**Homeownership: When your Son or Daughter has a Development Disability**

By: Halldor K. Bjarnason Barrister & Solicitor, Vancouver, BC November, 2020

Halldor is a lawyer in Vancouver and has been practicing for about 30 years and mainly works with families who have special needs kids. Advising on buying a home for your family members with disability is a part of his practice.

If you’re thinking about buying a home for your son or daughter you need to think about the following questions:

**1) Why?** What do you want to accomplish? What can OWNERSHIP accomplish that renting or government subsidized care can’t? Why are you buying a home? This is a key question. If you can’t answer this, then home ownership might not be the best option for you.

This is a crucial question. Given the complexities/cost of home ownership, unless you’re 100% certain of your objectives, ownership is probably not the right option for you.

**2) How will your son or daughter’s mental capacity affect ownership?** Is your family member legally capable of signing a Purchase & Sale agreement? If not, do they have a court appointed decision-maker (ie. a Committee?)

The key question is what is your son or daughters mental capacity and how will it affect home ownership. Are they capable of signing a purchasing agreement, if not, you may have a problem. You may need to go to court to get a court appointed decision make; ie. a Committeeship.

On that point, it’s a good reminder representation agreements cannot be used with respect to real estate. Many parents believe that they can, but unfortunately, under rep agreement regulations, rep agreements are explicitly excluded from dealing with real property. That is not an option.

**Special note re Representation Agreements:** Rep Agreements are useless with respect to homeownership. Section 2(2)(c) of the *Representation Agreement Regulation* [B.C. Reg. 162/2011]**, specifically prohibits Rep Agreements from being used to buy or sell real property.**

**3) Are you aware of the income tax implications?** The capital gains taxes on real estate can be VERY high – especially in the Lower Mainland. While the Principal Residence Capital Gain Exemption [“PRCGE”] applies to your own residence, it may not apply to your son or daughter’s home. Have you considered the taxes that may be payable – even if the home is not sold? (Ie. If held in a living trust.)

The problem is, changes in various Canadian laws in 2016-2017 have considerably reduced the number of realistic home ownership options for families. Many of the home ownership strategies that worked before 2017 don’t work today. The following covers many of the different home ownership options open to you.

Below are some of the different home ownership models and the pros and cons of each – why they might/might not work. There are many home ownership models that work, some better than others, but none of them are perfect. You need to look at your own situation as to what would work best for you.

**TYPES OF OWNERSHIP:  
In your Son’s or Daughter’s Name:**

The property is registered in the name of your son or daughter. (This is the model that parents typically mess up the most – mainly because it SEEMS simple!)

**PROS:**

* -  No capital gains taxes, as the PRCGE applies

However, there are a number of problems.

**CONS:**

* -  If deemed to have full mental capacity, your son/daughter can give away/sell the property whenever they want, to whomever they want.
  + they can give away their property to whoever they want whenever they want. Halldor has seen people get their properties stolen, so if your son or daughter is susceptible to persuasion, this model may be a real problem.
* -  If not deemed to have full capacity (by the lawyer/notary assisting with the sale), the property can’t be sold without a Court Order (and a Committeeship)
* Upon your son’s/daughter’s demise, it becomes part of their estate, and attracts probate fees. Does your son/daughter have the legal capacity – “testamentary capacity” – to do a will? If not, then there is an issue of who gets their property when they pass on.

**In your Name:**

The property is registered in your name.

**PROS:**

* -  Son/daughter has no control over the property, so they can’t give away.
* -  While you’re alive, easy to sell.

**CONS:**

* -  Unless you also live in the property – full capital gains taxes are payable upon either the sale or your death. Does your estate have the available funds to cover the tax liability? (If not, the home may need to be sold on your demise.)
  + Capital gains taxes equal about 26% of all gains. In the Vancouver-area, over your kid’s lifetime, there can easily be a property value increase of $200K - $400K, necessitating that the home be sold to pay taxes.
* -  What happens to the home when you die? (A myriad of estate issues, such as: capital gains taxes owing, probate fees, estate challenges by other sons/daughters, review and challenges by the Public Guardian and Trustee, etc.)
  + Probate fees will be owed--probate is going to take a percentage of the value of the home.
  + There may be estate challenges by your other children or spouse, as well, it may be reviewed and challenged by the PGT. Lots of potential legal issues involved.
* Owning the home in your own name is a possibility, but may be a lot of issues when you pass on.

