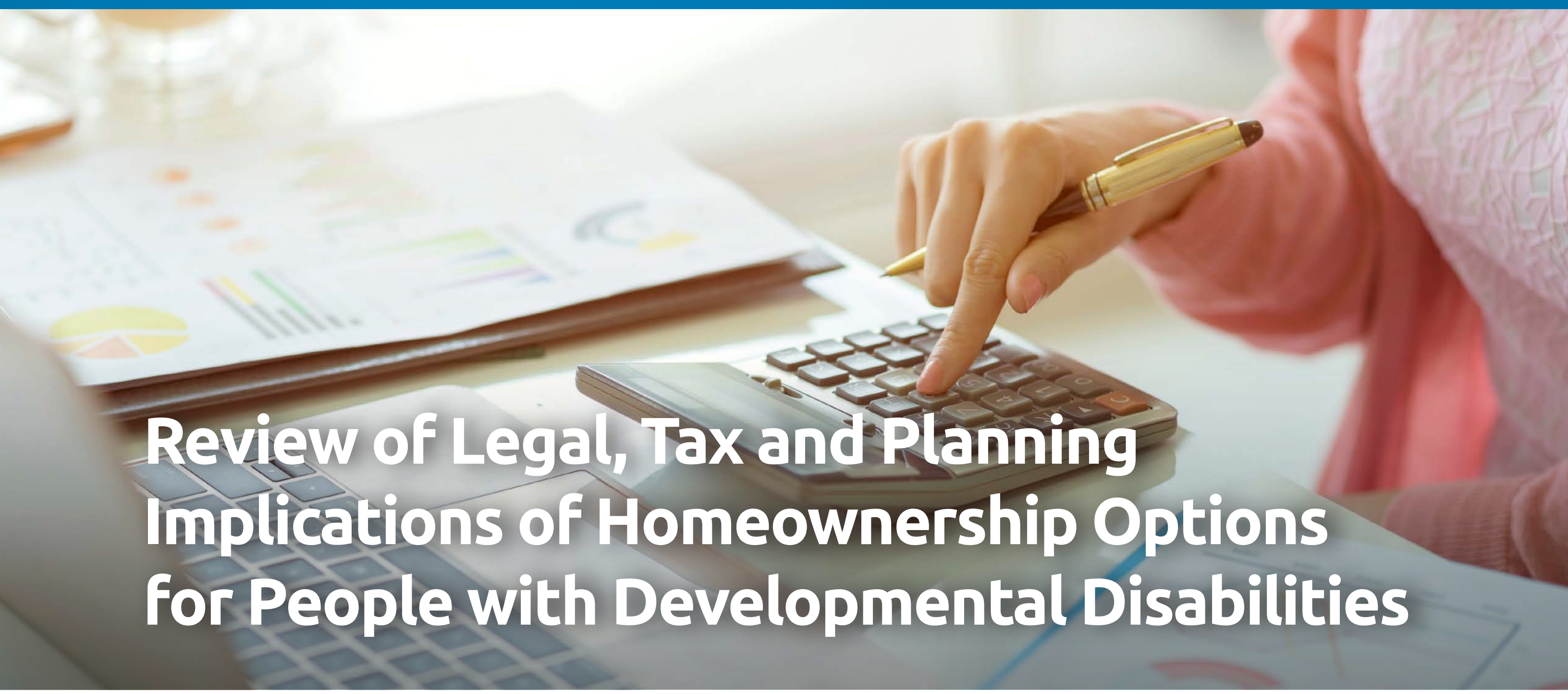
myHome
myCommunity

PATHWAYS TO HOMEOWNERSHIP



Review of Legal, Tax and Planning Implications of Homeownership Options for People with Developmental Disabilities

FINAL REPORT

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JUNE 8, 2020

POORANLAW

Ability
Tax And Trust Advisors

My Home My Community:

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NATIONAL HOUSING STRATEGY

TERMS, ACRONYMS AND ABBREVIATIONS

Beneficial interest: The right to receive benefits on assets held in a trust.

Beneficiary: The person(s) who benefits from the assets owned by the trust.

Contractual capacity: The capacity to enter into a contract.

Disability Tax Credit (DTC): A federal tax credit that helps people with disabilities or their supporting persons reduce the amount of income tax they may have to pay.

