

# Planning for Disabled Family Members: Henson Trusts and More

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# The Need for a Plan

- Planning to provide for the support and care of disabled family members is a challenging task, especially as the needs of the disabled beneficiary change over time
- Tendency of most parents to put off critical decisions
- Implications of not having an appropriate plan in place can be serious and costly

# Concerns / Issues

- How should assets be conveyed on death so as to maximize resources available to disabled family member?
- Who will care for disabled family member?
- How to balance the need to care and provide for other family members?

# Statutory Obligations Arising on Death

- Owed to surviving spouse
  - Right to equalization of “net family property” on the death of the first spouse – *Family Law Act*
- Owed to financial “dependants”
  - A “dependant” (incl. spouse, children and grandchildren) who is receiving (or had a legal right to receive) financial support from a testator at time of his/her death has a claim for support against the testator’s estate if the testator/testatrix failed to make adequate provision for them – Part V of *Succession Law Reform Act*

# Considerations in Crafting an Estate Plan

- Means of the testator/testatrix
- Statutory obligations owed to family members
- Age of the disabled family member
- Nature of the family member's disability
- Short term and long term care needs of the disabled family member
- Willingness and ability of family members to provide support
- The need for powers of attorney in addition to a will

# Ontario Disability Support Program (ODSP)

- Income support program administered by Ministry of Community, Family and Children's Services
- Available to adults between ages of 18 and 65 provided they meet medical and financial criteria
- Purpose of the program is to provide basic level of income, prescription drugs and dental care to adults with disabilities

# ODSP (Cont'd)

- Ontario government's position is that it should be the "payor of last resort"
- All of the adult's assets and income must be exhausted before the ODSP program will make payments
- The regulations setting out the financial criteria are subject to change (key point)
- Income support programs vary by province

# ODSP (Cont'd)

- Current regulations stipulate that to be eligible the application must not own liquid assets of more than \$5,000 (individual) or \$7,500 (married individual) (with adjustments for dependant children)
- “Liquid assets” is not defined



# ODSP (Cont'd)

- Key asset exclusions
  - Principal residence of any value
  - Vehicle of any value (second in some cases)
  - Inheritance or the proceeds of life insurance policies of up to \$100,000 provided held in trust (“Inheritance Trust”)
  - Inheritance or proceeds of life insurance policies of UNLIMITED amount if held in Henson Trust

# ODSP (Cont'd)

- Limits on annual income
- Excluded from income
  - Employment earnings of up to \$160 / month (single person) or \$235 / month (family unit)
  - Payments received from an Inheritance or Henson Trust if used to purchase disability related items and services
  - Payments received from either Inheritance or Henson Trust up to a maximum of \$4,000 over a 12 month rolling period

# What is a “trust”?

- A relationship between a person holding property (the trustee) and the beneficiary for whose benefit the property is held
- Established (or settled) by a person known as the “settlor” who delivers property to the trustee on certain terms and conditions
- Most trusts governed by written agreement between settlor and trustee (trust indenture or will)
- A personal trust can be created during the settlor’s lifetime (an *inter vivos* trust) or upon their death (testamentary trust)

# What does a “trustee” do?

- Responsible for investing and reinvesting the trust property – held to standard of prudent investor
- Responsible for filing annual tax returns
- Responsible for making distributions to the disabled beneficiary during their lifetime – requires a relatively high level of involvement in the disabled beneficiary’s life
- Duty to account to the beneficiaries
- NOT to be confused with the disabled beneficiary’s guardian of property or person

# What is a “Henson” Trust?

- A fully discretionary personal trust
- Name arises from case heard by the Ontario Court of Appeal in the late 1980's
- Mr. Henson established in his will a fully discretionary trust for the benefit of his adult daughter who was disabled and receiving income support from the provincial government
- After his death, the provincial government refused to make further income support payments to his daughter on the basis she did not meet the financial criteria

# What is a “Henson Trust” (Cont’d):

- Daughter challenged the decision and won!
- Ontario Court of Appeal held that because Miss Henson did not have a vested interest in the testamentary trust (i.e. an ability to compel the distribution of income and capital) she continued to qualify for income support

# Features of a Henson Trust

- Property (insurance proceeds or other assets) are transferred to the trustee for the benefit of the disabled person
- During the settlor's lifetime or on their death
- Key aspect – the Trustee has complete discretion to pay out as much of the income or capital to or for the benefit of the disabled beneficiary as they see fit; the disabled beneficiary has no ability to compel the trustee to make payments out

# Features of Henson Trust (Cont'd)

- Desirable to provide for alternate income beneficiary in some cases
- On the death of the disabled beneficiary, the capital and any accumulated income is paid over to another person (e.g. children of the disabled beneficiary, siblings, charities etc.)



# Features of Henson Trust (Cont'd)

- Include a specific direction to Trustee to ensure the disabled beneficiary's ODSP and related benefits are maximized
- Specifically authorize the Trustee to make payments to third parties on the disabled beneficiary's behalf to purchase disability related items and services
- Capital and accumulated income is distributed on the earlier of the death of the disabled beneficiary and such earlier date as the Trustee may decide

# What property should be settled on Henson Trust?

- Depends upon the circumstances
- Insurance proceeds, unregistered investment portfolio – good starting points

# Who should serve as Trustee(s)?

- Once again, it depends upon the circumstances
  - Anticipated lifetime of the trust
  - Nature of the beneficiary's disability
  - Family dynamics
  - Size of the trust
- Fair minded, neutral and financially capable adult
- Multiple trustees usually make sense
- Be conscious of conflicts of interest (who are the capital beneficiaries?)

# Who should serve as Trustee (Cont'd)?

- If a trustee has a conflict of interest, provide a mechanism whereby their conflict is addressed
- The larger the trust, the easier it is to justify the involvement of multiple and/or corporate trustees
- Provide for alternate trustees

# Is the Trustee entitled to be paid?

- Under *Trustee Act* in Ontario, trustee is entitled to be compensated for their efforts
- The amount of compensation is not set by statute, but rather a matter of common law
- In many cases, the trustee will waive their entitlement to compensation especially if they are family members
- Given the nature of a trustee's obligations and duties, only fair they are compensated

# How is a Henson Trust Established?

- During the Settlor's lifetime
  - Pursuant to a Trust Deed
  - Taxation rates applicable to *inter-vivos* trusts should be taken into consideration
  - Appropriate where settlor has significant assets and/or there are concerns about capacity
- On the Testator's death
  - Pursuant to a Will
  - Typical scenario but assets funding trust are subject to estate administration taxes

# How is a Henson Trust Established (Cont'd)

- Pursuant to a separate declaration in case of life insurance proceeds
  - A possible means of avoiding estate administration taxes
  - Life insurance proceeds are paid over to trustee outside the estate and administered for benefit of disabled beneficiary

# Is a Henson Trust Appropriate in Every Case?

- Not necessarily
- Considerations
  - The assets held (insurance policies, real property etc.) For example, it might be more appropriate to use RRSP/RRIF proceeds to purchase an annuity or settle the proceeds on a “lifetime benefit trust”
  - The age of the disabled beneficiary
  - Whether the disabled person is receiving or likely to receive ODSP payments



# Is a Henson Trust Appropriate in Every Case? (Cont'd)

- The nature of the disabled beneficiary's disabilities and their living arrangements
- The needs of other family members and the testator's desire to benefit them as well
- The availability of qualified trustees

# The Best Advice

- Seek the assistance of a legal professional
- Ensure that all aspects of the plan are addressed
  - On death (i.e. a will)
  - During the parent's lifetime through a power of attorney
  - Guardianship in either case