

Estate Planning for Individuals with Disabilities

Many parents of children with a disability are concerned about the best way to provide for their child, without jeopardizing any of the supports (e.g., ODSP) they receive. This is basic information regarding estate planning for persons with disabilities. Please consult financial and/or legal advisors to get advice on your own circumstances. One solution is a Henson Trust.

Important Terms

Will	is a written declaration by which a person provides for the distribution and/or administration of his/her property after their death
Beneficiary	is the recipient of a share of an estate, as defined by a will
Executor or Estate Trustee	is appointed in the Will and has authority to act for the estate from the moment of death
Trust Fund	is the part of the estate not immediately paid to beneficiaries
Trustee	is the executor or other person(s) appointed to administer the trust fund, make investments, prepare income tax returns, pay taxes, spend money on the beneficiary and collect rents, dividends and interest
Advisors	<ul style="list-style-type: none"> • If the trustee has a conflict of interest, relatives could be named in the Will to be advisors to the trustee, with provision that the trustee must consult the advisors about major decisions but is not bound by their advice • If the trustee is not an expert in the particular disability, a person with such expertise and who does not have a conflict of interest, could be appointed as advisor
Alternative Successor Trustees	<ul style="list-style-type: none"> • Unless the will specifically provides otherwise, the right to administer an estate passes to the executor of the last surviving trustee when this trustee dies • So, it is prudent to appoint alternative successor trustees to ensure continuity of trusteeship for as long as possible, especially if they are the same age or younger than the beneficiary
Consensual Decision-making	is the process of, wherever possible, involving the beneficiary in asset and estate management, if he/she is able to participate
Substitute Decision-making	Is the process of having an appointed person make decisions on behalf of the person with a disability when he/she is not able to do so

The Importance of a Valid Will

Without a valid Will

- your property will be distributed according to a set formula of your provincial government, and this may be quite different than what you wanted
- distribution to your heirs can be delayed until an administrator is appointed by the courts, and this can result in additional legal fees
- the courts will name a guardian to care for any minor or infirm children, and the person named may not be the one you would have selected

Problems with Alternatives To A Will

Placing the money in the hands of a trusted family member or friend

- the beneficiary has no recourse if the trustee loses the money through bad financial management, divorce, etc
- the province can take legal action to obtain access to the money to offset ODSP payments

Leaving more money to one sibling to help the individual with a disability

- the beneficiary has no recourse if the trustee loses the money through bad financial management, divorce, etc
- potential issues are civil litigation and extra taxes
- What happens if the trustee dies?

Some Ways to Reduce Taxes

- Reducing your taxes can produce funds that you can place in your estate
- Planned giving to charitable organizations maximizes tax credits and minimizes taxes on capital gains
- The disability amount is a non-refundable tax credit that reduces the amount of income tax payable by a person with a disability or by a person supporting him/her

Probate Fees

- Probate is the process of authenticating your Will and of confirming the appointment of your executor
- Fees depend on the total value of the assets in your estate. (in Ontario, for an estate of \$500,000, probate fees are in the area of \$7,000)
- Reduce probate fees by transferring property prior to death, or by transferring assets outside of your estate to life insurance, registered and prescribed annuities, RRSP's, RRIF's, GIC's, segregated (mutual) funds or joint tenancy

Age-Related Planning Considerations

- If the beneficiary is a child, whether disabled or not, his/her share of the estate will be held until he/she is 18 years of age
- On the advice of the Ontario Children's Lawyer (formerly called the Official Guardian), estate money may be used for specific and necessary purposes before a beneficiary reaches the age of 18
- At the age of 18, beneficiaries receive their shares of the estate whether or not they are capable of handling them
- thus the issues of executors and trustees and of consensual vs. substitute decision-making are important
- Support under the Assistance for Children with Severe Disabilities (ACSD) program for persons under 18 years of age will not affect future ODSP entitlement
- A bequest made to the person before his/her 18th birthday may later affect ODSP entitlement

Planning Considerations Related To ODSP Benefits

- Eligibility for ODSP is determined by financial testing and is based on rules for assets and income (assets and income are undefined and general terms under ODSP)
- The following are limits before ODSP benefits are decreased:
 - an ODSP recipient may have liquid assets up to \$5,000
 - the spouse of a recipient may have liquid assets up to \$2,500
 - the dependent of a recipient may have liquid assets up to \$500
 - an ODSP recipient can keep a combination of cash surrender value of life insurance and of trust funds totalling up to \$100,000
- A person who has become disabled later in life, after having accumulated assets such as RRSP's, can protect his/her assets and also qualify for ODSP
- Certain items and funds are excluded from being considered as assets or income
- The trustee may only provide income to the beneficiary up to a limit of \$4,000 within a 12-month period



Discretionary Trust

- There is no guarantee that payments will be made for the benefit of the person, except as required under general trust law
- This trust is based completely on the discretion of the trustee and has traditionally been used to provide for people with disabilities

Disability Expenses Trust

- This “government-regulated” trust evolved out of the discretionary trust and will be useful in these circumstances:
 - an inheritance of more than \$5,000 that has not yet been put in a discretionary trust or receipt of proceeds of a life insurance policy would disqualify the beneficiary from continued ODSP benefits
 - the beneficiary requires aids, assistive devices or monies for disability-related education or training, health care or services not provided by government or any insurance plan, and the person making the Will wishes to ensure that all the income from the trust monies will be used for the beneficiary
- ODSP asset, income and exemption rules apply

Henson Trust

- A Henson Trust has been available since 1989, when the case after which it is named was upheld by the Ontario Court of Appeal
- It is an absolute discretionary trust, with the legal arrangement that money in the trust is paid out at the complete and absolute discretion of the designated trustee, not the beneficiary
 - if the beneficiary does not require financial support from the trust, income and capital could be paid to other beneficiaries
- The inheritance is not an asset of the child and, therefore, will not affect provincial benefits, such as ODSP
 - the ODSP cap of \$100,000 does not apply
 - ODSP asset, income and exemption rules apply
- There are no restrictions on how much money can be in the trust

Updating the Will

- It is wise to review and, if necessary, update a Will at least every 5 years
- You should consider changes in provincial regulations and new case law
- If there is a significant change in tax laws, in the assets of the estate or in the circumstances of the beneficiaries, update the Will accordingly

Estate Planning Approaches Other Than Trust Funds

- In some cases, it makes sense to leave a house to the beneficiary with a disability, since a principal residence is not considered an asset
 - expenses to maintain the house, support services for the person and suitability of the house for the person's needs should be considerations

Can a Person with a Disability Make a Valid Will?

- A person with a disability can make a valid Will if:
 - he/she is able to understand the nature of the estate
 - he/she knows who the possible beneficiaries are
 - he/she appreciates the consequences of what is being done

SOME SOURCES OF INFORMATION

- Mary Louise Dickson, Q.C., Rod Walsh, Orville Endicott

The Wills Book: Benefits, Wills, Trusts and Personal Decisions Involving People with Disabilities in Ontario

(Ontario Association for Community Living, 1999 edition (revised 2004))

- Harry Beatty

Estate Planning Where a Beneficiary is Receiving an Allowance Under the Ontario Disability Support Program (or May Receive an Allowance in The Future): A Basic Information Package

(ARCH: A Legal Resource Centre for Persons with Disabilities, 2001)

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