

Preserving disability support benefits and post-mortem planning

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We all want quality of life for our loved ones — especially those with special needs. However, planning for them can be fraught with difficulties, some of which may jeopardize their entitlement to Ontario Disability Support Program Act benefits (ODSP).

The silver lining is that all is not lost: there are options to ameliorate the situation even after the testator has died.

At the outset, we need to appreciate the significance of preserving ODSP benefits.

The plan is a form of social assistance that provides a monthly stipend until age 65, when the CPP disability pension commences. In addition, there are medical benefits that can prove as valuable as the stipend, if not more so. All this, combined with other resources, can help provide a better quality of life for the special needs person.

So, what can be done to preserve ODSP benefits if the recipient comes into an inheritance? The best option is comprehensive estate planning while the testator is alive, but this does not always happen.

Consider a family with three children. One child (A) has a physical disability and developmental delay that qualifies her for the disability tax credit as well as ODSP benefits. Assume A is currently 31 with few or no vocational opportunities. The parents have set up a Retirement Savings Disability Plan (RDSP), but are financially unable to optimize permitted contributions. They have set up a fully discretionary trust (i.e. Henson trust) for A in their wills.

A's paternal grandmother has a simple will with a legacy to A of \$400,000, but no trust of any kind. The grandmother dies unexpectedly before her will can be revised or other planning completed.

Clause 28(1)(19) of Regulation 222/98 under the ODSP permits up to \$100,000 of A's inheritance to be put into a fully discretionary disability trust, akin to a Henson trust, without reducing ODSP benefits. The \$100,000 cap can also include life insurance products such as segregated funds.

As well, a portion of the legacy from grandma can be added to the RDSP established by A's parents. The monies will grow tax free and, based on the Ontario government's current administrative policies, withdrawals will not affect ODSP entitlement.

The maximum contribution level for RDSPs is \$200,000. The contributions can be spaced overtime so as to trigger matching amounts from the federal government. A's one-time contribution to the plan from grandma's inheritance, however, may result in the loss of some matching funds. But this loss should amount to less than the ODSP benefits given up if the inheritance stood in its original form. Let's say this will use up another \$100,000 of the legacy from grandma.

The next consideration is the balance of ss. 28(1) of Reg 222/98, which sets out other types of exempt assets a person can own without affecting ODSP eligibility. These can be applied to reduce the \$200,000 remaining from grandma's legacy.

One big ticket item is a home for A. Smaller exempt items include a vehicle, tools of a trade and a prepaid funeral.

Generally, we do not recommend that a person in A's circumstances own a home directly in case it needs to be sold later, but there is the option of having A's interest held in a Henson trust. Depending on the purchase price, the parents or others may need to provide top-up funds or help obtain financing.

Finally, a recent change to Reg 222/98 allows single recipients to accumulate up to \$40,000 of savings. If A's savings at the time of grandma's death are below this limit, it may be possible to leave some funds in her name personally without affecting ODSP entitlement.

But remember that asset ownership of any kind by A raises the issue of who will manage property on her behalf if she is not capable and does not have, or is unable to make, a power of attorney for property.

That's where guardianship applications, the subject of my next article in this series, come into play.

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