**A Percentage In your Name:**

Part of the property is registered in your name, part in your son or daughter’s name – as “tenants in common”. The worst of both worlds!

Halldor has never understood this one. Some parents have put 99% in their sons/daughters names and 1% in their own name. It is called “tenants in common”, and in his opinion, it gives you the worst of both worlds.

**PROS:**

* Son/daughter only has partial control over the property, so they can’t give away. (However, their creditor/spouse could still force the sale of the property.)
* Partially and *possibly* fully exempt from capital gains taxes., but this is open to speculation.

**CONS:**

* Unless you, as the parent, also live in the property, a portion of capital gains taxes *may be* payable upon either the sale or your death.
* If your son/daughter is not deemed to have full capacity (by the lawyer/notary assisting with the sale), the property can’t be sold without a Court Order (and a court appointed decision-maker: ie. a Committeeship)
  + Committeeship applications are very expensive. And very intrusive because you get the PGT involved forever.
* What happens to your share when you die? (A myriad of estate issues, such as: capital gains taxes owing, probate fees, estate challenges by other sons/daughters, review and challenges by the Public Guardian and Trustee, etc.)
  + There are still the same estate issues as having it solely in your name.
* If held in joint tenancy (as opposed to tenants-in-common), upon your demise, it has all of the problems of your son/daughter owning it, as listed above.
  + Ie, it goes to the survivor. So, if you pass, it goes to your son/daughter owning the home on their own and then you have the issues from the first example of having it in their name that we started with.

**In the Name of a Living Trust:**

By way of background, a “Trust” is a medieval, very useful, common law concept from the 1200’s, used to protect people’s property while they were fighting during the Crusades. In a Trust, there’s a separation between the “legal” and “beneficial” ownership of the property. A “Trustee” has legal title to the property, while the “Beneficiary” is the only person who can use the property. In our situation, it permits someone with full mental capacity – such as a parent, sibling, friend, trust company – to legally own the property, while your son or daughter is the beneficiary, and gets to live in/use the property.

A “living trust” is a Trust, which is created while the “Settlor” (or Creator) is still alive. This is different than a “testamentary trust” which is created, via a will, after the Settlor dies.

It is important to understand the tax implication and ownership implications. Ownership via a trust is different then just owning outright.

When a Living Trust is used to hold a property:

**PROS:**

* Son/daughter has no legal control over the property, so they can’t give it away.
* As the Trustee has full mental capacity, no issues with selling.
* The death of a parent or the son/daughter has zero impact, as the property is not part of anyone’s estate.
* The Trust Deed can specify what happens to the property when your son/daughter passes on. It makes distribution after death very easy.

**CONS:**

* Since 2017, full capital gains taxes are payable upon the sale of the property, as a living trust no longer qualifies for the Principal Residence Capital Gains Exemption. This is a problem.
* Income within living trusts is taxed at the highest marginal rate – currently in BC, about 49%. A very high tax rate: more than double the base tax for an individual. It is a very high tax.
* Taxes are even more problematic in that a living trust is deemed to dispose of its assets every 21 years. Hence, capital gains taxes MUST be paid every 21 years, whether the property is sold or not. In a real estate market like Vancouver, this can result in a very high tax bill – ie. $100K or more – payable every 21 years. If the trust doesn’t have significant funds in addition to the property, the deemed disposition could force the actual sale of the property. This defeats the whole purpose of buying a home in the first place.

**In the name of a Qualified Disability Trust (“QDT”):**

The property is held by a trust created within your Will, but it becomes a QDT if your son/daughter has a disability Tax Credit. And by becoming a QDT, it gets a much lower tax rate than most other Trusts.

**PROS:**

* Son/daughter have no legal control over the property, so they can’t give away.
* As the Trustee has full mental capacity, no issues with selling.
* The Trust Deed can specify what happens to the property when your son/daughter passes on.
* No capital gains taxes, as a QDT can utilize the PRCGE.

