



Red Tape, Human Rights, and Registered Disability Savings Plans in Ontario

Why is a well-meaning savings program leading to a loss of rights for people with disabilities?



The Issue in Brief

The Registered Disability Savings Plan (RDSP) is a federal initiative that is impacted by provincial legislation and policy. In Ontario, longstanding problems with the program are causing serious difficulties for people with disabilities and their families, and placing years of savings at risk. There are simple steps the provincial government can take to address these problems and increase the health and quality of life of people across the province.

The Issue in Detail


'Gretchen'¹ is an accomplished and active 86 year old who lives in Toronto. She has three daughters who also live in Ontario. All of her daughters qualify for the Disability Tax Credit, and Gretchen has opened and contributed to a Registered Disability Savings Plan (RDSP) for each of them for many years. She is currently plan holder for these RDSPs, meaning that she is responsible for managing the funds.

Two of Gretchen's daughters have intellectual disabilities, and one experiences significant mental health issues including bipolar disorder. There is a high risk that each daughter would be found incapable of managing their property and personal care if they were exposed to a capacity assessment.

Gretchen has done a lot of work to prepare for the time when she is no longer able to support her family. While the RDSP has enabled her to put away a considerable amount of funds for her daughters, she is worried about what will happen with the funds when she is no longer around to help with them. There is no other family member who can be appointed RDSP plan holder,² and the other options for managing RDSP funds carry significant risks. These options are:

1. Find someone willing to act as guardian of property for each daughter, and apply through the courts to have them appointed as such.
2. Request that the Office of the Public Guardian and Trustee in Ontario (OPGT) be appointed as legal guardian for property.

Gretchen has been an active advocate for her daughters' rights and freedoms, and she does not want to see them end up under guardianship. She understands the risks and negative outcomes connected to guardianship, which would take away their rights as individuals and give someone else almost complete control over their lives. And she is not alone – across the province, thousands of parents of people with intellectual disabilities and mental health issues feel this way.



Gretchen could also do nothing. In this case, in the event of her dying or otherwise losing capacity to manage the RDSP, the RDSP would be in limbo, and several things could happen. The RDSP provider could freeze the account until another plan holder is in place, effectively locking the assets indefinitely. They could also close the plan and distribute funds to the beneficiaries. This would likely involve partial repayments of federal contributions, and could have a negative impact on Ontario Disability Support Program (ODSP) benefits.

It is also possible that a financial advisor could inform the Public Guardian and Trustee of the situation, which could step in as guardian for property. However, this is not required and is generally not the policy of RDSP providers. In cases where this did happen, the women could quickly come under the purview of the OPGT, with all the negative outcomes that would entail. We know (thanks to a recent report of the Auditor General of Ontario) that the OPGT is highly bureaucratic and difficult to deal with, especially for people with cognitive impairments.³


In short, each of Gretchen's daughters will face a complex array of issues that are likely to have significant impacts on their finances, on the recognition of their legal capacity as individuals, and on their living situations – all because their mom took advantage of a federal government program that has failed to address longstanding and well-known issues.

This case brings attention to the fact that there are two possible outcomes for people whose capacity is in question and who don't have family members who can be appointed as RDSP plan holders: (a) access the RDSP but lose their rights, including the ability to control their own finances, or (b) maintain their rights and financial control, but lose access to up to \$110,000 in federal government contributions.

Gretchen has done all the right things. She has helped set her daughters up for long-term financial independence. She has supported them to develop strong circles of support, and has appointed trustees to assist her daughters to manage their finances. She has supported them to access needed services and supports via the developmental service and mental health sectors. They are all in a good position to continue to control their lives and make decisions, with circles of support and trustees that Gretchen has help to put in place for each of them.

Despite all this, it is entirely possible that Gretchen's daughters will lose their rights because of the unreasonable requirements of a single program that was designed to benefit people in their situations.

1. Implement a process for adults to appoint an RDSP legal representative, where there are concerns about their capacity to enter into an RDSP contract with a financial institution and they do not have an attorney or guardian for property.

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2. The capacity-related criteria used to grant or revoke the personal appointment of an RDSP legal representative should be based on the provisions of section 8(2) of the British Columbia Representation Agreement Act, which consists of several factors including the communication of a desire to have a representative, the expression of approval, and the existence of a relationship with the representative that is characterized by trust.
 3. The relationship between the RDSP beneficiary and the legal representative would draw on protections offered through existing provincial legislation related to decision-making, e.g., the ability to appoint more than one legal representative, and requiring RDSP legal representatives to maintain accounts of transactions.
 4. The RDSP legal representative would have authority to open and manage funds in an RDSP, including (in partnership with the beneficiary) consenting to contributions, deciding investments, applying for grants and bonds, and requesting that payments be made to the beneficiary; they would also be able to assist the beneficiary in managing funds paid out of the RDSP.
 5. The RDSP legal representative would have the duties of an attorney for property, and be held to the same standard of care. These duties include encouraging an adult to participate in decisions, to the best of their abilities; consulting from time to time with an adult's family and friends; and making decisions in a manner that is consistent with an adult's personal care decisions. This standard of care would require RDSP legal representatives to exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of their own affairs.

A similar process has been in place in Newfoundland and Labrador since 2014. This approach offers a low-risk solution for thousands of people that will increase access to needed funds, maintain people's rights, and limit unnecessary applications to the OPGT.

It must be stressed that there are thousands of people and families across Ontario in similar situations. The Government of Ontario needs to act immediately to protect Gretchen's daughters, and thousands like them, from losing their rights and access to crucial resources.

Notes

1. While the people in this document are real, names have been changed to protect privacy.
2. Under current federal rules, only a spouse, common-law partner, parent, or adult sibling of an RDSP beneficiary can act as RDSP plan holder for someone who may be considered incapable of managing their property.
3. Office of the Auditor General of Ontario (2018). 2018 Annual Report: Office of the Public Guardian and Trustee.

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Community Living Ontario is a non-profit provincial association that has been advocating with people who have an intellectual disability and their families for 70 years. We proudly work alongside more than 115 local agencies and advocate on behalf of more than 100,000 people across Ontario.

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