Discretionary trust: A trust where the trustee has control (exercises absolute and unfettered discretion) over the management of the assets in the trust. This is also referred to as an "**absolute discretionary trust"** or a "**Henson Trust**".

GRE: A Graduated Rate Estate is the estate upon the passing of an individual that is subject to income tax at graduated rates.

Henson Trust: A type of trust for people with disabilities that protects their right to collect social assistance. The trustee has complete control of the assets in the trust. This is also referred to as an "**absolute discretionary trust"** or a "**discretionary trust**".

Inter vivos trust: A trust where the person establishing the trust (the "settlor") is living at the time the trust is created and the trust may own assets during the settlor's lifetime.

Non-discretionary trust: A trust where the trustee has no control of the management of the assets in the trust and must adhere to the instructions established in the trust agreement.

ODSP: Ontario Disability Support Program; provincial social assistance program for people with disabilities between the ages of 18 and 65 in Ontario.

PRE: Principal Residence Exemption. Under the Income Tax Act, an exemption that refers to there being no income tax payable by an individual on capital gains triggered upon the sale of their principal residence.

Presumption of resulting trust: When a parent transfers assets to their adult child from their estate, the adult child is presumed to hold the property in trust for the parent's estate, unless the adult child can prove that the transfer was intended to be a gift.

Probate: A legal process where the estate of a deceased person is administered. It usually involves the payment of a tax associated to the assets held in an estate (i.e. Estate Administration Tax in Ontario.)

QDT: A Qualified Disability Trust, where the beneficiary of the trust is eligible for the Disability Tax Credit and subject to additional requirements referred to in section 122(3) of the Income Tax Act, and is subject to income tax at graduated rates.

Settlor: The person(s) who establishes and may contribute property to the trust for the person they intend to benefit (a "beneficiary").

Supported Decision-Making: A type of decision-making whereby people make choices for themselves, with the support of trusted family members and friends.

Testamentary capacity: The capacity to make a will.

Testamentary trust: A trust established in a will.

Trust: A trust is established when legal ownership, control and management of property is vested in one or more individuals (a "trustee") for the benefit of another individual (a "beneficiary").

Trustee: Person(s) appointed to control and manage the assets in the trust for the beneficiary.

BACKGROUND

My Home My Community: Pathways to Homeownership National Demonstration Initiative

My Home My Community ("MHMC") is a national partnership initiative of the Canadian Association of Community Living and People First of Canada and their member organizations, with the objective of building inclusive communities and better housing options for people with developmental disabilities. The MHMC is leading innovation and collaboration with partners across Canada to formulate evidence-based policy solutions; provide guidance on inclusive housing; and prototype models of inclusive housing.

Through the use of Demonstration Initiatives, MHMC is profiling innovative approaches to inclusive and affordable housing models. One such Demonstration Initiative is the *Pathways to Homeownership National Demonstration Initiative*, which brings together partners from the public and private sector to profile established and successful models of homeownership employed by people with developmental disabilities. Case studies will be used to develop knowledge dissemination products to help individuals, families, financial institutions, legal professionals and government agencies replicate and achieve proven approaches to stable homeownership.

Purpose of Report – Homeownership vs. A Home of One's Own

This report identifies three models of homeownership and their legal, tax and planning considerations for people with developmental disabilities. These models will serve as a basis for a research framework used to develop knowledge dissemination materials with respect to homeownership. "Homeownership" in this case is not only defined as holding legal title to a home, but as a means of achieving homeownership for people with developmental disabilities, given restrictive legal capacity laws and the lack of legally-recognized mechanisms to homeownership.

In addition to holding legal title to a home through sole or joint ownership, this report also considers that people with developmental disabilities may be named as "beneficiaries" or "beneficial owners" of homes, through a vehicle such as a trust. A trust would allow a person with a developmental disability to secure housing and enjoy its benefits, without having to oversee management of the property. Such a mechanism would allow people with developmental disabilities to achieve a "home of their own."

PART I: HOMEOWNERSHIP – HOLDING LEGAL TITLE TO A HOME

1. Sole Ownership

A. Overview

Similar to many people owning a home, the person with a disability (the "owner") becomes both the legal and beneficial owner of the home. The owner is ultimately responsible for all decisions in respect of the home—this may include purchasing/selling the home and the timely payment of home expenses such as maintenance, insurance, property taxes, utilities, and mortgage amounts. Even though the owner may rely upon a network of trusted family and/or friends for support, the owner is solely responsible for all decisions with respect to their home.

