



WILLS AND TRUSTS FOR PARENTS OF CHILDREN WITH DISABILITIES



BASIC INFORMATION

- **What is a Will?**
 - A legal document that sets out what will be done with your assets upon your death
 - During your lifetime, you can change your will as often as you like.

- **Why Have a Will?**
 - A will benefits your family and friends. Without one, your property may not go to whom you intended it to or may not be distributed as you wished.
 - If you have no will and your assets are distributed to your special needs child, the inheritance may make him ineligible for public benefit programs – even if your assets are not enough to properly care for your child.
 - Not having a will may mean money is wasted (ex: through taxes) that could have been used to improve your special needs child’s life.

- **There are Two Ways to Make a Will:**
 - (A) **“Holograph will”**: handwritten, signed, and dated by the person making the will (called a testator)
 - (B) **Formal will**: formally executed with two witnesses. This is the advisable method, especially if you have a child with a disability. **Use a lawyer!**

TERMINOLOGY

- **Beneficiary**: person who is left money or property under a will. In this document, we are concerned with special-needs beneficiaries (who are dependents),
- **Estate**: all of the property that the deceased owned or had some interest in at the time of death
- **Dependent**: must meet the definition of a dependent under the *Dependent’s Relief Act (DRA)*. The child with a disability can be under 18 or over 18. The child over 18 includes a child who, by reason of mental or physical disability, is unable to earn a livelihood or by reason of need or other circumstances.
- **Dependents Relief Act (DRA)**: this Act protects a dependent by ensuring that they get an appropriate share of your estate. They are entitled to a fair share (50-

50 split with other siblings). This Act becomes very important when the last surviving parent dies. Provision must be made for your dependent child.

- **Executor:** person who will be looking after your estate. You appoint the person in your will to manage and distribute your property under the terms of your will.
- **Guardian:** (also called a legal custodian) someone named by you in your will, to look after the personal or financial affairs of your child (if younger than 18 or if an adult with a severe mental disability) in the event of your death. The person named is usually the surviving spouse. There are two kinds of guardians: personal and property.
- **Public Guardian and Trustee (PGT):** government office that is responsible for protecting the interests of vulnerable people. The PGT has the authority to exercise guardianship powers over dependent adults and children under 18. For a full explanation of how the PGT protects these interests, look at the Government of Saskatchewan website at <http://www.justice.gov.sk.ca/About-PGT>.
- **Saskatchewan Assistance Act (SAA):** for Saskatchewan families and individuals who, for various reasons, including disability, illness, low income or unemployment, cannot meet basic living costs. Any person in financial need can apply for assistance. The amount of financial assistance provided under this Act depends on the circumstances and needs of the person.
- **The Adult Guardianship and Co-decision-making Act:** provides a means of representation protection and assistance for mentally disabled adults.
- **Testator:** a person who has made a will
- **Trusts:** vehicle by which title to your property is held by another person (trustee) for the benefit of your dependent child (beneficiary).
- **Inter vivos Trust:** express trust created which becomes effective during your lifetime
- **Trustees:** people chosen by you who will have complete discretion over the trust and will be in charge of spending money on your dependent child's behalf. Because your child will have no control over the money, social services will ignore the trust property for program eligibility purposes. Your child's entitlement to social assistance will not be affected.

WHO TO NAME AS EXECUTOR

- Can name your spouse, family member, friend, or a professional trust company.
- Must be over 18 years of age

- Must be physically and emotionally capable (will survive the dependent)
- Easier if they live close to your residence and the dependent's home
- Make sure your executor understands the requirements involved and consents.
- Joint executors must be able to work together. Can appoint alternate executors.
- The executor should be knowledgeable and trustworthy.
- Should make plans as to what will happen if the executor of your estate predeceases you. Have an alternate executor named if that should happen.

GUARDIANS and CO-DECISION MAKERS

- Options to consider if you have an adult child with a mental disability who does not have the capacity to make decisions and may be exploited by others or may endanger his own financial or personal welfare.
- Under the *Adult Guardianship and Co-decision-making Act*, an adult is someone who is 16 and older
- The term “**decision-maker**” describes someone who has been given the authority by the court to make or assist in making decisions for an adult. This term includes guardians or co-decision-makers.

