ESTATE PLANNING FOR INTELLECTUAL DISABILITY - APPLYING FOR GUARDIANSHIP* OF PROPERTY FOR FAMILY CONTROL OF DISABILITY CAPITAL

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****Information applies to residents of Ontario, Canada only.***

An extremely important objective facing families with a loved one with a complex intellectual disability is to set aside funds (disability capital) for her or him and then manage those funds to meet their future financial needs - now and probably for years into the future.

The setting aside of these funds usually starts today with contributions to an RDSP and eventually moves to bequests of various kinds in your will. Will transfers usually include the setting up of one or more trusts for your loved one and perhaps the transfer of RRSP, RRIF and sometimes RPP plan balances to an RDSP or RRSP of your loved one. Outright bequests should be avoided because the transferred funds would fall under the control of the Public Guardian when your loved one lacks legal capacity to sign agreements.

If your loved one lacks legal capacity, they cannot sign most agreements or make certain advantageous elections under the Income Tax Act. Therefore, you should take as many steps as needed in your planning to put decision making in the hands of your family and avoid the Public Guardian and other regulatory bodies. The Public Guardian is available as a last resort but certainly not a first choice as a financial decision maker if other family members are available do the job in a much more personalized way.

You should also be aware that a loved one may have legal capacity today but may be heading towards cognitive incapacity say from dementia. If so, get a power of attorney in place while you can because if you don't and legal incapacity arrives, personal guardianship will be the only way to administer their financial affairs.

OUR TAX LAWS - THE FEDERAL PROVINCIAL JURISDICTIONAL WRANGLE

The competing jurisdictional boundaries between the federal and provincial governments certainly add to the complexities facing financial caregivers who will have to manage the financial structures that are set up in a parent's will and other documents. These structure should be flexible so disability capital can be allocated to your loved one and even back to siblings when funds are no longer needed,

But is this federal/provincial control juggernaut in our tax laws really necessary? The 2022 Federal Disability Advisory Committee report dealt with that and has some strong opinions to the contrary which the federal governments has largely ignored and most recently in the design of the new Canada Disability Benefit.

2022 FEDERAL DISABILTY ADVISORY COMMITTEE RECOMMENDATIONS - AN ENLIGHTENED VIEW ON LEGAL RIGHTS OF THE DISABLED

The Federal Disability Advisory Committee made these significant recommendations (and others) in their 2022 report in order to mitigate against jurisdictional limitations of current tax provisions.

- The Department of Finance should amend the Income Tax Act and policy to allow a person with a mental disability to appoint a representative to manage their tax affairs without resorting to legal guardianship.

- The federal government should apply the Peace, Order and Good Government clause to encourage the creation of a national minimum-standard legislative framework for supported decision-making laws

• The federal government should broaden the list of persons defined as “qualified family member” in the Income Tax Act to include siblings to act as RDSP plan holders for persons with intellectual disabilities and it should also be extended beyond 2023.

• Amend the Income Tax Act to give persons with mental disabilities greater access to CRA services is a federal aspect of legal capacity which is distinct from provincial aspects.

• The Canadian constitutional law has recognized that Parliament is permitted to legislate on issues within the provincial heads of power provided certain constitutional requirements are satisfied. Amending the ITA to give persons with mental disabilities greater access to CRA services is a federal aspect to legal capacity which is distinct from provincial aspects. Expanding CRA accessibility does not intrude on provincial authority to make rules on legal capacity with respect to provincial objectives. Therefore, an amendment to the ITA to permit persons with mental disabilities to appoint an “authorized representative/supporting decision-maker would likely be constitutional.

What the federal government does not understand comes straight out of the mouth of their own advisory committee. Unfortunately, families cannot wait on this schism to resolve itself so their only defense is to apply for personal guardianship of property for their intellectually challenged loved one.

THE NEW CANADA DISABILITY BENEFIT– THE FEDERAL PROVINCIAL JURISDICTIONAL SQUABBLE GOES ON

The new Canada Disability Benefit Plan (CDB) start up is about a year away, but it remains to be seen who will control of funds paid out when the recipient lacks legal capacity. The Federal government put the kibosh on proposed provisions to prevent provinces and insurance companies from clawing back CDB income because of concern about stepping over the lines of provincial jurisdiction.