B. Legal Considerations

First and foremost, the owner must be considered *contractually capable*[1] to enter into contracts (as many jurisdictions do not legally recognize supported decision-making frameworks that allow for homeownership). For example, the owner must be competent to enter into buy/sell agreements or to understand and sign mortgage documents.

In addition, as the owner is both the legal and beneficial owner of the home, exposure to creditor action or domestic action on account of relationship breakdown is possible. For example, if the owner resided in a common law relationship that suffered a breakdown, the estranged common law partner could launch action against the owner and their assets (i.e. the home).

Further, as the home moves into the owner's estate upon their passing, it is imperative the owner have a properly drafted will that protects and reflects their wishes.

[1] The nature of legally recognized supports and of the duty to accommodate to enable a person to construct contractual capacity vary to some extent by provincial/territorial jurisdiction. There is no legal capacity regime in Canada which recognizes a right to support for people with significant intellectual disabilities to enable them to achieve contractual capacity, where this requires formalized supported decision making.

C. Tax Implications

Given that the owner inhabits the home on a continual basis, they may claim a *principal residence exemption* ("PRE")[2] upon the subsequent sale of the home and not be liable for taxes on any gain in value of the home during their ownership.

Anytime the owner rents a portion of their home for fair market rent, the owner must claim the rent amount as income on their T1 personal income tax return (which may or may not affect the amount of provincial/territorial disability assistance the owner may receive).

The owner may claim the PRE up to the date of their passing. Upon passing, the home is part of the owner's estate, and any gain in the value of the home, from the date of passing to the eventual sale by the estate, is subject to tax.

D. Compliance Requirements

Upon the sale of the home, the owner is required to report the proceeds of sale on their T1 personal income tax return (with the offsetting PRE).

Upon the owner's passing, the property may need to be probated (depending on all of the property in the estate).

2. Joint Ownership

A. Overview

Under a joint ownership arrangement, an individual is both a joint legal title holder and joint owner of the home. The individual and the co-owner of the home are jointly responsible for all decisions in respect of the home—this may include purchasing/selling the home and the timely payment of home expenses such as maintenance, insurance, property taxes, utilities, and mortgage amounts. Even though the individual may rely upon a network of trusted family and friends for support, the individual is solely responsible for making decisions in respect of his or her interest in the home.

[2] Under the Income Tax Act, there is no income tax payable by an individual upon the sale of their principal residence.

Oftentimes, in a joint ownership arrangement between non-family members, the co-owners enter into a joint ownership agreement. This agreement addresses issues such as dispute resolution, financial contributions, and the passing of a joint owner. For joint ownership arrangements between family members (i.e. parent and adult child), some of these issues are addressed in the parent's will.

B. Legal Considerations

As is the case of sole ownership, the joint owners must be considered *contractually capable*[3] to enter into contracts (many jurisdictions do not legally recognize supported decision-making frameworks that would allow for homeownership). Similar to sole ownership, joint owners may be exposed to legal action by creditors or upon relationship breakdown with respect to their interest in the home.

Of particular note is a joint homeownership arrangement between a parent and an adult child with a disability. Usually, a right of survivorship may apply that makes the adult child the sole owner of the home upon the parent's passing. However, depending on the financing of the joint homeownership, the *presumption of resulting trust* may apply—that is, the adult child joint owner may be presumed to hold the beneficial interest in the home as a result of a trust for the parent's estate (which may or may not be the parent's wishes). In other words, rather than being a party to joint ownership, the adult child may be presumed the beneficiary of a trust established by their parent.

C. Tax Implications

For perspective, a home is considered capital property under the Act and as such, upon the eventual sale of the home, income tax is payable on the sale of proceeds that are greater than the original purchase price of the home. However, there are exemptions to this rule; for example, if both joint owners ordinarily reside in the home, the principal residence exemption rule will apply to offset any tax liability that may arise upon the sale of the home.