GUARDIANSHIP:

- A **guardian** is someone who has the authority to make decisions for an adult who is incapable of managing his own personal or financial affairs.
 - A **personal guardian** makes decisions about an adult's personal welfare
 - A **property guardian** makes decisions about an adult's finances and property. The property guardian must inform the PGT of expenses, accounting and inventory of the adult's property.
- A person can also apply to be a temporary personal or property guardian in emergency situations (for up to a maximum of six months).
- If the Court finds that a personal/property guardian was not doing a good job, then the PGT will step in and act as a property guardian.

CO-DECISION MAKER:

- A **co-decision-maker:** someone who has the authority to help an adult make decisions and to make joint decisions with the adult.
 - A **personal co-decision-maker:** makes decisions with the adult about personal matters

- **A property co-decision-maker:** makes decisions with the adult about finances and property.
- A co-decision-maker must ensure that the adult has and understands all the information needed to make a decision, and knows the alternatives and likely results of any choice.
- A person can apply to be a personal or property co-decision-maker for adults requiring assistance in decision-making but who do not require guardians
- Appointing a co-decision-maker is appropriate where your adult child does not have full capacity to make decisions, but can still participate in the decision making process.
- You can look at forms for a co-decision-maker on the Public Trustee website under “Adults”

WHO CAN BE APPOINTED AS A DECISION-MAKER?

- Anyone 18 or older who has an interest in the personal or financial welfare of an adult may apply to the court to be appointed as a decision-maker for the adult.
- Court will determine whether the applicant is suitable to be the decision-maker. Among other things, the court will consider the applicant’s relationship with the adult, and whenever possible, the applicant should have a long-term caring relationship with the adult.
- The PGT may be appointed as a property decision-maker for an adult if there is no suitable person available for this responsibility.
- If you want to become a decision-maker for your adult child, there are a couple of steps involved:
 - (1) Make an application to the court to be appointed as a decision-maker. The application will include:
 - Evidence showing the court that the adult needs a decision-maker.
 - Two or more assessments (by qualified professionals) of your child’s capacity to make decisions.
 - Information about your suitability.

The court also determines whether it is appropriate to appoint a decision-maker and what duties and powers need to be exercised by them.
 - (2) Once you are appointed by the Court, you can name another person to continue this responsibility after your death.

MORE INFORMATION:

- For more information about adult guardianship, contact the Public Trustee’s office or visit their website at www.publictrustee.gov.sk.ca. More

specifically, see: “Applying for Adult Guardianship” under the “Publications” link on the PGT website.

- If you want to make an application to be a guardian/co-decision-maker, look at the Adult Guardianship in Saskatchewan Application Manual on the Government of Saskatchewan website at www.justice.gov.sk.ca.
- See also: “How to Apply for Guardianship” on the Government of Saskatchewan website.
- Look at forms for a co-decision-maker on the Public Trustee website.

Note: In reality most parents rarely apply for guardianship unless they cannot maintain control of a dependent child’s property or are not allowed to make decisions with respect to the adult child’s physical or mental care or wellbeing. The person named as a guardian in a will may not have the same control or “parental rights” and may have to apply for personal and/or property guardianship to ensure that they can control or participate in the personal and property decisions for the adult child.

INFORMATION TO GIVE YOUR LAWYER

- If you have a child with a disability and want to draft a will, use a lawyer! First and foremost, make sure the lawyer knows that your child has a disability. The lawyer also needs to know the following:
 - Nature of the child’s disability and the ability of the child to participate in decisions relating to the child’s property and personal care;
 - The quality of life that the child can enjoy;
 - The likely lifespan of your child; and
 - Whether the child receives the benefit of government program. If so, what that assistance is (e.g. assistance from the Saskatchewan Assistance Program (SAP)).
- This information helps the lawyer determine the type of support to be provided and who would be a good choice for executors and trustees.
- As well, you and your lawyer must determine your child’s capacity, whether he has the ability or inability to represent himself in relation to his claim to your estate:
 - If your special needs child does not have the capacity to represent himself, then this raises the prospect of guardianship.

WILL PLANNING FOR A DEPENDENT CHILD

Objectives of Will Planning for a Special Needs Beneficiary

- There are two objectives to keep in mind when drafting a will for a child with a disability:
 - (A) Make sufficient provision to avoid an application under the *Dependents Relief Act* by the PGT on your dependent child's behalf
 - Make sure the dependent child receives an equal share under the Will similar to the other siblings or a sufficient share to ensure that he/she is properly taken care of.
 - Furthermore, make sure this share will meet his/her needs for his/her expected lifetime
 - (B) Ensure that your will is made so that the benefit provided by the will does not disentitle your child to benefits under the Saskatchewan Assistance Program ("SAP"), or to avoid those benefits being reduced.

