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## ***TRUSTS FOR DISABLED BENEFICIARIES***

In addition to all the regular estate planning considerations outlined in our information sheet entitled “Your Will,” a person wishing to leave an inheritance to a disabled child or other beneficiary must address two important issues.

### **Does the beneficiary have the mental capacity to manage property?**

Under the Ontario *Substitute Decisions Act, 1992*, a person is incapable of managing property if he or she is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. A person who is incapable of managing property may not personally receive or hold any money or property, including an inheritance. If a mentally disabled beneficiary has a valid Power of Attorney for Property made while he or she was capable, then the inheritance may be paid to the attorney appointed therein. If not, then to avoid any involvement by the government or the court, the testator must appoint a trustee to receive and administer the inheritance on behalf of the beneficiary.

### **Will the beneficiary still qualify for government disability benefits after receiving the inheritance?**

Under the *Ontario Disability Support Program Act* (the “ODSPA”), a mentally or physically disabled person will only be eligible to receive benefits if his or her assets and income fall below certain limits. The current asset limit for a disabled person with no spouse or dependants is \$5,000. Certain assets are excluded from these limits, including a principal residence, a motor vehicle, a prepaid funeral, certain tools of the trade and business assets, and the two types of trusts described below.

#### **\$100,000 Trusts**

In determining whether a disabled person is eligible to receive disability benefits, the regulations under the ODSPA specifically exclude from his or her assets “the person’s beneficial interest in assets held in one or more trusts and available to be used for maintenance if the capital of the trusts is derived from an inheritance or from the proceeds of a life insurance policy,” up to a cumulative total of \$100,000. This type of trust may be created by the testator in his or her Will, or by the disabled beneficiary personally if he or she is mentally capable. In either case, any amount over \$100,000 must be applied for the disabled person’s maintenance, and only after the excess is exhausted may the disabled person re-apply for benefits. In addition, any income from the trust payable to the disabled person in excess of the limits set out by the regulations will reduce his or her disability benefits dollar for dollar.

#### **Henson Trusts**

The regulations under the ODSPA do not make any specific reference to a “Henson” trust. Instead, the name of this type of trust comes from a 1987 court decision which determined that a trust that gave the trustees complete discretion as to whether and when to pay out income and capital of the trust to the disabled beneficiary was not an asset of the beneficiary for the purpose of determining her eligibility to government disability benefits. The Ontario government has accepted this decision, and policy directives issued under the ODSPA now confirm that trusts with these terms will be excluded from the assets of the disabled beneficiary considered in determining eligibility for ODSPA benefits.

The primary advantage to a Henson trust over a \$100,000 trust is that there is no limit on the value of the assets that may be held in a Henson trust. However, because a Henson trust provides more flexibility with respect to distributions and alternate beneficiaries, it may be preferable even for smaller inheritances.

### **Advantages and Disadvantages of Henson Trusts**

In addition to resolving the two problems identified above, the creation of a Henson or discretionary trust to hold the inheritance of a disabled beneficiary will have the following significant advantages:

- A beneficiary who is mentally capable may still benefit from having a trustee administer his or her inheritance if he or she is financially inexperienced or imprudent, vulnerable to abuse from caregivers and other third parties, or physically restricted from dealing with banking and investment functions.
- The testator may provide guidelines as to the amounts that may be paid to the beneficiary, or the purposes of such payments. The testator may also choose alternate beneficiaries to receive income or capital excess to the disabled beneficiary's needs, or after the disabled beneficiary's death.
- Because the trust assets do not belong to the disabled beneficiary, they will not be subject to claims of the beneficiary's spouse or creditors, nor to probate fees when the beneficiary dies.
- Income generated in a trust created by Will may be subject to lower rates of tax than if the beneficiary were to hold the trust investments and earn the income personally.

There are some disadvantages to trusts as well. The most significant of these are as follows:

- The trustees are subject to significant duties and potential liability throughout the term of the trust. For more information, see our information sheet on "Duties of Trustees."
- There are administrative costs to operating a trust, including fees for preparing annual tax returns and statements of all transactions occurring in the trust, and compensation claimed by the trustees.

### **Terms of the Trust**

Once the testator has decided to include a Henson trust in his or her Will, he or she must consider the following matters:

- Trustees should be selected who have sufficient business sense to properly administer the trust assets, who are in sufficiently close contact with the beneficiary to determine his or her needs, and who will act in the best interests of the disabled beneficiary. In general, it is better to avoid trustees with a potential conflict of interest, such as siblings of the disabled beneficiary who may receive the assets remaining in the trust after the disabled beneficiary's death.
- Alternate trustees should be appointed in case the first named trustees die or become unable or unwilling to act during the lifetime of the disabled beneficiary or the term of the trust.
- If the disabled beneficiary is mentally capable, then he or she could be made a co-trustee of or an advisor to the trust in order to encourage his or her involvement and preserve his or her dignity.
- The trust should provide whether income excess to the needs of the disabled beneficiary is to be accumulated or used for the benefit of other family members or a charity.
- The trust may allow for a house or other property to be made available for use by the disabled person.
- The trust must provide for the distribution of any assets remaining on the death of the disabled beneficiary or other termination date of the trust among the current or potential future spouse and children of the disabled beneficiary, other family members or friends, or charities.

Although this article refers only to Ontario legislation and to gifts made by Will, similar considerations apply in other provinces and to gifts made during the lifetime of the donor. For more information, or to update your Will to include a discretionary trust, please contact Laura Kerr at (613) 614-7140 or [lkerr@estateslaw.ca](mailto:lkerr@estateslaw.ca).