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

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Providing for a Family Member With a Disability

As the parent of a child with a disability, you are likely quite concerned about how your child will be taken care of after your death. Estate planning for a child with a disability involves special considerations to ensure that if your child receives government benefits that any inheritance intended to benefit your child does not cause unplanned disqualification of those benefits. This brochure is written in the language of a parent with a child with a disability. However, the information is relevant to any family that has a member with a disability.

Disability Support Program

Under the Ontario Disability Support Program (ODSP) adults (age 18 or older) with a disability can receive income support if they meet 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. Please refer to our brochure entitled *General Information for Recipients of ODSP* for further information.

It is important to be aware that ODSP benefits may be terminated if, for example, an individual receives an outright gift under a Will or is named as the beneficiary of a life insurance policy. Parents or others who want to make provisions for the future care of a child with a disability must consider strategies that ensure ODSP benefits continue unless the size of the inheritance is sufficient to provide total support for the child's lifetime. If a child is not currently receiving ODSP but there is a possibility that the child will require governmental assistance in the future, these strategies should be considered as part of the parent's estate planning.

The Henson Trust

Trusts, in general, are an important part of estate planning for a number of reasons such as creditor protection, income-splitting, protecting a

spendthrift beneficiary and, in some cases, income tax savings. Trusts established as the result of a death are called testamentary trusts.

A special kind of trust known as a Henson trust may be used to provide financial assistance for a person with a disability while also protecting the person's governmental benefits, such as ODSP. Henson trusts are most often established after the death of someone and are therefore testamentary trusts.

For further information on other uses for trusts, please see our brochure entitled *How Can Trusts Help Me and My Family*.

To qualify as a Henson trust certain key features must be present:

- The trust must arise from an inheritance or the proceeds of a life insurance policy;
- The trustee must have sole and absolute discretion whether to make payments from the trust or not;
- The trustee must also have sole and absolute discretion when to make payments from the trust.

It is this absolute discretion which protects ODSP entitlement. The courts have decided that because the person with a disability cannot force a payment from the trust, the assets in a Henson trust should not be considered as belonging to the person with a disability when determining ODSP eligibility.

Advantages of a Henson trust include:

- There is no limit on the amount or type of income and assets held by the trust;

- There is no limit on the amount of money which can be paid out by the trust for disability-related or education expenses (as defined by the regulations governing ODSP);
- Payments can also be made for any purpose such as rent, home repairs, groceries, or entertainment; however, ODSP benefits will be reduced to the extent that payments are 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 a 12-month period;
- Control over the ultimate distribution of the assets remaining in the trust upon the death of the child with a disability is retained as the trust spells out how the remaining assets are to be distributed. For example, the balance of the trust might be distributed to the other children of the person who created the trust in his or her Will.

Henson trusts are most often included in the Will of a person who has a family member with a disability. Such a trust can exist in a separate document outside of a Will; however, it is generally more costly to do it that way. The trust can also be set up during the lifetime of the donor.

Because of the absolute discretion that the trustee of a Henson trust has, it is especially important to select the trustee carefully. When choosing a trustee, consider if the person:

- Is both conscientious and trustworthy;
- Thoroughly understands the wishes of the parents vis-a-vis the future care of the child and is willing to abide by these wishes;
- Is involved in the life of the child and understands and is sensitive to his or her unique needs and circumstances;
- Understands why a Henson trust was established and is prepared to obtain the appropriate professional assistance (lawyer, accountant, etc.) to ensure the trustee's duties are carried out effectively for the benefit of the person with a disability;
- Is willing to keep up to date with ODSP requirements.

One or more alternate trustees should also be appointed in the event that a trustee is unable to act. 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 requires will help in the selection of an appropriate trustee.

Regulation Trust

The regulations to the *ODSP Act* provide for another type of trust referred to by various names such as regulation trust, disability trust or discretionary trust. In this brochure, we will refer to it as a regulation trust.

These kinds of trusts allow someone with a disability to protect an inheritance within certain limits without affecting their ODSP entitlement. A regulation trust which meets the following requirements will not adversely affect the child's eligibility for Ontario government benefits:

- It must be for the maintenance of the adult child (in other words, the trust cannot provide for any beneficiaries other than a person with a disability);
- The value of the trust cannot exceed \$100,000 at any time including interest or other revenue earned by the trust;
- Payments can be made by the trustee only for disability-related expenses or education expenses (what qualifies as a valid expense under this rule is limited).

An individual receiving ODSP can set up a regulation trust if they have received an inheritance or insurance proceeds totaling less than \$100,000. The individual's ODSP benefits will not be affected as long as the total in all regulation trusts for the person does not exceed \$100,000 including interest or other revenue earned by the trust or trusts.

To set up a regulation trust, the person with a disability must be mentally capable with respect to managing their property. If the person with a disability lacks mental capacity, his or her guardian of property or attorney for property can establish the regulation trust.

Taxation of Testamentary Trusts

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

However, it is possible for a testamentary trust to benefit from graduated tax rates if specific conditions are met. For example, if the only beneficiary of the testamentary trust has the Disability Tax Credit (DTC), the trust could benefit from graduated tax rates.

Registered Disability Savings Plans

Since December 2008, it has been possible for a Canadian with a disability who qualifies for the federal Disability Tax Credit (DTC) to have a Registered Disability Savings Plan (RDSP). In Ontario, ODSP eligibility is not affected by being a beneficiary of an RDSP. Although generally not a replacement for either a Henson trust or a regulation trust, an RDSP should be considered when reviewing the estate planning of parents or others who plan to leave an inheritance for a person with a disability or if an unexpected inheritance is received by a person with a disability.

There are numerous restrictions on RDSPs which limit when contributions can be made to the RDSP as well as how much may be contributed. The age of the person with a disability may limit access to the RDSP. Government contributions may also be available which can help the RDSP grow even if parents or others are unable to contribute as much as they would like. The most important feature of an RDSP for Ontario ODSP recipients is that when withdrawals are made, ODSP benefits will not be affected.

Capacity to Sign Documents and/or Guardianship

If your child or other family member with a disability has the mental capacity to do so, she or he should have her or his own Powers of Attorney and a Will. Capacity refers to the mental ability to give instructions and execute documents. There are specific capacity criteria for each type of document. It is possible to have the capacity to sign one document, such as a Power of Attorney for Personal Care, but not have the capacity to sign another document, such as a Will. Please see our brochure entitled *Capacity to Make a Will or Powers of Attorney* for information about the mental capacity criteria for each type of document.

If your child or other family member is found not to have the capacity to sign his or her own Powers of Attorney, it may be necessary to apply to court for guardianship, whether of property or of the person or both. Please see our brochure entitled *Guardianship* for more information.

In conclusion, if you have a family member with a disability, it is important to review your estate plan with someone who is familiar with Henson trusts and other strategies that can, when properly reviewed and prepared, ensure that your loved one's best interests are considered and that, if appropriate, government benefits are protected. We encourage you to discuss all available options with a knowledgeable lawyer in order to determine what is best for you and your family.

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