Ways To Leave Money for a Special Needs Beneficiary

- **There are a number of different ways through which you can leave money to a dependent/special needs beneficiary without affecting your dependent child's entitlement to SAP benefits.**
- The method you choose will depend on the degree of your child's mental disability. You must assess the degree of ability and disability of your child, particularly whether your child is able to handle money and make financial decisions.
- If you leave money directly to your child, this may disentitle the child to the benefits under SAP. If your child's disability affects their ability to handle funds beyond very small amounts of money, then you should consider creating a testamentary discretionary trust.

(1) DIRECT BEQUEST

- Where you leave money directly to the dependent child.

Advantages:

- This method works best for children with very mild intellectual disabilities who are able to manage a small gift left to them in a will.

Disadvantages:

- If your special needs child receives property directly from your estate, your child may be disentitled to social assistance
- If your adult dependent cannot manage property because his mental disability is too severe, then a property guardian would need to be appointed under *The Adult Guardian and Co-Decision Making Act*. This application is time-consuming and expensive.

(2) TRUSTS

- Trusts can be set up during someone's lifetime (*inter vivos* trust) or in a will. If it is set up in a will, it will not become active until the person's death

■ How does a Trust work?

- A **trust** allows someone (trustee) to manage assets on behalf of someone else (beneficiary). The beneficiary does not directly receive any money. The trustee holds the legal title, but the beneficiary is entitled to the benefit of the trust. The trustee provides the beneficiary with benefits by using the trust funds.
- You need to decide who the trustee(s) will be. Usually between 1-2 trustees, or two successive trustees, are chosen. Choose people who know your child and would act only in the best interests of your child.

■ Type of Trust:

- There are a number of different types of trust, but the type that you will probably be most interested in is the discretionary trust.

(a) Discretionary Trust Created by Will:

- Under this type of trust, you cannot instruct the trustee to pay a monthly income to the beneficiary. The money in the trust is used at the discretion of the trustee for the best interest of the child taking into account the fact that the child's entitlement to SAP may be affected.
- The trust fund cannot be used for basic needs, but can be used for special needs, to increase independence, or to improve quality of life ("quality of life enhancements").
- Appropriate if your child has a mental or physical disability.

■ Carefully Choose who the Trustee(s) will be:

- Executor can also be named the trustee or they can be different people
- Most of the time, the surviving spouse is named the executor and trustee. However, in the event that your spouse dies, you need to name alternate executors and trustees.
- Include a provision for the appointment of replacement trustees.

- Choose people you trust entirely to carry out your wishes after your death!
- If there is a lot of money in the trust, if there is any concern about a choice of trustee, and if it is expected that the trust will continue for many years, using an institutional trustee may be appropriate. It is possible to appoint both an institutional trustee and a trustee who knows and cares about your disabled child.

Advantages of a discretionary trust:

- Avoids the need for a property guardian application since no property passed directly to child.
- Can be for any amount
- This is a way to provide a benefit of monetary value to your dependent child without jeopardizing his/her entitlement to social assistance. The dependent can stay on social assistance, thus not using up the trust funds.

Note: there is no actual legal assurance that a special needs beneficiary's SAP entitlement won't be reduced, even with a discretionary trust in place. However, the PGT's primary concern is to ensure that a dependent child is provided for. It is unlikely that the PGT will do anything that would reduce or eliminate a special needs beneficiary's SAP entitlement, unless such SAP entitlement results in less benefit than the trust can provide.

Disadvantages:

- May not be suitable for wealthier parents who are planning to pass on a lot of money to or for the benefit of the disabled child. Protection of SAP benefits may not be a consideration.
- Trustees are somewhat limited in what they can do to assist the child. If they provide an extra such as a new wardrobe for the child, this may offend the provisions of the *Saskatchewan Assistance Act* (SAA). A trustee must be knowledgeable as to what extras can be provided without offending the SAA eligibility rules.
- May not be beneficial to retain entitlement to social assistance. A discretionary trust may keep the beneficiary to a life at or below the poverty line. If a trustee cannot use the funds for basic needs, then the beneficiary may be restricted to a level of food, shelter, and clothing available on a subsistence budget.