What if both joint owners do not reside in the home? Often times, a parent and an adult child will be 50/50 joint owners of a home in which the child, and not the parent, ordinarily resides. In this case, upon the sale of the home, the tax liability will be calculated as follows:

[3] See footnote 1 with respect to contractual capability.

a. The parent will be subject to income tax liability on 50 percent of the amount the sale proceeds of the home exceeding the initial purchase price of the home.

b. The adult child will be subject to tax liability on 50 percent of the amount the sale proceeds of the home exceeding the initial purchase price of the home. However, since the adult child ordinarily resided in the home, they are eligible to claim the principal residence exemption for the home and not pay any tax liability upon the eventual sale of the home.

D. Compliance Requirements

Upon the sale of the home, the joint owners are required to report it on their T1 personal income tax return (with the offsetting PRE for each joint owner).

Upon a joint owner's passing, property may need to be probated (depending on all of the property in the estate).

PART II: *A HOME OF ONE'S OWN* – BENEFICIAL INTEREST IN A HOME

1. What is a Trust?

A. Overview

A trust is established when legal ownership, control and management of property is vested in one or more individuals (a "trustee") for the benefit of another individual or individuals (a "beneficiary"). In most cases, the legal relationship is established under a formal trust agreement whereby one person (the "settlor") transfers property to the trustee for the benefit of the beneficiary. For example, a parent (as the Settlor) establishes a trust and transfers a housing unit (the property) to a trusted family member or friend (as the Trustee) for the benefit of a child with a disability (as the Beneficiary).

The trust agreement sets out the terms, conditions, and authority under which the Trustee will manage the property for the Beneficiary. In all cases, the Trustee is bound by the trust agreement and has a legal obligation to <u>manage the property</u> for the benefit of the Beneficiary. In general, for legal and tax reasons, the Settlor, Trustee, and Beneficiary are different individuals (but may be the same when acting jointly with an arm's length individual). Put another way, the intent of a trust is to create a separation between the legal owner of the property (the Trustee) and the beneficial owner of the property (the Beneficiary).

There are different types of trusts depending on whether the Settlor is living at the time the trust is created and the powers given to the Trustee under the trust agreement. A trust is an <u>inter vivos trust</u> if the Settlor is living at the time the trust is created. If the Settlor has passed away and establishes a trust in their will, the trust is a <u>testamentary trust</u>.

Further, if the trust agreement or will empowers the Trustee to exercise their discretion in the management of property (i.e. amounts paid to beneficiaries, closing the trust), the trust is a <u>discretionary trust</u>. On the other hand, if the trust agreement or will does not empower the Trustee to exercise discretion (i.e. payments to beneficiaries are under strict terms), the trust is a <u>non-discretionary trust</u>.

Therefore, a trust may be either a discretionary or non-discretionary inter vivos trust (i.e. a living trust), or a discretionary or non-discretionary testamentary trust (i.e. created by a will). For example, a Henson Trust is considered a discretionary testamentary trust. A spousal trust created for the benefit of one spouse while the Settlor spouse is alive is considered a non-discretionary inter vivos trust (as the spousal trust rules do not allow for the Trustee to exercise any discretion).

B. Legal Considerations

A trust is not a legal entity; it is more of a legal tool that defines the relationship between a settlor, the trustee, and the beneficiary. As such, a properly written trust agreement (or will for a testamentary trust) with clear direction is imperative to ensure that the wishes of the settlor are followed. In drafting the trust agreement, adherence to the following is crucial:

1) The intention of the Settlor—what are the Settlor's wishes?
2) Who will be the Trustees? —consider their relationship to the Beneficiary, their competence and their willingness; should a corporate Trustee be considered?
3) Who will act as alternate Trustees?
4) Clear delegation of discretionary duties.

C. Income Tax Implications

Even though a trust is not a legal entity, it is considered a taxpayer under the *Income Tax Act* (Canada) (the “Act”) and is subject to income tax filings and obligations. Since 2016, all trusts are taxable at the highest marginal rate with the exception of two specific categories of testamentary trusts—a qualified disability trust (i.e. a beneficiary of the trust is eligible for the disability tax credit) (“QDT”) and a graduated rate estate (i.e. an estate upon the passing of an individual) (“GRE”). Both a QDT and GRE (for a maximum period of 36 months) are subject to income tax at the graduated rates.

