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Gifting to ODSP Recipients

It is easy to assume that leaving a gift to someone in your will or naming them as beneficiary of a life insurance policy would have nothing but positive results. Unfortunately, for those receiving benefits under the *Ontario Disability Support Plan* ("ODSP"), such gifts can have disastrous, although unintended, consequences. An outright gift under a will or the payment of life insurance, RRIF, RRSP, or other proceeds can result in the termination of ODSP benefits. To truly benefit someone who receives, or may qualify in the future to receive ODSP (the recipient), explore the available options and how best to benefit the recipient. Unless a very large amount will be left to the recipient, it is important to ensure that his or her ODSP benefits will not be lost as a result of receiving an inheritance.

What is ODSP?

ODSP is a government program managed by the Ontario Ministry of Community and Social Services. Under ODSP, adults with a disability who are Ontario residents and 18 or older can receive income and other supports provided the person meets 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.

There are restrictions on what an ODSP recipient is permitted to own. He or she can own liquid or cashable assets (money or assets that can be turned into money) to a limit of $5,000 at any one time.

There are also various 'exempt or excluded' assets which a recipient may own without affecting his or her ODSP entitlement, for example, a principal residence, a motor vehicle, or a prepaid funeral. Please refer to our brochure entitled *General Information for Recipients of ODSP* for further information.

Lost Benefits

Besides the ODSP income that a recipient could lose if he or she receives an inheritance, life insurance or other proceeds, the ODSP recipient could lose access to certain benefits which are available while receiving ODSP such as:

- dental and drug benefits;
- subsidized housing; and,
- access to social workers and other assistance.

Many of these benefits are very important to ODSP recipients. For example, if a recipient lives in a subsidized housing unit, a loss of ODSP eligibility could mean a forced move to another dwelling resulting in disruption and upheaval including the loss of friends and a supportive network, loss of familiarity with local services, stores, etc.

A Special Kind of Trust: the *Henson Trust*

If you would like to benefit an ODSP recipient in your estate planning, your first step should be to discuss the situation with the recipient, if possible, otherwise with his or her close family members and friends. The next step is to meet with a lawyer who has the knowledge and experience to explore the options with you and recommend the best course of action.

In many cases, it will be advisable to include a special kind of trust, known as a *Henson Trust*, in your will. Provided it is correctly administered, a *Henson Trust* (also known as a 'Discretionary Trust') allows for payments to or for the ODSP recipient without resulting in the loss of ODSP benefits. In

Ontario, the assets of a properly drafted *Henson Trust* are not considered the assets of the ODSP recipient. Therefore he or she will not lose ODSP benefits because of the inheritance.

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

- The trust must arise from the proceeds of a life insurance policy or other acceptable assets;
- The trustee must have absolute discretion <u>whether</u> to make payments from the trust or not;
- The trustee must also have absolute discretion as to <u>when</u> to make payments from the trust;

It is this 'absolute discretion' which protects ODSP entitlement. The courts have decided that because the recipient cannot demand a payment from the trust, the assets in the trust are not considered assets of the recipient for determining ODSP eligibility.

There are a number of 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 from the trust for disability-related or education expenses (as defined by the regulations governing ODSP);
- Payments can also be made for other purposes 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 any 12-month period;
- If the Henson Trust beneficiary qualifies for the disability tax credit (DTC) and there are no other beneficiaries of the trust who do not qualify for the DTC, the trust may benefit from graduated tax rates rather than being taxed at the top rate (as of January 1, 2016);
- Deciding what happens to the remaining trust assets when the recipient dies is up to you. Either you name the beneficiaries in your will or in the trust or you leave the balance of the trust to the ODSP recipient's estate and let him or her determine who receives the balance of the trust.

Henson Trusts are most often included in the will of a person who has a beneficiary with a disability. Such a trust can exist in a separate document outside of a will. However, it may be more costly to do it that way.

Because of the absolute discretion that the trustee of a *Henson Trust* has, the choice of trustee should be made very carefully. When choosing a trustee, consider the following characteristics:

- Someone who is both conscientious and trustworthy;
- Someone who cares about the recipient 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 in the most effective manner for the benefit of the recipient. The trustee must be willing to become familiar and keep up to date with ODSP requirements;
- Knowing the trust beneficiary's financial situation will also be important so that the trustee of the trust is aware of other income that the beneficiary receives and ensure payments are within the required limits.

One or more alternate trustees should also be appointed in the event that a trustee is unable or unwilling to act. Consider appointing one or more trustees around the same age as, or younger than, the recipient to ensure that there is always someone available to act.

The place of residence of the trustee from a tax perspective is also important as the trust is generally considered to be resident where the trustee is resident, not where the beneficiary is resident. For this reason, it is usually preferable to have a trustee who is resident in Canada for as long as the trust exists and the recipient is receiving ODSP.

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 involves will help in the selection of an appropriate trustee.

If you live in Ontario, you will likely have your will drafted by a local lawyer who should be familiar with *Henson Trusts*. If you live outside of Ontario (or if your lawyer is not familiar with such trusts), to ensure your will includes a valid *Henson Trust,* either you or your lawyer should have an Ontario lawyer who is familiar with *Henson Trusts* review the will and the trust before signing.

Disability Expense Trust

If an inheritance or the proceeds of life insurance are received but there is no *Henson Trust* to protect ODSP benefits, a disability expense trust (also referred to as a regulation trust) may be the solution. However, there are certain conditions that must be met. The capital in a disability expense trust must be derived from an inheritance or the proceeds of a life insurance policy. Note that the cumulative total for all such trust funds as well as the cash surrender value of any life insurance policies owned by the recipient cannot exceed $100,000. In contrast, there is no limit for the amount of funds that can be held by a *Henson Trust*.

To ensure that the recipient's ODSP benefits are not affected, a disability expense trust must meet the following requirements:

- Payments out of the disability expense trust must be to or for the benefit of the ODSP recipient;
- Payments must comply with the ODSP rules in terms of how much is paid out and what it is used for (as described above for Henson Trusts);
- The total assets in all disability expense trusts for the same recipient cannot exceed $100,000 at any time including interest or other revenue earned by the trust (or trusts if more than one) and including the cash surrender value of any life insurance policies owned by the recipient. This could be an issue if more than one person wants to provide a gift to the recipient or the recipient owns a life insurance policy.

A recipient can set up a disability expense trust for his or her own benefit. However, if the recipient is not mentally capable of setting up the trust and has not appointed an attorney for property while capable, it will be necessary for someone to apply to court to be appointed the guardian of property for the recipient. This can be a costly and time-consuming process. See our brochure entitled *Guardianship* for further information. Having to make a guardianship application to court may also be problematic as ODSP rules specify that the disability expense trust should be set up within six months of the inheritance or life insurance proceeds becoming available.

The cost of setting up a disability expense trust is more than the cost of including a *Henson Trust* in a will, particularly if a guardianship application is also necessary.

Conclusion

If you plan to give a gift to an ODSP recipient or leave an inheritance or name him or her as a beneficiary of a life insurance policy, make sure your gift will not create problems rather than being the thoughtful and helpful gift that you intended. Consult with a lawyer with specialized knowledge who can review your estate planning objectives and the available options to help you decide how best to benefit your loved one.

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