(b) DISCRETIONARY TRUST set up *inter vivos*

- You can set up a discretionary trust while still living, rather than setting it up in your will to be established upon your death.
- Put the money into a trust fund for your dependent child and name a trustee to administer the fund on behalf of the child.
- Create a trust document defining the discretion, benefits and other terms of the trust.

Advantage:

- You can monitor and advise the trustee while you are still alive

(3) PURCHASE ASSETS RATHER THAN PROVIDING CASH

- Purchase assets to meet basic needs and enhancements of life (house or wheelchair van)
- Some assets other than cash do not reduce or eliminate social assistance benefits

IF ADEQUATE PROVISION IS NOT MADE

- If you do not properly provide for your dependent child in your will, then a claim may be brought under the DRA by one of two parties:
 - (A) If the child has sufficient capacity, he can bring an application to ensure he receives what he is entitled to.
 - (B) If the child cannot represent himself, then someone can bring a Dependents' Relief Application on behalf of the dependent child (usually the PGT). Often times the person acting on behalf of the dependent child is the PGT for Saskatchewan.
- To see what constitutes "adequate provision" for a dependent, look on the PGT's website for a publication entitled "Dependents' Relief Application."
 - It has generally been accepted by the PGT that provision has been made for your dependent child if your dependent child benefits similarly in amount to your non-dependent children. For example, if you have three children and one-third of your estate is for the benefit of the dependent child, this would be sufficient provision.
- If you leave a dependent child out of your will, or the amount you leave is not enough, the court may establish a trust fund, called a **Section 9 trust**, for up to \$100,000, using funds from your estate. This trust supplements the dependent adult's social assistance benefits.
 - A court created discretionary trust is very rare and is used only where a parent completely fails to provide for their dependent child
 - **Remember:** there is **no cap** on a discretionary trust created by will!

USE GOVERNMENT PROGRAMS !

(1) DISABILITY TAX CREDIT

- Non-refundable tax credit that a person with a severe and prolonged impairment in physical or mental functions can claim to reduce the amount of income tax that he/she has to pay in a year
- Includes a supplement for persons under 18 years of age at the end of the year
- See the Canada Revenue Agency website for more information – www.cra.gc.ca

(2) REGISTERED DISABILITY SAVINGS PLAN (RDSP):

- Helps families save for the ongoing support of special-needs loved ones
- Up to \$200,000 can be contributed.
- Only one plan can be set up for each special needs child
- If your special needs child is under 18 or not capable due to a mental disability, then you, or a legal representative, can establish the plan and be the holder of it. The holder is responsible for managing the account.
- To get an RDSP set up, contact your bank. They administer RDSPs. They supply the proper forms and information.

Advantages:

- Dependent children with long-term disabilities benefit the most
- RDSP benefits are not included as income for SAP purposes. RDSPs will not affect the disabled child's eligibility for social assistance benefits.
- Anyone can contribute to the RDSP with the permission of the holder. Parents and other family members and friends can put money in the plan to provide for the future expenses of the disabled child.
- Contributions to the plan are tax-free. Growth inside the plan is tax-free.
- An RDSP can become a very good source of income. It may eliminate the need to make provisions in the will (including setting up a discretionary trust) for the disabled child..
- **Greatest advantage** – yearly government contributions to the plan in the form of grants and bonds. To receive the maximum benefit of CDSBs or CDSGs, start early, even if the contributions are small.

Disadvantages:

- The funds in the RDSP must start to be withdrawn the year before the child turns 60. Withdrawals from the RDSP are taxable.
- Cap on contributions is \$200,000, which may not be that beneficial for very wealthy families.

- If both parents die and the child is not mentally competent to be the holder of the RDSP, then the holder of the plan has to be a property guardian for that child or the PGT.

(3) SASKATCHEWAN ASSISTANCE PROGRAM (SAP)

- Program of last resort – for families and individuals who, for various reasons, including disability, illness, low income or unemployment, cannot meet basic living costs
- Any person in financial need may apply for assistance
- For more information – call 1-866-221-5200 or contact your nearest Social Services Office

(4) SASKATCHEWAN ASSURANCE INCOME FOR DISABILITY (SAID) PROGRAMME:

- SAID is a new income support program for people with significant and enduring disabilities living in residential care setting or those living independently

■ How to get it:

- Persons who have disabilities and who are receiving SAP benefits can apply by completing an application and assessment package. To obtain this, they have to see their Income Assistance Worker.
- Persons who are not receiving SAP benefits but think they may be eligible for SAID should visit the nearest Ministry of Social Services office or call the SAID inquiry line at: 1-888-567-SAID (7243).

