



# **Policy Brief: Red Tape, Human Rights, and Registered Disability Savings Plans in Ontario**

Part 2 – Stories of four families facing unnecessary RDSP-related barriers





## Introduction

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In November 2023, Community Living Ontario published *Red Tape, Human Rights, and Registered Disability Savings Plans in Ontario*, which reviewed problems with Registered Disability Savings Plans (RDSPs) and put forward a solution.

Our document presented the story of ‘Gretchen,’ a real person whose three daughters each have an RDSP, and who risk losing their rights and financial security when their mom is no longer able to act as RDSP plan holder.

Currently, an RDSP beneficiary whose mental capacity is in question cannot be plan holder of their own RDSP (a ‘plan holder’ is the person or organization that opens the RDSP and makes or authorizes contributions). Under federal law, only official legal representatives (e.g., guardians) or ‘Qualifying Family Members’ (i.e., parents, siblings, spouses, and common law partners of beneficiaries) can be RDSP plan holders in such a situation.

In *Red Tape*, we noted that there will be no one to act as plan holder for Gretchen’s daughters when she becomes unable to support them to manage their RDSPs. None of the women want to come under the legal guardianship of another person, or of the Public Guardian and Trustee. Despite years of advocacy on this problem, the Ontario government has not created an alternative pathway that gives people control over their finances while avoiding guardianship and the loss of rights this entails.

This solvable situation is causing unnecessary anxiety and confusion for families and RDSP providers, and creating added pressures for the Public Guardian and Trustee.

Since we released *Red Tape*, other families have come forward to share their stories. Four of these stories are presented below.



# Family Case Studies

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## *Agnes and Eva*

‘Eva’ is the 68-year-old mother of ‘Agnes,’ who is thirty (names have been changed to protect anonymity). They have lived together for all of Agnes’ thirty years, and have no other immediate family members.

Agnes is autistic and has an intellectual disability. She enjoys exploring her hometown of Toronto on her own, though she does need some support with her health and finances. Eva acts as Agnes’ substitute decision-maker for major medical decisions and helps her to manage her money, which includes income from ODSP and the Passport program.


Eva has been diligent about preparing Agnes financially for when she is no longer around to support her. Eva has created a Henson Trust, with Agnes’ godmother acting as trustee. When Registered Disability Savings Plans were introduced in 2008 by federal Minister of Finance Jim Flaherty (with whom Eva crossed paths in local parent groups), she was the first person at her bank branch to open one. She acts as plan holder for the account, which currently holds more than \$100,000.

It is unlikely that Agnes would be considered capable of managing her finances without support, which means that she isn’t able to be plan holder of her own RDSP. It is also unlikely that she would be considered capable of assigning Power of Attorney. Thus, guardianship would be the only option for maintaining clear control of the RDSP once Eva is no longer able to act as plan holder. As we note in our previous Red Tape document, this could happen in one of two ways:

- Identify someone willing to act as guardian of property, and apply through the courts to have them appointed as such.
- Request that the Office of the Public Guardian and Trustee (OPGT) be appointed as legal guardian for property.

Eva is aware of these options, and she isn’t thrilled about either of them:

- She thinks it would be unfair to ask Agnes’ godmother to step in as guardian, as this would mean asking her to take on significant legal responsibilities. Applying for guardianship is also quite expensive, with costs sometimes reaching above \$10,000. This is money that Eva doesn’t have, and which she would rather invest in her daughter’s future if she did have it.
- She doesn’t want the Public Guardian and Trustee to have control over finances, because she worries that Agnes’ needs will get lost in a large bureaucracy – a reasonable fear, given recent findings of the province’s Auditor General.<sup>1</sup>



In any case, applying for guardianship to manage a single financial program is a solution that is vastly out of proportion to the problem. There is a better solution that avoids the cost and headaches of guardianship, which we detail below (in brief, Agnes should be able to appoint her Henson trustee as her RDSP legal representative).

### ***Deborah, Sheila, and Matt***

‘Sheila’ is 70 years old, and her husband ‘Matt’ is 69. Their daughter, ‘Deborah,’ is 32 and lives in a studio condo apartment about a half hour away from them (names have been changed to protect anonymity). Sheila and Matt recently sold their family home and moved so they could be closer to their daughter.

Deborah has an intellectual disability, and lives independently with support from her mom and dad. They take her home-cooked meals on a regular basis, help her to understand bus schedules, and generally assist her when she needs support and advice. In particular, she needs help managing her finances, including income from ODSP and Passport, and managing her Registered Disability Savings Plan (RDSP) and a Henson Trust set up in her name.

Matt is plan holder for Deborah’s RDSP, and this will transfer to Sheila if he becomes unable to manage it. However, the family is worried about the future – since Deborah has no siblings and no spouse, under current rules (where only a parent, spouse, or sibling can act as plan holder without becoming a guardian or attorney for property) there will be no one to act as plan holder once her parents pass on.

Matt thinks it’s ridiculous that he and Sheila were able to appoint a trustee for Deborah’s Henson Trust (which is legally overseen by Deborah’s cousin), but the same person (or another person) can’t be appointed as RDSP plan holder.

Deborah is in a good and stable situation, and wants her life to stay the way it is. She has pretty simple needs. She’s a night owl, and likes talking to her friends and gaming online in the wee hours. She likes going to movies, and wants to travel more. Luckily she has several people close to her who can help maintain the stability that her parents have helped her create.