**CONS:**

* As a parent, you need to be dead to utilize a QDT.
* Your son/daughter can only have one QDT in a given tax year, so if as a parent, you’re divorced (with two parents creating QDTs), or have grandparents who also set up a QDT, it can get complicated.
  + You have to pick one trust per year, so the property may not get the capital gains exemption.
* As the property (or funds to purchase the property) is initially part of your estate, it’s open to legal claims by other beneficiaries, probate fees, etc.

**In the Name of a Living Trust, or a QDT, with a subsequent Life Interest to your Son or Daughter:**

This is the most expensive model. It CAN be brilliant, or it can be a disaster, depending on your circumstances. In this model, the home is held a trust, and then the trust registers a subsequent “life interest” with the son or daughter’s name on the property.

You can create this while you are alive, or through your will. You put the home into a trust and then the trust gives a life interest to your son or daughter. This is the most expensive model because there are two transactions. One from the home to the Trust and the second from the Trust into the Life Interest.

**PROS:**

* + No capital gains taxes, as the son/daughter qualifies for the PRCGE, because it is a primary residence
* If the son or daughter has full mental capacity, easy to sell.
* Little risk of son/daughter “giving the property away”, because a scam artist/creditor would not want a Life Interest – too hard to sell.
* As the property is ultimately distributed, as per the trust deed, so no/few estate issues. Upon the son’s/daughter’s death, it just reverts to the Trust.
* Avoids the 21-year “deemed disposition” because the property is temporarily outside the trust.

**CONS:**

* If son/daughter is not deemed to have full capacity (by the lawyer/notary assisting with the sale), the property can’t be sold without a Court Order (and a Committeeship). This can be expensive/stressful.
* Requires two property transfers, so the Property Transfer Tax must be paid twice. As a result, this model is expensive. However, you are saving a lot of income tax, so it can still be cost efficient.

**In the Name of a Microboard (or other non-profit society):**

Property is held in the name of the son’s/daughter’s microboard or other non-profit society

**PROS:**

* Son/daughter has no control over the property, so they can’t give away.
* As a non-profit is deemed to have full mental capacity, no issues with selling.
* No estate issues, as the property is not part of anyone’s estate.
* No capital gains taxes, as non-profit corporations do not pay income tax.

**CONS:**

* As all non-profit society assets must legally go to another non-profit, family loses control of home upon son/daughter’s demise. The property cannot go to another family member.
* You cannot get the property back, so you can’t give it to your other kids.

**In the Name of a Corporation:**

Property is held in the name of a business corporation. This is the worst option from an income tax perspective.

**PROS:**

* Son/daughter has no control over the property, so they can’t give away.
* As a corporation is deemed to have full mental capacity, no issues with selling.
* No estate issues, as the property is not part of anyone’s estate – the proceeds ultimately pass to whomever owns the corporation’s common shares.

**CONS:**

* SERIOUS taxation issues. Capital gains are deemed to be “passive corporate income” and are hit with tax penalties over and above regular capital gains taxes. You will be bleeding taxes.

**In the Name of a Charity:**

Property is placed in the name of a charity, with a leaseback option.

**PROS:**

* Son/daughter has no control over the property, so they can’t give away.
* No estate issues, as the property is not part of anyone’s estate.
* No capital gains taxes.
* Get a tax receipt for a portion of the value of the property.
  + So, depending on your child’s age, and the value of the property, you can potentially get a pretty big tax receipt for it.

**CONS:**

* Family has no control over ownership, so property can’t typically be sold/replaced if it is no longer suitable for the son/daughter’s needs.
* As family loses home upon son/daughter’s demise (reverts to the charity), it cannot go to another family member.

**Summary**

Ultimately, there’s no “perfect solution”, but some options have fewer negative consequences than others. If/when the Federal government chooses to reinstitute the PRCGE for Living Trusts, this may go back to being the superior option.

With the 2017 changes in the tax laws, almost every option has serious income tax implications. Several options have more negative consequences than others. If/when the federal government reinstitutes the PRCGT for living trusts, these may become good options again. Unfortunately, as long as you have to pay tax on the capital gains, living trusts are a real obstacle unless you have a lot of other assets in the Trust. The key is always to get proper legal and tax advice before buying a home.

