiaries with Disabilities in Canada: Inheritances, Trusts and the Ontario Disability Support Program, Harry Beatty - July 2005

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