Principal Residence Exemption

Under the Act, there is no income tax payable by an individual upon the sale of their principal residence (i.e. the principal residence exemption (“PRE”)). However, under current legislation in respect of trusts and the PRE, only a QDT is eligible to claim the PRE. This means that an inter vivos trust created to hold a principal residence for a beneficiary with a disability is not eligible to claim the PRE (which in effect would tax the trust on any gain on the value of the principal residence if it was to be sold). There may be relief from this exclusion as in a September, 2019 “comfort letter”, the Department of Finance has recommended the Act be amended retroactively to 2016 to allow an inter vivos trust to claim the PRE under certain conditions (i.e. the beneficiary is eligible for the disability tax credit, the beneficiary is a child of the settlor, no other individual other than the beneficiary can receive or obtain use of the property of the trust).

21-Year Rule

For trusts that hold a principal residence for a beneficiary with a disability, the 21 year deemed disposition rule does apply—this means that every 21 years, the trust is deemed to dispose of its property at fair market value and will need to pay tax on any accrued gains. There are planning options to mitigate this deemed disposition tax; however, these options include transferring the property to the beneficiary directly, which may or may not be the prudent strategy.

Income Attribution Rules

The attribution rules in the Act generally prevent taxpayers from reducing tax liability by shifting income (through a transfer of property) to a related family member in a lower tax bracket. With respect to a trust, under conditions where the Settlor (or a contributor) makes an additional gift or a loan to the trust, the attribution rules may apply—meaning the Settlor (not the trust) is liable for tax on any income earned by the

Trust. However, with proper planning of the trust, the application of the attribution rules may be avoided.

D. Trust Compliance Requirements

Under the Act, the Minister of National Revenue (the "Minister") requires most trusts to file an annual T3 Trust Tax and Information Return (the "T3") (with some administrative exemptions). Starting in 2021, the Minister is implementing enhanced reporting requirements (additional disclosure information) for all trusts. Within the context of a trust holding a home for a beneficiary, it is likely that the trust will be required to file the annual T3.

In addition, if a beneficiary is in receipt of provincial disability assistance, such as the Ontario Disability Support Program ("ODSP"), the province may require an annual report in respect of trust activity to enforce compliance eligibility for disability assistance (in particular, situations in which funds are contributed to the trust for upkeep and maintenance).

2. Utilizing a Bare Trust

A. Overview

In simple terms, a bare trust is a trust whereby the trustee or trustees hold property without any duty to perform except to convey to the beneficiary or beneficiaries upon demand.[4] For clarity, a bare trust is <u>really an agency agreement</u> under which the trustee acts strictly on the instructions of the beneficial owner, acting solely as agent to the beneficiary without any discretionary powers.

In *Trident Holdings Ltd. v. Danand Investments Ltd.*[5], Justice Morden, speaking for the Ontario Court of Appeal, made the distinction between an ordinary trust and a **bare trust**. He reproduced the following passages from Scott, The Law of Trusts, 4th ed. (1987):

> *" An agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary, although he is under a duty to deal with the trust property for the latter's benefit in accordance with the terms of the trust, and can be compelled*

[4] Water's Law of Trusts in Canada" 4th Edition; Waters et al, 2012; page 33
[5] (1988), 64 O.R. (2d) 65 (Ont. C.A.)

> *by the beneficiary to perform this duty. <u>The agent owes a duty of obedience to his principal</u>; a trustee is under a duty to conform to the terms of the trust.*
>
> *A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property that he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation that predominates, and the principles of agency, rather than the principles of trust, are applicable."*

Put another away, in bare trust relationships, under which a trustee holds legal title to property, but with no discretionary power or responsibility (and acting solely on the instructions of the beneficiary), the trustee is acting merely as agent for the beneficiary. In this type of trust arrangement, the principles of agency predominate the principles of trust.

In respect of a bare trust arrangement in which the trustee holds the home for the beneficiary with a disability, even though the legal title to the home is held by the trustee, the true beneficial owner is the beneficiary, who has full control and decision making in respect of the home under the bare trust agreement. The trustee acts merely as an agent for the beneficiary and holds no power with respect to the home.

In recognition of bare trust arrangements, recent changes to land transfer conveyance legislation in Ontario and British Columbia have now included disclosure requirements of beneficial owners of property (under the *Land Owner Transparency Act*, B.C. is establishing a public registry of beneficial owners of property situated in B.C.)

