For those parents who have a disabled child, planning for that child is of utmost importance to them. Usually the lawyer is not consulted about planning for the disabled child during the parents’ lifetime. However, the lawyer is consulted when preparing the parents’ wills for the disabled child. The lawyer preparing wills for these parents must have a good understanding of the legal and tax implications of such planning.

When a child has a disability, the lawyer must know the nature of the disability, the quality of life that the child can enjoy and the likely lifespan of that child. This information is helpful in determining the type of support to be provided and who would be a good choice for executors and trustees. It is also helpful to know whether the child receives the benefit of government programs and what assistance these programs provide.

When preparing wills for parents who have a child with a disability, one must be knowledgeable of the provisions of The Dependent’s Relief Act, 1996 (hereinafter called the “Act”). The definition includes a child under 18 or a child 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 ought to receive a greater share of the deceased’s estate than he or she is entitled to without an Order.

The Act provides that a dependent can make a claim against the estate being the property which the deceased has power to dispose of by will less debts and expenses. The Act does not provide for a claim against assets such as joint property and named beneficiary products.

Usually on the first death of a parent of the disabled child, that deceased parent leaves their estate to his or her spouse. The surviving spouse often times is the surviving parent of the disabled child and usually a claim is not made by a dependent on the first parent’s death. In this circumstance, the surviving spouse will still need to make provision under the Act for the disabled child. When the last surviving parent dies, the Act becomes more important and provision must be made for the dependent child.
If reasonable provision is not made for the dependent child, an application can be made by the dependent or by someone acting on behalf of the dependent to the court for an order to provide reasonable maintenance for the dependent child. Often times the person acting on behalf of the dependent child is The Public Guardian and Trustee for Saskatchewan.

It has been generally accepted by The Public Guardian and Trustee that provision has been made for a dependent child if the dependent child benefits similarly in amount to the non-dependent children of the deceased. For example, if there are three children and one-third of the estate is for the benefit of the dependent child, this would be sufficient provision.

If the deceased leaves property directly to the dependent child, numerous problems are created. Firstly, other than the small exemption allowed under *The Saskatchewan Assistance Act*, if the disabled child receives property directly from the deceased’s estate, this would disentitle the child to Social Assistance. Secondly, often times a disabled child is unable to manage property because of mental incompetence. A property guardian would need to be appointed under *The Adult Guardian and Co-Decision Making Act*. This application is time consuming and incurs unnecessary legal expense.

As a solution to these two problems, it has become common practice to set up a discretionary trust under the will for the disabled child. This discretionary trust gives the trustees full discretion as to what capital or income to provide for the child with a disability. The trustees of the trust provide extras to the child with a disability from time to time which would not disentitle the child to Social Assistance.

The Public Guardian and Trustee’s primary concern has been that a dependent child is provided for and a discretionary trust has been found acceptable. A discretionary trust set up in the will for the child avoids the need for a property guardian application. The child can also remain on government assistance thus not depleting the trust fund established for the child.

The problem with a discretionary trust is that the trustees are somewhat limited in what they can do in assisting the child. If they provide an extra such as buying a new wardrobe for the child, they may offend the provisions of *The Saskatchewan Assistance Act*. A trustee must be
knowledgeable as to what extras can be provided without offending *The Saskatchewan Assistance Act* eligibility rules.

The government recognizes that Social Assistance benefits can be supplemented if an Order is obtained pursuant to Section 9 of the Act. A trust fund can be established by this Order. The regulations presently allow a trust fund to be established to a maximum of $100,000.00. Payment to the dependent child of capital or income of the trust is not considered an asset or income of the dependent for the purposes of the dependent’s eligibility for assistance.

I like to plan wills such that the executor could apply for a Section 9 trust. Unfortunately the trust fund is only available where reasonable provision has not been made for the dependent child. Secondly, the application can only be made by the dependent child or someone acting on the child’s behalf. It appears that for a planned will which makes reasonable provisions for a dependent child, such a trust fund is not available.

It would be beneficial if the Act was amended so an executor could apply for a Section 9 trust fund for the dependent child. Extras could then be provided for from the discretionary trust without offending assistance eligibility.

A planned will which makes provision for a disabled child appears to be a disadvantage in utilizing the Section 9 trust fund. Perhaps the will should suggest that the executor agree to an application by the dependent for this trust fund to be set up under Section 9. The will could state that the trust fund be a segregated fund under the discretionary trust. If this could be accomplished, the executor could allocate income and capital out of this trust fund without offending *The Saskatchewan Assistance Act* eligibility rules.

Once it has been decided to set up a discretionary trust for the dependent child, consideration must be given to how it is funded. The testator may have insufficient assets available to fund the trust. One option is the trust be funded by life insurance.

Another consideration to funding the discretionary trust may be the surviving parent’s registered retirement savings plans and/or registered retirement income funds. The Federal *Income Tax Act,*
Section 60(l) allows for a rollover of these savings plans to a dependent child with mental or physical infirmities if these funds are transferred to the child’s R.R.S.P. or used to purchase a life annuity. A recommendation has been made to the government to review these rules to allow more flexibility in respect of financially dependent children and that a discretionary trust be permitted in these circumstances.

We need to consider whether or not the will should be instructing an executor to use registered retirement savings plans and registered retirement income funds to fund the child’s R.R.S.P. or acquire an annuity for the child. It would only make sense that the government allow a discretionary trust be the recipient of annuity payments as many a financially dependent child is incapable of managing an annuity. In addition, annuity payments would reduce the amount of assistance available to that child unless received by a discretionary trust.

The Minister of Finance has recommended that the *Income Tax Act* be amended to allow a tax-deferred rollover of R.R.S.P. or R.R.I.F. proceeds to acquire an immediate life annuity under which a trust is the annuitant. The child must be financially dependent by reason of physical or mental infirmity upon the deceased and that the child must be the sole person beneficially interested in payments made under the annuity to the trust.

In summary, future will planning for the disabled child will involve considering making use of Section 9 of the Act and also monitoring and adapting to the Federal *Income Tax Act* as it relates to rollovers of retirement plans of a parent to a dependent child.

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