Advantages:

- Recipients of SAID can inherit up to \$100,000 (through a simple bequest in the will) without any change in their ongoing benefits. Any amount over \$100,000 can be put into an RDSP.
 - To compare, if an adult child received an inheritance of \$100,000, his or her SAP payments would be suspended until the funds were spent.
- Benefits of SAID are currently \$50/month higher than for SAP.

■ If your adult child does not have capacity:

- If your adult child cannot manage \$100,000, then appoint a property guardian to manage your child's financial affairs
- Alternatively, as talked about, you can establish a discretionary trust of \$100,000 and your house in your will so that the trustee is responsible for managing the money

FUNDING A TRUST (WHILE AVOIDING TAXES!)

- Variety of ways to provide money to the discretionary trust: regular savings program, your estate (may be sufficiently large enough), by way of contributions from others (siblings, aunts, uncles, grandparents)
- Income taxes and capital gains taxes may be avoided or minimized through careful planning. Sometimes taxes can be deferred indefinitely

(A) Regular Savings Program

- May be able to provide adequate funds to the discretionary trust

(B) Your Estate

- Provided that it is sufficiently large, it could provide for you in your elder years and have enough left over to fund the trust

(C) By way of Contributions from Others

- Siblings, aunts, uncles, grandparents could be willing and able to provide money to fund the trust

(D) Life Insurance

- For the average family, this may be the only way to leave a large lump sum to the trust – by making small monthly payments.
- Also possibly the only way of funding a trust that is guaranteed. The other resources mentioned above may not always be available, but a paid-up life insurance policy can guarantee future funds
- Can be paid to beneficiaries in a lump sum or in an annuity (yearly payments over a lifetime)
- Important to structure your assets given to your beneficiary in a way that they are protected
- Can be in the form of a trust

(E) Registered Retirement Savings Plans (RRSPs) and/or Registered Retirement Income Funds (RRIFs)

- **General Rule:** on your death, the value of the RRSP/RRIF is fully taxable as ordinary income in your final return.
- An exception is where you name your special needs child as beneficiary of your RRSP/RRIF upon your death. Your RRSP/RRIF funds can be passed, tax-free, to your disabled child in one of two ways:

(1) The RRSP/RRIF Funds can be “Rolled Over” to an RRSP, RRIF, or annuity

- They can be rolled over, tax-deferred, to the child’s own RRSP, RRIF or annuity
- A life annuity could be purchased with the RRSP/RRIF money.

- Annuities should be paid into a discretionary trust if your child is incapable of managing an annuity, and to preserve your child’s entitlement to social assistance.

(2) Rollover to a RDSP

- If your special needs child is the beneficiary of your RRSP/RRIF and receives, upon your death, proceeds from these plans, these amounts may be rolled over (up to a certain limit) to your child’s RDSP

Disadvantages:

- The Government will not pay grants or bonds on the money transferred from RRSPs or RRIFs
- The maximum transfer amount is \$200,000, which is reduced by the amount of any contributions previously made to the plan. For example: if there is already \$50,000 in your child’s RDSP, the amount rolled over from an RRSP and RRIF cannot exceed \$150,000.

HELPFUL SOURCES

- **Adult Guardianship and Co-decision-making Act -** <http://www.justice.gov.sk.ca/Adult-Guardianship-and-Co-decision-making-Act>
- **Dependents’ Relief Act -** <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/D25-01.pdf>
- **The Saskatchewan Assistance Act -** <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S8.pdf>
- **Saskatchewan Assistance Program (SAP) –** www.socialservices.gov.sk.ca/sap
- **Saskatchewan Assured Income for Disability (SAID)** www.socialservices.gov.sk.ca/SAID
- <http://classiclaws.ca/>
- **Public Guardian and Trustee of Saskatchewan -** www.justice.gov.sk.ca/pgt
- **How to Apply for Guardianship –** http://www.justice.gov.sk.ca/mjag_Apply%20for%20Guardianship.pdf
- **Canada Revenue Agency (for information on RDSPs and the Disability Tax Credit) –** www.cra.gc.ca
- **Set up by parents of children with disabilities** www.specialneedsplanning.ca

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