**Always get proper legal and tax advice before using any of the above options. Individual circumstances can always affect the outcomes.**

**The foregoing is intended as information only, and does not constitute legal advice. As specific facts can affect the legal outcome, always consult with a lawyer and accountant to determine how the law affects your situation. For further information, please visit our website at:** [**www.Accesslaw.ca**](http://www.Accesslaw.ca)**.**

**Questions and Answers from the Learning Explorations and Family Zoom**

**Can a person on PWD own his or her own home?**

Yes/maybe. The home isn’t considered an asset when a person on PWD lives in it. The challenge is that if you ever sell it, as it is probably worth more than the $100,000 personal exemption limit, you will be cut off of PWD for having too many assets. Unfortunately, if you give the money back to your parents or whoever, you are deemed to be disposing assets. As a result, you will be cut off PWD, and in some cases, risk being charged with Fraud. So, yes, you can own in your own home and remain on PWD, but there are consequences if you need to sell it.

**What is the consequence of owning a home without the requisite mental capacity?**

There is no problem at all with owning, but a huge problem when you try to sell or mortgage. When you go to sell it, if it is in your kid’s name and they do not have full mental capacity, how can they sign the purchase/sell agreement? Very few lawyers are willing to risk being disbarred by having someone sign without mental capacity. So, basically, when your son/daughter owns the property it is no problem, it is when you go to sell it that you have major problems.

**Should you own the home before the PWD application so that you don’t have to say how much cash you had before buying the property?**

It doesn’t matter. Basically, owning a home is an exempt asset, so you can own it before or after. The only issue is, if you are buying the home after you are on PWD, can you explain to the Ministry where the money came from? When you apply to PWD, you must disclose all of your assets: every penny you have. If you have too much cash, you won’t qualify for PWD, and then if you get the cash afterwards, you have to explain where the cash came from.

**The PWD rental allowance may pay for the mortgage in some places but when a one-bedroom apartment is so costly, you do not have enough money to get an apartment even to rent? Where do people get money from in order to buy a home?**

We know there are problems with PWD and saving money. People get money from their parents, inheritances, etc to buy homes. It does take a lot of cash to own a home.

**Will owning a home impact on the monthly amount? How will they correct the situation?**

If the impact you are talking about is owning a home and how will that will affect their shelter allowance, that answer is easy. When you are on PWD, an individual gets up to $375 a month shelter allowance. You use it or lose it, but it is to be used for shelter-related costs, so with the shelter allowance, you can use it to pay your mortgage, to pay hydro, to pay for telephone, property taxes, as long as it aligns over 12 month period, you can justify paying $375 a month on shelter costs. Hence, you can own a home and keep getting the shelter allowance.

**Is there a way to advocate for home ownership for our family members?**

The Canadian association for Development Disabilities are trying to organize advocacy for home ownership. It is in the planning stages and it is not developed yet.

**Is there a how to book on how to buy a home for their sons of daughters?**

PLAN had manual on how to own a home, the problem is that was 10 years ago and it is completely out-dated. Hopefully, the CADD will develop a pretty comprehensive website.

**Can we buy a house for both of our adult children with disabilities to live in? And, when she we start planning this?**

Planning can begin right now. However, putting two kids in a home brings up other questions. Can your kids stand each other, or are they going to end up strangling each other being under the same roof? What happens if they have different life choices? What happens if one kid gets married and has kids? Are they going to be happy living under the same roof when there are a whole bunch of small children living there? If the two kids are living in the same house, what happens when one wants to move out? Can they force a sale of the home?

I have had several parents come to me who wanted to create Trusts, with the goal of procuring a home for both kids, where both kids can be happy living in the same home for their joint lifetimes. It may work for a couple of years, but people go off in different directions, they grow, and creating a Trust that has one home with two kids living in it is almost always a recipe for disaster. At some point, sooner or later, they will go in different directions. The problem is, there is so many variables that can be there. I can probably spend 3 hours describing all of the different variables that might happen with two kids in the same home owned by a Trust. It is a pretty complex issue and I would not recommend it, as it probably won’t work.