This is just a further continuation of the same federal position that fails to deal federal provincial jurisdictional control. In many cases this will leaves families unable to control the disability capital which they contributed to in the first place.

OUR INCOME TAX ACT RULES PREVENT FAMILIES FROM USUING PROVISIONS MEANT TO BENEFIT DISABILTY

The Income Tax Act has several important provisions designed to assist individuals with disabilities. Unfortunately, they are not available because they require the signature of your loved one with an intellectual disability which that person cannot give because the person lacks legal capacity.

Here are some important Income Tax Act limitations that prevent families and their intellectually challenged loved one from using:

• Set up an RDSP for an adult loved one (subject to transitional rules set to expire in 2023)

• Make the annual election by the challenged beneficiary for a trust to be a Qualified disability trust.

• Make the election by a preferred beneficiary to have trust funds taxed in the hands of the beneficiary, usually at significantly lower tax rates

• Have a family member continue as the plan holder after the death of the original plan holders, who put so much effort, hard work, and personal financial sacrifice into setting this up in the first place.

A LETTER OF WISHES STRENGTHENS FAMILY PLANNING

Unfortunately, there is a lot of complicated legal documentation that has to go into the financial planning for your loved one. But no matter how hard you work at this; the legal agreements are unlikely to really express your personal wishes in a personal way.

The solution to this is to write a personal letter of wishes expressing in a non-legally binding way, your wishes for care and support of your loved one. Your letter of wishes with respect to the terms of a trust should cover the following:

• Provide an understanding of the reasons for the trust and its broad goals.
• Provide guidance of any special needs of the beneficiary that are to be satisfied.
• Give directions to the trustees on whether to confer with others for guidance in decision-making.
• Provide instruction on whether the letter of wishes should be kept confidential.

To learn more about ARBUCKLE PERSONAL WEALTH STRATEGIES, please visit: https://www.disabilitytaxplanning.ca/

This informal document is difficult to write – it comes straight from your heart. Be sure to have it reviewed by a lawyer to be sure that it does nor override trustee powers in any way.

APPLICATION PROCESS FOR GUARDIANSHIP OF PROPERTY

I am not an expert about applications for guardianship of property, but I have consulted Rachel Merucci, licensed paralegal for TBH legal, who has far more knowledge than me on this.

We set out below some guardianship of property planning issues that Rachel and I talked about and that you should be aware OF while you plan:

• You can apply for statutory guardianship of property through the Office of the Public Guardian and Trustee (PGT). This is an application process that does not require going through a judge in court and is substantially cheaper.

• You are unlikely to need guardianship "of the person", and unlikely to need guardianship "of personal care" because Ontario residents have an automatic Substitute Decision Maker (SDM) assigned when in situations that require medical decisions to be made for those who are mentally incapable.

• You will need to provide a capacity assessment to the office of the Public Guardian and Trustee. This capacity assessment is researched and paid for by the applicant. Fees for this assessment range from $800 - $3,500 depending on who you choose as the assessor.

• You will need to prepare a management plan in prescribed form.

• It is possible for two or more "relatives" of the incapable adult to apply together as guardians of property, but the PGT may respond asking you to consider less family members to apply.

There is lots of speculation regarding the cost of guardianship of property but in the end a lot will depend on your ability to supply the needed information to an experienced legal representative, and to properly prepare a management plan.

If you apply as a single applicant, keep in mind that the guardianship will end on your death, and the process must start all over again with a new application by another family member. It would be better to have a two-generation joint application with a parent and sibling of the intellectually challenged individual so when the parent dies the sibling can carry on as sole guardian having already been a part of the process all along.

SUMMING UP

Simply said, there is no guarantee that our governments will make any changes to the federal provincial approach that will put families of intellectually challenged loved ones on the same footing as is permitted for physically challenged loved ones.

So, these families need to take control of their disability capital that they sacrificed for and have put aside and obtain guardianship of property. It is the only way to ensure your loved one's disability capital will be managed for their incapable loved one's best interests and without interference or added complexity from governments and other institutional organizations.

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NOTE: For most caregivers and SDMs, Guardianship of "Property" is the one type of Guardianship that is needed and will ultimately save them much unnecessary hardship. Learn more at www.tbhlegal.ca/adultguardianship, or contact Rachel Merucci, Licensed Paralegal at 519-777-9303, rmerucci@tbhlegal.ca