



Providing for Disabled Family Members Using Henson Trusts

Providing for a disabled family member in your Will presents special challenges. Often a key consideration is preserving government benefits to which the disabled person is entitled while providing additional support or benefits under your Will. The primary vehicle for accomplishing this in Ontario is the “Henson Trust”.

The Ontario Scenario

In Ontario, disabled persons may be entitled to benefits under the Ontario Disability Support Program (“ODSP”). If they are receiving these benefits or might qualify for them in the future, it is important to structure your Will in such a way that gifts to them in it do not deny them these benefits. This is where the Henson Trust comes in.

The Key Element in a Henson Trust

A Henson Trust must be a pure discretionary trust. All assets in it must belong to the Trustee of the trust, they cannot “vest” in the beneficiary of the trust. The Trustee cannot be obliged to pay anything to the disabled beneficiary of the trust. However, the Trustee has a discretion to use income and capital of the Trust for the benefit of the beneficiary and, as long as the Trustee does so in a way that does not violate guidelines prescribed by legislation and regulations in Ontario, the beneficiary will still be able to receive ODSP benefits.

ODSP Rules and Regulations

The rules and regulations governing ODSP benefits in Ontario are extensive and complex. They include provisions saying how much a disabled person can receive by way of benefits under a Will before these benefits affect the pension payable to him or her under the ODSP. These rules and regulations are adjusted from time-to-time. The Trustee of a Henson Trust must always be mindful of them so that he or she does not administer the Trust in a way which defeats the intention of the person who created the Trust in his or her Will.

The Lawyer’s Role

Your lawyer will play two critical roles regarding Henson Trusts. First of all, he or she must draft the Will in such a way that the appropriate trust is created in it. Secondly, on the death of someone who has created a testamentary Henson Trust, he or she will play an important role in advising the Trustee on how to manage the Trust in a way that will not deny the disabled beneficiary his or her ODSP benefits.

Choice of Trustee

If a Henson Trust is created in your Will, you are going to want to choose a trustee for it very carefully. The trustee of the Trust need not be your Estate Trustee who may be selected, for very different reasons, to carry out the general administration of your Estate.

With a Henson Trust, you are going to want to choose a trustee who is going to be sensitive to the needs and circumstances of the disabled person. Ideally, this will be a sibling or other family member. It will be important to choose someone who is likely to be around to carry out his or her duties under the Trust. For example, if the disabled person is 21 and has a life expectancy of 50 years, it makes no sense to name a grand-parent as the sole Trustee of the Henson Trust. The grand-parent may be the right choice initially but, if so, it will be important to name someone younger to take over when the grand-parent can no longer act as Trustee.

Final Thoughts

You will need the help of an experienced estates lawyer to deal with the complexities of providing for a disabled beneficiary who is receiving, or may receive, ODSP benefits. We would be pleased to discuss your situation and provide the guidance and documentation which you require.

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