B. Legal Considerations

Similar to all trusts, a bare trust is not a legal entity but simply a legal tool that defines the relationship between the settlor, trustee, and beneficiary. However, the nature of bare trust arrangements is that the agreement is more like an agency agreement—the trustee acts only as agent for the beneficiary.

As a matter of good practice, the drafting of the bare trust agreement must explicitly state that legal title to the property (i.e. the home) is held by the trustee acting only in the role as an agent for the beneficiary. In addition, the agreement should also state (i) that the trustee has no authority, responsibilities, or power in respect of the decision making for the property, and (ii) the trustee acts only on instruction from the beneficiary and those instructions must be carried out.

C. Tax Implications

A bare trust is not considered a taxpayer under the Act, and accordingly, the Minister disregards a bare trust for income tax and GST/HST filings and tax obligations (i.e. no annual T3 is required, nor is there application of the 21 year deemed disposition rule).

The beneficiary, as the beneficial owner, is responsible for reporting any income earned in the bare trust. This income is reported on the beneficiary's T1 personal income tax return. However, as the beneficial owner, the beneficiary is eligible to claim the PRE on a home held in a bare trust.

D. Compliance Requirements

A bare trust does not have annual reporting requirements to the Minister.

PLANNING CONSIDERATIONS

In evaluating homeownership options, people with developmental disabilities, their family members and support network should consider factors that may influence their choice for homeownership. In other words, in order for people with developmental disabilities to consider homeownership, factors that may enhance or eliminate homeownership options must be considered when pursuing homeownership under one of the three models. The following five factors should be considered in deciding which model of homeownership is the right option for people with developmental disabilities:

1. **Contractual Capacity**

The contractual capacity of a homeowner with a developmental disability will directly impact which option for homeownership may be implemented. For example, if the homeowner is deemed to be incapable of signing a contract , it is unlikely the person could own the home as the sole owner, as a joint owner, or under a bare trust agreement with a family member. The only homeownership option in this case would be for the home to be held in a discretionary trust arrangement in which the person is a beneficiary.

The determination of contractual capacity varies across the country, with reference to provincial statutes. In Ontario, for example, contractual capacity is determined by the person's ability to (i) understand a contract and (ii) appreciate its effect on a person's interest. The province's *Substitute Decisions Act* (the "SDA") presumes that anyone over the age of 18 has legal capacity, including contractual capacity, unless there exists clear evidence to suggest otherwise. When entering into a contract, subsection 2(3) of the SDA provides that a person is entitled to rely on the presumption of capacity with respect to another person, unless there are "reasonable grounds to believe the other person is incapable of entering into the contract."

In Ontario, a person with a developmental disability is therefore presumed to have contractual capacity, unless there is evidence to suggest that they lack the ability to understand the contract **and** to appreciate the consequences of entering into the contract. If the person entering into a contract lacks contractual capacity, and the opposite party had (actual or constructive) knowledge of the incapacity, the contract is voidable.

Therefore, it is imperative to consider any potential issues related to the contractual capacity of the prior to evaluating the homeownership options.

2. **Acquisition and Financing of the Home**

How the home is acquired and financed is relevant in narrowing homeownership options. Homes for people with developmental disabilities could be acquired and financed by either:

a) A transfer from a parent (either while the parent is alive or upon passing, through their estate);

b) A direct purchase agreement (either solely or jointly); or

c) An indirect purchase agreement (through the use of a trust).

While alive, a parent could transfer 100% of a home to an adult family member with a developmental disability, or transfer a portion of the home to their family member as joint owner of the home. Under this type of transfer, the adult child becomes a beneficial owner of the home and is therefore liable for financing obligations (i.e. mortgage).

If the acquisition of a home is from the estate of a parent, the home could either be property of the estate, or proceeds from the estate may be used to purchase a home for their adult family member (as a beneficiary of the estate). It is up to the individual who is in charge of the estate (the executor) to decide whether the home is to be held in a trust for the beneficiary, or if the beneficiary is capable of being the sole owner of the home.

The home could be acquired and financed directly by a person with a developmental disability, either as the sole owner or jointly with a parent or other family member. In this case, qualification for financing (i.e. mortgage) becomes a significant barrier for the homeowner, and options include having a family member provide a personal loan or act as a mortgage guarantor.