**Co-living with other families. How does it work?**

In a co-op or a strata type situation you have multiple families living together. It is a corporate environment, where people own shares. Each different family own shares in the housing complex. It would take work to figure out how people would share the common property. Another issue is, would be there would be people with special needs living in the environment? If so, you want to be careful with who can buy into it. You want to be able to select who can live in that environment. However, over time, people can’t get out and they can’t share so they’re often not interested. There are a number of co-op or strata home living arrangements, but it takes a lot of work to develop it into a comfortable environment.

**Can a QDT add interest?**

When the QDT purchases the property, it pays the property payment taxes during that purchase. Then, if the QDT gives it to your son/daughter as a life interest, it needs to pay property transfer tax again, so then you pay it twice. Then when you want to sell the property, you have the interest from your son/daughter back to the Trust. That is one property transfer tax, then the Trust to the purchaser, then that is a second property transfer…so you are paying twice at each end.

**Can someone make a Will for another person who does not have mental capacity? If a person has comitteeship is that the only option to for your family member to make a Will?**

No, having committeeship does not give you the power to help the Adult make a Will. A person with a Committee does not have full mental capacity, which typically means they do not have testimony capacity. There is a test for testamentary capacity which must be met to do a Will.

**We bought the house in our name and left it to the Host Agency as a charitable donation upon our death, and then the donation credits could offset the capital gains taxes. Does this still work as a strategy?**

I am unsure but did the Host Agency also become liable for the unpaid portion of the mortgage? I do not know if you can give the host agency the liability for the mortgage.

**Can a parent purchase a home for their special need child who is on PWD and would not reduce their PWD benefits or denial of PWD status? Can it be treated as a gift from parent or family when the parents are still alive?**

This is not a problem. One of the exemptions under the PWD Regs is home ownership. If they are living in their own home, then they will still qualify for PWD. However, the problem is if they ever move into a different home or specialized care, owning the home doesn’t work – they will have a very large asset that will cause them to lose PWD. Then if they try to give it away they will get penalized for disposing of assets. If they are living in the home they are fine but the moment they move out they have problems.

**If not for above what is the alternative?**

The home stays in the parent’s name and, after the parent’s demise, is held in a trust within the parent’s Will. However, you then have the problem of the estate paying capital gains taxes – as outlined above.

**Is the rule of 21 years for CRA capital gain under the “Living Trust” only or does that include the “Hansen Trust” as well? And, is the federal government looking at reinstating the PRCGE for living trusts?**

The 21 year rule does not have apply to a Hansen Trust (assuming it’s a QDT) If it is a QDT then it does not apply. But if it is a Hansen Trust that does not meet the criteria then yes, you are applicable for the 21-year rule.

With the Federal Government, there are many loops and there is lobbying to the government to change the rule back. However, the federal government makes a lot of money by not allowing trusts to hold properties tax free. So, the government is pretty hesitant to change that law back. There is a lot of political pressure on them; but I doubt it will change in the near future.

**Why doesn't our sons and daughters qualify for more than one QDT?**

There may be multiple trusts left for a disabled loved one, but they can't be lumped together in an attempt to pay the lower tax rate. Each trust has to pay yearly income tax.

Only one QDT per year can be used, so you can have several testamentary trusts, but you can only use the QDT designation each year. With a home in one of the trusts, it probably wouldn’t make sense to switch between trusts because you would lose the capital gains exemption.

**Can an agency override a Rep Agreement? We had a health care provider say that the agency could override our Rep Agreement.**

No, the health care provider is wrong. A Rep Agreement takes precedent over the Substitute Decision-makers Act. If there is no rep agreement then you go with the Substitute Decision-makers Act, but if there is a rep agreement that takes priory.

There is the legal answer, end and then there is the practical answer. . . . Unfortunately if you have a medical professional or a caregiving professional who will not follow the RA the only real option is to get a court’s direction to follow the RA.

**My daughter is 15.5 when would be a good age to set up a trust for a child?**

If it is a part of your estate, it is as soon as your child is born. If your child is underage when you pass on, provincial law requires that your child’s share must get paid to the Public Guardian and Trustee if it is not payable to a trust.

**I really need to emphasize that every situation is different. One factor might change the entire situation. As a result, it is really important to have a legal advice.**

I am happy to get emails and give further direction. So please feel free to email me whenever: Halldor Bjarnason: halldor@accesslaw.ca