



LAFRENIÈRE SANNA
— ESTATE LAW —
A B O U T I Q U E F I R M

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Henson Trusts – Acting as a Trustee

Definition of a Trust

A trust is a legal relationship where the trustee (one or more persons or a trust company) hold property or assets for the benefit of someone else who is called the beneficiary.

What is a Henson Trust?

A Henson trust is most often established on the death of a close relative or friend for someone with a disability. A trust established because someone has died is called a testamentary trust. It is also possible to create a Henson trust during the lifetime of the donor (legally referred to as the settlor) in which case it is an inter-vivos trust. Inter-vivos means between the living.

Generally, the purpose of a Henson trust is to provide financial assistance for an individual with a disability without risking his or her eligibility for the Ontario Disability Support Plan (ODSP) benefits. There is no limit on the assets that can be held by a Henson trust.

Although not discussed in detail in this brochure, there is another type of trust with an asset limit of \$100,000 that is similar to a Henson trust but more limited. Such trusts are referred to by various names such as regulation trusts, discretionary disability trusts, or protective trusts. These trusts are most often used to protect an inheritance left to a beneficiary with a disability in situations where the deceased did not include a Henson trust in his or her Will or the deceased did not have a Will.

Obligations of a Trustee

The trustee of a Henson trust has an overriding obligation to manage the trust assets for the trust beneficiary, that is, the person with a disability. The

trustee must ensure that the trust assets are managed prudently and that any investments that are made comply with the requirements set out in the Will or trust document and also comply with any relevant legislation (such as the *Trustee Act*). The trustee should work closely with a knowledgeable financial advisor, particularly where there are substantial trust assets. Depending upon the terms of the trust and other factors, the financial advisor's fees may be payable from the trust or may form part of the trustee's compensation.

Record-Keeping

For more information about the accounting required and trustee compensation, please see our brochure entitled *Estate Accounting for Estate Trustees (Executors) and Attorneys*. What follows is general information.

The trustee must maintain up-to-date, detailed records tracking all transactions of the trust including receipts, disbursements, investments, etc. The records, referred to as the trust accounts, must be supported by documentation such as receipts, bank statements, investment statements and so on. It is also recommended that a trustee keep copies of correspondence relating to the trust and a journal of all time spent by the trustee in carrying out his or her trustee duties. These records may have to be provided to an appropriate authority on request.

Trust accounting differs from tax accounting in several respects. For example, if the trust earns income that is not paid out to the beneficiary of the trust, the income is returned to the trust as *capital*.

This income needs to be tracked under trust accounting rules.

Audit or Review

The Canada Revenue Agency (CRA) has the right to audit the accounts of a trustee. The CRA requires that accurate and up-to-date records of the trust be kept. An audit is disruptive at the best of times. However, it is especially time-consuming if the accounts and supporting records provided to the CRA are incomplete or inaccurate.

Ontario's Public Guardian and Trustee (PGT) may also have the right to review the accounts of a trustee. This can occur as a result of a complaint being made to them by individuals who have concerns about the management of the trust. Complaints can come from the trust beneficiary, a relative, or a care worker.

An individual who has an interest in the assets of a trust has the right to demand that the trustee pass his or her accounts. This is a court process where a judge approves the accounting records of a trustee. Please see our brochure entitled *Passing of Accounts* for more information.

Tax Returns

The trustee of a trust is responsible for filing tax returns for the trust. As of January 1, 2016, new rules affect the taxation of testamentary trusts. Under the new rules, most testamentary trusts are subject to the top tax rate and must have a trust year-end of December 31. Previously, testamentary trusts could benefit from graduated tax rates and could have had a year-end other than December 31.

If specific conditions are met, it is still possible for a testamentary trust to benefit from graduated tax rates. If the only beneficiary of the testamentary trust has the Disability Tax Credit (DTC), the trust could benefit from graduated tax rates. It is strongly recommended that the trustee hire a tax accountant who is familiar with the taxation of trusts to ensure that tax rules are complied with, that trust tax returns are completed and filed on time, and that the trust is as tax-efficient as possible. The accountant's fees are usually payable from the trust.

ODSP Allowable Assets and Income

Currently, an individual receiving ODSP benefits is permitted to own assets up to a total value of \$40,000 at any one time.

An individual receiving ODSP benefits is permitted to receive up to \$10,000 additional income in any twelve-month period. The \$10,000 total includes income from any source including a Henson trust. For more information, please see our brochure entitled *General Information for Recipients of ODSP*.

Payments to Beneficiaries

It is essential that the trustee of a Henson trust be aware of both the ODSP rules regarding income limits and the income that the beneficiary receives from other sources so that benefits can be maximized. The trustee must also pay special attention to the fact that the limit is \$10,000 in any twelve month period, and not in a calendar year.

Disability-Related Items and Services

Despite the \$10,000 income limit, there is no limitation on amounts of money paid to or for the individual with a disability for disability-related items or services. Any expenses associated with the purchase of these items or services may also be considered as approved disability-related items and services such as repair costs, maintenance costs, installation and set-up costs.

Education and Training

Unlimited amounts can be paid out of the trust for educational supports such as interpreters, attendants, and readers for an individual enrolled in continuing education. Payments can also be paid out of the trust for sign language, lip reading, and other disability-related training.

Familiarity with ODSP Rules

In most circumstances, it is important that the trustee of a Henson trust not jeopardize the individual's eligibility for ODSP benefits. If the beneficiary loses his or her ODSP entitlement, there is no guarantee of future reinstatement into the program. Applying for reinstatement can be a difficult and time-consuming process. To understand the income and assets that an individual with a disability is allowed, the trustee should regularly review the ODSP rules and regulations or seek assistance from an advisor familiar with the rules and regulations.

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