The home could be purchased through an inter vivos trust established by a parent for an adult family member. In this case, the parent could transfer a home to the trust, or contribute funds to a trust to purchase a home.

Therefore, the process to acquire and finance a home becomes an integral part of the decision-making process for homeownership options.

3. **Impact on Social Assistance**

   Home ownership may have an impact on the social assistance received by a person with a developmental disability. Most social assistance programs, such as the ODSP, consider a person's principal residence as an exempt asset for the purpose of determining income support. If a portion of the home is rented out, however, the rental income to the person with a developmental disability may impact the amount of social assistance received.

   If the home is eventually sold, the proceeds from the sale of the home may also impact the amount of social assistance received by a personal with a developmental disability. In order to remain eligible for social assistance, these proceeds may be transferred to an asset that is considered exempt (such as another principal residence or a Registered Disability Savings Plan). Note that if the home was held in a discretionary trust, this issue may be avoided, as the proceeds of the sale would flow to the trust as opposed to a person with an ownership interest in the property.

4. **Funding for Recurring Home Expenses**

   The funding of future recurring home expenses (i.e. property taxes, utilities, upkeep, mortgage payments) should be considered in deciding options for homeownership. For example, a testamentary trust, established in a parent's will to hold a home for an adult family member, does not allow for future contributions to be made to the trust without the trust losing tax favourable status. In situations where the home is held in an inter vivos trust, the funds for recurring expenses should come from the settlor of the trust (or other contributor) and should not be paid directly to the trust by the beneficiary.

Therefore, notwithstanding the homeowner's ability to pay recurring home expenses, the funding of future recurring home expenses could impact the choice of homeownership options.

5. **Future Transition from the Home**

Planning for an unexpected move from the home by the homeowner with a developmental disability may influence the choice of homeownership option. For example, as a sole owner, the homeowner is responsible for the sale of the property, and the decisions related to the proceeds of sale. If the homeowner is in a joint ownership arrangement, the homeowner requires the joint owner to agree to the sale of the property. Upon the sale of the home, there may be tax consequences to the joint owner that may make them reluctant to sell the property.

Upon the sale of a home held in an inter vivos trust, the current legislation does not allow for the beneficiary to claim the principal residence exemption. Any gain on the sale of the home will be taxed at the highest tax rate (unlike a home held in a testamentary trust, in which the beneficiary is eligible to claim the principal residence exemption).

Therefore, planning for a possible transition from the home is likely to affect the decision under which model the home is held.

6. **Estate Planning**

For anyone, it is important to preserve and protect assets that are earned throughout a lifetime. For most people, a home is their largest asset. Therefore, under any of the homeownership options, it is imperative that the parent(s) and any family member with an ownership interest in a home carefully draft a will to ensure the home is disbursed according to their wishes.

For a person with a developmental disability, drafting a proper will is especially important if the person owns a home or the home is held in a bare trust, as it will form part of their estate upon death. Whereas under a discretionary trust, the settlor (person making the will, typically the parent) can control what happens to asset or the proceeds from the home upon the death of the primary beneficiary.

Lastly, in order to draft a will, a person must have **testamentary capacity**. There is a high legal threshold for testamentary capacity - it is not enough that the person is able communicate their final wishes, but they must be of sound mind. This means that the person making the will must meet the following requirements:

- Understands the nature of the will and its effects, which includes the act of making a will, the directions included in the will, and the effect of those directions (i.e. the division of assets);

- Understands the extent of the property being disposed of (meaning the value of major assets such as real estate, cash, investments, personal items, etc. and ownership interest in those assets (i.e. if the home is jointly owned));

- Understands and appreciates that certain people may have claims or expect support from the person (such as family members or others who are dependent on the person) and those claims and support ought to be given effect; and

- Has no insane delusions influencing the disposal of assets in the will, where they would not have disposed of assets in such a way if they were of sound mind.[6]

Note that testamentary capacity is not fixed and unchanging but may fluctuate over time. People with mental health issues, episodic disabilities or dementia, for example, may have testamentary capacity during periods of lucidity.

[6] The test for testamentary capacity has been well-established by the Supreme Court of Canada, in Skinner v. Farquharson (1902), 1902 CanLII 87 (SCC), 32 S.C.R. 58, adopted the formulation of the test offered in Banks v. Goodfellow (1870)), L.R. 5 Q.B. 549, at p. 565.