



Providing for a Family Member With a Disability

If you have a child with a disability, you are likely quite concerned about how your child will be taken care of after your death. Estate planning for a child with a disability involves special considerations to ensure your child is adequately provided for after your death while protecting any government benefits that your child may be receiving. This brochure is written in the language of a parent with a child with a disability; however, the information is relevant to any family that has a member with a disability.

Disability Support Program

Under the *Ontario Disability Support Program* (ODSP) adults with a disability can receive income support if they meet certain financial criteria. These criteria are based on the idea that individuals should receive benefits to the extent that they have no other means of support. Please refer to our brochure entitled "General Information for Recipients of ODSP" for further information.

It is important to be aware that ODSP benefits may be terminated, for example, if an individual receives an outright gift under a Will or is named as the beneficiary of a life insurance policy. Parents or others who want to make provisions for the future care of a child with a disability must consider strategies which will ensure that ODSP benefits continue unless the size of the inheritance is sufficient to provide total support for the person's lifetime. If a child is not currently receiving ODSP but there is a possibility that the child will require governmental assistance in the future, these strategies should be considered as part of the parents' estate planning.

The Henson Trust

Trusts, in general, are an important part of estate planning because of the beneficial tax treatment of testamentary (arising as the result of a death) trusts. However, trusts can be used for a variety of specific purposes besides tax planning. For example, a special kind of trust known as a *Henson Trust* may be used to provide financial assistance for a person with a disability while also protecting the person's governmental benefits, such as ODSP. *Henson Trusts* are also known as 'Discretionary Trusts'. For further information on other uses for trusts, please see our brochure entitled "How Can Trusts Help Me and My Family?".

To qualify as a *Henson Trust* certain key features must be present:

- The trust must arise from an inheritance or the proceeds of a life insurance policy;
- The trustee must have sole and absolute discretion whether to make payments from the trust or not;
- The trustee must also have sole and absolute discretion when to make payments from the trust;
- The trustee must have sole and absolute discretion to whom to make payments from the trust.

It is this 'absolute discretion' which protects ODSP entitlement. The courts have decided that because the person with a disability cannot force a payment from

the trust, the assets in the trust should not be considered those of the person with a disability for determining ODSP eligibility.

There are numerous advantages to a *Henson Trust*:

- There is no limit on the amount or type of income and assets that can be held inside the trust;
- There is no limit on the amount of money which can be paid out by the trust for disability-related or education expenses (as defined by the regulations governing ODSP);
- Payments can also be made for any purpose such as rent, home repairs, groceries, or entertainment; however, ODSP benefits will be reduced to the extent that payments made from a *Henson Trust* for expenses which do not qualify as disability-related or educational exceed the allowable amounts. Currently, the limit is \$6,000 in a 12-month period;
- A *Henson Trust* provides for payments to or for other beneficiaries, such as other children or family members or charities in addition to a child with a disability so that the trustee has the discretion to pay amounts to beneficiaries other than the person with a disability.
- Control over the ultimate distribution of the assets remaining in the trust upon the death of the child with a disability is retained as the trust sets out how the remaining assets are to be distributed. For example, the balance of the trust might be distributed to the other children of the person who created the trust in his or her Will.

Henson Trusts are most often included in the Will of a person who has a family member with a disability. Such a trust can exist in a separate document outside of a Will; however, it is generally more costly to do it that way. The trust can also be set up during the lifetime of the donor.

Because of the absolute discretion that the trustee of a *Henson Trust* has, it is critical to select the trustee carefully. When choosing a trustee, consider the following characteristics:

- Someone who is both conscientious and trustworthy;
- Someone who thoroughly understands the wishes of the parents vis-a-vis the future care of the child and is willing to abide by these wishes;
- Someone who is involved in the life of the child and understands his or her unique needs and circumstances;
- Someone who understands why a *Henson Trust* was established and who will seek the appropriate professional assistance (lawyer, accountant, etc.) to ensure the trustee's duties are carried out effectively for the benefit of the person with a disability. The trustee should be willing to keep up to date with ODSP requirements.

One or more alternate trustees should also be appointed in the event that a trustee is unable to act. Please see our brochure entitled "Henson Trusts – Acting as a Trustee" for further information regarding the duties and obligations of a trustee of a *Henson Trust*. An understanding of what the role of a trustee entails will help in the selection of an appropriate trustee.

Regulation Trust

The regulations to the *ODSP Act* provide for another type of trust commonly referred to as a "Regulation Trust" but also sometimes referred to as a discretionary trust. A Regulation Trust also allows someone with a disability to receive funds from an inheritance within certain limits without affecting their ODSP entitlement. A Regulation Trust which meets the following requirements will not adversely affect the child's eligibility for benefits:

- It must be for the maintenance of the adult child (in other words, the trust cannot provide for any beneficiaries other than a person with a disability);

- The value of the trust cannot exceed \$100,000 at any time including interest or other revenue earned by the trust;
- Payments can be made by the trustee only for disability-related expenses or education expenses (what qualifies as a valid expense under this rule is limited).

An individual receiving ODSP can also set up a Regulation Trust if they have receive an inheritance or insurance proceeds totaling less than \$100,000. The individual's ODSP benefits will not be affected as long as the total in all such Regulation Trusts does not exceed \$100,000 including interest or other revenue earned by the trust or trusts.

Registered Disability Savings Plans

As of December 2008, it has been possible for a person who lives in Ontario and who qualifies for the federal Disability Tax Credit (DTC) to have a Registered Disability Savings Plan (RDSP). Although generally not a replacement for either a Henson Trust or a Regulation Trust, an RDSP should be considered when reviewing the estate planning of parents or others who intend to leave an inheritance for a person with a disability or if an unexpected inheritance is received by a person with a disability.

There are numerous restrictions on RDSPs which limit when contributions can be made to the RDSP as well as how much may be contributed. Also the age of the person with a disability may limit access to the RDSP. Government contributions may also be available which can help the RDSP grow even if parents or others are unable to contribute as much as they would like. The most important feature of an RDSP for Ontario ODSP recipients is that when withdrawals are made, ODSP benefits will not be affected. See our blog about RDSPs for more information. Go to www.nefflawoffice.com/blog and type RDSP in the Search box then scroll down.

Capacity to Sign Documents and/or Guardianship

If your child or other family member with a disability has the mental capacity to do so, she or he should have her or his own Powers of Attorney and a Will. Capacity refers to the mental ability to give instructions and execute documents. There are specific capacity criteria for each type of document. It is possible to have the capacity to sign one document, such as a Power of Attorney for Personal Care, but not have the capacity to sign another document, such as a Will. Please see our brochure entitled "Capacity to Make a Will or Powers of Attorney" for lists of mental capacity criteria for each type of document.

If your child or other family member is found not to have the capacity to sign his or her own Powers of Attorney, it may be necessary to apply to court to seek guardianship, whether of property or of the person or both. Please see our brochure entitled "Guardianship" for more information.

In conclusion, if you have a family member with a disability it is essential to review your estate plan with someone who is familiar with Henson trusts and other strategies that can, when properly reviewed and prepared, ensure that your loved one's best interests are considered and that, if appropriate, government benefits are protected. We encourage you to discuss all available options with your lawyer in order to determine what is best for you and your family.

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