If changes are not made to the RDSP program in Ontario, all of this will be at risk. Without anyone to act as plan holder, guardianship would be the only option for maintaining clear control of the RDSP once Deborah’s parents pass on. There is a strong chance that it would be the Public Guardian and Trustee (PGT) that would need to step in, in which case someone Deborah might not ever meet would have control over her financial decisions.

## ***Robert and Emily***

‘Emily’ is a health professional in southern Ontario, a child of immigrants who moved to Canada with very little and founded two successful businesses. They are a proud family and have worked hard to provide for themselves and contribute to their community.

Emily’s brother, ‘Robert,’ is 51 years old (names have been changed to protect anonymity). He has an intellectual disability and lives in his and Emily’s childhood home with his elderly father. He loves hanging out with his dad and going out with friends and relatives for coffee, and he is very demonstrative to those around him. While he doesn’t use spoken language, he understands both English and Italian, and communicates with facial expressions, sounds, and gestures.

The family has set up a Henson Trust for Robert, with Emily acting as trustee. They have also contributed to a Registered Disability Savings Plan (RDSP) for many years. Robert’s dad is currently acting as RDSP plan holder, and Emily will soon take over this role thanks to recent federal changes that allow siblings to act as plan holders.


This seems like a stable situation. But what happens if Emily becomes unable to act as RDSP plan holder? They have no other siblings, and thus no one else (aside from the Public Guardian and Trustee) to fill this role. Robert would likely not be considered capable of granting Power of Attorney for property; even if he was, this would be an overbroad solution to a narrow problem.

Emily and Robert’s story brings attention to the reality that stable situations can quickly become unstable. Robert’s rights and finances are protected now – but what if Emily loses capacity? What about people who have siblings who are unwilling to act as RDSP plan holder? Despite recent federal changes that allow for siblings to become plan holders, hundreds (if not thousands) of RDSP beneficiaries will still be at risk once their aging parents become unable to support them to manage their finances.

## ***Denise and Marcus***

‘Denise’ is a financial professional in the Grey-Bruce region of Ontario. Her son ‘Marcus’ has been diagnosed with schizoaffective disorder, which is a combination of schizophrenia and depression that affects a person’s thoughts, behaviours, and communication. Marcus has a history of substance use and impulsive spending, and Denise took on the role of RDSP plan holder in order to protect his RDSP funds.

Denise is 68 years old and starting to worry about what will happen when she is no longer able to act as plan holder. Marcus has a sister who lives in the United States, but his RDSP provider will not allow a US resident to become plan holder. With no other parents or siblings, and no spouse, there is no one else in line to manage the RDSP when Denise



becomes unable. Denise is decidedly against the Public Guardian and Trustee taking control of Marcus' finances, given that body's unmanageable caseload and lack of personal connection to the people its case managers are responsible for.

This situation is made more difficult by the fact that Marcus does not have a strong support network around him. He finds it very difficult to live with other people, pushes those close to him away, and can be violent at times. He resists help in general, and the imposition of authority and structure can have a negative impact on his already disordered mental health.

In addition to the RDSP, Denise has set up a Henson Trust to protect Marcus' assets. Denise and her sister have each set aside funds for Marcus in their respective wills, and Marcus' cousin will act as trustee for both estates, as well as for the Henson Trust.

Denise's first wish is for her daughter to take over as RDSP plan holder. If this is not possible, the next best option would be for Marcus' cousin to take on the role. Unfortunately, a combination of bank bureaucracy and government policy has closed off both of these options. Despite doing all the right things, she is stymied by policies that fail to account for the full range of family situations and that leave her son's future in doubt.


## The Solution

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The families profiled above are not alone. Many Ontario parents who have opened an RDSP for children with disabilities are realizing that federal and provincial governments have left this serious gap open for sixteen years – a completely unacceptable period of time. While some provinces and territories have made changes that increase RDSP management options (most notably British Columbia with the Representation Agreement Act, and Newfoundland & Labrador with the Enduring Powers of Attorney Act), Ontario has not.

In its 2023 budget, the federal government said this:

*“Since the introduction of the Qualifying Family Member provision in 2012, the federal government has maintained that this provision is intended as a stopgap for provinces and territories to develop more appropriate, long-term solutions to address RDSP legal representation issues for persons with disabilities. While most provinces and territories have made significant progress, others have not. The government continues to encourage provinces and territories that have not already done so to address issues surrounding guardianship for persons with disabilities.”*



With people and families like those profiled above in mind, Community Living Ontario is making the following recommendations to Ontario's Attorney General:

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.
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 Public Guardian and Trustee.

# Notes

1. In a recent report, Ontario's Auditor General found that, when asked about the well-being of clients, about 20% of Public Guardian and Trustee caseworkers "either did not feel confident or did not know, 23% did not take a position, and 40% did not answer the question."
2. Ontario's Auditor General found that, though PGT policy requires that staff visit all clients within twelve months of coming under guardianship, half of those under the agency's care had never been visited in person. The PGT does not require that staff make annual visits to people whose finances they are controlling. Between 2013 and 2018, less than 15% of clients received an in-person visit.

**For more information, please contact:**

**Shawn Pegg**

Director of Social Policy & Strategic Initiatives  
shawn@communitylivingontario.ca



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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